

# The Nile Basin Initiative and the Cooperative Framework Agreement: Failing Institutional Enterprises?

A Script in Legal History of the Diplomatic Confront (1993–2016)

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## Abstract

Nearly two decades since its inception, the Transitional Mechanism of the Nile Basin Initiative (NBI) has been credited for fulfilling several components of its institutional undertaking –building an atmosphere of trust and dialogue among riparian states. Yet, the negotiations pursued under the auspices of the NBI have failed to realize one of organization’s most fundamental missions: establishing a permanent legal framework and institution ‘acceptable’ to all states across the basin. The diplomatic enterprise leading to the adoption of the Agreement on the Nile River Basin Cooperative Framework (CFA) was beset by multifaceted challenges. I argue that in spite of the unparalleled heights in cooperative dialogues that were largely depicted as a ‘political triumph’ from upstream perspective, the legal and hydro–political discourse leading to the CFA’s final framing failed to mollify the ‘expectations’ of two key stake–holding states: Egypt and Sudan. This preordained an existential threat to the institutional future of the NBI itself and the noble objectives it sought to realize. All the same, the organizational predicament in the basin also evinced that the Nile riparian states have little choice but to revive the ‘dwindling’ momentum and ensure that the NBI’s undertaking is concluded in an ‘inclusive’ and ‘equitable’ manner. Else, this author submits, the alternative would not only present a bleak future from the point of view of cooperation and optimum development of the Nile resources, over the long range, it also stifles the basin states’ enduring riverine interests.

## Key terms

Nile Basin Initiative, Nile River Cooperative Framework, Negotiations history of the CFA, Legal positions of Ethiopia, Egypt and Sudan, Future of the NBI.

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## Introduction

Organized as a sequel to the studies published in *Mizan* 8(2) and 9(2) focusing on legal history of the Nile (1902–2013),<sup>1</sup> this article reconstructs in multidisciplinary investigation fundamentals of the political and legal setting of the processes leading to the adoption of the ‘Agreement on the Nile River Basin Cooperative Framework’ (CFA) in 2010,<sup>2</sup> and endeavors to foster a critical understanding of why the NBI/CFA schemes stalled in the post–2010 period. Working on a gradual transformation of riparian cooperation in the region, the first section presents on milestone collaborative measures espoused by the basin states since the early 1990’s –following on the Nile-2002 Conference Series pursued under the auspices of the TECCONILE, and eventually, the NBI.

Section 2 submits details of the negotiations history on the CFA, the core challenges and key achievements of the ‘Panel of Experts’, the ‘Transitional Committee’ and the ‘Negotiations Committee’ in pursuing works on the drafts and formal structuring of the CFA, and the polarized debates that extended to date over certain aspects of the CFA. Section 3 deals with stalled processes of the NBI in relation to the CFA –discussing the concentrated efforts, actions and counteractions adopted by the basin states, and it highlights the ramifications of the ‘fractured’ enterprise which detracted the CFA’s chances from becoming a comprehensive legal instrument.

The fourth section discusses the most contentious legal issues ‘addressed’ under the CFA –focusing on three themes: the characterization of the ‘international watercourse’ conception, ‘water security and the fate of pre-existing uses/rights’ and the exchange of ‘information concerning planned measures’. The last section dwells on the analyses of key factors that accounted for the NBI’s ‘less promising future’ as a collective institutional platform, and it examines whether, in light of the contemporary circumstances, the NBI’s overall undertaking and the CFA itself could be read as ‘failing enterprises’ impacting the organization’s efficiency and sustainability.

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<sup>1</sup> See: Tadesse Kassa Woldetsadik (2014), ‘The Anglo-Ethiopian Treaty on the Nile and the Tana Dam Concessions: A Script in Legal History of Ethiopia’s Diplomatic Confront (1900-1956)’, 8.2 *Mizan Law Review*, pp.271–298; and ‘The Grand Ethiopian Renaissance Dam and Ethiopia’s Succession in Hydro-legal Prominence: A Script in Legal History of Diplomatic Confront (1957-2013)’, 9.2 *Mizan Law Review*, pp.373–411.

<sup>2</sup> On 13 April 2010, an Extraordinary Meeting of the Nile–Council of Ministers (Nile-COM) held in Sharm El Sheikh passed a resolution to proceed, at a later date, with a formal signature of the CFA; the document was opened for signature in Entebbe, Uganda, from 14 May 2010 for a period of not more than one year.

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## **1. The Advent of a Cooperative Exercise under the Nile Basin Initiative**

Since the early 1990's, the Nile River basin witnessed milestone cooperative steps –steadily transforming the legal and political setting of cooperation in the region. Consultative forums had already been organized since 1993 under the auspices of the 'Nile-2002 Conference' series. Alternately hosted by riparian countries, the conventions worked as 'venting spaces' –congregating politicians, legal scholars, technical experts, non-governmental organizations, stake-holding institutions and academics to converse and exchange views on the legal, socio-economic, political and institutional aspects of basin-wide cooperation, regulation and management of the Nile River water resources.<sup>3</sup>

From 1993 to 2002, the annual conferences were held under the umbrella of the Technical Cooperation Committee for the Promotion of the Development and Environmental Protection of the Nile Basin (TECCONILE) –an institutional platform established in 1993.<sup>4</sup> The themes of deliberation of the series were diverse –coalescing technical, political, legal and developmental studies presented by national and international experts; the thematic concentrations covered issues relating to national water resources management plans, opportunities for cooperative management of the Nile water resources through permanent legal and institutional frameworks, and the challenges faced in coordinating national schemes with the broader outlines for integrated use and management of the Nile River water resources.

## **2. Negotiations on the Cooperative Framework Agreement**

The outcome of the Nile-2002 proceedings was generally progressive. The platforms stimulated further cooperation and provoked thoughts about instituting permanent operational models through an inclusive organizational arrangement and regulatory framework for equitable and sustainable utilization of the Nile. In February 1995, the Nile-COM undertook the first crucial step in this direction –adopting the Nile River Basin Action Plan with support of the Canada International Development Agency (CIDA)– which comprised about

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<sup>3</sup> For more detailed treatment of the historical and political processes leading to the establishment of the Nile Basin Initiative itself, please refer to: Ashok Swain (1997), 'Ethiopia, the Sudan, and Egypt: The Nile River Dispute' 35.4 *The Journal of Modern African Studies*, pp.690-694; The Nile Basin Initiative (Nov.2013), 'Cooperation on the Nile', DEV COM Publications, Serial No.01, p3-5.

<sup>4</sup> It was formally launched following a Nile-COM resolution adopted in Kampala in 1992 as initiative to promote cooperation and development in the basin; it involved the DRC, Sudan, Egypt, Rwanda, Uganda and Tanzania. Ethiopia held an observer status. Nile Basin Initiative, <http://www.nilebasin.org/index.php/about-us/nile-basin-initiative>

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twenty-two projects;<sup>5</sup> the scheme was endorsed during the Nile-COM's third meeting in Arusha. Among others, the plan authorized work on the Nile River Basin Cooperative Framework (originally labelled as 'Project D-3') which proposed to establish a new platform for cooperative utilization of the resource. Implementation on the action plan's key objective of establishing a forum for legal and institutional dialogue began in 1996.<sup>6</sup>

The new discourse presented a unique opening for dealing with the complex legal and political quandaries involving the Nile, and heralded a new chapter founded on dialogue, cooperation and trust. In May 1996, the fourth Nile-2002 conference reconfirmed the political commitment of the basin states, and in the same year, a Panel of Experts (PoE) was constituted for the task –composed of three appointed members from each riparian state. By 1997, the Nile-COM partnered with the CIDA, the United Nations Development Program (UNDP) and the World Bank –the latter furthermore entrusted with the task of 'leading and coordinating' donor activities to support the establishment of a basin-wide consultative mechanism that expedites the realization of this objective. By this time, a second meeting of the Nile-TAC, established in March 1998, had approved proposals for the 'Nile Basin Initiative Policy Guidelines' and a 'Plan of Action Establishing the Nile Basin Initiative (NBI)'. In February 1999, the overall platform for dialogue evolved and the whole process was immersed into the mandates of the new 'Transitional Institutional Mechanism of the Nile Basin Initiative'.

Hence, more streamlined negotiations followed within the framework of the NBI –the first truly comprehensive cooperative enterprise on the Nile; it was formally established on 22 February 1999 through the Agreed Minutes on the NBI –adopted and signed by nine basin states.<sup>7</sup> Launching its operational base from Entebbe in June 1999 and conferred with legal personality and a fitting diplomatic status three years later,<sup>8</sup> the provisional diplomatic initiative worked towards attaining the 'Shared Vision' program whose core objectives have been 'to achieve sustainable socio-economic development through equitable utilization of, and benefit from, the common Nile basin water resources'.<sup>9</sup> In this

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<sup>5</sup> Nile Basin Initiative (May 2001), 'Shared Vision Program, Nile Transboundary Environmental Action', Draft Gef Project Brief, May 2001, Council of Ministers of Water Affairs of the Nile Basin States, p. 2.

<sup>6</sup> Ibid.

<sup>7</sup> Agreed Minutes of the Extraordinary Meeting of Nile Basin Council of Ministers, Dar es Salaam, Tanzania (1999)

<sup>8</sup> The Nile Basin Initiative Act (2002), Act to give the force of law to the Agreed Minute No.7 of the 9<sup>th</sup> Annual Meeting of the Nile Basin States held in Cairo, Egypt on 14<sup>th</sup> February 2002.

<sup>9</sup> Nile Basin Initiative (Nov.2013), 'Cooperation on the Nile', DEV COM Publications, Serial No.01.

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spirit, the NBI was extended with three chief functions: facilitating a basin cooperation, water resources management, and water resources development. Continuing the initiative with a view to setting in place the 'Nile River Basin Commission' and the 'Nile River Basin Cooperative Framework Agreement', too, constituted the NBI's central undertakings.

