

UNIVERSITY OF NAIROBI

INSTITUTE OF DIPLOMACY AND INTERNATIONAL STUDIES

**RESOLVING WATER USE CONFLICTS TO ENHANCE BETTER REGIONAL
INTEGRATION: A CASE STUDY OF THE NILE RIVER BASIN
MANAGEMENT**

ALEX KARANJA NDUNG'U

**A RESEARCH PROJECT SUBMITTED IN PARTIAL FULFILMENT OF THE
REQUIREMENTS FOR THE AWARD OF MASTER OF ARTS IN
INTERNATIONAL STUDIES**

SEPTEMBER 2013

DECLARATION

This Research Project is my original work and has not been presented for award of a degree in any other university.

Alex Karanja Ndung'u Signature _____ Date _____

R50/P/8241/2002

This Research Project has been submitted for examination with my approval as a university supervisor.

Prof. Maria Nzomo Signature _____ Date _____

DEDICATION

This research work is specially dedicated to MARY, ALLEN, MERCY and ERICK; my wife, sons and daughter. They were a constant source of inspiration. I hope they will find it worth it. God bless.

ACKNOWLEDGEMENT

It has taken me a while to finish this work. The delay in finishing it has constantly gnawed at my conscience. I am grateful to my Supervisor Ambassador Professor Maria Nzomo without whose assistance this work would not have been focused. I am indeed indebted to her. I would also wish to acknowledge the support I received from the entire staff of the Institute of Diplomacy and international Studies. I must also acknowledge and pay tribute to Mr. Francis K. Ndiga for his continuous encouragement and support. Thank you for reminding me that everything is possible with focus and dedication.

TABLE OF CONTENTS

| | |
|--|-----------|
| DECLARATION | ii |
| DEDICATION | iii |
| ACKNOWLEDGEMENT | iv |
| ABSTRACT..... | vi |
| CHAPTER ONE: INTRODUCTION..... | 1 |
| 1.0 Background to the Study..... | 1 |
| 1.1 Statement of the Problem..... | 3 |
| 1.2 Objectives of the Research..... | 4 |
| 1.3 Justification | 4 |
| 1.4 Literature Review..... | 7 |
| 1.5 Theoretical Framework..... | 13 |
| 1.6 Hypotheses | 16 |
| 1.7 Methodology | 17 |
| 1.8 Scope and Limitations..... | 17 |
| CHAPTER TWO: THE HISTORICAL AND HYDROLOGICAL ASPECTS OF THE NILE RIVER BASIN | 18 |
| 2.0 The Historical & Economic Aspects..... | 18 |
| 2.1 Physical and Hydrological Span of the Nile | 24 |
| CHAPTER THREE: CHALLENGES POSED BY THE PREVAILING LEGAL REGIME GOVERNING THE NILE | 26 |
| 3.0 Introduction..... | 26 |
| 3.1 The Agreements on the Water of the Nile | 27 |
| 3.1.1 The 1891 Anglo- Italian Protocol | 27 |
| 3.1.2 The 1902 Agreement between Britain and Ethiopia..... | 28 |
| 3.1.3 The 1906 Tripartite Treaty..... | 29 |
| 3.1.4 The 1925 Anglo-Italian Agreement | 30 |
| 3.1.5 The 1929 Anglo-Egyptian Agreement..... | 30 |
| 3.1.5 The 1959 Agreement for the Full Utilisation of the Water of the Nile..... | 31 |
| 3.1.6 The 1993 Framework for General Cooperation between Egypt and Ethiopia.... | 32 |
| 3.2 Interpretations of the Treaties | 36 |
| 3.3 Challenges..... | 39 |
| CHAPTER FOUR: ANALYSIS OF ENVIRONMENTAL CONFLICTS EMERGING AND THEIR SOCIO-ECONOMIC SIGNIFICANCE..... | 41 |
| 4.0 Manifestations of Environmental Conflicts | 41 |
| 4.1 Socio-Economic Significance of the Tensions to Regional Trade | 47 |
| 4.2 Summary and Conclusions | 53 |
| BIBLIOGRAPHY | 63 |

ABSTRACT

This study identifies the historical and present issues revolving around the sharing of the Nile Basin resources amongst the Nile riparian countries (namely; Egypt, Sudan, Ethiopia, Eritrea, Uganda, Kenya, Tanzania, DRC, Rwanda and Burundi). In their search for both a consensus vision and equitable utilisation of the Nile Basin water resources certain disputes and area of potential conflict have emerged.

In the study the disagreements and disputes in the sharing of the Nile basin water resources, is indisputably rooted in the historical background of the Nile river basin where Egypt has been the predominant user of the basin-wide water resources of the River Nile. Egypt in particular has always laid claim to what it calls its 'historical rights' to the Nile basin waters. It further argues that the said rights are embodied in the various Treaties concluded by United Kingdom and other states ostensibly governing the use of Nile waters. Historically, the river provided the Egyptians with almost all their fresh water and has long been regarded as the cultural symbol of Egypt dating back to the times of the pharaohs.

It is argued in this study, that resolving water use conflicts will enhance better regional integration among the riparian countries and in particular members of the Common Market for Eastern and Southern Africa [COMESA] preferential trading bloc. Necessarily therefore a re-evaluation of the existing initiatives should be aimed at achieving win-win opportunities to all riparian countries and holding out the promise of regional integration, peace and prosperity. Continuous progress will require not only a willingness from Nile riparian countries to continue revising their past visions of cooperation but also to creatively assemble appropriate legal infrastructure to achieve a lasting solution to the Nile basin resources sharing and management.

CHAPTER ONE

INTRODUCTION

1.0 Background to the Study

The Nile river is one of the longest river in the world, only second in length to the Mississippi in America. The Nile Basin traverses ten (10) countries in its span. These states are Kenya, Uganda, Tanzania, Rwanda, Burundi, Democratic Republic of Congo, Sudan, Egypt, Ethiopia and Eritrea. From ancient human civilizations until today, the flows of the Nile river system have nourished livelihoods and played a central role in a rich diversity of cultures. Evidence of enduring human endeavor is apparent throughout the basin.¹

While this endeavor has brought benefits, the task of developing and managing the River Nile basin sustainably for the Basin's peoples is not over. Famine, extreme poverty, instability, rapid population growth and deteriorating natural resources are characteristic features of the Basin today. Most of the countries located in arid and semi-arid regions of the basin are facing a water crisis, though the intensity and extent of that crisis may vary from one country to another, and also with time.² For the Nile basin countries, the climate change crisis, the civil wars and instabilities, along with economic and debt crisis, brought to the basin serious and severe problems and consequences. It is clear that water as a natural resource will be a limiting factor for economic development since it is

¹ Okidi.C.O, 1980 'Legal and Policy Regime of Lake Victoria and Nile Basins', *Indian Journal of International Law* Volm 20, pp 395-447

²Tesfaye T, 2008 'an appraisal of transboundary water dispute resolution in the Nile basin' <http://www.inweb.gr> pg4

limited, valuable, and vulnerable. Competing demands for water exist among basin countries, and among different sectors within each basin country. Transboundary shared water courses always have a potential for conflict. The Nile is such a transboundary river whose water resources have generated tension and disputes over their utilization. On the one hand there are lower riparian states who claim a Lion's Share of the Nile water resources while on the other hand, the upper riparians, where the Nile originates, only utilize a fraction of the waters.³

To justify their position, the lower riparian states rely on Treaties that were concluded between them and the other riparian countries during the colonial period.⁴ On the other hand the upper riparian states question the validity of the Treaties and their applicability today. So, there have been simmering tensions manifested by open pronouncements by political and other leaders of almost all the upper Nile riparian states, to the effect that at present, the sharing of the Nile waters is not equitable.

