UNIVERSITY OF NAIROBI

FACULTY OF LAW

REVISITING THE NILE QUESTION :- THE LAW, INSTITUTIONS AND THE PLACE OF NEGOTIATION AND CONCILIATION IN RESOLVING THE NILE DISPUTES

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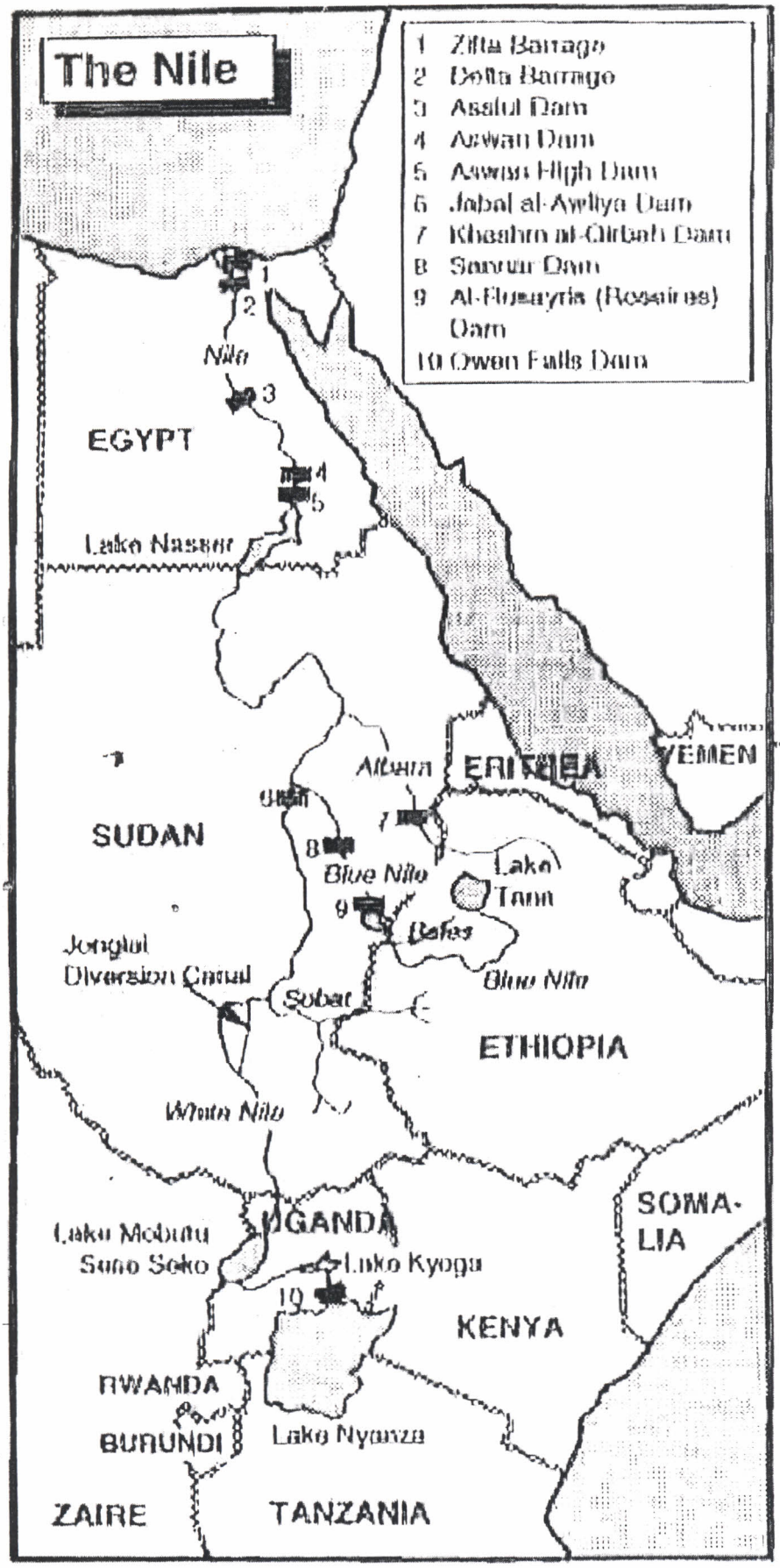
The Nile
1 Zifta Barrage
2 Delta Barrage
3 Asalul Dam
4 Aswan Dam
5 Aswan High Dam
6 Jabal al-Awliya Dam
7 Khashm al-Girbah Dam
8 Sennar Dam
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10 Owen Falls Dam
Nile
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SUDAN
Atbara
ERITREA
YEMEN
Blue Nile
Lake Tana
Baro
Jonglei Diversion Canal
Sobat
Blue Nile
ETHIOPIA
White Nile
UGANDA
SOMALIA
Lake Mobutu Sese Seko
Lake Kyoga
KENYA
RWANDA
BURUNDI
Lake Nyanza
ZAIRE
TANZANIA

Dedication

This project is dedicated to my children Eddy Mwangi and Erica Joy.

You have always given me support and encouragement, may the Lord bless you abundantly.

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It should be pointed out that the above individuals, bear no responsibility to the final content of this study but the views expressed in this study are those of the author.

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CHAPTER ONE

1.1. INTRODUCTION OF THE STUDY

"Internationally shared bodies of water create political, social and economic tensions and disputes concerning the distribution and use of resource management. Furthermore, when a resource base extends across a political border, misunderstanding or lack of agreements about allocation is more likely." [1]

In recent times the demands put on natural resources to sustain and improve development, have produced unprecedented problems for the human race. The growing competition for fresh water is one of the pressing problems.

Water has never respected the political frontiers drawn by humankind, and the mobility of water indicates the problems connected with the use, administration and conservation of water resources. Where water is shared by two or more states, conflicts are inevitable. Water is the most important shared natural resource, which has caused and is likely to cause conflicts unless properly utilized. The distribution of fresh water resources is inequitable, yet the demand for water is increasing rapidly, thus the need for international cooperation. [2]

This study examines the disputes in the Nile River Basin and it establishes whether there are any legal and institutional framework that exists and whether the disputes can be resolved by application of negotiation and conciliation which are some of the methods provided for settlement of international disputes by Article 33 of the United Nations Charter.

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[1] Peter Gleick (2000); *Conflicts over Resources* Pg.6.
[2] John Waterbury 1979 ;*Hydropolitics of the Nile* Valley Pg. 2.

Internationally shared waters create political, social, and economic tensions and disputes. Such disputes cannot be satisfied, unless the rules governing the conduct of states in relation to international watercourses are identified.

One of the issues in relation of international watercourses is that a river may be the determining line between two or more states and as a result of erosion or avulsion, the bed of the river or lake will shift or it may be that activities in one state in making use of the water that it has on its territory may have repercussions jeopardizing the use that another state is making or may wish to make of the same waters once within its own frontiers.[3]

1.2. BACKGROUND

Access to water is a basic necessity for all people for consumption, agriculture, industry and maintenance of ecosystems. Thus balancing competing uses over scarce water supplies is a major challenge. The rising demand for water due to the population growth, agricultural expansion and the ever-rising expectation in the improvement in the standards of living of the people has made the pressure upon existing water resources to intensify, and there will be increased exploitation of the international watercourse.

The increased exploitation of international watercourses is no longer within the traditional reach of individual states where every state exercised exclusive sovereignty over natural resources but the law on international watercourses requires equitable distribution of the water among all riparian states and since natural resources are the backbone of any economy , every country bestows great value on natural resources. This is demonstrated by United Nations General Assembly (UNGA) Resolution 2158(XXI) of 25th Nov. 1966, which recognizes that natural resources of the developing countries constitute a basic component of their economic development in general and of their industrial progress in particular.

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[3] Dante A Caponera (1980) - *The Law of International Water Resources* Pg 3.

Rivers have a perverse habit of wandering across borders and nations have a perverse habit of treating whatever resource that flows within its borders as a national resource at their sovereign disposal, but water is ambient and the consequences of its use or removal may be felt downstream.[4] The immediate result may cause shortages and or deteriorating quality of the watercourse and the ultimate result may be war. Most of the conflicts between nations over world's scarce and vital resources are tracked on a collision course.

In the recent times the demands put on the earth's natural resources to sustain and improve the momentum for development have produced unprecedented problems for the human race. Some of these problems are atmospheric and marine pollution, the destruction of forests and the consequent desertification, inadequate food supplies and famine and the growing competition for fresh water.

Although planet earth is still endowed with plenty of fresh water resources, it has become strikingly evident that these resources are badly distributed. Areas receiving tropical rainfall and with swamps boast of surplus that may even become destructive, while some areas suffer significant shortages. Water is essential for the sustenance of life, for man uses it for domestic purposes such as drinking, cooking or washing; for industrial purposes including the production of hydroelectric power; for agricultural purposes such as irrigation; for animal husbandry and so on.

A sustainable supply of fresh water is thus not merely fundamental to environmental protection but also to life. The Nile River is one of the sources of water in Africa and there have been many disputes in the Nile Basin relating to the sharing of the scarce resource.

1.2.1. The Problems in Nile Basin

The major problem in the Nile Basin is that there is a long standing dispute which seems to erode the efforts that has been made to resolve the disputes. The solutions that have been tried seem to be elusive.

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[4] John Waterbury (1979); *Hydropolitics of the Nile Valley* Pg. 2.

As a background the Nile basin is shared by ten states, all of which influence the flow and quantity of the Nile waters. Historically Egypt has monopolized the Nile waters and has always been acutely sensitive to the broader regional context of the use of the Nile waters as its economic life is at the mercy of the upstream states. There are many problems in the Nile River Basin ranging from inequality in the distribution and utilization of the Nile waters, lack of relevant legal instruments to govern utilization, environmental degradation and political instability of the riparian states, among other problems.

In regard to the Nile Basin problems, Zewdie Abate [5] stated that:

"Almost all countries in the Nile Basin face a number of environmental problems and issues, such as deforestation, soil erosion, and sedimentation, as well as social and political problems, such as lack of appropriate institutional financial resources, and trained manpower for environmental protection and management. These problems, coupled with poverty and high population growth, pose serious threats to the water resource and hence the life support system of the basins environment .The basin is ridden with vectors, malaria, and stagnating lakes and ponds thus it is not adequately healthy for habitation and settlement"

The paradox in the Nile Basin is that countries "contributing" most of the water are using the least; on the other hand countries using the most water are those which have the military power. This is the case of Egypt. The supply of the water is lower than the demand and use in the Nile Basin. The basic problem facing Egypt, Ethiopia and Sudan is simply that there is not enough Nile water available to complete all of their irrigation schemes .

There are eight treaties that have been used or are used in the management of the Nile waters. The first bilateral negotiations with respect to Aswan High Dam were in 1954. The argument for both Sudan and Egypt was the factor of allocation of international waters which were at stake. Egypt and Sudan moved toward agreement undeterred and on 8th November 1959, the Agreement for the Full Utilization of the Nile Waters was signed. The agreement was on water allocation where it was agreed that Egypt's share was 55.5 billion m^3 while Sudan was to get 18.5 billion m^3. Ethiopia which contributes about 84% of the Nile waters has no

[5] Zewdie Abate (1990); *The Integrated Development of Nile Basin Waters in the Nile* by PP Howell and J A Allan. Pg 139.

allocation of the Nile waters. Egypt utilizes 87% of the Nile waters while Sudan utilizes 13% of Nile water. The 1959 Agreement has brought about conflicts in the Nile Basin because it denied all the riparian states rights to control or utilize the Nile waters without prior consent of Egypt.

The observation to be made on the Nile Basin treaties is about the signatories. The signatories of most of them were European colonial powers acting on behalf of an African colony or occupied country yet international law recognizes the continuing validity of such instruments in accordance with the Law of State Succession and territorial nature of the obligation arising from those treaties.[6].

The water needs of the riparian states are higher than the water available. According to a study by the World Conservation for Nature in 1991, the disenfranchisement of local people from traditional land and water rights has been a major factor of fueling disputes and instability in the Nile Basin. There are a lot of tensions that exist in the Nile Basin states whenever a new development project is proposed. This is because the needs of all the riparian states of the Nile are not met.

Threats of war over the Nile waters were many in the late 1970's and 1980's particularly between Egypt the most downstream country and Ethiopia the source of more than 84% of the Nile Water arriving at the Aswan High Dam. This is illustrated by President Sadat of Egypt sentiment in May 1978 when he stated;

"We depend upon the Nile 100% in our life, so that anyone, at any moment who thinks to deprive us of our life, we shall never hesitate to go to war because it is a matter of life and death".[7]

Poverty added to internal conflicts in the Sudan, Kenya, Ethiopia and Eritrea and has helped to postpone conflicts over the waters. [8] El-Moghraly in 1997 proposed that, wars should be started in the Nile in order to convince riparians to integrate to

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[6] Samir Ahmed 1990; *Principle and Precedents in International Law Governing the Sharing of Nile Water* by PP Howell and J. Allan Pg 226.

[7] Guardian Newspaper of 31st May 1978.

[8] El-Khodar Nabil M. (2002); *The Nile Basin initiative: Business as usual*? Paper presented at International Conference of Basin Organizations, at Madrid, Spain –4th to 6th November 2002 Pg. 2.

harmonize the use of the shared and other resources and war to convince riparian countries that the Basin is an indivisible whole. The 1959 Nile Waters Agreement between Sudan and Egypt should be revised to include the interests of the other riparian countries. [9]

In the recent years, the use of the Nile Waters for development has become something of a borne of contention among the ten riparian countries. The contention partly arises from the two agreements signed during the colonial era namely the 1929 Nile Water Agreement and the 1959 Agreement for Full Utilization of the Nile. The two agreements gave Egypt and Sudan extensive rights over the river's use. This contention is clearly demonstrated in a Conference held on 29th November 2004,[10] where it was reported that six riparian states want the controversial Nile water treaty between Egypt and Britain renegotiated.

In the year 2000, President Hosni Mubarak of Egypt led a peace initiative in Sudan but according to the Report by Global Policy Forum, [11] Mubarak's peace initiatives will however not resolve the region's contentious water rights. But with the creation of the Nile Basin initiative in 1993 , Egypt has agreed to cooperate in the development of the Nile basin. According to El –Khodari the Nile water today seems to be a catalyst for cooperation rather than for conflicts and the Nile Basin is still categorized as a "threat" with a fatality level of dispute. [12]

According to studies on the Nile River disputes the water needs of all these countries are barely being met now and will probably not be met in the future and since the supply is likely to remain unchanged, this has resulted to increased tension and instability in the region. According to El- Khodari, a strong tension still exists between the Nile Basin countries whenever a new Nile development project is proposed. [13]

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[9] Asim El-Moghraly (1997) - *International Study of the Effectiveness of Environmental Assessment Water Management in the Sudan Pg. 20.*

[10] David Muganyi "States want River Nile treaty debated afresh in the Kenya Daily Nation Newspaper of 30th November 2004 Pg. 6.

[11] Report by Global Policy Forum 10th August 2000 Pg. 3.

[12] Nabil M. El-Khodari , (2003) ; CEO of Nile Basin Society. "*The Nile Basin Initiative; Business as Usual?.* Pg. 2.

[13] Ibid, Pg. 5.

Gleick[14] stated that conflict has the greatest potential to emerge when the downstream nation is militarily stronger than the upstream nation and it feels it's interests are threatened.

