



**THE IMPACT OF LACK OF AN ACCEPTABLE BASIN WIDE AGREEMENT
ON HOW TO SHARE THE NILE WATERS.**

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AUGUST 2018.

DECLARATION

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DEDICATION

I dedicate this book to the two most important people in my life: my parents, Peter Njathi Ruaro and Mercy Njeri Njathi for the extraordinary gift of love and life you have given me.

I also dedicate it to the 257 million Nile riparians. May this dissertation inspire the need for peaceful coexistence.

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ABBREVIATIONS AND ACRONYMS

ADB	Africa Development Bank
AH	Appreciable Harm
BCM	Billion Cubic Meters
CFA	Cooperative Framework Agreement
EA	Equitable Allocation
EU	Equitable Utilization
IBRD	International Bank for Reconstruction and Development
ICJ	International Court of Justice
IFI	International Financial Institution
ILA	International Law Association
ILC	International Law Commission
IMF	International Monetary Fund
IWRM	Integrated Water Resource Management
MW	Megawatts
NBI	Nile Basin Initiative
NBTF	Nile Basin Trust Fund
Nile-COM	Nile Council of Ministers
NRBAP	Nile River Basin Action Plan

OD Operational Directive

SAP Subsidiary Action Programs

SVP Shared Vision Program

TECCONILE The Technical Co- operation Committee for the Promotion of the
Development and Environmental Protection of the Nile Basin

UN United Nations

UNDP United Nations Development Program

WB World Bank

NWA Nile Waters Agreement

NBCFA Nile Basin Cooperative Framework Agreement

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ABSTRACT

Scarcity of freshwater in certain regions of the world has led to international conflict based upon competition for shared water. An example of such international cooperation over shared water is the Indus Waters Treaty, signed in 1960 by India and Pakistan. This is an international water treaty signed by two enemy states which has lasted through two Indo-Pakistani wars to the nuclear era, in 1998, in the Indian Subcontinent. The World Bank intervention was critical to the creation of the Treaty. Cooperation among co-riparians is important because war does not lead to long term national water security. If the governments in question are willing to explore ways to cooperate, then cooperation will be more likely.

The Nile basin is one of the hotspots where violent conflict could erupt over the shared water resources because of the various hydro political intricacies involved and lack of an acceptable all-inclusive Agreement on how the Nile Waters should be shared.¹ Kenya would be affected if the tension between Egypt and Ethiopia escalates over Addis Ababa's move to build the giant Renaissance Dam on River Nile. Egypt in the past has threatened to go to war over its "rights" to River Nile waters, given by a discredited 1929 colonial treaty that gave it and Sudan 90 per cent of the river's water. Life in Egypt depends on the Nile. The move to build the dam has increased tension between the Nile Basin Countries. Egypt's main concern is that the dam will diminish its share of the water from the river. The 1959 Treaty is the first Treaty to be concluded in post-colonial period and the only Nile Treaty that apportions annual water quotas. According to the 1959 Apportionment Treaty Egypt's annual share of the Nile waters is 55.5 billion cubic meters (BCM) while Sudan's is 18.5 BCM. Since the treaty was concluded between only two riparian states, the upstream states have persistently argued that they are not bound by its provisions, by virtue of the principle *pacta tertiis nec nocent nec prosunt* (a treaty binds the parties and only the parties; it does not create obligations for a third state).

The major factors creating the potential for an extreme conflict in the basin include; mounting demands for more water, an alarming population growth rate, the absence of

comprehensive legal and institutional frameworks, and relations among the riparian states that are marred with suspicion and misunderstanding. The Basin states have not been able to devise any solution in regard to the Nile issue. It is important to devise a way on the utilization and management of Nile water for the benefit of all riparian States. Lack of a basin-wide agreement complicates the whole issue and thus the need for all riparian States to adopt an acceptable agreement. None of the agreements over the Nile River involves more than three states. The accords constitute one of the hurdles towards regional cooperation.

This research reviews the main agreements which have decided control over the Nile and the implications of such agreements in the path towards regional peace. This research aims at encouraging the need for a basin-wide agreement to resolve any potential conflict to the issue of the Nile. The research limits itself to the legal aspects of the questions of the Nile and proposes appropriate approaches to a basin-wide agreement. The research does not examine all the conflicts enveloping the Nile basin.

CHAPTER ONE

1.0 Introduction:

In matters concerning basic life water is very important as compared to food and certainly more important than oil. Professor Michael Klare, a political scientist and author contends that water bears many similarities to oil, since it's limited in quantity and it's high in demand.²

Riparian is the term used to describe an individual, institution or nation that has ownership or sovereignty over territory along, or across a river. Riparian's have access to the river flow. In circumstances where there is no effective regulation riparian States may withdraw water and release waste water with negative impacts on other riparians.

The Nile River is ranked the longest globally and one of only three river basins that encompass eleven or more territorial boundaries.³ These eleven Nile Basin riparian⁴⁵ States are: Egypt, Sudan, Ethiopia, Eritrea, Uganda, Kenya, Tanzania, Burundi, Rwanda, Democratic Republic of Congo (DRC) and South Sudan. Its significance is that it brings water from a relatively water rich region – the Horn of Africa across a desert to Egypt which has utilized the Nile floods for five or more millennia. Whereas, the eight upper riparian provide the substantial amount of the water, the amount of the water they utilize

²Klare, M.T. (2001). Resource wars: the new landscape of global conflict. New York: Metropolitan Books: Henry Holt and Company, LLC. P. 142.

²Said, Rushdi (1993). The River Nile – geology, hydrology and utilization Pergamon Press, Oxford p. 29.

² Riparian is the term used to describe an individual, institution or nation that has ownership or sovereignty over territory along, or across a river. Riparian's have access to the river flow. In circumstances where there is no effective regulation riparians may withdraw water and release waste water with negative impacts on other riparians.

² Block P., and Rajagopalan (1999), Statistical- dynamical approach for stream flow modeling at Malakal, Sudan, on the White Nile River. Journal of Hydrologic Engineering, 14(2), 185-196.

²Klare, M.T. (2001). Resource wars: the new landscape of global conflict. New York: Metropolitan Books: Henry Holt and Company, LLC. P. 148.

is insignificant compared to their counterparts. The White Nile's flow is regulated by the Sudd Swamp found in South Sudan.⁶

Egypt is the basin hegemony, and acts as the first among equals.⁷ The Basin has been characterized by constant conflict, resulting from the agreements signed in 1929 and 1959 that concessioned all the waters of the Nile flow to only Egypt and Sudan.⁸ The formation of the Nile Basin Initiative (NBI) in 1999 represented a progressive step in the process of transboundary water cooperation involving all ten riparian States. This complex and evolving process of negotiations has achieved mixed success. The Nile Basin Initiative has evolved at a pace determined by Egypt. However, recent activities by Chinese agencies are transforming the situation. The global force against building of dams was in the early 2000s at the time when China expanded investments in dam construction globally hence revolutionizing the international climate for large scale development projects. The international community's big concern is that China showed very little concern to social and environmental impacts of the specific projects. The European Investment Bank president suggested this when he stated that, "Chinese banks don't bother about social or human rights conditions"⁹ As of 2009, about half of the worldwide dams were situated inside the Chinese outskirt, and China was included "approximately 220 dams in 50 nations". A previous senior government official from Ethiopia emphasized that working with Chinese was more ideal than working with IFIs in light of the fact that the Chinese don't intrude in local undertakings. The advancement of Chinese support in large scale development worldwide has constrained WB to turn around its past alert and has started to embrace dams once more.

⁷ Al-atawy, M. H., (1996). "Nilopolitics: A Hydrological Regime 1870-1990", American University in Cairo Press, History.P. 62.

⁷ Bosshard, P. "China Dams the World." World Policy Journal 26 (4): 2010, 51

⁷ Bosshard, P. "China Dams the World." World Policy Journal 26 (4): 2010 47

⁷ Professor J. Addis Ababa University. Ethiopia, July 2014.

⁷ Hintjens, H. and S. pavan (2011)Africa: Illusions of Peace, Illusions of War, Development and Change, Vol 42, Issue 3, p. 859 871.

⁷ Bosshard, P. "China Dams the World." World Policy Journal 26 (4): 2010, 51

The World Bank has approved around 4\$ billion in help of generally medium sized hydropower ventures since 2003.¹³ The significance of Ethiopia as the main source of most of the water that reaches northern Sudan and Egypt and the uncertainties regarding future rainfall regime in Ethiopia are of strategic significance to all three Eastern Nile riparians Ethiopia, Sudan and Egypt. All riparians big water challenges as a result of their growing population. Every single individual added to this population requires about 1000m³ of water per year to cater for their overall needs with food taking a significant chunk of up to 90% of this volume.¹⁴ As a consequence of rising population, all the economies within the basin have identified ways of meeting the high demand of water resources for the increasing consumers. The quality of water in Egypt is being affected by its own population's increased water utilization mainly in irrigation. Over time Egypt and Sudan have developed a sense of entitlement over the Nile water based on the narrative that their economies developed largely as due to use of the Nile before all the other riparian. Egypt's influence has been used over the last 50 years to establish its downstream preference for the principle of "prior use" rights. So far none of the upstream states has been able to utilize the Nile waters in a scale likely to threaten Egypt's water security. But the situation is changing at an alarming rate and the next three decades will see significant dam and reservoir construction upstream. Some of these structures will increase the consumptive use of Nile water flows thus raising tensions. Egypt and Sudan asserted their assumed domination and entitlement to the Nile River in the 1959 Nile Waters Agreement which reserved 75% of the flow to Egypt and the remainder of 25% to Sudan.¹⁵

¹⁴ Ali Zaidi, For Egypt, its Life and Death, E. AFRICAN (Kenya), May 3, 2010, <http://www.theeastafrican.co.ke/news/For%20Egypt%20its%20life%20and%20death/-/2558/910506/-/12qm5wz/-/index.html>*Egypt's Choice: From the Nile Basin... (PDF Download Available)*. Available from: https://www.researchgate.net/publication/267926459_Egypt%27s_Choice_From_the_Nile_Basin_Treaty_to_the_Cooperative_Framework_Agreement_an_International_Legal_Analysis [accessed Apr 16 2018].

¹⁴ Krishna, R., (1998) The Legal Regime of the Nile River Basin. In: J. Starr and D. Stolls, Eds. The politics of scarcity: water in the Middle East, p. 23-41.

When the British took over the East African protectorate which covered most of the Nile riparian states except Ethiopia, they were just as protective of the rights of downstream Egypt and the Sudan to the freshwater flows of the Nile. During this period, the British Colonialists established a practice that enabled Egyptian Engineers to freely monitor the flow and activities taking place in the upstream states and especially in the Sudan and Lake Victoria regions.

The upstream riparian have on their part advocated for the adoption of the principle of water sovereignty, which they aver would promote reasonable access to all riparian and towards this goal attempts have been made to present the idea of fair usage as a principle of international customary water law.¹⁶

The competition over the management and use of water in the Nile basin has been influenced by a number of factors. Among the primary considerations that have influenced the legal regimes over the Nile basin includes the interests of the British over the colonial era and the water security policy brought about by Egypt. British interests dictated the terms of utilization of the Nile waters during the colonial era. This created an idiosyncratic relationship with Egypt which manifested in the arrangements made by them concerning the Nile River.¹⁷ The British keen interest in controlling the Nile was motivated by the need to accumulate sufficient water needed for cotton plantation irrigation in area with the potential to generate raw materials for its Europe based industries. This brought about water utilization patterns that favored Egypt at the expense of other riparian states interests.¹⁸ The United Kingdom frustrated any development

¹⁶ Swain, A. (1997) Ethiopia, the Sudan and Egypt: the Nile River Dispute. *Journal of Modern African Studies* p 35.

¹⁶ Charles Bourne, (1997) "The Right to Utilize The Waters of International Rivers", in Patricia Wouters, *International Water Law: Selected Writings of Professor Charles B. Bourne*, p. 65.

¹⁶ John Markakis (1998), *Resource Conflict in the Horn of Africa*, Uppsala University, p 33.

¹⁶ Charles Okidi, (1990) "A Review of Treaties on Conceptive Utilisation of Waters of Lake Victoria and Nile Drainage basins". P 324

¹⁶ Charles Bourne, (1997) "The Right to Utilize the Waters of International Rivers" *International Water Law* p. 64.

¹⁶ *ibid* p. 65.

works in the upper riparian to guarantee decrease of water stream to Egypt caused by advancement works in the upper riparian settlements. This trend continued in subsequent agreements whereby Egypt continues to be given preference over the other riparian. For instance the 1902 agreement signed between Great Britain and Egypt expressly restricted Ethiopia from undertaking any construction along the River which could hamper the river's flow to Egypt.¹⁹ Similarly the 1929 Nile Water agreement between Egypt and Sudan represented by its colonial masters the Great Britain sought to obtain guarantees from the Sudan that it shall not undertake any construction works in its territory that could jeopardize the quality and quantity of water reaching Egypt without prior consent of Egypt.²⁰ The Colonial British government's dominance over the basin States gave rise to an unconventional relationship between it and Egypt which is reflected in the Agreements made by them over the Nile water.²¹

Another factor that has been attributed to having contributed to the crafting of the legal regimes for the management of the Nile waters was Egypt's apprehension of its water security hence advocated for water security policy. Egypt's apprehension and obsession over the Nile arose out of its near exclusive reliance on the Nile for its water needs. As such Egypt considers the water of the Nile, an issue of national security. Before the ouster of President Morsi he categorically stated that if their share of Nile water decreases then their blood would be the alternative. The remarks underscored Egypt's resolve not to compromise in matters water security. Similar remarks had been made earlier by Anwar Sadat during the Camp David Accord with Israel whereby he was emphatic that the only

²¹ Sandra Postel, (1993) *The Politics of Water*, Oxford University Press p. 7.

²¹ YacobArsano, (1996) "Sharing Water Resources for Economic Cooperation in the Horn of Africa", in *Trading*

Places: Alternative Models of Economic Cooperation in the Horn of Africa, p. 41.

²¹ Girma Amare, (2000) "Nile Waters – Hydrological Cooperation Vs. Hydro-politics", Paper Presented at the Eighth

Nile 2000 Conference, Addis Ababa, p. 2.

²¹ Mitchell, Christopher and Michael Banks (1996) *Handbook of Conflict Resolution: The Analytical Problem-Solving*

Approach. Pinter: London. P. vii.

issue that could take Egypt back to war was water.²² From the two leader's pronouncements, the Nile waters occupy the heart and soul for the Egyptians. Any utilization of the water by the riparian is frowned upon by the Egyptians and viewed as a threat to its national security as well as its general existence. ²³ The Aswan High Dam in Egypt was constructed strategically and deliberately to address Egypt's security concerns. It was aimed at creating a reservoir within Egypt's territory to cushion itself against future River Nile hydro politics.²⁴ The iron fist approach adopted by Egypt may not be helpful in the quest for a basin wide cooperative framework agreement. An all-inclusive treaty can only be reached through an neutral party mediation e.g. World Bank but the intervention of other donors like the Chinese complicates the issue. As Mitchell and Banks suggests, conflict analysis should be the first step in conflict resolution between Egypt and Ethiopia.²⁵

²² Each country has specific needs for water that should be agreed on so as not to fall below the level of water requirements within the conventions since it would hinder development and affect the national security of a particular State.

²² Salman, S., (2011b) Grand Ethiopian Renaissance Dam: Challenges and opportunities. CIP Report p. 10(4), 21-23,

1.1 STATEMENT OF THE RESEARCH PROBLEM

Water security²⁶ is an issue that is gaining a lot of significance. International transboundary relations over water are very controversial. The relations over transboundary waters in the Nile Basin are shaped by a dominant riparian, which in this case is Egypt. The existing Nile basin agreements and institutions seem to support the downstream favored approach of prior use. Prior use approach lays emphasis on water integrity, an approach that protects the interests of downstream riparian. This approach has caused unease and agitation among the upstream riparian who favor water sovereignty principle. To strike a compromise, attempts have been made to reach a balance through the international customary water principle of equitable utilization. Whereas no upstream State has utilized a noteworthy volume of Nile freshwaters that would weaken Egypt's significance of its water asset security, in the past decade the presence of Chinese public and private companies with hydraulic engineering and irrigation development capacities has significantly changed the Basin dynamics. The situation is changing rapidly and the next two decades will see a significant dam and reservoir construction by upstream countries like Ethiopia²⁷. Some of these structures will increase the consumptive use of Nile water flows and thus increase in conflict between downstream riparian States and upstream States. There is concern in Egypt over Ethiopia's diversion of the Blue Nile River in May, 2013 over how the dam would affect water volume. The mega project has placed the two countries at loggerheads after Ethiopia signified its intentions to divert the Blue Nile River for to construct the 6000 MW Grand Renaissance Dam. There is growing concern over how the dam could impact downstream water levels.

²⁶ Henrike Peichert, *The Nile Basin Initiative: A Catalyst for Cooperation*, in *Security and Environment in the Mediterranean; Conceptualizing Security and Environmental Conflicts* (Hans Gunter Brauch 3rd edn. 2003). P. 763.

²⁶ Ashok Swain, (2004) *Managing water Conflict*, Asia, Africa and the Middle East p. 93.

²⁶ Jutta Brunne (2002) *Changing Nile Basin Regime: Does Law Matter?* (43rd Harvard International law journal p. 105.

The exponential population growth being witnessed in the Nile basin states will definitely result in increased demand for water resources putting massive pressure on the Nile river with the likelihood of a conflict among the riparian states unless an agreeable management and utilization regime is arrived at.²⁸ It is projected that by 2025 nearly all the Nile basin states will experience water scarcity.²⁹

The dissertation will lay out on the need of an agreement across the basin to resolve the Nile Basin dispute since the Nile Basin Cooperative Framework Agreement seems not to have achieved any significant legal or political effect.³⁰ Delegates from upper riparian countries supported equal and reasonable use whereas the lower riparian nations supported water security. There is an urgent need to formulate an agreeable framework for the management of the Nile River which is beneficial to all the riparian states.

1.2 RESEARCH OBJECTIVES

The dissertation will seek to analyze the impact of lack of an acceptable Nile Basin Wide Agreement. It's been over five decades since the last agreement concerning the Nile River was signed between Egypt and Sudan in 1959.

To this end it aims at the following specific objects;

- (a) To trace the history of Nile Basin treaties and agreements among the riparian states and their impact on regional stability.
- (b) To evaluate the inadequacies or otherwise existing in all the agreements and treaties that seem to support only the downstream states to the detriment of the upstream riparian.

²⁸ Davin O'Regan, (2004) the Nile River: Building or Stumbling Block? P.22.

²⁸ Mason, S. A. (2005) Are we Scorpions? The role of upstream – downstream dialogue in fostering cooperation in

The Nile Basin. Mountain Research and Development. 25.

²⁸ Mas-Colell, A., Whinston, M. D. and Green, J.R. (1995) Micro economic Theory. New York: Oxford University Press. P. 6.

²⁸ Ibid note 24.

- (c) To appraise equity in water allocation among the Nile riparian.
- (d) To provide sound suggestions and recommendations of the legal and political framework that can avert conflicts between the upstream and the downstream riparian states.

1.3 BROAD ARGUMENT LAYOUT

The legal framework concerned with use of Nile water is currently not able to provide clear, pragmatic and structured approach on equal sharing of Nile River resources. It is argued that there is need for an acceptable agreement on how the Nile waters ought to be utilized since most of the agreements were reached before independence and seem to protect only Egypt's interests.

1.4 HYPOTHESIS

1. The water wars concept predicts that tension in the Nile Basin region will cause conflicts due to freshwater's benefit to economic growth, national security and an acceptable and all-inclusive treaty would resolve the conflict
2. There is a connection between control of important resources and expectation of conflict.
3. Cooperation would assist in resolving the conflict and there is a need for mediation for an acceptable agreement to be reached.