Lower riparian states, Egypt and Sudan, believe that the status quo should be maintained. Instead of perpetuating such a situation, a diffusion of the tensions and disputes is possible. It is indeed possible to initiate co-operation in the sharing of the Nile waters, which act, in itself would go a long way in fostering co-operation in other areas, specifically trade. This study aims at examining ways and means of exploring such co-operation among the Nile states.

³ Ibid

⁴ Op cit

1.1 Statement of the Problem

The Nile River is a transboundary river traversing ten countries namely: Kenya, Uganda, Tanzania, Rwanda, Burundi, Sudan, Egypt, Democratic Republic of Congo, Ethiopia and Eritrea.

It is comprised of two main components, the Blue Nile and the White Nile. The White Nile has got its source in the countries comprising the East African countries today i.e. Kenya, Uganda, Tanzania, Burundi and Rwanda. It flows from these countries and crosses into the Democratic Republic of Congo on its way to Sudan. The Blue Nile on the other hand flows from Ethiopia and Eritrea and it joins the White Nile in Sudan near Khartoum.

Over the years the waters of the Nile have been utilized by communities along the river, for agricultural purposes, hydroelectricity and navigation.⁵ Since the Nile riparian countries became independent there has been disquiet and suspicion over equitable utilization of the Nile waters. The upper Nile states, particularly where the river originates from, have also been using the waters albeit on a small scale.

This has been informed by the fact that Egypt and Sudan claim sovereignty over the Nile waters based on a series of Treaties that were signed between Egypt and United Kingdom during the colonial period. The most notorious of these Treaties are the 1929 and 1959 Treaties.⁶

⁵ Op cit

⁶ League of Nations Treaty Series, 1948 Volume 93-94

Over the years, tensions have been mounting with the Nile riparians being divided into two, Sudan and Egypt on one hand and the rest of the countries on the other. These tensions are inimical to co-operation in all spheres of economic development yet almost all the riparian states belong to common economic trading blocs. So, is it possible to resolve the water use disputes and tensions among the Nile Riparian states for the sake of economic co-operation?

1.2 Objectives of the Research

The aims of this research are primarily to;

- a) Define the manifestations of disputes generated by the present use of the Nile waters.
- b) Identify the sources of the disputes in the utilization of the Nile waters.
- c) Identify ways of resolving water use disputes among the Nile states.

1.3 Justification

The utilization of the Nile waters could be a basis of regional co-operation instead of being a source of disputes. All the Nile riparian states except Tanzania are members of the Common Market for Eastern and Southern Africa [COMESA], which is an organization that among other things has created a Preferential Trade Area within its membership. COMESA (as defined by its Treaty) was established; *'as an organisation of free independent sovereign states which have agreed to co-operate in developing their natural and human resources for the good of all their people'* and as such it has a wide-

ranging series of objectives which necessarily include in its priorities the promotion of peace and security in the region.⁷

Its main focus is on the formation of a large economic and trading unit that is capable of overcoming some of the barriers that are faced by individual states. The disputes now manifest over the use of Nile waters may hinder the achievement of the objectives of COMESA because they will actually hurt trade interactions. Obviously parties locked in a dispute would find it hard to create the right atmosphere for co-operation in trade. Such a dispute may actually become a barrier to effective trade relations. If an equitable utilization of the Nile waters is achieved it shall be a win-win situation for all the countries along the Nile. A harmonious utilization of the waters will necessarily eliminate disputes that can impact on trade.

The available literature on the subject of the Nile Waters focuses too much on the colonial Treaties and particularly their validity at International Law. To date there is no internationally agreed upon treaty on the management and utilization of the Nile River which secures the benefit of all riparian countries. Indeed the legal instruments for the utilization and the management of the Nile basin water consists of disputed bilateral agreements concluded amongst the basin countries. The character and content of the Treaties has variously been questioned.⁸

⁷ ‘The common market for eastern and southern Africa (Comesa) Treaty’ 2005 United Nations Treaty Series Annex A; Volume 2319

⁸ *ibid*

There is therefore a need to develop appropriate legal frameworks on co-operative utilization of the Nile waters. At present, the focus has been too much on who gets how much water under the Treaties and whether they are amendable or not. The focus should actually be on measures of permanently finding a formula of preventing such disputes from arising. That may only be achieved by agreeing to face the problem head on. So it is hoped that this study shall contribute in providing to a way forward in resolving the disputes now perceived. In addition it is hoped that this study will add to the existing literature on the International Law interpretation and understanding of International Treaties that deal with transboundary resources.

The study is also aimed at provoking debate on whether, the efforts so far seen being pursued by leaders within the Nile Basin Initiative are in any way geared towards finding a lasting solution or whether, the efforts are just white washing a simmering problem. Whether a solution will indeed be found or not by the concerned states is a critical question that shall be posed by this study. Africa as whole is committed to the implementation of the Millennium Declaration of the Heads of States and government adopted by the United National General Assembly in 2000.⁹

This declaration inter alia resolved to stop the unsustainable exploitation of water resource by developing strategies, which promote both equitable access to water and adequate supplies. This kind of commitment poses an important challenge to all water stakeholders in Africa. This study therefore shall in a way contribute to the greater Pan

⁹ 'United Nations Millennium Declaration,' 2000 Resolution adopted by the General Assembly of the United Nation

African ideal of achieving the Millennium Development goals.¹⁰ Just as there are challenges posed by water sharing along the Nile, there is also the need to generate information in support of policy development and implementation.

It is hoped that the study will elicit important responses from policymakers to the concerns that shall be raised herein. Finally we expect to further add value to the present efforts being made by the Nile Basin Initiative.

1.4 Literature Review

There is a formidable amount of literature touching on the Nile River Basin. There is literature contained in books and journals that address the issues raised by the transboundary nature of the Nile.

Most of the writings concern themselves with the Nile water Treaties that were concluded between United Kingdom and Egypt. Various ways of interpreting the Treaties have been explored and there is no unanimous agreement on how to interpret the International Treaties.¹¹

Okidi laments the paucity of detailed scholarly work on shared natural resources in Africa. He has questioned the applicability of the Treaties signed between Egypt and Sudan and the United Kingdom which Treaties purported to bind the rest of the Nile riparian states even after independence.¹² It is instructive to note that Egypt so far considers those Treaties as conclusive and non-amendable. There have been situations

¹⁰ *ibid*

¹¹ Malcom .N. Shaw, 2008 *International Law* Cambridge University Press 6th Edition Pg 932

¹² *Op cit*

among the Nile riparian states, where respective governments and states, invoke International legal rules and principles favourably to suit their circumstances or their diplomatic interest.