During the 1990's, attempts to resolve disagreements surrounding the Nile Basin and to develop a regional partnership within riparian states to equitably share the Nile waters got underway but real progress has been slow Kenyan, Ugandan and Tanzanian Legislators have recently sparked fresh debate over the legitimacy of the colonial era agreements.[15]

In a recent interview Antoine Sendema,[16] stated that;

"Since the Nile riparian states share a common history and problems' including poverty, environmental degration and unstable economies, there is need to utilize the existing opportunities to have a cooperation where actors will have a win-win gain through negotiation towards development."

On the other hand Geoffrey Howard [17] said in an interview with IRIN that;

"The main challenge for the region is for upstream countries to find sustainable ways of harnessing the Nile that would not hinder its flow downstream to Egypt."

Having stated that there are disputes in the Nile basin, the study will look at existing legal and institutional framework for the management of the Nile Basin disputes and review the application of negotiation and conciliation to can resolve these disputes.

As an international river, the Nile is naturally governed by the rules of international law on the administration and the uses of the waters of international rivers. The term international watercourse is conveniently used to designate rivers, lakes or ground water sources shared by two or more states. Such watercourses will either

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[14] Peter Gleick (2000) ; *Questions of Equity at the Heart of Water Conflict Management "Water and Conflicts Prevention.*

[15] Merck Article in the Science in Africa Magazine*", The Nile Water Conflicts"* May 2003Pg. 1.

[16] Antoine Sendama (2003) one of the Nile Basin initiative' s regional coordinators in an interview with IRIN in the Science of Africa Magazine in May 2003.

[17] Geoffrey Howard (2003), Incharge of the International Human for Conservation of Nature (IUCN) in Eastern African Programme in an interview with IRIN in the Science of Africa Magazine in May 2003.

form or straddle an international boundary in the case of rivers; they may flow through succession of states.[18]

1.3 Statement of the Problem

Logically international watercourses like the Nile Basin , to which more than one state have access cannot be wholly subject to the jurisdiction of any one of them as it must be shared and when they share, disputes are inevitable.

Since there has been long standing disputes in the Nile River Basin over the sharing of the Nile Waters which need to be shared equitably between all riparian states and the available solutions seems to be elusive, this study therefore explores the legal and institutional set-up for the management of the Nile disputes and reviews the applicability of negotiation and conciliation in the resolution of disputes over the Nile waters.

1.4. Theoretical Framework

The study is anchored on the solidarism theory that sees value in the international society in concert. In the connection international regulatory legal and institutional framework have a role to play in the management of internationally shared water resources such as the Nile.

Further the study is premised on the international law principle and belief that international disputes should be settled peacefully, a principle well espoused in Article 2 (3) of the United Nations Charter among other instruments.

1.5 Main Objective

Having established that there exists long standing dispute in the Nile basin, the objectives of this study are;-

- To analyze the legal and institution of framework for the management of the Nile waters;

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18 Lipper Garretson (1967) "*The Law of International Drainage Basins* Pg. 8.

- To discuss the nature and dynamics of disputes over the Nile waters and the methods of their resolution with specific regard to negotiation and conciliation;

- To explore the applicability of negotiation and conciliation in the resolution of the disputes over the Nile waters;

- To make recommendations on effective legal, institutional and dispute resolution mechanisms for the equitable and sustainable use of the Nile waters.

1.6 Hypothesis

The study proceeds on the hypothesis that goodwill exists among the Nile Basin states to improve the legal, institutional and disputes resolution mechanisms to ensure equitable and sustainable utilization of the Nile waters.

1.7 Research Questions to be Answered

The research questions in this study are:

1. What are the possible disputes that may arise or have arisen in the Nile Basin?
2. What are the legal and institutional frameworks available for the management of the Nile Basin disputes?
3. How has negotiation and conciliation as methods of international dispute settlement been used in resolving the Nile Basin disputes?
4. How would the disputes in the Nile Basin be effectively managed and what improvements can address those challenges?

1.8 The Methodology

The study uses both primary and secondary data as sources of information. The study will be descriptive, analytical and prescriptive.

The primary data *inter alia* include International Conventions.

The secondary data include *inter alia;*

1. Text books.

2. Materials from Internet including on-line libraries.
3. Court records.
4. Newspapers and other media reports.
5. Journals articles.
6. Visit the various resource institutions and centres dealing with natural resources management for instance: - International Union for Conservation of Nature(IUCN), Ministry of Water Development among others.
   Get information from scholars who have written publications on the Nile.

1.9 Literature Review

The focus of the study is to examine the conflicts in the Nile Basin and to analyze the existing framework for disputes resolution. In particular, the study will explore the usage of negotiation and conciliation in the resolving and settlement of disputes in the Nile basin.

There have been several studies about the Nile namely,

- Howell and Allan[19], gave the history of the Nile, the Nile hydropolitics and the legal issues causing the Nile conflicts. The authors did not indicate how the conflicts would be resolved.

- Godana,[20] analyses in general context the conflicts that arises when an international watercourse is shared by several states. He did not specifically focus on the Nile but dealt with it in general terms.

- Waterbury [21] addressed the politics in the Nile Basin but did not address how the conflicts and disputes would be resolved.

- Arthur Okoth Owiro [22] gave analyses of the contentious Nile Treaties.

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[19] P .P. Howell and J A Allan (1990);"T*he Nile ,Resource Evaluation ,Resource Management ,Hydro-politics and Legal Issues* "University of London. Legal and institutional aspects of the Nile.

[20] Bonaya Godana (1985);"*African Shared Water Resources*, Niger and Senegal"; London, Frances Pinter publisher.

[21] John Waterbury (1979); "*Hydro-politics of the Nile Valley*." Syracure University Press (USA).

[22] Article 33, United Nations Charter.

None of the writers have addressed how the Nile conflicts would be addressed by use of pacific settlement of disputes mechanisms provided for by the United Nations Charter. This study will fill in these gaps and will examine how negotiation and conciliation have been used or would be used in the management of the Nile Basin conflicts and in resolving the Nile disputes.

1.10 Chapter Outline

Chapter One explains the basis of the study. It includes the introduction to the study, background of the study, the statement of the problem, the objectives of the study, the research questions, the methodology used and also contains the literature review.

Chapter Two of the study will analyse all the laws, rules international principles and institutions that govern the international watercourses.
The chapter will examine briefly evolution and general principles on the uses of international watercourses in the 21st Century.

Chapter Three examines the nature and dynamics of the Nile problems and disputes. It critically examines the politics in the Nile, the legal instruments (Treaties) and institutional mechanisms for the management of the Basin. In this chapter all the treaties governing and institutions involved in the management of the Nile Basin will be critically examined. In the chapter international methods of dispute resolution, will be examined.

Chapter Four of the study analyses the applicability of negotiation and conciliation in the resolution of the Nile Basin disputes. The effectiveness of such framework and the general strengths and weaknesses of the mechanisms (that is the advantages and disadvantages) will be examined.

Chapter Five proposes recommendations for proper and effective management of the Nile Basin. The chapter also proposes ways and methods of management disputes resolution in the Nile Basin.

CHAPTER TWO

2.0 THE LEGAL AND INSTITUTIONAL FRAMEWORKS IN RELATION TO INTERNATIONAL WATERCOURSES

2.1. Introduction

Water has never respected political frontiers. It may happen that a river will be taken as a reference feature for determining the demarcation line between two or more states. It may be that activities in one state with a view to making use of the water that it has on territory may have repercussions jeopardizing the use that another state is making or may wish to make of the same water once within its own frontiers. [23]

The law governing the utilization of the water of international drainage basins for non-navigational purposes was developed in the 20th century. It was developed in response to increasing utilization of the waters for such basins and to the great emphasis laid on basin development. It manifested itself in international practice as evidenced predominantly by treaties, in judicial decisions and in the opinions of individual jurists and of private and public international bodies.

2.2 The Concept of International Watercourses

The expression "international watercourses" is used to identify water resources common to several states. For the term connotes all water resources (surface, underground, atmospheric and frozen water) of international concern.[24]

As a background, in the 19th century a common description was "international rivers or lakes" an expression which was enshrined in Article 108 of the Final Act

[23] Caponera Supra. Pg. 3.
[24] Ibid, Pg. 4.

of the Congress of Vienna of 1815.[25] The expression refers to navigation waterways of concern to two or more states (successive international rivers) or they serve to demarcate them (contiguous international rivers).

Later the expression gained currency in international practice making for extension of the international rules to tributaries, canals and secondary courses as well as to the main stream lakes and rivers. Toward the late 1950's it was purposed to adapt the expression "international drainage system" after recommendation of International Law Association (ILA).

A precise definition was given by Article 2 of the "Helsinki Rules" adopted in 1966 by International Law Association (ILA) where the expression connotes "a geographical area extending over two or more states determined by the watershed limits of the system of waters"

In recent years two new expressions have come to be used namely, international water resources system [26] and share water resources.[27] This refers to all natural resources that are shared including water.

However, watercourse systems is a concept adopted by the International Law Commission (ILC) for the United Nations in its attempt to modify the law of non-navigable uses of international waters .It defines watercourses as a water resource shared by a plurality of states, not as a physical or geographic element, but as a system, indicating the connection between these and other components of the resources. Connectivity may be as a result of beneficial use, inter-dependence between states in the exploitation, administration, and protection of water resources.[28]

Hence, a framework law was formulated which stated that detailed provisions shall be made to remove inconsistencies and subsequently watercourses was retained.

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[25] Ibid, Pg. 4.
[26] UN report of the group of experts on legal and institutional aspects of water resources New York 1976 Pg. 14.
[27] UN DOC. E / CONT. 70/29 PP 51.
[28] Dante A. Caponera 1995; *Patterns of Cooperation in International Water Law.*

Water resources shared between two or more countries form a significant portion of the world's fresh water resources. The Report of the Secretary General of United Nations dated 11th March 1977 on the register of international drainage basins, noted that two hundred and fourteen such basins are now shared between two or more countries. Africa alone has not less than seventy international drainage basins. All these constitute great assets to the nations sharing them. They are vital resources for countries trying to cater for growing population and to improve the quality of life of their people.

Outside the UN systems, there are also other bodies which deal with international watercourses, for example, the Council of Mutual Economic Assistance (C M E A) and the European Committee for Standardization (CEN) have promulgated international standards to control the quality and quantity of water, to prevent water loss and to develop irrigation especially around the Danube river basin which is shared by eight countries.

2.3 The Rise and Early Supremacy of Freedom of Navigation on International Rivers

The interest of the state in the regulation of water rights was not limited to national waters only. In the course of time, as a result of the rise of international interaction between states, there developed the interest to delimit and regulate inter-state rights over rivers separating or traversing the territories of two or more states. Because first and for a long time, the most important use of such rivers was communication with the outside world, it followed naturally that the development of international law of rivers began with navigation.

Early writers such as Hugo Grotius viewed rivers as God-given highways which may be used by all nations or which are mere extensions of the seas, and would be like the sea open to navigation by all nations. They felt generally that the international rivers were not subject to sovereignty or to ownership by individual states.

On the contrary, states have from time immemorial claimed sovereignty or ownership over the waters within their territories including portions of international rivers. Shared natural resources between states must be utilized for the benefit of all of them. The problems of international rivers have interested associations of international law and individual jurists from the beginning of the 19th century. The study of the subject was included on the programme of the Institute of International Law in 1910.[29]

The trend toward international cooperation in the utilization of non-maritime waters was demonstrated by the adoption of the two existing general multilateral conventions concerning the utilization of international rivers. The conventions were concluded in 1921 and 1923.

Furthermore, more efforts were made in 1959 by the Bolivian delegation to the General Assembly, in Resolution 1801 (XIV) of 21st November 1959, which decided that preliminary studies should be initiated on the legal problems relating to the development and use of international rivers, with a view to determining whether the subject was appropriate for codification.

In Article 3 of the Charter of Economic Rights and Duties of States, adopted on 12th December 1974, the Assembly declared that:-

"In the exploration of natural resources shared by two or more countries each state must cooperate on the basis of a system of information and prior consultation in order to achieve the optimum use of such resources without causing damages to the legitimate interest of other states."

The historical development of international water law has followed closely that of political, economic, technical and social needs, so that we find the development process now marked according to the use in question.[30] The earliest legislative documents extract being found in Roman law and related to navigation. Freedom of navigation has its basis in the concept of *aqua profluens as being a res communis omnium* this regime of freedom was broken throughout the Middle

29 Annaire de L" institute De Droit International Vol. 24 1911

30 Caponera Supra Pg. 6.

Ages. With the French revolution the freedom of navigation idea began to gain currency again.[31]

Pari passu with the affirmation of the freedom of navigation by the Final Act of the Congress of Vienna, 1815 and Treaty of Paris, 1856 for the Danube among other treaties there emerged the need for understanding between the riparians for the administration of watercourses and the ban on fiscal measures.

The first and only attempt to codify internationality the freedom of navigation and the need to establish joint commissions for the management of international rivers was the League of Nations Conference held at Barcelona in 1921, where a Convention and Statute on the regime of navigable waterways of international concern was adopted.[32] This attempt at codification was not successful since only a few countries ratified the Convention.

It has therefore become evident from the above discussion that international watercourse must be utilized by riparian states in which the rivers traverse for the benefit and enjoyment of all of them.

2.4 Evolution and General Principles of General Water Law on the Uses of International Watercourses in the 21st Century

Throughout history, rivers as natural phenomenon have played a decisive role in the progress of humanity. It was on their banks that early great civilizations sprang and flourished, and their waterways served as channels of communication that stimulated humankind into their quest for far-off lands, for example, Christopher Columbus, thus bringing different societies into contact with one another for trade and other purposes. In the words of Dubois,[33] he stated that ;-

[31] Ibid, pg 6.
[32] League of Nations, Treaty series vol. VII Pg. 37.
[33] W.E.Dubois ;*In the World and Africa New York International Publishers* 1947.

"Civilization flowed to man along the valley of great rivers where the soil was fertile and where the waters carried him to other peoples who were thinking of the problems of human life and solving them in varied ways".

From the ancient times, the importance of international waters as means of communication and commerce as well as sources of supply for domestic and agricultural uses has been recognized. [34] The important role that great watercourses as the Indus, the Ganges, the Rhine and the Nile played in the social and economic progress of humankind needs no emphasis. Indeed, the origins of the organization of the state have been traced from water rights. For example, the Chinese word *Schin'* means both *'to rule'* and *"to regulate water"*. Thus, the interest of the state in the regulation of water is of ancient origin.

2.5. Problems of Sovereignty in the Management of Shared Water Resources

On 16th November 1792, the Provisional Executive Council of the French Republic, noted that :

> "The stream of a river is the common undeniable property of all the countries which is borders or traverses; that no nation can without injustice claim the right exclusively to occupy the channel of a river and to prevent the neighbouring upper riparian states from enjoying the same advantages that such an exclusive right is a remnant of feudal servitude or at any rate an obvious monopoly which has been imposed by force and yielded by impotence; that it is therefore revocable at any moment and in spite of any convention, because nature does not recognize privileged individuals, and the rights of man are forever imperceptible."

The principle of sovereignty of states has a major negative effect on the management of international watercourses. As the US Attorney General [35] in 1895 said when US had a dispute with Mexico over the diversion of the RIO Grande, he said: -

".....the fundamental principle of international law is the absolute sovereignty of every nation within its own territory..... all exceptions, therefore, to the power of a nation within the own

[34] Caponera supra Pg. 8.
[35] M. Harmon USA Attorney General in 1895.

territory must be traced up to the consent of the nation itself. They come only from no other legitimate source. [36]

Principle 21 of the Rio Declaration 1992 states that, states have sovereign right to exploit their own resources pursuant to their own environmental and developmental policies, and the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other states or of areas beyond the limits of national jurisdiction.

