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Yehenew Tsegaye Walilegne
Addis Ababa University

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Yehenew
Tsegaye Walilegne*

The Nile Basin: From Confrontation
to Cooperation

Water is one of the scarcest natural resources on our planet. Yet, it is one of humans' most vital needs. This gift of nature has been a cause of tension and confrontation in many parts of the world due to the lack of a shared vision for its optimal and rational use. Among the great water bodies, the Nile basin has been cited as one of the major trouble spots. Recently, the Nile basin states have started to cooperate under the auspices of the Nile Basin Initiative for sustainable and equitable approach to Nile water use. This article discusses some of the recent cooperative efforts in the use, management and development of the Nile. It briefly discusses the natural setting of the Nile River and reviews past confrontations over Nile waters. It then tries to highlight some of the reasons why basin-wide cooperation is necessary for the riparian states. The final section of the article outlines the need for a permanent legal and institutional framework that would help ensure the optimal and equitable utilization of Nile waters.

L'eau est l'une des ressources naturelles les plus limitées de la planète. Pourtant, elle est l'un des éléments les plus essentiels aux humains. Ce cadeau de la nature est une source de tension et de confrontation dans beaucoup de parties du monde à cause de l'absence d'une vision commune pour son utilisation optimale et rationnelle. Le bassin du Nil est l'un des grands bassins hydrographiques souvent cité comme l'un des principaux «points chauds». Récemment, les états limitrophes du bassin du Nil ont amorcé une collaboration sous les auspices de l'Initiative du bassin du Nil en vue d'adopter une approche durable et équitable quant à l'utilisation de l'eau du Nil. Cet article décrit certains des récents efforts de collaboration pour ce qui est de l'utilisation, de la gestion et du développement du Nil. L'auteur décrit brièvement le cours et l'environnement du Nil et il rappelle les conflits passés relativement à ses eaux. Il énonce ensuite certains des motifs qui rendent nécessaire la collaboration entre les États riverains. L'auteur fait ensuite ressortir le besoin d'un cadre législatif et institutionnel permanent qui permettrait d'assurer l'utilisation optimale et équitable des eaux du Nil.

* Lecturer in Law and former Assistant Dean, Faculty of Law, Addis Ababa University. LL.M. in Int'l Hum. Rts. Law (*Summa Cum Laude*), Notre Dame Law School, (U.S.A., May 2004); Certif. in Int'l Law, International Law Seminar, United Nations Office at Geneva (Switzerland, 2004); Certif. in Int'l Law, The Hague Academy of Int'l Law, (The Netherlands, 2003); LL.M., Dalhousie Law School, (Canada, 2001); LL.B., (Distinction), Addis Ababa University (Ethiopia, 1997). An earlier version of this article was presented at the 15th International Conference of Ethiopian Studies at the University of Hamburg, Germany, from July 20 to 25, 2003. I wish to record my thanks to Prof. David VanderZwaag (Dalhousie Law School), Prof. Dinah Shelton (George Washington University Law School, U.S.A.) and Prof. William Andreen (Alabama University Law School, U.S.A.) for reading the first draft of this article and making constructive comments and suggestions. My heartfelt gratitude goes also to Prof. Elena Baylis for her invitation to present this article at Pittsburgh University Law School on March 16, 2004. All errors and misstatements, of course, remain mine.

Introduction

I. *Natural Setting*

II. *Past Confrontations*

III. *Why Cooperate Now?*

IV. *Recent Developments*

V. *Need For a Permanent Legal and Institutional Framework*

Conclusion

Introduction

“Perhaps the weight of history lies too heavy in the silt of the Nile valley, but man will always need water; and in the end this may drive him to the river to drink with his enemies.”¹

...

“One day, every last drop of water which drains into the whole valley of the Nile ... shall be equally and amicably divided among the river people, and the Nile itself ... shall perish gloriously and never reach the sea.”²

Water is one of the scarcest natural resources on our planet. Yet, it is one of humanity’s most vital needs and everyone “...including the poor and marginalized, must have access...”³ This gift of nature “...which has no substitute, which has poorly developed international law, and the need for which is overwhelming, constant, and immediate has driven its share of

1. Robert O. Collins, *The Waters of the Nile: Hydropolitics and the Jonglei Canal 1898-1988* (Oxford: Clarendon Press, 1990) at 300 quoted in Lisa M. Jacobs, “Sharing the Gifts of the Nile: Establishment of a Legal Regime for Nile Waters Management” (1993) 7:1 Temp. Int’l & Comp. L. J. 95 at 122 [Jacobs: Sharing the Gifts of the Nile].

2. Winston Churchill, (1908) quoted in Lori Pottinger, “Can the Nile States Dam Their Way to Cooperation” (March 2004), online: International Rivers Network <[http://www.irn.org/ programs/safrica/Nile_Briefing.pdf](http://www.irn.org/programs/safrica/Nile_Briefing.pdf)> [Lori Pottinger: The Nile States] (date accessed: September 4, 2004).

3. World Commission on Water for the Twenty-First Century, Commission Report: Water Secure World: Vision for Water, Life, and the Environment quoted in James Kraska, “Sustainable Development is Security: The Role of Transboundary River Agreement as a Confidence Building Measure (CBM) in South Asia” (2003) 28 Yale J. Int’l Law 465 at 466, n. 4.

political conflicts.”⁴ Regrettably, this essential resource has been a cause of tension and confrontation in many parts of the world due to the lack of a shared vision for its optimal and rational use.⁵ There is no shortage of predictions forecasting the possibility of water wars in the foreseeable future.⁶ Among these water bodies, the legendary Nile River, “a prime example of a scarce water resource”,⁷ has engendered constant tension among the riparian states and has been a textbook example of a cause for international conflict.⁸

4. Jesse H. Hamner & Aaron T. Wolf, “Patterns in International Water Resource Treaties: The Transboundary Freshwater Dispute Database” (1997) 1997 Colo. J. Int’l Envtl. L. Y.B. 157.

5. The confrontations in the Jordan Valley and the conflict between India and Pakistan over the Indus Valley are good examples.

6. Among the many prophecies, it suffices to quote the following: “...in a geopolitical sense, water is likely to become the oil of the next century” See Arun P. Elhance, *Hydropolitics in the Third World: Conflict and Cooperation in International River Basins*, (Washington D.C.: United States Institute of Peace Press, 1999) at 54. The World Bank’s Vice President, Ismael Seageldin, once said “many wars this century were about oil, but the wars of the next century will be about water” quoted in the *Mail & Guardian*, 20 December 1999. Thomas Naff alleges that “[i]n sum, the strategic reality of water is that under the circumstances of scarcity, it becomes a highly symbolic, contagious, aggregated, intense, salient, complicated, zero-sum, power-and-prestige-packed issue, highly prone to conflict and extremely difficult to resolve.” See Thomas Naff, “Water Scarcity, Resource Management, and Conflict in the Middle East” in Elizabeth Kirk, ed., *Environmental Dimensions of Security: Proceedings from AAAS Annual Meeting Symposium*, (Washington: American Association for the Advancement of Science, 1992) at 25. According to Klaus Toepfer, Director-General of the UNEP, “Future war over water is a real possibility.” “Water Wars Forecast if Solutions Not Found”, online: <<http://ens.lycos.com/ens/jan99/1999-01-01-02.html>> (date accessed: March 6, 2002). In the opinion of the UNESCO’s Director-General, Federico Mayor “as [water] becomes increasingly rare, it becomes coveted, capable of unleashing conflicts. More than petrol or land, it is over water that the bitterest conflicts of the near future may be fought.” *Ibid.*, see generally, Gred Browder & Leonard Ortolano, “The Evolution of an International Water Resources Management Regime in the Mekong River Basin” (2000) 40:3 *Nat. Resources J.* 499 at 500; Patricia Wouters, “An Assessment of Recent Development in International Watercourses Law through the Prism of the Substantive Rules Governing Use Allocation” (1996) 36 *Nat. Resources J.* 417. But Dellapenna says, “Water is simply too critical a resource to fight over.” See Joseph W. Dellapenna, “Treaties as Instruments for Managing Internationally Shared Water Resources: Restricted Sovereignty vs. Community of Property” (1994) 26:1 *Case W. Res. J. Int’l L.* 27 at 31 [Dellapenna, *Treaties as Instruments*].

7. Niveen Tadros, “Shrinking Water Resources: The National Security Issue of this Century” (1997) 17:2 *Nw. J. Int’l L. & Bus.* 1092 [Tadros: *Shrinking Water Resources*].

8. John Barnett, “Destabilizing the Environment” (2000) 26:2 *Review of International Studies* 271 at 275; Russell Smith, *BBC News Online* “Africa’s potential water wars,” online: <http://news.bbc.co.uk/1/engish/world/africa/454926.stm> (date accessed: 11 July 2001). Smith argues that the Nile is one of the “possible flash points”; Ashok Swain, “Ethiopia, the Sudan, and Egypt: The Nile River Dispute” (1997) 35:4 *The Journal of Modern African Studies* 693 [Swain: *The Nile River Dispute*]. Swain says that unless the states are able to bring the current competitive use to a halt the disagreement may well ‘escalate into violence over sharing the resources of the Nile in the near future’; Daniel Kendie, “Egypt and the Hydro-politics of the Blue Nile River” *The Reporter* (August 6, 1999) at 10 [Daniel: *Hydro-politics of the Blue Nile*]; “Interview with Ambassador David Shinn” (August 6, 2000) with *Addis Tribune* at A9; Tadros: *Shrinking Water Resources*, *supra* note 7 at 1091; Dante A. Caponera, “Legal Aspects of Trans Boundary Rivers Basins in the Middle East: The Al Asi (Orontes), The Jordan and the Nile” (1993) 33 *Nat. Resources J.* at 629 [Caponera: *Legal Aspects*]; Peter Allison, “International Water Hot Spots : A Dozen Flash Points Where Past and Present Disputes over Water could Lead to Full-scale Armed Conflicts,” online: http://www.itind.com/waterbook/intl_hot_spots.asp (date accessed: July 23, 2001).

The Nile has been flowing through Sub-Saharan Africa for centuries without making any significant contribution to the development of the region, with the exception of Egypt.⁹ Several factors account for this regrettable situation including: the unbalanced economic and political capacity of the riparian states; recurrent famine throughout the riparian area; political instability in the region; and financial, institutional, technical and human resources constraints.¹⁰ Consequently, there has been much pessimism surrounding the issue of a shared vision on the reasonable use and sustainable management of the Nile. As one commentator has noted:

Decreasing water volumes, increasing water demand and a decidedly lopsided distribution of water, with one country [Egypt] benefiting more than all the others combined. To the casual observer, this cursory assessment of the situation in the Nile Basin would spell an unusually large potential for conflict.¹¹

In light of this insightful observation, a recent change of heart which manifested itself as an apparent willingness on the part of Egypt to cooperate with the rest of the Nile basin countries, has come as a pleasant surprise to observers of the hydro-politics of the Nile. Egypt has demonstrated a shift from its assumed gate-keeping role to acknowledging the rights of other riparian states to share the resources of the Nile. Thus, Robert Collins's prophetic words quoted at the beginning of this article may yet come true. The Nile basin states, including Egypt, have started to cooperate under the auspices of the Nile Basin Initiative for a sustainable and equitable approach to Nile water use.

This article analyzes some of the recent developments regarding this cooperative effort to manage the Nile. It briefly discusses the natural

9 For the geographical description of the Nile basin see Part I. The ten Nile basin states are Burundi, Democratic Republic of Congo, Egypt, Eritrea, Ethiopia, Kenya, Rwanda, Sudan, Tanzania, and Uganda.