It is only natural that a party to an International or municipal dispute will want to interpret a legal rule in their favour. It is therefore not surprising that Owiro should advocate for the East African states to take a common position just like Sudan and Egypt have taken a common position on the Nile issue.¹³ Thus for Owiro, the prevailing legal regime (Treaties) is no longer binding as the direct consequence of state succession, is that newly independent states are not bound by the Treaties signed on their behalf by their colonial masters.

There is need to develop comprehensive legal regime to regulate the Nile waters. But certainly this shall only come about if states approach the problem collectively but not by taking certain positions which are inimical to the circumstances of other members. Thus to say that Egypt lays claim to the Nile waters based on their “natural and historic” rights is no justification to advocate for the East Africans to say in turn, that ‘the Nile originates from our countries therefore we are supposed to control it’.

¹³ Owiro A.O, 2004 ‘The Nile Treaty’- State Succession and International Treaty Commitment: A case study of the Nile Water Treaties’ Law & Policy Research Foundation pp2-43

Transboundary water courses pose challenges to their population. Lumumba acknowledges this problem.¹⁴ To Lumumba, the Nile Basin crisis and water disputes now manifest are not about having too little water to satisfy growing need. Rather the crisis is that of management of these water resources and the legal regulation of the interests and sovereignties of transboundary water countries.

The International community having been prompted by the weak regulatory framework and coordination over shared water courses has stepped up efforts to address this. According to Lumumba, the present concern to address the situation of the Nile waters is attributable to the fact that an estimated 160 million people depend on the river for survival.¹⁵

Guy Moigne and Ashok Subramaian observe that water does not respect borders. When a significant amount of water used in one country comes from another, the process of formulating an international/regional water resources management is challenging. Cooperation and goodwill among states sharing a drainage basin are essential for development.¹⁶ There is however hope that the Nile Basin Initiative will address the problems posed by the Treaties.

¹⁴ Lumumba PLO, 2005 'The interpretation of the 1929 Egypt-British Nile Waters Treaty and its legal Relevance and implications on the stability of the Region.' *Law Society of Kenya Journal* Volm 1 No2 PP1-18

¹⁵Ibid

¹⁶ Guy M. et al, 1994 'Guide to the formulation of water Resources strategy' World Bank Technical paper number 263 pp 3-91 <http://www-wds.worldbank.org>

The Nile Basins Initiative was started in 1998.¹⁷ It was prompted by recognition by the riparian states that the water problems of the Nile cannot be wished away and must be addressed. It has as one of its aims the ambitious goal of establishing regional co-operation in the utilization of the Nile waters.

The Nile River Basin contains a wide range of unique and highly productive ecosystems including mountainous areas, and wetlands. These ecosystems contribute to the production, retention and transport of water from the highlands to the northern Sudan and Egypt. The inhabitants use the ecosystem to provide for a range of livelihoods including, rain fed agriculture, livestock production, irrigated agriculture, fisheries and urban dwellings.¹⁸

The Helsinki Rules on the uses of the waters of International Rivers provide in Article IV that

*“...each basin state is entitled within its territory, to a reasonable and equitable share in the beneficial uses of the waters of an International drainage basin.”*¹⁹

What is reasonable and equitable however is to be determined in the light of factors such as the geography of the basin, extent of the drainage area in the territory of each basin state and the hydrology of the basin. As far as the upper riparian Nile states are concerned the Helsinki rules are not observed in the utilization of the waters.

¹⁷ ‘Agreement On the Nile River Basin Cooperative Framework’ 2009 <http://www.internationalwaterlaw.org>

¹⁸ Waterbury J.J, 1982 ‘Riverains and Lacustrines – Towards Co-operation in the Nile Basin’. <http://www.princeton.edu> pp 6-9

¹⁹ “Helsinki Rules on uses of waters of International Rivers” 1966

Perhaps the most significant International document in this regard is the Charter of Economic Rights and Duties of States.²⁰ All the Nile riparian states are signatories to this Charter. In Article 2(1) the Charter provides that;

*“every state has and shall freely exercise full and permanent sovereignty including possession, use and disposal over all its wealth, natural resources and economic activities”.*²¹

Clearly, every riparian state can then argue that the Charter justifies that they do as they wish with the waters running, through or emanating from their states. If this were to happen, the entire Nile Basin Initiative would collapse.

For some authors like Zeriban, this should be the way to go.²² He urges his motherland Ethiopia to act unilaterally and start exploiting the waters of the Blue Nile as it wishes. The principal concern he has is that Ethiopia has not received any attention in the Nile Treaties or initiatives that purport to deal with the sharing out of the Nile waters.

The consequences of acting unilaterally would be dire and would frustrate any future attempts at resolving the water tensions now prevailing. There are parallels to be drawn from the basin management in the steelport basin management. This basin is situated within South Africa.²³

²⁰ ‘Charter of Economic Rights and Duties of States’ <http://www.un.org> .

²¹ *ibid*

²² Dawit Z, 2006 ‘The Nile: Challenges and opportunities for Ethiopia’ www.nilebasindiscourse.org

²³ Le`vite Herve` et al, 2003 “Resolving water use conflicts through stakeholder participation: issues and examples from the steelport Basin South Africa” African Water Journal, Pilot Edition pg 32

Although, the challenges posed by the steelport basin are addressed under Municipal Laws, yet the tensions that the basin generates among the population living alongside it are similar to the Nile transboundary basin. The resentment induced within a water user by actions of the other water users is the same in that all users are concerned with the quality and quantity of water that they are entitled to. The micro-reform strategies used by the South African Authorities in managing the steelports basin are worth emulating.²⁴

The conflicts manifest along the Nile over the water resources according to Godana mean that there shall always be a state in the basin which would wish a co-basin state to refrain from using the water of the basin as it would do if left alone.²⁵

Only five among the instruments that make up the Nile legal regime contains provisions on dispute settlement. The much sought after regional co-operation for trade and economic prosperity may remain a mirage if solutions are not found to resolve water use disputes.

For Supra National bodies like the World Bank, intervention in disputes like on the Nile basin has also not been easy.²⁶ Riparian states do not want any kind of interference with their existing uses and water rights. They (riparians) zealously safeguard their potential uses and rights even when they do not have the faintest notion of what they would be in future.

²⁴ Ibid

²⁵ Godana B, 1985 'Africa's shared Water Resources – Legal and Institutional Aspects Nile, Niger and Senegal Rivers' Frances Pinter (Publishers) London

²⁶ Op cit

It emerges that as the situation is at among the Nile states, the issue of environmental conflicts are there and must be addressed. For instance, the Nile basin is the source of 96% of Egypt's renewable freshwater; it is therefore an essential element of Egypt's sustainability.²⁷ Demands for water and land are rapidly increasing in response to a growing population, industrialization, food production, and employment generation. Available land and water resources are limited, so a concerted effort to better manage the country's limited water resources has become a national priority. The unrestricted use of water, to which Egyptian users have been accustomed for many centuries, is no longer possible.