The other theory that has a negative impact on the international watercourses is the "absolute territorial integrity theory " under which downstream states are held to have an absolute right and that the natural rate of flow shall not be altered.

These two theories take into account the territorial sovereignty of one state and disregard reciprocal sovereign rights of other states which have an interest in the same international watercourse.

The solution to the problem posed by the two theories is the recognition of interests among states having claims over the same international water resource from which they derive a series of reciprocal rights and duties. This was affirmed by the Permanent International Court of Justice in 1929 in the Case relating to the Territorial jurisdiction of the International Commission of the River Oder. [37] The court accepted the theory of limited territorial sovereignty of states over the water resources shared with other states.

2.6 International Legal principles and Guidelines for the Management of International Lakes and Rivers.

What the legal issues that the law of International watercourses address?

The law on international watercourses should take into account the following important issues:-

1. Right of riparian states,

[36] Moiré 1906, *Digest of International law* Pg. 654.
[37] PICJ series A No. 23 1929

2. Transboundary pollution which may result from industrial waste being discharged into lakes causing pollution as well as silt pollution water downstream,
3. Agricultural chemicals where farms are located upstream and chemicals from upper part pollutes the lower portion,
4. Environmental conservation of the shared watercourses,
5. Sustainable development in relation to human activity, for example, farming.
6. Sustainable management of watercourses, and
7. Resolution of disputes and conflicts between states.

The law governing the utilization of the water of international drainage basins for non-navigational purposes was developed in the 20th century. It was developed in response to increasing utilization of the waters for such basins and to the great emphasis laid on basin development, which manifested itself in international practice as evidenced predominantly by treaties, in judicial decisions and in the opinions of individual jurists and of private and public international bodies.

Hence to avoid potential conflicts arising over international watercourses the United Nations convened a panel of experts in 1969, to look into the matter and make the necessary recommendations on the issue. The panel was the United Nations panel of experts on the legal and institutional aspects of international water resources development. The panel emphasized the need to establish adequate administrative arrangements among states sharing the same water basin.

Secondly, the United Nations Water Conference held at Mar del Plata, in 1977 called the Mar del Plata Action Plan stated that ;

"States sharing water resources should co-operate in the establishment of programs, machinery, and institutions necessary for the co-ordination and development of such resources and establish joint committee to provide for the collection, standardization and exchange of data, the management of shared water resources, the prevention and control of water pollution"

Since each drainage basin is unique, with its own economic, geographical, ecological, cultural and political variable, no comprehensive system of rigid rules

can anticipate adequately the variations from one basin to another. Consequently, the mechanisms developed by the UN agencies are peculiar to each water system.

2.7 International Legal Principles and Guidelines

The processes of creating international law, in general and regarding international watercourses in particular are many and varied.
The traditional starting point is Article 38 (1) of the Statute of International Court of Justice which indicates which international law in case of disputes submitted to International Court of Justice, shall apply. The court shall apply International Conventions (Article 38 (a)), International customs (Article 38 (b)), General Principles of Law (Article 38 (c)) and Judicial decisions and the teaching of the most qualified publicists (Article 38 (d)).

We shall analyze and discuss the sources of international watercourses by each of the sources indicated by Article 38 (a) – (d) of the statute of ICJ.

2.7.1 International Conventions

The most commonly used procedure of creating rules of conduct between states in relation to international watercourses is that of International Agreements, Conventions or Protocols.

The Conventions are either general or particular.

(a) **General Conventions**

The general Conventions in relation to international watercourses are:-

(i) The Convention and Statute on the regime of navigable waterways of international concern [38]

The Convention relating to the development of the hydraulic power affecting more than one state and protocol signed in 1923. [39]

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[38] The Convention and Statute on the regime of Navigable Waterways of International Concern. Signed in Barcelona on 20th April 192.
[39] League of Nations, Treaty series vol. XXXVI Pg. 77.

(ii) The 1992 UNECE Convention on the Protection and Use of Transboundary Waters and Lakes

It adopts the definition of transboundary waters, requires that surface and ground waters which mark, cross or are located on boundaries between two states should be managed and conserved in an ecologically sound and rational way and used reasonably and equitably, and parties are required to control transboundary impacts such as pollution to ensure conservation and restoration of ecosystems and to co-operate in the protection of the environment. The 1992 UNECE Watercourses Convention is now the principle multi-lateral treaty governing environmental protection of most international watercourses.

(iii) The 1997 UN Convention Relating to the Non-Navigation uses of International Watercourses

This convention seeks to codify much of the law on international watercourses, it was signed on 21st May 1997. Article 5 of the Convention indicates that equitable and reasonable use of a watercourse.

In 1997, parties to the 1992 UNECE Convention adapted the Helsinki Declaration in which they recognized the need for integrated management of all fresh watercourses. The states committed themselves to apply the principles of the convention when drawing up, revising, implementing and enforcing national laws and regulations on the management of their respective internal waters as well as transboundary water resources.

The General principles under the 1997 Convention in relation to the use of international watercourses are:-

1. Equitable and reasonable utilization (Article 5 (i))

   The article requires states to utilize an international watercourse in an equitable and reasonable manner for purposes of attaining optional and sustainable utilization and taking into account the interests of the watercourses states concerned and consistent with adequate protection of the watercourses.
2. This paragraph also encompasses the general international watercourses law, the principles of good neighbourly relation. It requires states in sustainable utilization of shared waters to take into account the interest of other riparians..
3. The Preventive principle – Article 7 requires watercourses states in utilization of international watercourse to take all appropriate measures to prevent the causing of harm to other watercourses states.
4. The Principle of Co-operation under Article 8 – it requires watercourse states to co-operate to attain optional utilization and adequate protection of an international watercourse and Article 23 require watercourses' states to cooperate in the protection of marine environment of marine pollution.
5. Principle of Notification (Article 12) it requires states to notify each other in regard to planned activities which would have adverse effects on other watercourses states.

(b) Particular Conventions

These may be multilateral agreements or bilateral agreements.[40] Most agreements relating to international watercourses are of bilateral nature. The bilateral agreements may take various forms. For instance, they may be agreements for the integrated management of an international basin or watercourses or agreements calling in the harmonization of national laws governing water with a view to avoid discrimination against users of different nationalism

2.7.2. Custom in International watercourses Law

"Custom" has played a significant part in building the present fabric of the international legal system.[41] Custom is a habitual course of conduct. A customary

[40] Caponera supra Pg. 11.
[41] Verma S.K. (1998) An introduction to public international Law Pg. 23.

role of international law may be defined as a role when the community of states has for along time recognized as the right role of conduct and which has the force of law. [42]

Customarily it is widely held that international custom is constituted by a constant and uniform conduct by states and their conviction as to the obligatory nature of such conduct as being in conformity with a juridical norm.
State practice is fundamental to the formation of a custom. But what amounts to a state practice and what constitutes a state practice may cover every activity of the state origins in an international context. [43] The elements for state practice to constitute a customary international rule the custom must be consistently, uniform and extensive. [44]

The precise length of time required for it's existence is immaterial. [45] The state practice rule even though general and consistent is not customary law unless an *opinion Juris* or "psychological element" is present. That is, the practice is recognized as obligatory and there is the conviction that it's repetition is the results of a compulsory rule. [46]

The international watercourses custom was applied in the North Sea Continental Shelf Case.[47] The case was between Germany and Denmark and Netherlands, where the court affirmed the international custom of usage of shared water resources. [48] The court observed that:

"Not only must the acts concerned amount to a settled practice, but they must also be such, or be carried at in such a way, as to be evidence of a belief that this practice is rendered obligatory by the existence of a rule of law requiring it. The need for such a belief is implicit in the very notion of the *opinion Juris*. The frequency or even habitual character of the acts is not in itself enough"

International custom may be of general kind (binding all states) or particular kind (binding only to a given group of states). The international custom that is of

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[42] Ibid, Pg. 24.
[43] Ibid, Pg 25.
[44] Ibid, Pg 27.
[45] Ibid, Pg 27.
[46] Ibid, Pg 30.
[47] ICJ Reports 1969 Pg. 3.
[48] Caponera Supra Pg. 11.

general kind is the general rule that the rights of the respective states are limited in relation to any shared resources.

This was recognized by the Permanent International Court of Justice in its decision in the Case of Territorial Jurisdiction of the International River Oder Commission [49] where it noted that:

"when consideration is given to the manner in which states have regarded the concrete situation arising out of the fact that a single waterway traverses or separates the territory of more than one state,---------, it is at once seen that a solution of the problem has been sought not in the idea of right of passage in favour of upstream states, but in the community of interest of the riparian states".

The other customary rules relating to international watercourses and which have been provided for by the 1997 UN Convention on the Uses of non-navigable Waters are:-

(a) Rules prohibiting the management of those resources in such a way as to cause substantial damage to other states.(Article 7).
(b) Rules requiring prior consultation in the case of water use plans (Article 12).
(c) Rules of equitable distribution of water resources (Article 5).

2.7. 3. General Principle of Law as applied to International Watercourses

Article 38 (c) treats general principles of law recognized by civilized nations as a subsidiary source to be drawn in the absence of international conventions or customary rules. [50]

The general principles of law act as gap fillers where there is absence of international conventions or customary rules. Due to this fact, they are subordinate to conventions and customary rules. There has been the reconstruction of general principles. Such reconstruction has been made through judicial decisions and in learned writings.

The general principles have been the limitations to the principle of the sovereignty of a state in the case of international watercourses.

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[49] PICJ Judgments No. 23 of 1929 pg 5-23.
[50] Caponera Supra Pg. 16.

The principles *inter alia* include: -

(a) The principle that there shall be no abuse of rights by states in the use of its own territory causing unjustified loss or damage to or in another state. This general principle was adopted in Article 7 of UN Convention on Uses of Watercourses.

(b) The principle of good-neighbourly relations, where no state may engage on its own territory in activities likely to have damaging effects on the territory of another state. This general principle was adopted in Article 5 of UN Convention on Uses of Watercourses.

(c) The principle embodied in the water-laws of individual states whereby in almost all national water laws the rule requiring a balancing of rights between competing users is always included.

(d) The principle to take all necessary preventive measures (preventive principle) in order that the question of damage does not arise. This general principle was adopted in Article 7 of UN Convention on Uses of Watercourses.

(e) The other principle concerns the equitable use and utilization of international watercourses. This has been affirmed by Articles IV to VIII of the Helsinki Rules as drafted by ILA and Article 5 of UN Convention. This principle achieves a balance between potentially conflicting interests and it establishes priorities among needs and makes allowance for existing uses.

(f) The other principle is the principle of co-operation which is the rule requiring that states shall inform and consult each other. This rule has been embodied in many international instruments such as the General Convention of 1923, The Declaration of Montevideo of 1933 and Article 3

of the Charter of Economic Rights and Duties of States of 1974 and Article 8 of 1997 UN Convention.

(g) Common management principle. The principle is the logical combination of the idea that watercourse basins are most efficiently managed as an integrated whole, and need to find effective institutional machinery to secure equitable utilization and development.

2.7.4 Judicial decisions contribution (Article 38 (d) part one)

Judicial decisions contribute a lot to the creation of law of the international watercourses, this includes:-

(a) Judgments and advisory opinions of the international courts,

(b) Awards rendered by Arbitral tribunals,

(c) Decisions of national tribunals.

According to Article 38 (d) of the Statute of the ICJ, judicial decisions applications are subject to Article 59 of the Statute. Article 59 provides that the decision of the court has no legal binding basis except between the parties to a dispute. Thus decisions of the Courts have no force of precedent ***(stare decisis)***.
Judicial decisions only apply as subsidiary means for the determination of the rules of law.

The decisions of ICJ and international tribunals are based either on the rules of customary law and general principles. For instance, in the United States in the case of Kansas Vs Colorado [51] the Supreme Court held that the dispute must be settled on the basis of equality of rights principle.

[51] 185 US 125 1902.

2.7.5. Contribution of the most highly qualified publicists to the development of international watercourses law

According to Article 38 (1) (d) of Statute of ICJ, the court may use the teachings of most highly qualified publicists to determine the rules of the law. The teachings are subsidiary means for the determination of the rules of law.

The international law of watercourses has been enriched through the scholarly contribution. [52] For instance the work of Institute of International Law and the International Association for Water Law. The International Law Association has made a notable contribution to the development of international watercourses law.

Among the resolution s *inter alia* are: -
Statement of principles (Resolution of Dubrovnik 1956), Resolution on the use of the water of International Rivers New York 1958 and Resolution on International watercourses Administration, Madrid 1976.

The international jurists have directly influenced the law of international watercourses thus helping in the identification of the international customary rules on the subject and sometimes they have found forum in state practice. For example the Helsinki Rules on the uses of the water of international Rivers 1966 have been used as guidelines in international watercourses treaty making. The rules have been used in the drafting of basic water resources agreement in Senegal, Zambia, Kagera and Lake Chad basins and have been the subject of a general declaration of acceptance by some governments. [53]

Again there are many individual scientists who have also published important publications in the field of international watercourses law.

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[52] Caponera supra pg. 21.
[53] Ibid, pg. 22.

2.7.6 Resolutions of Intergovernmental Organizations containing declaration of principles on international watercourses

Though Article 38 does not recognize this source, the United Nations General Assembly has adopted a series of resolutions dealing with international watercourses.
These for instance are:-

(a) Resolution 1803(XVIII) on permanent sovereignty over natural resources of 12th December 1962.
(b) Resolution 3281 (XXIX) on the Charter of Economic rights and Duties of States dated 12th December 1971,on cooperation in the field of the environment concerning natural resources shared by two or more states.

These resolutions have had a notable influence in the process of formation of the general international law governing the respective subject matters. [54]

2.8.0 Institutions dealing with International Watercourses

There are several institutions dealing with international watercourses.
These are ;

(a) The U N Economic Commission for Africa (U N E C A) is responsible for assessing, planning and providing for safe water supplies. U N E C A has set up an agency to cooperatively develop International Lake and River Basins.

(b) The United Nations Economic and Social Commission for Asia and the Pacific (ESCAP) promoted and influenced the creation of Mekong Committee, which deals with river basin cooperation.

(c) The United Nations Economic Commission for Europe (U N E C E) has a committee for cooperation between its members. In 1980 UNECE

[54] Ibid, Pg. 17.

declaration of policy on the prevention and control of water pollution, adopted fourteen principles to assist European Countries in the use and management of shared water resources.

2.9.0 Conclusion

The Law of international watercourses has for most of the history been concerned with the allocation and use of a natural resource of international significance not with the conservation or environmental protection.

The 1997 UN Convention on the Uses of non-Navigation Waters was meant to codify the law relating to international watercourses but it was and has not been successful. It is unfortunate that water is life and yet there is no codified law dealing with international watercourses. Again as has been seen the few Conventions in place do not focus on environment. There is need to have a codified law on international watercourses in order to avert an outbreak of war /or conflicts.

It is important to mention that, the contribution of the ICJ and scholarly work in the development of international watercourses law cannot be underestimated.