In essence, the new initiative sought to annul all pre-existing legal arrangements, including colonial-epoch treaties that restricted the Nile River's use upstream, and to structure a comprehensive legal instrument that ensures equal access and equitable uses across the basin. Yet, the basin states differed on the specific approaches that should be adopted in this regard and espoused contrasting positions in relation to the fate of the 'status quo'. Indeed, during the negotiations, the charge of accommodating under the CFA the seething conflict between 'pre-existing arrangements' and 'current rights of utilization' remained the most daunting challenge –hampering the whole diplomatic process in the subsequent years.<sup>10</sup>

Since January 1997, a Panel of Experts was commissioned to work on a draft CFA. The Panel submitted an agreed upon framework to the Nile-COM meeting in August 2000. Reinforced by a partnership convention of the 'International Consortium for Cooperation on the Nile' held in Geneva to further dialogue on collaboration and development in the basin (June-2001), a 'Transitional Committee' operating under the auspices of the NBI was constituted to complete the PoE's undertaking to fruition; its missions included offering solutions to lingering issues that required riparian convergence and to pursue works on the formal structuring of the CFA document. The Committee produced the CFA's first draft in August 2001.<sup>11</sup> However, unresolved matters remained leading to protracted dialogues in the hands of the 'Negotiations Committee'.<sup>12</sup>

With riparian stakes so high and national approaches divergent, the basin states endeavored for four more years to draw a charter that composes riparian rights and regulates the cooperative use of the river. From 2003 to 2005, the Negotiations Committee deliberated on a draft produced by the Transitional Committee, and resolved nearly all the outstanding matters. Yet, in March 2005, the Nile-COM's meeting in Addis Ababa failed to take a decision on final text

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<sup>10</sup> Tadesse Kassa Woldetsadik (2015) 'Remodeling sovereignty: overtures of a new water security paradigm in the Nile basin legal discourse', eds. *Sovereignty and the Development of International Water Law*, Volume 8: A History of Water Series III, A.B Tauris, London / New York pp.646-647.

<sup>11</sup> Nile Basin Initiative, 'The Cooperative Framework Agreement For The River Nile Basin: An Overview', <http://www.nilebasin.org/index.php/about-us/the-nb-cooperative-framework>.

<sup>12</sup> Ibid.

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of the document; this was due to unresolved issues relating to the fate of ‘pre-existing uses/agreements’ and how best to address such a juridical draw through the provision of alternative stipulation on ‘water security’; as the polarized debate extended over the years without proffering any solution, a provision on water security ‘proposed’ by the World Bank was introduced as a conceptual middle –ground to salvage the cooperative enterprise.<sup>13</sup>

Novel and ambiguous as it was, the new concept, which had been floating since 2005, was referred to additional scrutiny on the basis of a request tabled by Ethiopia. Again, the overall task on the CFA draft was deferred to the political process of the ministers and submitted with alternative texts for a meeting in Kigali in February 2007; the meeting dropped an earlier version of Article 14.b – a subject broadly addressed in Section 4.2 below – and resolved to settle on the stipulation in its present form under the CFA.

In June 2007, the Nile-COM, the highest decision-making organ of the NBI, finalized in Uganda negotiations on the substantive and procedural aspects of the CFA, concluding its rigorous deliberations that stretched from March 2006 to June 2007. Again, all but one provision of the CFA were agreed upon; the contentious clause was referred to the respective heads of states of the riparian states,<sup>14</sup> and yet, no resolution was dispensed. While beset by a few outstanding issues, this historical episode closed a painstaking decade-long diplomatic initiative that drove user-right dialogues in the basin to unprecedented heights.<sup>15</sup>

### **3. A Stalled Process: Actions and Counteractions on the CFA**

While a measure of flexibility had been witnessed in riparian positions of the basin states and it is true that the political process laboring on attaining equitable utilization of the Nile waters was charged by enthusiastic ambience, in the final phases of 2007, negotiations on the CFA stalled. Fiery debates over Article 14.b on water security continued; by this time, it appeared the bargaining process had ‘exhausted’ all offers that could have been provided to arrive at a mutually pleasing settlement. In 2008, several failed attempts followed to realign positions, and in the end, seven upstream states broke the gridlock. On 22 May 2009, an Extra-Ordinary Meeting of the Nile-COM in Kinshasa readied a final text and proposed to open the CFA for signature at a designated date.<sup>16</sup> Against the backdrop of a drawn-out process and stalemate, a resolution by the ‘upstream bloc’ decided to ‘annex’ the contentious provision to the main text so

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<sup>13</sup> Elaborate discussions on the concept of water security and its structure under Art.14 of the CFA are provided in Section 4.2 below.

<sup>14</sup> Nile Basin Initiative, note 11.

<sup>15</sup> Tadesse Kassa Woldetsadik (2015), *supra* note 10, p.647.

<sup>16</sup> Nile Basin Initiative, *supra* note 11.

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that the matter would be addressed by subsequent decision of a permanent institution –the Nile River Basin Commission (NRBC)– if and when it is established under the CFA.

Unsurprisingly, Egypt protested against the ‘unilateral’ move, which, it contended, deviated from the modalities applied under previous proceedings leading to Nile–COM’s resolution in 2007; it held that hitherto ‘key’ provisions of the draft were accepted only by ‘consensus’ and others through ‘majority decisions’ –a position which generally mirrored the amendment procedures specified under Article 35 of the CFA’s final text.<sup>17</sup> On the other hand, Sudan’s delegation –led by Minister Kamal Ali Mohammed– questioned the competence of the assembly to address issues related to the ‘signing’ of the CFA before the document was submitted to the heads of states; hence, Sudan, not present when the Nile–COM’s decision was eventually taken, joined hands with Egypt to register objections.<sup>18</sup>

The treaty’s future as a ‘basin-wide platform’ looked doomed as both states championed positions on the basis of ‘water security’ postulate which embraces the CFA *only* in a context that warrants non-interference with ‘established’ rights. In essence, the countering approach by downstream states strove to restore the ‘zero–sum’ policy which had been employed in the past, and hence ‘confine’ the resource’s utilization to preexisting uses erected along the lower stretches of the river. The fact remains, however, that the Nile, the longest river in the world, is endowed with a very limited water flows regime relative to population; the basin states will inevitably face serious challenges to sustain the ‘historical shares’ of downriver communities and simultaneously cater for ‘future irrigational water requirements’ of the upriver population –unless more waters could be availed through wide ranging conservation works.

It states the obvious to recount that at this stage the cooperative process was overwhelmed by formidable contests. The legal and political ramification of a ‘fractured initiative’ was clear, and the basin states had sensed the predicament. This triggered the launch of intensive basin-wide conventions in the post-2009 period hoping to achieve three objectives: mending the outstanding differences, paying respect to Egypt’s request for temporary deferment, and unifying riparian positions through extended consultations.

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<sup>17</sup> Article 35 on the Amendment of the CFA provided that Articles 1, 2, 3, 4, 5, 8, 9, 14 (on water security), 23, 24, 33, and 34 may be amended only by *consensus*. As to proposed amendments to other articles or to any protocol, the Parties shall make every effort to reach agreement by consensus. If all efforts to arrive at consensus have been exhausted, and no agreement is reached, the amendment shall as a last resort be adopted by a *two-thirds majority vote* of the State Parties to the instrument in question present and voting at the meeting.

<sup>18</sup> Nile Basin Initiative, *supra* note 8.

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Following the Nile-COM's meeting in Alexandria (July 2009), a resolution was adopted to pass-over the task to the Nile-TAC and the Negotiations Committee. The two institutional platforms would not only work on the unsettled matters within six months, but would also submit recommendation on installing an inclusive mechanism under the CFA and facilitate the CFA's conclusion as a legal instrument that transforms the NBI into a permanent institution of the NRBC. New rounds of political and technical meetings of the Nile-COM and the Nile Technical Advisory and Negotiators Committees (Nile-TAC) were therefore held in Entebbe (September 2009) and Dar es Salam (December 2009). Still, Egypt and Sudan failed to reconcile their positions with the Nile-COM's proposal endorsed in Kinshasa.

As the protracted deliberations and diplomatic pressures directed at Egypt and Sudan yielded no results, the upstream states realized that they had no choice but to resort to the next move: opening the CFA for signature. In ironic happenstance, a ground-breaking resolution that called for the abolishment of the old uses regime in the basin was eventually proclaimed in Egypt itself. In spite of the outstanding differences in riparian positions, on 13 April 2010, an Extraordinary Meeting of the Nile-COM held in Sharm el Sheikh resolved to proceed at a designated date with a formal signature of the CFA.<sup>19</sup> Egypt and Sudan not only rejected the move for the opening of the CFA's signature, the former also directed attention to procedures of negotiation – -reproving upper riparian states of 'violating the rules agreed upon in the Nile Basin Initiative which stated that decisions should be taken by consensus, not by majority'. In remonstrance, Minister Mohamed Nasreddin Allam proclaimed Egypt 'will not sign any deal before its conditions are met' which included that 'all decisions are to be finalized unanimously, and not through majority vote'.<sup>20</sup>

Consequently, the CFA opened for signature in Entebbe, Uganda, from 14 May 2010 for a period of not more than one year.<sup>21</sup> Against Egypt's proposal and declared anticipation that 'upstream countries (would) reverse their decision to sign a unilateral framework agreement so that negotiations continue',<sup>22</sup> the treaty has since been signed by six states. Ethiopia, Rwanda, Tanzania and Uganda signed the CFA on the opening day; Kenya followed suit on 19 May 2010 and Burundi on 28 February 2011. The Republic of South Sudan was admitted to the NBI in July 2012; it declared plans to sign the CFA in spite of the unsettled questions involving 'succession' of the 1929/1959 Nile waters

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<sup>19</sup> Nile Basin Initiative (14 April 2010), 'Ministers of Water Affairs End Extraordinary Meeting Over the Cooperative Framework Agreement', Press Release.

<sup>20</sup> *Al Ahrām Online* (22–28 April 2010), 'Danger on the Nile', Issue No. 995.

<sup>21</sup> Nile Basin Initiative (14 May 2010), 'Agreement on the Nile River Basin Cooperative Framework Opened for Signature', Press Release.

<sup>22</sup> *Al Ahrām Online* (22–28 April 2010), *supra* note 20.

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treaties, hence generally furthering the vigor of the negotiations in favor of the ‘upstream bloc’.