1.5 Theoretical Framework

To effectively deal with the challenges posed by shared water resources, a state must formulate clear and acceptable policies that enhance interaction between the co-riparian members. The geographical span of River Nile is a fundamental factor and of permanent importance which the foreign policies of the concerned nations must take into account at this point in time. Since ancient times the river Nile has played different roles in the countries that it transcends through. Today's political decisions that will impact on the utilization of the Nile waters must take into account the historical usages and sharing.

The world system theory postulates that although states may on significant occasions be an important actor, this is not always so, accordingly, state boundaries are not necessarily

²⁷ *ibid*

the fundamental dividing line between intra state consensuses.²⁸ States are not alone in having effective means of self-help and self arrogated right to make use of them. States frequently do not act as cohesive hierarchically organized, well integrated units commanding the full loyalty of their citizens.²⁹

In the world systems model the emphasis is put on transactions so that the notion of systems – a set of patterned interactions is the basic unit of analysis. As such to analyse a phenomenon it may be necessary to include the activities of actors as widely disparate as a particular individual, United Nation etc. To the world systems theorist, such problems like, conflict, security, integration etc are themes that cut across all levels of analysis. Conflict for instance has economic, legal, psychological and other cross-disciplinary dimensions.³⁰

The world systems theory denies that man is always driven by an instinct to dominate unlike in the realist argument.

This theory fits very congenially with the relative deprivation theory which informs this study.³¹ Relative deprivation theory is defined as “a perceived discrepancy between “value expectations” (*resources to which one feels entitled*) and “value capabilities” (*resources which one feels capable of acquiring and keeping*)”.³² Dissatisfaction and

²⁸ Wallenstein .I, 1976 “The Modern World-System: Capitalist Agriculture and the Origins of the European World-Economy in the Sixteenth Century.” New York: Academic Press pp. 229-233.

²⁹ *ibid*

³⁰ *ibid*

³¹ Gurr T. R, 1980 ‘Handbook of Political Conflict; Theory and Research’, The Free Press, New York P 364

³² *ibid*

discontent derive from the perception of relative deprivation and it is the main factor of collective disenchantment that may lead to violence.

This study applies relative deprivation in examining the effect of inequitable water use in the Nile basin; which use is ostensibly grounded on a questionable treaty regime. The study postulate that all the efforts in solidifying the gains of COMESA, will come to naught if no serious attempt is made at resolving real and perceived water disputes pertaining to Nile water use.³³ Yet by coming together as a trading bloc, nine of the Ten Riparian states have got an opportunity of increasing levels of cooperative water use.

Relative deprivation is visible in the use of the Nile waters where two countries, Egypt and Sudan, out of ten sharing the basin, utilize the lion's share of the water resource. Economically, these two countries also happen to be the strongest in the Nile basin region. In particular, the two states do not have perennial food shortages like the other basin states. In Egypt, the Nile waters account for most of its agricultural production with sufficient food for domestic consumption and even export.³⁴

Relative deprivation has important consequences for both behavior and attitudes, including feelings of stress, political attitudes, and participation in collective action. As such like in the present case under study, if Egypt and Sudan utilize the greater volume of the Nile waters to achieve a given economic benefit, the other riparian member suffer an equal and direct loss. In the realist arguments, that is so. It is a zero sum game.

³³ Op cit

³⁴ Op cit

Each of the ten riparian nations looks to the utilization of the Nile resource in terms of the gains that each state can make if a formula of sharing the resource is defined. Such gains are again dependent on peculiar circumstances of each individual nation. The prosperity that Egypt derives from the Nile is not necessarily the gain that other riparian states can get if; say they use the water primarily for irrigation as Egypt does. After all not all the co-riparian states are in need of water for irrigation as Egypt does.

In the concern of the Nile riparian states, admittedly all the states do not have equal power both politically and economically. The resource endowments are distributed differently; Egypt and Sudan are more economically endowed than the rest of the states. Yet they are the ones that lay claim to the lion's share of the Nile water resources.³⁵

For the upstream states, where the Nile originates from, utilization of the Nile waters is not even. In the case of the Nile water resource; there is an opportunity for all parties to arrive at a formula of utilization for the benefit of all without leaving any room for disenchantment.

1.6 Hypotheses

1. The current inequitable utilization of the Nile Basin waters has led to disputes.
2. The disputes over the utilization of the Nile waters are caused by the existing Nile water Treaties.
3. The existing disputes over the use of Nile waters can hamper regional trade.

³⁵ Op cit

1.7 Methodology

Primary and secondary data sources shall be the principal sources of data in the analysis of the research topic. Primarily the study will largely be undertaken through Library research and internet searches. The geographical and hydrological traverse of the Nile is not in doubt and is mostly to be found in maps and books. So the available documented historical facts shall provide a reliable compliment to the study.

1.8 Scope and Limitations

This is a privately funded research. All efforts and the little available funds shall be employed so as to achieve the best possible results. Although both time and resources are a severe constraint, we shall endeavour to deliver the best results possible.

CHAPTER TWO

THE HISTORICAL AND HYDROLOGICAL ASPECTS OF THE NILE RIVER BASIN

2.0 The Historical & Economic Aspects

The Nile River is the second longest river in the world after Mississippi. If one was to consider that the Nile was very central and critical to the development of Egyptian civilization, then one has to conclude that the Nile as a river has had one of the oldest and most critical sets of uses in all History.³⁶ The Nile River is one of the world's great rivers. For Millennia, this unique waterway has nourished livelihoods, an array of ecosystems and a rich diversity of cultures.³⁷

Throughout antiquity, Egypt relied on its agricultural wealth, therefore on the Nile. By 3100BC the Nile valley and delta had merged into a single entity forming what was possibly the worlds then first large nation state.³⁸

Between 1975 – 1640 B.C, basin irrigation was a well established activity. The annual inundation was relatively reliable and the flood plain and delta were very fertile making Egyptian agriculture the most secure and productive in the near east. At the same time flooding would be very destructive. By 1500BC, Egyptians had developed artificial

³⁶ Okidi.C.O, 1980 'Legal and Policy Regime of Lake Victoria and Nile Basins'. Indian Journal of International Law Volm 20, pp 395-447

³⁷ *ibid*

³⁸ Mohammed A, 2004 'The Nile Question: The Accords on the Water of the Nile and Their Implications on Cooperative Schemes in the Basin' [https://biblio.ugent.be/publication pg46](https://biblio.ugent.be/publication/pg46)

water lifting devices.³⁹ Among the notable factors that shaped the legal regimes over the Nile, was the presence in the basin of British interests during the colonial era and the water security policy pursued by Egypt. During the first half of the Twentieth Century, the patterns in the utilization and management of the water of the Nile River were dictated by the interests of the United Kingdom. This created a peculiarity in its relations with Egypt, as manifested in the arrangements made by them concerning the Nile.⁴⁰

The UK had a deep-rooted interest in controlling the water of the Nile, which was to provide irrigation for cotton plantations in the area which could provide raw material for its industries in Europe. This laid the foundation for water utilization patterns that favoured Egypt at the expense of the interest of other riparian states. Using its considerable influential power in the basin, it tried to ensure that there was no reduction of water flow to Egypt caused by the development of works in the upper riparian colonies.⁴¹

As a result, all the agreements to date, are a manifestation of this interest, and have thus given priority to the requirements of Egypt. Evidence of this can be seen for instance, in the 1902 Agreement, concluded by Ethiopia and Great Britain, which prohibited Ethiopia from engaging in any construction activities on the headwater of the Nile that would arrest the flow of water to Egypt. The 1929 Nile Water Agreement, concluded by Egypt, and Britain, representing the Sudan, which provided that there should be no undertaking of development and construction works in upstream Sudan or other countries under

³⁹ *ibid*

⁴⁰ *ibid*

⁴¹ *Op cit*

British administration, that would entail prejudice to the interests of Egypt, without the prior agreement of the government of Egypt.⁴² Generally, the dominance of the British government over the basin States gave rise to an unconventional relationship between it and Egypt and this was reflected in the agreements made by them about the water of the Nile.