CHAPTER THREE

3.0. THE NATURE AND DYNAMICS OF THE NILE BASIN DISPUTES AND METHODS OF DISPUTES RESOLUTION

3.1 Introduction

In examining the Nile it's important to examine briefly the relations and mutual susceptibilities among the riparian states. The territory of the Nile Basin is shared by ten states all of which influence the flow and the quantity of the Nile waters.

Egypt has always been acutely sensitive to the dangers of this broader regional context for, as the epitome of the downstream state, its economic life is at the mercy of the upstream states. Egypt has on several occasions taken the initiative to reserve for itself the right to intervene in the affairs of other states to protect its water interest. This is bound to spark conflicts among the riparian states. [55]

The importance of the Nile cannot be overstated. Waterbury [56] said in 1979 that:

"It is unlikely that President Sadat of Egypt and President Numery of Sudan would go to bed at night since they have visions of the Nile running dry or been polluted beyond use thus, torturing their sleep"

It is then here that the essential conundrum is posed:
"How can "sovereign" states, pursuing national self-interest and whose policies are seemingly to ensure a regime's survival cope with the challenge of Bi-national or multinational co-ordination in the use of a common water resource like the Nile?

[55] Waterbury Supra Pg. 5
[56] Ibid, Pg. 6.

3.2. The History of the Nile River

The Nile Basin has a surface of 3 million km^2 and it covers one tenth (1/10) of Africa. The length of the Nile is about 6,500 Kilometres, and it contains voluminous waters, stretching some 6,000 Kilometres through some of Africa's most arid lands. It is the longest river in the world and upto 250 million people depend on it.

The Nile basin is shared by ten countries namely Burundi, Rwanda, the Democratic Republic of Congo (DRC), Tanzania, Kenya, Uganda, Ethiopia, Eritrea, Sudan and Egypt.

The major source of the Nile is Lake Victoria in East-Central Africa where the White Nile comes from and the Blue Nile's source is Ethiopian highlands. Egypt is the main beneficiary of the Nile river as it is drained by it but makes no contribution to its drainage. The river itself is of major current strategic economic importance to only Egypt although it has become increasingly significant to Sudan.[57] According to Waterbury, if Egyptians would be allowed, every drop of the Nile river water reaching the Mediterranean will have been utilized and no water would be allowed to escape.[58]

For many years the inhabitants of the Nile valley have been mastering their river in order to master their land. By the 19th Century as the population grew, the race between technological progress and ecological breakdown became particularly intense and by the 20th century man-made imbalances had become so acute that the only solution was to try to correct one imbalance by planting the seeds of yet another. [59]

The average annual discharge of the main Nile as measured at Aswan dam is 84 billion m^3. The Nile is significant for agricultural use to meet the universal problem of increasingly population and for hydro-river, and it is the birth place of

[57] Howell and Allan Supra, Pg. 181.
[58] Waterbury Supra, Pg 12.
[59] Ibid, Pg. 12.

hydrology. There is no other river that provides such a wealth of information like the Nile. The Nile has fascinated philosophers, geographers, historians, and engineers of all creeds and races. The mystery of the Nile lay not only in its source but also in the predictability of the rise and fall of its flood. [60]

The Nile has provided the basis of agricultural development in Egypt and Sudan since the start of agriculture in the area about 7000 years ago. In recent years the use of Nile water has gradually increased, keeping pace with the increase in population. Egypt and Sudan are the major beneficiaries of the Nile waters. Due to the fact that water demand is higher that the supply, conflicts are inevitable in the Nile Basin.

3.3 The Nile River Politics : Who Receives the Nile Waters ?

Historically, Egypt has monopolized the largest river in the world and development throughout the region. For half a century, Egypt had maintained its monopoly over the Nile by regional instability. [61] Egypt backed rebel groups in Sudan, Ethiopia and Somali to cause instability in order to divert attention out of the Nile basins In addition to destabilizing fellow riparian states, Egypt maintained its "owner's rights" in the Nile through the 1959 Agreement. The Agreement gave Egypt rights to 87% of the Nile River's water and Sudan to utilize the remaining 13%. [62]

It should be noted that substantial amount of the Nile waters comes from the Ethiopian highlands and yet Ethiopia did not get any allocation under the 1959 agreement. Although Ethiopia has repeatedly declared its rights to develop the Nile waters, the country's protracted conflicts have prevented that development. Although Ethiopia receives a small portion of the Nile's water for usage, it cannot develop alone without Egyptian consent. But recent developments have shown that Egypt is trying to create warm relations with Ethiopia and Sudan .President Hosni Mubarak of Egypt has led the peace negotiations between the government rebels in Sudan and sent delegates to the Somali peace conference in Djibouti. According to

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[60] Howell and Allan *Supra,* Pg. 5.
[61] Report by Global Policy forum on 10th August 2000 "Nile River politics: who Receives what" Pg. 1.
[62] Waterbury supra Pg. 6.

the Report by Global Policy Forum Mubarak's peace initiatives will however not resolve the region's contentious water rights. [63]

The creation of the Nile Basin Initiative in 1993 is a way forward to the Nile Basins problems and Egypt is agreeable to cooperation in the development of the Nile. Egypt has agreed to cooperate in the development of the Nile.

As the Report on Global Policy Forum puts it:

"Egypt's willingness to cooperate would seem to contradict it's historical domination of the Nile. The contradiction however is only semantic. This is because Egypt can employ it's considerable experience to participate in dam deconstruction and water resource management as well as other projects in Ethiopia and thereby continuing Egyptian rule over one of the worlds most famous rivers." [64]

3.4. The Problems of Nile Basin

As indicated earlier, there are many problems in the Nile and Zewdie Abate said:

"Almost all countries in the Nile Basin face a number of environmental problems, such as deforestation, soil erosion, and sedimentation, as well as social and political problems, such as lack of appropriate institutional financial resources, and trained manpower for environmental protection and management. These problems, coupled with poverty and high population growth, pose serious threats to the water resource and hence the life support system of the basins environment". [65]

The paradox in the Nile Basin is that countries "contributing" most of the water are using the least and on the other hand countries using the most water are those which have the power namely Egypt. The basic problem facing Egypt, Ethiopia and Sudan is simply that there is not enough Nile water available to complete all of the irrigation schemes on the drawing board.

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[63] Supra ,Report by Global Policy forum 2000 Pg. 2.
[64] Ibid, Pg. 2.
[65] Smith J. (1996); *Nine nations, One Nile.* The University of Michigan, School of Natural Resources and Environment 1996 Seminar in population – Environment Dynamics .Obtainable online at http://.www.personal. umch.edu/~wddrake/smith.html.

In this regard, Rasian in 1999, [66] in answer to the biggest challenges for institutions in the Nile basin said: -

"The growing population and thus the need for water are the biggest challenges. Also there is a need for adding agricultural lands to total cultivated area in Egypt which is a challenge".

According to UNESCO's report,[67] population and economic pressures are mounting faster than the Niles capacity to sustain civilization, and as a result the choice is becoming more and more stark between conflict over an increasingly scarce resource and cooperation to manage the resource more equitably.

3.5 Disputes in the Nile Basin

According to Allan and Sandra, water poses a potentially dangerous problem in many areas but not yet a murderous one. [68]

In the past, Egypt has not hesitated to threaten the use of force to keep its overwhelming share of the Nile Waters. The "Unity of the Nile Valley" was the more potent slogan of the Egyptian nationalist movement in 1950s. [69]

3.5.1 Historical Perspective of the Nile Disputes

Disputes in the Nile systems started as early as 1876 when the British took over the control of Egypt's debts. The British occupied Egypt in 1882 upto December 1954.[70] In the wake of the First World War, the British were confronted with an Egyptian nationalist movement, which sought independence from Britain and unity with Sudan.

The potent of Disputes were expressed in 1935 by Prince Omar Toussoun of Egypt who had been sent to Sudan to explore the possibilities of economic integration. He reported: *"if we fail to colonize the Sudan then the Sudan will colonize us"*.[71]

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[66] Raslan Y.D (1999). *National Water Research Centre (Egypt)* Email Interview on June 30th 1999.
[67] UNESCO Report on *"Averting Conflict in the Nile basin"*-2004 Pg. 1.
[68] Ibid, Pg. 1.
[69] Waterbury supra, Pg. 44.
[70] Ibid, Pg. 46.
[71] Cited by Ibrahim Talat. *"The Last Days of the Wafd* (December 13, 1976").

The first bilateral negotiations with respect to Aswan High Dam were in 1954. The argument for both Sudan and Egypt was the factor of allocation of international waters which were at stake. Egyptians in making their case insisted on the priority of existing needs. The fact that their country was dependent on irrigation water for agriculture and nothing could change the situation made them request for more allocation of the waters, that is 62 billion m^3.

The Sudanese disputed the Egyptian basis of water sharing and due to this disagreement the political relations between the two countries deteriorated rapidly thus creating potential for disputes over the shared international water resource the Nile. The mistrust and misunderstanding became poisoned in February 1958, when the two countries fought over the ownership of the territory of Halaib but Sudan managed to stop Egyptian penetration after a military confrontation.
These disputes brought about the repudiation of the 1929 Agreement and in the absence of any other agreement the Nile was without international governance. [72]

In 1959, Britain which was colonizing Kenya and Uganda (both being riparian states) called for an international Nile waters conference to assure the rights of all riparian states and to find an International Nile Waters Authority (INWA) of which United Kingdom would be a member. Egypt and Sudan moved toward agreement undeterred and on 8th November 1959, the Agreement for the Full Utilization of the Nile Waters was signed. The agreement was mainly on water allocation where it was agreed that Egypt's share of the Nile Waters was 55.5 billion m^3 while Sudan was to get 18.5 billion m^3. The implementation and supervision of the agreement was to be placed in the hands of a Permanent Joint Technical Commission (P.J.T.C.) which would station inspectors in each nation's territories.

The other riparian states were concerned about the 1959 Agreement. Uganda, Kenya and Tanzania (Then Tanganyika) reserved their rights as to the future and hypothetical disposition of the waters of the Equatorial Lakes and source of the White Nile.

3.5.2. Recent Disputes in the Nile Basin

In the recent years, the use of the Nile waters for development has become something of contention among the ten countries that share it's basin. The contention partly arises from two Agreements signed during the colonial era; the 1929 Nile Water agreement and the 1959 Agreement for full utilization of the Nile. This contention was clearly demonstrated in a Conference held on 29th November 2004, [73] where it was reported that six riparian states want the controversial Nile water treaty between Egypt and Britain renegotiation. The purpose of the Conference was on "how to resolve disputes based on resources among communities and countries." At the same Conference there was heated debate which shows that, there is potential of conflicts, the representative of the Southern Sudanese Government, Mr Yoanns Ajawin said that the 1959 Agreement prohibits Kenya, Uganda, Tanzania and the Sudan from implementing projects using Nile water without prior permission from Egypt.

The upstream countries have argued that the treaties have served to give Egypt unfair control over the use of the Nile waters and none of the riparian countries were involved in the adoption of the Nile treaties. Egypt and Sudan have been reluctant to renegotiate the treaties and this has at times caused strained relations between the upper and lower riparian nations. [74]

Peter Gleick stated that: [75]

"Internationally shared bodies of water create political, social and economic tensions and disputes concerning the distribution and use of resource management. Furthermore, when a resource base extends across a political border, misunderstanding or lack of agreements about allocation is more likely."

A 1991 study by the World Conservation Union found that the disenfranchisement

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[72] Waterbury supra pg 71.
[73] Daily Nation Newspaper Supra Note 10.
[74] Supra note 16 Pg. 2.
[75] Peter Gleick (2000); Conflicts *over Nile Resources*.

of local people's from traditional land and water rights has been a major factor of fuelling conflict and instability in the Nile basin. Poverty added to internal conflicts in the Sudan, Kenya, Ethiopia and Eritrea and has helped to postpone conflicts over the waters. [76]

In terms of resource conflict resolution, Conca states that progress exists in trying to identify policies for reducing the risks of disputes over water as well as in a better understanding of mechanisms for promotion of cooperation and collaboration over shared water resources. [77]

Thus advances in disputes resolution and environmental cooperation function as an emerging platform for national and regional collaboration. In the Nile basin conflicts, third parties like World Bank are involved and this further complicates the issue of political, social and economic interests and hinders regional cooperation. This hinders the effective operation of the regional agencies.

Allan argues that governments are more likely to rely on the exhaustion of the resources to be the evidence that persuades water- using communities that patterns of water use have to change. In these instances the state and regional agencies are not strong enough to implement economically and environmentally sound water practices to anticipate and avoid catastrophes. [78]

Threats of war over the Nile water were abundant in the late 1970's and 1980's There were tensions over the Nile water thus potential to war. According to El-Moghraly, wars should be started in the Nile in order to convince riparians to integrate to harmonize the use of the shared and other resources, war to convince riparian countries that the Basin is an indivisible whole. The 1959 Nile Waters Agreement between Sudan and Egypt should be revised to include the interests of the other riparian countries.[79]

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[76] El-Khodari Supra note 8 Pg. 2.
[77] Ken Conca (2000): *Conflicts over Resources; "Eliminating the Causes of War"*, Queens College, Cambridge.
[78] Tony Allan (2001), *The Middle East Water Question: Hydro-politics and the Global Economy* Pg. 182.
[79] Asim El-Moghraly (1997)- *International Study of the Effectiveness of Environmental Assessment Water Management in Sudan Pg. 3.*

Though the Nile today seems to be more of a catalyst for cooperation rather than for conflicts, the Nile Basin is still categorized as "threat" with a fatality level of dispute. However, the demand for the Nile waters will definitely increase, as the nations in the Nile valley develop their economies and since the supply is likely to remain unchanged, there is increase of chances for armed conflict over the waters of the Nile river. A strong tension still exists between the Nile Basin countries whenever a new Nile development project is proposed. [80]

According to studies on the Nile River disputes the water needs of all these countries are barely being met now and will probably not be met in the future. In addition Egypt as the country most in danger of losing access to the Nile Waters remains willing and able to intervene by using force or militarily in order to keep status quo. [81]

Gleick [82] said that, conflicts have the greatest potential to emerge when the downstream nation is militarily stronger than the upstream nation and when it feels that it's interests are being threatened.

3.6. The Principles in International Law Governing the sharing of the Nile Waters.

3.6.1 Introduction

As earlier indicated the provisions and principles of international law, governing the utilization of the water of international rivers developed relatively recently, since the problems involving international rivers were primarily those concerning international navigation. The 1815 Vienna Congress ushered in the principle of the freedom of navigation, in international rivers.

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[80] El-Khodari supra,pg 3.
[81] Waterbury Supra Pg. 8.
[82] Peter Gleick (2001); *Questions of Equity at the Heart of water conflict management "Water and conflict Prevention.* In the second world water forum, in Hague, on 17-22 March 2001.

As an international river, the Nile is naturally governed by the rules of international law on the administration and the uses of the waters of international rivers. Although the Nile basin countries share one of the greatest rivers in the world, many inequities over this common resource exist and are especially difficult to redress.

Smith [83] is probably right when she said in her article that:

"Developing the Nile's water resources for common benefit will require a cooperative approach treating the Nile Basin as one hydrologic unit and all riparian states as equal stakeholding partners".

