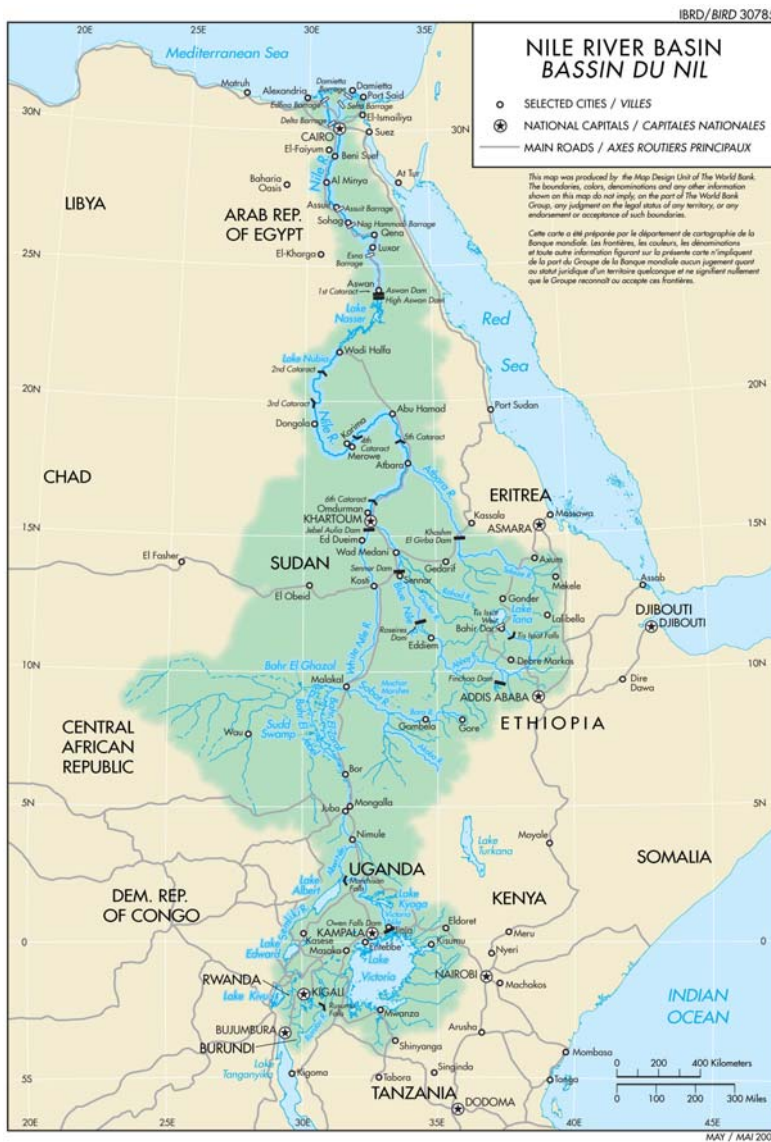


TURBULENCE IN THE NILE: TOWARD A CONSENSUAL AND SUSTAINABLE ALLOCATION OF THE NILE RIVER WATERS

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The Nile River is the lifeline for Egyptians. The very survival of Egyptians and the existence of both modern Egypt and the biblical Egypt of the Pharaohs are intractably tied to this critical and important resource. In fact, Egyptian political, economic, social and cultural life are so intertwined with the Nile that it is not an exaggeration to say that it would be difficult to envision a viable Egyptian civilization without the Nile.

Egyptians, of course, are not the only peoples whose civilizations have been influenced significantly and, to a great extent, shaped by the waters of the Nile. There are millions of other peoples who today owe their very existence to the Nile's waters. Besides Egyptians, other beneficiaries of the Nile are today found in Sudan, Ethiopia, Kenya, Uganda, Tanzania, Eritrea, Democratic Republic of Congo, Rwanda and Burundi. In today's Nile River Basin political economy, each of these 10 riparian countries lay some claim to the river's waters. Unfortunately, the legal scheme that governs the exploitation and allocation of the waters of the Nile River is a set of colonial-era agreements, which effectively reserved virtually all of the Nile's waters for Egypt and Sudan.