In recent history, the Nile basin has remained as one of the most distinct and visually identifiable regions of the world. The basin played an important role in early European contact with Africa drawing explorers and adventurers from Europe as far back as the fifteenth century. Many of the explorers' exploits actually prepared the way for future European expansionism and eventually colonial control.⁴³

Even historically, not all the basins riparian states have been in a position to utilize the waters of the Nile proportionately. Egypt has been the most aggressive user of the Nile waters since the times of the Egyptian civilization. To a lesser extent Sudan and Uganda have also utilized the waters.

Besides Egypt, there are nine other co-riparian states of the Nile basin. They are Burundi, Democratic Republic of Congo [DRC], Ethiopia, Eritrea, Kenya, Rwanda, Tanganyika, Sudan and Uganda.

⁴² Owiro A.O, 2004 'The Nile Treaty'- State Succession and International Treaty Commitment: A case study of the Nile Water Treaties' Law & Policy Research Foundation pp2-43

⁴³ Nicol A, 2003 "The Nile: moving beyond cooperation" Water Policy Programme, ODI(webworld.unesco.org/water/wwap/pccp/pubs/) pg 2

Over the whole course of the Nile River, the topography and ecology of the basin are as varied as the people who inhabit it. The cultures of the people of the Nile basin are very diverse. In the entire Nile basin population there is virtually nothing in their history language, attitudes towards power, agricultural conditions etc that can bind them together.⁴⁴

Analytically, the entire basin can be classified into four geographical and social parts.⁴⁵ Firstly there is Egypt, an old and self-contained practitioner of irrigated agriculture. It is the biggest society in the basin, the most militarily powerful and the most vulnerable as far as water supply is concerned. In the upper streams there are two parts; viz; the upper Blue Nile with Ethiopia and Eritrea. These two form the second part. Notably, 80% of whatever finally discharges into the High Aswan Dam flows from this part. The third part consists of Uganda, Kenya, Tanganyika, Democratic Republic of Congo, Rwanda and Burundi. These states, compared to Egypt and Ethiopia have small populations and are militarily weak.⁴⁶

Finally the Sudan is the fourth part. This is the only one that links the other three parts geographically. It is the middle stream state that distributes the waters of both the White and Blue Niles.

All the Nile Basin states have primarily agricultural economies. In the upper riparian states of Ethiopia, Kenya, Uganda, Eritrea, Tanzania, Rwanda, Burundi and Democratic

⁴⁴ ibid

⁴⁵ Ibid

⁴⁶ ibid

Republic of Congo, settled agriculture is the general economic activity. These states are also, fortunately within abundant rainfall zones. Sudan and Egypt are also primarily agricultural economies. But in contrast to the upper riparian states, agriculture in Sudan is largely irrigation based and entirely so in Egypt.⁴⁷

In Egypt, the entire life of the Nation is dependent on the rivers waters for there is practically no rainfall.⁴⁸ Nearly 86% of Egypt is classified as very arid and rest as arid. Thus the complete control of the Nile River over the economy of Egypt is a unique feature and perhaps a challenge in working out a formula of sharing out the waters.⁴⁹

In the Sudan, on account of historical reasons, the northern Sudan has so far remained the hub of economic development whose principal activity is irrigation agriculture. The Nile River plays a significant role in the economy of the Sudan. Thus the survival of Egypt and Sudan is dependent on the Nile albeit to different extents. All the other Basin states too, consider the river basin as a principal feature of their economies.⁵⁰

The economic use of the Nile for purposes of agriculture is its most important use. The other main feature is generation of Hydroelectricity for the vast population of the basin population.⁵¹

⁴⁷ Op cit

⁴⁸ Op cit

⁴⁹ Op cit

⁵⁰ Op cit

⁵¹ ibid

Historically and up to date, Egypt and the Sudan have sought to lay Territorial sovereignty and jurisdiction over the Nile waters.⁵² In the early 1900's tremendous pressure was brought to bear upon Egypt to produce cotton. Egypt was then under the British rule. The need for summer water and flood control provided an unprecedented impetus for an intensive period of water development along the Nile.⁵³ After World War 1, the Nile project commission was set up. It had representatives from United Kingdom, India and United States of America. Thus the period after the 1900 witnessed a flurry of activity in Egypt that would create the perception of superiority by Egypt vis a vis utilization of the Nile waters and that would lead to a reference to Egypt's Natural and historic rights.⁵⁴

Today, the Nile river basin is home to an estimated 160 million people within the boundaries of the Nile basin and roughly 300 million live within the 10 countries that share the Nile waters. The basin contains unique and highly productive ecosystems including mountainous areas, lakes, wetlands etc. These ecosystems contribute to the production, retention and transport of water from the highlands areas with an annual rainfall of 2000mm to northern Sudan and Egypt with virtually zero annual rainfall.⁵⁵

The basin inhabitants use the ecosystem services to provide for a range of livelihoods including rain fed agriculture, livestock production, irrigated agriculture, factories and urban dwelling. Egypt presently uses the majority of the river Nile flows and could

⁵² ibid

⁵³ ibid

⁵⁴ Op cit

⁵⁵ Op cit

suffer crippling water reductions if other co-riparian states were to utilize their share of the Nile waters in a big scale.