The CFA would enter into force on the sixtieth day following the date of deposit of the sixth instrument of ratification or accession with the African Union.<sup>23</sup> The moral, political and legal implications of the CFA, should it enter into force, were clearly noted. In varying scales of success, both riparian ‘blocs’ labored in intense diplomacy to achieve incompatible ends by making use of the CFA.

Coincidentally, as the wave of demonstrations of the Arab Spring revolution took root in 2011, Egypt slipped into chaos and political turbulence. The post-Mubarak provisional government was greatly preoccupied with domestic concerns to pursue a robust and consistent riparian policy that influences the discourse on the CFA. In distraction, therefore, Egypt resorted to a high-profile diplomatic drive ‘appealing’ for delays in the ratification of the CFA across the Nile basin states –pending the constitution of a ‘duly mandated’ civilian government. A request tabled by the ‘Egyptian Public Diplomacy’ was formally accepted by Ethiopia, the chief proponent of the CFA and equitable utilization of the Nile waters across the basin.<sup>24</sup>

Yet, Egypt’s ‘first-ever’ democratic election which brought Mohammed Morsi to the helm of the new political order in June 2012 proffered little initiative to restrain the contrasting approaches; nor did it strive to narrow down the grave upstream-downstream divide espoused under a ‘water security’ frame. Worse, a serious setback to the CFA constituting a platform that includes Egypt came about in June 2013 –following a tense diplomatic altercation and fallout between itself and Ethiopia in reaction to the latter’s construction of the Grand Ethiopian Renaissance Dam (GERD) on the Blue Nile.<sup>25</sup> Against the background of depressed diplomatic relations, Ethiopia’s House of People’s Representatives took the first historic move ratifying the CFA on 13 June 2013; it was followed by Rwanda (August–2013) and Tanzania (March–2015), initiating the formal transformation of the NBI into a permanent Nile River Basin Commission (NRBC).

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<sup>23</sup> Art. 42 of the CFA.

<sup>24</sup> Ethiopian Television, Interview with PM Meles Zenawi on the GERD, uploaded on YouTube 17 May 2011, <https://www.youtube.com/watch?v=d5CTbpnUeOY>

<sup>25</sup> Implementation on the GERD started in 2011; the project, one of the biggest hydropower infrastructures in the world in terms of installed capacity, is situated at Guba in the Benishangul-Gumuz regional state. It comprises a dam about 1,780 m long and 145 m high, and will host a power plant with an installed generating capacity of 6,000 MW. The dam will create Ethiopia’s largest artificial lake impounding 74 billion m<sup>3</sup> of the Blue Nile flows – nearly half the gross volume at the Lake Nasser Reservoir – and has a total surface area of 1,680 km<sup>2</sup>.

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In tandem with the CFA's adoption, the 'interim' institution of the NBI began preparations for its own structural evolution. In February 2010, it launched a project on Institutional Design Study to 'identify and clarify future institutional options for the NBI in the transition to a river basin organization'.<sup>26</sup> The NBI also took measures with a view to setting a foundation for works of the new commission and its multifaceted tasks through which the remaining issues on the CFA would be resolved.<sup>27</sup> The abysmal pace at which the NBI's development programs have been implemented had caused concern in many quarters, and if any, the challenges encountered in its institutional processes had demonstrated the imperatives of speedily launching a permanent institution –the NRBC. The NRBC would nurture the NBI's gains, but most importantly, it is would steer basin-wide water resource development initiatives in more meaningful ways –by coordinating and harmonizing national and regional policies and actions. Today, in spite of the strong diplomatic momentum and promising developments in the early stages of the cooperative enterprise, the treaty remains restrained by serious problems –detracting its chances of ever becoming a truly comprehensive legal instrument.

In legal response to upstream bloc's resolve, Egypt warned sternly that any decision held at the Extra-Ordinary Meeting of the Nile-COM 'reflects the views only of the states.'<sup>28</sup> Its Minister, Mohamed Nasreddin Allam, reiterated 'Egypt will not sign any deal before its conditions are met'; and however framed, the 'Nile Cooperative Framework Agreement must clearly recognize Egypt and Sudan's historic share of the Nile waters'.<sup>29</sup> An alternative proposal for direct launching of the NRBC 'within the framework of which further negotiations on the remaining pieces of the CFA would be undertaken' failed to garner an upstream favor.<sup>30</sup>

Overwhelmed by uncertainties on how best to safeguard national riverine interests, Egypt and Sudan weighed on the virtues of staying in an institutional initiative which, they claimed, had failed to recognize historical rights and allowed upriver appropriation of the Nile waters without their prior consent. To counter the Nile-COM's Sharm el Sheik resolution, presidents Hosni Mubarak

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<sup>26</sup> Nile Basin Initiative (March 2011), A Quarterly Newsletter of the Nile Basin Initiative, Volume 8, Issue 1.

<sup>27</sup> *Al-Monitor* (27 March 2015), 'Will Egypt seek Nile River agreement with upstream countries?' Interview with John Rao Nyaoro, Executive Director of the Nile Basin Initiative.

<sup>28</sup> Nile Basin Initiative (14 April 2010), *supra* note 19.

<sup>29</sup> *Al Ahram Online* (22-28 April 2010), *supra* note 20.

<sup>30</sup> Tadesse Kassa Woldetsadik (2013), *International Watercourses Law in the Nile Basin, Three States at a Crossroads*, Earthscan Routledge, Taylor and Francis Group, Oxfordshire, United Kingdom, p.165.

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and Omar Al-Bashir dispatched diplomatic messages to heads of states of the Nile riparian countries ‘to open the door for a new round of negotiations’.<sup>31</sup> This latest exercise was attended by a little successful visit of Egypt’s Foreign Minister Ahmed Abul-Gheit ‘to three Nile Basin countries’.<sup>32</sup> However, the new legal trajectory evolving in the basin was too robust to reverse; in consequence, Egypt and Sudan decided to ‘freeze’ their involvement in the NBI –shortly after upstream states ventured to sign the CFA in 2010.

Sudan reactivated its membership in the NBI in 2013, but Egypt would not resume participation until February 2015 –when it ‘reevaluated the situation in light of developments in the scene’<sup>33</sup> and dispatched to Sudan its long-absent ministerial delegation led by Hossam Moghazi on the occasion of the sixteenth anniversary of the NBI and annual celebrations of the Nile Day.

Egypt’s rediscovered traction to the NBI’s common visions, it was pronounced, was a reaction to the ‘need for maintaining a collective and all-inclusive movement of the Nile Basin countries under one framework’. Yet, Egypt and Sudan persevered to view the NBI’s core missions and its preoccupation with the CFA on equitable uses of the Nile waters *only* in a context that does ‘not affect’ prior uses and rights. Such a restricted approach on issues of common riparian welfare impelled serious doubts regarding their commitment to sovereign equality and the fundamental objectives which the NBI itself upholds.

Despite such a gloomy background, though, this period also witnessed positive developments; Egypt’s unofficial comeback to the NBI’s consultative forums could be read as a step forward towards full reengagement. In the same year also, the Nile-COM meeting held in Khartoum focused on hammering outstanding issues of the basin-wide legal framework. Already pressed by concentrated negotiations with Ethiopia over the Grand Ethiopian Renaissance Dam (GERD), Egypt seemed to realize that it could not safeguard its riverine interests by ‘staying away’ from the NBI’s cooperative platform.

Still, Egypt continued to flout upstream plans under the CFA, and further declared that it would not accept the CFA in its current form – while accentuating that such differences shouldn’t ‘hinder cooperation’ between the riparian states. If it may be perplexing from purely legal perspective, ‘reopening’ negotiations on the CFA looked a more inevitable course; in fact, in the latest rounds, such agenda seemed to have found favor with a few upstream countries. On its part, Egypt, too, stressed it had already ‘presented its views

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<sup>31</sup> *Al Ahram Online* (22-28 April 2010), *supra* note 20.

<sup>32</sup> *Ibid.*

<sup>33</sup> *Egyptnews.net* (22 Feb.2015), ‘The 16<sup>th</sup> anniversary of the Nile Basin Initiative: Egypt back after an absence’.

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about the required amendments on certain items of the Entebbe Agreement' so as to patch the upstream-downstream divide, and hoped the 'coming period will witness further moves to solve all the unresolved or pending issues.'<sup>34</sup> In the subsequent processes, however, Egypt's passive envelopment and disruptive effects of 'renegotiating' the treaty drew pale optimism over the prospect that downstream states would ever endorse the CFA.

Six years since adoption in 2010, the CFA's entry into force thus continued to face a bleak future –because of different reasons. Kenya and Uganda, two of the stiffest players initiating the drive against pre-existing treaties, renegaded on repeated pledges for immediate ratifications; DR Congo –a country with the least geographical expanse and water contribution in the basin next only to Eritrea –remained unenthusiastic, and in fact, in 2016, the Congolese P.M. Augustin M. Ponyo reportedly declared support for Egypt in relation to the dispute over the GERD.<sup>35</sup> Burundi's position continued to be ambiguous, and the Republic of South Sudan –the latest entry into the club, has *yet* to sign the CFA document.

The behavioral trail of the riparian states swerved uncertainly, revealing inconsistencies in the political and developmental agenda which each state had pursued through its participation in the NBI. While a few, with embedded stakes, contended with pressing calls for equitable utilization of the resource to satisfy the irrigational, hydro–power and developmental needs of their communities, others, accounting for a smaller proportion of the river's overall floods, remained unconcerned in the political discourse or preferred to dwell on technical matters of water resources management –including ecological preservation, hydrology, meteorology and systematic monitoring the state of the river. Slowly, therefore, the momentum of riparian cooperation on the scales anticipated under the NBI paled. Instead, the weight of the legal and diplomatic rendezvous 'shifted' to the trilateral negotiations of the 'Eastern Nile Basin states' – a fact obviously prompted by a new resource development enterprise on the Blue Nile segment in Ethiopia.

To summarize, while the cooperative spirit under the NBI remained unprecedented and the political implication of the undertaking has been duly acknowledged, the initiative and its legal architecture failed to complete the running course. Legally, too, the CFA tended to create an unviable regime that potentially applies *only* as between the upriver states –with little chances of Egypt (and Sudan) accepting the treaty in its present form. As late as in 2015,

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<sup>34</sup> *Al Ahram Weekly* (26 Feb.2015), 'Unresolved matters', Issue No.1235.

