



**Exploring the Principles of 1997 United Nations Watercourses Convention and the Role of Multilateral Agreements between Nile Basin States on Fair Use of Nile River**

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***Abstract***

*Since the establishment of the Helsinki Rules in 1966, legal ideas had been evolved substantially to reach into an agreement on international watercourses, but all-embracing agreement became difficult. However, the 1997 Convention on the law of the Non-navigational uses of International Watercourses is the first and the only worldwide instrument, enacted under the auspice of the United Nations to govern the non-navigational uses of international watercourses. This convention has the advantage of being broad in its concept and encompassing all aspects associated with water use. At the same time, it has its own weaknesses that limit its efficacy as a working document, as it permits the riparian states to engage in disputes and endless discussion over all the factors which might be considered. Although the Convention has entered into force in 2014, after 17 years long and complex journey of its adoption, none of the Nile Basin states are currently parties to the Convention. This is because of the divergent views of the riparian states towards the provisions of the Convention coupled with the existing tension and lack of genuine trust among downstream vis-à-vis upstream blocks. Thus, this article is aimed to explore the principles of the 1997 UN Convention and the roles of multilateral agreements among riparian states on the use of Nile River. Owing to the confusing nature of the principles in the Convention, the Nile basin states are better to create a cooperative and mutual beneficial agreement on the use of Nile River than ratifying the Convention. Therefore, the writer of this article argues that to Ethiopia it is rationale and better to expect the application of the customary international water law regime, if there is any or Nile Basin Initiative (NBI) or Cooperation's to fairly utilize the Nile River.*

**Key words:** Cooperation, Equitable and Reasonable Use, Nile Basin Initiatives, Nile River, No significant harm rule, Ratification, Riparian States, Watercourses, Ethiopia

**1. Introduction**

Nile is one of the longest rivers of the World, shared by eleven (11) African nations (namely; Ethiopia, Egypt, Eritrea, Uganda, Kenya, Tanzania, Democratic Republic of Congo, Rwanda, Sudan, South Sudan and Burundi) most of which are among the World's poorest States.

The rise in population number increases the demand for water for electric generation, agriculture and household uses putting the water resource under an even more stress (*Yacob, 2007*). Unlike some other shared river basins in the World, there is no comprehensive agreement among the riparian states in the utilization of the Nile water. The existing treaties and agreements are either bilateral or were deliberately planned by colonial forces to serve the interest of downstream countries, particularly Egypt (*Yacob, 2007*). The development of international water law applicable to the use of waters in trans-boundary rivers has lasted most of the twentieth century. During this time, the legal ideas have evolved substantially but widespread agreement has been difficult to obtain, since the establishment of the Helsinki Rules in 1966 (*Salman, 2015*).

Following this rule further work by the International Law Commission on a framework Convention was devised by the UN, which was accepted by the General Assembly in 1997 (*Andualem, 2015*). This Convention has the advantage of being broad in concept and encompassing all aspects associated with water use. However, at the same time there are serious weaknesses which will limit its utility as a working document, since it permits the riparian states in dispute to engage in almost endless discussion over all the factors which might be considered.

The major problems in the Nile Basin with respect to the utilization and management of the water are to strike a balance between patting the water in a reasonable manner and causing no significant harm to all riparian states. To date, the Nile Basin states could not, however, forge a comprehensive legal framework to resolve these problems. Because there are no sound rules and principles which govern water allocation and management acceptable to all riparian states (*Bayeh, 2016*).

The 1997 Convention calls for a close cooperation among member states and the substantive rules of the Convention provides solid rules for determining the rights and duties of States regarding the fundamental question of "who gets what" (*Andualem, 2015*). While the Nile Basin Initiative (NBI), which inaugurated in 1999, is a remarkable achievement towards the cooperative development and management of the common Nile water resources. It reflects a shared vision defined by all riparian states for sustainable socio-economic development through equitable utilization and benefit from the common Nile water resources. However, the application of basic rules of the Convention is difficult due to its inclusion of contentious and vague terms.

Therefore, the objective of this study is to explore the content and limitations of the Convention's general principles and the role of NBIs, thereby to assess which legal document should be used to ensure reasonable and fair utilization of the water by the Nile riparian states.