1.5 RESEARCH QUESTIONS

This research will attempt to fill noticeable gaps by attempting to address the following questions;

- i. To what extent does the 1959 Agreement protect the interests of the upstream riparian?

- ii. What proposals could be made for an acceptable legislative and institutional framework to cater for an acceptable agreement by all the riparian?

1.6 JUSTIFICATION OF THE STUDY

Tensions will probably continue to rise between riparian states over competition for access to fresh water. The dissertation highlights the importance of cooperation over this precious resource. In arid areas the inconsistencies between demand and supply have increased the tensions between riparian nations.

The existing agreements regarding the Nile Basin were negotiated during colonial rule and thus they seem to protect Egypt's interests with the exclusion of the other riparian states. This scenario has increased tensions between riparian since Egypt has stated that it would use any means to protect its interests. Ethiopia is in the process of constructing the Grand Renaissance Dam and this has increased tensions between Egypt and Ethiopia. The unilateral decision by Ethiopia to construct the dam has no doubt heightened tensions between Egypt and Ethiopia increasing the number of interested parties in Nile's water. This dissertation will enrich debate on the need for impartial third party intervention.

1.7 CONCEPTUAL AND THEORETICAL FRAMEWORK

The demand for fresh water in the arid realm has increased tensions especially by states that do not benefit from past agreements that seem to favour downstream riparian. Most of these agreement come into place during the colonial era thus were not all inclusive since the colonialists were trying to protect their interests. Egypt is the most downstream country in the Nile Basin and depends on the Nile River for its water. Egypt and Sudan are the only signatories to the Nile Waters Agreement whereas all the other riparian remain outside the treaty and they do not feel obliged to recognize or abide by its provisions. The growing populations in all the Nile countries are causing a growth in water consumption as well. Water allocation among riparian states ordinarily involves the use of treaty. Such agreements bind contracting parties and as such conflicts are easily avoided. The challenge which the Nile treaties faces is the lack of legitimacy owing to its

skewed nature of water allocation which was primarily determined on the basis of political dominance, military strength and financial superiority. Water scarcity in Egypt and some of its neighbors will necessitate the development of an acceptable basin wide policy that is satisfactory to all Nile Basin States. Due to Egypt's economic and political power was able to effect its will without considering the interests of the other states. The power asymmetry on the political, monetary and military power is at present moving to the advantage of the upstream riparian.

The intervention process can be portrayed inside a system that contains four segments: engaging, issues, options and agreement. This framework does not only focus on mediation but it also considers bilateral or multilateral conflict resolution procedures as alternatives.

The expectation of conflict and war has been considered since fresh water is considered as an important resource. Mediation is a recurrent procedure since agreement is required at various stages and on various levels. For an agreement to be reached it must be fraught with difficulties. Most challenges are political other than technical. In the search for an effective method to resolve the conflict one has to consider past disputes. The establishment of NBI (Nile Basin Initiative) strategizes cooperation based on interests rather than legal positions. The NBI did not establish specific goals for progress; it focused more on building trust.³¹ Historical disputes makes cooperation an uphill task.³²

This contextualization begins with isolation of social planner's problem of water resource allocation among riparian states. The Social Planner's problem introduces the "allocate and trade" which includes a mechanism used to deal with external problems. The Social Planner promotes basin-wide participation. The Allocate-and- Trade allows countries to

³² Harmon Doctrine, 21 Op. Att'y Gen 274(1895) The Harmon Doctrine is an early Unites States' Attorney General's written embodiment of the broader international practice of absolute territorial sovereignty.

³² Scott Cunningham, (2000) Do Brothers Divide Shares Forever? Obstacles to the Effective Use of International Law in Euphrates River Basin Water Issue, 21 U. PA. J. INT'L ECON. L. 131, P. 156-57.

³² Lowi, Miriam R., (1993), Water and Power: The Politics of a Scarce Resource in the Jordan River Basin. Cambridge University Press: Cambridge. p. 4.

³² Ibid note 26

³² Ibid.

trade water within the basin. Social's Planner's allocation not only addresses efficiency but it helps in solving equity issues.³³ The social efficient level is obtained by considering the impact that the upstream states on the downstream riparian.³⁴

According to Conflict theory by Karl Marx human society has a collection of competing interest. This is because riparian do not have same interests, values or even expectations. An agreement tends to be reached among states that share same privileges, class, and wealth or in the same status. The unequal distribution of the Nile River as per the 1959 Agreement which gave Egypt and Sudan 100% control has increased tension among the other riparian.

Under the hypothesis of outright regional power, waters moving through the limits of a country are inside the space of that country and along these lines it can use with no respect for downstream beneficiaries, the previous Iraqi government worked under this methodology, legitimizing its utilization of the Euphrates River in regard to its total right use the water however it sees fit.³⁷

1.7.1 Power-Based Approaches

Liberalism views the global framework as very interdependent. In this manner, despite the fact that a performing an actor may not be exclusively intense, by coordinating with other State actors it can turn out to be so. Game theory then again characterizes power as wit and time. In this way the actors that rises more has the capability to exclusively

³³ Burchill, Scot (1996) *Realism and Neo-realism: Theories of International Relations*. Macmillan Press. P. 90

³³ Waltz, Kenneth N., (1985) "*Anarchic Orders and Balances of Power*" in Art, Robert J. and Robert Jervis (eds) (1985), *International Politics: Anarchy, Force, Political Economy, and Decision-Making*. 2nd Edition. Harper Collins. P. 23.

³³ Jervis, Robert (1985) "*Cooperation under the Security Dilema*": *International Politics: Anarchy, Force, Political Economy, and Decision-Making*. 2nd Edition. Harper Collins. P. 86.

³³ Dalby, Simon, (1990), *Creating The Second Cold War: The Discourse of Politics*. Pinter Publishers: London. P 189.

outsmart its rival, but it needs to do first. The focus is on the geographic organization of the state's territory. Basic geopolitics by contrast questions the entire make up of power.⁴⁰

1.7.2 Realism

It is sensible to infer that two antagonist countries would be unwilling to participate with one another over shared water, each preferring to keep up full command over the asset. Realism “describes the unavailability of disputes between countries by emphasizing on the insecure and disordered international environment”.⁴¹ In the neo-pragmatist viewpoint of global relations States act to pick up advantage. Neo-pragmatists see the global framework as having a hierarchy.⁴² The most powerful states are at the top whereas the weakest states are at the bottom. Traditionally power is determined by military might and will. In the middle lie most states which attempt to enhance their position particularly as for their enemies. Along these lines neo-pragmatists contend that in choosing a way of activity, a State weighs up the potential gains against potential costs and costs incurred so far States follow the most beneficial path in overall. States are constantly careful about losing what they have therefore choices are impacted not simply by what is possibly to be gained, yet additionally by what is to be lost.⁴³ Subsequently if by coordinating, a State makes a few gains yet the additions are deficient to make up for the freedom and independence of over its regular assets, at that point participation may not be attractive.

⁴⁰ Ibid P 88.

⁴⁰ Painter, Joe (1995) *Politics, Geography and ‘Political Geography’: A Critical Perspective*. Arnold: London p 138.

⁴⁰ Murphy, Alexander B. (1991) “Territorial Ideology and International Conflict: The Legacy of Prior Political Formations” in Kliot, Nurit and Stanley Waterman, (eds) (1991), *The Political Geography of Conflict and Peace*. Belhaven Press: London. p 126.

⁴⁰ Kliot, Nurit (1991) “The Political Geography of Conflict and Peace – An Introduction” in Kliot, Nurit and Stanley Waterman, (eds) (1991), *The Political Geography of Conflict and Peace*. Belhaven Press: London. p. 4.

⁴⁰ Painter, Joe, (1995) *Politics, Geography and “Political Geography”: A Critical Perspective*. Arnold: London p. 139.

⁴⁰ Waltz, Kenneth N., (1985), “Anarchic Orders and Balances of Power” in Art, Robert J. and Robert Jervis, (eds) (1985), *International Politics: Anarchy, Force, Political Economy, and Decision- Making*, 2nd Edition Harper Collins. p12.

⁴⁰ Barnett, Michael N. (1992) *Confronting the Costs of War: Military Power, State and Society in Egypt and Israel*, Princeton University Press: Princeton, NJ p 9.

The realist point of view of international relations sees the worldwide system of country States with doubt. The absence of a supra-national body with the ability to implement choices upon recalcitrant States is viewed as characterizing the framework as anarchic. The absence of such an overseeing body in the way of a national government leaves the weaker States powerless against corruption activities except if they can be able to protect themselves.

Evans and Newnham contend that realism sees universal governmental issues as basically irreverent.⁴⁴ Thus not following one's self-interests and to act altruistically, is to act unreasonably and some even think of it as stupid driving States to make their very own profound quality in the rarefied air of international politics. As indicated by this contention the most noteworthy profound quality is "national interest", while the guardian is the principle of sovereignty.

According to realists, international politics revolve around nation's quest to survive in the face of stiff competition for influence.⁴⁵ Some Nations survive through forcefully commanding themselves over states deemed to be weak.⁴⁶ A nation's might is gauged on its own ability to be in command of the resources found within its borders.⁴⁷ Some nations

⁴⁵ Ibid p. 6.

⁴⁵ Ibid p 7.

⁴⁵ Booth, K. (1991) "Security in Anarchy: Utopian Realism in Theory and Practice" *International Affairs* (Royal Institute of International Affairs 1944) p. 527 – 545.

⁴⁵ Kliot, Nurit (1991) *The Political Geography of Conflict and Peace – An Introduction* Belhaven Press: London. P. 4.

⁴⁵ Gilpin, Robert Jervis (1985) *International Politics: Anarchy, Force, Political Economy, and Decision*, 2nd Edition. Harper Collins. P 390.

⁴⁵ Lowi, Miriam R. (1993) *Water and Power: The Politics of a Scarce Resource in the Jordan River Basin*. Cambridge University Press. p 5.

⁴⁵ Wolf, Aaron T. (1995b) *International Water Dispute Resolution: The Middle East Multilateral Working Group on Water Resources* "Water International. Vol. 20. P 142.

⁴⁵ Lowi, Miriam R. (1995) *Rivers of Conflict, Rivers of Peace* "Journal of International Affairs. Vol 49, no. 1. P 123.

⁴⁵ Lowi, Miriam R. (1993) *Water and Power: The Politics of a Scarce Resource in the Jordan River Basin*. Cambridge University Press. p 5.

view cooperation as weakness and a compromise to its sovereignty hence resist it..⁴⁸ Therefore just the weak collaborate, on the grounds that the strong don't have to do as such as they have every asset that they require and are independent.

The issue of autarky (or self-sufficiency) and, autonomy focused generally upon key assets that are characterized as "vital", or of national interest, for example, oil and vital minerals. Strategic assets are in demand yet their entrance is restricted. If access to these assets is denied or confined, at that point the security and interests of the country is risked. Generally security was characterized in military terms, however later it came to incorporate financial contemplations

Brutality is considered as an authentic means, if not the essential means, to defend national interests and sway from aggressors. Participation is viewed as a peculiarity in guarantying a State's security however; some regard it as a sign of weakness. some see it as an indication of weakness. Waltz recognizes high and low politics.⁴⁹ He contends that high politics is about global issues and it identifies with the external security of the state. Low politics then again manages a nation's residential political economy and social pressures.⁵⁰ Realists contend that the best threat to a nation should originate from external forces since it anticipates that the State will be united from within

The issue of autarky (or independence) and freedom focused generally upon key assets that are characterized as "key", or of national intrigue, for example, oil and vital minerals. Vital assets are sought after however their entrance is restricted. On the off chance that entrance to these assets is denied or limited, at that point the security and interests of the country is imperiled. Generally security was characterized in military terms, yet later it came to incorporate financial contemplations.

⁴⁹ Painter, Joe, (1995) *Politics, Geography and 'Political Geography' A Critical Perspective*. Arnold: London. P 139.

Viciousness is considered as a genuine means, if not the essential means, to defend national interests and sway from aggressors. Collaboration is viewed as a peculiarity in guarantying a State's security in any case; some see it as an indication of shortcoming. Waltz recognizes high and low legislative issues. He contends that high legislative issues is about global issues and it identifies with the outside security of the state. Low governmental issues then again manages a nation's residential political economy and social weights. Pragmatists contend that the best danger to a nation should originate from outer powers since it anticipates that the State will be inside brought together.

Barnett argues that State authorities and civil servants are at more serious risk from domestic sources than external aggression.⁵¹ When State officials are faced with external threat they have to garner support for their policies and approaches to manage the threat.⁵²

Realists argue that States go to war in the quest for their own self-interests and in view of their financial and military abilities.⁵³

1.7.3 Liberalism

Liberal viewpoint of international relations sees cooperation as the standard although it decreases State sovereignty.⁵⁴ The factors that contribute interdependence includes; an autonomous worldwide political economy, an expansion in international political participation and a delicate global environment.⁵⁵ Liberal institutionalism recommends

⁵⁴ Hargreaves-Heap, Shaun P. and Yanis Varoufakis (1995) *Game Theory: A Critical Introduction*. Routledge: London p 4.

⁵⁴ Agnew, John and Gearoid O Tuathail (1992) "*Geopolitics and Discourse: Practical Geopolitical Reasoning in American Foreign Policy.*" *Political Geography*. Vol 11, no. 2. March. P 191.

⁵⁴ Gleick, Peter H. (ed), (1993), "*Water in Crisis: A Guide to the World's Fresh Water Resources*". Oxford University Press: New York. P. 95.

⁵⁴ The ICJ has ruled on Gabčíkovo-Nagymaros, dam dispute between Hungary, Czech Republic, Slovakia and Austria on the Danube River.

that asymmetrical information and vulnerability which frequently characterizes a conflict impedes cooperation.⁵⁶

It is arguable that similarly as authenticity assumes blanket conflict, radicalism expects blanket cooperation. From the conventional hypothesis of interdependence, an institutionalist (functionalists) expects coordination to develop naturally starting with one issue then onto the next.⁵⁷ The spillover should be gradual from technical issues to matters of a political nature.⁵⁸ This spillover would eventually lead to more and more cooperation and the end result would be peace.

Lowi contends that collaboration would just be conceivable if the issues are “de-linked”.⁵⁹ The implication of the proposed alternatives should be worthy to the decision administration in light of what is acceptable to current government. The proposition ought to be issue particularly in that cooperation over water does not tie the parties to the collaboration on different issues therefore causing struggle of issues. Along these lines, blanket cooperation, like blanket conflict is inadmissible to the disputants and does not clarify the particular cases of collaboration that happen in the midst of war.

Progressivism views cooperation as the standard. The essential target of the discussions ought to be to anchor the long term accessibility of a fresh water supply. Egypt's worries with respect to its long-term supply must be replied before it consents to proposition that would adjust the current supply network. The respect for secure long-term supplies proposes that riparians would collaborate over their common waterways. It is questionable that participation should hold on instead of war. The key role of the third party should be to ensure cooperation is achieved. This research encourages mediation which is a mode of assisted communications. Mediation does not endeavor to foresee occasions in a question but rather it only aides disputant's conduct and it comprises of four phases: drawing in, issues, alternatives and in the end an agreement.

⁵⁷ Biswas, Asit K. (1997) *Water Resources: Environmental Planning, Management, and Development*. McGraw-Hill: New York. P 199.

1.7.4 The Game Theory

Realism looks to game theory to understand the choices, resources and decisions characterizing international interaction when legitimizing violence.⁶⁰ The game theory makes a number of assumptions; that States have preferences and that they will act rationally to fulfill their preferences, and the actors will attempt to maximize on their utilities. In this way by knowing the need of the maximize it is conceivable to decide the activity to be picked.

The game theory utilizes a predetermined number of games to represent to patterns of social collaboration to investigate the conceivable situations that may emerge out of any circumstance. The game theory takes after its own rationale which is reductionist

in nature. The game theory has two main components. First, the rules which are the allowable actions and second, how the parties follow up based on the principles. The second segment has divisions which incorporate actor's inspiration and what every actor thinks the other will do in specific situations.⁶¹ Games theory's reliance on its own logic has a heuristic value and parties can learn from their mistakes.

1.7.4.1 Cons of Game Theory

The game theory assumes that outcomes are known and it does not represent the mediation of an outsider e.g. an arbiter.

⁶⁰ El-Fadel, M., (2003), "*The Nile River Basin: A Case study in surface water conflict resolution.*" Journal of Natural Resources and Life Sciences Education Vol. 1 p. 32.

⁶⁰ El-Fadel, M., (2003), "*The Nile River Basin: A Case study in surface water conflict resolution.*" Journal of Natural Resources and Life Sciences Education Vol. 1 p. 32: 107-117.

⁶⁰ *ibid* p. 110.

⁶⁰ Mason, S. (2003) *From conflict to cooperation in the Nile Basin*, Ph.D. dissertation, Swiss Federal Institute of Technology, Zurich, Available at <http://e-collection.ethbib.ethz.ch/eserv/eth:27328/eth-27328-02.pdf>. Accessed on 14th February 2015.

⁶⁰ GoE and GoS (Government of Egypt and Government of Sudan).(1959). *Agreement between the Republic of the Sudan and the United Arab Republic for the full utilization of the Nile waters.* Available at <http://faolex.fao.org/docs/texts/sud15971.doc>. accessed on 14th February 2015.

1.7.4.2 Geopolitics

Geopolitics views States as a spatial phenomenon which derives their power from the geographic features that make up the State's territory. This is the study of the physical world's influence upon the "conduct of foreign policy".⁶² It is arguable that traditional geopolitics lies close to the realist school of international relations.

Rights- Based Approaches

Power-based approaches defend sovereignty. International law is codified by two bodies: the United Nations' International Law Commission (ILC), and a professional body, the International Law Association (ILA). The International Court of Justice (ICJ) can be regarded as an executive organ.⁶³ Thus if a dispute is before a particular body e.g. the ICJ a decision will be made based only on the law. However parties to the dispute must consent to the jurisdiction of the ICJ. It only has compulsory jurisdiction to determine disputes. Due to being mindful of their sovereignty States are usually reluctant to agree to adhere to the final arbitrated judgment especially when there is little guarantee of getting a desirable outcome. However, some of the disputes before ICJ have been respected, most notably in international maritime boundary disputes.⁶⁴

The legal criteria used to settle a dispute is usually vague and ill determined. International water law encodes general principles perfectly. However, difficulties arise when applying to the practical situation. A great example is what is an equitable allocation of water? And how is "appreciable" harm measured? When judgment is made, the executive body has to rely on voluntary implementation and enforcement by the disputing States. Thus

⁶³ A. Swain (2002) SAIS Review. The Nile Basin Initiative: Too Many Cooks, Too Little Broth. 22,2. Pp. 293 – 308.

⁶³ Abadir M. Ibrahim, The Nile Basin Cooperative Framework Agreement: The Beginning of the End of Egyptian Hydro-political Hegemony, 18 Missouri Environmental Law and Policy Review (2011).

⁶³ Hefny, M., and S. Amer, (2005) "Egypt and the Nile Basin." Aquatic Sciences p. 50.

⁶³ Ibid note 61

⁶³ Ibid.

⁶³ Yohannes, O. (2008) "Water resources and inter-riparian relations in the Nile Basin: The search for an integrative discourse". Albany, NY: State University of New York Press p. 39-40.

⁶³ Arsano, Y., and Tamrat.(2005) "Ethiopia and the Eastern Nile Basin." Aquatic Sciences.P 67.

⁶³ Goulden, M., Conway, & Persechino, (2008) "Adaptation to climate change in international river basins in Africa: a review". Tyndall Working Paper 127. Norwich, UK: Tyndall Center for Climate Change Research

this fails to resolve conflicts between hostile States. Thus difficulty in international water law remains in its implementation. The two areas that obstruct implementation: prioritizing one principle over another and there is difficulty in assigning specific definitions to vague terms. Since time immemorial, two principles have defined international water courses i.e. equitable utilization and appreciable harm. The ILC has defined a water course as “*a system of surface and underground waters constituting by virtue of their physical relationship a unitary whole and flowing into a common terminus*”.⁶⁵

1.8 LITERATURE REVIEW

1.8.1 Introduction

This Chapter appraises existing literature that other scholars have written in an attempt to find lasting solutions and make recommendations on how best to manage the Nile basin..