<http://weekly.ahram.org.eg/News/10570/17/Unresolved-matters.aspx>

<sup>35</sup> *Al Ahram Online* (4 Feb. 2016), 'Congo supports Egypt on Ethiopian dam issue: Prime minister' <http://english.ahram.org.eg/WriterArticles/Ahram-Online/344/0.aspx>

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Minister Hossam Moghazi reaffirmed his country's unswerving policy –that Egypt still rejects the CFA and would not endeavor to be its part without substantive modifications.<sup>36</sup> Given the fundamental variations in national approaches of the basin states, it appeared as though the basin-wide legal architecture had been preordained to fail from the outset.

#### 4. Contentious Matters under the CFA

Within the NBI, Egypt and Sudan endeavored to orient their national water use policies in an international context. Such approach has been enthused by two fundamental causes: first, a rational assessment that only closer socio-economic and basin-wide collaboration guarantees stable water utilizations regime. Without a cooperative regulation, unilateralism reigns, which often is attended by uncoordinated uses of different actors across the basin –conceivably, in environments of tension and conflict. The second factor is related to the progressive development and codification of international watercourses law regime itself which already relegated all discernments of 'unfettered sovereignty' over transboundary waters. Not many states wish to stand in the open advocating 'obsolete' principles of international law that had long ceased to regulate riparian relationships.

Today, more than ever, riparian cooperation remains imperative undertaking for a harmonious, sustainable and equitable development of the Nile water resources, and no state seems to harbor any illusion on this subject. Yet, the bargaining process had always been a very intricate commission –both at the political, legal and technical levels. If anything else, the extended talks that led to the CFA validate this assertion; clearly, the fundamentals that informed riparian perspectives radiated from unrelated national policies, geographical and climatic considerations, and narrow perceptions of legal entitlements.

Against such background, the fact that the basin states echoed support for conflicting approaches or endeavored to promote positions through 'cautious interpretation' of various principles of international watercourses law was only natural. In fact, the lengthy codifications process of the UN Watercourses Convention itself, lasting from 1970 to 1994, would seem to present a perfect parallel to the quandaries faced during the negotiations on the CFA.<sup>37</sup> The

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<sup>36</sup> *Al Ahram Online* (18 Dec.2015), 'Egypt still rejects Nile Basin's Cooperative Framework Agreement: Irrigation minister', <http://english.ahram.org.eg/NewsContent/1/64/173843/Egypt/Politics-/Egypt-still-rejects-Nile-Basins-Cooperative-Framew.aspx>

<sup>37</sup> UN Convention on the Non- Navigational Uses of International Watercourses, UN GA Resolution, A/Res/51/229, New York, adopted on 21 May 1997, entered into force 17 August 2014.

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drafting phases of the Convention saw philological arguments between states putting forward varied perspectives on key provisions, including, for instance, on the definition of the ‘international watercourse’ conception, the contents and relationship between the ‘equitable utilization’ and the ‘obligation not to cause significant harm’ principles, on the obligation to ‘regularly exchange data and information’, and on the nature of the duty to trade ‘information concerning planned measures affecting the condition of an international watercourse’.<sup>38</sup>

Two clusters of basin states, respectively spearheaded by Ethiopia and Egypt, engaged in intense diplomatic maneuvers to settle vital issues of water-sharing and basin-wide regulation of the resource. In varying degrees, three substantive matters posed a challenge at different stages of the negotiations process: the definition of the ‘international river’ expression, ‘water security’ (later juxtaposed with the ‘fate of pre-existing agreements/rights’), and the ‘exchange of information concerning planned measures’. All, except one, were eventually ‘addressed’ in some form and accommodated in the CFA with apparent ‘consensus’ of all basin states.<sup>39</sup> A brief highlight of the key issues raised and their evolutionary context is presented below.

#### **4.1 The characterization of ‘international river’**

The question of how a ‘watercourse’ should be conceived in defining the geographical scope over which international law applies had been the subject of intense debate during the codification of the UN Watercourses Convention.<sup>40</sup> Hence, it should not come as surprise if the CFA, too, was engulfed by similar geographical contests. In this regard, the principal, if not exclusive, question related to whether, in regulating the uses and management of transboundary rivers, international law applies on a ‘drainage basin’ determined by watershed limits of a river or should remain confined to channel waters of a ‘successive or

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<sup>38</sup> For wider account of the International Law Commission’s work on the topics, *refer to*: Report of the International Law Commission on the work of its forty-sixth session, 2 May–22 July 1994, Official Records of the General Assembly, forty-ninth session, Supplement No.10, Document A/49/10, 1994, pp.88-135.

<sup>39</sup> A semblance of unanimity existed giving the impression that the issues under the CFA are confined only to Article 14.b. Yet, even as recently as in 2015, Egypt continued to submit that the outstanding issues extended beyond – to include, in the words of Minister Hossam Moghazi, ‘prior notice, the unanimity condition in the decision making process, and the water security in exchange for historical quotas’.

Al-Monitor (2015), ‘Despite dam dispute, Egypt seeks to build trust with Ethiopia’  
<http://www.al-monitor.com/pulse/hi/originals/2015/12/egypt-ethiopia-sudan-rennaissance-dam-water-dispute.html>

<sup>40</sup> For details, *refer to*: International Law Commission, Law of the Non-navigational Uses of International Watercourses: Replies of Governments to the Commission’s questionnaire, Document A/CN.4/294 and Add.1, 1976, pp.148-168.

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contiguous' river traversing across or forming a boundary between two or more states.<sup>41</sup>

No doubt, the 'interdependence' of different uses and the need for 'harmonizing' activities across a basin for better control and management of river resources had been recognized since the days of the so-called 'fluvial irrigation civilizations' in the Nile, Euphrates, Tigris, Yangtze, Yellow and Indus rivers thousands of years ago.<sup>42</sup> But, the earliest 'formal' thesis of the 'drainage basin' as a physical unit for the application of international law was voiced in 1815 by Wilhelm Von Humboldt of Prussia when he submitted, at the Congress of Vienna, that a river must be envisaged 'as a unity' from its head waters to its mouth and be managed as such.<sup>43</sup> On the other hand, the opposing discourse which could be traced to a definition embodied under 'Articles I and II of the Regulation of 24 March 1815' and the 'Final Act of the Congress of Vienna of 1815' characterized an 'international watercourse' merely as referring to a waterbody which 'successively' passes through political territories or 'contiguously' runs along the boundary of two or more states.<sup>44</sup>

In upstream–downstream divide, such conceptual exertion has been grounded on concerns which a broader definition of a 'river' spurs in relation to the 'territorial sovereignty' of riparian states, considerations of functional unity for purposes of rational development or ecological preservation notwithstanding. A drainage basin, comprising an integrated network of water systems including tributaries, sub-tributaries, interlinked surface and groundwater systems, and a great deal of the adjoining physical landscapes within a watershed –permits greater intrusion into a 'larger territory' of basin states, and hence, forms a type of 'dual sovereignty' over such stretches of land and water bodies. In the Nile setting, its application to Ethiopia, an upstream supplier of the largest floods of the river, places no less than a third of its landscape and most of its water resources under the effective control of international law or basin-wide legal arrangement.

For decades, the treaty practice of states and institutional initiatives of international organizations –including the International Law Commission, the Institute of International Law and the International Law Association– had endeavored to restate a normative dictate on the subject. Despite its vague and changing composition under customary international law, a position was

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<sup>41</sup> Tadesse Kassa Woldetsadik (2010), 'International law and moderations of physical geography: the Nile setting', (eds.) *The Currents of Power: Water and the New World Order*, Terje Tvedt et al., A.B. Tauris, London, New York, p. 473.

<sup>42</sup> Ludwik A. Teclaf (1996), 'Evolution of the River Basin Concept in National and International Law', 36 *Nat. Resources J.*, p.361

<sup>43</sup> For extensive discussions on the drainage basin concept, refer to: Id., p. 359.

<sup>44</sup> Id., p.479, 483.

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reiterated under institutional resolutions and declarations –including the UN Watercourses Convention,<sup>45</sup> which tilted heavily to the ‘drainage basin’ as the physical object of international regulation– so far as riparian rights of use are concerned. True, in heeding to the divergent views and practices of states, Article 2(a) of the UN Watercourses Convention purposely chose not to employ any of the rivaling notions (‘drainage basin’ or ‘successive/contiguous river’), but in substance, the Convention applies to all aspects of connected river system flowing in a basin. Under Article 2(a), a ‘watercourse’ is defined as a system of all surface and ground waters constituting a unitary whole and flowing to a common terminus.

The diverse positions which the Nile basin states had espoused during the CFA’s drafting were informed by similar theoretical conjectures. Egypt’s position on the subject was not only unambiguous, it was also the most extreme, introducing a version which received no parallel in the regulatory framework of any other basin in the world. It resonates with arguments submitted during preparatory deliberations on the UN Watercourses Convention wherein Egypt had battled what it considered was a ‘wrong’ employ of the watercourse expression under Article 2 by the International Law Commission. As a motion was set at the UN General Assembly to endorse the Watercourse Convention, Egypt formally registered its protest; it contended an ‘international watercourse’ is not inconsistent with the ‘basin of an international river’ –when in fact a ‘watercourse’ should merely be understood as part of a river basin, and therefore the use of this new term cannot under any circumstances affect the rights and obligations acquired under bilateral or regional international agreements.<sup>46</sup>

Egypt persistently promoted a broader ‘territorial’ concept which encompasses every water supply in a basin – including tributaries, feeding streams, lakes –and even *precipitation* falling within a basin. This explains why, in its dealings with upstream Nile, Egypt’s former Minister Mohammed Abu–Zaid argued that in relation to the mean annual flow of the Nile River (84 BCM), Egypt’s share of 55 BCM per annum under the 1959 Treaty,<sup>47</sup>

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<sup>45</sup> For example, International Law Association, Report of the 47<sup>th</sup> Conference held in Dubrovnik 1956, London, 1957, pp. 241-243; International Law Association, Report to the 48<sup>th</sup> Conference held in New York, 1-7 Sept.1958, London 1959, pp. viii-x; International Law Association, Report of the 52<sup>nd</sup> Conference, Helsinki, 14-20 August 1966, London, 1967, pp. 484-532; Act Regarding Navigation and Economic Cooperation Between States of the Niger Basin, Niamey, 26 Oct.1963 (UN, Treaty Series, vol. 587, No. 8506, p. 9); Protocol on Shared Watercourse Systems in the Southern African Development Community (SADC) Region, Johannesburg, 28 August 1995.