10. J. Anthony Allan, "The Nile Basin: Evolving Approaches to the Nile Waters Management" (1990) 20 *Occasional Papers* online: SOAS <<http://www.soas.ac.uk/Geography/WaterIssues/OccasionalPapers/ AcrobatFiles/OCC20.PDF>> (date accessed: July 13, 2001) [Allan: Evolving Approaches]; Kinfe Abraham, "The Nile Issue: Psycho-Political Hurdles to an Agreement, The Basis and Contestability of Previous Accords" (November 1999) 3:2 *Mercure* at 43 [Kinfe: The Nile Issue]; Jacobs: Sharing the Gifts of the Nile, *supra* note 1 at 118. According to Caponera the interest of the other upper riparians, such as Burundi, Kenya, Rwanda, Tanzania, Uganda, and Zaire "mainly concern power production and control of floods." Caponera: Legal Aspects, *supra* note 8 at 662. Salim and Amoako stated that out of the ten Nile countries "seven countries are, or recently have been, involved in international or internal conflict." See S.A. Salim & K.Y. Amoako, "If the Nile Can Dissolve Borders" *International Herald Tribune* (13 July 2001) [Salim and Amoako: If the Nile Can Dissolve Borders].

11. B. Posthumus, "Nile Basin Nations Move Towards Cooperation," online: Oneworld <<http://www.oneworld.org/euconflict/publicat/nl3.1/page13.html>> (date accessed: August 26, 2001).

setting of the Nile River and reviews past confrontations over Nile waters. It then seeks to explain some of the reasons why basin-wide cooperation is necessary for the riparian states. The final section of the article outlines the need for a permanent legal and institutional framework that would help ensure the optimal and equitable utilization of Nile waters.

I. *Natural Setting*

The Nile River is located in the northeastern part of Africa. It is the longest river in the world, traversing 6,825 kilometers and traveling through ten African States.¹² Its main sources are the Blue Nile, which rises in the Ethiopian highlands, and the White Nile which originates in Lake Victoria in east central Africa.¹³ The White Nile and the Blue Nile flow to Khartoum, where they join and flow on to Egypt, eventually emptying into the Mediterranean Sea.¹⁴ Other sources of the Nile include the Kagera and Arbarah rivers and Lake Albert.¹⁵ Nearly 86% of the Nile's water originates in the Ethiopian highlands, while the remaining 14% comes from the White Nile.¹⁶ In its long journey, the Nile "...takes decomposed basalt, rich alluvial soil and silts and converts what would otherwise have been a complete desert into a rich agricultural area."¹⁷

The Nile has been providing life to the surrounding basin since time immemorial. Despite the abundant natural endowments in this region, the basin has five of the ten poorest nations of the world all with annual per capita income of less than \$200.¹⁸ The inhabitants of the basin are faced with extreme poverty, instability, rapid population growth and environmental degradation and many are reduced to begging or leading a hand-to-mouth existence at best. The population of the region, which was 300 million in the year 2000, is growing at a 3% annual rate.¹⁹

12. Nile Basin Initiative, "Introduction to the Nile River Basin," online: Nile Basin Initiative <<http://www.nilebasin.org/IntroNR.htm>> [NIB: Introduction] (date accessed: July 26, 2001).

13. Tadros: Shrinking Water Resources, *supra* note 7 at 1094.

14. *Ibid.*

15. NIB: Introduction, *supra* note 12.

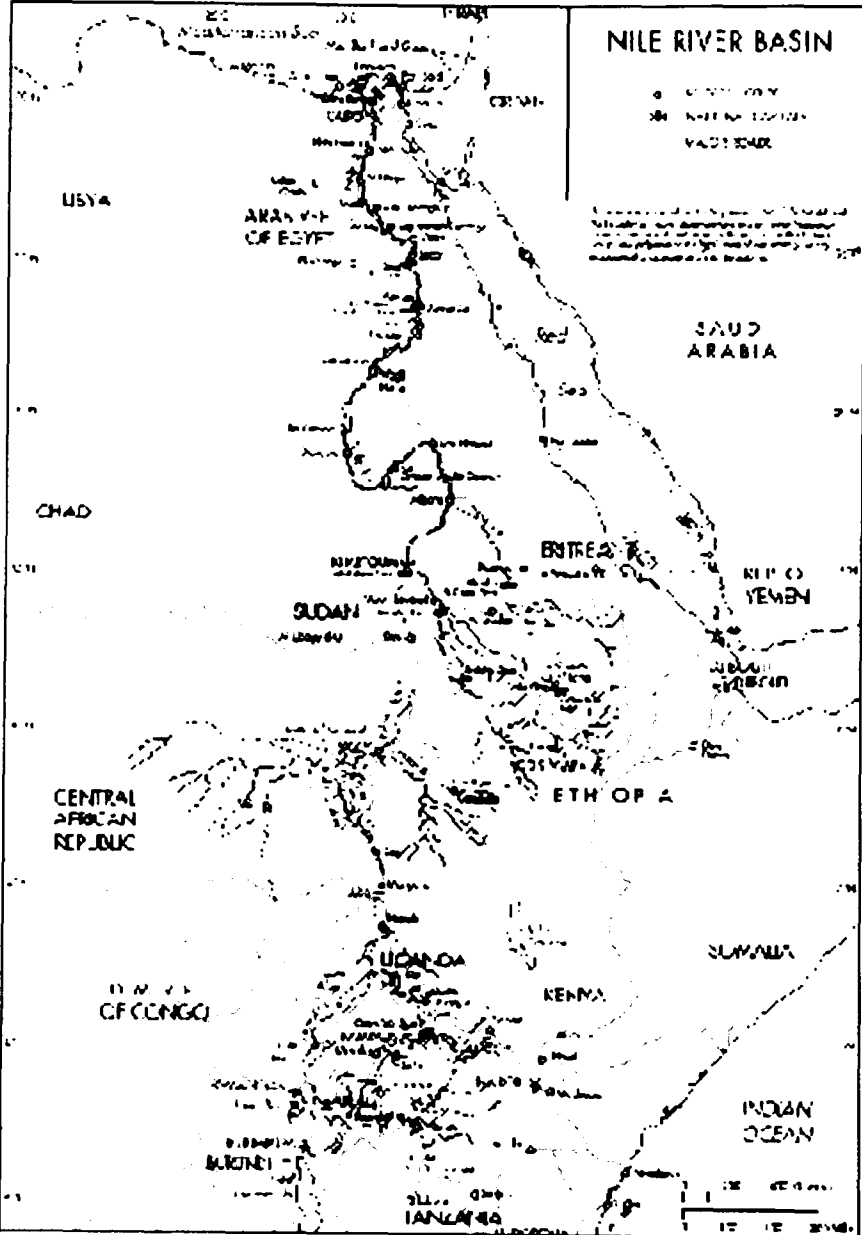
16. Jacobs: Sharing the Gifts of the Nile, *supra* note 1 at 96; C.O. Okidi, "Legal and Policy Regime of Lake Victoria and Nile Basins," (1980) 20 Indian J. Int'l L. 398-399 [Okidi: Legal and Policy Regime]; C.O. Okidi, "Review of Treaties on Consumptive Utilization of Waters of Lake Victoria and Nile Drainage System" (1981) 22 Nat. Resources J. 161 [Okidi: Review of Treaties].

17. Daniel: Hydro-politics of the Blue Nile, *supra* note 8, see also Dellapenna: Treaties as Instruments, *supra* note 6 at 47; Caponera: Legal Aspects, *supra* note 8 at 650.

18. Salim and Amoako: If the Nile Can Dissolve Borders, *supra* note 10. The basin is rich in, among others, natural gas, oil, gold, cobalt, diamond.

19. World Bank, "Nile Basin: Overview," online: The World Bank Group <<http://www.worldbank.org/afr/nilebasin/>> (date accessed: August 4, 2001).

All these factors suggest that the Nile river has the potential to play a significant role in extricating the Nile inhabitants from poverty and helping them to attain food sufficiency, economic development and regional economic integration. In order to achieve these lofty goals and to meet the



Source: Nile Basin Initiative Home page, online: Nile Basin Initiative <<http://www.nilebasin.org/nilemap.htm>>.

needs of present and future generations, the Nile needs to be managed, protected and conserved.

II. *Past Confrontations*

A distinctive feature of the Nile River has been the lack of a shared vision and spirit of cooperation among the riparian states. Thus, there is no basin-wide agreement that takes into account the interests of all ten states sharing the Nile. A few agreements, however, do exist.²⁰ These treaties were mainly designed to protect the interests of Egypt and its former colonizer Great Britain and, to a certain extent, the Sudan.²¹ For instance, in the 1929 agreement between Great Britain and the Egyptian government, the former recognized Egypt's "historical" and "natural" rights to

20. There are at least 14 Agreements, Treaties, Memoranda of Understanding and Exchange of Notes. For the complete list of these instruments see Caponera: *Legal Aspects*, *supra* note 8 at 657-659. For detailed discussion of the Nile treaties see Christina M. Carroll, "Past and Future Legal Framework of the Nile River Basin" (1999) 12:1 *Geo. Int'l Envtl. L. Rev.* 269 at 276-281 [Carroll: Past and Future]; Swain: *The Nile River Dispute*, *supra* note 8 at 675-683; Kefyalew Mekonnen, "The Defects and Effects of Past Treaties and Agreements on the Nile River Waters: Whose Faults Were They?" *Addis Tribune* (28 November 1998), also available online Ethiopians <<http://www.Ethiopians.com/abay/engin.html>> (date accessed: August 22, 2001); C.O. Okidi: Review of Treaties, *supra* note 16 at 166-196; C.O. Okidi: Legal and Policy Regime, *supra* note 16, at 410-436; Fisseha Yimer, "State Succession and the Legal Status of International Rivers" in Ralph Zacklin & Lucius Caflisch, eds., *The Legal Regime Of International Rivers and Lakes* (The Hague: Martinus Nijhoff Publishers, 1981) 177 at 186-190 [Fisseha: The Legal Regime]; Albert H. Garretson, "The Nile Basin" in A.H. Garretson, R.D. Hayton & C.J. Olmstead, eds., *The Law of International Drainage Basins* (New York: Oceana Publications, Inc., 1967) 256 at 270-292 [Garretson: The Nile Basin]; Mekete Bekele Tekle, "Sharing the Nile Waters: A Quest for Equity Among the Riparian States" (1998) 7:8 *Njiwa*, Magazine of the Eastern Africa Environmental Network at 6-7 [Mekete: Sharing Nile Waters]; Getachew Abera, "There is Neither Customary International Law nor a Treaty that Entitles Egypt to Nile Waters within Ethiopian Territory" *The Reporter* (24 November 1999) at 6 & 10 [Getachew: Customary International Law]; Rolet Chih-Shih Chen, *The Non-navigational Uses of International Rivers* (Ph.D. Dissertation, University of Nebraska, Lincoln, 1963) at 31 & 46-54 [unpublished] [Chen: International Rivers]; Sayed Mohamed Hosni, *Legal Problems of The Development of The River Nile* (Ph.D. Dissertation, New York University, 1957) at 75-222 [unpublished]; Jacobs: *Sharing the Gifts of the Nile*, *supra* note 1 at 105-114; Bonaya Adhi Godana, *Africa's Shared Water Resources: Legal and Institutional Aspects of the Nile, Niger and Senegal River Systems* (London: Frances Pinter, 1985), at 103-123 [Godana: Africa's Shared Waters]. It is possible to divide these treaties into three types: a) Colonial agreements signed between colonial powers during their rule in the basin outside of Ethiopia; b) agreements concluded between colonial powers and independent states into states; and c) agreements entered between independent countries of the basin. The first set of agreements favoured the colonial interest in Egypt and the Sudan. The second type of agreements, notably the 1929 agreement, provided that Egypt has a monopolistic right over the Nile waters. In this agreement Great Britain went to the extent of recognizing the "natural" or "historical" right of Egypt on the river. The third category of agreements, notably the 1959 agreement, partitioned the Nile waters between Egypt and the Sudan and denied the rights of the other riparian countries.