Disputes between Egypt and Ethiopia and the other Nile upper riparian’s have dominated the Nile Basin for the last half-century. The Nile Basin Initiative (NBI) and the Nile basin Cooperative Framework Agreement were an attempt to find a solution to the disputes that have dogged the Nile basin states for decades. However CFA ended up complicating the differences and the emancipation of the upper riparian as a force to be reckoned with. Ethiopia contributes about 86% of the total flow of the Nile Waters whereas the remaining 14% is provided by Equatorial lakes. The Nile colonial treaties are the major causes of the dispute. One of the most important factors leading to an acceptable agreement among all riparian is that they must explore cooperative measures safely, and the governments must have a political will to compromise and reach a settlement.

⁶⁵NBI (Nile Basin Initiative). 2010. Agreement on the Nile River Basin Cooperative Framework. Available at [http://internatonalwaterlaw.org/documents/regionaldocs/Nile River Basin Cooperative Framework 2010.pdf](http://internatonalwaterlaw.org/documents/regionaldocs/Nile_River_Basin_Cooperative_Framework_2010.pdf).accessed on 14th February 2015.

⁶⁵ Abdo, M. (2004) “*The Nile question: The accords on the water of the Nile and their implications on cooperative schemes in the Basin.*” Perceptions, Journal of International Affairs p. 9.

⁶⁵ NBI 2010.

1.8.2 Inadequacies in the existing Agreements and Treaties

The 1929 Agreement between Egypt and Anglo – Egyptian Sudan granted Egypt exclusive and overriding rights over the Nile water especially during the dry season when water is most needed for agricultural irrigation. In effect, the agreement limited Sudan's right to utilize the water to a great extent and completely ignored the other riparian's right to access. Naturally the other riparian did not endorse the agreement as they were never involved nor their interests considered in the agreement. In November, 1959, an agreement concerning the Nile Basin waters was signed between Egypt and Sudan. The conditions of the Nile Waters treaty reiterated that Egypt receive 55.5 km³ of the Nile's water whereas Sudan would receive 18.5 km³. This particular allocation was based on there being 84km³ of water flowing through the Nile at Aswan High dam in Egypt; the remaining 10km³ are lost to evaporation.⁶⁶ According to the Agreement, Sudan was to construct the Roseiers Dam on the Blue Nile in order to augment the water supply whereas Egypt was to build the Aswan High Dam which would reduce the Nile's annual flood, generate hydroelectric power, and decrease the volume of sediment reaching the Nile's delta.⁶⁷ El-Fadel argues that the needs of upstream nations including Ethiopia were not considered in this treaty considering Ethiopia contributes about 86 percent of the Nile's flow.⁶⁸ Ethiopia reiterates that it is not bound by the 1959 Agreement and it intends to negotiate it thus increasing tension among the riparian states.⁶⁹⁷⁰ Ethiopia has since 1990's defied Egypt and Sudan's attempts to block and frustrate development projects within its territory. Instead Ethiopia has initiated diverse irrigation and

⁶⁷ Tafesse (2010) *"The Concepts of Equitable Utilization, No Significant Harm and Benefit Sharing under the Nile River Basin Cooperative Framework Agreement"* p. 101.

⁶⁷ Jutta Brunne (2002) *"Changing Nile Basin Regime: Does Law Matter?"* (43rd Harvard International law journal p. 105.

⁶⁷ A. Swain. (2002) SAIS Review. *"The Nile Basin Initiative: Too Many Cooks, Too Little Broth."* 22, 2. Pp. 293 – 308.

⁶⁷ M. El Fadel. (2003) Journal of Natural Resources and Life Sciences Education: The Nile Basin: a Case Study in Surface Water Conflict Resolution. 32,7. Pp. 107 – 117.

⁶⁷ Kameri-Mbote (2007) Water, conflict, and cooperation: Lessons from the Nile River basin. Navigating Peace, 4. p.1.

⁶⁷ S. Lemma (2001) Cooperating on the Nile not a Zero-sum Game. UN Chronicle. 3. P. 65.

hydropower projects⁷¹ The Nile Basin Cooperative Framework Agreement was launched by the upper riparian states in an attempt to resolve the dispute over equitable utilization of the Nile.⁷²

In July, 1993, an agreement between Egypt and Ethiopia was signed stipulating that neither country would undertake any development project that would affect the other country's supply of Nile Water.⁷³ Both countries agreed to conform to international water laws, consult and cooperate on exploitation of the Nile water.⁷⁴ The agreement was meant to strengthen the relationship between Egypt and Ethiopia and hence contribute to the region's stability.⁷⁵ The cooperative move was later undermined by Egypt's ongoing irrigation schemes. The Toshka Canal Project which began in 1997 and is set to be completed in 2017 is a great example. It aims to irrigate 400,000 hectares of desert land in south-western Egypt, requiring an additional 5.5 BCM of water per year.⁷⁶ Egypt did not consult Ethiopia when it initiated the Toshka Canal which fails to comply with conditions put forth in the 1993 agreement because an additional withdrawal of 5.5 km³ will definitely affect the amount of water which Ethiopia can withdraw from the Nile. However, neither quantitative nor qualitative studies have been conducted in order to determine how Ethiopia will be affected once the canal is completed. From the above it is evident that all agreements seem to favour Egypt thus escalating tensions between the riparian states. Arsano and Tamrat argue that a new agreement needs to be formulated

⁷⁴ Bar-Siman-Tov, (1994), "*The Arab-Israeli Conflict: Learning Conflict Resolution*" Journal of Peace Research, vol. 31, No. 1: p. 76.

⁷⁴ Amer (2005) S. "*Sustainable development and international cooperation in the Eastern Nile Basin*." Aquatic Sciences p. 11.

⁷⁴ Wolf, Aaron T (1997a) "*Conflict and Cooperation along International Waterways*." Paper presented at the ADC New Millennium meeting on International Water Management in the 21st Century, Valencia, Spain, 18- 20 December 1997.

⁷⁴ McCaffrey, Stephen C. (1993) "*Water, Politics, and International Law*" in Gleick, Peter H., (ed) (1993), *Water in Crisis: A Guide to the World's Fresh Water Resources*. Oxford University Press: New York. P. 99.

⁷⁴ Shivananda, S. (1961) *Political and Legal Aspects of the Indus Water Dispute between India and Pakistan*. Unpublished MA thesis. Department of Political Science, University of Washington. P.ii.

⁷⁴ Shivananda, S., (1961), "*Political and Legal Aspects of the Indus Water Dispute between India and Pakistan*." Unpublished MA thesis, Department of Political Science, University of Washington p. 29.

and it should consider Ethiopia's and the other riparians water use and water development needs.⁷⁷ The Nile Basin has been rated as having a high potential for conflict and that's why the international community is exerting pressure on the riparians to reach an agreement.⁷⁸

Since 1997, the eleven riparians of the Nile Basin have been negotiating a Cooperative Framework Agreement (CFA) that would allow all riparians to benefit from the Nile's waters. The CFA provides for the principle of equitable and reasonable use and no significant harm.⁷⁹ Ethiopia, being an upstream state, uses the principle of equitable and reasonable utilization to argue for its need to use the Nile's water whereas Egypt as a downstream country uses the principle of no harm and historical use. For Egypt, no harm means that it holds to its allocation as set out in the 1959 agreement. The contradiction between the principles of equitable and reasonable use and no harm is where the tension emanates from since some harm would occur to the flows reaching Egypt during construction of Grand Ethiopian Renaissance Dam. The 1959 agreement has been heavily criticized by Ethiopia because of its bilateral nature which creates tension between the upstream and downstream countries.⁸⁰ A gain in water use for one country is a loss for the other thus it creates clear obstacle to cooperation between the upstream states and downstream states. The primary objective of the NBI has been to conclude a cooperative framework agreement. The CFA (The Nile Cooperative Framework Agreement 2010) favours the territorial sovereignty approach by granting riparian states the right to

⁷⁷ Shapland, Greg, (1997) *Rivers of Discord: International Water Disputes in the Middle East*. Hurst and Co: London. P. 167.

⁷⁸ Beaumont, Peter (1994) *"The Myth of Water Wars and the Future of Irrigated Agriculture in the Middle East."* Water Resources Development, vol 10, no. 1.P 19.

⁷⁸ Dinar, Ariel and Aaron T. Wolf (1994c) *"Middle East Hydro politics and Equity Measures for Water-Sharing Agreements."* Journal of Social, Political and Economic Studies. Vol. 19, no. 1 p. 70.

⁷⁸ Wolf, Aaron T., (1997a) *"Conflict and Cooperation along International Waterways."* Paper presented at the ADC New Millenium meeting on International Water Management in the 21st Century, Valencia, Spain, 18-20 December 1997.

⁷⁸ Goldberg, David (1995) *"World Bank Policy on Projects on International Waterways in the context of Emerging International Law and the Work of International Law and the Work of the International Law Commission"* London. P. 156.

⁷⁸ Hillel, Daniel (1994) *Rivers of Eden: The Struggle for Water and the Quest for Peace in the Middle East*. Oxford University Press: New York p. 274.

appropriate water passing through their. It however provides for safeguards to ensure that such utilization is equitable and reasonable. Naturally, the downstream states favour the no-harm rule as it guarantees continued access derived from prior use while limiting upper riparian from undertaking activities that may jeopardize the lower riparian. Upper riparian on the other hand favour equitable utilization principle. The CFA also includes provisions requiring the Nile Basin states “*to take all appropriate measures to prevent causing significant harm to other basin states*”. Article 14 of CFA requires the basin states “*to work together to ensure that all states achieve and sustain water security*”.⁸¹ Egypt reiterated through the entire negotiation process on their existing uses and rights and this is basically a claim to the no-harm rule. Egypt has all along held the view that the 1902 treaty approved its veto power over any developments on the Nile in Ethiopia. Immediately after announcement of the construction of the Grand Ethiopian Renaissance Dam, Egypt and Sudan fervently rejected its construction. They averred that that the dam would have catastrophic effects on their territories. However, Sudan later endorsed the project. According to Tafesse, there has been a shift towards moderate positions by the riparian since the inception of the NBI.⁸² A survey of all the treaties and agreements concerning the Nile shows that they favour the interests of Egypt.⁸³ It is arguable that the NBI is only building consensus between the riparians since it lacks enforcement power.

To date, Egypt is the predominant user of the waters of River Nile. According to Swain and Fadel, political volatility and economic hardships continue to incapacitate the other riparian from exploiting the resources of the Nile.⁸⁴⁸⁵ Kameri-Mbote argues that, “*except*

⁸³ Goldberg, David (1995) “World Bank Policy on Projects on International Waterways in the Context of Emerging International Law and the Work of the International Law Commission” in Blake, Gerald H. (eds) The Peaceful Management of Transboundary Resources . Graham and Trotman/Martinus Nijhoff.: London P. 157.

⁸³ Goldberg, David (1995) “World Bank Policy on Projects on International Waterways in the Context of Emerging International Law and the Work of the International Law Commission” in Blake, Gerald H. (eds) The Peaceful Management of Transboundary Resources . Graham and Trotman/Martinus Nijhoff: London. P. 157.

⁸³ Caponera, Dante A., (1981), “International River Law” in Munir Zaman, (ed) (1983), River Basin Development: Proceedings of the National Symposium on River Basin Development 4 – 10 December 1981. Tycooly International Publishing: Dublin p.183.

for Kenya and Egypt, all of the basin countries are among the world's 50 poorest Nations."⁸⁶ Lemma argues that the biggest dilemma which the Nile riparian states are grappling with is whether the NBI will be the answer in liberating themselves from perennial skewed distribution of the Nile basin resources⁸⁷

2.3 Principles that would address equity in water allocation:

There are three options at the disposal of a riparian state to choose from in deciding an appropriate approach to engage other riparian in sharing transboundary waters. The first is the principle of sovereignty which appeals mostly to the upstream riparian who seek to appropriate all the water that goes through their territory without any unreasonable restrictions. Secondly is the principle of integrity which appeals mostly to downstream states as it advocates entitlement brought about by prior use. The third principle is that on equitable utilization which has so far proved elusive in implementation owing to competing interests by the upper and lower riparian respectively. It is arguable that Egypt does not have a monopoly of hard power although it has substantial soft power. One type of soft power is bargaining power by asserting its interests to great effect. A good example is that Egypt has not agreed the key Article of the draft 2007 NBI Framework Agreement as it would weaken its continued assertion that it is entitled to 75% of the Nile flow. International cooperation can be regarded as a form of conflict management which may be lost if a protracted conflict use military as the only means of resolving conflict.⁸⁸ The riparian states should recognize the benefits of cooperation in sharing the Nile waters.⁸⁹

⁸⁷ Jones, G. (2003 April 1). "Hydropolitics in the 3rd world: conflict and cooperation in international river basins". (review) Journal of Third World Studies, Retried from <http://www.highbeam.com> accessed on 14th February 2015.

⁸⁷ Klare, M.T. (2001). Resource wars: the new landscape of global conflict. New York:Metropolitan Books: Henry Holt and Company, LL. p. 148.

⁸⁷ Mason S. A. (2003). "From conflict to cooperation in the Nile basin." Thesis, Center for Security Studies, Swiss Federal Institute of Technology, Zurich, Switzerland., ISBN: 3-905641-95-x

The Water Convention fails to clarify which principle is to be prioritized.⁹⁰ Conflicts are complicated by the internal struggle between the encoding bodies of international law, the ILA and ILC. The ILA supports the application of equitable utilization (EU) whereas the ILC prefers appreciable harm (AH). In justifying their adherence to a particular principle each body claims that the others favored principle falls short of justice. Thus, the ILC argues that *“utilisation of an international watercourse is not equitable if it causes other watercourse states appreciable harm (AH).”*⁹¹ The ILA in turn supports the appreciable harm principle’s protection of states that were the first to develop their uses. The appreciable harm principle harms the upstream states since only the downstream states were the first to develop their uses. The principle damages the upstream states’ right to develop their own uses. Shivananda argues that the application of the doctrine of strict legal rights in international water disputes is an obstacle to any policy of active development which involves the consent and cooperation of both parties.⁹² Shivananda rightly argues that the strict confines of international water law cannot alone resolve an international water dispute since economic and political issues often dominate the dispute.⁹³ Since the encoding bodies are in disarray they do not resolve conflicts thus making international water law appear useless. This worsens the tensions between conflicting states. This research suggests that international water law cannot assist in reaching an agreement between the riparian states since political and economic issues always dominate.

The co-riparian will adopt a legal position which best suits their circumstances and their development requirements. Normally the principle a riparian state chooses depends on the geographic position of the state. Downstream states have developed the watercourse more than the upstream states. It is arguable that states that are yet to develop their uses can only benefit using equitable utilisation whereas states with existing uses would prefer appreciable harm principle.

It is arguable that international water law complicates the problem when applied rather than resolving the conflicts. Shapland argues that international water law is used to dignify and justify their positions rather than resolving conflicts.⁹⁴ Shapland tends to support Shivanada's argument that international water law complicates the issues amongst riparian states. Thus states support principles that are beneficial to them and not on principle. Agreeing on what constitutes "equitable" allocation is also an issue even if disputants agree to apply the principle of equitable utilisation.⁹⁵ Dinar and Wolf argue that defining and measuring equity is a problem with water cooperation and sharing.⁹⁶ Intervention of a third party like ICJ is usually costly. Wolf points out that the ICJ has only ruled on the *Gabcikovo-Nagymaros* dam dispute between Hungary, Czech Republic, Slovakia and Austria, on the Danube River.⁹⁷

The World Bank and the International Bank for Reconstruction and Development (**IBRD**) applies the principle of appreciable harm with success. They favour this principle because it is easier to define and measure compared to equitable utilization.⁹⁸⁹⁹ Since World Bank is a major financier of international water projects it implements a strict procedure of notification as outlined in its Operational Directive (OD) 7.50. It states that if a riparian applies for a loan to finance its planned development of an international watercourse the riparian must notify its co-riparian. This encompasses the sharing of any relevant data and fore-knowledge of potential damage to existing uses or shared water. If in the Banks opinion the project is a mere feasibility study that does not affect co-riparian utilization the riparian is exempt from this. Thus if a riparian fails or refuses to notify its co-riparian, the World Bank terminates the application immediately.¹⁰⁰ It is thus arguable that the Bank's policy is to prevent investing in projects that are controversial and involve a dispute over water. The aim of the notification procedure is to allow the affected riparian to respond to the proposed project by either giving their approval or

disapproval.¹⁰¹ This shows that there is need for a legal instrument to address disputes over river Nile.

The ILC of the United Nations on the other hand has an unconvincingly feeble notification procedure that is highly subjective. It emphasizes on self-regulation and it may open the door future water disputes. The ILC notification procedure asks riparian to notify its co-riparian if in its own opinion the project will cause them appreciable harm. This affects the credibility of the whole process since it is highly unlikely for a state to give an honest opinion that would be against its interest. It is arguable that international water law is ambiguous since there is no mechanism to enforce principles that are agreed upon.

This does not mean that International Water Law does not resolve conflicts but illuminates the difficulties involved. International water law's role is to resolve conflict. According to Caponera, "*Co-operation, however, must be established on such principles as good faith, good neighborliness, equality and reciprocity. All basin states should keep in mind not only their own national interests, but those of the basin community as a whole*"¹⁰²

Author Arun Elhance posits that optimum management of shared water resources can only be achieved through the taming of the protagonists into cooperation and compromise among themselves.¹⁰³ A potential conflict can only be prevented by renegotiating the agreements since Egypt has benefitted enormously from its privileged position.¹⁰⁴

¹⁰² Russell Smith, (1999) "Africa's Potential Water Wars".P. 15.

¹⁰² Charles Bourne, (1997) "The Right to Utilize The Waters of International Rivers", in Patricia Wouters, *International Water Law:* Selected Writings of Professor Charles B. Bourne, p. 65.

¹⁰² Ibid.

¹⁰² Ibid.

¹⁰² John Markakis (1998), "Resource Conflict in the Horn of Africa", Uppsala University, p. 33.

¹⁰² Ibiid note 98.

¹⁰² Patricia Wouters et.al, "Water Wars in the Near Future? Reconciling Competing Claims for the World's Diminishing Freshwater Resources: The Challenges in the next Millennium", cited at http://www.dundee.ac.uk/cepmlp/journal/html/article_3-2.html accessed on 5th April 2015.

1.8.3 Conclusion

The underlying spirit for the formation of the NBI was to eventually come up with an acceptable management framework binding on all the riparian. Such a framework would ensure equitable sharing of the Nile resources. The unilateral decision making by Ethiopia in constructing the Grand Ethiopian Renaissance Dam is likely to increase conflict. There should be a water treaty that gives all states affected the freedom of independent development of the waters flowing through their lands. It was hoped that a comprehensive framework endorsed by all the parties would enable equitable management of water resources by the riparian states.¹⁰⁵ Egypt and Sudan still insist on the validity of the 1929 and 1959 agreements which is making efforts to establish an inclusive Basin-wide agreement more difficult. The results of this research weigh on the prospects of a basin-wide agreement that is acceptable to all riparian states. The expectation of this research is that by creating a permanent basin-wide agreement shift from conflictive tendencies to cooperative relationship amongst the riparian states.

1.9.0 RESEARCH METHODOLOGY

1.9.1 INTRODUCTION

It is clear from the outset that the material to be gathered will be principally be of a historical nature. The materials to be used will be materials in archives of participating states which will be the primary focus of research and interviews with actual representatives of these parties would be limited. Thus a concerted effort will be made to gain access to the relevant archives.