## **2. The 1997 UN Convention on the Law of the Non-Navigational Uses of International Watercourses**

In 1970, the General Assembly of the United Nations recommended that the International Law Commission of the United Nations (ILC) take up the study of the law of the non-navigational uses of international watercourses with a view to its progressive development and codification (*Salman, 2015*). After close to a quarter century of study and deliberation, the Commission come-up with a set of Draft Articles on the non-navigational uses of international watercourses, on which a serious debate was conducted and finally, the United Nations General

Assembly adopted the first comprehensive international water course Convention on May 21, 1997. This Convention reflected the most important international customary norms and entered into force on 17 August 2014, following 17 years long and complex journey. The delay of the Convention's entry in to force and the reluctance of countries to join it indicate the existence of divergent views among up and downstream Nile riparian states towards the benefits they can derive out of it, because of its contentious nature (*Andualem, 2015 and Salman, 2015*). As a result, countries decided their better-off position by calculating cost benefits of being ratifying or not of it. In this regard, Ethiopia is not party to the Convention because of the believe that the text of the Convention was not balanced, particularly with respect to safeguarding the interests of upper riparian States and its provisions are downstream riparian's favored. Article 7 and Part III of the Convention were of particular concern. Part III put onerous burden on upper riparian States. The elements in Article 3 on adjusting application of the Convention's provisions to the characteristics of a particular watercourse undermine the Convention (*Andualem, 2015*). As a result, reserving the right to use its international watercourses, Ethiopia had not voted against the Convention, but had abstained hoping negotiations to ensure equitable utilization, though the negotiation process was largely turbulent and full of contentions. And Article 3-7, 11-19 and 33 were among the most contentious provisions throughout the negotiation process (*Lucius, 1998*).

## **2.1. Understanding the Contentious Provisions of the Convention**

### **2.1.1. The Status of the Existing Agreements (Article 3)**

The relationship between the Convention and the existing agreements as well as future agreements concerning specific watercourses as a whole, or partially dealt in Articles 3 and 4 of the Convention. The Convention generally encourages states sharing watercourses to enter into agreements that apply and adjust the provisions of the Convention to the particular characteristics of the watercourse concerned (*Article 3(3) of the Convention*). But the way Article 3 of the Convention dealt with the status of existing agreements is particularly controversial. Unlike other provisions of the Convention, the debate and the positions of states on the validity or otherwise of existing bilateral, or multilateral agreements was not addressed based on their contents and/or fairness between the riparian states (*Andualem, 2015*). The Convention left the issues to be solve by the concerned states via cooperation and it simply stated general principles.

Regarding the existing agreements between riparian states on the Nile River, different agreements were done during colonial and post-colonial periods. In 1891, Anglo-Italian Protocol was signed between Britain (representing Egypt and Sudan) and Italy on behalf of Eritrea. The Protocol was not on the water of the Nile per se, but the water of Nile was referred under Article III of the Protocol as an incidental issue. The Protocol was primarily meant for delimitation of the colonial boundary of Britain and Italy in the Sudan and Eritrea. This Article prohibited Italy from undertaking any construction work at the headwaters of the Nile. It is conducted without including the upper riparian states, where the substantial share of the water comes from (*Shams Al Din, 2013*). However, what makes it senseless and irrelevant is the fact that the Nile River did not flow in the territory colonized by Italy and at the time Ethiopia was an independent state. Thus, Italy did not have the right to engage in negotiation over the headwater found in Ethiopia.

The next agreement was conducted in 1902, between the King of Great Britain Edward VII on behalf of Sudan and the Ethiopian Emperor Menelik II. They signed a treaty regarding the delimitation of the frontier between Ethiopia and Sudan, which was part of the Egyptian territory while Egypt was under the British protection. The treaty was drafted both in English and Amharic versions and consisted of five Articles. The first two are related to the determination of the boundaries between the two states while the last two Articles deal with the future cooperation between the two empires. Article III was the only Article dealing with the Nile Water. However, there was a disagreement on its meaning in the Amharic (Ethiopian Language) and the English versions. In the Amharic version, the obligation imposed on Ethiopia did not preclude the use of the water, but what prohibited was any scheme which would totally arrest the flow of water (*Yacob, 2007*).

The other is in 1906 Tripartite treaty was concluded in London on 1906, between Britain, France and Italy on the use of the Nile water in Ethiopia's sub-basin to safeguard the interest of Great Britain, without prejudice to Italy's interest, and also agreed to protect the interest of Ethiopia. It is difficult to imagine how they could claim to protect Ethiopia's interest, without inviting Ethiopia to take part in the agreement process or without consulting Ethiopia. Thus, the Ethiopian government immediately voiced its fervent rejection of the agreement and indicated that no country had the right to stop it from using its water (*Yacob, 2007*).

In 1925 Anglo-Italian agreement in Rome, Italy agreed to recognize the prior rights of Egypt and Sudan on the headwater of the Nile and guaranteed not to construct on the headwater and its tributaries any works that might sensibly modify their flow into the main river. Right after its conclusion, Ethiopia voiced its objection against the treaty. Following Ethiopia's rejection of it, the British government disclosed that it renounced its position and admitted that the agreement was bilateral and was not meant to bind Ethiopia (*Yacob, 2007*).