3.6.2. History of International Treaties Concerning the Nile

The regulation of the Nile dates back to 4000 BC when Egyptians joined the Nile with a natural depression in the western desert, thus creating Lake Qarun. [84]

The British who held sway over the greater part of Nile basin until the middle of the 20th Century began the quest of "basin wide management". Their idea was to develop the entire basin in an integrated way through a series of dams controlling the out flow from the equatorial lakes feeding both tributaries and a canal for the White Nile to bypass large swamp area in the Sudan called the Sudd.
From 1898 until late 1940's alteration on the water of the Nile focused almost entirely on the irrigation needs of Egypt and the Sudan and the possible future requirements of the other riparian states were ignored. [85]

3.6.3. Agreements and Treaties in the Nile and their Defects and Effects on the Nile River Waters

In a chronological order, the following is a review of the international instruments governing the uses and the sharing of the Nile waters. There are nine agreements that have been used in the utilization of the Nile waters and the observation to be made is that ,the first six agreements ending with the 1929 Agreement have to do

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[83] Smith Supra note 34.
[84] Kuusisto (1998) ,*International Rivers and the uses of Resources,* Finnish Environmental Institute, Report to the Finnish Ministry for Foreign Affairs.
[85] Smith Supra note 34.

with the territorial status of the contracting parties. It is an agreed principle of international law that such territorial status agreements constitute an obligation and limitation on the contracting parties, the territory is unaffected by a change of sovereignty.

The other observation to be made on these Nile Basin treaties is about the signatories. For most of them the signatories were European colonial powers acting on behalf of an African colony or occupied country yet international law recognizes the continuing validity of such instruments in accordance with the Law of State Succession and territorial nature of the obligation arising from those treaties. Therefore the treaties and instruments which govern the Nile, confirm the principle accepted by international jurisprudence and norms of State Succession. [86]

The treaties in the Nile Basin are discussed below but it's worth noting that all these treaties were bilateral and the other party was always Britain.

(i) The Anglo-Italian Protocol of 15th April 1891

The protocol was between Britain and Italy for demarcation of their respective spheres. It was signed on 15th April 1891. Article 111 of the Protocol sought to protect the Egyptian interest in the Nile waters. Article III states that, "Italian Government engages not to construct on the Atbara River, in view of irrigation, any work which might modify its flow into the Nile".
It appears that the interest of the treaty was not for the use of the Nile water but to establish a colonial boundary. [87]

The effects and defects of the Treaty is that the intent of the treaty was not use of the Nile water thus the treaty cannot be seen as an agreement over property rights to the river. The outline of the treaty was that nearly all the water of the Nile goes to Britain (Egypt) and Italy agreed not to construct any significant diversions.
Secondly the treaty was unreasonable for the other riparian countries were left out.

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[86] Ahmed supra note 6 pg. 229.
[87] Kefyalew Mekannen (2003);*The defects and Effects of Past Treaties and Agreements on the Nile River Waters; whose faults were they?.*

(ii) The Treaty between Britain and Ethiopia –1902

This agreement was signed between Ethiopia and Britain on 15th May 1902. Britain was acting for Egypt and the Anglo-Egyptian for Sudan. Under the Treaty Britain (Egypt) was to receive all the waters of the Blue Nile, the treaty continued to be in operation between Egypt and Ethiopia.

Article III related to the use of the Nile Water, originating from Ethiopia. The aim of the treaty was to establish the border between Ethiopia and Sudan. The Treaty prohibited Ethiopia from undertaking any project in the Blue Nile unless with prior consent from Britain (Egypt).

The defect of the 1902 Treaty was that it has been the most controversial Treaty in the history of the Nile Agreements as both parties to the treaty understood the treaty differently. To Great Britain, they viewed the treaty to mean that Ethiopia would not utilize or use the waters of the Blue Nile without prior consent of Britain and to Ethiopia, they understood the treaty as securing and maintaining the prior agreement of Britain before construction of any work on the Nile tributaries, "not to stop" the flow of the Nile Waters did not mean "not to use". [88]

This controversy remained a threat to present and future cooperation over the Nile waters.

(iii) The Agreement between Britain and the Government of the Independent State of Congo -1906

The Treaty was signed between Great Britain and Belgium on behalf of Congo on 9th May 1906, it was an agreement on the colonial boundary of the Congo.

Article III of the agreement was about the Nile waters and it stated that " the Government of the independent state of Congo undertakes not to construct, or allow to be constructed, any work over or near the Semliki or Isango river which would diminish the volume of water entering Lake Albert except with agreement with the Sudanese government, the agreement restricted Congo from accessing their part of the Nile Water.

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[88] Kefyalew Supra pg 2.

The treaty had the effect of restricting the people of Congo from accessing their part of the Nile

(iv) The Tripartite Treaty of 1906

The agreement was signed between Great Britain, France and Italy on 13th April 1906.

Article 4 (a) of the Treaty dealt with the use of the Nile water in Ethiopia's sub-basin. It states " 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".

The treaty denied the "absolute sovereignty" principle of Ethiopia over its water resource. This resulted in Ethiopia immediately notifying its rejection of the Agreement.

(v) The 1925 Exchange of Notes between Britain and Italy

Britain and Italy signed an agreement in 1911 over Lake Tana of Ethiopia. The notes gave Great Britain the right to control the waters of Lake Tana, and Italy offered to support Great Britain in order for her to obtain from Ethiopia the concession to carry out works of barrage in the lake".

In 1925, it was expanded to state that "Italy recognizes the prior hydraulic rights of Egypt and Sudan not to construct on the head waters of the Blue and white Niles". Ethiopia opposed this agreement and notified the parties.

The Treaty did not have any incentive for riparian states that might enhance their future cooperation since it involved the principle of equitable water use (now the approach of integrated water development).[89]

The notes denied Ethiopia sovereignty over Lake Tana. and the agreement had no explicit mechanism enforcing the agreement [90]

[89] Kefyalew Supra pg. 3.
[90] Ibid, Pg. 4.

(vi) The Agreement between Egypt and Anglo –Egyptian Sudan –1929

This was between Egypt and Great Britain, where Egypt accepted the findings of the 1925 Nile Commission restricting the amount of water impounded by Sudan excluding during flood period. According to Whittington and Guariso [91] this agreement included the following:-

- Egypt and Sudan utilize 48 and 4 billion cubic meters of the Nile flow in the year respectively.

- Egypt reserves the right to monitor the Nile flow in the upstream countries.

- Egypt assumed the right to undertake Nile River related projects without the consent of other riparian states.
- Egypt assumed the right to veto any construction projects that would affect their interest in the Nile adversary.
- The Treaty gave rights to use Lake Victoria and other water bodies around River Nile.

The effects of the 1929 Treaty was mainly to secure the Nile waters for Egypt limiting the rights of the Sudan and rejecting those of the remaining riparians.
This Agreement was the base for the 1959 Nile Water Agreement, which opened the door for Egypt and the Sudan to acquire rights to Nile Water Resources, and for the full utilization of this water, by developing Aswan High Dam which had the negative effect of disposition of human settlements.

(vii) The Anglo-Belgian Agreement of 1934

The Agreement was signed in London between Britain and Belgium on 22nd November 1934. The Treaty focused on River Kagera system thus the head waters of the Nile. Article 1 provided that, water diverted from the watercourse shall be

[91] Whittington and Guariso 1983 Pg. 41.Obtainable online at file ://A:/NILC/. The 20% defects % 20 and % 20 effects % 20 of past % 20 Treaties.

returned without reduction to its bed before such watercourse forms common boundary.

(viii) The 1952 – Treaty between Egypt and Great Britain (Uganda)

It was signed on 16th July, 1962 concerning the construction of the Owen Falls Dam in Uganda then under British colonial administration under the treaty, Egypt was to pay Uganda $980,000 as loss of hydroelectric power and also flood compensation. The Agreement was signed to safeguard British local interests and for payment of appropriate compensation to Uganda.

(ix) The 1959 Nile agreement for Full Utilization of Nile Water

The agreement was between Egypt and Sudan signed on 4th November 1959. It assumed the availability and proposed allocation of the water of the Nile.
It is the most famous international treaty relating to the Nile.

The Agreement *inter alia* included the provided for following:-

- The quantity of average annual Nile basin was settled and agreed to be about 84 billion m^3 measured at Aswan High Dam in Egypt.
- The agreement allowed the entire average annual flow of the Nile to be shared between Sudan (18.5 billion m^3) and Egypt (55.5 billion m^3).
- Annual water loss allowed to be about 10 billion m^3.
- The agreement granted Egypt the right to construct the Aswan High Dam that can store the entire annual Nile River flow of a year.
- A permanent joint technical commission was to be established to secure the technical cooperation between them.

The objective of the 1959 Agreement was for Britain (Egypt) to gain full control and utilization of the annual Nile flow. It is the most complete agreement on the use of the Nile between the Sudan and Egypt.

The defects of the agreement was that neither Sudan nor Egypt were contributors to the Nile Water but only users, the Agreement was signed between the two without inviting other riparian countries. The 1959 Treaty exacerbated developing conflicts over water allocation.

The dam build in accordance with the Treaty has adverse effects or impacts on the basin's ecosystems. There are several species, for example, mosquito's which have inhabited there as a result of the dam. [92]

In conclusion we may say that the treaties and agreements dealing with the use of the Nile waters did a lot of harm than good, as they ignored completely the plight of other riparian states. There is need to renegotiate the treaties in order to avoid conflicts over the use of the Nile Waters.

In this regard it's important to note that, as at 15th August 2002, none of the Nile basin countries had ratified the Convention on the Law of the Non-navigational Uses of International Watercourses (1997). [93]

3.6.4. Current Legal Regulations

According to Dr Odera, [94] there is no law on sharing water resources among countries in the Nile Basin region. She further said that Egyptian leaders had used the Nile waters as a "Political weapon in their relation with their Northern neighbours". She further said that the Egyptian policy on the upstream riparian states has been overprotective of the water security, at times even aggressive.

This is an indication that there are tension and sometimes disputes in the Nile basin.

There are recent agreements reached by riparian countries in relation to, hydro-electric development, power sharing cooperatives, river regulation and water management. The new policies will cancel out the 1959 Sudanese Treaty and spelt out water usage rights among the riparian States.

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[92] Conca Supra note 47 Pg. 145.

[93] Kefyalew Supra note 57 Pg. 5.

[94] Dr. Josephine Odera 2004 Lecturer at University of Nairobi, in a conference held in Nairobi, Kenya on 29th November 2004 report on Daily Newspaper of 30th November 2004.

3.7. Institutional Mechanisms Controlling the Nile Waters

3.7.1. Introduction and historical perspective

The optimum use of international watercourse cannot be attained without implementation through joint investigative and administrative efforts. In most instances in the management of international watercourses it has been found expedient to create an international body to deal with the issues that may arise and in the development of water resources policies. [95]

The institutions bring all the basin states together to cooperate in planning for comprehensive water resources development. The organizations vary and they may be permanent or *ad hoc*. The international rivers organizations are of limited scope but have played a role in the development and management of shared water resources.

Throughout the colonial period, the Nile was controlled exclusively by a single authority with its headquarters in Egypt and was execrated by Egyptian Ministry of Public Works in Cairo. But after Sudan got independence, the 1959 Nile Water Agreement Section IV established a Joint Technical Committee for the Nile waters. Section IV paragraph 1 provided for the functions of the committee to include *inter alia* to supervise the execution of the approved projects and to draw the main lines of the schemes aiming at the increase of the river supply and supervise and direct the research work.

The government of Ethiopia joined the technical committee at the end of 1971. The committee was also joined by other riparian states. Its headquarters are now in Nairobi. [96] The informal technical committee has proved to be a very effective forum for intergovernmental cooperation and coordination in the Nile Waters.

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95 Bonaya Godana (1985); *Africa's shared water resources legal and institutional aspects of the Nile, Niger and Senegal Rivers systems*, London, Frances Pinter Publishers Pg. 250.
96 Ibid, Pg. 260.

There are several Institutions controlling the management of the Nile Basin. Among them are:-

(i) The Nile Basin Initiative (NBI)

The Nile is managed by the Nile Basin initiative (NBI). In 1992 the Council of Ministers (COM) of water affairs of the Nile Basin states launched a new initiative to promote cooperation and development in the basin. To avert the possibility of war, the riparian states established the NBI, which is designed to replace the threat of conflict with the spirit of cooperation.

The Nile Basin initiative is the greatest plan for a better future of the Nile Basin. [97] The NBI process started in 1942 when the Council of Ministers the highest authority in the Nile Basin, formed the Technical Cooperation Committee for the Promotion of the Development and Environmental Protection of the Nile Basin (TECCONILE) .The NBI was officially launched on 22nd February 1999 and it is managed by World Bank. The NBI does not have a formal legal framework.

Sendama, one of the NBI Regional Coordinators [98] stated that it is vital for the success of future developments of the Nile that both Egypt and Sudan are involved in the NBI. Since Sudan and Egypt are part of NBI, it means that they are interested in seeing that it works and he thinks the Nile countries can achieve cooperation.

He further stated that :-

"The whole environment is changing and I don't believe any more in the scenario of war, I think that the work that has been done by the Nile Basin Initiative in creating the right environment, and maybe by UNESCO introducing knowledge in enabling people to have reached that stage, nobody is talking about conflicts, but about how to achieve the best solution".

The NBI vision is "to achieve sustainable socio-economic development through the equitable utilization of and benefit from the common Nile basin water resources".

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[97] Nabil M. EL- Khodari : *The Nile Basin Initiative (NBI): Business as usual*? 2002 Pg.5.

[98] Kimberely E. Foulds (2003): *The Nile Basin Initiative: Challenges to Implementation* , a paper presented at a Conference for "The Managing Shared Waters" in Ontario, Canada on 23-28 June 2002 Pg 10.

The Problems Facing the Nile Basin Initiative

Critics to the NBI have argued that the initiative has been a closed affair in which only states involved and the World Bank have had input into decision making largely ignoring the voices of ordinary people whose livelihood depend on the use of the Nile Basin Resources.

The other problem is that in NBI lacks a binding agreement between Nile Basin countries on the equitable and just distribution of the Nile waters. This is considered as the thorniest issue that would cause the collapse of the NBI. [99]

The other issue affecting the NBI, is that there is lack of involvement of all specialized agencies. In most of the riparian states, the civil society which plays a major role in a country's developments has been shut out of the NBI. As Havard [100] said ,the NBI did not come easy because governments were initially cautious over the inclusion of civil society in the process. The IUCN have formed a parallel initiative, which they say would enable them to participate in the NBI process.

There is lack of transparency and information about NBI. Elizabeth Birabwa [101] said that there was hardly any information passing between NBI secretariat and the media because the language used by the secretariat was "too technical and distanced from us". In a workshop held in Madrid, Spain [102] instructions were given to Non Governmental Organizations participants not to discuss the deliberations of the meeting outside the Conference room.[103]

(ii) The Nile River Basin Strategic Action Program (NRBAP)

The other institution in the Nile management is the NRBAP which is made of the following transitional institutions: -

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[99] *Khodari Supra note 8* Pg. 3.
[100] IUCN representative 2003 .Details obtainable from nttp://www.iucn.org.
[101] Elizabeth Birabwa a writer on environmental issues.
[102] International Conference of Basin organization 4th -6th November 2002.
[103] EL-Khodari Supra note 8 Pg. 4.

- Nile COM (Council of Ministers), this is the main policy forum for the Nile Basin countries.
- Nile TAC (Technical Advisory Committee). This was established by the Nile COM to coordinate joint activities.
- Nile SEC (Secretary) – this is a Permanent Secretary office and it is based in Entebbe.