The Nile River Agreements have become increasingly contentious and upstream riparian states have denounced the agreements as irrelevant, anachronistic and a major constraint to their national interests. Many of them argue that they should not be bound by what are essentially colonial impositions. Of course, the main bone of contention is that Egypt wants to bind the upstream riparian states to agreements that were concluded without their full and effective participation and which did not take the interests of these upstream riparian states into account. These states are, therefore, demanding that the agreements be renegotiated or totally replaced with a more comprehensive, inclusive and relevant legal framework.¹ With significant increase in the demand for water among the Nile River Basin states—due not only to rapid population growth but also to expansion of economic activities and significant improvements in the ability of many of these states to utilize the waters of the Nile for productive activities—existing methods of exploitation and allocation of the Nile waters are leading to an escalation of tensions among the river's various stakeholders with the likelihood of open and widespread conflict. Unfortunately, there does not exist within the region a mutually accepted, beneficial and enforceable institutional framework that can provide the legal structure for the efficient, equitable, fair and sustainable management of the Nile.²

Understandably, it is not in Egypt's best interest to enter into agreements that might adversely impact its access to Nile waters. Thus, the country's leaders have been unwilling to revisit the Nile River Agreements or engage the upper riparian states in a more inclusive, participatory and competitive negotiation process to produce a legal arrangement that enhances the ability of all riparians to maximize their national interests. With its significantly superior military strength, Egypt seems to have taken the view that it can compel the Nile's other riparian states to abide with the anachronistic Nile Agreements.³ Having failed to persuade the Egyptians to enter into new and inclusive negotiations over the exploitation and utilization of the Nile waters, upstream riparian states have recently entered into new agreements or made declarations that purport to declare the existing agreements null and void as far as they are concerned.

¹ For example, in 2002 then Kenyan Energy Minister, Raila Odinga (and now the country's prime minister), denounced the Nile Waters Agreements (the 1929 Agreement and the 1959 Agreement) and called them "obsolete" and totally irrelevant to Kenya's development agenda. See John Kamau, "Can EA Win the Nile War?" *The Daily Nation* (Nairobi-Kenya), March 28, 2002.

² For example, see Valerie Knobelsdorf, "The Nile Waters Agreements: Imposition and Impacts of a Trans-boundary Legal System," 44 *Columbia Journal of Transnational Law*, (2006).

³ For a detailed account of the colonial origins of the Nile River Agreements, see "John Mukum Mbaku, "The Colonial Legacy and the Management of Water resources in Africa: The Nile River Basin," Working Paper, Weber State University.

Although the upper riparian states have yet to put forth concrete explicit proposals for the governance of the Nile River, what is clear is that these states envisage a new legal framework, one that is negotiated and agreed to through a democratic process—the critical issue for them is that all relevant stakeholders be provided the facilities to participate fully and effectively in the compacting of a new governance scheme for the Nile. While the colonially-imposed Nile River Agreements, which did not take into consideration the interests of most of the upper riparian states, are not sustainable and hence, must be set aside, it is equally important to caution that recent attempts to negotiate an agreement without the participation of Egypt are ill-advised and would only lead to increased conflict. Instead, we propose a coordinated multilateral approach, one that includes: first, all the Nile River Basin riparian states—national representation at any negotiations must include not just each country’s elites (i.e., political and economic leaders) but also the local communities whose livelihoods are dependent on and intertwined with the Nile—second, the developed industrial countries, which have a substantial economic presence in the Basin; and third, the multilateral organizations that support development efforts in this region. A sustainable governance scheme for the Nile must fully and effectively define the rights and obligations of the various stakeholders, making certain that those who partake in and benefit from the exploitation of the river’s varied forms of wealth also contribute fully to its upkeep—that is, the agreement must have a forward-looking mitigation program to make certain that the river’s sustainability is assured.⁴