In 1929 Anglo-Egyptian agreement was signed between Egypt and Great Britain representing Sudan as its colonizer. This agreement was done by exchange of notes between Mohamed M. Pasha, the president of Egyptian Council of Ministers and Lord Lloyd the British High Commissioner in Cairo. The Agreement mainly aimed at securing the Nile water for Egypt by limiting the rights of the Sudan and rejecting those of the other upper riparian states including Ethiopia. The Agreement recognized Sudan's right to use the water of the Nile in as far as Egypt's natural and historic rights were protected, and conferred upon Egypt the right to monitor the flows of the water in the upper riparian states (*Shams Al Din, 2013*). It also empowered Egypt the right to undertake any projects on the Nile without the consent of the other riparian countries. The agreement recognized, somehow, the right of the Sudan to utilize the water but its exercise is contingent on whether or not its uses preserved Egypt's historic and natural rights.

In 1959, bilateral agreement concluded between Egypt and Sudan for the full utilization of the Nile water. It was called by Sudan for the revision of 1929 agreement in a manner that would divide the water in a rational way (*Nebiyu, 2016*). Under this treaty, the two countries negotiated for the allocations of 55.5 BCM water for Egypt and 18.5 BCM for Sudan based on a calculated yearly runoff of 84 BCM. This left an extra 10 BCM unallocated to make up for losses due to evaporation (*Nebiyu, 2016*). As the name itself implies, it allotted the entire water of the Nile to the two states only. Its purpose was, therefore, to gain full control of the water and this

constitutes the culmination in efforts to give preference to both states. This is because it highlighted the construction of the Aswan High Dam which is now the basis of Egyptian claims to historical water rights, as the major element for controlling the Nile water for the benefit of Egypt and the Sudan (*Yacob, 2007*). Thus, it is the legacy of the colonial era and affirmed the British approach to the water of the Nile. The two states acted as if the Nile starts in the Sudan and ends in Egypt and left, contrary to common sense, no room for the other riparian states.

The first bilateral Framework for General Cooperation regarding the Nile issues after the colonial period was signed between Egypt and Ethiopia in Cairo in 1 July 1993 (*Yacob, 2007*). It stipulated that future negotiations between Ethiopia and Egypt, with respect to the utilization of the water of the Nile, would be based on the rules and principles of international law. The Framework was only indicative for future negotiations without detailed rules. It merely represents the first attempt by the two states to come together and it does not have a binding effect. It is no more than the heralding of a new era of improved relations between the two states with regard to the water of the Nile (*Nebiyu, 2016*). However, still all agreements made in regard to the water of the Nile are of limited scope in their application. None of them managed to involve more than three states and are concluded mainly to secure and safeguard the interest of the two lower riparian states (*Andualem, 2015*).

As a result of the aforementioned historical backgrounds, in the meeting of the 1997 Convention, Ethiopia argued that at least some provisions of the Convention should be regarded as rules of ‘*jus cogens*’ (*Art 64 of the Vienna Convention on the Law of Treaties, 1969*) and pleaded for the lapse of all existing watercourse agreements that contradicts with the general principles of the Convention (*Andualem, 2015*). Finally, the Convention incorporated the provisions that encourage the harmonization of pre-existing agreements with its provisions under Article 3 of it. That means the riparian states could negotiate in good faith based on the principles of the Convention when they conclude a bilateral, or multilateral, or regional watercourse agreement/s (*Louka, 2006*).

## **2.1.2. Substantive Rules that Governs the Use Allocation of Transboundary Water**

### **2.1.2.1. The Principle of Equitable and Reasonable Utilization and the “No Significant Harm” (*Sic uteretur ut alienum non laedas*) Rule (Article 5 and 7)**