2.1 Physical and Hydrological Span of the Nile

The Nile River is the only drainage outlet from lake Victoria and is the second largest river in the world after Missisipi.⁵⁶ The Nile is made up of three main tributaries. These are the White Nile, Blue Nile and the Atbara. The White Nile rises from its source in the Highlands of Rwanda and Burundi and flows into lake Victoria.⁵⁷ Lake Victoria sits on the Eastern African Plateau at an elevation of 900 meters. The total area of the lake is approximately 68800sq kilometers. The surface water contributed by rivers is mainly as follows: River Kibuon, Sondu, Miriu, Keyando, Yala, Nzoia, Sio, Mara and Kagera. Of these rivers, Kagera is the most significant in that it drains also the territories of Rwanda and Burundi and also because it extends the limits of the Nile basin further to the southwest.⁵⁸

The stretch of the Nile from Njinja to lake Kyoga is called the Victoria Nile. The river leaves Kyoga and flows through Murchison falls and into lake Mobutu Sese Seko. It is at lake Mobutu that the Democratic Republic of Congo (formerly Zaire) becomes prominent as a basin state. This is because river Semiliki from the Democratic Republic of Congo enters the lake Mobutu.⁵⁹

⁵⁶ Op cit

⁵⁷ ibid

⁵⁸ ibid

⁵⁹ ibid

The river flows from lake Mobutu to Malakal in Sudan where it is joined by several small tributaries. Beyond Malakal the White Nile flows directly northwards upto Khartoum where it is joined by the Blue Nile. The Blue Nile drains from lake Tsana, which sits on the Ethiopian Highlands. After about one hundred and eighty miles from the north, the Nile is joined by the Atbara from the Eritrean Highlands. It crosses the Egyptian border at a place called the Wadi Halfa.⁶⁰ The famous five cataracts of the Nile are located in the section just before Wadi Halfa. From Wadi Halfa the river flows down north, parallel to the Red Sea. It empties into the Mediterranean through a delta whose principal arms are Rosetta and Dampetta.⁶¹

The White Nile from the East African side flows 24 milliards of cubic meters of water. Half of this amount is lost through evaporation and soakage in the Sudds only to be restored at Khartoum at the confluence with the Blue Nile. Eighty five percent of the flow of the Nile from Khartoum originates from Ethiopia with only 15% from the East African sources. The East African contribution is affected by wastes in the Sudanese swamps.⁶²

The rivers' discharges vary both seasonally and from year to year. It is noteworthy to observe that the Jonglei Canal Project was set up to achieve the purpose of reducing the losses of water in the Sudd in order to increase the water ultimately reaching Khartoum from the East African Sources.⁶³

⁶⁰ ibid

⁶¹ ibid

⁶² Op cit

⁶³ Op cit

CHAPTER THREE
CHALLENGES POSED BY THE PREVAILING LEGAL REGIME GOVERNING
THE NILE

3.0 Introduction

As the potential for disputes over transboundary watercourses increases, there has never been a greater need for international legal guidelines regarding the rights and obligations of riparian states in the use of their fresh water resources than now. Article 2(1) of the Charter of Economic Rights & Duties of States says, “*Every state has and shall freely exercise full permanent sovereignty, including possession, use and disposal over all its wealth, natural resources and economic activities.*”⁶⁴ Arguably every state has got the right to do ‘as it wishes’ with the resources within its territory. However the reality on the ground is different because most of these resources are transboundary in nature. Bilateral agreements may go some way towards addressing the issue of utilisation on a small scale but do not sufficiently address the wider problem. An international drainage basin is even more peculiar in that it crisscrosses political boundaries.⁶⁵

Article 2 of the Helsinki Rules defines an international drainage basin as, “*a geographical area extending over two more states determined by the water shed limits of the system of waters including surface and underground waters flowing into a common terminus*”. Unlike some other shared river basins in the world, there is no comprehensive agreement in the utilization of the Nile waters.⁶⁶

⁶⁴ Op cit

⁶⁵ Op cit

⁶⁶ Op cit

The existing Treaties are either bilateral or were deliberately planned by colonial forces to serve the interest of downstream countries particularly Egypt.⁶⁷ Egypt and Sudan have throughout the years sought to lay territorial sovereignty and jurisdiction over the River Nile waters. This is evident from the formal and informal agreements, negotiations and protocols that the two countries have entered into regarding access to and use of the waters of the Nile.⁶⁸ With the establishment of colonial rule along the Nile Basin, it became necessary to regulate through treaties and other instruments the water rights and obligations attaching to various colonial territories within the basin. Thus the colonial period came to witness a steady development of formal treaties and regulations as well as informal working arrangements and administration measures which taken together constituted the legal regime of the Nile.⁶⁹

3.1 The Agreements on the Water of the Nile

3.1.1 The 1891 Anglo- Italian Protocol

This was signed on 15 April 1891, between Britain, representing Egypt and the Sudan, and Italy, on behalf of Eritrea.⁷⁰ The Protocol was not on the water of the Nile per se. The water of the Nile was referred to, under article III of the Protocol, as an incidental issue, since the Protocol was primarily meant for delimitation of the colonial boundary of Britain and Italy in the Sudan and Eritrea. Article III of the Protocol prohibited Italy from undertaking construction work at the headwaters of the Nile, which might sensibly modify it. The Protocol did not include, or make reference to, the upper riparian states,

⁶⁷ Op cit

⁶⁸ ibid

⁶⁹ ibid

⁷⁰ ibid

where the substantial share of the water comes from. Thus, it remains a bilateral agreement and does not extend its scope of application to the other riparian states. What makes it senseless and irrelevant is the fact that the Nile River did not flow in the territory colonised by Italy, which was the basis for its claim to its water.⁷¹

At the time of the treaty conclusion, Italy had not established itself in Ethiopia. As a result, it did not have the right to engage in negotiation over the headwater found in the upper riparian area, in particular Ethiopia. Nonetheless, from the obligation imposed on Italy, it is implicit that the intention of the British government was to safeguard the interest of its colonial subject, Egypt. Thus, the Protocol manifests part of a grandiose British strategy to fully control the water of the Nile.⁷²

3.1.2 The 1902 Agreement between Britain and Ethiopia

This was signed on 15 May 1902, between Britain, representing the Sudan, and Ethiopia, to determine the boundary between Ethiopia and the Sudan. Like the 1891 Protocol, this agreement was also meant primarily as a means to provide boundary delimitation. However, it contained a provision relating to the water of the Nile. Ethiopia agreed, under Article III of the agreement, not to construct or permit construction on the Blue Nile and its tributaries, of any works that would arrest their flow, without the prior agreement of the government of Britain.⁷³

⁷¹ *ibid*

⁷² *ibid*

⁷³ *ibid*

There was a disagreement on the meaning of the word "arrest" in the Amharic (Ethiopian Language) and the English versions. In the Amharic version, the obligation imposed on Ethiopia did not preclude the use of the water. What was prohibited was any scheme which would totally arrest the flow of water. There was no evidence indicating that Ethiopia had acknowledged the meaning of the word "arrest" as to not utilise the water.⁷⁴ The agreement was the most controversial one in the history of Nile agreements, as both parties claimed that their own understanding of it was correct. Like the 1891 Agreement, it repeated the same thing, in the sense that it prevented the Ethiopian government from engaging in development activities on the water of the Nile, in order to preserve the interests of the lower riparian states.⁷⁵

3.1.3 The 1906 Tripartite Treaty

This was concluded in London on 13 December 1906, between Britain, France, and Italy and dealt with the use of the Nile water in Ethiopia's sub-basin.⁷⁶ They reached an agreement to safeguard the interest of Great Britain in Ethiopia's sub-basin by regulating, without prejudice to Italy's interest, the water of the Nile, and also agreed to protect the interest of Ethiopia.

It is difficult to imagine how they could claim to protect Ethiopia's interest, without inviting Ethiopia to take part in the agreement process, or without consulting Ethiopia.