21. Carroll: Past and Future, *supra* note 20 at 278; Caponera: *Legal Aspects*, *supra* note 8 at 657 and 662.

the Nile.²² These treaties do not include most of the riparian states.²³ The 1959 treaty between Egypt and the Sudan, an *Agreement for the Full Utilization of the Nile River*, is a good illustration.²⁴ As the title of the Agreement indicates, these two countries set out to utilize all of the water of the Nile.²⁵ Thus, Egypt and Sudan apportioned almost the entire water flow of the Nile between themselves, 55.5 billion cubic meters a year for Egypt and 18.5 billion cubic meters a year for the Sudan, respectively.²⁶

Gamal Moursi Badr, an Egyptian writer, argues that the main reason why the Nile water question has constituted an exclusive bilateral issue between Egypt and the Sudan is because "None of [the remaining] countries has *any present, or indeed foreseeable*, use of the Nile waters for irrigation purposes."²⁷ His argument is unpersuasive for the simple reason that no one could rule out the possible plans of the other riparians to use the Nile for different activities, including large irrigation schemes. This lack of shared vision and meaningful cooperation for an optimal utilization of the river creates the potential for serious confrontations and disagreements over the Nile water.

Beyond excluding many of the riparians, these agreements also leave out issues that are at the forefront of contemporary international water sharing and management thinking such as environmental protection and sustainable development of the river.²⁸ Moreover, due to socio-economic and political changes that have been taking shape in the region since the 1960's, the status of the treaties is highly controversial.²⁹ Following the independence of some of the riparian states in the 1960's, several of them have rejected the colonial agreements, based on the doctrine of *tabula rasa* (the clean slate doctrine), the principle of *clausula rebus sic stantibus* or

22. Carroll: Past and Future, *supra* note 20 at 278.

23. Swain: The Nile River Dispute, *supra* note 8 at 686.

24. *Agreement on the Full Utilization of the Nile Waters*, (8 November 1959), U.A.E.-Sudan, 453 U.N.T.S. 51, reprinted (1959) 15 Rev. E.D.I. 321 [*Agreement on the Nile*].

25. Okidi argues that it seems rather anomalous to refer to that agreement as "full utilization" and "full control of the river" when there were only two countries involved in the agreement rather than all the riparian states. Okidi: Review of Treaties, *supra* note 16 at 182; Okidi: Legal and Policy Regime, *supra* note 16 at 429.

26. *Agreement on the Nile*, *supra* note 24, Art. 2.

27. Gamal Moursi Badr, "The Nile Waters Question: Background and Recent Development" (1960) 15 Rev. E.D.I. 94 at 95 [emphasis added].

28. Carroll: Past and Future, *supra* note 20 at 282; Getachew: Customary International Law, *supra* note 20 at 10; Tadros: Shrinking Water Resources, *supra* note 7 at 1096.

29. See Carroll: Past and Future, *supra* note 20 at 278-282; Fisseha: The Legal Regime, *supra* note 20 at 200; Getachew: Customary International Law, *supra* note 20 at 10; Caponera: Legal Aspects, *supra* note 8 at 660-662; Tadros: Shrinking Water Resources, *supra* note 7 at 1096; Godana: Africa's Shared Waters, *supra* note 20 at 143-157.

the Nyerere doctrine.

According to the doctrine of *tabula rasa*, successor states do not inherit obligations arising out of treaties concluded by their predecessors.³⁰ Hence, "... a newly independent state begins its life with a clean slate [with respect to treaties concluded by its predecessor]."³¹ As far as the treaties that were concluded at the dawn of the 20th century, riparian states may invoke the principle of *clausula rebus sic stantibus*: fundamental change of circumstances.³² Given the socio-economic and demographic changes that have taken place in the basin, Nile states can invoke Article 62 of the 1969 *Vienna Convention on the Law of Treaties* which stipulates that fundamental change of circumstances can be invoked to terminate an existing international treaty.³³ The Nyerere doctrine, named after the late Tanzanian President M.J.M. Nyerere, states that treaties concluded by former colonies of Great Britain lapsed when they became independent.³⁴ Egypt, however, has stood alone in arguing that the treaties remain binding on the successor state.³⁵ Riparian states that are not party to the existing Nile agreements could also invoke the principle of *pact tertiis nec nocent nec prosunt*³⁶ to challenge such agreements. To put it differently, the parties to those treaties can create rights and duties only to themselves, not to non-state parties.

Another distinctive feature of Nile hydro-politics is the inverse relation of the state's water contribution to the full volume of the Nile and the state's dependency and utilization on, and of, Nile waters. Put simply, Ethiopia, the country from which 86% of the waters of the Nile originates, makes insignificant use of the river³⁷ while countries such as Egypt and

30. Godana: Africa's Shared Waters, *supra* note 20 at 137.

31. Fisseha: The Legal Regime, *supra* note 20 at 179.

32. *Vienna Convention on the Law of Treaties*, 23 May 1969, 1155 U.N.T.S. 331, 8 I.L.M. 679 (entered into force 27 January 1980) [*Vienna Convention*].

33. Getachew: Customary International Law, *supra* note 20 at 10.

34. Carroll: Past and Future, *supra* note 20 at 279.

35. Godana: Africa's Shared Waters, *supra* note 20 at 143-144.

36. It means contracts create obligations and confer rights only on contracting parties. See Christine Chinkin, *Third Parties in International Law* (Oxford: Clarendon Press, 1993) at 5; Sir Ian Sinclair, *The Vienna Convention on the Law of Treaties* (Manchester: Manchester University Press, 1984) at 98-99. Articles 34-36 of the *Vienna Convention on the Law of Treaties* also address this issue, *Vienna Convention*, *supra* note 32.

37. According to a well-known Nile researcher, Ethiopia's annual use of the Nile is "less than 1 percent of the Nile, i.e. 0.65 billion m³ of water...." See Tesfaye Tefesse, *The Nile Question: Hydropolitics, Legal Wrangling, Modus Vivendi and Perspectives* (London: Transaction Publishers, 2001) at 44 [Tefaye: The Nile Question]; see also Lori Pottinger: The Nile States, *supra* note 2.

the Sudan, that contribute little or nothing³⁸ to the overall volume of the Nile, extract the largest share of the Nile waters. As acknowledged by a former Egyptian Ambassador to Ethiopia, Marawan Badr, Egypt “depends on the Nile for 97% of [its] waters”³⁹ and Sudan, next to Egypt, makes significant use of Nile waters.

Egypt and Sudan have consistently acted as if the Nile originates in Sudan and ends in Egypt. These two countries have been unwilling to share the Nile’s resources with Ethiopia, the single largest contributor to the Nile. Ethiopia, a country that has been preoccupied with maintaining its territorial integrity and political independence and hard hit by recurrent drought and famine,⁴⁰ has had little time and scarce resources to develop and use its natural bounty, the Nile.

Relations among the riparian states, especially between Egypt and Ethiopia, have been strained and marred by mistrust and suspicion. In the near past, acrimonious statements flew back and forth between Addis Ababa and Cairo concerning the use of the Nile. The two countries accused each other of appropriating or monopolizing the Nile unilaterally. Ethiopia’s call for a change to the *status quo*, for a fair and reasonable use of the Nile, has been labeled as disingenuous, and has earned it several threats of war. For instance in 1979, Anwar Sadat, then President of Egypt, stated that “...the only matter that could take Egypt to war again [after the 1974 War with Israel] is water.”⁴¹ Echoing this view, Boutros Boutros Ghali asserted in 1990 that “[t]he next war in our region will be over water of the Nile, not politics.”⁴² In a similar vein, President Hosni Mubarak of Egypt was quoted as late as 1999 as threatening to bomb Ethiopia if the latter planned

38. Schwabach contends that Egypt contributes nothing towards Nile water. See Aaron Schwabach, “The United Nations Convention on the Law of Non-navigational Uses of International Watercourses, Customary International Law, and the Interest of Developing Upper Riparians” (1998) 33 *Tex. Int’l L. J.* 257 at 263 [Schwabach: The United Nations Convention]. He says: “None of the river’s water originates within Egypt, with the exception of a small amount of rain. Egypt is entirely dependent on its upstream neighbors for its supply of water...”; see also Godana: Africa’s Shared Water Resources, *supra* note 20 at 83 and Carroll: Past and Future, *supra* note 20 at 275.

39. Ambassador Marawan Badr, “Egypt and the Horn of Africa: The True Perspective” *Addis Tribune* (7 August 1998) at A3.

40. Daniel: Hydro-politics of the Blue Nile, *supra* note 8 (13 August 1999) at 11.

41. O. Genckaya, “Interdependence, Cooperation and Conflict Resolution: A Critical Assessment of Peace-Pipeline Project” (Address before the First Conference of the European Peace Research Association, Florence, Italy 8-10 November 1991) quoted in Caponera: Legal Aspects, *supra* note 8 at 630. Dellapenna considers such war threats as far-fetched for the two countries do not share a common border; Dellapenna: Rivers as Instruments, *supra* note 6 at 27.

42. Gebre Tsadik Degefu, “What Benefits Will Ethiopia Gain from Membership of the Nile Basin Initiative?” *Addis Tribune* (18 February 2002), online: Addis Tribune <<http://www.addistribune.com/Archives/2005-02-18-02-05/What.htm>> (date accessed: June 3, 2005).

development works on the Nile.⁴³

Naturally, these threats of war did not sit well with the Ethiopian government. The Ethiopian Foreign Minister, Seyoum Mesfin, for example, responded by stating that Egypt's continuous threat of war was an "... irresponsible instance of jingoism that will not get us [riparian states] anywhere near the solution of the problem."⁴⁴ He added: "there is no earthly force that can stop Ethiopia from benefiting from the Nile."⁴⁵

Moreover, several commentators have maintained that Egypt has been providing material and logistical support to insurrectionist groups who have worked towards destabilizing Ethiopia. One observer claims that Egypt "... went to the extent of sponsoring disgruntled political groupings such as the Somali factions and the Eritrean government as a form of deterrence and probably as political intimidation directed against Ethiopia."⁴⁶ Another researcher noted that "[b]y promoting the Eritrean insurrection, Egypt made sure that Ethiopia would not divert both its efforts and its resources into quelling the Eritrean uprising — resources, which could have been utilized in tapping the water of the Blue Nile for development purposes."⁴⁷

Similarly, it has been claimed that Egypt, whose nationals were heads of "... crucial departments concerned with environment and international law [in the World Bank in the 1980s and 1990s],"⁴⁸ has never been hesitant to use its political leverage and influence to block financial assistance and loans from donor and international financial institutions intended to undertake development works on the Blue Nile. For instance, Egypt successfully blocked a loan from the African Development Bank to Ethiopia in 1990 for water development projects.⁴⁹

Interestingly and paradoxically, Egypt has undertaken two of the largest irrigation projects in Africa, the Toshkan and El Salaam (Peace)

43. "Africa's Potential Water Wars," *BBC News* (11 October 1999), online: BBC News <<http://news.bbc.co.uk/1/hi/english/world/africa/454926.stm>> (date accessed: February 3, 2001). BBC retracted this news on the request of the Egyptian Embassy in Addis Ababa, Ethiopia, see "Egypt Embassy denies Reports of Mubarak Threatening to attack Ethiopia-BBC Apologizes to Egyptian Embassy" *The Reporter* (January 12, 2000) at 3.

44. Statement by Ethiopian Foreign Minister Seyoum Mesfin, "Egypt is Diverting the Nile through the T[oshkan and Peace Canal Projects]" *Addis Tribune* (30 January 1998) [Seyoum: Egypt is Diverting the Nile].

45. *Ibid.*

46. Alula Yohannes, "The Politics of Nile" (Presented to East African Forum) online: [Ethiopiafirst] <<http://www.ethiopiafirst.com/news/news459.html>> (date accessed: July 13, 2001).

47. Daniel: Hydro-politics of the Blue Nile, *supra* note 8 (13 August 1999) at 11.

48. Allan: Evolving Approaches, *supra* note 10.

49. Swain: The Nile River Dispute, *supra* note 8 at 688; Joseph W. Dellapenna, "Rivers as Legal Structures: The Example of the Jordan and the Nile" (1996) 36 *Nat. Resources J.* 217 at 247 [Dellapenna: Rivers as Legal Structures].