These are the second most controversial provisions of the Convention and currently considering as the most important substantive norms that deals respectively with the principle of equitable and reasonable utilization and obligation no to cause significant harm (*Article 27 & 28 of the Convention*). The equitable and reasonable utilization principle sets out the fundamental rights and duties on the member states concerning the utilization of international watercourse (*Andualem, 2015*). It sets forth the cornerstone of the law of international watercourses, because today this principles becoming as customary international water law and after four months of its adoption the International Court of Justice (ICJ), in its decision of *Gabcikovo-Nagymaros* case, emphasized the importance of operating the project involved in the case "in an equitable and reasonable manner" (*Gabcikovo-Nagymaros Project (Hung Vs Slovak, 1997)*). The other trans-boundary watercourse agreements also refer this principle as a substantive norm; for example, Article 12(1) of the Berlin Rules on Water Resources (2004), which states that Basin States shall in their respective territories manage the waters of an international drainage basin in an equitable

and reasonable manner having due regard for the obligation not to cause significant harm to other basin States. Article 3(7(a)) of the Revised Southern African Development Community (*SADC Protocol, 2000*) on shared watercourses, was adopted largely to give effect to key provisions contained in the 1997 UN Convention. In Article 5 of the 1995 Mekong Agreement, State parties agreed on a term to utilize the waters of the Mekong River system in a reasonable and equitable manner in their respective territories, pursuant to all relevant factors and circumstances. The Agreement on the Nile River Basin Cooperative Framework 2009, which provides for principles of development and protection the Nile River System also establishes the principle of equitable and reasonable utilization of the waters of the Nile River System under Article 4 of its agreement (*Emmanuel slide prepared for law of natural resource course, 2016*).

However, Article 6 of the Convention has a negative impact on Ethiopia with regard to the use of Nile in compute with Egypt. Because when you see some factors under Article 6(1) (b, e, and g) that requires to be taken in to consideration in determining the equitability and reasonableness of water utilization among riparian states, that all benefits Egypt than Ethiopia. The practical application of this Article and attaching weight thereto are often difficult and those factors are needed to be weighed and balanced in every actual situation without giving priority to any such factors over the others.

Whereas, “*no significant harm*” principle which derives its normative foundation from *sic uteretur ut alienum non laedas*, or the good neighborliness principle, provides an obligation on riparian states not to cause significant harm to others in utilization of shared water resources. Article 7(1) of the Convention incorporates the ‘*no-harm rule*’ while Article 7(2) of the Convention implies a ‘*reasonable use*’ that may still cause significant harm to another watercourse state although all appropriate measures had been taken. This principle drive from the theory of limited territorial sovereignty that stipulates all watercourse States have an equal right to the utilization of a shared watercourse and but they must also respect the sovereignty of other States to equal rights of use. The duty “*not to cause significant harm*” is a due diligence obligation of prevention, rather than an absolute prohibition on trans-boundary harm. The type of harm is qualified by the term ‘*significant*’, which is defined as the real impairment of a use, established by objective evidence (*Yacob, 2007*). The ‘*significant*’ threshold excludes mere inconveniences or minor disturbances that States are expected to tolerate, in conformity with the legal rule of good neighborliness” but the provision on the ‘*no harm rule*’ was actually the most controversial one (*Andualem, 2015*). In 1991, the ILC draft version of Article 7(1) and its 1994 version was seriously opposed by Ethiopia (*1994 ILC Draft Articles, 36 Natural Resource Journal 1996*), which still continued in the final version of the Convention. It was discussed very controversially in the Working Groups seeking the amendment of the draft Article (*Attila, 1997*).

As per para 2 of Article 7, if significant harm was caused despite the exercise of due diligence, the states involved must enter into consultations concerning two things. First, the extent to which the harmful use is equitable and reasonable and second, whether the harming state should adjust its use to eliminate or mitigate the harm, and where appropriate, the question of compensation. Finally, the issue of compensation was hardly discussed and not changed by the Working Group (*Esther, 2002*). But still it was abundantly criticized by lack of clarity and

maintaining of responsibility and liability under the no-harm rule, since it did not allow the settlement of controversies and it challenges of equitable and reasonable use of the Nile River.

### **2.1.2.2. The Principle of the Protection and Preservation of Ecosystems of International Watercourses (Articles 20 and 22)**

This is the other substantive rule of the 1997 Convention that obliges the states to protect and preserve the ecosystem of international watercourses, since watercourse ecosystems provide many valuable services to humans, including the provision of habitat for fish, and other aquatic species of fauna and flora (*Yacob, 2007*). To have these benefits Articles 20 and 22 of the 1997 UN Watercourses Convention recognize the principle of protection and preservation of ecosystems. It requires States to 'individually and where appropriate, jointly, protect and preserve the ecosystems of international watercourses.' This provision still obliges the member states to take a due diligence. This standard takes into account the sensitivity of the ecosystem as well as the capability of the state involved. Article 22 restricts the introduction of alien species into an international watercourse which may have effects detrimental to the ecosystems of the watercourse resulting in significant harm to other watercourse States. The obligation contained in this Article applies only where significant harm will be caused to other riparian states.