1.9.2 Data Collection Methods

The research intends to use various means to obtain information. These include:

1. Library sources

¹⁰⁵ "Politics: East Africans consider pulling out of Nile water treaty. (2004) Inter Press Service English News Wire," Retrieved from <http://www.highbeam.com> accessed on 6th April 2015.

¹⁰⁵TilahunWondimineh, (1979) "Egypt's Imperial Aspirations over Lake Tana and the Blue Nile", p. 49.

The researcher intends to conduct library-oriented, internet and field modes of study. At the library, the researcher will look at both primary and secondary data.

2. **Internet searches.**

The researcher intends to use internet to search for up-to-date data that is not available in the library e.g. Google Scholar.com

3.3 Limitations to the study/ The possible challenges that will be encountered include;

- i. Enquiries with actual representatives of these countries may pose a challenge.
- ii. Lack of adequate literature and data in regard to all the countries involved may be limited. E.g. I read Sudanese and Ethiopia newspapers, but I could not find any articles pertaining to the topic in any of them. There is very little literature about the Nile in Sudan.
- iii. Bureaucracy in public offices e.g. permission to access classified information used in the negotiation from the various states.
- iv. Possibilities of political or economic instability in Egypt which might change the dynamics of my study. Political instability in Egypt is most likely to prevent Egypt from fulfilling its international obligations e.g. ratifying international treaties.

3.4 Tools of data collection

The material to be gathered will principally be of a historical nature. Secondary data will be used and obtained from educational libraries e.g. University of Nairobi Law Library, Kenya National library Services, Macmillan Library and various archives.

1.10 CHAPTER BREAKDOWN: CHAPTER ONE

Chapter one will be introductory; this chapter will restate the problem, lay out the objectives of the research, the hypotheses, and the research methods to be used, justification, theoretical framework and literature review.

CHAPTER TWO

This chapter will evaluate the history of river Nile and the conceptual discussions, various treaties and agreements between riparian states and their impact to regional peace.

CHAPTER THREE

This chapter describes the Nile Basin's physical and political environment as a background to understanding the conflict that arose between different users. An arid environment coupled with an uneven distribution of water and Egypt being the main beneficiary for over seven decades since Egypt gained from Britain in 1922. Chapter three will address the general "theory" of mediation. Mediation has been defined and the role of the mediator will also be considered.

CHAPTER FOUR

This is the substantive chapter. This chapter argues the need for renegotiating the Nile Basin Agreement to ensure that all countries views are encompassed in the Agreement.

CHAPTER FIVE

This chapter will draw the conclusions that will be made in this dissertation; and will suggest further work from the inadequacies posed by the Nile Basin Initiative.

CHAPTER TWO

2.0 THE HISTORY OF RIVER NILE

2.1 INTRODUCTION:

The Nile Basin has been characterized by three major historical phases. In the early 20th century, the region was characterized by complete domination by European powers who controlled the political, economic and social spheres. This continued until 1960's onwards when most states gained their independence. ¹⁰⁶ .

Several factors have influenced the development and management of the Nile basin.¹⁰⁷ The most notable factor arose in twentieth century when the European colonialists developed particular interest with the Nile River, by then Egypt was pursuing a water security policy which involved the River Nile.¹⁰⁸ During the colonial era the patterns in the utilization and management of the water of the Nile River was a preserve of the British Colonialists.¹⁰⁹ The British had a deep rooted interest in controlling River Nile to obtain water for purposes of the huge cotton plantations that were being sustained through irrigation. This trend of favoring Egypt at the expense of the interests of other riparian states thus took root.¹¹⁰ The colonial rulers ensured that no significant developments would take place upstream that could hamper the water flow to Egypt.¹¹¹ Thus, all the Agreements between the riparian states are a manifestation of British interests since Egypt's interests were given priority. This is evidenced in all Agreements and Treaties between the riparian states. Egypt is dependent on the Nile water for about 97% of its water supply with no other viable water source.¹¹² Egypt is the major Nile water recipient and Ethiopia is the major contributor supplying in excess of t 86% of the

¹⁰⁸ Wondimneh, "Egypt's Imperial Aspirations over Lake Tana and the Blue Nile", p. 14.

¹⁰⁸ Ibid note 103.

¹⁰⁸ Abebe (1994) Water in the Middle East, New York p. 3.

¹⁰⁸ Kefyalew, "A New Basis for a Viable Nile River Water Allocation", p. 15.

¹⁰⁸ Wondimneh, "Egypt's Imperial Aspirations over Lake Tana and the Blue Nile", p. 75.

Nile water.¹¹³ This research revisits the accords that have been signed over time for the control and management of the Nile. This study purposively scrutinizes the legal framework in place for the management of the Nile and makes proposal for the need to adopt an acceptable basin wide agreement. The study does not delve into all the conflicts bedeviling the Nile basin.

2.2 HISTORICAL LEGAL ISSUES:

In theory, the Nile basin is governed by international customary law on international watercourses epitomized by the Water Convention and the Helsinki rules (1966). Concepts such as cooperation, equitable distribution, consultation and compensation were introduced by the Helsinki Rules and ILC.. There have been a great number of legal documents and diplomatic exchanges on the sharing and use of the Nile's waters. The aforementioned agreements that were agreed upon during the colonial era have offered little assistance in equitable utilization, protection and conservation of such resources. The historical agreements only focused on water allocation rather than equitable utilization and benefit sharing thus increasing the tension between riparian states.

2.3 MAJOR TREATIES PERTAINING TO THE WATER OF THE NILE:

The 1891 Anglo-Italian Protocol entered into between Britain on behalf of Egypt and Sudan on the one part and Italy on behalf of Eritrea was the first formal accord on the Nile River. This protocol however mentioned the Nile water in passing as its main objective was to delimit the colonial boundaries of the then colonial powers Britain and Italy in the Sudan and Eritrea. As such The Nile basin was merely an incidental issue whereby Italy was precluded from undertaking any form of construction works at the

¹¹³ Ibid at p. 91.

¹¹³ Ibid note 108.

¹¹³ Kefyalew, "A New Basis for a viable Nile River Water Allocation", p. 4.

¹¹³ D. Whittington and G. Guarriso, (1983) "Water Management Model in Practice: A Case Study of the Aswan High Dam", p. 41.

¹¹³ Kefyalew Achamyelch, (1995) "Problems and Prospects for Inter-country Cooperation for Integrated Water

Resources Development of the Nile River", Economic Commission of Africa, Addis Ababa p. 20.

headwaters of the Nile.¹¹⁴ The protocol completely ignored the upper riparian who contribute substantial amounts of water to the Nile. In that sense the protocol remained bilateral with limited application only binding on the two states which were signatories. It is implicit from the reading of the Accord that Britain's intention was to safeguard the interests of its colony Egypt at the expense of the other states including Italy's colony at the time. The wording of the protocol however proved to be vague as the rights and duties created under it could not be ascertained. This led to the signing of another accord in 1902 between Britain and Ethiopia. This second accord sought to delineate the boundaries between Ethiopia and Sudan. Whereas the purpose of the agreement was to primarily delineate the boundaries, it bound Ethiopia not to undertake or permit any construction works at the Blue Nile or its tributaries without the consent and approval of Britain.¹¹⁵ The agreement was presented in two languages i.e. Amharic the National language of Ethiopia and English a preference of the British. A divergence arose over the interpretation of the term 'arrest' as used in the Amharic version of agreement. The

¹¹⁴ El-Fadel, M., Y. El-Sayegh, K. El-Fadl, and D. Khorbotly. (2003) "*The Nile River Basin: A Case study in surface water conflict resolution*". Journal of Natural Resources and Life Sciences Education p. 32.

¹¹⁴ Kefyalew Achamyeleh, (1995) "*Problems and Prospects for Inter-country Cooperation for Integrated Water*

Resources Development of the Nile River," Economic Commission of Africa, Addis Ababa p. 21.

¹¹⁴ Cascao, A.E., (2009) "*Changing Power Relations in the Nil River Basin*," Georgetown International Environmental Law Review 12 p. 245.

¹¹⁴ Cascao, A.E., (2009) "*Changing Power Relations in the Nil River Basin*, Georgetown International Environmental Law Review 12 p. 6.

¹¹⁴ Arsano, (1997) *Sharing Water Resources for Economic Cooperation in the Horn of Africa*, p. 52.

¹¹⁴ Tesfaye Tafesse, (2001) "*The Nile Question: Hydro-politics, Legal Wrangling, Modus Vivendi and Perspectives*," Addis Ababa, Mega Pub., p. 75.

¹¹⁴ Abraham, (2004) *The Nile Issue: Psycho-political Hurdles to an Agreement and the way towards Rapprochement*, p.14

¹¹⁴ Yohannes, O. (2008) "*Water Resources and inter-riparian relations in the Nile Basin: The search for an integrative discourse*". Albany, NY: State University of New York Press. p. 39.

¹¹⁴ Kefyalew Achamyeleh, (1995) "*Problems and Prospects for Inter-country Cooperation for Integrated Water*

Resources Development of the Nile River," Economic Commission of Africa, Addis Ababa p. 20.

¹¹⁴ Tafesse (2004) "*The Nile Question: Hydropolitics, Legal Wrangling, Modus Vivendi and Perspectives*," p. 79.

¹¹⁴ Aljazeera.net, 2011(a documentary on Struggle over the Nile) accessed on 5th April 2015.

Ethiopians interpreted it as not precluding their right to use the water of the Blue Nile and that what was restricted was limited to activities that would totally arrest the flow of the river. Britain did not adduce evidence to demonstrate that Ethiopia had comprehended the impact of the term ‘arrest’.¹¹⁶ As a result of the disagreement over interpretation of the agreement, Ethiopia subsequently refused to ratify it. ¹¹⁷The 1902 Agreement has been heralded as the most contentious of all agreements involving the Nile as each party had a different version which they claimed was legitimate.¹¹⁸ According to the English version, Ethiopia was barred from conducting any activities on the Nile waters so as not to jeopardize the lower riparian states. Similarly the 1906 Tripartite between France, Britain and Italy further sought to entrench the rights of the lower riparian states over the upper riparian. Specifically it addressed the utilization of the Nile water in Ethiopia’s sub-basin.¹¹⁹ Article 4(a) stated thus “*to act together ... to safeguard; ... the interests of Great Britain and Egypt in the Nile Basin, more especially as regards the regulation of the waters of that river and its tributaries (due consideration being paid to local interests) without prejudice to Italian interests*”. This clause effectively diminished Ethiopia’s claim of sovereignty over the water in its territory leading to Ethiopia outrightly rejecting it. Most agreements were signed between the colonial rulers to protect the interests of the lower riparian states. In 1925, yet another agreement, fashioned Anglo- Italian Agreement was signed between Britain and Italy. In it Italy categorically accepted to be bound by Egypt and Sudan’s claim of prior rights on the use of the Nile

¹¹⁸ Amare (2003) Nile Waters-Hydrological Cooperation Vs. Hydropolitics. P. 7.

¹¹⁸ Markakis (2003) “Resource Conflict in the Horn of Africa,” p. 36.

¹¹⁸ A. Swain (2002) SAIS Review. “The Nile Basin Initiative: Too Many Cooks, Too Little Broth.” 22,2. Pp. 293

¹¹⁹ Ibid Pp. 293 – 308.

¹¹⁹ Abadir M. Ibrahim, “The Nile Basin Cooperative Framework Agreement: The Beginning of the End of Egyptian Hydro-political Hegemony,” 18 Missouri Environmental Law and Policy Review (2011).

¹¹⁹ Cascao, A.E., (2009) “Changing Power Relations in the Nil River Basin,” Georgetown International Environmental

Law Review 12 p. 245.

¹¹⁹ M. El Fadel. (2003) Journal of Natural Resources and Life Sciences Education: “The Nile Basin: a Case Study in

Surface Water Conflict Resolution.” 32,7. Pp. 107 – 117.

¹¹⁹ Klare, M.T. (2001) “Resource wars: the new landscape of global conflict”. New York: Metropolitan Books: Henry

Holt and Company, LLC. P. 148.

waters. It gave an undertaking not to commence any works on the headwaters of the Nile that would have an effect of modifying the continuous flow to the downstream states.¹²⁰ Ethiopia once again voiced its objection against the treaty leading to the British government's concession that indeed the agreement had been bilateral between itself and Italy and hence not binding on Ethiopia.¹²¹

The 1929 Anglo- Egyptian Agreement was signed between Egypt and the Great Britain, representing the Sudan. Unsurprisingly its overriding objective was to limit Sudan's rights over the Nile water and guarantee Egypt's claim to the waters.¹²² Sudan's right to utilize the water was limited to it not interfering with what was termed as Egypt's historic and natural rights. The agreement granted Egypt exclusive right to monitor activities in the other riparian states so as to protect its interests as well as the right to implement any project without consent of the other riparian while vetoing any constructions upstream which it deemed adverse to its security.¹²³

It is definite from the numerous agreements that bilateralism may not achieve cohesion in the region. Instead there is need for a comprehensive multilateral agreements in which all the riparian take part in the negotiations and their interests considered.

¹²² Brunnee J. and Toope S. J. (2001) "*The Changing Nile Basin Regime: Does Law Matter?*" Harvard International Law Journal Vol. 43, No. 1., p.146.

¹²² Zeitoun, M. and J. Warner. (2006) Hydro-hegemony – a framework for analysis of transboundary water conflict
Water policy 8 p. 447

¹²² Zeitoun, M. and J. Warner. (2006) Hydro-hegemony – a framework for analysis of transboundary water conflict
Water policy 8 p. 447

¹²² Kefyalew, (1996) A New Basis for a viable Nile River Water Allocation, p. 2.

¹²² S. Lemma (2001) Cooperating on the Nile not a Zero-sum Game. UN Chronicle. 3. P. 65.

¹²² Arsano Y. (2007) Ethiopia and the Nile: Dilemmas of National and Regional Hydro politics: Center for Security Studies, Swiss Federal Institute of Technology. p.245.

2.3.1 POST INDEPENDENCE:

After gaining independence most of the riparian states sought to stake their claim in the Nile basin through multilateral and bilateral agreements. The 1959 agreement between Sudan and Egypt was one of the foremost agreements. The agreement divided the waters of the Nile among the two states Egypt and Sudan while completely ignoring the other riparian states. In the agreement, it was proposed that Aswan High dam shall be constructed in Egypt to control possible flooding and act as a reservoir for water.¹²⁴ On its part Sudan was to construct the Roseires Dam on the Blue Nile in order to augment the water supply.¹²⁵ The Agreement had no room for other riparian states and the two states acted as if the Nile starts in Sudan and ends in Egypt.¹²⁶ The agreement sought to institutionalize the partnership through establishment of a Joint Technical Commission on the Nile. The other riparian states disregard the agreement as being bilateral hence inconsequential on the other states.¹²⁷

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

The bilateral agreement signed between Egypt and Ethiopia set out the ground rules for future engagements between Egypt and Ethiopia on River Nile.¹²⁸ The agreement articulated that future negotiations between Egypt and Ethiopia on matters touching on the Nile waters shall be guided by international law. .¹²⁹ It however did not mention the specific rules of international law which reference shall be made to. However there was mention of the ‘no harm’ principle which Ethiopia did not fancy as they viewed it as

¹²⁶ World Bank, Regional Integration in Africa, Nile Basin Initiative, <http://web.worldbank.org/WBSITE/EXTERNAL/COUNTRIES/AFRICAEXT/EXTREGINI/EXTAFRREGINICOO/O,,contentMDK:20627347-menuPK:1592471-pagePK:64168445-piPK:64168309-theSitePK:1587585,00.html>.

¹²⁶ Press Release SG/SM/8139OBV/262, <http://www.un.org/News/Press/docs/2002/sgsm8139.doc.html>>

¹²⁶The 1929, Nile Agreement between United Kingdom and Egypt, L.T.T. No. 7, p. 100 UNTS and, the 1959 Nile Agreement between Egypt and Sudan.

favouring Egypt and flying on the face of Ethiopia's sovereignty over the River Nile..¹³⁰ Ethiopia's concern over the 'no harm' rule was however deemed weak since under international law it was not the only rule to be applied in any negotiations. The aim of the framework agreement was to improve the otherwise volatile engagement between the two countries and establish a working relation between the two countries but not to create binding relations.¹³¹ This cooperative move was eventually undermined by Egypt's ongoing irrigation development schemes. A great example is the Toshka Canal project which aims to irrigate 400,000 hectares of desert land in south-west Egypt that began in 1997 and is set to be completed in 2017. The project requires an additional 5.5 BCM of water per year.¹³² The Toshka Canal was implemented without consulting with Ethiopia and it fails to comply with the conditions stipulated in the 1993 agreement since an additional withdrawal of 5.5km³ will undoubtedly affect the amount of water which Ethiopia can withdraw from the Nile waters. It is arguable that the 1993 Agreement is superficial and it is designed to falsely assure Ethiopia that it cannot be harmed by Egypt's withdrawal of the Nile and as a result there is a need for an all-inclusive agreement.

2.3.3 NILE BASIN INITIATIVE:

The Nile Basin Initiative (NBI) was established as a tool to forge a partnership among the Nile Riparian states so as to develop the river in a cooperative manner; share substantial socioeconomic benefits, and promote regional peace and security".¹³³ NBI was formally launched in February 1999 by the water ministers of 9 countries that share the river. These countries are Egypt, Sudan, Ethiopia, Uganda, Kenya, Tanzania, Burundi, Rwanda

¹³² Mekonnen, D. (2011) *"From Tenuous Legal Arguments to Securitization and Benefit Sharing: Hegemonic Obstinacy- The Stumbling Block against Resolution of the Nile Waters Question"*, Mizan Law Review 4 (2): 235.

¹³³ CFA 2010 has been negotiated by the nine basin states since 1999 with Eritrea only attending as an observer and has been signed by six basin states namely Tanzania, Burundi, Kenya, Uganda, Rwanda and Ethiopia after it was opened for signature for one year on 14th May 2010 in Entebbe, Uganda.

and the Democratic Republic of Congo with Eritrea as an observer. The NBI was formed with the hope of concluding negotiations on a basin wide cooperative Framework Agreement (CFA). It however did not achieve much success as Egypt and Sudan adopted hardliner positions frustrating the adoption of the draft CFA.¹³⁴ The CFA created more conflict between the upper riparian states and down riparian since Egypt is still hardening its position. John Nyaoro the then chairman of NBI (2009) has reassured other nations that;

*“All the time that Egypt has walked out, they still come back...because there is no other source that they can use... and what they have been telling them (Egypt) is to cooperate”*¹³⁵

The Nile Cooperative Framework Agreement 2010 also known as “Entebbe Treaty” or “Entebbe Agreement” was signed at Entebbe, Uganda. The CFA proposed that each basin state should reserve the right to utilize the water within its territory albeit in a reasonable and equitable manner. It proposes a number of factors to be used to determine what amounts to reasonable and equitable use.¹³⁶ The downstream states of Sudan and Egypt insisted on the no harm rule which to them acts as a guarantee that its water security shall not be affected. The Upper riparian on the other hand favour equitable utilization principle. Under Article 14, basin states are urged to cooperate with each other to promote sustainable water security among all the basin states. Throughout the negotiations Egypt held firm to its position of its preexisting rights which ought to be recognized before any CFA could be concluded.¹³⁷ The six upstream countries of Burundi, Ethiopia, Kenya, Rwanda, Tanzania and Uganda nonetheless signed the CFA in

¹³⁶ Abate, Z., 1995, Integrated development of Nile waters, in Howell, P. P. and Allan, J. A., *The Nile: sharing a*

Scarce resources, Cambridge: Cambridge University Press, pp 227-242.

¹³⁶ Ibid note 1

¹³⁶ Whittington, D., 1997, paper given at the Nile 2002 meeting held in Addis Ababa in February 1997.