Canals, without ever consulting any of the other riparian states. Some of these projects, notably the El Salaam Canal, are intended to divert water from its natural course into the Sinai Desert in order to transform it into productive and habitable agricultural and industrial areas.⁵⁰ This project plans to divert six million gallons of water per day in order to irrigate over 500,000 acres of land in one of the world's driest climates.⁵¹ This enterprise, which has been called the "project of the millennium" by President Mubarak,⁵² has attracted much international attention and debate. One scholar dubbed the project as "preposterous, a national fantasy"⁵³ and another calls it an attempt to "clone a Nile."⁵⁴ Similar criticisms came even from Egyptian scholars and water experts. Farouk El-Baz, an Egyptian hydrologist, doubted the viability and long-term effects of the project.⁵⁵ He claimed that "... the open channel will suffer enormous evaporative loss, and could easily be filled with sand blowing from the area's large dunes."⁵⁶ Microbiological studies indicated that the "large volume of stagnant water in the canals under the hot desert sun will facilitate the breeding of even more snails carrying the killer schistosomiasis bloodflukes (bilharzia) and lead to an increase of mosquitoes."⁵⁷ Despite such criticisms, President Mubarak appears determined to go ahead with the project.⁵⁸

To justify and perpetuate its monopolistic use of the Nile waters and the myth that Egypt *aut Nilus is aut nihil*,⁵⁹ Egypt has consistently championed the 'no harm rule' "in its stronger, more absolute version"⁶⁰ over the Nile.⁶¹ The essence of this claim is that since Egypt's use of the Nile has

50. Seyoum: Egypt is Diverting the Nile, *supra* note 44.

51. Aaron Gladman, "Massive Nile River Diversions Planned" (1997) 12:3 *World Rivers Review*, online: International Rivers Network <<http://www.irn.org/pubs/wrr/9706/nile.html>> (date accessed: August 12, 2001) [Gladman: Massive Diversion].

52. "Plans For New Nile Irrigation Scheme Causes Controversy," online: Hewett School Geography Department <<http://www.hewett.norfolk.sch.uk/curric/NewGeog/Africa/waterwa7.htm>> (date accessed: September 4, 2004).

53. Professor Antony Allan as quoted, *supra* note 51.

54. Alan Cooperman, "Egypt Clones a Nile: Making the Desert Bloom - or Making the Wells go Dry," (19 May 1997) online: US News <http://www.usnews.com/usnews/issue/archive/970519/19970519006977_brief.php> (date accessed: August 12, 2001).

55. Gladman: Massive Diversion, *supra* note 51.

56. *Ibid.*

57. "Plans For New Nile Irrigation Scheme Causes Controversy," online: Hewett School Geography Department <<http://www.hewett.norfolk.sch.uk/CURRIC/NEWGEOG/Africa/water/wa7.htm>> (date accessed: August 13, 2001). For some positive developments, see Part IV below.

58. *Ibid.*

59. Garretson: The Nile Basin, *supra* note 20 at 261.

60. Dellapenna: Rivers as Legal Structures, *supra* note 49 at 247.

61. Swain: The Nile River Dispute, *supra* note 8 at 685; Dellapenna: Rivers as Legal Structures, *supra* note 49 at 244; Jacobs: Sharing the Gifts of the Nile, *supra* note 1 at 109.

continued unchallenged since time immemorial, its long-established right takes precedence over all other later claims, regardless of their nature.⁶² The effect of this policy has meant that other riparians are banned from using the Nile if such use interferes with Egypt's "natural and historical rights" to the Nile waters. In other words, Egypt's existing use of the Nile waters should remain unrestricted. Its relatively developed economy and the internal crises in the other riparian states enabled Egypt to extract more water than its fair share under the 1959 agreement.⁶³ Giving primacy to Egypt's use of the Nile negates "the concept of 'equitable utilization' that is accepted as the controlling customary international law."⁶⁴ In 1994, the United Nations International Law Commission, after a careful review of state practice, decisions of national and international tribunals and the works of renowned jurists, concluded that the principle of equitable utilization as laid down in Chapter 2 of the 1966 Helsinki Rules on the Uses of the Waters of International Rivers is a customary rule of international law⁶⁵ governing the utilization of international rivers.⁶⁶

Ethiopia has advocated the principle of equitable utilization of the Nile. The essence of this principle is that international rivers should be equitably, but not necessarily equally,⁶⁷ apportioned among co-riparian states. In short, the principle refers to equality of the rights of the riparian states to use the waters, not to the equal division of the entire quantity of the water-course.⁶⁸ The principle of equitable utilization requires co-basin states to

62. Chen: International Rivers, *supra* note 20 at 15-16; Dellapenna: Rivers as Legal Structures, *supra* note 49 at 247.

63. Tadros: Shrinking Water Resources, *supra* note 7 at 1097-1098.

64. Dellapenna: Rivers as Legal Structures, *supra* note 49, at 248. There is an array of authority on the status of the principle of equitable utilization. For instance, Fisseha argues that the principle of equitable utilization had attained "the status of a customary rule of international law while the *Convention [on the Non-navigational Use of International Watercourses]* was still in the process of elaboration." see Fisseha Yimer, "The Convention on the Law of the Non-Navigational Uses of International Waterways" (1997) *Ethioscope* 13 at 16. But Getachew Aberra disputes Fisseha's contention. He argues that there is not enough state practice to suggest that the principle has attained the status of a customary rule of international law, see Getachew: Customary International Law, *supra* note 20 at 10.

65. The Helsinki Rules (replaced by the Berlin Rules August 2004) were formally adopted on August 20, 1966, by the International Law Association in Helsinki, Finland at its 52nd Conference, see International Law Association, *Report of the Fifty-Second Conference Held at Helsinki* (July 1966) at 447.

66. Charles B. Bourne, "The International Law Association's Contribution to International Water Resources Law," (1996) 36 *Natural Resources Journal* 155 at 215- 216.

67. Jerome Lipper, "Equitable Utilization" in A.H. Garretson, R.D. Hayton & C.L. Olmstead, eds., *The Law of International Drainage Basins* (New York: Oceana Publication, Inc., 1967) 15 at 44 [Lipper: Equitable Utilization].

68. *Ibid.*

take into consideration all relevant factors and circumstances when working toward an obligation to utilize transboundary waters in an equitable and reasonable manner.⁶⁹

There are now some indicators that the previous tensions over the Nile are on the decline. The riparian states, including Egypt, seem convinced that a more collaborative and imaginative approach is needed not only to avoid conflicts as a result of competitive use of the Nile but also to maximize the benefits that could be generated from the Nile waters. Recently, all the Nile states have started to engage in authentic discussion geared towards reaching common understanding and accord. The next section focuses on the reasons why basin-wide cooperation for the management of the Nile is necessary.

III. *Why Cooperate Now?*

[There are] two possible directions for Africa. One is of a glorious renaissance.... The other is one in which we sink deeper into the abyss of war, poverty, HIV/AIDS, disinvestments in human capital, and an ever-mounting brain drain. At the dawn of the new millennium, it is no exaggeration to say that Africa stands at a stark crossroad.⁷⁰

Nowhere in Africa is this crossroad starker than in the Nile Basin. Here at the crossroad... [the Nile countries] will choose the path of renaissance — of cooperation and joint development, increasing all the flows along the river, addressing together the threats of poverty and conflict, opening the way to greater harmony and integration among [the Nile] countries, turning this great river into a river of opportunity and hope for all the people of its countries.⁷¹

As far as the utilization of the Nile is concerned, there seems to be "... no alternative to cooperation."⁷² Several reasons can justify this claim.

First, some hydrological studies of the Nile basin indicate that due to

69. Godana: Africa's Shared Waters, *supra* note 20 at 55.

70. K.Y. Amoako, quoted by David Grey, Opening Remarks on Behalf of the CIDA UNDP World Bank Partnership on the Extraordinary Nile-COM Meeting (28-29 March 2001) in Khartoum, Sudan, online: Nile Basin Initiative <[http://www.nilebasin.org/Country%20Statements %201.htm#World Bank Statement](http://www.nilebasin.org/Country%20Statements%201.htm#WorldBankStatement)> (date accessed: July 6, 2001) [Grey: Opening Remarks].

71. *Ibid.*

72. James Wolfensohn, addressing the first ever joint meeting of the Ministers and high-ranking officials from the Nile Basin countries with donors and international development agencies in Geneva, Switzerland from 26-28 June 2001. "Ministers and Donors Full Development of Nile Basin" *Addis Tribune* (29 June 2001), online: Addis Tribune <<http://www.addistribune.com/Archives/2001/06/29-06-01/Ministers.htm>> (date accessed: June 3, 2005).

the rapidly degenerating eco-system,⁷³ pollution from industrialization⁷⁴ and uncontrolled use of pesticides and fertilizer, the overall quality and quantity of the Nile's water is decreasing.⁷⁵ The region is also afflicted with other problems such as desertification, deforestation and land degradation.⁷⁶ Kinfe Abraham, Head of an Ethiopian think tank, maintains that "[t]he ecological degradation taking place in the Ethiopian highlands will in the long-term exacerbate Ethiopia's water level and adversely affect the volume of water which will flow to the other countries like Egypt whose needs are also bound to rise because of the demographic pressure."⁷⁷ To address these problems the riparian states need to adopt a holistic and integrated approach that recognizes the interdependencies between resource development and environmental management. This approach involves the adoption of measures and standards to protect the environment both at the national and at the regional levels.

Second, famine and drought have almost become synonymous with the Nile basin countries. Cyclical drought and famine in Ethiopia claims hundreds of lives every four to five years. The heavy dependency of Ethiopia on rain-fed agriculture and the unreliable nature of rainfall are said to be the main causes of crop failure that repeatedly lead to serious food shortages and famine.⁷⁸ To attain food self-sufficiency, Ethiopia needs to use its water resources, including the Blue Nile, for irrigation purposes. The remaining riparian states also have agricultural economies⁷⁹ and are trying to pursue their share of the Nile waters for irrigation purposes as well.⁸⁰ Added to this is the challenge posed by an ever-increasing population. In the year 2000, the estimated number of people living in the riparian states was 300 million.⁸¹ This number is projected to rise to 812 million by the

73. Kinfe: The Nile Issue, *supra* note 10 at 42.

74. Tadros: Shrinking Water Resources, *supra* note 7 at 1092.

75. Carroll: Past and Future, *supra* note 20 at 270; Mann: Nile Waters, *supra* note 42 at 5; Caponera: Legal Aspects, *supra* note 8 at 656; Jacobs: Sharing the Gifts of the Nile, *supra* note 1 at 116.

76. Swain: The Nile River Dispute, *supra* note 8 at 684-686.

77. Kinfe: The Nile Issue, *supra* note 10 at 42.

78. Daniel: Hydro-politics of the Blue Nile, *supra* note 8 (13 August 1999) at 11.

79. Godana: Africa's Shared Waters, *supra* note 20 at 83.

80. Caponera: Legal Aspects, *supra* note 8 at 663; Mekete: Sharing Nile Waters, *supra* note 20 at 9; Valentina Okaru-Bisant, "Institutional and Legal Frameworks for Preventing and Resolving Disputes Concerning the Development and Management of Africa's Shared River Basins" (1998) 9 *Colo. J. Int'l Envtl. L. & Pol'y* 331 at 332 [Okaru-Bisant: Institutional and Legal Framework]; Godana: Africa's Shared Waters, *supra* note 20 at 83-84. Rushdi Said, "The Waters of the Nile: Cooperation or Conflict?" (1997) 7 *Middle East Executive Report* 16 [Said: The Waters of the Nile]; Tadros: Shrinking Water Resources, *supra* note 7 at 1099.

81. World Bank, "Nile Basin: Overview," online: The World Bank Group <<http://www.worldbank.org/afr/nilebasin/>> (date accessed August 4, 2001)

year 2040.⁸² Such a major population explosion will surely increase the demand placed by riparian states on Nile waters. When countries that share a common natural resource unilaterally try to harness this common resource, conflicts are bound to arise. It is not difficult to imagine what will occur when the riparian states engage in unilateral withdrawal of water in order to satisfy their pressing economic and population needs.