### **2.1.3. Duty to Cooperate**

This is the third controversial point that designed for planned measures under Part III of the Convention, largely embodying procedural requirements to notify, exchange information, consult and negotiate. That is absolutely central to the discharge of due diligence standards of the obligation to prevent harms. Equally, trans-boundary environmental impact assessment is central to practical discharge of the duty to notify of planned projects and thus to effective co-operation.

Without the benefit of an EIA, the duty to notify and consult other states in cases of trans-boundary risk will in many cases be meaningless' (*Birnie and Boyle, 2002*). Though the 1997 UN Convention does not expressly require the conduct of an EIA before the implementation of planned projects or activities, which may have a significant effect. However, some scholars suggest that, even in those instances where no specific provision is made, environmental impact assessment may be taken to be implicit in other procedural duties; in particular the duty to notify other States of proposed activities that may entail trans-boundary harm (*Okowa, 1996*). The Convention provides further evidence that the international community as a whole emphatically rejects the notion that a state has unfettered discretion to do as it alone wishes with the portion of an international watercourse within its territory. It essentially provides that a state contemplating a new use or a change in an existing use of an international watercourse that may have a significant adverse effect on other riparian states, must provide prior notification to the potentially affected states (*Anduaem, 2015*). Those state/s are then given six months within which to respond. If the notified state object to the implementation of the planned project or activity, they are required to enter into discussions with the notifying state, "with a view to arriving at an equitable resolution of the situation" (*Article 33 of the Convention*). This entire process could take twelve months. If the matter is not resolved to the satisfaction of any of the states concerned, the dispute settlement procedures of Article 33(4) would be applicable. But, regarding the Nile river Ethiopia, Egypt and Sudan by their multilateral agreement clearly stated

and declared the basic principles how they could solve any disagreement if arises between themselves concerning the Grand Ethiopian Renaissance Dam Project (GERDP, 2015).

### **3. Basin-Wide Cooperation Initiatives**

#### **3.1. Nile Basin Initiative (NBI) Towards Cooperation**

Nile Basin Initiative is a new chapter for cooperation efforts in the Nile basin, as it is the first basin-wide institutional mechanism that brings together all riparian countries to address a common agenda. It was launched in 1999 by Ministers of Water Affairs of Riparian States, except Eritrea, with the aid from the World Bank and UNDP (*Andualem, 2015*). It hopes to facilitate cooperation among basin states. The four goals of NBI are; building confidence among the basin states, changing perceptions on the issues of the Nile waters, realizing that cooperation is more beneficial than confrontation, and knowing the extent of the water resource potential for interstate collaboration, and its explicit motto is “sustainable development of the river Nile for the benefit of all” (*Yacob, 2007*).

It was formulated to serve as a transitional institution until Cooperative Framework Agreement (CFA) negotiations are finalized and a permanent institution of Nile Basin Commission (NBC) that incorporates all states was created (*Batisha, 2011*). It was an important step in creating a forum to maintain cooperation and peaceful negotiation among the riparian countries. In order to do so, it provides an institutional mechanism, a shared vision, and a set of agreed policy guidelines (*Shema, 2009*). NBI is guided by its shared vision seeking to achieve “sustainable socio-economic development through the equitable utilization of and benefit from, the common Nile basin water resources” (*Tvedt, 2010*). NBI strives for cooperatively developing the Nile and bringing peace and security to the basin. It aimed to address problems related to shared resources, history and political economy of the region. It also established various projects targeting different sectors both at basin level (projects under Shared Vision Program) and at sub-basin level (projects under Subsidiary Action Program). Through these projects, NBI serves as a forum for cooperation and information exchange among experts from the basin countries. These projects, however, have not been able to show significant progress since their formation (*Batisha, 2011*). In addition to these projects NBI has been engaged in studying basin-wide Power development options and trade opportunities in the Nile basin (*NBI, 2014*). From the very beginning, it has been gaining funds from international financial institutions, particularly, from the World Bank. This fact has highly limited its effectiveness as this institution demand unanimity in decision of riparian states before granting funds. This in turn has given states power to veto any development efforts of their neighbors where reaching decisions become unachievable under the initiative.

The existence of various interests of riparian states under the initiative has further weakened the performance of the NBI. For instance, Egypt is “extremely reluctant to address the issue of reallocation, in fear that doing so would decrease their entitlement.” As a result, Egypt attempted to redirect regional focus on the potential benefits to be gained from integrated development, but only in those areas which will not directly lessen their water supply” (*Yacob, 2007*). Ethiopia on the other hand believes that effective cooperation will surface “if and only if, the 1959 bilateral agreement between the Sudan and Egypt is nullified and a fresh Nile water redistribution arrangement that would accommodate the interests of all the riparian countries is



negotiated” (*Mohamoda, 2003*). The diversion of interest between Egypt and Ethiopia trace to NBI’s goals and projects bringing these states as the leading advocators of two divergent issues. Egypt focuses on regional cooperation where it has been a major supporter of TECCONILE and its Action Plan, while Ethiopia on the other hand seek for the formation of basin-wide legal agreement being more interested in Panel of Experts and its Cooperative Framework (*Foulds, 2002*). The inability of NBI to address these diversions has highly limited its effectiveness in the basin as it fails to lay all-inclusive agenda.