¹³⁶ Mwangi S Kimenyi, John Mukum Mbaku, Turbulence in the Nile: Towards a Consensual and sustainable allocation of the Nile River waters. Africa Growth Initiative. Available at www.worldbank/publications viewed on 21st March 2017

2010 with a one year allowance for the downstream riparian to append their signatures; the period however lapsed without any commitment from Sudan. The successful implementation of the CFA thus remains in limbo as long as Egypt holds on to its water security demand as well as its veto over projects undertaken in the Nile River provided in the 1902 Agreement. This came to the fore recently when Ethiopia announced plans to undertake a major hydro power project in the Nile christened Grand Renaissance Dam. Egypt and Sudan vehemently opposed the project arguing that it would have adverse effect on the quantity and quality of water reaching their territory. Whereas Sudan later on supported the project, Egypt has remained adamant even threatening to use military force against Ethiopia should it proceed with the project.

2.4 EFFECTS OF TREATIES AND POLICIES ON NILE BASIN WATER USE:

Control over the Nile has been a contentious issue since colonial era. Whereas the colonialists managed to exert some dominance over the Nile by use of military force, this domination was not fully effective. As such the colonialists entered into agreements among themselves on behalf of their protectorates. Upon gaining independence, the Free states sought to rewrite the old agreements to assert their rights over the Nile as independent states. The 1959 Egypt/Sudan agreement was the earliest of such agreements. The 1959 seemed to have abated the tension over the Nile waters as it divided the water among Sudan and Egypt while completely ignoring the other riparian including Ethiopia which contributes a substantial amount of the water.¹³⁸ Ethiopia has never recognized the 1959 agreement regarding it as a bilateral agreement between Sudan

¹³⁸ Tesfaye Tafesse, (2001). *The Nile Question: Hydropolitics, Legal Wrangling, Modus Vivendi And Perspective 2*

¹³⁸ Nile Basin Secretariat, 2012 at www.nilebasin.org

¹³⁸ Abiodun Alao, *Natural Resources And Conflict In Africa: The Tragedy Of Endowment* 55 (2007).

¹³⁸ Niveen Tadros, (1996–1997). *Shrinking Water Resources: The National Security Issue of this Century*, 17

NW. J. INT'L L. & BUS. 1091, 1092

¹³⁸ Yoseph Endeshaw, *Review of the Validity or Continuous Application of the Nile Water Treaties*, Paper Submitted at the National Water Forum, ECA, 3–4 (October 25–27, 2004)

¹³⁸ Tesfaye Tafesse, (2001). *The Nile Question: Hydropolitics, Legal Wrangling, Modus Vivendi And Perspective*

and Egypt hence not binding on Ethiopia. As such Ethiopia has defied Egyptian and Sudanese attempts to veto developments upstream by exploring its own development potential through irrigation and hydroelectric projects.¹³⁹ In 2010, Ethiopia in a joint effort with other upper riparian established the Nile Basin Cooperative Framework Agreement with an aim of setting out a formula for the equitable utilization of the Nile Basin resources.¹⁴⁰ The entire upper riparian have since gaining independence denounced the colonial agreements and agitated for fresh negotiations.¹⁴¹

To date however, Egypt continues to enjoy the lion share of the Nile waters; this has largely been contributed by its economic superiority hence enhanced capacity to employ modern technology in utilizing the Nile waters. The situation for the upper riparian has not been helped by the constant political turmoil experienced in the region.¹⁴² At some point Ethiopia faced similar challenges whereby internal conflicts diverted the government's attention away from development projects in its water resources.¹⁴³ In the recent past however, Ethiopia has embarked on mega development projects along the Nile comprising of massive irrigation projects and the Grand Renaissance Dam which is projected to produce in excess of five thousand megawatts of electricity on completion.

¹⁴⁰ Kinfe Abraham, (2004) Nile Dilemmas: Hydropolitics And Potential Conflict Flashpoints 69–71

¹⁴⁰ Peter Kagwanja, *Calming the Waters: The East African Community and Conflict over the Nile Resources*, 1 J. E.

African Studies. 321, 325 (2007) (describing how Egypt supported destabilizing forces in Eastern Africa and How Kenya sided with Ethiopia to the extent that it even intercepted and forced Somalia bound Egyptian military

transport aircraft to land in Kenya); *Nile River Politics: Who Receives Water?*, GLOBAL POL'Y F., Aug. 10, 2000,

available at <http://www.globalpolicy.org/component/content/article/198-naturalresources> viewed on 15th February 2017

¹⁴⁰ Fiona Flintan and Imeru Tamrat, (2002), *Spilling Blood over Water? The Case of Ethiopia, Scarcity and Surfeit* in

Scarcity And Surfeit: The Ecology Of Africa's Conflicts 243, 296 (Jeremy Lind & Kathryn Sturman, eds., Available at <http://www.ucc.ie/famine/GCD/Chapter6.pdf%3B>.

¹⁴⁰ Abadir Ibrahim, *The Nile Basin Cooperative Framework Agreement: The Beginning of the end of Egyptian Hydro-Political Hegemony*.

For a long time, Egypt took advantage of the internal conflicts in most of the upper riparian to fully maximize its utilization of the Nile waters; however with relative stability in the region in the recent past, the old order of business may radically shift. The increasing population is also forcing governments to look to its natural resources to feed its people. Despite clamor by the upper riparian for equitable sharing of the Nile resources, Egypt has remained rigid and untamable to the demands of the upper riparian states dashing hopes of formation of an international treaty any time soon.. An acceptable basin-wide agreement by all riparian states is the most promising way to manage the Nile River since Egypt has been trying to put in place an agreement that favours, promotes and strengthens its control over the water. All existing agreements in respect of River Nile are either bilateral or tripartite hence limited in their scope of application. They all seem to be biased in Egypt's favor in spite of Egypt holding on to them; it has become clear that they are the stumbling blocks in any attempt to forge cooperation.¹⁴⁴ Bilateral treaties exert influence because they exclude other riparians. Zeitoun and Warner argue that bilateral agreements result in "pre-empting the rights of the non-signatory states"¹⁴⁵ and never resolve the differences.¹⁴⁶ It averts escalation of conflict over the Nile which appears imminent calls for enactment of a comprehensive agreement which is fundamentally different from those in existence.¹⁴⁷ Once a new Agreement is agreed upon, all the subsisting Agreements must be discarded especially those that advocate for water monopoly among few downstream states at the expense of the upper riparian. A new agreement should principally be based on principles governing international water courses. A prominent principle in international water courses is that on fair and equitable

¹⁴⁵ Art 31(3)c Vienna Convention

¹⁴⁵ Art 32 Vienna Convention.

¹⁴⁵ Eric W. Sievers,(2002) *Transboundary Jurisdiction and Watercourse Law: China, Kazakhstan, and the Irtysh*, 37

TEX.INT'L. L. J. 1, 15 .

¹⁴⁵ Bonaya Adhi Godana, (1985). *Africa's Shared Water Resources: Legal And Institutional Aspects Of The Nile, Niger And Senegal River Systems* 84

¹⁴⁵ Ibrahim Kaya,(1985). *Equitable Utilization: The Law Of The Non-Navigational Uses Of International Watercourses* 45-46 (1985).

¹⁴⁵ *Lake Lanoux (France v. Spain)*, 12 R.I.A.A. 281, *translated in* 24 ILR 101, at 111-112 (1957)

allocation of water among riparian states in a transboundary watercourse. Lemma avers that the greatest challenge facing the Nile riparian states in its NBI initiative is reversing the age old unjust and unequal distribution of the Nile water resources.¹⁴⁸

What has escalated tension over the River Nile is the ambiguity over the term ‘water security’ as well as the opposing interests of the upper riparian states against the lower riparian. As the upper riparian agitate for equitable sharing of the Nile water, the lower riparian insist that any new agreement including the CFA should factor in previous agreements as being fundamental to the creation of a new agreement.¹⁴⁹ The reliance on the Nile resources is set to intensify with rapid population growth in the region. As such every state seeks to secure its share of the river to enable its citizens their livelihood as well as improving the countries’ economies.¹⁵⁰ There are legitimate concerns that unless the Nile issue is addressed urgently it could degenerate into a violent conflict in the near future. In 2002, former UN Secretary General Kofi Annan reckoned that “*conflict over water resources contains the seed of violent conflict*”.¹⁵¹ According to a realist perspective, it is highly unlikely that riparian states would fight over river Nile. They must put into consideration the costs of the war and the possibility of winning bearing in mind the local political realities. As is the case in every military confrontation, no country can be guaranteed of outright victory. The realists argue that war would be more expensive than cooperation thus prompting the need to cooperate by riparian states.

¹⁴⁹ Mark Sinclair, The Environmental Cooperation Agreement Between Mexico and the United States: A Response to the Pollution Problems of the Borderlands, 19 CORNELL INT’L L. J. 87, FN 120 (1996); Report of the Fifty-Second Conference of the International Law Association, Helsinki Rules on the Uses of the Waters of International Rivers

¹⁴⁹ Dante Caponera, Legal Aspects of Transboundary River Basins in the Middle East: The Al Asi (Orontes), the Jordan and the Nile, 33 NAT. RESOURCES J. 629, 652 (1993).

¹⁴⁹ Ibid at note 21

¹⁴⁹ Art vii, Helsinki Rules 1967

¹⁴⁹ Convention on the Law of the Non-Navigational Uses of International Watercourses, U.N.G.A. Res. 51/229, May 21, 1997

Cooperation can be fostered through involvement of the members of the public, technical and financial support, human resource support coupled with good political will.

Whereas the Egyptian government continue to threaten the upper riparian with military force should they interfere with its water security policy, these threats may not be tenable in the face of international law. .

The 1929 Nile River Agreement between United Kingdom and Egypt and the 1959¹⁵² Nile River agreement between Egypt and Sudan are perceived as the most important agreements in the Nile River basin to date. These two agreements seem to favor the lower riparian states and thus they escalate the tension between the upstream and downstream riparian states.

CONCLUSION:

The longstanding dispute between upper and lower riparian states revolves around unsettled historical interests. It is unfortunate that no consensus was achieved after extensive deliberations on Article 14 (b) which stipulates “*not to significantly affect the water security of any other Nile Basin State*”. Whereas all the other states approved the provision, Egypt and Sudan proposed their own version to wit: “*not to adversely affect the water security and current uses and rights of any other Nile Basin State*”. Through

International Rivers

¹⁵² Dante Caponera, Legal Aspects of Transboundary River Basins in the Middle East: The Al Asi (Orontes), the Jordan and the Nile, 33 NAT. RESOURCES J. 629, 652 (1993).

¹⁵² Ibid at note 21

¹⁵² Art vii, Helsinki Rules 1967

¹⁵² Convention on the Law of the Non-Navigational Uses of International Watercourses, U.N.G.A. Res. 51/229, May 21, 1997

¹⁵² See generally the Water Convention ibid

¹⁵² Convention on the Law of the Non-Navigational Uses of International Watercourses, May 21, 1997, 36 I.L.M. 700

¹⁵² Preamble Convention on the Law of the Non-Navigational Uses of International Watercourses

¹⁵² Mohamed Abdo, The Relevance and Contribution of the UN Watercourses Convention Towards resolving the

problems in the Nile Basin, Masters Thesis.

¹⁵² Jeffrey D. Azarva, *Conflict on the Nile: International Watercourse Law and the Elusive Effort to Create a Transboundary Water Regime in the Nile Basin*, 25 TEMP. INT’L & COMP. L.J. 457, 461 (2011).

¹⁵² Art 5 & 7 Convention on the Law of the Non-Navigational Uses of International Watercourses

its adamancy, Egypt has managed to frustrate the formation of a CFA. It's now clear that the “**water security**” is devoid of legitimacy and its sole purpose was to deliberately create an ambiguity to further and maintain Egypt's status quo of dominion.¹⁵³ Egypt was deliberately trying to legitimize previous bilateral agreements which were unacceptable by the upper riparian states. Egypt and Sudan strenuously rejected any other discussions before resolution of the water security question. This hardline position frustrated negotiations and eventually aborted all efforts to create an acceptable CFA by all riparian states and in the end they both refused to sign. It is arguable that failure to come up with an optional phrase acceptable to all the Nile Basin States frustrated the CFA 2010¹⁵⁴ thus increasing the tension between the riparian states.

¹⁵³ Aaron Wolf and Joshua Newton, Case study of transboundary dispute resolution: the Nile Waters Agreement,

www.transboundarywaters.orst.edu/research/case_studies/Documents/nile.pdf

¹⁵³ *ibid* note 32.

¹⁵³ Daniel Abebe, "Egypt, Ethiopia, and the Nile: The Economics of International Water Law," University of Chicago Public Law & Legal Theory Working Paper, No. 484 (2014).viewed at http://chicagounbound.uchicago.edu/public_law_and_legal_theory

¹⁵³ Valerie Knobelsdorf, *The Nile Waters Agreements: Imposition and Impacts of a Transboundary Legal*

CHAPTER THREE

3.0 GEO-POLITICAL AND ECONOMIC ISSUES OVER THE USE OF RIVER NILE BASIN.

3.1 Introduction

The interests of the upstream and downstream riparian of any water course invariably differ. Downstream riparian tend to have an advantage over their upstream counterpart owing to the tendency to have level alluvial soil. On the other hand upstream states tend to be mountainous making any development quests technical and expensive.¹⁵⁵ In the Nile River Basin Egypt and Sudan enjoy the advantage of being downstream riparian. On the other hand eight states namely Uganda, Kenya, Rwanda, Ethiopia, Burundi, Eritrea, Burundi and Democratic Republic of Congo are upstream riparian. Owing to their geographical disadvantage the urban upper riparian's have not been able to gather enough resources to develop their water resources. Historically they were held back by the counter interests of the colonial powers. However with independence, the upper riparian began to clamor for equitable sharing of the Nile water.¹⁵⁶

Egypt owing to its technological, economic and institutional advancement over the other riparian has been able to utilize most of the Nile water. It has always asserted its entitlement on the basis of the 1959 agreement it signed with Sudan.¹⁵⁷ This agreement was hurriedly put in place by the Egyptian government with the sole intention of gaining

System, 44 COLUM. J. TRANSNAT'L L. 622, 623–24 (2006)

¹⁵⁵ Dereje Zeleke Mekonnen, *The Nile Basin Cooperative Framework Agreement Negotiations and the Adoption of a 'Water Security' Paradigm: Flight into Obscurity or a Logical Cul-de-sac?*, 21 EUR. J. INT'L 421, 431 (2010)

¹⁵⁵ Dereje Zeleke Mekonnen, *The Nile Basin Cooperative Framework Agreement Negotiations and the Adoption of a 'Water Security' Paradigm: Flight into Obscurity or a Logical Cul-de-sac?* 21 EUR. J. INT'L 421, 431 (2010)

¹⁵⁵ Mwangi S Kimenyi, John Mukum Mbaku, *Turbulence in the Nile: Towards a Consensual and sustainable Allocation of the Nile River waters*. Africa Growth Initiative. Available at www.worldbank/publications.

¹⁵⁵ Daniel Kendie, (1999), "Egypt and the Hyrdo-Politics of the Blue Nile River" 6 *Northeast African Studies*, 141

¹⁵⁵ Kenneth Kiplagat, (1995) "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.

total control over the use the Nile River. As such the legal framework governing the use of the Nile waters has been described as a set of colonial era agreements which in effect signed off all the Nile's water to Egypt and Sudan.¹⁵⁸

3.2 The Stakes for the Riparian States

The Nile watercourse traverses eleven states inhabited by approximately forty percent of the entire African population.¹⁵⁹The Nile River Basin covers 6,695km from its source in Burundi. The Nile River Basin covers over three million square kilometers which is ten percent of Africa's total land area.¹⁶⁰The Nile resource is primarily used for irrigation, hydroelectric power generation, industrial consumption, domestic use and transportation.¹⁶¹ The upper riparian states of the Nile basin are characterized by a fast growing population, environmental degradation, poverty, food insecurity, water scarcity and worryingly the potential for conflict over water resources.¹⁶²The potential conflict is likely to arise out of the projected increased demand coupled with decrease in supply.

Whereas the lower riparian have benefitted economically from exploiting the Nile basin resources, the upper riparian have not benefitted to a great deal. This is attributable to the fact that exploitation of the water resources at the upper catchment requires technical and financial capacity which most of the upper riparian either lack or have been unwilling to commit themselves. Internal conflicts and instability have also shifted the focus to other matters.¹⁶³ All the upper White Nile riparian utilize an estimated 0.05 cubic kilometers of

¹⁵⁹ Knobelsdorf (2006), p 631. Also see Gebre Tsadik Degefu, *The Nile: Historical, Legal and Developmental*

Perspectives, (New York: Trafford Publishers.

¹⁵⁹ Daily Nation Newspaper, December 11,2003

¹⁵⁹ Daily Nation Newspaper, March 28, 2002.

¹⁵⁹ Christina Carroll,(1999); "Past and Future Legal Framework of the Nile River Basin," 12 *Georgetown International Environmental Law Review*, 269, 278

¹⁵⁹ Jeffrey D. Azarva,(2011).*Conflict on the Nile: International Watercourse Law and the Elusive Effort to Create a*

Transboundary Water Regime in the Nile Basin, 25 TEMP. INT'L & COMP. L.J. 457, 461

the water while Egypt in itself utilizes approximately 55.5 cubic kilometers of the Nile waters.¹⁶⁴

Whereas Egypt and Ethiopia do not share a common border, the Nile River has created an inextricable ecological relationship. This relationship has however been characterized by misunderstanding, mistrust, suspicion and in some cases political and military confrontations and threats.¹⁶⁵ It is claimed that Egypt has seized every opportunity to destabilize Ethiopia. This is evidenced by the Ethiopian Eritrea war and the Ethiopia Somalia conflict which Ethiopia alleges were fanned with Egyptian support.¹⁶⁶ On its part Ethiopia has employed a reciprocal policy towards Egypt. It is claimed that it played a role in the Sudan People's Liberation Army during its armed struggle with the Arab north in their quest to secede.¹⁶⁷

From a legal perspective, the treaty regime governing the Nile River is incomplete and fragmented. Further a majority of the riparian states have refused to recognize the validity and legitimacy of those treaties. The customary rules of international law applicable in the Nile basin are also unclear. Upper and lower riparian states have advanced opposing theories to advance their claims.¹⁶⁸

¹⁶⁴ Tadesse Kassa Woldetsadik,(2013).International Watercourses Law In The Nile River Basin: Three States At

A Crossroads

¹⁶⁴ Ibid note 188.

¹⁶⁴ *Ethiopia: Egypt Attack Proposals 'Day Dreaming,'* YA LIBNAN (June 5, 2013), <http://www.yalibnan.com>

¹⁶⁴ Ahmed Feteha & William Davison, *Egypt and Ethiopia Disagree on Probe of Nile Dam Impact*, BLOOMBERGNEWS (Nov. 6, 2013),

<http://www.bloomberg.com/news/2013-11-06>

¹⁶⁴ Preamble, Convention on the Law of the Non-Navigational Uses of International Watercourses

¹⁶⁴ Stephen McCaffrey, 2001, "The Contribution of the UN Convention on the Law of the Non-Navigational Uses of

International Watercourses", *International Journal of Global Environmental Issues*, Volume, 1

¹⁶⁸ Patricia Wouters, (2000) "National and International Water Law: Achieving Equitable and Sustainable Use of

Water Resources", *Water International*, Vol. 25 No. 4, P. 503.

¹⁶⁸ Art 5,7,8 Watercourses Convention,

3.3 The Law on International Watercourses

The Nile River Basin has a number of existing bilateral agreements in a multilateral basin shared by eleven Basin states. These include 1929 Nile River agreement between Egypt and the United Kingdom on behalf of the then upstream riparian territories of Sudan, Uganda, Kenya and Tanzania that were under the British rule. The other essential agreement is the 1959 Nile River Agreement between Sudan and Egypt. The 1959 Nile Agreement allocated all the Nile waters to Egypt and Sudan leaving 10BCM annually for evaporation in Aswan dam.