<sup>46</sup> United Nations General Assembly Press Release GA/9248; General Assembly Session 51 Meeting 99, May 21, 1997. Explanation of vote before the vote, Lamia A. Mekhemar (Egypt).

<sup>47</sup> *Al Ahram Weekly* (23 April 2015), ‘Questions about the CFA’, Issue No.1243.

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constitutes only 6–8% of the total ‘water resources’ of (about 1600 BCM) which the ‘Nile River Basin’ is endowed with.<sup>48</sup> As Teclaf explained, while waters of a basin system are interconnected and form part of the broader hydrologic cycle which begins in the atmosphere and ends in the oceans,<sup>49</sup> Egypt’s approach which includes all ‘natural precipitation’ of a basin as a basis for computing and allocating the ‘utilizable flows of a river’ has simply no precedence even among riparian states who endorsed the drainage basin concept.

In this light, during the CFA negotiations, whether the ‘Nile’ should be conceived synonymously with ‘drainage basin’ or be regarded as a ‘system of water bodies’, constituted a key point of contention. A counter-proponent, Ethiopia struggled against the discourse influenced by the ‘drainage basin’ conception, among others, because of its clear geographical implication beyond the water bodies. On the other hand, while Egypt’s wider formulation which endeavored to include the basin’s whole precipitation into the region’s governance structure received no backing, its argument that the CFA’s physical scope of regulation extends over the ‘river basin’ was nonetheless supported by several states – both upstream and downstream, and hence endorsed.

Against such background, a perspective was adopted by the CFA that strove to take into account the specific concerns of Ethiopia, on the one hand, and most other riparian states, on the other. In unparalleled legal maneuver and thoughtful structure, Article 1 on the ‘scope of application of the CFA’ declared that the instrument shall apply to the ‘use, development, protection, conservation and management of Nile River Basin and its resources.’ Two distinct terms were, however, introduced in connection with the ‘geographical scope of application’ of the rules contained in the CFA –depending on the specific functions contemplated.

Hence, Article 2(a) on the ‘use of terms’ provided the ‘Nile River Basin’ constitutes the ‘geographical area determined by the watershed limits of the Nile River System of waters’: this definition would be used *only* in connection with issues of ‘environmental protection, conservation or development.’ On the other hand, a second terminology, the ‘Nile River System’ was introduced which embodies ‘the Nile River and surface waters and ground waters which are related to Nile River’: this conception shall be used ‘where there is reference to utilization of water.’ This wording appears to be a slight approximation of the ‘river ecosystem’ expression employed by the ILC during the drafting of the UN Watercourses Convention –to refer to ‘river streams’ as such and the waters they carry.

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<http://weekly.ahram.org.eg/News/11030/17/Questions-about-the-CFA-.aspx>

<sup>48</sup> Tadesse Kassa Woldetsadik (2010), *supra* note 41, p.489.

<sup>49</sup> Ludwik A. Teclaf (1996), *supra* note 42, p.360.

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Obviously, Ethiopia had strained to limit a wider connotation which the basin approach entails in relation to territorial sovereignty; if only in part, it had succeeded. Egypt's previous argument to embrace 'basin-wide precipitation' within the 'utilizable waters' of a river over which the CFA's regulations apply was not accepted.<sup>50</sup> At least, in relation to issues of 'utilization' and 'water resources subjected to regulation', the CFA employed language so akin to the UN Watercourses Convention which handed 'narrower' intrusion to territorial sovereignty – a cause many upriver states had endeavored to uphold.

All the same, the formulation could not disguise the really concerning issue. It is the 'flowing waters' confined in rivers and ground systems, and not the 'adjoining physical landscape' extending over a basin that truly counts when it comes to disputes over transboundary waters. In this light, the regulatory expanse of both the UN Watercourses Convention and the CFA are but broad – limiting each basin state's sovereign discretion with regard to the utilization of the main channels of the Nile, tributaries, as well as sub-tributaries, rivulets and groundwater systems availed throughout the basin – so long as they form part of a unitary whole.

#### **4.2 Water security: protecting prior uses and pre-existing treaty rights?**

The CFA's preamble persuasively stressed the need for integrated management, sustainable development and harmonious utilization of the Nile waters. In so doing, the basin-wide legal platform has reproduced several foundational principles of international watercourses and environmental laws –including the right to equitable and reasonable utilization, the duty not to cause significant harm, and the obligation to protect the river basin and its ecosystem. In an unparalleled structuring of riparian rights under treaty regimes, the CFA also introduced a new concept, 'water security'.

The enclosure on water security under the CFA –primarily framed by the World Bank at later stages during the negotiations, stirred challenge from the outset, particularly from Ethiopia. Ethiopia's fears focused on the concept's implications, and no less, on the specific objectives which the clause intended to serve in upstream-downstream context. Such national disinclination seemed only justified; after years of dialogues, it was hardly logical to prop up a new

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<sup>50</sup> Abu-Zeid admitted Egypt 'had signaled its reservations on this point; when we talked about water-sharing and use, we referred to the *Nile River Basin* which means all the water in the basin, including the groundwater and rainfall. We were surprised...that in Article 4(1) of the CFA text...the wording *Nile River Basin* was replaced by *Nile River system* or *watercourse*, which is very different.' The change introduced implied that 'instead of taking into account all the water that falls into the basin, the signed CFA was proposing to take only the water that runs in the river...a considerable reduction.' *Al Ahram Weekly* (23 April 2015), *supra* note 43.

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stipulation that reinstates the debates on the status of ‘prior agreements’ and reestablishes their ‘legitimacy’, a matter which, from upstream perspective, had been regarded as a settled commission. Minister Mohamed Abu-Zaid, Egypt’s long-serving diplomat involved in the stretched discussions on the CFA, made no secret of the objectives of such initiative: ‘when the negotiations on the CFA started, the draft included a reference to the historical agreements and the countries did not agree to that; so we looked for an alternative solution and the water security concept was introduced.’<sup>51</sup>

While it is clear that the NBI’s objectives transcend well beyond mere issues of ‘prior uses/rights’, such downstream salutation (but in name) to the ‘old legal regime’ had raised valid fears of barrier against prospective uses of the Nile in hydropower and irrigational schemes upstream. For Egypt and Sudan, on the other hand, the concept’s inclusion has a far-reaching connotation; water security was perceived as essential mechanism for preserving the water allocation regime forged under the 1929/59 Nile water treaties-accords which had not bestowed a commensurate guarantee to future equitable rights of use of other states in the basin.

At the start, the concept, floated on the negotiations table since as early as 2005, drew attention and widespread support within the NBI. In fact, downriver states were able to marginalize Ethiopia’s resistance and obtain upstream backing for Egypt’s phraseology on the subject. The concept was therefore accommodated under the CFA against Ethiopia’s reluctance and substantive objections. But in time, Ethiopia was able to turn the tide after it requested for opportunity to study its contents, and later worked on a counter-proposal which altered Egypt’s submission, echoing a new framing along the lines now contained under the CFA.

Perhaps, apart from the obvious intents of the clause, a more pressing question in connection with the introduction of the water security proviso involves what legal implications the concept procures in international legal relations and what added value it yields to the contemporary discourse on the Nile.

Generally speaking, it could be submitted that the approach adopted by the Nile basin states demonstrates the increased credence being attached to water security paradigms under international watercourses law and water resources management regimes. There has already been a growing predisposition on the part of the international community to ‘achieve and sustain water security’ across communities. In fact, development threats associated with the provision of water security have been the focus of successive United Nations conventions since the UN Water Conference in Mar del Plata (1977) and the International

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<sup>51</sup> Al Ahram Weekly (23 April 2015), *supra* note 47.

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Conference on Water and the Environment in Dublin (1992); the subject was also addressed at the Ministerial Declaration of The Hague on Water Security in 2000. In purely legal discourses, however, a ‘right to water security’ has scarcely evolved into a subject of concentrated consideration nor developed as normative standard, although a few researches had touched upon the subject in the recent–past.<sup>52</sup> This complicates the task of establishing its place and import within riparian rights discourse traditionally premised on other, commonly–recognized, principles of international watercourses law.<sup>53</sup>

Substantively, Article 14 under the CFA states that that having due regard to the provisions of Articles 4 and 5 (on ‘equitable utilization’ and ‘no significant harm’), the Nile Basin States recognize the vital importance of water security to each of them, and that the cooperation, management and development of waters of the Nile River System will facilitate achievement of water security and other benefits. In this spirit, the Nile Basin States agree:

- (a) To work together to ensure that all states achieve and sustain water security, and
- (b) Not to significantly affect the water security of any other Nile Basin State.

An Egyptian/Sudanese counter–proposal, later rejected by upriver states, craved to modify Article 14(b) so as to read that the states agree ‘not to adversely affect the water security and *current uses and rights* of any other Nile Basin state’.

Noticeably, water security conveyed different meanings under both schemes. After fiery debates and consultations that spanned over several years, a clean text of Article 14 was only agreed upon in 2009 at the Extra–Ordinary Meeting of the Nile–COM in Kinshasa. During this phase, three alternative phraseologies were suggested and discussed to break the standoff: removing the whole part on Article 14, to reformulate the provision and continue negotiation on the subject, or deferring the issues raised under Article 14 to the machinery of the NRBC which shall handle the matter within six months of its establishment. As no consensus could be achieved at the end of the meeting, the last alternative was picked by the Nile–COM so that Article 14 was eventually noted as an annex to the main treaty body.

No doubt, Article 14 brought a scarcely-utilized paradigm into the Nile basin legal discourse. Yet, the objectives which it intended to achieve remained unconvincing, to say the least, given how the concept has been composed under

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<sup>52</sup> Tadesse Kassa Woldetsadik (2015), *supra* note 10, p. 650.