Besides, the failure of NBI to involve civil society in its decision-making processes limited its effectiveness, as it hindered NBI from cooperation of all stakeholders. In order to strengthen the voice of civil societies and to ensure NBI’s response to development needs of local community, Nile Basin Discourse (NBD) was founded in 2003 as a partner of NBI with over 1200 member and partner organizations within the Nile Basin region.

However, NBD has failed to raise the voice of the riparian society or integrate them, but it remained as a public platform for dialogue among civil society organizations in the Nile Basin (*Nile Basin Discourse Forum, 2007*). In line with NBD, another civil society organization called Nile Basin Society (NBS) that struggle to raise the voice of the society (*Canadian based NGO, 2012*). These NBS seeks “real involvement in NBI that include participation from project planning to project evaluation/monitoring and not just as ‘implementers’”. NBS demand to change the reality by bringing new insights through “creating a public dialogue on goals, policies and tradeoffs over Nile waters issues”. Nevertheless, like NBD, NBS has not been more than a forum and source of information for the public. As a result, the NBI lacks multilateral governance failing to gain a broad basis and to strengthen its performance.

Since its establishment most of NBI’s focus has been mediating claims and uniting multi-lateral relations. In other words, it has been serving as a platform for the riparian states where they can discuss as to know the realities on the utilization of the water of the Nile and for joint planning and management of water and related resources in the river basin providing the most promising framework for organization, development, and cooperation across the basin states (*Batisha, 2011*). Such effort has led to hopeful developments particularly since 2010, although its projects have not been doing well. Besides, it has not been able to address the various conflicts of interests in the basin.

### **3.2.Cooperative Framework Agreement (CFA)**

It is a framework agreement aimed to govern the relations between Nile basin countries. It is established to strengthen and promote cooperation, integrated management, sustainable development, harmonious utilization, conservation and protection of the river. It also provides for the establishment of a permanent Nile River Basin Commission, through which member countries will act together to manage and develop the resources of the Nile (*Draft CFA, 2010*).It is composed of fifteen general principles and thirty-nine Articles, providing the rights and obligations of riparian states. It paved the road to form the “Permanent River Nile Basin Organization” or the “Nile Basin Commission” (*Andualem, 2015*). This arrangement was concerned with the enforcement of any legal arrangement among the Nile Basin states. Article

16 of the Agreement dealt with its own new purpose and objective of the Commission. It stated that it has three main objectives:

- a. To promote and facilitate the implementation of the principles that incorporated in the Agreement, and the rights and obligations of the Nile basin states;
- b. To serve as an institutional framework for cooperation among Nile basin States in the use, development, protection, conservation and management of the basin and its water; and
- c. To facilitate closer cooperation among states and peoples of the Nile river basin in social, economic, and culture fields (*Nile Basin CFA, 2010*).

Besides its main objectives and purposes, the Nile River Basin Commission was given extra functions in regards to dispute settlements, information exchange, and mutual cooperation. Article 33 of the Agreement on the Nile River Basin Cooperative Framework gives the Nile River Basin Commission a reasonable role in dispute settlement. It urged the states' members to use the Nile River Basin Commission as mediator or conciliator between the quarreled parties (*Shams Al Din, 2013*). It is introduced by the upper riparian states as an international legal instrument. The signing of the CFA is a significant development in the process of negotiations in basin. It has given right to all the basin states to use the water of the Nile. These will allow the upstream countries to utilize their water resources that have been blocked for long by the lower riparian state/s (spatially by Egypt). So, for the upper riparian countries, the signing of the CFA is the realization of their dream as they have been negotiating for such development for a decade.

The CFA for equitable and reasonable use of the Nile River was officially opened for signature on the 14<sup>th</sup> of May 2010 at Entebbe Uganda. Four riparian states: Ethiopia, Rwanda, Tanzania and Uganda signed the agreement on this very first day. Kenya and Burundi have joined later. South Sudan and the Democratic Republic of Congo are expected to follow suit. Egypt and Sudan have continued to negotiate over the agreement, although neither has rejected the principles of the agreement. They propose that Article 14(b) should be amended as: "not to adversely affect the water security and current uses and rights of any other Nile Basin State" that is the demand of the consideration of previous agreements. However, to implement it majority agreement is sufficient and hence, after the signing of six states Ethiopia started her historical and African biggest Dam called GERD (Grand Ethiopian Renaissance Dam) in 2011.