There are general provisions of international law that may prove helpful in negotiating an acceptable Nile basin agreement. These principles are however collateral to existing treaties and agreements and only help in interpretation of the existing agreements. They may be also used when no acceptable agreement exists at all. The Vienna Convention provides that *“there shall be taken into account, together with the context... any relevant rules of international law applicable in the relations of the parties with respect to the interpretation of a treaty or subsequent practice.”*¹⁶⁹ It further states that *“recourse may be had to supplementary means of interpretation ... in order to confirm the meaning resulting from the application of article 31 or to determine the meaning when the interpretation according to article 3(a) leaves the meaning ambiguous or obscure.”*¹⁷⁰

3.3.1 The Principle of Territorial Sovereignty.

This principle generally states that a sovereign nation has a right to exclusively exert jurisdiction over land territory which is within its boundaries.¹⁷¹ Under this principle

¹⁶⁸ Art 5 Watercourses Convention.

¹⁶⁸ ICJ GL No 92(1997) ICJ Rep 7

¹⁶⁸ Patricia Wouters, (1999). “The Legal Response to International Water Conflicts: The UN Watercourses Convention and Beyond”, *German Yearbook of International Law, Vol. 42*, P. 336

¹⁶⁸ Salman, A. Salman,(1998) “International Watercourses: Enhancing Cooperation and Managing Conflict”, In

Salman A. Salman and De Chazournes (eds) *International Watercourses: Enhancing Cooperation and Managing Conflict*. World Bank Technical Paper. No 414, p. 170

¹⁷¹ Patricia Wouters, (2000) “National and International Water Law: Achieving Equitable and Sustainable Use of

therefore, waters flowing through boundaries of a sovereign nation are deemed to fall within the absolute domain of that nation. They have discretion to exploit the water together with its resources without any regard to the fate of the downstream users.

Most of the upstream riparian states of the Nile basin have supported this principle stating that sovereign states should not be restricted from using water which either originate or pass through their jurisdictions.¹⁷² International recognition of the theory has however declined and is only adopted in times of great need such as during extended droughts and famine.¹⁷³ In the landmark case of *Lake Lanoux Arbitration* between Spain and France, the ICJ stated that judicial decisions uphold treaty restrictions only where there is overwhelming and convincing evidence suggesting an impairment of the territorial sovereignty of a state.¹⁷⁴ If this principle were to be applied in the Nile basin it would mean that sovereign right of the states to utilize the Nile resources can only be limited by an explicit agreement between the sovereign states.

3.3.2 Natural and Historical Rights Claims

The natural rights approach is similar to the principle of territorial sovereignty in that it allows a nation to claim to international waters on the basis of hydrology, its contribution

Water Resources", *Water International*, Vol. 25 No. 4, P. 503

¹⁷¹ Art 7 Watercourses Convention

¹⁷¹ Art 8 Watercourses Convention.

¹⁷¹ Green Cross International, *National Sovereignty and International Watercourses*, Green Cross International, the Hague, 2000, P. 44

¹⁷¹ L.B. De Chazournes, (1998, October). *The UN Convention on International Watercourses: Prospects for an*

Unfinished Agenda for Co-management. Paper presented at the Conference on Water : Dispute Prevention and

Development, Center for the Global South, Washington College of Law, American University, Washington, DC.

¹⁷¹ Report of ILC on the work of its Forty Sixth Session 2 May-22 July 1994, General Assembly Official Records, Forty Ninth Session. Supplement No. 10 A/49/10, p. 207

to water catchment and its prevailing social and economic needs.¹⁷⁵ This approach has been exemplified in the ILC's Helsinki Rules of 1967. In the Nile basin case it would enable upper riparian to lay claim based on flow contribution. Egypt has however denied the application of this principle in the Nile and laid emphasis on the prior use principle.¹⁷⁶ The prior use doctrine advocates for a nation to continue enjoying the rights that they currently have or have historically possessed. Most of the treaties signed over the Nile basin have been based on the prior use principle. Egypt asserts that based on this doctrine the upper riparian are precluded from utilizing the waters of the Nile in a manner that may be prejudicial to Egypt's established historical use.¹⁷⁷

The challenge with applying the prior use doctrine in the Nile basin is the glaring disparity in the developmental and technical capacity between the upper riparian states and Egypt. This disparity has been compounded by Egypt's historical control of majority of the water which in turn increased its capacity even further.

The current trend in international watercourse law seems to favour currently established prior uses but does not endorse the claim for historical right to water not currently used. The Helsinki Rules state that ***“an existing reasonable use may continue in operation unless the factors justifying its existence are outweighed by other factors leading to a conclusion that it can be modified or terminated so as to accommodate a competing incompatible use.”***¹⁷⁸ Similarly the Watercourse Convention¹⁷⁹ propagates the doctrine of

¹⁷⁵ Beaumont, P (2000) The 1997 UN Convention on the law of Non-navigational Uses of International Watercourses:

its strengths and weaknesses from a Water management perspective and the need for New Workable guidelines

Water Resource Development, Vol 16, No 4 Carfax Publishing.

¹⁷⁵ Stephen McCaffrey, 2001, “The Contribution of the UN Convention on the Law of the Non-Navigational Uses of

International Watercourses”, *International Journal of Global Environmental Issues, Volume, 1, No. 3/4*, p. 252;

¹⁷⁵ Report of ILC on the work of its Forty Sixth Session 2 May-22 July 1994, General Assembly Official Records, Forty

Ninth Session. Supplement No. 10 A/49/10, p. 207

¹⁷⁹ J. Brunnee and J. S. Toope,(2002) “The Changing Nile Basin Regime: Does Law Matter?”, *Harvard International Law Journal, Volume 43, No. 1*, p. 151

equitable and reasonable use which impliedly sustains the prior use principle subject to such use being reasonable and balanced against interest of other users.¹⁸⁰

The laws and rules governing the use of International water courses such as the Nile River are derived from the Convention on the Law of Non-Navigational Uses of International Watercourses¹⁸¹. It was concluded and opened up for signature in 1997.

The Convention concerns itself mainly with Non-navigational uses of International watercourses. Its objectives are: *to ensure the utilization, development, conservation, management and protection of international watercourses and the promotion of their optional and sustainable utilization for the present and future generations.*¹⁸² It is the only Convention which governs the uses of international watercourses exclusive of navigation purposes.

Of the nine riparian states of the Nile, seven took part at the negotiation. At the voting stage, four of them abstained namely; Ethiopia, Egypt, Rwanda and Tanzania. Kenya and Sudan voted in favour while Burundi opposed it. Judging by the voting pattern of the Nile riparian states, it is debatable whether the Convention is of much relevance to the Nile basin and the contribution it can make to resolution of the standoff in the basin.¹⁸³

Although Egypt and Ethiopia have not given their assent, the convention has been regarded as being the most accurate representation of customary international law on international watercourses.¹⁸⁴

¹⁷⁹ J. Brunnee and J. S. Toope,(2002) "The Changing Nile Basin Regime: Does Law Matter?", *Harvard International Law Journal*, Volume 43, No. 1, p. 151

¹⁸⁴ Ozawa C. P. and L. Susskind (1985), *Mediating Science _ Intensive Policy Disputes.*" *Journal of Policy Analysis and Management* vol 5, no. 1 p. 2.

¹⁸⁴ [UNITE] Refers to the mediation training undertaken by author, given by UNITE, Southlands Centre, Ormesby Road, Middlesbororough TS3 0HG.

The Convention is premised on the principles of equitable and reasonable utilization and participation of the riparian states exploiting a watercourse, and an obligation not to cause significant harm to other states sharing that watercourse.¹⁸⁵ These principles suggest that whereas upper riparian states have the right to occasion development with their water resources, in doing so they should be mindful of the downstream riparian states so as not to cause them significant harm. They also call on riparian states to reach equitable and reasonable solutions to watercourse conflicts.

3.4 Egypt's Claim of Exclusive Use Under International Law

Egypt has made several contentions under international law in support of its claim that it enjoys superior and near exclusive right to exploit the resources of the Nile. It argues for instance that the 1902 treaty between Great Britain and Ethiopia in which Ethiopia purportedly surrendered all its rights to the Nile and undertook not to carry out any activities that would jeopardize the availability of the Nile waters to Egypt. Egypt's contention is that it was a British protectorate at the time of the treaty hence it is a third party beneficiary of the treaty.¹⁸⁶

It has also relied on article 7 of the Convention on the Law of the Navigational Uses of International Watercourses, which obliges states to take all measures to prevent significant harm to other states sharing the watercourse. Egypt's contention is that the 1902 treaty read conjunctively with the Convention and International customary law precludes Ethiopia from exploiting the Nile waters.¹⁸⁷

Egypt has also subscribed to the doctrine of appropriation in allocating water rights. This doctrine is linked to the theory of 'prior' or historical use. The doctrine of appropriation propagates that the first user of some amount of water for a beneficial purpose gains an exclusive property right to the amount of water utilized as against subsequent users. The subsequent users can only utilize the remainder of the water as long such use does not

infringe on the first user's rights. Egypt thus contends that other riparian states can only utilize the Nile on condition that Egypt's prior rights are not interfered with.¹⁸⁸

Egypt has also argued that the treaties entered into by Egypt and Sudan between 1929 and 1959 governing the use of the Nile shall apply in equal measure to all the other riparian states even though those states were not parties to the negotiation process.¹⁸⁹ The 1929 treaty recognized Sudan's right to use an increased amount of the Nile water subject to such increase not being detrimental to Egypt's historical rights to the water and its requirements for agricultural expansion.¹⁹⁰ Upon the gaining of independence by Sudan, the 1929 treaty was revisited and a new 1959 agreement established. The new treaty modified the 1929 Agreement and apportioned the waters between Sudan and Egypt only excluding all the other riparian states and explicitly barring them from utilising the Nile water resources.¹⁹¹

3.5 Upper Riparian Claims to the Lake Basin Resources Under International Law.

There has been significant increase in demand for water among the Nile River Basin. This has been occasioned by a number of factors including: the increasing reliance on surface water over rainfall attributed to climate change which has resulted in erratic weather patterns and in most cases drought; rapid population growth which requires water for survival and also the expansion of economic activities in the upper riparian coupled with the increased technical capacity to utilize the water.¹⁹²

Nearly all the upstream riparian states have disapproved of the Nile River Water Agreements with a clamor for negotiation of a new framework to manage the Nile river waters.¹⁹³ The main bone of contention revolves around Egypt's attempt to bind all the

¹⁸⁸ Bar-Siman-Tov, Yaacov, (1994) "The Arab- Israeli Conflict: Learning Conflict Resolution." *Journal of Peace Research*, Vol 31, no. 1. p. 75

¹⁸⁸ Bevan, Alexander H., (1992), *Alternative Dispute Resolution: A Lawyer's Guide to Mediation and other Forms of Dispute Resolution*. Sweet and Maxwell: London. p. 2.

¹⁹³ Article 33 UN Charter.

upper riparian states to agreements that were negotiated without their participation and which did not factor in the interests of the upper riparian states.

Most of the upper riparian states seem to endorse what is popularly referred to as the Nyerere Doctrine of Treaty Succession.¹⁹⁴ In that doctrine, the former president of Tanzania argued that his new country then known as Tanganyika would not accept to be bound by agreements it that had been entered into by the Colonial regimes unless required to do so under International Law.¹⁹⁵

In December 2003, Kenya's parliament made a declaration that it was not going to be bound by the agreements as it had not been part of the negotiations. The legislators felt that there was no obligation created on the part of Kenya by the colonial era imposition. It declared that it was time to free itself from a yoke that had constrained the country's freedom to exploit its Natural resources.¹⁹⁶ Earlier in 2002, the Kenyan Minister for Energy had denounced the Nile Waters Treaty Agreements as totally obsolete and totally irrelevant to Kenya's development agenda.¹⁹⁷

¹⁹³ Bailey, Sidney D. (1985), "Non-official Mediation in Disputes: Reflections on Quaker Experience" *International Affairs*, Vol 61, no. 2. p. 222

¹⁹³ Jonah, James O.C.. (1992) "The United Nations and International Conflict: The Military Talks at Kilometre Marker – 101" in Bercovitch, Jacob and Jeffrey Z. Rubin. p. 199.

¹⁹³ Ozawa, C. P., and Susskind (1985), "Mediating Science-Intensive Policy Disputes." *Journal of Policy Analysis and Management* vol 5, no 1. P. 34

¹⁹³ Mitchell, Christopher, and Michael Banks, (1996), *Handbook of Conflict Resolution: The Analytical Problem- Solving Approach*. Pinter: London p. 5.

¹⁹³ Susskind, Lawrence and Eileen Babbit, (1992), "Overcoming Obstacles to Effective Mediation of International Disputes" Bercovitch, Jacob and Jeffrey Z. Rubin, (1992), *Mediation in International Relations: Multiple Approaches to Conflict Management*. Macmillan Press: London.

¹⁹⁷ Winters, P (ed) (1997). *International Water Law: Selected Writings of Professor Charles B. Bourne* (London/The Hague/Boston: Kluwer Law International).

¹⁹⁷ Bruhacs, J. (1993). *The Law of Non-Navigational Uses of International Watercourses* (Dordrecht/Boston/London: Martims Nijhoff Publishers).

3.6 Ethiopia's Unique Position

What is unique of Ethiopia is the fact that despite it having been a sovereign nation when the agreements were being negotiated, they were never invited to participate in enacting the agreements nor consulted. It is also worth noting that most of the waters of the Nile originate from the Ethiopian highlands. As such Ethiopia's argument is that since it was not subjected to any form of colonial rule, no colonial government ever entered into a treaty agreement on its behalf. Its position is that as a country it will not be compelled to adhere to an agreement that does not serve domestic public interest.¹⁹⁸

In rejecting the validity of the 1902 treaty, Ethiopia has relied on article five of the Convention on the Law of the Non-Navigational Uses of International Watercourses which provides for equitable and reasonable utilization by watercourse states and the Harmon Doctrine which propagates the notion that jurisdiction over natural resources in a sovereign's territory is exclusive and absolute. As such it asserts that it retains the right to unhindered exploitation of the Nile water resources.¹⁹⁹

Ethiopia also argues that the 1902 treaty is not binding on it since it did not properly ratify it and even if it did, there is a contention over its interpretation since the English and The Amharic version seem to be in conflict.²⁰⁰ Ethiopia's argument is that the treaty did not encompass a provision denouncing its right to exploit the resources of the Nile. Further Ethiopia's argument is that the Convention unconditionally bars appropriation approach in international watercourses and that to the contrary the Convention it advocates for all riparian states to have access and equal utilization of the international watercourse.²⁰¹

Ethiopia has since begun developing a hydropower project dubbed Grand Ethiopian Renaissance Dam Project which on completion will be one of the world's largest power plants.²⁰² This development has made Egypt apprehensive over its future owing to its

²⁰² Mohamoda DahilonY(2003) "Nile Basin Cooperation: A Review of the Literature." Current African Issues 26

major dependence on the waters of the Nile. Egypt's main concern is that the Dam may cause a reduction in the amount of water reaching its territory and also that reservoir accompanying the Dam may cause evaporation in the Blue Nile leading to reduction of the volumes of water in the Nile.²⁰³

3.7 The Relevance of The UN Watercourses Convention in Resolving Shared Water Resource Conflicts

The Watercourses Convention being the only international Treaty that governs the utilization, management and development of shared water resources for non-navigational purposes²⁰⁴, could be critical in negotiating an equitable framework for the utilization of the Nile basin resources. Its principles and rules could be useful in addressing the challenges faced in the Nile Basin. The Convention provides a general basis in the negotiation process of agreements relating to a specific watercourse. It also acts as a default framework in the absence of a specific agreement outlining the rules governing the conduct of riparian states to a particular watercourse.²⁰⁵

Currently there is no legal framework on the Nile basin which has been endorsed by all the nine riparian states. The 1929 agreement between Egypt and Uganda and that of 1959 between Egypt and Sudan have been regarded as bilateral agreements hence not binding on other riparian states.

It has been stated that the lack of a binding legal framework for the management of international watercourses may result in inequitable utilization which may lead to conflicts.²⁰⁶

²⁰² Mekonnen Kefyalew. (2008)"The Defects and Effects of Past Treaties and Agreements on the Nile River Waters: Whose Faults Were They? Available at www.ethiopians.com/abay/engin viewed on 1st

April 2016

²⁰² Erin Johnston(2009) Factors Influencing a basin wide agreement governing the Nile River. Masters Research Project British Columbia University.

²⁰⁶ United Nations Economic Commission for Africa (UNECA) 2000 Transboundary River/Lake basin Water Development in Africa: Prospects, Problems and Achievements, Addis Ababa Ethiopia.

This prevailing situation thus makes the Watercourses Convention an ideal foundation for the establishment of an acceptable legal framework for the management of the Nile basin.

3.7.1 Rules and Principles under The Convention

The Convention proscribes both substantive and procedural rules and principles on the use and management of International Watercourses. Most prominent are those on reasonable and equitable use, no significant harm and the duty to cooperate.²⁰⁷ It obliges riparian states to utilize the international watercourse in a manner that is optimal and sustainable and taking into consideration the interests of other watercourse states. It also places a duty on the watercourse states to cooperate in the protection and development of the international watercourse.²⁰⁸ The ICJ affirmed the principle of equitable use while rendering its decision in the *Gabcikovo Nagymaros*²⁰⁹ case. The court made explicit reference to the water Convention as being an authoritative statement on matters of the law of international watercourses despite the fact that no single state had ratified the Convention at the time court rendered its decision.²¹⁰ The decision has been hailed as a landmark ruling with the potential to influence the resolution of watercourse disputes in international watercourses.²¹¹ In essence the decision guides warring states in watercourse disputes to concede the supremacy of the principle of reasonable and

²⁰⁶ Waterbury J (1987) Legal and institutional arrangements for managing water resources in the Nile basin.

International Journal of Water Resources Development

²⁰⁶ A. Soffer, (1999) *Rivers on Fire: The Conflict over Water in the Middle East*

²⁰⁶ Brunnee and Toope, (2002) 'The Changing Nile Basin Regime: Does Law Matter?', 43 *Harvard International Law Journal* (2002)

²⁰⁶ Ibid at note 7

²⁰⁶ Ibid at note 229

²¹⁰ Art 3, 4 Agreement on the Nile River Basin Cooperative framework. Available at www.nilebasin.org/images/docs/CFA - English French Version.pdf viewed on 7th June 2017.

²¹⁰ Ibid at art 3, General principles.

²¹⁰ S.A. Mason, (2004) *From Conflict to Cooperation in the Nile Basin*, at 201.

²¹⁰ Dereje Zeleke Mekonnen; (2010) The Nile Basin Cooperative Framework Agreement Negotiations and the

Adoption of a 'Water Security' Paradigm: Flight into Obscurity or a Logical Cul-de-sac?. *European Journal on*

International Law ; 21

equitable use in settlement of disputes relating to shared water resources. Further states have recognized the principle as a fundamental principle of international water law.²¹² Should the riparian states of the Nile basin refer their dispute on the use of the Nile water resources to an International tribunal such as the ICJ, it is certain that the *Gabcikovo Nagymaros* case shall have a huge bearing and influence in the determination.

On the obligation not to cause significant harm, where a significant harm is nevertheless caused, the watercourse state responsible for the harm shall take appropriate measures to mitigate or eliminate the damage caused and where appropriate cause compensation.²¹³

On the general obligation to cooperate, the riparian states shall base their cooperation on sovereign equality, territorial integrity, mutual benefit and good faith. To facilitate such cooperation, the watercourse states may establish joint mechanism or commissions.²¹⁴

The Nile basin lacks rules and principles on utilization of its resources. The Water Convention rules and principles can be of great significance towards establishment of a framework that will guide the utilization, management and development of the Nile basin resources. As such the Convention could play certain specific roles:

3.7.2 Basic framework for future agreement

The Convention acts as a broad and general framework agreement. This allows for its adoption to be used as a starting point in the development of a regional framework.²¹⁵ Its general nature allows for elaboration through additional treaties.²¹⁶ It thus allows for

²¹⁶ 'The Nile River Cooperative Framework Agreement: Contentious Legal Issues and Future Strategies for Ethiopia',

Paper Presented at the National Consultative Workshop on Nile Cooperation, 12–13 Feb. 2009, Addis Ababa, Ethiopia, at 11.