Nile River Water Agreements

Even before the enactment of the current Nile River Water Agreements, there were a number of protocols that sought to govern the utilization of the Nile waters either directly or indirectly. The earlier agreements were primarily between the colonial powers that had laid claim to different African territories. Some of the more relevant agreements include: *the 1891 Anglo-Italian Agreement* signed between Britain (which was representing Egypt and Sudan) and Italy (which was representing Eritrea), in which Italy committed not to “construct on the Atbara, in view of irrigation, any work which might sensibly modify its flow into the Nile;”⁵ *the 1902 Anglo-Ethiopian Agreement*, signed between Britain and Ethiopia to settle the boundary between Ethiopia and Sudan, which stipulated that Ethiopia should not undertake any activities on the Blue Nile and its tributaries that would interfere with the flow of water to the Nile and hence, negatively affect Britain’s cotton-growing interests in Egypt;⁶ *the 1906 Tripartite Treaty between France, Britain and Italy*, which specifically dealt with the allocation of water in the Ethiopian sub-basin; and *the 1925 Anglo-Italian Agreement* signed in Rome and purported to provide a structure for the effective allocation of the waters of the Nile with Italy agreeing not to construct any structures on the various rivers that fed into the Nile—a process which Britain feared could severely constrain the flow of water into the Nile and, hence, negatively impact its agricultural interests in Egypt.⁷

As far as the regulation of the waters of the Nile today is concerned, the most important agreements are the *1929 Anglo-Egyptian Agreement* and the *1959 Agreement between Egypt and Sudan*, often referred to as the Nile River Waters Agreements. These two protocols together form the basis of the legal framework currently in place to regulate any activities related to the exploitation and allocation of the waters of the Nile River.

The 1929 agreement was signed between Egypt and Britain (which was representing Sudan and its other colonies in East Africa). Despite the fact that Britain was representing the interests of

⁴ For a comprehensive discussion on proposals for a new framework, see Mwangi S. Kimenyi and John Mukum Mbaku, “Toward a Consensual and Sustainable Allocation of the Nile River Waters,” Draft Working Paper, August 2010.

⁵ Art. III. *Treaties Relative to the Frontiers Between Sudan, Ethiopia, and Eritrea, May 15, 1902, Eth.-Gr.Brit.-Italy.*

⁶ Art. III, *ibid.*

⁷ *Exchange of Notes Between the United Kingdom and Italy Respecting Concessions for a Barrage at Lake Tsana and a Railway Across Abyssinia from Eritrea to Italian Somaliland, December 14 and 20, 1925, No. 1 & No. 2, League of Nations Treaty Series, No. 1211.*

Sudan, the final agreement granted Egypt virtually unlimited control over the Nile—Egypt claimed the entire timely flow of the river—and actually limited the ability of Sudan to access the waters of the Nile. Specifically, the agreement (1) gave Egypt the right to monitor Nile-related activities by upstream riparian states to make certain that they did not negatively affect availability of water to Egypt’s agricultural projects, and (2) allowed Egypt to veto any construction projects by other riparians considered harmful to Egypt’s interests on the Nile.⁸ The agreement purported to bound upstream riparians even though they were neither signatories nor participants in its development.⁹ After estimating the Nile’s average production of water to be roughly 84 billion cubic meters per year, the 1929 agreement allocated 48 billion cubic meters per year to Egypt; 4 billion cubic meters per year to Sudan; and the remaining 32 billion cubic meters for possible allocation between the upstream riparian states.¹⁰

What is quite instructive about the 1929 agreement is the fact that Britain, which was representing Sudan, assured Egyptian authorities that no matter its concern for the interests of the Sudanese, His Majesty’s Government would not engage in any activities that would interfere with Egypt’s “historic rights” to the waters of the Nile. The agreement specifically required “Egyptian oversight and approval of any irrigation, power or other water diversion project along the Nile.”

While the 1929 agreement has been quite influential in the management of the Nile River Basin, today’s governance of the Nile River Basin was set by the 1959 agreement between Sudan and Egypt. The 1959 agreement was signed on November 8, 1959 by Egypt and Sudan and reflected an approach to the allocation of the waters of the Nile that favored Egyptian interests.¹¹ Like the 1929 agreement, the 1959 agreement purported to bound upstream riparian states despite the fact that these states were neither signatories nor participants in the compacting of the agreement. As in 1929, Egypt was assigned the bulk of the Nile waters—Egypt increased its allotment to 55.5 billion cubic meters per year, while Sudan’s share was raised to 18.5 billion cubic meters per year. That allocation left only 10 billion cubic meters unallocated, primarily to account for seepage and evaporation.¹²

The 1959 agreement, of course, did not specifically mention the upstream riparian states. However, it allocated virtually all of the Nile’s water to the two signatory states, effectively abrogating the rights of upstream riparians. To further strengthen their ability to control the Nile River, the two signatory states agreed to act with one voice in facing any challenges posed by other riparians to the allocation of the waters of the Nile. Also important was the fact that the 1959 agreement also formed a Joint Technical Commission (to be staffed by an equal number of people from the two countries), which according to Art. 5(1), was expected to make sure that if any upstream riparian state wanted to construct any structures on the Nile River, it had to obtain

⁸ *Exchange of Notes between His Majesty’s Government in the United Kingdom and the Egyptian Government in Regard to the Use of the Waters of the River Nile for Irrigation Purposes (May 7, 1929)*, *League of Nations Treaty Series*, No. 2103, at 46.