As a result, Egypt has taken different measures including visiting different upstream states offering support in return for changing their claims toward the agreement. They have also exercised a diplomatic influence over potential donors and lenders including the World Bank and Western governments to counter the effects of the CFA (*Andualem, 2015*). This indicates their reluctance to give up their claims over the waters of the Nile which is not supported by either the fact on the ground or theoretical, legal and practical experiences of the World. The upstream countries sought this framework as a legal base for their struggle against poverty without seriously threatening the well-being of the lower riparian states. The ratification of CFA by Ethiopia, Rwanda and the remaining four riparian states assured its future existence. This in turn put cooperation as the best option to all riparian states. As a result, in 2015 Egypt, Ethiopia and Sudan agreement on declaration of principles on the Grand Ethiopian Renaissance Dam Project (GERDP) was done in Khartoum. Its very purpose is to cooperate the riparian states based on common understanding, mutual benefit, good faith, win-win, principles of international law, and

in understanding of upstream and downstream water needs in its various aspects(*Principle I of the Khartoum Declaration, 2015*).

### **3.3.The Khartoum Agreement on Declaration of Principles on the Grand Ethiopian Renaissance Dam Project (GERDP)**

Although the Malabo statement promised to usher in a new phase of cooperation between the three Eastern Nile countries over the GERD, technical deliberations continued to face challenges as a result of disagreements over the criteria of selecting the consultancy firm that would conduct the required studies. However, the 2012 International Panel of Experts (IPoE) come up with its own report by setting aside the legal and political issues that associated with the dam and the Egypt's and/or Sudan's share of water in its final report. Hence, on March 6, 2015 the Foreign Ministers of three Eastern Nile countries reached a preliminary agreement, which was signed two weeks later by the heads of three states in Khartoum (*Rawia, 2015*).

Principle I para 1 of the declaration requires the three states to cooperate based on common understanding, mutual benefit, good faith, win-win, principles of international law, and in understanding of upstream and downstream water needs in its various aspects (*Principle I of the Declaration, 2015*). As per this principle to realize the equitable and reasonable utilization on Nile waters, the three countries need to take into consideration of certain guiding factors; like dependency on the Nile water, the existing and potential uses of the water, the availability of alternatives or existing use. It is the known fact that Egypt totally depends on the Nile river. Therefore, in view of these factors, the treaty seems an instrument of securing and maintaining the water need of Egypt (*Bayeh, 2016*). This, in turn, keeps Ethiopia loyal to the water interest of Egypt thereby compromising its domestic interests.

Principle VI, a confidence building principle gives priority to downstream countries to purchase power generated from GERD.As it is clear from the argument of Ethiopian government, the dam is a meant to satisfy energy demand of neighboring countries and other countries with a special emphasis to the interest of downstream countries. It is rational to allow them to be beneficiary as far as they are competitor to other energy demanding countries (*Bayeh, 2016*). In a nutshell, the agreement fails to put the duties/parameters to be met by those downstream countries to enjoy the aforesaid privilege. This, in turn, would result in misunderstanding and dispute.

Concerning the principle of sovereignty and territorial integrity, the three countries shall cooperate on the basis of sovereign equality, territorial integrity, mutual benefit and good faith in order to attain optimal utilization and adequate protection of the River. And after signing the declaration in Khartoum, Abdel Fattah el-Sisi made a visit to Ethiopia, during which he agreed with the Ethiopian Prime Minister to elevate the current bilateral ministerial commission to the presidential level to enhance cooperation (*MFA of Egypt in 2015*). This means two leaders would meet annually to discuss the progress of cooperation and intervene to reduce the obstacles facing this progress. In his speech to the Ethiopian Parliament, el-Sisi stressed the importance of building trust between the two countries, and underlined Egyptian perceptions on the utilization of the Nile water, which appear to have changed very little despite changes in Nile politics over the last decade. He argued that, while the Nile is important to Ethiopia for producing hydropower

and achieving development, it is the source of sustaining life for Egypt given the lack of alternative water resources. In general, almost all substantive and procedural rules of the declaration are the direct copy of the 1997 UN International Watercourses Convention Principles with a very few modifications. The contents of the declaration and the 1993 bilateral agreement between Ethiopia and Egypt were also similar in many aspects.