Third, the cooperative use of the Nile presumably would increase the volume of water available in the basin as well as reduce the silting that is causing serious problems in the downstream dams of Egypt and the Sudan.⁸³ The water level of Aswan Dam is decreasing as a result of sediment siltation.⁸⁴ Similarly, floods are causing problems to the irrigation projects and dams of the Sudan.⁸⁵

Cooperative use and management of the Nile would also reduce evaporation which is a major problem in the Nile basin.⁸⁶ In the Sudd region of the Sudan 20 to 25 billion cubic meters (BCM) is lost annually due to evaporation.⁸⁷ Similarly, close to 30 BCM a year is lost in the Bahr El-Ghazal basin and in the marshes that block the Sobat River.⁸⁸ One very critical strategy to reduce water loss due to evaporation would be to create regional water reservoirs in non-arid climatic regions. As reckoned by Daniel Kendie:

... by blasting a deep outlet and erecting a dam, about six billion cubic meters of water can be stored in Lake Tana. The advantage of storing

82. Jacobs, "Sharing the Gifts of the Nile," *supra* note 1 at 117, quoting Heba Saleh, "Countries Near Longest River Grapple With Water Shortage" *Toronto Star* (5 August 1990) H2.

83. Warren Giles, "International Economy: Nile Nations Funded to Aid Water Sharing," *Financial Times* (3 July 2001), online: Financial Times <wysiwyg://439 http://globalarchive.ft.co...es.html?id=010703001046&query=Nile+river> (date accessed: 12 July 2001) [Giles: Nile Nations].

84. Interview of Professor Teferi Tsegaye, "We Must Get our Message About the Nile Across Slowly but with Assuredness," *The Reporter* (12 July 2001) A6 [Professor Teferi: We Must Get Our Message Across]. By some estimates, 60 to 100 tons of debris enters the Nile river annually. The sedimentation rate in Egypt stands a rather high level of 6 to 15 cm per century; while in the Sudan the figures go up to 30 cm, see Tesfaye, "The Nile Question," *supra* note 39 at 31.

85. Professor Teferi: We Must Get Our Message Across, *supra* note 84 at A6.

86. "Nile Basin Nations Move Towards Cooperation," online: Oneworld <http://www.oneworld.org/euconflict/publicat/n13.1/page_13.html> (date accessed: July 13, 2001); Caponera, "Legal Aspects," *supra* note 8 at 653; Kinfe Abraham, "Nile Imperatives: Avenues Toward A Win-Win Situation," online: EIIPD <http://www.eiipd.org/research/nile%20issue/nile_imperatives.htm#THE_HISTORICAL> (date accessed: September 7, 2004). As noted by Kendie, "...evaporation losses from reservoirs ... amount[] to one-meter depth per year in Ethiopia, compared with over three meters depth at Aswan, the actual potential rate of evaporation in the world. While the evaporation loss in Ethiopia will be only 3%, in Egypt it will be 12%," see Daniel, "Hydropolitics of the Blue Nile," *supra* note 8 at 15.

87. Said, "The Waters of the Nile," *supra* note 80.

88. *Ibid.*

such water in the high and cool sites in Ethiopian uplands would enhance the water available for both Ethiopia and its down stream neighbours. The amount of water that Ethiopia would utilize for irrigation may be equivalent to the amount of water lost by Egypt through evaporation. Authorities in the field argue that even if Ethiopia draws off Six Km³ of water, Egypt and Sudan would still benefit from the construction of dams in Ethiopia. The amount of water to Egypt and the Sudan would not be affected.⁸⁹

Fourth, the current legal framework over Nile management is uncertain for different reasons. The treaties are not all encompassing and deal with very limited issues, mainly water sharing. Furthermore, the excluded riparians do not recognize the treaties and agreements on the Nile.⁹⁰ In the absence of a comprehensive legal framework, states may engage in unilateral use of Nile waters, which will most likely cause conflict. What is more, the Sudan, which is the second largest beneficiary of the Nile waters under the current treaty regime, has expressed its dissatisfaction with the only post-colonial treaty, the 1959 water agreement, which fixes its share at 18.5 BCM.⁹¹ Consequently, the diplomatic relationship between Egypt and the Sudan has deteriorated. When Sudan threatened to block the Nile waters by diverting its direction, Hosni Mubarak did not hesitate to threaten war against the Sudan. He declared that “[t]hose who play with fire in Khartoum ... will push us to confrontation and to defend our rights and our lives.”⁹²

Rushdi Said, the former head of the Egyptian Geological Survey and Mining Authority, argued that conflict over the Nile water “...would be not only extremely unwise, but also uncalled for, because the Nile basin has enough water to satisfy the present needs of all its inhabitants.”⁹³ He added that if the riparians agree to develop and manage the Nile, it has enough fresh water resources to meet all their needs.⁹⁴ Currently, out of the total 476 BCM of water that is potentially available to the riparian states per year, less than half or 227 BCM is being used.⁹⁵

89. Daniel: Hydro-politics of the Blue Nile, *supra* note 8 at 15. For detailed discussion on this point, see generally, Elhance, *supra* note 6; Collins, *supra* note 1.

90. Tadros: Shrinking Water Resources, *supra* note 7 at 1096.

91. Caponera: Legal Aspects, *supra* note 8 at 660; Swain: The Nile River Dispute, *supra* note 8 at 685 and Said: The Waters of the Nile, *supra* note 80 at 17.

92. “Water as a Weapon” (15 July 1995) 6-11 *Sudan Update* quoted in Swain: The Nile River Dispute, *supra* note 8 at 685.

93. Said: The Waters of the Nile, *supra* note 80 at 17.

94. *Ibid.*

95. *Ibid.*

These various factors underscore the need for an integrated approach geared towards optimal utilization of the Nile by all of the riparian states. The basin states must work out a comprehensive treaty that can address the interests of all of them and the important issues thus far relegated to the background before affairs degenerate into crisis.

Arguably, the *Convention on the Law of the Non-Navigational Uses of International Waterways* (hereafter *Convention*) can provide a good starting point for a comprehensive Nile basin agreement.⁹⁶ Articles 5 and 7 are deemed to be the “twin cornerstones” of the entire *Convention* because they set out the governing principles for the utilization of international watercourses.⁹⁷

Article 5 sets forth the long-established principle of an equitable and reasonable utilization of international watercourses.⁹⁸ This principle allows each riparian state to “...utilize an international watercourse within its territory in an ‘equitable and reasonable manner’ as long as it takes into consideration the legitimate rights and interests of all other users.”⁹⁹ It should be noted that this principle does not require an equal sharing of a common river among basin states. Rather, it demands that the needs of each state be considered on an equal basis with the needs of other water-

96. There seems to be a disagreement concerning the relevance of this Convention for the formulation of a basin wide Nile agreement. For instance, Carroll says that the Convention does not provide “guidelines on how to formulate a regional agreement” and it “cannot provide for the preliminary steps that Nile states must take before they negotiate a regional agreement.” She adds: the “... Convention cannot resolve the underlying problems impeding cooperation, such as lack of shared understanding of Nile problems and weak domestic water regulatory systems,” see Carroll: Past and Future, *supra* note 20 at 271 & 286-291. Similarly, Nahid Islam argues that as the Convention is highly western, both in terms of content and procedure, it barely reflects the socio-economic and cultural circumstances of developing countries. She advocates for a participation of user communities in resource management and decision-making process at the national level. See Nahid Islam, *Rethinking The Law of Non-Navigational Uses of International Watercourse: Options for Regional Regime-Building in Asia* (J.S.D. Dissertation, Law, Dalhousie University, 1998) at 4 [unpublished]. In a similar vein Schwabach, based on the voting pattern of states, argues that in situations where there are developing upper riparian states “the Convention is not likely to provide useful guidance, except in a very limited sense.” Schwabach: The United Nations Convention, *supra* note 38 at 260-270. Out of the ten Nile states only Kenya and the Sudan voted in favour of the Convention. Egypt, Ethiopia, Tanzania and Rwanda abstained from voting while Burundi voted against the Convention. The remaining countries did not take part in the vote. See *Convention on the Law of Non-navigational Uses of International Watercourses*, 21 May 1997, G.A.Res. 51/229, U.N. GAOR, 51st Sess., 99th plen. mtg., U.N. Doc A/51/PV.99 (1997); Jacobs: Sharing the Gifts of the Nile, *supra* note 1 at 120.

97. Stephen McCaffrey, “The Law of International Watercourses: Some Recent Developments and Unanswered Questions” (1989) 17 *Denv. J. Int’l L. & Pol’y* 505 at 508.

98. *Convention on the Law of Non-navigational Uses of International Watercourses*, 21 May 1997, G.A.Res. 51/229, U.N. GAOR, 51st Sess., 99th plen. mtg., U.N. Doc. A/RES.51/229 (1997); reprinted in 36 *I.L.M.* 700 (1997) [*Convention*].

99. Tadros: Shrinking Water Resources, *supra* note 7 at 1105.

course states.¹⁰⁰ As discussed previously, the principle of equitable utilization gives each riparian of an international basin the equal rights to utilize the waters of the basin.¹⁰¹ This principle does not imply that each riparian has an equal claim to the basin waters; rather, it is interpreted to mean that each riparian's needs are to be considered on an equal basis in relation to the needs of the other states sharing the basin.¹⁰² Article 6 of the *Convention* provides a non-exhaustive list of the relevant factors that need to be taken into consideration when determining whether a state's utilization of water resources is equitable and reasonable.¹⁰³ Article 7 requires watercourse states to take all appropriate measures not to cause significant harm to other watercourse states.¹⁰⁴

In their recent dialogues under the Nile Basin Initiative, to be discussed in Part V, the riparian states have accepted the principle of equitable utilization as a guiding principle in their efforts to forge a comprehensive agreement on the Nile.¹⁰⁵ The problem with this principle, however, is that "the same platitudinous quality which makes it so agreeable also makes it disturbingly vague and uncertain."¹⁰⁶ In other words, as is the case with any other legal principle, the principle does not provide "an infallible matrix for problem solving."¹⁰⁷ Rather riparian states could use these factors to arrive at different conclusions of what constitutes equitable and

100. Jacobs: Sharing the Gifts of the Nile, *supra* note 1 at 99; Charles B. Bourne, "The International Law Association's Contribution to International Water Resources Law" (1996) 36 *Nat. Resources J.* at 158.

101. Jacobs: Sharing the Gifts of the Nile, *supra* note 1 at 99.

102. *Ibid.*

103. *Ibid.* The factors are: (a) geographical, hydrographical, hydrological, climatic, ecological and other factors of a natural character; (b) The social and economic needs of the watercourse States concerned; (c) The population dependent on the watercourse in each watercourse State; (d) The effects of the use or uses of the watercourse in one watercourse State on other watercourse States; (e) Existing and potential uses of the watercourse; (f) Conservation, protection, development and economy of use of water resources of the watercourse and the costs of measures taken to that effect; (g) The availability of alternatives, of comparable value, to a particular planned or existing use.

104. *Convention*, *supra* note 98, Article 7.

105. Nile Basin Initiative, "Celebrating Cooperation on the Nile" online: Nile Basin Initiative <<http://www.nilebasin.org/ICCON1.htm>> (date accessed: August 15, 2001).

106. William W. Van Alstyne, "International Law and Interstate River Dispute" (1960) 48:4 *Cal. L. Rev.* 596 at 617. Explaining the problematic nature of the principle Lord Selden is quoted as saying "Equity is a roguish thing: for Law we have a measure, know what to trust to, Equity is according to the Conscience of him that is Chancellor, and as that is larger or narrower, so is Equity. 'Tis all one as if they should make the Standard for the measure, we call, a Chancellor's Foot, what an uncertain measure would this be? One Chancellor has a long Foot, another a short Foot, a third an indifferent Foot. 'Tis the same thing in the Chancellor's Conscience." Eugene C. Gerhart, *Quote It!: Memorable Legal Quotations* (New York: C. Boardman Co., 1969) at 198.