⁷⁴ *ibid*

⁷⁵ *ibid*

⁷⁶ *Op cit*

Consequently, the Ethiopian government immediately voiced its vehement rejection of the agreement and indicated that no country had the right to stop it using its water.⁷⁷

3.1.4 The 1925 Anglo-Italian Agreement

This was signed between Britain and Italy on 20 December 1925 in Rome and dealt with issues of the Nile water.⁷⁸ Italy agreed to recognise the prior rights of Egypt and the Sudan on the headwater of the Nile and guaranteed not to construct on the headwater and its tributaries any works that might sensibly modify their flow into the main river. Right after its conclusion, Ethiopia voiced its objection against the treaty. Following Ethiopia's rejection of it, the British government disclosed that it renounced its position and admitted that the agreement was bilateral and was not meant to bind Ethiopia.⁷⁹

3.1.5 The 1929 Anglo-Egyptian Agreement

This was signed on 7 May 1929, between Egypt and Great Britain, representing the Sudan.⁸⁰ The United Kingdom was acting for the Sudan as its colonizer. This agreement was done by exchange of notes between Mohamed M. Pasha, the president of Egyptian Council of Ministers and Lord Lloyd the British High Commissioner in Cairo. The Agreement mainly aimed at securing the Nile water for Egypt by limiting the rights of the Sudan and rejecting those of the other riparian states.⁸¹

⁷⁷ Op cit

⁷⁸ Op cit

⁷⁹ ibid

⁸⁰ ibid

⁸¹ ibid

The Agreement recognised Sudan's right to use the water of the Nile in as far as Egypt's natural and historic rights were protected, and conferred upon Egypt the right to monitor the flows of the water in the upper riparian states, the right to undertake any projects on the Nile without the consent of the other riparian countries, and the right to veto construction works that would affect its interest adversely.⁸² The agreement recognised, somehow, the right of the Sudan to utilise the water but its exercise is contingent on whether or not its uses preserved Egypt's historic and natural rights.

3.1.5 The 1959 Agreement for the Full Utilisation of the Water of the Nile

This was concluded between the independent Sudan and Egypt on 8 November 1959.⁸³ It was based on the revision of the 1929 Agreement. The Sudan called for the revision of the 1929 agreement in a manner that would divide the water in a rational way.⁸⁴ As the name itself implies, it allotted the entire water of the Nile to the two states only. Its purpose was, therefore, to gain full control of the water and this constitutes the culmination in efforts to give preference to both states. This is because it highlighted the construction of the Aswan High Dam as the major element for controlling the Nile water for the benefit of Egypt and the Sudan.⁸⁵ Thus; it is the legacy of the colonial era and affirmed the British approach to the water of the Nile. The two states acted as if the Nile starts in the Sudan and ends in Egypt and left, contrary to common sense, no room for the other riparian states. This manifests an entrenched quest to have full control of the water.

⁸² *ibid*

⁸³ *ibid*

⁸⁴ *ibid*

⁸⁵ *ibid*

3.1.6 The 1993 Framework for General Cooperation between Egypt and Ethiopia

This was signed on 1 July 1993, in Cairo, between Egypt and Ethiopia.⁸⁶ It was the first bilateral framework for cooperation signed between Egypt and Ethiopia regarding the Nile issues, after the colonial period.⁸⁷ It stipulated that future negotiations between Ethiopia and Egypt, with respect to the utilisation of the water of the Nile, would be based on the rules and principles of international law. The Framework was only indicative of the base of future negotiations and failed to provide detailed rules.

The ‘no harm’ rule principle was mentioned in it and for this reason, some Ethiopians criticised it as favouring Egypt and compromising Ethiopia’s sovereignty over the Nile.⁸⁸ Even if the ‘no harm’ principle was part of the agreement, this did not mean that it was the only principle on which water division would be based, since the rules and principles of international law are referred to as the guideline for negotiations in the document itself. Apart from the ‘no harm’ principle, other relevant principles in international law could then be employed. Hence, the assertion that the framework favours Egypt, for it makes reference to the no harm rule, is exaggerated. Even the basis of what it contains in general is not so strong. It merely represents the first attempt by the two states to come together, and does not have a binding effect. It is no more than the heralding of a new era of improved relations between the two states with regard to the water of the Nile.⁸⁹

⁸⁶ op cit

⁸⁷ ibid

⁸⁸ op cit

⁸⁹ ibid

All of the agreements made in regard to the water of the Nile are of limited scope in their application. None of them managed to involve more than three states and are concluded mainly to secure and safeguard the interest of the two lower riparian states. They are, therefore, bilateral in nature and devoid of legal application to the other riparian states. The fact that the treaties are bilateral means that they cannot legitimately be perceived to regulate all of the Nile waters and all the basin states. They approached the problems in the basin in a splintered manner.

Thus, they have become an obstacle for cooperation. This is because, they undermine, owing to their bilateral nature, the emergence of basin-wide shared understanding and the evolution of a communal identity between the riparian states, as basin states and thus did not provide opportunities for basin-wide interaction and trust-building. The 1959 Agreement managed to institutionalise collaboration between the Sudan and Egypt, with the setting up of the Egypt-Sudan Permanent Joint Technical Commission on the Nile.⁹⁰ This cooperative scheme has been, and is, effective only between the two countries. It does not symbolise an all-inclusive scheme embracing all riparian states.

Firstly there were treaties concluded between the United Kingdom and the powers that controlled the upper reaches of the Nile at the beginning of 1900. Secondly there were informal arrangements consisting of proposals and principles recommended by the various commissions constituted to draw up development plans for the exploitation of the

⁹⁰ op cit.

Nile waters. Thirdly there is the 1929 Agreement between Egypt and Sudan governing the utilization of the Nile waters.⁹¹

On 15th April 1891, Italy and the United Kingdom signed a protocol for the demarcation of their respective spheres of influence in Eastern Africa.⁹² Article 3 of this Protocol sought to protect the Egyptian interests in the Nile waters contributed by the Atbara River. The Article provided “the Government of Italy undertakes not to construct on the Atbara any irrigation or other works which might easily modify its flow into the Nile.”⁹³

On 15th May 1902, Ethiopia and the United Kingdom (UK acting for Egypt and Anglo Egyptian Sudan) signed a treaty regarding the frontiers between, Anglo Egyptian Sudan, Ethiopia and British Eritrea.⁹⁴ Article 3 of the treaty provided “His majesty the Emperor Menelik II, King of Kings of Ethiopia engages himself towards the Government of his Britanic Majesty not to construct or allow to be constructed any works across the Blue Nile, lake Tsana or Sobat which would arrest the flow of their waters into the Nile except in agreement with his Britanic Majesty’s Government.”⁹⁵

On 9th May 1906, United Kingdom and the independent state of Congo concluded a treaty to re-define their respective spheres of influence. Article 3 of the treaty provided; “The Government of the independent state of Congo undertakes not to construct, or allow to be constructed, any work on or near Semliki or Isango River which would diminish the