²¹⁶ Tamrat, (2009)'Prospects and Problems of the On-going Cooperation in the Nile Basin and the Way Forward – A

Personal Ethiopian Perspective', Discussion paper presented at the National Consultative Workshop held in

Addis Ababa, Ethiopia, 12–13 Feb. at 15

²¹⁶ Nile Cooperative Framework Agreement to be discussed at extra-ordinary Nile-COM meeting in Kinshasa', NBI

regional watercourse states to adjust them to fit their conditions and circumstances. The framework Convention was crafted by the ILC as a result of the diversity of different watercourses and the difficulty in formulating specific principles applicable to all watercourses.²¹⁷

In the absence of specific rules and principles guiding utilization of a specific watercourse as is the case in the Nile basin, recourse could be made to the framework Convention as a basis for future negotiation and establishment of framework law for the management of the Nile basin.

3.7.3 Flexibility

Under article 3, States have the freedom to adjust the provisions of the Convention to suit the peculiar characteristics of a particular watercourse on condition that the rights of other watercourse states are not adversely affected. The allocation of water in the Nile has caused huge controversy; this is because the allocation was based on historical and acquired rights which gave unequal rights to the riparian. The reallocation of the Nile water equitably as demanded by the upper riparian states should be based on diverse relevant factors. Article six of the convention provides some of the factors to consider.

3.8 Applicability of The Water Convention on The Nile Basin.

The Convention has been hailed for its nature of being a framework treaty. In this sense it can be used as a guide to resolving major issues and not as a blueprint for final resolution of disputes.²¹⁸

The principle of reasonable and equitable utilization enshrined in article five of the Convention has been elevated to status of customary rule of international law.²¹⁹ This

News, available at: www.nilebasin.org/index.php?option=com_content&task=view&id=130&Itemid=70 (Accessed on 5 June 2017).

²¹⁹ The Daily Nation Newspaper(24th May 2009) "Sudan walks out of Nile River talks' available at: www.nation.co.ke/news/africa accessed on 5th June 2017

²¹⁹ See for instance Dereje Zeleke Mekonnen (2010) The Nile Basin Cooperative Framework Agreement Negotiations and the Adoption of a 'Water Security' Paradigm: Flight into Obscurity or a Logical Cul-de-sac 2010;

21 (2): 421-440. European Journal on International Law.

development has been further asserted by state practices found in treaties concluded by them and also in decisions of international and national tribunals while resolving conflicts over use of international waters and also in writings of environmental jurists.²²⁰ The Convention by providing for the principle of reasonable use thus codifies an internationally acceptable norm. The implication of this international customary norm on the Nile basin states is that it is binding on all of them irrespective of whether or not they have ratified the Convention. This arises from the fact that reasonable use is a norm of international law in the sphere of shared water resources.

Based on the principle of reasonable and equitable use, the claims by the lower riparian of the Nile basin of acquired and historic rights as well as those of the upper riparian's of absolute territorial sovereignty and integrity can no longer be asserted. Their claims seem to be based on outdated theories which have been overtaken by the international customary principle of reasonable and equitable utilization. When made applicable to the Nile states, the principles of the water Convention counteract the previously opposing rules of equitable and reasonable use under article five and that of obligation not to cause significant harm under article seven by placing them on the same footing.²²¹ This effectively deprives both the upper and lower riparian of their arguments for their claims

²¹⁹ 17th Nile Council of Ministers in Charge of Water Affairs Reaffirm Basin-Wide Cooperation', NBI News, available

at: www.nilebasin.org accessed on 5th June 2017

²¹⁹ Online US based World Water Wars Database, accessed 13 September 2017, at, <http://worldwaterwars.com/index.htm>

²²¹ Wondimu H (2008) "Nile Basin Initiative: Current Context and evolution towards institutional strengthening."

Paper presented at the International workshop on institutional capacity development in transboundary basins.

Bonn Germany.

²²¹ Nile Basin Initiative(2007) www.nilebasin.org

²²¹ Waterbury (2002) The Nile Basin: National determinants of collective action. New Haven. Yale University Press.

²²¹ Ostrom (1990) Governing the commons: The evolution of institutions for collective action. New York. Cambridge

University Press.

²²¹ Patricia Kameri-Mbote From conflict to cooperation in the management of transboundary waters, the Nile

to take precedence against the other. Instead it will compel both the upper and lower riparian states to reconsider their hardline positions and engage in more consultations with each other with a view of finding amicable solutions.²²²

3.9 MEDIATION

Mediation is used in every area of human interaction. At its simplest level, mediation is the intervention by a third party to aid communication between two or more disputing parties. The main objective is to change the situation from being a two fight to a three way search for a solution. Thus it is arguable that mediation is negotiation assisted by a third party. The contentious issues are discussed, possible options are explored and eventually possible agreements are still reached. In mediation the decision making power remains with the disputants. The primary focus of mediation is to reach an amicable agreement. Dispute management should not be a win or lost contest. It should be a relationship-building process. In most cases it involves process, content, and emotions. Reaching a specific settlement is as important as the way that specific dispute was resolved. Mediation process seeks to ensure that the disputants retain control of decision-making leading to a resolution of the dispute.

The whole process of mediation is voluntary. The disputing parties voluntarily allow the intervention of a third party and the third party volunteers to intervene.²²³

Therefore, this thesis argues that disputants will in most cases by necessity, have some form of continued interaction after the agreement has been signed. If the resolution process is adversarial, then the post-agreement relationship may have been damaged to

Experience. Published in Linking Environment and Security- Conflict Prevention and Peace Making in East and

Horn of Africa (Washington DC.HeinrichBoell Foundation.

²²³ Waterbury J (2002) The Nile Basin: National determinants of collective action. New Haven. Yale University Press.

²²³ Hatfield (2006)b Milestone 1 Report: Needs Assessment. West Vancouver, Canada

²²³ Adams Oloo (2007) The Quest for Cooperation in the Nile water Conflicts: The case of Eritrea. African Social

Review

²²³ Nicol A, (2002) The Nile: Moving Beyond Cooperation, UNESCO.

²²³ Richard K.Painsly, Taylor W. Henshaw, 'Transboundary governance of the Nile River Basin: Past, Present and

Future. Environmental Development available at www.elsevier.com

the point of obstructing implementation. Thus, wasting the goodwill that was generated during the proposal stage, signing stage, and ratifying the agreement.

This dissertation suggests that mediation is probably the optimum route to resolving disputes between the riparian States. This is because the disputants determine the shape and nature of outcome of the process. This will equally lead to an improved post-mediation relationship between the disputants. Thereby, reduces tension as compared to a more adversarial technique of intervention.

The intervention of a mediator is critical to resolving conflicts between the riparian States. A great example is the dispute between India and Pakistan. Matters between the disputants had reached a breaking point since a number of outstanding issues had failed to reach an amicable conclusion. India was adamant that no third party should intervene in its dispute with Pakistan over the State of Jammu and Kashmir. India was however willing to allow a mediator to assist in resolving water issues in the Canal Waters. The World Bank had to mediate to resolve the issue. Effective intervention by a third party can change the nature of a bilateral dispute if the conflicting parties are unable to resolve the dispute through direct bilateral negotiations. The mediator and the disputing parties have to volunteer to engage in the mediation process. The mediation process can be characterized within a framework comprising of four sections:

- (i) **Engaging**
- (ii) **Issues**
- (iii) **Options**
- (iv) **Agreement**²²⁴

This framework describes the process of mediation and other conflict resolution processes both bilateral and multilateral. Conflict resolution occurs when the

²²⁴ El-Khodari N,(2003), 'The Nile river: Challenges to Sustainable Development' Paper presented to the River symposium.

²²⁴ Okidi O (1994) History of the Nile and lake Victoria basins through treaties

²²⁴ Ayah Aman, Al-Monitor newspaper(24th April 2017) viewed at : <http://www.al-monitor.com/pulse/originals/2017/04/egypt-water-share-dispute-nile-basin-initiative-obstacles.html#ixzz4jU6RRcU6> on 8th June 2017

incompatibility between the preferences of the various parties to a conflict disappears or when the sources of a conflict are removed.²²⁵ In instances where the conflict is not resolved through mutually acceptable outcomes, the process of mediation is beneficial to the disputants since it allows them to interact with each other in a controlled environment. This makes later agreements more likely.

Disputes are a hostile form of communication. Dispute resolution hence reduces hostility and enhances communication between the parties. The decision to resolve, stop or escalate their conflict is determined by the disputants.

The credibility of the mediation process lies with its individual success and not the pre-established reputations of the people involved as opposed to the more adversarial procedure. The value of mediation is expounded by the well-known case of the orange.²²⁶ There is one orange available, and two people want it, one wants the peel, the other one wants the flesh. The different conflict resolution techniques can allocate the orange in the following way:

- The legal avenue can end in the courtroom. This would see the judge decide between the two parties and assign it to one of them.
- Arbitration would cut the orange in half and share it between the two parties.
- Mediation, by contrast, would ask why each party wanted the orange, and then allocate it accordingly thus arriving at an optimal win-win solution. This is possible because the mediator must focus on the interests, and not rights or positions.

Disputants can manage or resolve conflicts using mediation to aid their communication process. Mediation allows the parties to interact with each other away from the battlefield, and redefine the problem and the objectives in a more realistic manner. This

²²⁶ Ayah Aman, Al-Monitor newspaper(24th April 2017) viewed at : <http://www.al-monitor.com/pulse/originals/2017/04/egypt-water-share-dispute-nile-basin-initiative-obstacles.html#ixzz4jU6RRcU6> on 8th June 2017

²²⁶ Ibid at note 32

²²⁶ <http://www.bbc.com/news/world-africa>

²²⁶ Stratfor Worldview 'Egypt forced to negotiate on Nile Dam' viewed at www.stratfor.com on 8th June 2017

dissertation argues that mediation can cope with situations where participants bring different concerns, values, and interpretations to conflict.

This dissertation clearly demonstrated that all four sections of the mediation framework (engaging, issues, options, and agreement) are very important since failure at any stage can derail the entire process.

Article 33 of the UN Charter reiterates the importance of mediation in settling disputes.²²⁷

For mediation to succeed there's need for lower riparians to provide incentives to upper riparians e.g. by funding the digging of dams.

3.9.1 The Role of a Mediator

“If mediation is successful, the parties take the credit: if it fails, the mediator gets the blame”²²⁸

The primary responsibility of a mediator is to build trust.²²⁹ The mediator whether an individual or an institution, needs to be impartial by being neutral, open, flexible, committed to the process and non-judgmental.²³⁰²³¹

Mediation is divided into three basic categories – pre-negotiation, negotiation and implementation.²³² Pre-negotiation is the engaging stage. This is the stage where the disputants agree to be subjected through mediation. The negotiation stage involves

²²⁹ Ibid at note 36

²²⁹ Mwangi S. Kimenyi & John Mukumu Mbaku, [*Governing the Nile River Basin: The Search for a New Legal Regime*](#) (Washington, D.C.: The Brookings Institution, 2015)

²²⁹ Mwangi S. Kimenyi & John Mukumu Mbaku, [*Governing the Nile River Basin: The Search for a New Legal Regime*](#) (Washington, D.C.: The Brookings Institution, 2015)

²²⁹ Kameri Mbote, (2005) from conflict to cooperation in the management of transboundary waters the Nile experience published in Linking Environment and Security- Conflict Prevention and Peace Making in East and Horn of Africa (Washington DC: Heinrich Boell Foundation.

discussion of issues, exploring the issues and agreeing on a proposal. The implementation stage involves signing, ratifying, domesticating, implementing and maintain the agreement. The final stage in the mediation process is for the disputing parties to agree on an outcome that is mutually acceptable.

3.10 Conclusion

In general the Water Convention's rules and principles could be the key in unlocking the Nile basin standoff. The rules and principles enshrined in articles seven and ten could be useful in ending the disputes over which interests should override the others.

The adoption of the limited territorial sovereignty principle has however been criticized by some commentators. They claim that it has not helped in solving the challenge of water rights in international watercourses. The main reason why the doctrine has been criticized is for its abstract nature of the definition of the term '**reasonable**'. Thus it has been stated that: "*the substantive law on the utilization of shared water resources is defined in the vague language of the doctrine of equitable utilization and offers little guidance to states on how they may proceed lawfully with the utilization of these waters in their territories*"²³³. The water convention has been criticized for being underdeveloped, vague and lacking in enforcement mechanisms.

It has also been asserted that every international watercourse is a distinct unit with specific hydrological, economic and political conditions. As such each international watercourse has its own specific characteristics which a general framework may not address²³⁴.

²³⁴ Ibid at note 40

²³⁴ Nile Cooperation Opportunities and Challenges, (2014) Initiative of the Nile Basin Trust Fund and the World

Bank. Available at www.nbi.com accessed on 9th June 2017.

²³⁴ Ibid at note 42

²³⁴ Ibid at note 42

CHAPTER FOUR

4.0 THE QUEST FOR A COOPERATIVE MANAGEMENT FRAMEWORK OF THE NILE BASIN.

4.1 Introduction.

Currently, a comprehensive framework on the allocation and utilization of the Nile basin resources is lacking.²³⁵ The 1959 agreement between Egypt and Sudan provided for full utilization of the Nile water by the two states only ignoring the rights of all the other riparian. The agreement gave Egypt the right to carry out development plans along the river and to veto projects proposed by other countries that are likely to have adverse effects on Egypt. It further provided that during dry seasons, the utilization of the water shall be reserved for Egypt. In effect the 1959 agreement granted full control of the Nile to Egypt.²³⁶

The 1959 agreement has been described by the other riparian states *as a relic of colonial era which no longer reflects their needs and aspirations* hence the need to renegotiate a new.²³⁷ Egypt however is opposed to any form of modification of the agreement that would result in jeopardizing the uninterrupted flow of the Nile into Egypt.

4.2 The Nile Basin Initiative

There have been several attempts after the 1959 agreement to come up with institutions to manage the Nile basin resources. The institutions that were subsequently formed include **HYDROMET**, **UNDUGU** and **TECCONILE**. It is instructive to note that in these institutional efforts, Ethiopia did not take part while Egypt seemed to be the dominant force dictating the direction and agenda. These institutions however seemed not to have yielded success in formulating a sustainable management framework for the Nile basin. The Hydromet established a forum for member states to chat a path for resolution of contentious issues surrounding the utilization of the Nile resources.²³⁸ The Hydromet

²³⁶ United Kingdom negotiated most of the historical agreements on behalf of the territories which were under their administration by then.

process was characterized by suspicion with some of the riparian's suspecting Egypt of fishing for data to use for future planning. Ethiopia on its part refused to be an active participant.²³⁹

Undugu followed the unsuccessful Hydromet. Its objective was to go beyond water related issues propagated by the Hydromet. Undugu sought to integrate transportation, inter riparian investment and tourism initiatives together. Its general purpose was to provide a platform for discussion during annual ministerial meetings the issues surrounding the Nile waters including agriculture, resource development and the promotion of scientific cooperation on the promotion of economic issues among the riparian.²⁴⁰ The Undugu initiative was endorsed by Sudan, Uganda, Zaire, Burundi, Rwanda and Tanzania. Ethiopia and Kenya only took part as observers.²⁴¹

The Technical Cooperation Committee for the Promotion of the Development and Environmental Protection of the Nile (**TECCONILE**) was established by the riparian states as a transitional mechanism with the hope that within a period of three years a permanent basin wide framework would have been crafted.²⁴² Even though it's technical nature inhibited some of the riparian from becoming full members, it ended up being instrumental in the quest towards Nile riparian cooperation. It led to the formation of Nile River Action Plan. The Action plan visualized the eventual formation of a basin wide framework. This however was not achieved owing to the lack of full commitment of the riparian states as well as lack of funding.²⁴³

4.3 The Nile Basin Cooperative Framework Agreement (CFA).

The NBCFA was conceived under the framework of TECCONILE. The text of the NBCFA prescribes the principles, rights and obligations for the cooperative management and development of the Nile basin water resources.²⁴⁴ It intends to create a framework

*"promote integrated management, sustainable development, and harmonious utilization of the water resources of the Basin, as well as their conservation and protection for the benefit of present and future generations"*²⁴⁵

The agreement brought into the agenda the emotive issue of equitable allocation of Nile waters.²⁴⁶ It however took a period of over ten years for negotiations to yield a draft Cooperative Framework Agreement (CFA) which would ensure that the basin is governed by a singular institutional framework agreed to by all riparian as opposed to the earlier prevailing situation of competition and utilitarianism.²⁴⁷ The draft framework was however subject to resolution of outstanding issues. The major stumbling seems to have been the status quo represented by colonial-era treaty regimes.

Despite extensive deliberations on the draft Cooperative Framework Agreement, a consensus could not be achieved on the question of water security as introduced by article 14 of the draft. The text of article 14 provided as follows:

“Having due regard for the provision of Articles 4 and 5, Nile Basin states recognize the vital importance of water security to each of them. The States also recognize that cooperative management and development of the waters of the Nile River System will facilitate achievement of water security and other benefits. Nile Basin states therefore agree, in a spirit of cooperation:

- *(a) to work together to ensure that all States achieve and sustain water security*
- *(b) not to significantly affect the water security of any other Nile Basin State”*

Egypt and Sudan sought to have article 14(b) amended to introduce an obligation on the other riparians *“not to adversely affect the water security and current uses and rights of any other Nile Basin State”*²⁴⁸. This amendment was unacceptable to the other riparian thus causing a stalemate. The lower Basin States would want to ensure that the precautionary principle of prevention of harm whereas the upper riparian would like the

²⁴⁵ Nye (1988) p. 7

principle of equitable and reasonable utilization to be applied. This lack of balance between the two riparian resulted in a major quagmire hence being a stumbling block to the realization of an acceptable all-inclusive Nile river agreement. The upper Nile riparian have stated categorically that since the historical agreements were signed by their former colonial rulers they are not parties to the Nile river historical agreement and thus it cannot bind them. Egypt argues that the historical Nile Agreements and failure by the basin States to accept and recognize these historical agreements could result to these States losing their territorial boundaries since these agreements are territorial agreements. It is arguable that the historical Nile River agreements are bilateral agreements on the use and development of the Nile River water resources. This impasse necessitated the Nile River Basin States to search for a new Nile River Agreement that would be acceptable, all inclusive and that is in harmony with the prevailing International water law. After failing to resolve the impasse, the Council of Ministers (Nile-COM) as a compromise adopted both the text of article 14 which was agreed upon by all the other riparian as well as the amendments proposed by Egypt and Sudan. It then referred the unresolved water security issue to the respective heads of state of all the riparian for their resolution.²⁴⁹

The draft CFA was further deliberated upon at the 16th Nile-COM in Kinshasa. The objective of the meeting was to try and resolve the sticky issue of water security which could then pave the way for the formation of a permanent Nile basin organization.²⁵⁰ The outcome of the meeting however was not what had been anticipated. The stalemate could not be resolved; instead the uncontested articles of the CFA were adopted while article 14(b) was referred to the Nile River Basin Commission for further deliberations.²⁵¹

²⁵¹ Abadir M. Ibrahim, "The Nile Basin Cooperative Framework Agreement: The Beginning of the End of Egyptian Hydro-Political Hegemony, MO. ENVTL. L. & POL'Y REV., Vol. 18, No. 2

²⁵¹ Abadir M. Ibrahim, "The Nile Basin Cooperative Framework Agreement: The Beginning of the End of Egyptian Hydro-Political Hegemony, MO. ENVTL. L. & POL'Y REV., Vol. 18, No. 2

Commentators have roundly criticized the decision to leave the contentious issue of water security and instead refer it to the Nile River Basin Commission which in itself offers no guarantees as to its success where the Nile-COM had failed.²⁵²

The 17th Nile-COM held in Alexandria Egypt in 2009 again postponed the resolution of the outstanding issues. It allowed an additional period of six months with the hope that member state would reach a consensus and conclude an all-inclusive treaty and consequently leading to the signing of a comprehensive CFA. The COM also tasked the Technical Advisory Committee and the negotiating committee to seek the expert advice of international partners on procedures of signing the CFA.²⁵³

4.4 Water Security

Each country has specific needs for water that should be agreed on so as not to fall below the level of water requirements within the conventions since it would hinder development and affect the national security of a particular State.