107. Jacobs: Sharing the Gifts of the Nile, *supra* note 1 at 99.

reasonable utilization of the Nile waters.¹⁰⁸ In the view of Eyla Benvenisti, however, such vagueness is a blessing in disguise.¹⁰⁹ The vague nature of the principle, it is argued, gives the riparian states sufficient leeway to formulate an arrangement that best suits their particular interests and situations. Similarly, Nebiyou, Daniel and Kentaro argue that:

Generally speaking, there are hardly any rules, whether in international or municipal law, which a priori establish a decisive solution to such a politically contested issue [the apportionment of shared water courses]. Each case is so specific and unique that it is hardly possible for a set of legal rules to predict every possible situation.¹¹⁰

They further assert that “it seems fair to say that the role of international law can and ought to play is not so much to establish a conclusive rule on apportionment of shared water resources as to offer a legal framework of a general nature based on which co-basin states may be encouraged to negotiate and settle the dispute by themselves.”¹¹¹

For far too long the tone and substance of the relationship among the Nile riparian states has been characterized by fierce competition, mutual suspicion, latent antagonism and even threats of war. In recent years, however, the basin has witnessed a paradigm shift in which states talk about cooperative and sustainable development of the river as well as possible regional economic integration. As argued above, efficient and equitable water management will have an important contribution to the long-term political, economic, and environmental security of the basin for the years to come.¹¹² The next part examines the major recent developments as far as a cooperative use and management of the Nile is concerned.

IV. *Recent Developments*

As stated in Part II, the lack of trust and common understanding among the riparians concerning the sharing and management of the Nile has long

108. Carroll: Past and Future, *supra* note 20 at 288-289.

109. Eyal Benvenisti, “Collective Action in the Utilization of Shared Freshwater: the Challenge of International Water Resources Law” (1996) 90 A.J.I.L. 384 at 403.

110. Nebiyou Dagne, Daniel Bekele Mulugeta & Kentaro Kaihara, “Towards a Cooperative Use of the Nile: A Legal Perspective” (1999) 12:2 CRIA 226 at 233 [Dagne Towards a Cooperative Use].

111. *Ibid*

112. Jeremy Berkoff, *A Strategy for Managing Water in the Middle East and North Africa*, (Washington, D.C.: World Bank, 1994) at 1.

been a feature of Nile resource management. Recently, the Nile riparian states, with the help of the international community, have embarked on a new road towards the cooperative use and management of Nile waters.

Accordingly, the riparian states are conducting annual conferences called the *Nile 2002 Series*, which are intended to bring together water experts from the basin states as well as from around the world.¹¹³ The overarching goal of this series of conferences is to create “unofficial and informal venues” for valuable and constructive discussion and exchange of intellectual ideas.¹¹⁴ The latest meeting, the ninth Conference of Nile 2002, was held in Nairobi, Kenya from October 7-9, 2002. At the conclusion of the conference, the countries underscored the importance of cooperative use of the Nile in order to attain an optimal and efficient use of the river.¹¹⁵

In an earlier similar project, six¹¹⁶ of the riparian states (including Egypt) established the *Technical Co-operation Committee for the Promotion of the Development and Environment Protection of the Nile Basin* (TECCONILE) in December 1992.¹¹⁷ TECCONILE was charged with the task of preparing an agreement for the establishment of a regional organization, including the remaining riparian countries. In February 1999, the riparian states, except Eritrea, signed the Agreed Minutes in Dar es Salaam, Tanzania.¹¹⁸ Under this arrangement the countries adopted the Nile River Basin Strategic Action Program (NRBAP).¹¹⁹ The Program consists of two interrelated sub-programs namely, the Shared Vision Program and

113. Swain: The Nile River Dispute. *supra* note 8 at 691. The first Nile 2002 conference was held in Aswan (Egypt) in February 1993, followed by the second in Khartoum (Sudan) in January 1994, the third in Arusha (Tanzania) in February 1995, the fourth in Kampala (Uganda) in February 1996, the fifth held in Addis Ababa (Ethiopia) in February 1997, the sixth conference was held in Kigali (Rwanda) in February 1998, the seventh in Cairo (Egypt) in March 1999, the eighth held in Addis Ababa (Ethiopia) in June 2000, the ninth Conference was held in Nairobi (Kenya) in 2002. See Program of the Eighth Nile 2002 Conference, Addis Ababa, Ethiopia, (26-29 July 2000) at 1[on file with the author].

114. *Ibid.*

115. Nile Basin Initiative, 9th Nile 2002 Conference, online: Nile Basin Initiative <http://www.nilebasin.org/Documents/Other_Docs/Nile%202002%20Brochure.doc> (date accessed: September 4, 2004).

116. The countries are Democratic Republic of Congo, Egypt, Rwanda, Sudan, Tanzania and Uganda; the remaining countries were observers, which joined the arrangement subsequently, see Nile Basin Initiative, “History of the Nile Basin Initiative,” online: Nile Basin Initiative <<http://www.nilebasin.org/nbihistory.htm>> (date accessed: August 10, 2001) [NIB: History].

117. *Ibid.*

118. *Ibid.*

119. *Ibid.*

120. Council of Ministers of Water Affairs of the Nile Basin States, “Policy Guidelines for the Nile River Basin Strategic Action Program,” online: Nile Basin Initiative <<http://www.nilebasin.org/Documents/TACPolicy.html>> (date accessed: August 10, 2001).

the Subsidiary Action Program.¹²⁰

The Shared Vision program is geared towards creating a conducive environment for the implementation of the shared vision through action on the ground, within a basin-wide framework.¹²¹ The projects that have been developed and agreed upon by the riparians under the “Shared Vision Program” are

- a) Confidence building and stakeholder involvement,
- b) Environmental analyses and management,
- c) Promoting power trade,
- d) Efficient uses of water for agriculture,
- e) Socio-economic, environmental and sectoral analysis,
- f) Water resources planning and management, and
- g) Applied training.¹²²

The Subsidiary Action Programs, on the other hand, are intended to “...plan and implement action on the ground at the lowest appropriate level...”¹²³ They consist of development projects at the sub-basin level, involving two or more countries.¹²⁴ The two Subsidiary Action Programs are the Eastern Nile (EN-SAP) which currently consists of Ethiopia, Sudan and Egypt; while the Nile Equatorial Lakes Region (NEL-SAP) includes Burundi, the Democratic Republic of Congo, Kenya, Rwanda, Tanzania and Uganda.¹²⁵

In February 1999, the riparians¹²⁶ launched a new partnership called the Nile Basin Initiative (NBI) which succeeded the TECCONILE.¹²⁷ NBI is a transitional regional partnership in which the countries of the Nile basin are grouped together to develop and manage the Nile in a “sustainable and equitable” manner.¹²⁸ The establishment of the NBI may be regarded as a breakthrough in the history of Nile basin cooperation. What makes the NBI unique is that it involves all riparians in collective manage-

121. Nile Basin Initiative, “Nile Basin Initiative Program,” online: <<http://www.nilebasin.org/nbiprocess.htm>> (date accessed: August 10, 2001) [NIB: Program].

122. *Ibid.*; “Nile Basin Initiative - Current Activities,” online: Nile Basin Initiative <<http://www.nilebasin.org/current%20activities.htm>> (date accessed: August 13, 2001) [NIB: Current Activities].

123. NIB: Program, *supra* note 121.

124. *Ibid.*

125. NIB: Current Activities, *supra* note 122.

126. Entrea is not a formal member yet. It has been participating as an observer and has shown strong interest to join the regional partnership, see Nile Basin Initiative, News Release, “Nile Basin Officials Meet to Finalize Recommendations on Joint Projects” (No. 01 3-23), online: Nile Basin Initiative <[http://www.nilebasin.org/pressreleases.htm#Nile Basin Officials Meet to Finalize Recommendations on Joint Projects](http://www.nilebasin.org/pressreleases.htm#Nile%20Basin%20Officials%20Meet%20to%20Finalize%20Recommendations%20on%20Joint%20Projects)> (date accessed: August 3, 2001).

127. NIB: History, *supra* note 116.

128. NIB: Program, *supra* note 121.

ment for the first time in the history of the Nile.

The objectives of the NBI include the development of the Nile water resources "...in a sustainable and equitable way to ensure prosperity, security and peace for all its people; to ensure cooperation and joint action between the riparian states, seeking 'win-win' gains; to eradicate poverty; and promote economic integration."¹²⁹ Since the establishment of the NBI, the member states have been actively engaged in discussions and in the development of what is referred to as the "Shared Vision" to address some of the problems that have been wracking the Nile Basin. The shared vision of the NBI is "[t]o achieve sustainable socio-economic development through the equitable utilization of, and benefit from, the common Nile Basin water resources."¹³⁰

The NBI is composed of three transitional institutions, namely, the Council of Ministers of Water Affairs of the Nile Basin (Nile-COM), the Technical Advisory Committee (Nile TAC) and the Nile Basin Secretariat (Nile SEC) located in Entebbe, Uganda.¹³¹ The Council of Ministers is composed of the water affairs ministers of the riparian states and is the highest decision-making organ of the NBI.¹³² The Technical Advisory Committee is composed of two senior officials from each Nile country¹³³ and serves as the technical organ of the NBI. The Nile SEC carries out the day-to-day activities of the NBI under the direction of the Nile-TAC.¹³⁴ It is also in charge of coordinating and monitoring the activities of the working groups of the two sub-programs.¹³⁵

The three-day meeting of the International Consortium for Cooperation on the Nile (ICCON) held in Geneva, Switzerland from June 26-28, 2001¹³⁶ can be regarded as a landmark event in the history of the Nile. For the first time, ministers of water affairs and senior government officials

129. Nile Basin Initiative, "Celebrating Cooperation on the Nile," online: Nile Basin Initiative <<http://www.nilebasin.org/ICCON1.htm>> (date accessed: July 6, 2001).

130. As declared on the Nile Basin Initiative Homepage, online: Nile Basin Initiative <<http://www.nilebasin.org/>> (date accessed: July 6, 2001).

131. *Ibid.*

132. Nile Basin Initiative, News Release, "Nile Basin Officials Meet to Finalize Recommendations on Joint Projects" (No. 01/3/23), online: Nile Basin Initiative <[http://www.nilebasin.org/pressreleases.htm#Nile Basin Officials Meet to Finalize Recommendations on Joint Projects](http://www.nilebasin.org/pressreleases.htm#Nile%20Basin%20Officials%20Meet%20to%20Finalize%20Recommendations%20on%20Joint%20Projects)> (date accessed: July 6, 2001).

133. Nile Basin Initiative, "Nile Basin Initiative Technical Advisory Committee Nile-TAC," online: Nile Basin Initiative <<http://www.nilebasin.org/nile-tac.htm#Start>> (date accessed: July 24, 2001).

134. Nile Basin Initiative, "Nile Basin Initiative Secretariat," online: Nile Basin Initiative <<http://www.nilebasin.org/nile-sec.htm>> (date accessed: July 24, 2001).

135. *Ibid.*

136. Nile Basin Initiative, "Strategic Action Program Overview Document," online: Nile Basin Initiative <http://www.nilebasin.org/overview_chapter_2.htm> (date accessed: September 4, 2004).

from all the Nile basin states, together with the donor community and civil society representatives, gathered in one place with a shared commitment to develop an integrated plan for the use and conservation of the Nile. The ICCON was set up by the World Bank upon the requests of the Nile-COM in order to coordinate donor support for the NBI action plan and to convene a consultative group meeting.¹³⁷ The ICCON is a newly created platform conducive to the discussion and planning required to map out the options and opportunities for the unified and comprehensive development of the Nile Basin.¹³⁸

This meeting gave rise to cautious optimism that confrontation and mistrust will be replaced by a spirit of cooperation and trust. At the conclusion of this meeting, development partners pledged financial support of at least \$140 million.¹³⁹ During this meeting, the World Bank promised to establish a Trust Fund to finance the full program the NBI presented to ICCON.

The ICCON initiative marks a shift in the international community's approach to the issue of Nile waters management. Historically, the international community, generally speaking, had pursued a "hands off" approach concerning Nile water issues. This was especially true regarding the World Bank's Operating Directives, OD 6.50, which required a consensus from all the riparians before grants or loans could be made for a water project on an international water resource in the territory of one of the riparians.¹⁴⁰ This restricted lending policy cemented the *status quo*, thereby protecting and reinforcing Egypt's traditional non-cooperative position.¹⁴¹

At the conclusion of the ICCON meeting, the President of the World Bank, James Wolfensohn, expressed the Bank's readiness to support and promote the new spirit of cooperation and partnership among the Nile states in order to develop the waters of the Nile in a sustainable and equitable manner for the benefit of all. Mr. Wolfensohn assured the participants that the Bank, together with the international community, is prepared to provide the necessary financial support for development projects as

137. *Ibid.*, online Nile Basin Initiative <<http://www.nilebasin.org/ICCON1.htm>> (date accessed: July 24, 2001).