The Nile River Basin Strategic Action Program was launched in 1999. Under the programme, the ten states of the Nile have agreed to cooperate in sharing access to water from the Nile river. The States aim to renegotiate the controversial 1959 agreement. All the other eight Nile Basin states want greater access to the Nile waters and they hope to draw up a new agreement.

From the foregoing discussion it is clear that there are disputes in the Nile Basin which are as a result of the colonial treaties which were signed during the colonial era but their application was carried forward even after the riparian states acquired independence.

3.8 International Disputes Resolution and Settlement Methods

Having established that there are disputes in the Nile Basin there is need to enhance peace in the Nile Basin in order to avert any war that may arise. The study will examine methods for resolving the disputes.

The term "dispute" is used here to "mean" a disagreement on a point of law or fact, a disputes of legal views or of interest between two persons. [104]

The term "International disputes" on the other hand has a wider connotation that covers within it's ambit inter-state dispute as well as disputes between states and individuals corporate bodies or non-state entitles which are a subject to international regulations. [105]

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[104] S.K. Verma 1998 - *An introduction to Public International Law* Pg. 330.

Disputes are an inevitable part of international relation. The disputes between states have been categorized as "legal" or justifiable and "political" or "non justifiable". [106]

Most of the international disputes are political, in that they relate to vital interests of states or their external independence or territorial integrity or any important interests such as disputes over shared natural resources.

To settle disputes that may arise, international law embodies certain rules and procedures springing partly out of customs or usage's and partly out of treaties or conventions. International disputes may be settled either by amicable or compulsive means.

Under amicable means of settlement of international disputes, the preamble of the United Nations Charter requires member states to settle disputes by peaceful means. Article 2 (3) and Article 2 (4) of UN Charter enjoins members to settle their international disputes by peaceful means.

The peaceful means which are enumerated by Article 33 of the UN Charter are negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement or resort to regional agencies or arrangements or other peaceful means in such a manner that international peace and security, and justice, are not endangered.

The International Court of Justice accepted the importance of peaceful settlement of disputes under Article 33 of UN Charter in the Nicaragua case [107] where it stated that Article 33 has the status of the customary international law.

The same methods of peaceful settlement disputes are stipulated by General Assembly in Resolution 2625 (xxv) of 24th October 1970 on declaration of principles of friendly relations and co-operations which requires states to settle their international disputes by peaceful means. The peaceful means of amicable

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[105] Ibid , Pg 331.
[106] Ibid, Pg. 330.
[107] ICJ Rep 14 at 145 Para – 290.

settlement under the Resolution are negotiation, good offices, mediation, conciliation, inquiry, arbitration and judicial settlement.

However, states are not obliged to resolve their differences at all. All the methods available to settle disputes are operative only upon the consent of the particular states.[108] There is no inherent hierarchy with respect to the methods specified and no specific method which is required in any given situation. States have a free choice as to the mechanisms to adopt for settling their disputes[109].

Only five among the treaties in the Nile basin contain provisions on disputes settlements.

These are: -

(i) The 1906 Agreement between the Britain and Belgium- It provided for the dispute to be referred arbitration at the Hague Tribunal.

(ii) The 1929 Nile treaties Agreement- it provided for mutual agreement in good faith in case of a conflicts and if it fails the matter be referred to an independent body for arbitration.

(iii) The 1934 Agreement between Britain and Belgium – it provided that in case of a dispute, the parties shall refer the matter to arbitration or court of arbitration.

(iv) The 1949 Exchange of Notes between Britain and Egypt – it provided that the matter should be referred to arbitration in accordance with the arrangement to be agreed upon the countries concerned.

(v) The 1977 Kagera River Treaty – it provided that in the event of a dispute the dispute must be resolved by consultation among the members and if it fails the members to resort to procedures under OAU Charter.

There are third–party disputes settlement procedures outside the specific instruments. These fall under the following categories namely:-

(i) The International Court of Justice.

(ii) The Organization of African Unity.

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[108] Shaw Supra, Pg. 916.
[109] Ibid, Pg. 918.

(iii) Other bilateral treaty arrangements for forms of conflict resolutions.

According to Godana, [110] any dispute arising over the Nile waters may be dealt with through the peace and Security Council of the OAU. The matter may also be referred to the International Court of Justice.

During the 1990's, attempt to resolve disagreements surrounding the Nile basin and develop a regional partnership within which countries of the basin could equitably share the Nile water's got underway. But real progress has been slow but Kenya, Uganda and Tanzania legislators have recently sparked fresh debate over the legitimacy of the colonial-era agreements .Uganda for instance have demanded for compensation from Egypt, which they claim has been able to industrialize by using the Nile resources to general electricity and irrigation whereas Uganda has not had this freedom.[111]

This is a clear indication of disputes in the Nile in the last decade efforts towards cooperation on the Nile have intensified.
The diplomatic methods of disputes settlements as earlier stated are negotiation, good offices and mediation, conciliation and inquiry. The study will discuss these methods in brief in this chapter but we are going to discuss in details negotiation and conciliation in the next chapter.

(i) Negotiation

Most of the treaties on pacific settlement recognize negotiation as the first step towards the settlement of international disputes.[112] It is the simplest and first means resorted by states for settling of the vast majority of cases.

The reason why states resort to negotiation is because it enables them to establish control over the decision in dispute till the end, and the negotiating mechanism is flexible and relatively informal. [113]

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[110] Bonaya Godana ;*Africa's Shared Water Resources* Pg. 308.
[111] Supra –Magazine titled *Science in Africa May* 2003.
[112] Verma Supra Pg. 332.
[113] Ibid, Pg. 333.

Negotiation suffers from certain drawbacks namely the absence and difficult in ascertaining facts of a dispute objectively, and the absence of third party influence. [114]

Inspite of the drawbacks, negotiation is a necessary preliminary recourse to other methods, as it is considered to be the precursor to other settlement methods as the parties decide amongst themselves on how best to resolve their differences.[115]

(ii) Good offices and mediation

The employment of the procedures of good offices and mediation involves the intervention of a third-party to encourage the contending parties to come to a settlement. Good offices are involved where a third party attempts to influence the opposing sides to enter into negotiations, and mediation implies the active participation in the negotiating process of the third party itself [116]

According to Merrills [117]once mediation has begin, its prospects of success rest on the parties willingness to make necessary concessions.

Both mediation and good offices suffer from lack of any procedure for conducting a thorough investigation into the facts or the law, hence their utility is limited [118]

(iii) Inquiry

Inquiry refers to the process that is performed whenever a court or other body endeavors to resolve a disputed issue of fact. In its institutional sense, inquiry refers to a particular type of international tribunal known as to Commission of Inquiry which were first elaborated in the 1899 Hague Conference. [119]

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[114] Ibid, Pg. 332.
[115] Malcoim N. *Shaw; International Law* 5th Edition ,Pg 919.
[116] Ibid, Pg 921.
[117] Supra Merrills Pg. 39.
[118] Supra Verma Pg. 334.
[119] Supra Merrills Pg. 45.

The importance of a fact finding commission in settling the boundary disputes is significant, as the commissions help in the preliminary elucidation of certain special facts, which would be crucial in the settlement of a particular dispute [120]

According to Shaw inquiry as a separate mechanism of dispute settlement has fallen out of favour as it is hardly used.[121]

(iv) Conciliation

Conciliation is the process of settling a dispute by referring it to a commission of persons whose task is to elucidate the facts and to make a report containing proposals for a settlement.[122] The parties to a conciliation method are under no legal obligation to adopt the proposals for a settlement suggested to them.

The importance of conciliation was accepted by the League of Nation in Articles 15 and 17 of the Resolution of 22nd September, 1922[123]. According to Verma, states also attach great value to the procedure of conciliation as reflected by several treaties for conciliation and that after the First World War more than a hundred permanent commissions were established.[124]

Conciliation processes play a great role in disputes settlements as they are flexible and by clarifying facts and discussing proposals it may stimulate negotiations between the parties.[125] Conciliation helps in ascertaining the facts of a dispute without making specific recommendations, which paves the way for a negotiated settlement.[126]

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[120] Supra Verma Pg. 335.
[121] Supra Shaw Pg. 925.
[122] Supra Verma Pg. 334.
[123] Ibid, Pg. 335.
[124] Supra Verma 335.
[125] Supra Shaw Pg. 926.
[126] Supra Verma Pg. 355.

3.9. Conclusion

The study has examined the existing legal and institutional framework for the management of the Nile Basin. In relation to the legal setup, there is need for all the other riparians to denounce the application of the colonial treaties that govern the management of the Nile Basin just like what Tanzania which denounced the colonial treaties after she acquired independence. A new treaty should be signed after negotiation by all the riparians where the interest of all would be considered.

The study has shown that there are disputes over the utilization of the Nile waters and there are several methods of pacific settlements. In the next chapter the study will explore the applicability of negotiation and conciliation in the resolution of the disputes over the Nile water.

CHAPTER FOUR

4.0. THE APPLICABILITY OF NEGOTIATION AND CONCILIATION IN THE DISPUTES OVER THE NILE WATERS

4.1 Introduction

This study will examine two of the methods of settlement of international disputes stated by Article 33 (1) of the UN Charter. The two methods are Negotiation and Conciliation.

The reason for choosing these two methods of international settlement is because they are the most commonly used or popular methods in many disputes. The two methods have been used quite often in resolving international disputes.

4.2. Negotiation

Negotiation consists basically of discussions between the interested parties with a view to reconciling different opinions. [127] Negotiation is a process whereby each party makes agreements with the other party or modifies its demands to achieve a mutually acceptable compromise.

It is usually the first step in an attempt to settle a dispute. [128] Negotiation is one of the international dispute settlement mechanisms provided for by Article 33 of UN Charter. Of all the methods to resolve disputes, the simplest and most utilized method is negotiation. [129]

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[127] Shaw Supra pg. 918.
[128] Merrills J.G. (2000); *International Dispute Settlement*, Third Edition, Cambridge University Press Pg. 1.
[129] Shaw Supra Pg. 918.

According to Shaw[130], negotiations are the most satisfactory means to resolve disputes since the parties are so directly engaged. The great majority of treaties on pacific settlement recognize negotiation as the first step towards the settlement of international disputes. In practice negotiation is employed more frequently than all the other methods put together and even when other methods are used negotiation is included in the final analysis. [131]

Negotiation is more than just a means of settlement of disputes but it is a technique for preventing disputes from arising. Negotiation always begins at consultation stage. [132]

4.2.2 Forms of Negotiation

Negotiation between states are usually conducted through diplomatic channels namely through their respective foreign offices, or by diplomatic representatives. Negotiation may also be carried by competent authorities of each party state, for instance the respective Ministry dealing the particular matter in question.

When the problem is recurrent, where continuous supervision is required, states may institutionalize negotiation by creating mixed or joint commission. The joint or mixed commissions sometimes have power to decide minor disputes and to investigate other cases before referring them for settlement through diplomatic channels. [133] Mixed commission normally consists of an equal number of representatives of both States concerned. When the established machinery tries negotiation and it fails to resolve the issue, summit discussions or summit diplomacy as a means of negotiation is used.

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[130] Shaw Supra Pg. 919.
[131] J.G Merrill, *International Dispute Settlement,* 3 rd Edition Pg 2.
[132] Ibid, pg 3.
[133] N. Bar –Yaacor 1974- *The Handling of International Dispute by means of Inquiry* pp. 117-119.

4.2.3 Characteristics of Negotiation

First, the parties to the dispute must believe that the benefits of an agreement outweigh the losses. If one state is to benefit more that the other, then negotiation would not succeed. This was the situation in Lake Lanoux Arbitration [134] which was between Spain v. France where the various attempts at a negotiated settlement encountered an obstacle in the irreconcilability of Spain's demand for a veto over works affecting border waters with France's insistence on it's complete freedom of action.

Second, it's important to consider whether the issue at the heart of a dispute can be split in such a way as to enable each side to obtain satisfaction. This approach was adopted in the Maritime Delimitation Dispute between Australia and Papua New Guinea in the Torres Strait. [135] The parties' succeeded in negotiating an agreement which dealt separately with the interests of the inhabitants of islands in the strait, the status of the islands, seabed jurisdiction and navigation rights. Earlier attempts to negotiate a single maritime boundary for the area had all ended in failure. [136]

Third, negotiation is a "give and take" phenomenon, and it is an essential part of a successful negotiation and negotiation allows the parties in a dispute to retain the maximum amount of control over their dispute.

When parties to a dispute specify that negotiations are to have priority as a means of settlement, none of the parties would delay the legal proceedings by the simple expedient of refusing to negotiate. This was stated in Diplomatic Staff in Tehran Case [137] where one of the instruments relied on by the United States gave the ICJ jurisdiction over any dispute, "not satisfactorily adjusted by diplomacy", but the court found that Iran had refused to discuss the hostages issue with U.S.A.

Even if the parties are not required to explore the possibility of negotiated settlement as a condition of international jurisdiction, diplomatic exchanges will

[134] 24 ILR 101 (1957) at PG 123.
[135] D. Renton. The Torres Strait Treaty".
[136] Merrills Supra Pg 12.
[137] (1980) ICJ Rep pg 3.

usually be necessary to focus a disagreement at the point where it can be treated as an international dispute. [138]

4.2.4. Advantages of Negotiation

First, negotiation is a process which allows the parties to a dispute to retain maximum amount of control over their dispute.

Second, negotiation is often easier to implement for executive than for legislative decision making since the former is usually rigidly, structured and more centralized.

The common interest of the state is taken care of, where states enjoy close relations. It may be possible to establish machinery for negotiating the coordination of legislative and administrative measures on matters of common interest.

Negotiation preempts use of force and confrontation when a Government anticipates that a decision on a proposed course of action may harm another state, discussions or negotiation with the affected party can provide a way of heading off a dispute by creating an opportunity for adjustment and accommodation. [139]

Negotiation allows parties to voice their views. After consultation, the parties may agree to shape an indictment in a less offensive manner and the parties will be kept informed of progress.

Negotiation allows for flexibility. There are no set procedures for negotiation, this allows flexibility of the parties

According to Merrills negotiation is a more than possible means of settling differences, and is also a technique for preventing them from arising. [140]

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[138] Merrills Supra pg 19.
[139] Ibid, pg 3.
[140] Ibid, Pg. 3.

4.2.5. Disadvantages of Negotiations

Having looked at the advantages of negotiation its imperative that we also look at the disadvantages.

First, negotiation is impossible if the parties to a dispute refuse to have any dealings with each other.

Negotiation is ineffective if the parties' positions are for apart and there are no common interests to bridge the gap. In a dispute if one party insists on it's legal rights, while the other recognizes the weakness of it's legal case and seeks a settlement on some other basis, there is a little room for any agreement on mater of substance.

Another disadvantage of negotiation is that states with more powers may bulldoze the negotiation. Thus a state with unjustified claim may be able to secure a favorable negotiated settlement by bringing superior power to bear.

Another disadvantage which may make negotiation unsuccessful is the fact that if negotiation fails there might be use of force and negotiation may be impossible, ineffective or inappropriate when the dispute is of great magnitude.

Lastly, with negotiation it is difficult to persuade states to accept consultation procedures and the ways in which they operate when established are reminders of the fact that states are not entities like individuals, but complex grouping of institutions and interests.

4.2.6. Applicability of Negotiation in the Nile Waters

Negotiation as one of the methods of dispute settlement has been used in various occasions in the Nile disputes to resolve them.