#### **4. The Role of 1997s UN International Watercourses Convention (IWC)**

To determine whether the Convention really matters in Nile basin, it is important to examine its role in enhancing the future cooperation in the region. Actually, the Nile states could theoretically consider negotiating a regional agreement under the auspices of the Convention since the Convention provides for the negotiation and adoption of regional watercourse agreements (*Articles 3 & 4 of the Convention*). It also establishes a general obligation to “cooperate on the basis of sovereign equality, territorial integrity, mutual benefit and good faith in order to attain optimal utilization and adequate protection of international watercourses” (*Articles 8 of the Convention*). However, there are several barriers to use the Convention as a basis for a Nile agreement. As mentioned earlier, most significantly, the Convention lacks the support from all Nile states since its adoption. Only Kenya and Sudan voted to adopt the Convention in the U.N. General Assembly. And more importantly none of the Nile riparian countries currently signed or ratified the Convention till now (*Takele, 2008*).

Thus, given the non-party status of the Nile states and their divergent views with respect to the fundamental provisions of the Convention; particularly regarding the status of existing agreements and the relationships between the two principles (i.e. equitable and reasonable principle, and no significant harm principle) coupled with the Convention’s compromising and confusing languages thereto; the tripartite agreement of 2015 is taken as the important agreement among ideally conflicting states, since it calls all Nile riparian states to cooperative by taking into account their own interests.

### **5. Conclusion and Recommendations**

#### **5.1. Conclusion**

It is true that the principles and rules incorporated in the UN Watercourses Convention cannot, as they stand, conclusively resolve the problems enveloping the Nile basin. They are rather subject to the degree to which the Nile basin states embrace the principles contained in the Convention. Thus, the Convention’s impact and effectiveness do not necessarily hinge on its ratification by the Nile basin states. If the Nile basin states show readiness and genuinely make use of it as foundation and guideline for their negotiations, it could play its own role for cooperative spirit and thereby resolve the conflicts over the uses and management of the water of the Nile. This would be possible if they arrive at a compromise on national interests and security concerns, de-politicize the issues of the Nile and engage in dialogue in good faith with a view to addressing the water demands to the benefit of all the riparian states.

But the reality was, as a result of controversial nature of the Substantive Principles and Rules of the Convention; it is difficult to apply for the Nile River, the relationship between equitable and reasonable utilization principle and “no harm rule” are vague, and subject to different interpretations. Lack of organized Commission to solve the raising questions, the

notification procedures and the way the Convention deal with the status of existing agreements may also cumulatively affect the interest of upper riparian states, especially Ethiopia. Hence, NBI and the Cooperative Framework Agreement (CFA) are the historical step for all Nile riparian countries. The CFA paved the way to Ethiopia to benefit legally from the Nile water. Lastly, the writer concludes that Ethiopia would benefit from the regional or multilateral negotiation (NBI) than the 1997 Convention, because for the first time it brought the most conflicting three riparian states together in the round table.

## 5.2. Recommendations

The Nile Basin states need to work together to develop the Nile water resource to the benefit of all riparian states in a manner that does not jeopardize the potential use of the existing and future generations. However, this could not be achieved in a situation where some of the basin states benefits the river exclusively while the sister riparian states are being affected by poverty, drought and food shortage. Therefore, the Nile riparian states are required to set aside their differences and work together for cooperation in order to benefit from the river and transfer smooth environmental spirit to the coming generations of all States.

Therefore, based on the findings of this study, the writer recommends:

- ◆ To reconcile the Nile Riparian States together substantive principles of the 1997 UN Convention that incorporated in 2015 Khartoum Declaration as *jus cogens* is important.
- ◆ Since all the riparian states are developing countries, they all face challenges of rapid population growth, desertification and the like. Hence, NBI can bring them together to negotiate how to use and manage the flow of the Nile River in order to meet the existing uses and growing needs among riparian states. This will enable the riparian states to realize their relative advantages; i.e., Ethiopia to produce electricity, Sudan food security and Egypt provide the capital and the agricultural know how.
- ◆ NBI may better upsurge all riparian states' interest, because the repeated cooperation may create brotherhood thinking and may bring a win-win utilization of the river. It may create network of capable institutions long term vision; consistent economic rationale for project selection or water allocation; this may bring food security in the region by create peaceful environment.
- ◆ NBI is better, because it encourages the Basin states to Establishment a Permanent Joint Commission to guide and coordinate for further integration among riparian states. They should create Platform conferences to build confidence, trust and partnership to share common goals among states; that enhances cooperation in the management of the NB national resources using the comparative advantages within each riparian country. These will bring basin-wide benefits for all NB countries with relatively different, but integrative potentials.

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