138. World Bank, News Release, "Donor Community Supports Poverty Reduction, Prosperity and Peace through the Nile Basin Initiative" (No. 01/06.28) [World Bank: Donor Community].

139. *Ibid.*

140. Dellapenna: Rivers as Legal Structures, *supra* note 49 at 146-147.

141. *Ibid.* at 247 n. 162. For an excellent discussion about what measures the Bank needs to take in order to make significant contribution to Africa's water basins see Okaru-Bisant: Institutional and Legal Framework, *supra* note 80 at 359-361.

142. World Bank: Donor Community, *supra* note 138.

further cooperation between the Nile countries develops.¹⁴² The active involvement of the international community, especially the World Bank, in pooling resources and coordinating support from other donors is another unique feature of the current initiative.

Most importantly, in December 2003, the co-basin states established the Nile Basin Cooperative Framework Negotiating Committee, which is composed of very senior ranking government officials, with a mandate to recommend a legal institutional framework for the development and management of the Nile Basin water resources.¹⁴³ Despite the dearth of information on its exact content, the Committee "... has developed a draft Cooperative Framework Agreement, understandably marred by many square brackets."¹⁴⁴

Dellapenna rightly claims that a transboundary river should be considered as a "common property resource" since its over use by one riparian is likely to have a diminishing impact on the benefits that could be derived by other co-basin states.¹⁴⁵ Consequently, "[i]deal economic efficiency would seem to dictate that a water basin be treated as a single unit, with optimal basin-wide calculations of water utilization including an inventory of soils, feasibility of irrigation and drainage, values of alternative crops, and domestic and industrial water needs."¹⁴⁶ In the face of the extreme difficulty in forging international agreements on shared water resources "... the ideal solution to the satisfaction of competing needs and conflicting interests is unitary basin-wide development of water resources under some system of supranational authority or management."¹⁴⁷ Hence, each water state should acknowledge the legitimate interests of the others and should be willing to cooperate with a view to making optimal use of the resources.

The following section therefore addresses the need for a viable legal arrangement and a permanent supranational institutional framework for the use and management of the Nile.

143 Nile Basin Initiative, News Release, "The Nile: Forging the Path of Cooperation" (No. 04/02-26), online: Nile Basin Initiative <<http://www.nilebasin.org/pressreleases.htm>> (date accessed: September 24, 2004).

144 Seifeselesie Lemma, "Cooperating on the Nile not a Zero-Sum Game" *United Nations Chronicle* (Sept. - Nov. 2001), online: Ethiopian Embassy <http://www.ethioembassy.org.uk/articles/articles/November%2001/nile_article.htm> (date accessed: September 24, 2004)

145 Dellapenna: *Treaties as Instruments*, *supra* note 6 at 51; see also Tesfaye: *The Nile Question*, *supra* note 39 at 3. Tesfaye asserts that in the case of the Nile "[i]f, for instance, Ethiopia develops upper Nile waters, Egypt will lose out, and conversely, if Egypt insists on maintaining the [*status quo*], that is, insisting on becoming the sole beneficiary of the Nile, all other riparian states will lose out. This is what is called a *zero-sum game* and results in suspicion, distrust, tension and even war if one is certain to win." Tesfaye: *The Nile Question*, *supra* note 37 at 3.

146 Daniel J. Epstein, "Making the Desert Bloom: Competing for Scarce Water Resources in the Jordan River Basin" (1996) 10 *Temp. Int'l & Comp. L. J.* 395 at 401-402 [Epstein: *Making the Desert Bloom*]; see also Tesfaye: *The Nile Question*, *supra* note 37 at 3.

147 Epstein: *Making the Desert Bloom*, *supra* note 146 at 402

V. *Need For a Permanent Legal and Institutional Framework*

As noted in Part II of this article, one of the problems in the use and management of the Nile River has been the lack of a comprehensive basin-wide treaty. One major reason why such an agreement was never concluded was because of Egypt's firm and consistent assertion of its "superior historical" right to the Nile waters.¹⁴⁸ Egypt, based on its misdiagnosis of the Nile issue as a zero-sum game, rejected all calls for a more equitable and coordinated development of the Nile water as merely a demand that it relinquish its privileges. Fortunately, there have been some changes in Egypt's previously held position.

Egypt has come to realize that the lasting solution to the Nile question is an integrative and complementary use of the river. In addition to its active participation in the NIB, where co-basin states discuss equitable sharing of the Nile water and, in fact, develop a number of joint water projects, in recent years Egypt has made some striking public declarations acknowledging the rights of other riparian states in the Nile waters. For instance, in 1998, the then Egyptian Ambassador to Ethiopia, Marawan Badr announced that:

Egypt recognizes that each state has the right to equitable utilization of its waters in accordance with international law. Egypt further recognizes that existing water agreements do not hinder the utilization of the Nile waters by any of the riparian states. Egypt is ready to cooperate with Ethiopia in exploiting its huge hydro-electric power potentials, and did not object to the construction of small scale water dams.¹⁴⁹

In July 1993, Egypt and Ethiopia signed a memorandum of understanding in which the two countries agreed to consider the Nile as a "center of mutual interest."¹⁵⁰ While visiting Ethiopia in December 2003, Egyptian Foreign Minister Fayaza Aboulnaga, expressed Egypt's readiness to provide technical assistance to Ethiopia for utilisation of Nile water resources especially in developing its irrigation systems for agriculture.¹⁵¹

148. Tadros, *Shrinking Water Resources*, *supra* note 7 at 1096.

149. Ambassador Marawan Badr, "Egypt and the Horn of Africa: The True Perspective" *Addis Tribune* (7 August 1998) at A3; see also "Egypt Explains Position about the Nile Waters" *Pan African News Agency* (6 April 2001), online: Sudan.net <<http://www.sudan.net/news/posted/2013>> (date accessed: September 5, 2004).

150. FAO, "1993 Framework for General Cooperation Between Egypt and Ethiopia," Preamble, online: FAO <<http://www.fao.org/docrep/w7414b/w7440p.htm>> (date accessed: September 4, 2004).

151. Cam McGrath & Sonny Inbaraj, "Claiming the Nile" *Mail & Guardian* (18 January 2004), online: Mail & Guardian online <<http://www.mg.co.za/Content/13.asp?ao=29806>> (date accessed: September 4, 2004).

Now that the Nile countries have started to cooperate on the use of Nile waters, it seems only appropriate to discuss the legal and institutional arrangements required for a unified and comprehensive development of the basin. The riparian states need to back up their "...remarkable and fragile first step..."¹⁵² with a comprehensive basin-wide agreement. The riparians should conclude a treaty that clearly sets out the rules and principles to govern the use and development of the basin. As stated in Part IV, the *Convention* can serve as an appropriate starting point. The existing bilateral agreements, including the 1959 agreement between Egypt and the Sudan, must be replaced with a comprehensive basin-wide arrangement.

The agreement should, *inter alia*, take into account the multifaceted and admittedly often contradictory interests and concerns of the riparian states.¹⁵³ As discussed in Part IV, the combined population of the riparian states is predicated to rise from 300 million today to 800 million in 2040.¹⁵⁴ Such a burgeoning population, coupled with the introduction and operation of energy intensive industries which require the harnessing of water to produce electric power, and the recurrent drought in the region will place increasing demands on the limited water resources of the Nile.¹⁵⁵ The agreement should also clearly specify measures that should be taken in emergency situations, environmental protection measures, dispute prevention and settlement mechanisms, water storage options, problems of evaporation and, of course, water sharing.¹⁵⁶ As international law principles do not provide a ready-made formula for water sharing, the agreement should also provide principles for resource sharing and how, in what manner, and by what proportion, the riparian states ought to share the waters of the Nile.

It should be noted that the existence of an agreement on the use of the Nile is insufficient in itself to ensure the proper management of the river.

152. World Bank: Donor Community, *supra* note 138.

153. For Egypt, access and control over the Nile water has vital implications for its sovereignty and survival. As previously noted, approximately 98% of Egypt's fresh water supply comes from the Nile. Hence, many Egyptians fear that any compromise that would give the riparian states control over the Nile water might put Egypt in a disadvantaged position. On the other hand, given the relative peace and stability in the country, Ethiopia is now trying to implement different water projects in the upper reaches of the Nile for agricultural and hydropower production purposes. See Ashok Swain, "A New Challenge: Water Scarcity in the Arab World Precious Water: Growing Demand and Increasing Scarcity" (Winter 1998) 20:1 *Arab Studies Quarterly* 1, online: <http://web.macam.ac.il/~arnon/Int-ME_water/Water%20scarcity%20in%20the%20Arab%20world.htm> (date accessed: September 7, 2004).

154. Jacobs: Sharing the Gifts of the Nile, *supra* note 1 at 117.

155. *Ibid.*

156. Carroll: Past and Future, *supra* note 20 at 300-303.

Instead, the legal framework needs to be supported by an institutional arrangement that implements the rules set forth in the agreement. Furthermore, the proper management of Nile water resources requires the undertaking of a range of different activities, notably the collection, centralization, standardization and dissemination of technical data, the continuous supervision of the various projects and development programs, and the prevention and settlement of disputes among the basin states.¹⁵⁷ Such an institutional arrangement would provide a forum for consultation and discussions on project development and financing as well as tackling problems that may occur in the future.¹⁵⁸

Different types of institutional arrangements, with differing degrees of autonomy, duration, function, purpose and jurisdiction, have been created to regulate and coordinate the use and development of an international watercourse.¹⁵⁹ Such international bodies have included, commissions, authorities and committees.¹⁶⁰ Factors such as “the importance, number and geographical location of the water resources concerned ... the administrative and economic infrastructure of the states concerned, and the latter’s [sic] readiness to confer regulatory, executive or quasi-judicial functions on a joint body,” *inter alia*, serve as factors for selecting a particular governing structure.¹⁶¹

The Approved Action Plan of the UN Water Conference held in Mar del Plata, Argentina, in 1977, underscored the need for the establishment

157. P.K. Menon, “Institutional Mechanisms For the Development of International Water Resources” (1972) 8 Rev. B.D.I. 80 at 81 [Menon: Institutional Mechanisms].

158. George E. Radosevich, “Implementation: Joint Institutional Management and Remedies in Domestic Tribunals” (1992) 3 Colo. J. Int’l Envtl. L. & Pol’y 260 at 263-264 [Radosevich: Joint Institutional Management]; see also Okaru-Bisant: Institutional and Legal Framework, *supra* note 80 at 332.

159. For instance, the 1960 Frontier Treaty between the Federal Republic of Germany and the Netherlands established the permanent Netherlands-Germany Boundary Water Commission. H. Hohman, *Basic Documents of International Environmental Law* (London: Graham and Trotman Ltd., 1992) at 1159. The 1960 Indus Treaty between India and Pakistan established the Permanent Indus Commission, U.N. *Legislative Texts and Treaty Provisions Concerning the Utilization of International Rivers for Other Purposes than Navigation*, ST LEG SER.B.12 (1974) at 229 & 236; the *Treaty for Amazonian Cooperation* of 1978 created the Rhine and the Danube River Commission, reprinted in 17:5 I L M 1045, the 1964 Niamey Agreement created the Niger river Commission and the International Joint Commission between the United States established according to the Boundary Convention of March 1, 1889. For discussion of these treaties, see Dante A. Caponera, “Patterns of Cooperation in International Water Law: Principles and Institutions” (1985) 25 Nat. Resources J. 563 at 572-587; Radosevich: Joint Institutional Management, *supra* note 158 at 262; Melanne A. Civic, “A New Conceptual Framework for Jordan River Basin Management: A Proposal for a Trusteeship Commission” (1998) 9 Colo. J. Int’l Envtl. L. & Pol’y 285 at 306-313; Godana: Africa’s Shared Waters, *supra* note 20 at 250.