<sup>53</sup> *Id.*, p.650, pp.650-651.

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Article 2(f) of the CFA.<sup>54</sup> To start with, the overall approach was not prompted by genuinely ‘legal’ considerations, and in the end, its inclusion failed to indicate any significant added-value in ‘defining’ riparian rights per se. This is particularly true in view of the fact that several well suited principles of international water law had been presented under various headings of the same legal instrument; indeed, the system of international watercourses law offers adequate mechanisms that could help in realizing the objectives set out under Article 2 –except that a self-defeating political aim was sought under the CFA from the outset.

In their widely referred article, Wouters *et al* concluded ‘evolving international legal frameworks that govern transboundary water resources provide an appropriate platform for addressing water security concerns’. The authors rightly argued ‘the notions of equity, reasonableness, fairness and sustainability which are enshrined in the key principles of international water law properly reflect the core objectives of fair and effective management of the world’s shared water resources, and thus of the promotion of regional and global peace and security’.<sup>55</sup>

In the Nile setting, the recourse to water security was simply implausible, if for anything else because of the effects it produced. Today, the whole process of the NBI in relation to the CFA has been jeopardized due to a disagreement over the framing of Article 14. Of course, it would be naive to submit that the NBI’s enterprise ‘failed’ wholly on account of the concept’s introduction within the CFA. Of no lesser significance was also that the basin states had aspired to accomplish different goals through the CFA’s machination. The political tact of the states in laboring on deliberate ambiguity was evident in the processes that eventually even the concept’s full enclosure did little to persuade either Egypt or Sudan to embrace the CFA in its present form. Both states looked for more than a simple declaration of ‘equal right of access’ to the Nile waters guaranteed under Article 2. In fact, a downstream counter-proposal on Article 14(b) of the CFA intended to dispense more than the conventional objectives of ‘water security’ restated in human development and international relations paradigms.

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<sup>54</sup> It defines water security as entailing ‘the right of all Nile Basin states to reliable access to and use of the Nile River System for health, agriculture, livelihoods, production and environment’.

<sup>55</sup> Patricia Wouters, Vinogradov, S. and Magsig, B.O. (2008), ‘Water Security, Hydro-solidarity and International Law: A River Runs Through It’, 19(1) *Yearbook of International Environmental Law*, p.98.

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If only fatefully, such approach mingled mere issues of ‘water rights’ and ‘resource scarcity’ with broader agendas on ‘national and political security’.<sup>56</sup>

In conclusion, both Egypt and Sudan failed to trust the CFA’s machinery and perceive that ‘downstream use regimes’ would be protected adequately under the cooperative scheme. This formal mindset handed severe blow to the NBI, brought the negotiations process back to where it started two decades ago, and ultimately led the CFA to the frozen state in which it found itself today.

#### **4.3 Notification concerning planned measures with possible ‘adverse effects’**

The UN Watercourses Convention establishes a layered procedural framework for the ‘exchange of information’ and ‘notification of planned measures’ so that watercourse states trade pertinent information, consult with each other, and if necessary, negotiate on the possible effects of planned measures on the condition of transboundary rivers. Furthermore, the Convention provided detailed mechanisms that regulate the interaction between states when a planned measure which may entail ‘significant adverse effect’ upon another watercourse state is implemented, including its ‘timely notification’ which needs to be accompanied by technical data, information and any environmental impact assessment.

The whole system on timely notification of planned measures is designed to reassure sovereign equality and establish equitable balance between the stakes of riparian states over shared watercourses and avoid problems that inherently obtrude in any ‘unilateral assessment’ of the effects of any state’s actions pursuing a planned measure. The procedure, ‘mostly’ applicable when the implementation of new projects may result in violation of Article 7 of the Convention (obligation not to cause significant harm), circumvents ‘disputes’ which new uses by a state may trigger in relation to the legitimate interests of other basin states. This is not to imply that a riparian state is proscribed from embarking on development programs that ‘significantly affect’ another state’s current utilization of the same resource –an issue resolved by studying the contested relationship between Articles 5 and 7 on ‘equitable utilization’ and the ‘obligation not to cause harm’. Of course, under Article 5, a state’s right to equitable utilization is explicitly recognized; this entails that any ‘factual harm’ generated by a country, so long as such remains within equitable entitlement or

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<sup>56</sup> Domestically, this was further complicated by Article 44 of the Egyptian Constitution adopted in 2014 which stated that the state commits to protecting the Nile River and maintaining Egypt’s historic rights thereto.

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does not deprive another state of its equitable benefits, will not entail legal responsibility under international law.<sup>57</sup>

Instead, the message under Article 12 of the Convention accentuates that even when a state predicates its action on a reading of equitable entitlement, it must entreat to the procedural mechanisms set forth on the notification of planned measures whenever such actions likely cause a ‘significant adverse effect’ on the condition of the river in another state. Hence, the affected state, which may have pre-existing uses or may embark on the implementation of planned uses in the future, would get the opportunity to evaluate the measures and communicate its inferences.

In varying forms, the principle on notification of planned measures is extensively employed in regional and basin-wide agreements, declarations, and is furthermore referred to in the decisions of courts and tribunals.<sup>58</sup> This does not, however, signify its status under customary international law is a wholly settled matter or that its contents are unambiguous. In the context of upstream-downstream disputes, several sticking points linger: the nature of the obligation on ‘direct trading’ of data and information for purposes of ‘evaluation’ which some states are reluctant to undertake; the requirement that implementation of planned measures must be ‘suspended’ during six months following notification and possibly during negotiations –which, many states fear, undermines sovereignty; and the difficulty in arriving at equitable resolution through bilateral consultations and negotiations when a notified state ‘subjectively’ concludes that implementation of planned measures is inconsistent with the provisions of articles 5 or 7. In his critical essay, Borne concluded that while generally the Convention structured a preferential treatment to notified states and lacked balance in respect of the notifying states,<sup>59</sup> for the most part, the basic requirements of exchange of information, notice, consultation and negotiation now form part of customary international law, whereas in others the ILC had engaged in the progressive development of the law.<sup>60</sup>

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<sup>57</sup> For detailed readings adopted by the Special Rapporteurs of the International Law Commission (ILC) on the subject, see ILC, *The law of non-navigational uses of international watercourses*, draft articles and commentaries thereto adopted by the Drafting Committee on 2<sup>nd</sup> reading: articles 1–33, reproduced in *Yearbook of International Law Commission* (1994), vol.II (Part Two), para. 222, A/CN.4/L.493 and Add.1 [and Add.1/Corr.1] and 2, p.103.

<sup>58</sup> *Id.*, p.112.

<sup>59</sup> Charles B. Borne (1992), ‘The International Law Commission’s Draft Articles on the Law of International Watercourses: Principles and Panned Measures’, 3 *Colo. J. of Int’l Env’tl. L. & Pol’y*, pp.68-69.

<sup>60</sup> *Id.*, p.72.

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Given such uncertainties in international law, it did not come as surprise that the discussions under the CFA were engrossed by similar conceptual contests. In the final phases, states across the world espoused diverse positions, generally based on their geographical positions in river basins. Ethiopia battled to dodge restatement of Article 12 of the UN Watercourses Convention under the CFA – either wholly or in diluted form. In abstaining on the General Assembly’s resolution on the UN Watercourses Convention in 1997, Ethiopia was one of the few states who had registered objections: it argued ‘the text of the Convention ... falls short of achieving the required balance, in particular in safeguarding the interests of upper riparian states...’; this, it submitted, was evident ‘in most of the provisions of the Convention, and particularly with regard to article 7 and part III of the Convention on planned measures which put an onerous burden on upper riparian States’ and were endorsed despite the ‘considerable opposition to part III and a number of amendments...suggested to create a balance’.<sup>61</sup>

Clearly, under the CFA, the principle was diluted –especially in comparison to the comprehensive regulatory regime provided under the UN Watercourses Convention. While both principles, i.e. the ‘exchange of data and information’ and ‘planned measures’ were retained under the CFA, ‘information’ on planned programs in pursuance of Article 8 would be routed –not directly between the ‘affecting’ and ‘affected’ states as such, but through the Nile River Basin Commission who shall make use of procedures developed in the future to pass decisions.<sup>62</sup> The framing under the CFA also featured certain ‘restrictions’ which tended to bolster upriver positions.

First, in providing that ‘the Nile River Basin states agree to exchange information through the NRBC’, no restriction was provided with regard to the ‘substance’ of the measures subjected to notifications regime. The UN Watercourses Convention has structured a two-tiered system on planned measures: under Article 11, states are required to ‘exchange information and consult each other, and if necessary, negotiate on the *possible effects of planned measures*’. This wider formulation refers to ‘all’ measures –whether impacting the condition of an international watercourse in positive or negative ways. Under a narrower stipulation of Article 12, a watercourse state intending to implement planned measures is required to provide a timely notification to other watercourse states *only* if the action *may have a significant adverse effect*.

In contrast, Article 8 of the CFA *only* spoke of agreement to ‘exchange information through the NRBC’; the provision does not state whether this entails a system for mandatory notification which each state ‘must’ embark

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<sup>61</sup> United Nations General Assembly Press Release GA/9248; General Assembly Session 51 Meeting 99 May 21, 1997, Mr. Berhanemeskel Nega (Ethiopia).

<sup>62</sup> The Nile River Basin Cooperative Framework Agreement (2010), Articles 7, 8.

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upon before implementing planned measures. In fact, two crucial elements of the principle (relevant in resolving disputes and misunderstandings, 'consultation' and 'negotiation' on the possible effects of planned measures), were omitted in what appears to be a well-considered undertaking during the negotiations process. This denotes that while the basin states are still required to exchange information on planned measures through the NRBC, no legal frame is instituted on the basis of which a notifying state engages in consultations and negotiations with the state potentially 'affected' by a planned measure –so as to be able to settle its equitable interests through joint mechanisms. Therefore, a state may embark on unilateral development programs on the Nile without engaging in consultations or negotiations, or even more, without securing consensus from other riparian states potentially affected by its actions. Under the CFA, its obligation is restricted to 'exchanging information on planned measures'. Given the uneven water resources development setting in the basin, this furnishes greater legal leverage to upstream states who may involve in new water resource development schemes in the future.