⁹ See Christina Carroll, “Past and Future Legal Framework of the Nile River Basin,” 12 *Georgetown International Environmental Law Review*, 269, 278 (1999); and Knobelsdorf (2006), p. 628.

¹⁰ Art. 1(1)-(2) of *United Arab Republic and Sudan Agreement (With Annexes) for the Full Utilization of the Nile Waters, Signed at Cairo, on November 8, 1959*, 6519 *U.N.T.S.* 63 (“The 1959 Agreement”); in force December 12, 1959, specifically the 1929 Nile Waters Agreement assigned Egypt “48 Billiards [billions] of cubic meters per year as measured at Aswan” and Sudan “4 Billiards of cubic meters per year as measured at Aswan.”

¹¹ First, Sudan received an increase in its allotment of water from the Nile (that is, an increase from the 1929 allotment). Second, Egypt agreed to allow Sudan to construct the Roseires Dam on the Blue Nile and “any other works which the Republic of the Sudan considers essential for the utilization of its share.” Art. 2(2). Third, Egypt agreed to pay Sudan 15 million Egyptian Pounds “as full compensation for the damage resulting to the Sudanese existing properties as a result of the storage in the Sudd el Aali Reservoir up to a reduced level of 182 meters.” Art. 2(6).

¹² The 1959 Agreement, Art. 1 (1).

the permission of the two countries, as well as subject the project to mandatory oversight and supervision by the Commission.¹³

Upstream Riparian States: The Nile is Ours Too

Today, virtually all of the upstream riparian states express their disapproval of the Nile River Waters Agreements and demand that new, alternative and more accommodating strategies for the management of the Nile River waters should be developed and adopted. Quite a few countries want the existing agreements scrapped and new, more inclusive and democratic schemes created.¹⁴ The position taken by the upstream riparian states is largely in line with views expressed by Julius Nyerere who became the prime minister of an independent Tanganyika in December 1961.¹⁵ That year, Nyerere articulated what came to be known as the *Nyerere Doctrine* of Treaty Succession.¹⁶ Nyerere basically argued that the new country (i.e., Tanganyika) would not agree to be bound by agreements inherited from the colonial regime “unless required by international law.”¹⁷ With respect to the Nile River Waters Agreements, followers of the Nyerere Doctrine have argued that these agreements force the upstream riparian states to subject their development plans to the scrutiny and supervision of Egypt and that such an approach to development is not compatible with their status as sovereign States.¹⁸ This, essentially, is the argument being advanced by the eight upstream riparian states, all of whom did not participate in the creation of the 1929 and 1959 agreements.

For example, in December 2003, the parliament of Kenya declared that Kenya, which had not been a party to the 1929 agreements and had not been consulted before the protocol was enacted, would not consider the agreements legally binding. Kenya’s legislators felt that it was time to repudiate what they believed was a colonial-era imposition that continues to significantly constrain the government of Kenya’s ability to use the country’s natural resources, including its water resources, effectively to deal with domestic poverty and improve the living conditions of its citizens.¹⁹ Likewise, other riparian states have, through their national leaders, indicated that they are not bound by the 1929 and 1959 agreements since they were neither consulted nor provided the opportunities to participate in their compacting. On various occasions, these upstream riparian states have stated that they do not accept the fact that their rights to the waters of the Nile River were unilaterally abrogated and transferred to Egypt during the colonial period. Hence, in their various declarations,²⁰ these riparian states have sought to reserve the right to claim the waters of the Nile River in the future for development.²¹ In principle, the states are taking the position that it is important for them not to surrender their rights to the Nile by acquiescence to agreements that are essentially colonial impositions.