160. Godana: Africa’s Shared Waters, *supra* note 20 at 250.

161. *Ibid*

of an institutional framework for the management and development of international watercourses. It suggested that:

States sharing water resources ... should cooperate in the establishment of programs, machinery, and institutions necessary for the coordinated development of such resources ... and establish joint committees ... to provide for the ... collection, standardization and exchange of data, the management of shared water resources, the prevention and control of water pollution, the prevention of water associated diseases, mitigation of drought, flood control, river improvement activities, and flood warning systems.¹⁶²

The importance of an integrated and coordinated management of a shared international watercourse is also underlined by the *Convention*. Article 24(1) of the *Convention* provides that: "Watercourse States shall, at the request of any of them, enter into consultations concerning the management of an international watercourse, which may include the establishment of a *joint management mechanism*."¹⁶³ Article 24(2) defines the term management as:

- (a) Planning the sustainable development of an international water course and providing for the implementation of any plans adopted; and
- (b) Otherwise promoting the rational and optimal utilization, protection and control of the watercourse.

Experience has shown that a major problem in the development of an international watercourse lies in the difficulty of establishing an institution that is charged with the management of the water resources.¹⁶⁴ This is because any such institution will inevitably involve some restriction on the political sovereignty of the various states¹⁶⁵ and the ability of those states to make final decisions on important issues that they consider to involve issues of national sovereignty which are always jealously guarded. States, therefore, tend to create institutions that have limited powers and that encroach as little as possible on their authority.¹⁶⁶

162. Report of the United Nations Water Conference, Mar del Plata, Argentina, 14-25 March 1977, U.N. Doc. E/CONF.70/29.

163. *Convention*, *supra* note 98, Art. 24(1) [emphasis added]

164. Herbert Arthur Smith, *The Economic Uses of International Rivers* (London: P.S. King and Sons Ltd., 1931) 120.

165. Dellapenna: *Treaties as Instruments*, *supra* note 6 at 54.

166. Menon: *Institutional Mechanisms*, *supra* note 157 at 81.

Nevertheless, the institution should have the power to make binding decisions in order to insure compliance with the terms of the agreement. In the opinion of Tadros, the existing dispute settlement mechanisms for international environmental issues leave much to be desired.¹⁶⁷ He contends that the International Court of Justice, the institution that settles such disputes, has neither the expertise nor the legal machinery to enforce its decisions.¹⁶⁸ He argues that the establishment of a discrete dispute settlement institution will provide three advantages:

First, the forum will deal solely with the Nile basin states; therefore it can gain the legitimacy and authority needed. Secondly, it will develop expertise [o]n the issues of that region, and the international agreements that govern. Finally, because it is local and the states are parties to the agreement, claims can be brought with expediency and decisions rendered efficiently.¹⁶⁹

The power and duties of the international watercourse institutional arrangement should be clearly specified, because they have a bearing on how those powers are exercised and how the institution is equipped and staffed. It should be added that the authority of the institutional arrangement should not be limited to data collection and research activities, as was the case in the Hydro Meteorological Survey of Lakes Victoria, Kioga and Albert (HYDROMET), UNDUGU¹⁷⁰ and the TECCONILE.¹⁷¹ The riparian states will benefit from a strong institutional arrangement that is capable of discharging the responsibilities entrusted to it. This institution should, therefore, be vested with sufficient authority, as well as financial and human resources.¹⁷² Such a transnational water resource management institution

167. Tadros, *Shrinking Water Resources*, *supra* note 7 at 1129.

168. *Ibid.*

169. *Ibid.*

170. UNDUGU or Ndugu in Swahili means Brotherhood. The UNDUGU Group was established in 1983 consisting of six of the Nile riparian states, namely Egypt, Sudan, Uganda, Zaire, Rwanda, Burundi, and the Central Africa Republic. It was later succeeded by the TECCONILE. See Robert O. Collins, "The Inscrutable Nile at the Beginning of the New Millennium," online: Department of History at the University of California, Santa Barbara <<http://www.history.ucsb.edu/faculty/Inscrutable%20Nile1.pdf>> at 5 (date accessed: October 6, 2004)

171. Caponera, *Legal Aspects*, *supra* note 8 at 663.

172. Dellapenna: *Treaties as Instruments*, *supra* note 6 at 54. Dellapenna claims that [n]ations have found it very difficult to agree to relinquish their sovereignty to international institutions authorized to plan, construct, or operate single or multi-purpose projects despite the considerable benefits to be expected from such institutions." *Ibid.* Some water law experts, however, claim that the majority of water resource management structures are "rendered weak or inoperative, because of the huge political difficulties that are on their way." See for instance, Professor Thomas R. Odhiambo, "Coordination of Nile Basin-Wide Research Approaches" (Notes for a Keynote Address on the first day of the 9th Nile 2002 Conference, Nairobi, Kenya, 7-9 October 2002) at 2.

will also have a significant role to pool resources from multilateral and bilateral donors. For instance, the new Operational Policies 7.50 of the World Bank states that the Bank is ready to assist basin nations in achieving joint cooperation and goodwill.¹⁷³ According to one scholar, “[t]he existence of sound institutional and legal frameworks for preventing and resolving water use and management disputes among basin nations will facilitate the process of executing these Bank instruments.”¹⁷⁴ In sum, establishment of the institution indicates to donors and the international community the existence of a basin-wide agreement and commitment of basin countries to work together.¹⁷⁵

Another important issue is how the institution will be constituted. The representatives of the riparian states in the current NBI are Ministers and high-level government officials. This representation has a tendency to make the negotiations politically charged and less sensitive to the important physical-economic aspects of the water resources involved.¹⁷⁶ It is strongly suggested that the representatives should be technical and legal experts with a professional background rather than political representatives.

Equal importance should be given to national institutions that are responsible for water and related issues. The existence of national institutions that are well financed and properly staffed is a necessary prerequisite to effective transnational cooperation.¹⁷⁷ Most of the Nile basin countries lack a well-developed national legal and policy framework and properly financed and staffed institutions that are capable of addressing water issues on both the domestic and international level.¹⁷⁸ There is, therefore, great need to boost the technical and legal capacities of national institutions. This will enable riparians to identify their interests and goals in the short and long run and to take stock of the type and nature of the water

173. Okaru-Bisant: Institutional and Legal Framework, *supra* note 80 at 333.

174. *Ibid.*

175. Kinfe Abraham, “Nile Imperatives: Avenues Toward A Win-Win Situation,” online: EIIPD <[http://www.eiipd.org/research/nile%20issue/nile_imperatives.htm#THE HISTORICAL](http://www.eiipd.org/research/nile%20issue/nile_imperatives.htm#THE%20HISTORICAL)> (date accessed: September 7, 2004).

176. Northcutt Ely & Abel Wolman, “Administration” in A.H. Garretson, R.D. Hayton & C.J. Olmstead, eds., *The Law of International Drainage Basins* (New York: Oceana Publications, Inc., 1967) 124 at 138, [Ely and Wolman: Administration].

177. Okaru-Bisant: Institutional and Legal Framework, *supra* note 80 at 332.

178. See Carroll: Past and Future, *supra* note 20 at 292-297 for an excellent discussion on technical and legal capacity of the Nile riparian states.

resources that are available in the basin.¹⁷⁹ The process of discussion should provide the Nile states the opportunity to prioritize their interests and goals, and even “a collective identity of the Nile states as basin states,”¹⁸⁰ which makes negotiation much easier.¹⁸¹ According to Brunnée and Toope, “...the emergence of a basin identity and shared understanding as to basin-wide interests will serve to constrain Nile states from making entirely self-interested arguments.”¹⁸²

As indicated above, the NBI is a transitional arrangement with limited technical, financial and human resources. There is, therefore, a need to develop “...the institutional setup from the present NILE COM and NILE TAC to a more profound Nile Basin institutional legal cooperative framework capable of achieving economic integration in all development economic sectors.”¹⁸³ The permanent nature of the institution would enable it “... to anticipate and adapt to the dynamic and changing aspects of river development.”¹⁸⁴ It would also enable the riparians to discuss common issues on an uninterrupted basis without the need for negotiations at the diplomatic level each time a new issue arises.

Conclusion

For many years, the Nile riparian states, especially Ethiopia, Egypt and to some extent the Sudan, remained eyeball-to-eyeball over the use of water resources of the Nile. It now appears that the narrowly defined national interests of the past have begun to give way to a spirit of cooperation and

179 *Ibid.* at 297. The meeting convened by the UN Secretariat at Dakar in 1981 recommended that “multinational activities in respect of international watercourses should be supported by appropriate machinery at the national level which would act as a liaison with the international agencies and coordinate and take account of the various sectors involved at all levels of administration....” United Nations, *Experience in the Development and Management of International River and Lake Basins, Proceedings of the United Nations Interregional Meeting of International River Organizations, Dakar, Senegal, 5-14 May 1981*, (New York: United Nations, 1983).

180. Jutta Brunnée & Stephen J. Toope, “The Changing Nile Basin Regime: Does the Law Matter?” (2002) *Harv. Int’l L. J.* 105 at 155 [Brunnée & Toope “Does the Law Matter?”].

181. Some authors claim that since a multilateral initiative addressing the concerns of all ten riparians of the Nile will most likely not transpire, He suggested that a solid cooperation at the sub-basin among Egypt, Sudan, and Ethiopia, which hold within their territory the largest portion of the river flow and have the largest stakes in the conflict level, should take priority. See Dagne: Towards a Cooperative Use, *supra* note 110 at 236.

182. Brunnée & Toope: Does the Law Matter?, *supra* note 180 at 155.

183. Speech by the Honorable Guest of Honour the Vice President of the Republic of Sudan, On the Occasion of Extra-ordinary Meeting of COM, Khartoum, 28-29th March, 2001, online: <[http://www.nilebasin.org/Country%20Statements%201.htm#Burundi Statement](http://www.nilebasin.org/Country%20Statements%201.htm#Burundi%20Statement) (date accessed March 10, 2002)> (date accessed: July 6, 2001).

184. Ely and Wolman: Administration, *supra* note 176 at 137-138.

good neighbourliness. There are indications that the basin states are capable of working jointly to alleviate the harsh effects of famine and poverty that have become such a distinctive trademark of the region. Recent developments provide some flicker of hope to the poverty-stricken inhabitants of the basin. There is optimism that the measures that are being taken will lay a solid foundation for an equitable and sustainable utilization of the Nile waters. After all, it is only with a unified and cooperative development of the Nile that recognizes the rights of all the riparian states that the basin states will be able to more effectively tackle the multifaceted problems facing the region.

There is no doubt that formulating a mutually acceptable accord over a scarce water resource shared by as many as ten countries and in a region that has been witness to political tensions and controversies as the Nile basin may be an extremely complex and painstaking task. However, if all the riparians are willing and ready to address the problems fairly and with the proper mindset, achieving a lasting solution to the Nile problems is not impossible.

There is a long and perhaps bumpy road ahead for the riparian states but, as the saying goes, a long journey begins with a single step. The riparian states have made a move in the right direction, but they need to make many additional and determined strides to reach their destination. The successful implementation of all the programs and projects requires permanent legal, institutional and administrative arrangements. The riparian states should hasten to support their highly encouraging achievements with an institutional framework that best addresses the particular features of the basin and best serves the interests of the riparians. In this regard, the international community should continue to provide much overdue support and backing to the riparian states in order to enable the riparians to develop their legal, technical and institutional capacity on water resource utilization and management. As David Grey stated:

[L]et not the history books stop with [the] deliberations and visions [of the Nile countries]. Let history record how [the riparians] work to take the path of Nile Cooperation succeeded in playing its part in the realization of the hopes and dreams of the young people of [the] countries — and of their children and their grandchildren.¹⁸⁵

And let the Nile, which many thought might bring war to the basin, serve as a prime example of how a shared water resource can serve as a catalyst for cooperation, development, stability, and even regional economic integration.

185. Grey: Opening Remarks, *supra* note 70.