Yet, it could be submitted that the CFA's scheme in relation to 'exchange of information on planned measures' serves no rational purpose unless it is 'meant' to involve all stakeholders in institutional process that assures each basin state's equitable interest. The NRBC is not expected to undermine such principles recognized under customary international law –except when a treaty unambiguously provides to that effect. From a downstream perspective, therefore, a countering contention could be raised that in the future the NRBC would improvise on the procedural framework of Articles 12–19 of the UN Watercourses Convention in regulating the exchange of information on planned measures and the conduct of negotiations between a state implementing planned measures on the one hand, and others who may be affected by such actions. A challenge remains, though, that any regulatory framework applied by the NRBC must be agreed upon by *all* basin states beforehand.

In the meantime, any misgiving which a 'notified' state in the Nile basin may have would be accommodated not through the employ of the elaborate procedures that comprise consultations and negotiations, but only within the context of the Commission's powers under Article 24 that strive to establish 'equity' in the utilization of the Nile. This power of the NRBC mainly involves drawing a 'basin-wide framework' complementing the principle of subsidiarity under Article 10, and instituting mechanisms for a thorough review of conflicting riparian schemes and for balancing interests on the basis of equitable considerations.

Not surprisingly, the CFA's stipulation on planned measures had been one of the most divisive subjects. The subject lingered on the negotiations table for years and no consensus was reached until the Nile-COM's crucial meeting in Kigali in 2007. The basin states took different positions on the question of

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whether a riparian state should be required to notify ‘all other basin states’ and ‘receive’ a green light before commencing a project within their jurisdictions. Egypt presented its case on the basis of a model offered under Article 12 of the UN Watercourses Convention. At the outset, many upstream states appeared to sympathize with Egypt’s proposal, although the final wording failed to content Egypt’s expectations.

Article 8 took its present, extremely condensed, form only in due course, mainly because of Ethiopia’s firm opposition. Ethiopia’s rejection of the principle, and later, a modest conciliation offered to accommodate it in ‘some form’ was predicated on fears of negative effect which its application may generate; if a system of notifications coined along Article 12 of the UN Convention is introduced, upriver projects would be blocked (or vetoed against) each time a basin-wide consent lacks, or at best, the proposals would be subjected to rigorous procedural processes hindering the implementation of pressing national development schemes on the Nile. Therefore Ethiopia campaigned to undermine the concept, deny it of any substantive import, or at the very least, delay its application –by requiring the establishment of the Commission for its operation. Ultimately, the compromise provided under the CFA, in line with the Nile-COM’s resolution in Rwanda’s capital Kigali, corresponded to Ethiopia’s position on the subject.

During the Nile-COM’s meeting in 2007, Egypt grudgingly accepted the final resolution as a consensus stipulation; but it was obvious that Egypt, which had ever looked for an elaborate procedural framework, was not pleased by the process. In 2010, Minister Nasreddin Allam reasserted his country’s position adopted during the last round of the negotiations on the CFA, and reiterated Egypt would not sign the CFA before two vital conditions are met –one of which included ‘commitment to an early notification mechanism before the construction of any projects in upstream countries’.<sup>63</sup> To assuage upstream irritation, Egypt drew on example from a previous experience in the basin in which Uganda ‘shared’ a proposal to construct the Bujagali hydro-power plant which, Egypt stated, was ‘studied’ and ‘sanctioned’ as it entailed no problem from a downstream perspective. In this light, and defying the reading under the CFA, Egypt insisted that a compulsory notifications clause should be placed under the treaty wherein a procedural mechanism for arriving at consensus is devised and agreed upon to evaluate and authorize the implementation of any projects on the Nile.

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<sup>63</sup> *Al Ahram Online* (April 2010), *supra* note 20.

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## 5. The NBI and the CFA: A Failing Enterprise?

The transitional mechanism of the NBI should be credited for fulfilling a few vital components of its organizational mission –building an atmosphere of trust and dialogue among riparian states and for embedding a sense of growing conviction in a common destiny. Indeed, apart from its main undertaking on basin-wide legal framework and institutional setup, the NBI had worked on a range of programs –laying the foundation for the NRBC’s creation, expediting negotiations on the CFA, and designing and implementing water resource development and management programs on limited scales. These ‘subsidiary’ tasks have been pursued within the framework of one of the NBI’s core missions: ‘coordinating and facilitating transboundary water resources management and development’. This authority has been employed in three successive phases of institutional development: a ‘Confidence and Capacity Building Phase’, the ‘Institutional Strengthening Phase’, and lately, the ‘Delivery Phase’.<sup>64</sup>

Indeed, the NBI had labored on designing major thematic concentrations for the Shared Vision Program since July 1998; by 1999, the policy guides and preliminary list of priority projects were already identified. In December 2000, the draft final projects document was prepared, and the Shared Vision Program was formally adopted in 2001.<sup>65</sup> Along with two investment-oriented Subsidiary Action Programs endorsed in 2002 for the Eastern Nile and the Equatorial Lakes regions, the NBI endeavored to discharge several undertakings. These included preparing investment projects; supporting member states to manage transboundary water resources within the context of integrated water resources management; carrying out analysis and scenarios on sustainable natural resources management and planning at basin, sub-basin and national levels; creating mechanisms for basin-wide exchange of information and notification on water resource development; reviewing multi-purpose development options for power generation, irrigation and sub-basin analysis of water resource development; and providing better understanding and management of climate change consequences.<sup>66</sup> A few of these, albeit slowly, materialized into tangible development projects and the founding of investment portfolios on power, agriculture and basin management. Most were initiated and agreed upon at regional levels through the involvement of two sub-regional offices, the Eastern Nile Subsidiary Action Program (ENSAP) and the Nile Equatorial Lakes

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<sup>64</sup> Nile Basin Initiative (Sept.2011), Nile News, A Quarterly Newsletter of the Nile Basin Initiative Vol.8, Issue 3.

<sup>65</sup> Nile Basin Initiative: Key Operational Milestones of the NBI (1998-2005).

<sup>66</sup> Nile Basin Initiative (Sept.2011), *supra* note 64.

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Subsidiary Action Program (NESLAP), and were implemented either regionally or nationally (by states), depending on the nature of the projects.

In a sluggish stride over the years, the NBI projects' dossier thickened – showcasing the gains of cooperative partnership.<sup>67</sup> And yet, none of the action plans designated specific dates for delivery, this being contingent on numerous factors presented below. Serious challenges lingered in the provision of concrete results, hence distressing the institution's overall accomplishments, influencing riparian views about its future, and prompting concerns relating to its effectiveness and sustainability.

First, the NBI's projects started to take shape only after 2000 –following several years-in-waiting, and even then, the actual implementation of projects was delayed indefinitely. The schemes, only a handful now in the implementations phase, have been regarded as manifestly insufficient –both in terms of their 'scale' and 'significance' in bringing about fast socio-economic developments to communities in the basin. After two decades of riparian partnerships and dialogues, the NBI ought to have evolved from a forum that nurtures cooperation and riparian confidence into a platform that conveys tangible outcomes. In participation, several states had looked for a meaningful transformation of the 'inequitable patterns of use' in the basin. Only a little changed in the status quo.

Second, nearly all the NBI schemes concentrated on relatively less-pressing side-issues involving 'watershed management', 'flood hazards, preparedness and early warning systems', 'small-scale hydropower and agricultural projects', and 'environmental protection'. Four factors, namely the provisional nature of the NBI's organizational setup, inadequate funding, persistent problems relating to riparian mistrust, and the 'unequal stakes' and 'priorities' of basin states in the river's development detracted the NBI from initiating meaningful (large-scale) irrigational and hydro-power programs. While such ordering of low-key schemes suited the strategic interests of a few basin states in the cooperative

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<sup>67</sup> By 2011, the NBI's development portfolio comprised an irrigation and drainage scheme in Egypt and Ethiopia, the Ethio-Sudanese power transmission interconnection project, flood preparedness and early warning scheme for the region, regional transmission interconnection projects involving Kenya, Uganda, Burundi, Rwanda and DRC, watershed management projects in Egypt, Sudan and Ethiopia, fisheries project in Uganda and DRC, the Tana-Beles integrated water resources development in Ethiopia, and the Lake Victoria environmental management project. Likewise, new projects and initiatives for water-sector investment were set in motion in the subsequent years – comprising the Bugesera integrated water and irrigation project in Rwanda-Burundi, Phase II of the flood preparedness and early warning scheme across the basin, and the Rusumo Falls hydro-electric and multipurpose project connecting Tanzania, Rwanda and Burundi. Nile Basin Initiative (June 2011), NBI Investment Projects, Quarterly Newsletter of the NBI, Vol.8, Issue 2.

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enterprise, in others, it built deeper resentment over the regional platform – questioning its capacity and suitability, and spurring, over time, an inward-looking approach to river resources development programs at national levels.

Third, the pace at which technical and fiscal resources have been marshalled to execute ‘agreed upon’ projects also remained far from satisfactory –raising doubts about the realization of the NBI’s development objectives within reasonable time-frame. True, the NBI had helped states in ‘prioritizing shared development opportunities’ and in ‘preparing and identifying their potential water-based development projects’ even under circumstances when consensus on feasible projects initiated at regional and sub–regional levels had been problematic. Yet, no practical measures were adopted for a longer period – mainly due to a mismatch between the means and ends.

Obtaining pre-investment finance for projects identified through the NBI’s action plans constituted a formidable challenge –particularly in relation to the Subsidiary Action Programs of the Eastern Nile. Partly, this failure could be attributed to the intergovernmental nature of such undertakings where political and financial commitments were difficult to garner, and in part, to the serious diplomatic dispute that bubbled in the post-2010 period involving Ethiopia and Egypt. Such developments overshadowed the NBI’s overall gains, leaving little doubt that in the long term the institution’s objectives will be debilitated if the current trajectory remains –with visceral effects on its competence in guaranteeing the equitable rights of ‘all’ the basin communities and in ‘detering’ unilateral measures that undermine the spirit of cooperation.