The case of Ethiopia is quite unique in that despite the fact that it was a sovereign state when the various agreements were negotiated, and is also the one upstream riparian responsible for

¹³ The 1959 Agreement, Art. 5(1).

¹⁴ As noted previously, Kenyan officials have, denounced the Nile Waters Agreements as invalid and called for their dismantling. Ethiopian officials have also either repudiated the agreements or called for the upstream riparians to ignore them and consider them invalid and not binding on them. See Daniel Kendie, “Egypt and the Hyrdo-Politics of the Blue Nile River” 6 *Northeast African Studies*, 141 (1999), 147-149.

¹⁵ Tanganyika merged with the islands of Zanzibar in 1964 to form the United Republic of Tanzania.

¹⁶ See Kenneth Kiplagat, “Legal Status of Integration Treaties and the Enforcement of Treaty Obligations: A Look at the COMESA Process”, 23 *Denver Journal of International Law and Policy*, 259, 263-64 (1995).

¹⁷ Knobelsdorf (2006), p 631. Also see Gebre Tsadik Degefu, *The Nile: Historical, Legal and Developmental Perspectives*, (New York: Trafford Publishers, 2003).

¹⁸ Knobelsdorf (2006), p 631.

¹⁹ See *Daily Nation* (Nairobi), December 11, 2003.

²⁰ Ethiopia and Kenya, for example, have indicated that they intend to ignore the agreements and proceed with their development plans. See Kendie (1999) 147-148 and Kamau (2002).

²¹ See for example Greg Shapland (1997), *Rivers of Discord: international Water Disputes in the Middle East*, (New York: St. Martin’s Press, 1997), 754-75.

supplying the Nile River with most of its water—rivers which originate in the Ethiopian highlands contribute as much as 86 percent of water to the Nile—Ethiopia was neither consulted nor invited to participate in the negotiations leading to the compacting of either the 1929 or 1959 agreements. Thus, Ethiopia has also made declarations repudiating the Nile River Waters Agreements, arguing that it was never a party to any of them, nor was it consulted before any of the protocols were enacted. More important is Ethiopia's argument that since it was never subject to long-term colonization, unlike the other riparian states, no colonial government ever negotiated a treaty on its behalf. Thus, as a sovereign country, which neither participated nor was consulted during the compacting of these agreements, none of the treaties is binding on it.²² Ethiopia's position is that a country should not be forced to adhere to an agreement that is outdated and no longer serves the domestic public interest, especially if that agreement was designed without the participation of the society that it now purports to govern.²³ Like most of the other riparians, Ethiopians believe that an appropriate legal framework for the Nile River Basin must be one that reflects the interests of relevant stakeholders, as well as provides the wherewithal for the people to deal effectively with ever evolving realities (e.g., global warming, droughts, rapid population growth, industrialization, migration and other shifts in population, and globalization) on the ground as the rules are implemented.

Toward Consensus: Averting War and Environmental Disaster

The effective, equitable and sustainable management of the waters of the Nile is very important, not only for the reduction of violent conflict in the region, but also for poverty alleviation and economic development. The current framework is clearly not sustainable and a new legal arrangement is urgently called for.²⁴ Failure to act is likely to be costly in the near future as widespread war is a real possibility. It is important to keep in mind that Egypt has, indeed, on many occasions demanded that Ethiopia not build any structures on the Blue Nile or on Lake Tana that might interfere with the flow of water into the Nile. In fact, Egypt has gone to war with Ethiopia in an attempt to stop the latter from building structures on the Blue Nile that would negatively affect the flow of water into the Nile. Beyond conflict, uncoordinated "scramble" in the use of the Nile waters is likely to evolve into an environmental disaster of monumental proportion and with consequences beyond the Nile Basin itself. The common pool problems associated with ill-defined or poorly-specified water-use rights are likely to emerge unless a consensual framework is put in place.

It is therefore crucial that a new consensual framework on the utilization and management of the Nile waters be negotiated. The starting point to reaching such an agreement is to take the

²² See Carroll (1999), p 279.

²³ Of course, it is important to note that except for a brief period (1936-1941) during which Italy occupied Ethiopia, the country was never a colony and was never a participant, either directly or indirectly, in the Nile River Waters Agreements—the 1929 and 1959 agreements. However, Ethiopia did sign an agreement with Britain in 1902 (1902 Anglo-Ethiopian Agreement). Nevertheless, shortly after Ethiopian leader, Emperor Haile Selassie, was returned to power after the Italians were ousted in 1941, he repudiated the 1902 treaty in retaliation for British support of Italy during the latter's occupation of Ethiopia from 1936 to 1941.