The following are some of the instances negotiation has been or may used in the dispute settlement in the Nile Basin;-

The 1977 Treaty establishing the organization for the management and development of Kagera River Basin. which is part of the Nile, Article 18 provides that in the event of a dispute arising, it shall be resolved by consultations (negotiation) among the member states and in case of failure to agree the parties will resort to the procedures land down by the OAU channel.

The procedure comprises two stages, namely: -

- Direct consultations and negotiation.
- Reference to the commission of mediation, conciliation and arbitration by Organization of African Union (OAU).

Secondly, according to a report by UNESCO in 2004, it stated that "after living with tensions and the threat of war for many years, the countries of the Nile Basin are talking around the table. The ten nations that share the Nile Basin are turning to cooperation through negotiation with the help of UNESCO. This could be an encouraging example for dozens of countries that face conflict unless they can reach an agreement on how to share rivers that flows across international boundaries". [141]

According to Salame, the Nile Basin trend illustrates how the nations in the Nile have a tendency to seek means of cooperating by means of negotiation rather than fighting over water.[142]

Gleick [143] argued that understanding the increased scarcity of water and it's necessity recognizes that the real peace potential of water issues will be a "negotiated solution of differences" over water allocation because continued conflict is at best a "Zero-sum game". He is emphasizing the use of negotiation in conflict resolution in the Nile Basin.

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[141] UNESCO: Averting conflict in the Nile Basin, 2004.
[142] Lena Salame : UNESCO *World Water Assessment Programme.*
[143] Peter Gleick: *Questions of Equity at the Heart of Water Conflict Management* – 2001.

Fredrick [144] in turn said that the best dispute resolution mechanism in the Nile Rivers conflicts is negotiation, and has actually been the approach used through the Nile Basin Initiative.

Halftendorm [145] argues "the asymmetrical structure of water conflict excludes the possibility of a cooperative solution. She further asserts that the settlements of conflicts will be determined by the structure of the conflict and not the causes, water problems need to be tied to other problems in order to seek a manner in which to replace the asymmetrical structure to a more cooperative symmetrical structure." Haftendorm recommends for "trade-offs" which is one of the characteristics of negotiation.

Negotiation was used in the Nile Basin in 1998, when all the riparian states except Eritrea, began discussions (negotiations) with a view of creating a regional partnership for better management of the Nile. A transitional mechanism for co-operation and negotiation was officially launched in February 1999 in Dares-Salaam by the Council of Ministers of water affairs of the Nile Basins states (NILE –COM) .The process was officially named Nile Basin Initiative (NBI) and in November 2002 a secretariat was established in Entebbe, Uganda, with funding from World Bank. In praise of NBI Philip Ksssaija [146] said, NBI will help open up negotiations on the equitable use of the Nile and reduce conflicts over the use of its waters.

According to Sendema, [147] the ten riparians which share the Nile and its sources met to find a way of co-operating through negotiation on the using of the Nile "sustainably, and effectively towards development". Sendema in an interview in 2003 [148] said that most of the riparian states share a similar history and problems of poverty, high population growth, environmental degradation, unstable economic and insecurity, "we need to utilize the existing opportunities to have a co-operation

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[144] Kenneth D. Fredrick, *Water As A Source Of International Conflict* 1996 Pg. 83.
[145] Helga Haftendorm "*Water and International Conflict*" 1999 Pg. 10.

[146] Philip Kassaija ,a lecturer at Makerere University in Kampala(2002).
[147] Antone Sendema, One of NBI Regional Coordinator 2002.
[148] Interview IRIN, *in the Science in Africa Magazine May* 2003.

where actors will have a win-win gain towards development. The win-win gain mechanism is negotiation as earlier explained.

According to Philip Kassaija [149] NBI initiative would help open up negotiations on the equitable use of the Nile and reduce conflicts over the use of its waters.
Kassaija further said:

"At least there is a framework now for negotiations. This is a positive case in which a conflict is being arrested before it flares up and the NBI in reducing the potential for conflict"

Kassaija reiterates one of the advantages of negotiation, where conflicts are arrested before they break up. He also said that it is important to renegotiate (through negotiations) the colonial treaties.

The use method of negotiation as a means of dispute settlement in the Nile disputes is also demonstrated by the Fifth Conference of NBI which was held on 29th November 2004 [150] where it was reported that six riparian countries want the controversial Nile water treaty between Egypt and Britain renegotiated. Thus the use of negotiation as a dispute resolution mechanism will be prevalent.

The formation of Permanent Joint Technical Commission (PJTC) is another indication on the use of negotiation in resolving the Nile waters conflicts. Articles of the Egyptian Sudanese Nile waters agreement (1959) stipulated that the Technical Commission to be formed would be for an equal number of experts from each party. Since 1961, the Commission has held meetings with representatives from Tanzania, Uganda and Kenya, resulting in very fruitful exchanges of views on all technical aspects of Nile administration and the maximization of the benefit of water sharing. [151]

In 1967, riparian states decided to start a new technical commission made up of Egypt, the Sudan, Uganda, Tanzania, Kenya, Burundi, Rwanda and Zaire to conduct the Hydro-meteorological surveys of the catchments of lakes Victoria,

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[149] Supra note 146.
[150] Reported in Kenyan Daily Nation newspaper of 30th November 2004 Pg. 6.
[151] Supra Ahmed Pg. 232.

Kioga and Albert. Ethiopia initially participated as an observer but later joined as a full member.

The project would assist the riparian states in the planning of water conservation and development, and in providing the groundwork for future inter-governmental cooperation in the regulation and utilization of the Nile waters.

4.3. Conciliation

Conciliation has been defined as a method for the settlement of international disputes of any nature according to which a commission is set up by the parties, either on a permanent basis or on *Ad hoc* basis to deal with a dispute.[152] It proceeds to the impartial examination of the dispute and attempts to define the terms of a settlement susceptible of being accepted by them or of affording the parties with a view to it's settlement as they may have requested. [153] Conciliation puts 3rd Party intervention on a formal legal footing and institutionalizes it.[154]

Where negotiation and consultation fail a number of environmental treaties endorse mediation and conciliation (or the establishment of a committee of experts to resolve disputes of which revolve the intervention of a third party)
According of Akehurst, [155] conciliation is a combination of inquiry and mediation. A conciliator who is appointed by agreement between the parties investigates the facts of the dispute and suggests terms of a settlement.

The first treaty to provide for conciliation was concluded between Sweden and Chile in 1920, where conciliation was chosen as an alternative means of settlement of disputes. A Permanent Board of Conciliation was charged with the task of investigating the facts and law and also formulating proposal for a solution.

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[152] Merrills Supra Pg. 62.
[153] Article 1 of The Regulations On The Procedure Of International Conciliation 1968 African Nature Convention Art XVIII.
[154] Rebecca Wallace: *International Law* Pg. 281.
[155] Michael Akehurst, A *Modern Introduction to International Law* Pg. 224.

The Conciliation Commission may intimate to the parties the terms of settlement which seem to it suitable and lay down a time limit within which they are to reach their decision. At the close of it's proceedings the Commission draws up a report under the General Act for the Pacific Settlement of International Disputes. In 1928, Conciliation was to be compulsory unless the states concerned accepted the jurisdiction of the Permanent Court of Justice.

Conciliation was a popular dispute settlement mechanism from early 20th Century to mid 20th Century. The task of a Conciliation Commission is to examine the claims of the parties and make proposals to them for a friendly solution. [156]
The importance of conciliation was accepted by the League of Nations[157]. States also attach great value to conciliation as reflected from several hundred treaties for conciliation concluded after First World War, and many Permanent Conciliation Commissions were set up. [158]

The procedure of conciliation also has been sparingly used directly between states, though it is now a procedure of major importance in international institutions. [159]
The conciliation procedure under the 1928 General Act (revised in 1949) was intended to deal with mixed legal factual situations and to operate quickly and informally. [160]

The conciliation procedure was used in the **Iceland-Norway dispute** over the continental shelf delimitation between Iceland and Jan Mayen. [161] The agreement establishing the conciliation commission stressed that the question was the subject of continuing negotiations and that the commission report would not be binding.

The use of conciliation as a method of dispute settlement can be seen in number of treaties concerned with environment. For example, the 1985 Vienna Convention for the Protection of the Ozone Layer. It states that if there is a dispute and

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[156] Rebecca Wallace Supra Pg. 281.
[157] Articles 15 and 17 of the Covenant.
[158] Ibid, Vienna Pg. 335.
[159] Max Sorensen; *Manual of public International law* – 1968 Pg. 683.
[160] Malcom N. Shaw; *International Law* 4th Ed. Pg. 727.
[161] ILM 1981 Pg. 797.

A conciliation commission has a duty to examine the nature and background of a dispute and so it is usually equipped with powers of investigation. The commission can obtain information in different ways as it deems fit.

4.3.2. Advantages of Conciliation.

Conciliation helps in ascertaining the facts of a dispute without making specific recommendations which paves the way for negotiated settlements.

Second, the importance of a fact-finding conciliation commission in settling the boundary disputes is significant. The commission may inquire into the historical and geographical facts which are the subject of controversy and thus clarify the issues for a boundary agreement.

According to Wallace, [165] the conciliation commission helps the parties to a dispute to arrive into a solution in a friendly way.
Conciliation helps to solve a dispute between parties before the occurrence of any incident which would disturb friendly relations between the parties.[166]

Conciliation is a method of dispute settlement which is appropriate to any dispute whatsoever, because the terms of settlement are merely proposed and not dictated to by the disputing parties. [167] Conciliation is extremely flexible in that the conciliator usually has discussions with parties, with a view to finding an area of agreement between them before issuing the report.[168]

Conciliation stimulates negotiations, by clarifying the facts and discussing proposal between the parties, this may stimulate negotiations between the parties.[169] This was stated in the **Iceland Norway Dispute** [170] where the flexibility of conciliation process seen in the context of continued negotiations between the parties was demonstrated.

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[165] Rebecca Wallace: Supra Pg. 281.
[166] Stowell (1997): *International Law* Pg. 407.
[167] J-L. Briefly: *The Law of Nations* 1963 Pg. 375.
[168] Akehurst Supra Pg. 224.
[169] Malcolm N. Shaw (2003): *International Law* Fourth Edition Pg. 727.
[170] Shaw Supra pg 728.

Conciliation can provide the parties with a better understanding of their opponent's case and an objective appraisal of their own. Conciliation has so far proved most useful for dispute resolution where the main issues are legal, but the parties desire an equitable compromise.

The other advantage of conciliation is that the parties are able to predict the outcome. This is because through dialogue with and between the parties, there is no danger of it producing a result that takes the parties completely by surprise, as sometimes happens in legal proceedings.

Lastly conciliation helps improve relations between parties in a dispute. For instance the recent Somali and Sudan peace talks were conducted through conciliation, mediation and negotiations.

4.3.3. Disadvantages of Conciliation

The report of the Conciliation Commission is not binding to the parties to the dispute. They are only proposals. This was held in the Iceland-Norway dispute [171] where it was held that the commission report would not be binding.

The other disadvantage of conciliation is that a Conciliation Commission usually has no political authority to back up it's proposals thus conciliation is not a particularly attractive option even for major disputes. This was illustrated in Vitianu case (1949) [172] where an attempt to achieve a conciliated settlement failed as substantial interest of a political nature was in issue. Goodwill and a readiness to compromise are clearly prerequisites of conciliation and in many cases parties are not in talking or their friendly relations are strained.

Conciliation cannot be forced on the parties to an international dispute but only takes place if they consent. So unless they have taken the initiative and agreed on

[171] Ibid, pg 729.
[172] Merrills Supra pg 85.

the formation of a commission or appointment of conciliation their unwillingness to consider this form of assistance may prove a major stumbling block.

4.3.4. The Applicability of Conciliation in the Nile Basin Dispute

Conciliation has been used as a method of dispute settlement in the Nile Basin. The discussion below will be to explain how conciliation mechanism has been used in the Nile and discussion on how it can be used to resolve the Nile disputes.

According to Godana [173] in the management of international watercourses it is expedient in most instances to establish institutions or commissions. The commissions or institutions may be permanent or *ad hoc.* These institutions would act as conciliators as they bring all the basin states together to cooperate in planning for comprehensive water resources development. They also play supervisory and advisory rules in regard to dispute settlement and dispute evidence.[174]

As a way of disputes resolution in the Nile basin, conciliation methods have been applicable by formation of various Commissions (3rd parties) to manage the Nile Basin.
The Commissions or bodies established in the Nile basin *inter-alia* include:

(i) **The Technical Cooperation Committee for the promotion of the Development and Environmental protection of the Nile Basin (TECCONILE) 1993**

In 1993, the Technical Cooperation Committee for the Promotion of the Development and Environmental Protection of the Nile Basin (TECCONILE) was established with the aim of promoting a development agenda. This is a form of conciliation.

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[173] Bonaya Godana; *Africa's Shared Water Resources* Pg. 250.
[174] Maxwell Chen; *River Basin Planning*: 1982 Pg. 247.

In 1997 World Bank UNEP and CIDA began working as "co-operating partners" or "conciliators" to facilitate further dialogue among the riparian states. In the same year, the first in a series of "Nile 2002 Conferences" supported by the Canadian International Development Agency (CIDA) took place within the framework of (TECCONILE) and the Nile River Basin Action Plan (NRBAP) was prepared in 1995.

(ii) Nile Basin Initiative (NBI)

In 1997 the World Bank, UNDP, and the Canadian International Development Agency (CIDA) acting as conciliators began working as "cooperating partners" to facilitate dialogue among the riparian states. In 1998, all the riparian states except Eritrea began discussions (negotiation) with a view to creating a regional partnership for better management of the Nile. A transitional mechanism for cooperation was launched in February 1999 in Dar-salaam by the council of ministers of water affairs of the Nile basin states (Nile-com)
This demonstrates the use of conciliation as a mechanism of international disputes settlement and conflicts resolution.

(iii) United Nations Educational, Scientific and Cultural Organizations (UNESCO)

UNESCO, which is the lead agency on fresh water issues, has established a global programme called PCP meaning "from potential conflict to cooperation potential". UNESCO in collaboration with the Green Cross International which was established to examine the potential for shared water resources the PCP became a catalyst for regional peace and development through dialogue, cooperation and participate management of river basins.
This is a form of conciliation mechanisms where third parties are involved to resolve a conflict or to prevent the conflict from occurring.

The role of the three institutions in the management of the Nile Water and averting conflicts was stated by Professor Luijenjijk [175] he said that:

"The new policies will cancel out the 1959 Egyptian-Sudanese Treaty and spelt out water usage rights among the riparian states"

(iv) The Nile Basin Commission

This is another Institution which has acted as a Conciliator in the Nile disputes.

The Egypt-Sudanese Technical Permanent Commission urged other riparians to join the larger Nile Basin Commission. In December 1977 a Conference was held in Cairo and other riparian states approved the establishment of an enlarged Commission.

Since then an important development has taken place, as the governments of Egypt, Sudan, Zaire and central Africa has been holding Ministerial – level meetings with a view of co-coordinating their policies in the Nile waters. This is a demonstration of the use of conciliation and negotiation in Nile conflict resolution.

(v) Undugu Grouping

The Government of Sudan, Uganda, Egypt, Zaire and Central African Republic held a ministerial level meeting with a view to coordinate their policies on a host of political and technical matters including the Nile waters. They later established the Undugu Grouping . Undugu means Brotherhood.