Finally, and perhaps the most critical challenge accounting for the NBI’s less promising future as a collective institutional platform may be linked to the fate and current status of the CFA itself. For nearly two decades, negotiations pursued under the auspices of the NBI failed to realize one of the organization’s fundamental missions: a permanent legal and institutional framework ‘acceptable’ by all states in the basin. The development leading to the adoption of the CFA, not yet in force six years since it was endorsed by the Nile–COM, was not only beset by multifaceted glitches discussed above, in the end, the enterprise also failed to mollify the ‘expectations’ of two key stake–holding states in the basin: Egypt and Sudan. In diplomatic niceties, Egypt and Sudan continued to recognize the equitable rights of each state; in practice, both states struggled to reconcile such a stance with the strict ‘hands off’ policy they uphold to preserve the security of prior appropriations of the Nile waters. This delivered hefty setback to the NBI’s single–most important undertaking – forcing riparian countries to continue cooperation under a ‘transitory’ institutional mechanism.

Attended by domestic policy considerations and developmental drives, a ‘less–yielding’ enterprise of the NBI also impelled Ethiopia, the largest provider of the Nile River’s flow regime, to fine–tune its conviction in the regional

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initiative and direct its focus on unilateral schemes. The decision, in 2011, to engage in construction of the GERD, shortly after Egypt and Sudan suspended active involvement in the NBI, could be viewed as a case in point.<sup>68</sup>

In the pre-2010 period, Ethiopia's national policy focused on influencing riparian discourse within the NBI –so that upstream states' long-held perceptions of injustice are remedied through the institution of permanent legal and organizational platform. While Ethiopia succeeded in rallying upriver countries over the CFA, Egypt and Sudan, the two key players (in terms of extended preexisting uses, count of population dependant on the resource and territorial stretches within the basin) refused to sign the treaty – practically rendering the framework (and possibly the NRBC) a 'one-party' undertaking of the 'upstream bloc'.

Again, about a year later, Ethiopia's national development enterprise on the GERD started to generate extraordinary apprehension along the downstream Nile. In June 2013, the blow to any hopes of the CFA as comprehensive pact including Egypt came about following the unprecedented scales of diplomatic fallout and legal squabbling between Egypt and Ethiopia. While the states strove to mend the diplomatic fracture in the subsequent years, paradoxically, the new developmental minutia also heralded a fresh episode in the history of cooperation between the states of Ethiopia, Egypt and Sudan – progressively altering the tense national temperaments featured in the past. While still clouded by deeper accounts of mistrust, the trilateral legal relationship of the 'Eastern Nile River Basin States' picked momentum after 2013 and continued to intensify – fleeting through succeeding chapters of twists, upturns and downturns.

In specifics, the cooperative undertaking between the three countries was informed by the same fundamentals ensconced under the CFA. And yet, the process – working on multilayered issues of concern along political, legal and technical tracks – was pursued through the employ of a separate 'legal frame' and 'institutional platform' unrelated to the NBI itself. In fact, during the trilateral proceedings, the NBI machinery was effectively sidelined as institutional stakeholder – raising genuine concerns about the visions and sustainability of a 'basin-wide' cooperation. This is not, of course, to imply that sub-basin arrangements are prohibited or viewed as inconsistent with either the NBI or the CFA; it is rather to highlight that in the present circumstances, no effort had been exerted to ensure coherence between the purposes and activities pursued in 'Eastern Nile' and the overall schemes of the NBI or the CFA. The NBI was barely involved in the political, legal and technical discussions, nor

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<sup>68</sup> Ethiopia argued that this is in the spirit of the CFA and extends a variety of benefits to lower riparian states.

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engaged in facilitating dialogue or coordinating consultations on national programs of action on the Nile.<sup>69</sup> Clearly, the institution was relegated –this also becoming increasingly evident from the minuscule roles it continued to play in relation to the resolution of disagreements over potentially contentious large-scale water resource development schemes such as the GERD.

The pursuit of issue-triggered collaboration at local levels of the Nile basin seemed to hamper the NBI's status as a lead institution in the region. Not least, a fragmented discourse continues to impact the CFA indirectly, leaving Egypt and Sudan with little incentives to engage in its ratification –which, in turn, undermines the prospects for a basin-wide cooperation on the Nile.

## Conclusions

In retrospect, it may be inferred that the basin-wide legal architecture in the Nile had been preordained to 'fail' from the outset. In upriver states and lower reaches of the river, the values, nationalist views and strategic designs that informed the decades-long negotiations process were fundamentally incompatible, to the say the least, and commonly attended by rigid domestic policy frames. Between riparian states, the incentives for collaboration anticipated different sets of economic, social and political payoffs –placing greater emphasis on narrower national interests, which, in the end, were found difficult to reconcile.

However, riparian interests of the basin states are not wholly incompatible. In fact, the Nile basin states have no choice but to ensure that the NBI's enterprise is concluded in an inclusive and equitable manner. Else, the alternatives would not only present a bleak future from the point of view of cooperation and integrated development of the resource, in the long term, they would also stifle the riparian states' lasting riverine interests.

Today, the impending 'failure' on the CFA presents the strongest threat to the NBI's future. In part, the way forward must conceive of 're-orienting' the diplomatic focus with a view to embracing Egypt and Sudan fully onboard the CFA. It is reassuring to note that Egypt and Sudan reestablished their position

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<sup>69</sup> The NBI argued, though, that the successful direct negotiation among the three NBI Member States is a result of the culture of dialogue, mutual trust, joint consultation and deliberation the NBI has been promoting since its establishment. It considered 'the NBI's invitation to this historical event as a clear recognition by the three countries, of the NBI's contribution in...facilitating cooperation on the use of the shared Nile Basin water resources among the Nile Basin countries...'.  
Nile Basin Initiative (2015), 'NBI congratulates Egypt, Ethiopia and Sudan on signing the Agreement on Declaration of Principles on the GERD Project',  
<http://www.nilebasin.org/index.php/news/192-nbi-congratulates-egypt-ethiopia-and-sudan-on-signing-the-agreement-on-declaration-of-principles-on-the-gerd-project>

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within the NBI – after decisions in 2010 to freeze participation in the process. But, ‘mere participation’ in the NBI’s routine forums whose roles have been increasingly questioned for lack of impact only fulfills certain, largely transitory, objectives. A lasting equitable interest of all states in the basin only lies in launching, without delay, a permanent and comprehensive legal mechanism. A prolonged NBI, deprived of clear direction and optimism to evolve into permanent platform, triggers riparian despair and eventually drives states to tune domestic policies along ‘unilateralism’ as means of securing equitable stakes. Hence, any legal intricacy involved in ‘post-adoption’ amendment of the CFA notwithstanding, the basin states should again labor in genuine diplomatic undertaking on the stumbling blocks postured under the CFA and toil on their formulation so as to furnish common ground.

From downstream perspective, there is also obvious geographical rationale for seeking to secure one’s riverine calling within the NBI/CFA. In the absence of a comprehensive deal on equitable utilization, Egypt and Sudan will remain vulnerable to upstream abstractions of the Nile waters; for both states, it would be very difficult to forestall such threats just by marshaling the old legal chorus on ‘historical rights’. It is also evident that in the 21<sup>st</sup> century, a long-term security to the legitimate claims of downstream states could not be procured through political manipulation, diplomatic altercations or belligerent threats; any such sanctuary must be sought within the frame of comprehensive institutional platforms and integrated water resource development strategies framed through the involvement of all stake-holders.

Noticeably, Egypt, Sudan and Ethiopia have fairly succeeded in the search for ‘negotiated settlement’ of multifaceted issues that arose in the context of the GERD. But it must be noted that this ‘isolated’ cooperative mechanism seemed to work only because each state had been heavily invested in the last five years –instituting new legal procedures and acquiescently addressing the political, legal and technical snags related to the GERD on a case by case basis. One cannot be certain that the same ‘talking ambience’ and ‘positively perceived payoffs’ would prevail in each future riparian encounter instigated by upstream development of projects on the Nile. Not least, it is worth noting that Ethiopia’s repeated assurances –that the GERD is intended *solely* for purposes of hydro-power, a non-consumptive utilization, and that the dam offers economic and environmental benefits to downstream states as well, had *factored* in the relative amicable solutions forged in relation to the lingering issues of dispute between the three states.

Still, a fragmented approach to riparian cooperation, however enticing in the short-term because of its relative comfort in forming technical and political deals between a fewer players, may only undermine the larger benefits procured from basin-wide cooperation and integrated water resource developments. In the long range, such trajectory may fail to shield the downstream states’ water

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security concerns; Ethiopia, the largest potential user in the coming decades, has already laid concrete plans to engage in more extensive utilization of the resource, and no doubt, other upriver states will follow suit. Such measures, whose scope may expand over time, would open the door for competitive uses over a scarce water resource, and in the absence of a cooperative agreement, to simmering tensions, diplomatic fallouts and even confrontation.

Without doubt, unilateral pursuit of water control works in upstream Nile will generate increased uncertainty in relation to the interests of Egypt and Sudan. In this light, a more guarding approach would not be to labor on isolated negotiations with each upriver state carrying out projects in the basin, but to salvage the CFA's institutional platform and engage in its process without placing unreasonable preconditions. True, the unique water security interests of the downstream states could not be discounted, but such vulnerability should not present a pretext for showcasing the 'national wellbeing' of Egypt or Sudan only in a context that sanctions full control of the Nile waters. Within the framework of existing initiatives, both states should demonstrate that their bloated concerns over 'water security' and 'integrity of preexisting uses' are not necessarily 'incompatible' with the 'equally sovereign rights' of other basin states and their aspiration to engage in cooperative development of the river resources.

Clearly, this could not be achieved without serious resolve on the part of all basin states, and no less, without looking into a wide-ranging political, cultural and economic partnership that set up complementary platforms other than the Nile and encourage integrated, rather than competitive control and utilization of the resource. Such functional setting creates conducive environment for the (re)allocation of beneficial uses, for conserving more waters through supply-side management of resources lost in evaporation, evapo-transpiration and seepage, and for introducing virtual water trading schemes to offset deficits in water supplies. In such context, cooperation would not only epitomize securing equitable interests, it would also entail entrenching riparian confidence and enhancing common welfare through the implementation of programs that entail less harm to each other. \_\_\_\_\_■

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