²⁴ In 1999, the Nile River Basin Initiative (NRBI) was formally launched by the Ministers of Water of the 10 riparian States. The riparian states expect the NRBI to provide the structure for more effective harnessing of the resources of the Nile River Basin for effective and sustainable socio-economic development in the region. The NBI, however, does not represent a legal framework for the equitable and reasonable allocation of the waters of the Nile River. The relevant legal framework for water allocation in the Nile River Basin remains the Nile River Waters Agreements (the 1929 Anglo-Egyptian Agreement and the 1959 agreement between Egypt and Sudan). The NRBI provides a framework for the relevant riparian states to cooperate in the management of the Nile River Basin resources and eventually develop and adopt an effective legal framework for the equitable and sustainable allocation of the Nile waters.

demands by the upstream riparian states for new agreements to govern the Nile River waters seriously. Egypt and the international community must accept the fact that the Nile's upstream riparian states have the right to use the Nile for their development needs—what they appear to be demanding is that they be allowed to participate fully and effectively in the design of a legal framework for the Nile River within which they can realize their individual development goals. While those demands are well grounded, it is equally important to recognize that any agreements that fail to take into account the interests of Egypt would not be acceptable nor would they be sustainable.

To arrive at an all-inclusive framework that ensures equity and the sustainability of the Nile, we propose the following:

- (a) The development of a new framework must acknowledge the fact that the current one is neither equitable nor sustainable.
- (b) The process of creating a new legal framework must be participatory and inclusive—such a process must provide all the relevant stakeholders the facilities to participate fully and effectively in the development of the new governance structure. In addition to the fact that all 10 riparian states should take part in the negotiations, the various communities that now inhabit the Nile Basin should be fully engaged in the process also. Agreements entered into by the upstream riparian states that have excluded Egypt and Sudan should be shelved. Egypt and Sudan must in turn agree to be part of a process to undo the colonial-era agreements that failed to consult the upstream states and explicitly neglected the latter's interests.
- (c) An international summit on the Nile should be organized as soon as possible. The purpose of such a summit would be to put together a set of principles that will govern negotiations between all the Nile Basin's relevant stakeholders to develop an effective legal framework. While leadership from the United Nations and the African Union would be critical in bringing about this initial summit, it is important to note that the job of effectively resolving Nile Basin governance issues remains that of the river's relevant stakeholders—primarily the 10 riparian nations and the various communities that inhabit the Nile. However, given the resource constraints which the various Nile Basin countries currently face, it is critical that multilateral organizations such as the United Nations and the African Union; international development organizations that are interested in promoting economic and social development in the region; and the developed industrial countries, virtually all of whom stand to benefit significantly not only from the region's environmental resources, but also from its emerging markets, support the effort to develop a comprehensive legal scheme to govern exploitation and development of the Nile's resources for the benefit of its various communities. This initial forum should include experts in water management, climate change, social and economic development, as well as other experts who can provide critical insight into the optimal utilization of the waters of the Nile and perhaps more importantly warn of the dangers of uncoordinated exploitation and allocation.
- (d) Regardless of what the final legal framework for the governance of the Nile is, if such a structure does not enhance the ability of local communities along the river to maximize their values, it would fail to minimize conflict and promote sustainable development. Thus, it is critical that the final agreement reflect the desires, interests, values and expectations of the various communities that inhabit the Nile Basin. The only way to make certain that these stakeholders' values are reflected in the final agreement is to provide them with the facilities to participate fully and effectively in the process of putting together any future Nile River compact.
- (e) In the final analysis, lasting solutions to the competing demands on the scarce waters of the Nile will come from innovations in science and technology. Hence, it is critical that all Nile River Basin States should invest in the development of technologies that enhance efficient utilization of water for household consumption, recreation, agriculture, industrial development, and other national needs.

The Nile River is an important resource that has the potential to contribute positively to economic development of Africa. However, it can also be a source of widespread and costly conflict amongst the various riparian states. Now is an opportune time for various countries and international organizations to participate in designing a consensual legal framework for the utilization of the Nile waters.