Undugu is an unofficial African regional grouping created in 1983 in fulfillment of resolutions of the 16th OAU summit of July 1979 at Monrovia. The Undugu grouping have held several meetings since its inception, and has done several activities. Members of UNDUGU grouping are now Egypt, Sudan, Zaire, Uganda, Tanzania, Rwanda, Burundi and the Central African Republic.

[175] UNESCO representative.

The UNDUGU grouping objectives *inter-alia* include; to develop a regional cooperation among the Nile riparians and to evaluate the Nile Water resources and the needs of the riparian states regulations both in long and medium terms.

(vi) The United Nations Development Programme (UNDP) Project

In 1988 UNDP acting as a Conciliator undertook a technical and economic extensive feasibility study for the future cooperation among the riparian states. Its aim was to create concrete regional initiatives to enhance cooperation in the Nile Basin.

In 1989 UNDP sent two missions to visit the Nile Basin states to study the possibilities of enhancing cooperation among them.
This is a form of Conciliation where a third party is involved .In it's report the UNDP mission had the basis of a more comprehensive study of an economic and technical cooperative development plan for a long-term (25 years).

4.3.5 Conclusion

The foregoing discussion indicates that both negotiation and conciliation are the most preferred methods of international disputes settlements. Negotiation and conciliation are mechanisms of international dispute settlements that are recommended by most international conventions in relation to pacific settlements of disputes. Negotiation and conciliation enhances good diplomatic relations between states. One would say that may be it is because of the two mechanisms that have prevented the outbreak of war in the Nile basin though of the tensions that has been there between the riparian states.

Negotiation and conciliation methods of international dispute settlements are useful and are advantageous though the methods have disadvantages, but the advantages are more than disadvantages.

CHAPTER FIVE

5.0 CONCLUSION AND RECOMMEDATIONS

5.1 Introduction

Since water still symbolizes such values as opportunity, security and self determination and water represents these values, less because water itself has economic value than because control over it signals social organization and political power. It should be realized that strong communities are able to hold on to their waters and put it to work thus, there is need to look into the best methods of management of shared international watercourses.

The factors contributing to the unequitable utilization of the Nile applies in other countries and other regions, both developed and developing where finite water resources are under heavy stress.

5.2 Conclusion

From the foregoing discussions we have seen that the countries that are the sources of the Nile River are not the users and the users have no source. We would say that this is a clear demonstration how African countries love peace, otherwise this can spark war at any time, having seen that water is life.

We have seen that the Nile Basin in governed by colonial agreements which were signed when all the riparian states were still under colonial rule. None of the treaties and agreements dealing with the use of Nile water signed during the colonial period involved all the riparian countries and they did not deal equitably with the interests of these riparians. The treaties did not take into account the impact of water development on the basin social and biophysical environment.

Since each drainage basin is unique, with its own economic, geographical, ecological, cultural and political variable, no comprehensive system of rigid rules can anticipate adequately the variations from one basin to another.

It is the high time the riparian states disregard the 1959 Agreement and come up with a treaty that would be applicable and binding to them. The states should all be involved in the negotiation of the agreement and the environment an aspect which is missing in the 1959 agreement should be incorporated, and/or taken into account.

Having analyzed the tension and potential disputes existing in the Nile basin, it is only through negotiation between the riparian states and through conciliation in collaboration with third parties namely Non-Governmental Organizations and international bodies, that the Nile would be fully utilized by all the riparian equitably and without discrimination.

Negotiation and conciliation are mechanisms of international dispute settlements that are recommended by many international conventions in relation to pacific settlements of disputes. Negotiation and conciliation enhances good diplomatic relations between states. We have seen that negotiation and conciliation methods of international dispute settlements are useful and are advantageous though the methods have disadvantages but the advantages are more than disadvantages. We have also seen that both negotiation and conciliation have been used in the settlement of the disputes in the Nile basin in various ways. We may state that may be it is because of the use of negotiation and conciliation that there has not been any war over the Nile waters though there has been tensions.

We can conclude by saying that negotiation and conciliation as methods of disputes settlement have been to some extent successful in suppressing the outbreak of war in the Nile basin but the mechanisms have not been successful in resolving the disputes in the Nile since the long standing dispute relating the sharing of the Nile waters is still there . Hence the writer makes various recommendations as a way forward to the Nile disputes.

Now that the Sudan peace accord has been signed (on 10th January 2005) with full assistance of most of the Nile Basin riparian states there is hope that the Nile basin management will be enhanced, due to the fact that Sudan has not been fully participating in the Nile Basin initiative yet it should be a key player due to the fact that it is a beneficiary of the 1959 Agreements on the Nile.

The paper finally recommends for the urgent signing of an agreement or a treaty creating a regulatory framework, involving all the states of the Nile system.
The question is not one of renegotiation of the legal regime, but one of clean slate negotiation, this is because for majority of the riparian states (8 out of 10) there is no previous negotiated agreement which binds them.

Whatever the case, negotiation will have to be used if a new treaty has to be signed by the riparian states since there must be a "win"- "win" situation among the riparian states. The paper suggest that now that no war over the Nile basin has cropped up, it is better to agree on such a framework while there is a propitious atmosphere than after a conflict of use and utilization has arisen among all or some of the basin states.

As prerequisites to such a negotiation, each of the basin states should work out comprehensive national Water Master Plan, where assessment of available water and the possible term uses would be projected. It is actually pointless to go for negotiations in the absence of such a master plan.

A new agreement on the Nile should be long-sighted and realistic in that water will be increasingly important in the quest for stable agriculture and the increase in population thus increase of domestic and industrial demands. This will achieve equitable or utilization of the Nile waters. The new treaty should also address environmental issues since environmental stress is a big potential or practical source of conflicts. Thus if environmental stress is addressed by the new treaty, disputes relating thereto will be addressed. The agreement should also have environmental aspect of conservation and management with provisions on

sustainable utilization, environmental impact assessment, preventive and precautionary approaches.

From the foregoing we can say that negotiation and conciliation have been about sixty percent (60 %) successful in disputes resolution in the Nile. Therefore there is more to be done to end the Nile disputes and to reduce the tensions .With a new treaty involving all the riparians there would be less disputes.

5.3 RECOMMENDATIONS

5.3.1 Need to adopt a new treaty

As Smith [176] puts it:

"Developing a basin wide management strategy for the future and effort to renegotiate a new Nile waters agreement that includes all ten riparians, have been objectives to the goal of achieving a better and "more equal" Nile water management."

Thus there is an urgent need to renegotiate the 1959 Nile Treaty where all the riparian states would be involved and their interest in the Nile taken into account. But there is no need of re- negotiating the Nile Treaties. There is urgent need for the adoption of new treaties which should be signed by all riparians. The colonial treaties should be disregarded and a new one signed.

The agreement should have provisions to include *inter alia* issues of sustainable utilization of the Nile waters, environment conservation and management, environmental impacts assessments including social assessments and dispute settlement. This is because environmental stress is on if the causes of the Nile conflicts, therefore if it's addressed by the new treaty conflicts would be reduced or eliminated.

Thus if these rules would be adhered to there would be less tension and disputes in the Nile Basin.

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[176] Smith supra pg 40.

5.3.2 The new treaty should incorporate part of Helsinki Rules

The Nile treaty needs inclusion of the principles of the International Law Association's Helsinki Rules. This is because the myriad of *ad hoc* treaties currently in use (or abuse) in the basin are inadequate. [177]

The Helsinki Rules which need to be incorporated in the new treaty for proper management of the Nile without disputes are:- [178]Equity of distribution and utilization being the governing factor among riparians.
Equity does not mean distribution by equal share, but by fair share which can be decided by the following factors:- The topography of the basin, in particular the size of the rivers drainage area in each riparian state; the climatic conditions affecting the Nile basin in general; the precedents about past utilization of the waters of the basin, upto present-day usages; the economic and social needs of each basin state and the population factors of the riparian states; the comparative costs of alternative means of satisfying the economic and social needs of each basin state; the avoidance of undue waste and unnecessary damage to other riparian states.

The basin states are all entitled to equitable distribution and utilization of basin water resources in that they enjoy these resources and share them according to equitable principles.

The principle of equitable utilization form an important part of contemporary international law and it lies at the heart of general international water law and it constitutes the vehicle for the realization of appropriate shared water management and exploitation. [179] Thus there is need to include this principle in any agreement that would be entered into, in relation to the Nile waters.

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[177] C.O. Okidi 1990: *History of the Nile and Lake Victoria Basins through treaties* P.P.. Howell and J.A. Allan – The Nile pg. 194 – 224.

[178] Malcolm Newson, *Land Water and Development, River Basin Systems and their Sustainable Management* pg 156 –157.

[179] Godana Supra Pg. 344.

5.3.3 The new treaty should incorporate the 1997 UN International watercourses convention

For effective management of the Nile Basin, if the provisions of the 1997 UN International watercourses Convention can be adopted for instance the creation of joint mechanism or commission as a means of giving effect to their duty of cooperation and consultation, this would lead to optimal utilization and management of the Nile Basin.

The World Commission on Dams (2000) suggested that:

"It is time to bring the debate home. The controversy over dams has appropriately been raised to the international stage. However we should allow decisions about fundamental water and energy development choices to be made at the most appropriate level, where the voices of powerful international players and interests do not draw out the many voices of those with a direct stake in decisions"

Other concerns that the treaty should incorporate are international law principles on watercourses like the precautionary principle preventive principle and sustainable utilization principle.

5.3.4 Public involvement

There is need for public involvement and participation for Nile River management to succeed. Public participation must be as wide-spread as possible and involve all sectors of the civil society, academia, media and international agencies. As earlier indicated one of the reasons why the Nile Basin Initiative fails to resolve the Nile disputes is because it has ignored all the riparian states and the people living along the Nile Basin. [180]

Howard [181] stated that:

"It has been clear that decisions made by governments in the Nile Basin are implemented without actual conciliation with the people who live in the Nile Basin".

[180] Science in Africa Magazine Supra Pg. 3.
[181] Geoffrey Haward – Incharge of IUCN in 2003.

5.3.5 Civil society participation

There is need to facilitate and organize civil society. This was recommended by Jean Bigagaza [182] when in 2003 she said that, the IUCN was drafting a social pact to facilitate the work of the civil society in the Nile Basin Initiative.
The civil society creates awareness and pushes for the signing of international agreements, which are needed at the Nile Basin. But the agreements that would have to be signed must be agreed upon by all the Nile Basin riparian states.

5.3.6 Need for River Restoration

There is need for River Restoration.[183] Restoration capitalizes on the innate ability of fresh water biotic systems to recover from damage. It is also known as recovery enhancement. The indirect methods of restoration include restoration of hydrological stability and the improvement of water quality. The direct methods of restoration are in stream habitat structures and management of the riparian zone. Widespread public involvement is also critical to restoration.

5.3.7 Improvement of Infrastructure

Improvement of Intra-African infrastructures remains a major pre-occupation and challenge to African governments and organization. Thus improvement in the infrastructures would enhance peaceful settlement of disputes or even about the occurrence of the dispute.

Concrete solutions in the Nile problems would only be arrived at by the policy-makers and their experts through day to day negotiation or diplomacy through regional agencies which could encourage regional cooperation.

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[182] Head of the Discourse desk of IUCN.
[183] Gore J.A. (1985) *The Restoration of Rivers & Streams.*

5.3.8 Re-organization of the management of the Nile Basin

Waterbury argued that a critical shortage of varying magnitude in the Nile waters is both possible and probable within a decade or so, it could be avoided by some of the following measures;- [184]

(i) The Sudan should freeze its irrigation based agricultural schemes at current levels and put all it's energies into rainfall agriculture.

(ii) Both countries could make dramatic breakthrough in efficient water-use by educating their peasants, introduction of high-cost sealed water delivery systems and varieties of seeds with high yields and low water needs.

(iii) All projects of the upper Nile scheme could be negotiated, funded and completed within shortest time with no other riparian states making supplementary demands on the Nile tributaries arising in or flowing through their territories.

(iv) A policy of internationalism in resource management is necessary.

(v) There is need to have code of conduct for the use of transboundary bodies of water. The code of conduct must be comprehensive taking into account the impact of various formulas upon questions of national security. The policies must be adopted out of enlightened national self-sacrifice of the riparians.

Any of the above measures or recommendation could avert crisis in the Nile River Basin.

5.3.9 Common management

There is also the need to develop cooperative regimes for the common management of international watercourses. The logic of common management idea is that watercourse basins are most efficiently managed as an integrated whole and there is need to develop institutional machinery to secure equitable utilization and development. If this would be developed in the Nile Basin, there would be an

[184] Waterbury supra Pg. 242.

institutional cooperative regime where all the riparian states would decide on how to share the Nile waters equitably without any conflicts or tension.

5.3.10 Involvement of specialized agencies

For success in the Nile management there is need to involve more specialized agencies which would give financial, technological and manpower assistance.
In order to create solutions to conflicts concerning water scarcity in the Nile basin distribution and use, economic growth traditionally has been seen as the principal means for adhering to broad development objectives. Thus has is need to empower the riparian states economically, [185]

5.3.11 Development of International cooperation

The physical, economic and political factors affecting international watercourses strongly demonstrate the need for international cooperation and consequently the development and application of principles of international law and international watercourses.

As Conca et al [186] puts it there is need to identify policies for reducing the risks of disputes over water as well as having a better understanding of mechanisms for promotion of cooperation and collaboration.

Frederick recommends that policy aimed at achieving a sense of equity should include the formalization of historic patterns of use among all parties which may be all more realistic in settling international disputes. [187]

5.3.12 Need for regional approach

The riparian states should develop the Nile water resources for common benefit and this will require a regional approach to cooperate by treating the Nile Basin as

[185] W.E.Cox. *The Role of Water in Social Economic Development* 1987 pg 13.
[186] Conca el al –*Conflicts Over Resources, Eliminating The Courses of War.*
[187] Kenneth Fredrick: Water as a source of International Conflicts 1996 pg 23.

one hydraulic unit and all riparian states should be equal stakeholding partners. A regional Convention or treaty of all the riparian states would enhance the principle of equity in the sharing of the Nile waters. The Nile basin riparians should come together to sign a regional agreement relating to the use of the Nile waters.

There is urgent need to establish a regional organization of all the Nile riparian states and the organization will enhance peace and equitable distribution of the Nile waters.

5.3.13 Use of Arbitration

The Nile conflicts should be referred to arbitration. Arbitration is a method of international dispute settlement provided for by Article 33 of the United Nations Charter. One or more of the aggrieved riparian state should take up the matter with the international tribunal.

5.3.14 Use of judicial Method by taking the matter to International Court of Justice

Finally one or more of the aggrieved state or states should take the matter to International Court of Justice for judicial determination under Article 33 of UN Charter since the diplomatic methods do not work in the case of the Nile basin conflicts then the matter may be referred to judicial process. The ICJ may settle this long standing dispute over the Nile waters and would also determine whether the colonial treaties are binding to the riparian states after acquiring independence.

In conclusion, having established that there is no effective mechanism for dispute resolution in the Nile basin, there is need to have an effective mechanism but both negotiation and conciliation if properly utilized would provide such mechanisms though the role played by both negotiation and conciliation of the Nile disputes can not be underestimated.

With implementation of the above recommendations coupled with negotiation and conciliation the Nile disputes would be resolved peacefully.

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