The term “water war” is not clearly defined, but environmentalists to identify a water conflict from other conflicts. Arguably, water war is “a type of conflict due to an acute shortage of water for drinking and irrigation”.²⁵⁴

Under liberalism and neoliberal institutionalism, the “no water war” approach rejects the realist water war theory and argues for integrated water resources management. It promotes the ability of institutions to manage competing interests, play a mediating role in dispute resolutions and promote cooperation among the riparian states.

4.5 Appraisal of the Successes and Challenges of the Nile Basin Initiative

The Nile Basin Initiative is the first all-inclusive Cooperative Framework which brings together all the riparian of the Nile basin. Its establishment was supported by global

actors such as the World Bank, United Nations Development Programme (UNDP) and the Canadian International Development Agency.²⁵⁵

The vision of the NBI is “*to achieve sustainable socio-economic development through the equitable utilization of, and benefit from, the common Nile Basin water resources*”,²⁵⁶

Its organizational structure incorporates all member states of the Nile basin. The highest decision making body in the NBI is the Council of Ministers, comprising of Ministers in charge of water resources in the Nile basin states.

Deliberate steps have been undertaken to build trust among the riparian states. These include: conducting technical studies; training and capacity building activities; training and exchange of technical expertise.²⁵⁷ Lack of clarity on the resource base of the Nile basin had been cited as one of the obstacles impeding achievement of collective action.²⁵⁸ Overall the council of ministers have reached consensus on the general policy guidelines which shall aid the implementation of the NBI. As such a Basin Wide Programme commonly referred to as the Shared vision Programme has been approved. It provides the guidelines for collaborative action and capacity building. The council of ministers is also in support of sub basin action programmes that complement the NBI. The aim of these is to implement physical infrastructures at the lowest levels possible without compromising plans planned by individual states.²⁵⁹

Whereas the time and other resources that have been invested by the member States may have developed better understanding which could support better cooperation, there seems to be still a long way to travel before achievement of formal cooperation which could lead to an acceptable Nile Agreement.²⁶⁰ Among the many stumbling blocks include the

²⁵⁷ Pottinger L. (2004) ‘Can the Nile States’ Dam Their Way to Cooperation? International Rivers Network, Berkeley: California. p.4

failure of the riparian states to agree on basic facts about the river even in the face of overwhelming scientific proof.²⁶¹

In an effort towards achieving NBI's ultimate objective of cooperative development of the Nile basin, a Strategic Action Programme has been developed by the riparian states. The programme comprises two sub-programmes namely: a Basin Wide Shared Vision Programme (SVP) with the role of propagating a united front among the riparian and coordinate implementation of the shared vision; secondly is the Subsidiary Action Programmes (SAPs) whose role is to implement physical infrastructure projects.²⁶²

One of the major successes of the NBI initiative has been the successful application of the principle of subsidiarity which involves management of the basin resources at the lowest level. As a result of this decentralization the Eastern Nile as well as the Nile equatorial lakes countries have been formed. The objective of the division reduces decision making complexities which then facilitates cooperation efforts.²⁶³

The NBI has also been credited for the successfully negotiating and implementing the Nile Basin Interim Procedures for Data and Information sharing and Exchange (2009) as well as the Operational Guidelines for implementation of the Nile Basin Interim Procedures for Data and information Sharing and Exchange (2010)²⁶⁴

The major challenges hampering the NBI revolve around political instability in the region, mistrust among member states. Other general challenges involve the lack of transparency in resolution of issues of common interest, the absence of technical, financial and economic capacity and the inadequate legal framework for the management of the Nile basin resources.²⁶⁵

The specific challenges that hampered the reaching of an agreement include the hardline stance adopted by some of the lower riparian whose sole claim is the utilization of the entire flow of the river Nile to the detriment of the upper riparian states. Egypt seems to

be adamant that the other riparian can only enjoy the Nile water after it has satisfied its needs. It has been suggested that one of the formulas that could be used to allocate the Nile water is to take into account the volume of water contributed by each riparian²⁶⁶

4.6 The future of the NBI

In June 2010 Egypt froze its membership in the NBI in protest to the signing of the CFA by six upstream states of the Nile basin. Of particular dismay to Egypt were three clauses which were controversial throughout the CFA negotiations. During the discussions Egypt had been adamant that article 14(b) on water security ought to be amended as to safeguard what they termed as Egypt's historical quota of the Nile water which is estimated at 55.5 billion cubic meters provided in the 1959 agreement. It also sought amendment of article 12 so as to compel upstream states to notify and seek Egypt's approval before commencing any infrastructural project on the Nile. It also asked for amendment of article 46 on voting to allow for decisions to be made unanimously instead of by a majority. This was based on Egypt's apprehension that States opposed to its interests could form blocks so as to defeat its perceived domination of the Nile waters.²⁶⁷

Egypt is said to have presented the Nile-COM with a detailed technical and legal report regarding the geological and hydraulic status of the river. The report expound on Egypt's water management plan vision which is in accordance with international laws and rules governing management of transboundary natural resources. Egypt's contention is that its demands are based and are consistent with international law on transboundary natural resources and thus not based on political obstinacy against cooperating with the other Nile riparian states.²⁶⁸

According to an official of Egypt's Water Resources Ministry, the freezing of its membership and participation in the NBI had had some negative impact on Egypt such as the failure to obtain data on the other riparian's activities on the river basin and also the continued propagation of false information on Egypt's Nile water uses.²⁶⁹

4.7 Egypt's' unease over Ethiopia's Grand Renaissance Dam.

In 2011, the Ethiopian government led by then Prime Minister Melez Zenawi launched the construction of the Grand Renaissance Dam located on the Blue Nile. Egypt seemingly caught by surprise by this development responded instantly. It launched an offensive campaign of words against the Ethiopian government. The Egyptian president was quoted retorting angrily that “*while he was not calling for war with Ethiopia, Egypt's water security could not be violated at all and that all options were open and that Egyptians would not accept any projects on the Nile River that threatened their livelihood*”²⁷⁰. Ethiopia defended the project saying that whereas the Blue Nile Water will be slightly diverted, it would return to its natural course.

Egypt's capacity to implement its threat however seem to be implausible considering that it lacks the capacity to stop the dam construction militarily either during or after construction. This is based on the fact that Egypt's airfields are too distant from Ethiopia compounded with its lack of aerial refueling capacity. Facing this handicap Egypt turned to international partners to try and pressurize Ethiopia in abandoning the project. The move did not gain enough support leaving Egypt will little options but to negotiate with Ethiopia.²⁷¹

Ethiopia on its part has encountered difficulties in completing the dam project. The major obstacle has been funding constraints. Most financiers such as the African Development Bank, the European Investment Bank and the Chinese bank have held bank ostensibly over their concern of Ethiopia's national debt. The controversy surrounding the project has also contributed to the reluctance of would be donors.²⁷²

In March 2015, the leaders of Egypt, Ethiopia and Sudan signed an agreement which was seen as a major breakthrough in resolving the potential conflict that had arisen out of Ethiopia's dam project. The agreement has been dubbed the “Nile Agreement” and it is hoped that it could help in resolving the disagreements over the sharing of the Nile

waters.²⁷³ In the agreement Egypt offered to ease its resistance and opposition of the dam project in return for guarantees that Ethiopia will not interfere with the uninterrupted flow of the Nile to Egypt.

Commentators have however questioned the impact of the agreement owing to its limited scope as it only deals with the Grand Renaissance Dam and do not extend to the contentious issue of equitable, fair and reasonable sharing of the Nile waters among all the riparian.²⁷⁴

4.8 Sustainability of the Nile Basin Initiative.

In view of the geopolitical issues that have accompanied the NBI negotiations coupled with the diversity of actors as well as the huge magnitude of proposed projects along the Nile, sustainability may prove to be a big challenge. Concerns have also been raised about the involvement of external actors such as the World Bank in the negotiations. Parties have viewed these external organizations with suspicion and with a negative attitude on their real objectives.²⁷⁵ As such critics have doubted the viability of the NBI to achieve its objective of being a poverty alleviation mechanism.

The persisting controversy over which principle to adopt between that of '*equitable use*' as opposed to that of '*obligation not to cause significant harm*' remains as a challenge. It is not lost that the earlier agreements were rejected on the basis of entrenching one principle over the other to the detriment of some countries. The NBI will therefore be effective only if a strong institutional and legal framework is in place so as to govern all the activities of the basin. Egypt has been outspoken in stating that all the Nile basin states are entitled to an equitable share of the river but subject to them not causing significant harm to other states of the Nile. This position has been interpreted as safeguarding the prior appropriation claims which the other riparian have rejected.²⁷⁶

The question of civil society representation continues to be a thorny one. Whereas there seems to be consensus on the need to involve diverse stakeholders in the development of

the Nile basin activities, there has been division on the nature and extent of such involvement. Doubts have also been raised on whether governments are willing to sponsor the activities of the civil society which most governments often view with suspicion. Further with the reduction of external funds to the NBI, there is apprehension that the member states may not be able or simply not willing to shoulder the burden of the joint initiative.²⁷⁷

Funding for its projects has been identified as a major challenge which the NBI and its institutions will face going forward. For a long period NBI has relied on external donors to fund its activities and more so the World Bank through the Nile Basin Trust Fund (NBTF) programme. It was hoped that the member countries would slowly enhance their financial cooperation in the anticipation of the exit of external donors. This however has not happened as member countries continue to either delay or fail altogether to remit their contributions. This has put the future sustainability of the NBI and its programmes in real jeopardy.²⁷⁸

There also exists the question of commitment to the course of cooperation by member states. For the cooperation to be meaningful and successful, the member states must show their commitment by complying with the decisions of the Nile-COM. Since the majority of the issues related to realization of the cooperative agenda are political, the solutions must also be political. As such political trust must be created among the membership.²⁷⁹

4.9 Conclusion

In spite of the myriad of challenges that the NBI process has undergone, significant milestones have been achieved in a relatively short period of time. The biggest success has been to bring the parties together to negotiate a joint cooperative framework with a shared vision. There have been enhanced levels of engagement especially in technical spheres.

There is an air of optimism as the Nile states look to surmount the last hurdle towards the establishment of the Nile basin commission to take over from the NBI.

To date there is no acceptable Nile River Basin Agreement by the riparian States since all the historical Nile River Agreements were not negotiated by the independent Nile River Basin sovereign States but were negotiated by their colonial masters.²⁸⁰ The Nile River historical agreements that were agreed upon during the colonial reign with the intention of reducing conflicts over the use of the Nile shared water resources have offered very little assistance if any in the equitable utilization, protection and conservation of such resources as these historical agreements were only focused on water allocation rather than equitable utilization and benefit sharing.

Over the past few years, I have been exploring the ideas of an acceptable Nile agreement and the upper Nile River riparian role in achieving that agreement. I've also been examining the emergence of Egypt as, by some accounts, a competitor to the upper riparian in that role. I have sought to remain as an observer rather than as an advocate, trying to understand through a study of history and an assessment of current political, economic, security and social factors, how the structure of the Nile agreements has evolved, and in what direction it is likely headed. My attempt has been to explore this theme through the lens of "should, "of "was" and "is."

CHAPTER FIVE

5.0 KEY FINDINGS, RECOMMENDATIONS AND CONCLUSIONS

This chapter presents the findings on the existing Nile River Agreements and treaties and examines such factors as the rapid population growth, economic expansion, effects of climate change thus emphasizing the need for cooperation, participatory planning and management and sustainable development in an equitable and reasonable utilization manner that is acceptable by all the Nile riparian States. This dissertation calls for the

need to have a new Nile River Basin agreement that would create a conducive environment for equitable and reasonable utilization of the Nile Basin water resources.

This dissertation has analysed the Nile River Basin historical agreements, the development and management of the basin water resources, the institutions that have been established by the Basin States to oversee the use of the Nile River resources.

This Chapter therefore, seeks to address the key findings of the aforementioned discussions, the conclusion based on the key findings and the recommendations on addressing the issues revolving River Nile.

5.1 KEY FINDINGS

As discussed under the Problem Statement in Chapter One of this thesis, the major quagmire to the development of an acceptable Basin Wide agreement today is the threat to water security of the Riparian States that led to the lower riparians refusal to sign the negotiated CFA 2010 since the upper riparians failed to guarantee their existing water uses. Efforts to reach a middle ground between upper riparians and lower riparians have proved futile. There is an urgent need for appropriate management responses before the tension become critical.

1. Egypt and Sudan refused to sign the negotiated CFA 2010 due to a threat to water security since the other basin States failed to guarantee their existing water uses and the historical rights that were granted by the 1929 Nile Agreement between United Kingdom and Egypt and the 1959 Nile Agreement between Egypt and Sudan in the unresolved article 14(b). This dissertation argues that article 14(b) requires the balancing of existing water uses by the lower riparian States and the potential uses by the upper riparians. Many of the more successful cooperative frameworks failed to concentrate on “water security” thus avoiding the core of the dispute. “water security” claim by the lower riparian countries froze the execution of the CFA.
2. Cooperation of all the Nile riparians is necessary especially in accessing and addressing any conflicts that might arise is an important tool to avert existing and potential conflict.

COOPERATION:

This dissertation supports cooperation since war cannot lead to long term national water security. Security is possible through good water management at both the national and international levels. The riparian States must be willing to explore ways to cooperate. Legal, technical and environmental factors are second to political goodwill if cooperation is to be realized.

Kant set out three cornerstones for liberalism, namely: the establishment of a constitutional government and democratic institution both domestically and internationally to guarantee what Kant termed as “perpetual peace”. He argues that disputes should be resolved in a peaceful manner.

Liberalists hold that international institutions can play a great role in promoting international cooperation and peace. Such institutions have capacity to promote cooperation by creating better communication among states through the sharing of available information. The risk of dishonesty is thereby reduced since the institution plays a mediating role and promotes cooperation among states.²⁸¹ It is arguable that those institutions formulate policies that enhance cooperation even within independent states.

If direct bilateral negotiations become unsuccessful, the direct intervention of an impartial mediator can assist communication between the disputants.

Each Nile riparian is developing the Nile waters to deal with agricultural food production, navigation, tourism, drinking water supply, drought management, flood management, aquaculture production, and hydropower generation. This has escalated the tension since most of these developments are unilateral in nature.

There is a need for an institutional mechanism to act as an independent mediator in resolution of issues. This would be the institution responsible for resolution of conflicts.

CONCLUSION

From the research findings it can be deduced that there is a need for an acceptable Nile River Agreement. Most of the current Nile River Regimes are based on historical Nile River Agreements of 1929 and 1959 only focus on prioritizing water allocation to Egypt

and Sudan rather than on equitable and reasonable utilization and the precautionary principle of prevention of harm to the Nile riparians. Most of the historical Nile River Agreements favoured water allocation to downstream to the detriment of upper riparians. Peaceful and sustainable utilization of the shared water resources is vital to achieving water security through cooperation. This research argues that cooperation is a must to creating an acceptable framework for utilization of the Nile waters.

From the findings is arguable that Egypt and Sudan will neither sign nor ratify the negotiated Nile River Basin Cooperative Framework 2010 in its present form. There is an urgent need to come to a happy medium between the upper riparians and the lower riparians. Article 4 and 5 of the CFA 2010 balances the right of the Nile River States to utilize the basins water resources with a duty not to cause significant harm to other riparian States. If article 4 and 5 are implemented with the cooperation of all the basin States this would guarantee water security for all the basin States.

Article 4 and 5 of the CFA together with article 10 and 16 allows for the development of the Nile River Agreement. If the agreement is acceptable by all the Nile riparians it will provide for additional sets of rules. Such developments will only be approved if they will not cause significant harm to other basin States.

The Nile River agreement was to be achieved through an agreed Cooperative Framework Agreement (CFA) that would provide a permanent legal and institutional Framework. The CFA 2010 under article 4 thus provides for equitable and reasonable use, a principal which was ignored in the historical Nile Agreements of 1929 and 1959.

Egypt has always been determined to monopolize the waters of the Nile River.²⁸² The increased need for Nile River water resources for domestic use, irrigation, for hydroelectric power generation, transportation and increased industrial consumption²⁸³ has forced the upper riparians to challenge Egypt's domination over the Nile waters. This will escalate the conflict since the Nile basin water per capita in both quantity and quality

will decrease with high population growth, poverty, food security and environmental degradation.

5.3 RECOMENDATIONS

This dissertation recommends that conflicts in regard to river Nile be referred to an independent mediator to avoid scenarios of a win- lose situation that can be created by a more adversarial system.

This dissertation therefore, proposes there is an urgent need for an acceptable Nile River Agreement that should provide for clear guidelines on development, compliance, enforcement and conflict resolution mechanism.

The development of a new framework must acknowledge the fact that the current ones are neither equitable nor sustainable. The new framework for governance of the Nile should enhance the ability of local communities along the river to maximize their values in order to minimize conflicts and to promote sustainable development. The only way to ensure that 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. Public participation is key to reflect the desires, interests, values and expectations of the various communities that inhabit the Nile Basin.

There is the need to replace the unresolved article 14(b) on water security. This will enable all the Nile Basin States to cooperate in the development and management of the Nile River waters. This will thus safeguard water security. The Nile Cooperative Framework Agreement failed to resolve this impasse.

There is no doubt that the riparian states are inherently interdependent on each other, the development of each state invariably relies on the hydrological cycle of the Nile. There is therefore need for a coordinated approach in the management of the Nile so as to create synergies throughout the Nile basin. Such cooperation consequently results in peace and stability in the region. To achieve seamless cooperation requires a solid and acceptable legal and institutional framework. States parties are thus urged to continue with negotiations in seeking consensus for the adoption of the contentious Nile Basin Cooperative Framework Agreement.

To engage stakeholder participation in management of transboundary resources, trust must be nurtured and built among the actors so as to achieve a convergence of interests and commonality of purpose. The involvement of external actors should be modeled on the principle of public participation as developed under Principle 10 of the Rio Declaration with particular emphasis on its attributes of access to information, actual public participation in decision making, freedom of association and access to justice. Citizen participation throughout the decision making processes of public projects that affects their lives is crucial for easy implementation and to create a sense of ownership over the project itself. The NBI failed to create allowance for citizen and NGO participation. The NBI has been criticized for being a closed affair in which only the riparians involved and the World Bank are involved in decision making and thus ignoring the voices of the ordinary people whose livelihoods depend on the utilization of the Nile waters.²⁸⁴ It is very difficult to find any evidence that the NBI has conducted public participation in decision making, including negotiation of CFA.

The states should give more support to civil society organizations when they demand for access to benefits accruing from negotiations by the states at inter-state levels.

There is a need for Egypt to participate in giving incentives to the upper riparians to aid in their hydropower projects. Egypt recognizes this, which is why it has offered substantial assistance to clean up streams of the Nile in Uganda - either by providing equipment, expertise or technical support. Egypt has also contributed to digging hundreds of water wells in Kenya and Tanzania. Realists argue that power is the essence of security. Military might is the highest priority for achieving national interests and security. Egypt is the undisputed military power in the riparian states. It also enjoys stronger economic position and thus dominating all negotiations including the NBI. Therefore, it's arguable that Egypt can use this clout to accommodate the views of the other riparians.

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