⁹¹ Op cit

⁹² Op cit

⁹³ Op cit

⁹⁴ Op cit

⁹⁵ Op cit

volume of water entering Lake Albert, except in agreement with the Sudanese government". The rudiments of the international legal regime resulted from the foregoing agreements.⁹⁶ In 1929 Britain and Egypt concluded the so called 1929 Agreement. This was done by exchange of Notes and it incorporated the report that had been done by the 1925 commission.⁹⁷

The most important provision of this agreement provided that no works or other measures likely to reduce the amount of water reaching Egypt were to be constructed or taken in Sudan or in territories under British Administration without Prior Egyptian consent. It further granted Egypt the right to construct water works and take other measures in Sudanese and East African territories.⁹⁸

In 1932, a supplementary agreement was signed between Egypt and Sudan, which provided inter alia for the construction and maintenance by Egypt of a storage reservoir three miles upstream from Khartoum on the Blue Nile. This reservoir was constructed by Egypt for its own use.⁹⁹

In 1952, Egypt and the United Kingdom signed an agreement called the Owen falls agreement.¹⁰⁰ This agreement concerned the construction of the Owen falls Dam in Uganda then under British Colonial administration. The agreement provided for the safeguarding of local interest and for the payments of appropriate compensation by Egypt

⁹⁶ Op cit

⁹⁷ Op cit

⁹⁸ ibid

⁹⁹ Op cit

¹⁰⁰ Op cit

wherever the projects were undertaken mainly for Egypt's benefit. Again in 1952 another agreement was reached between Sudan and Egypt, which provided for the raising of the sennar reservoir by one metre for assistance to be provided by the Sudan for the construction of the Fourth Cataract Dam.¹⁰¹ It is observable that the development of the legal regime of the Nile in the colonial era was conditioned by two factors namely; the collaboration between Egypt and Great Britain and the dependent status of the regions subjected to this region by agreements concluded on their behalf by the administering power. Finally in 1959 Egypt and Sudan signed an agreement on the utilization of the Nile waters and followed it with a protocol establishing a joint technical committee in 1960.¹⁰²

3.2 Interpretations of the Treaties

If the Nile Waters Treaties are valid and binding, they legitimise the legal order of the colonial period that gave Egypt preeminence in the control of the Nile and developments in the basin. This would be a severe constraint on the development efforts and opportunities of upper riparian states. But if the Nile Waters treaties are not binding, then the control and utilisation of Nile waters are regulated by the principles of customary international water law.¹⁰³

It would also mean that the Nile is in search of a new legal regime in the form of a basin-wide agreement. This would provide plenty of room for negotiation and bargaining as amongst the riparian states. It could help develop a utilization regime that is more

¹⁰¹ Op cit

¹⁰² Op cit

¹⁰³ Op cit

sustainable and equitable. Putting the agreements into perspective, there are the pre World War 1 agreements. These as shown above were between United Kingdom, Eastern African colonies and Italy. It can be properly assumed that the agreement by dint of state succession expired at the end of the Italian and British Colonial Era in the region. As a matter of general principle a new state, *ex-hypothesi* a non-party, cannot be bound by a treaty, and in addition other parties to a treaty are not bound to accept a new party, as it were, by operation of law.¹⁰⁴

The rule of non-transmissibility applies both to secession of newly independent states (that is, to cases of decolonisation) and to other appearances of new states by the union or dissolution of states.¹⁰⁵ Regarding the 1902 Addis Ababa treaty, Ethiopia has questioned the validity or binding force of the agreement for the following reasons.

- (i) The agreements have never been ratified. Customary rights which might appear from the behaviours between the lower riparians and Ethiopia would not be binding on Ethiopia if contract positivistic interpretation is adopted.
- (ii) Ethiopia's "natural rights" in a certain share of the waters in its own territory are undeniable and unquestionable. None of the treaties has mentioned Ethiopia "natural rights" particularly as considered under the Charter of Economic Rights and Duties of states. This fact alone is sufficient to invalidate the binding force of these agreements which have

¹⁰⁴ Vienna Convention on Succession of States in respect of Treaties 1978

¹⁰⁵ *ibid*

no counterpart in favour of Ethiopia. The maxim of reciprocity in conclusion of International Agreement i.e. it is a prerequisite to any validity of an agreement.¹⁰⁶ Under Municipal Law it is referred to as consideration.

- (iii) In 1935, the United Kingdom recognized the annexation of Ethiopian Empire by Italy, such recognition is an act which invalidated all previous agreements between the five governments.

So, what was the status vis a vis the former British Colonies? With regard to Tanzania, it did not agree to be bound by that treaty. Indeed in 1962 Tanganyika addressed identical notes to Britain, Egypt and Sudan outlining the policy of Tanganyika on the use of the waters of the Nile River. The Kenya and Uganda Governments were also copied in those notes. Tanzania further argued that since the 1929 agreement applied to colonies Under British treaty, the treaty lapsed ipso facto in relation to Tanganyika when it became independent.¹⁰⁷ In 1963, Egypt replied to Tanzania maintaining that pending further agreement the 1929 agreement remained valid and applicable.

As for Kenya, at the time of her independence, she adopted a position similar to Tanzania's. It further observed that former colonial countries had no role in the formulation and conclusion of treaties done during the colonial era. Therefore, they must not be assumed to automatically succeed to those treaties. Kenya granted a two year grace period, during which the treaty would apply on the basis of reciprocity or modified

¹⁰⁶ Op cit

¹⁰⁷ Op cit

by mutual consent. The treaty was not modified or negotiated within two years. After the lapse of the two years that treaty became obsolete.¹⁰⁸

There are several theories on interpretation of treaties.¹⁰⁹ Lumumba attempts to apply the various theories of construction and interpretation of treaties. Although he has not dealt with the question of State Succession to treaties, he nonetheless distinguishes the various applicable theories. A conclusion that is in consonance with this study is the observation that “the treaty must be interpreted in order to further stability in the region. A case must therefore be made for more effective riparian cohesion. The Nile hydro-politics have to be affirmatively interpreted in favour of increased regional stability”.¹¹⁰

3.3 Challenges

Several critical questions arise which throws a major challenge to the political managers of the Nile riparian states. For instance, can a strong case be made for more effective riparian dialogue?¹¹¹ This rhetorical question clearly indicates that the present Nile Basin Initiative is not good enough. He further throws another challenge thus, can the 1929 treaty as amended in 1959 be interpreted in order to further stability in the region? It would seem no in the answer to this question. In the February of 2004 Tanzania launched a project worth USD 27.6 million to draw water from lake Victoria to supply

¹⁰⁸ Op cit

¹⁰⁹ Op cit

¹¹⁰ Op cit

¹¹¹ Op cit

the Kahama area in Shinyanga region.¹¹² This has happened even as the Nile Basin Initiative continues to discuss the Nile problems.

Thus, the greatest dilemma and challenge under International Law is the use of a shared water course is how best to strike a balance between this inherent natural attribute of water as a hydrological unit and the conflicting interests of states to utilize its waters to serve their ever increasing demands. This dilemma is further compounded today considering the rapid growth and advancement in technology which can enable one country to appropriate all waters of a given shared river for itself.

Hydro politics has always taken front seat in the play of forces among the Nile states. There is a lot of suspicion and misunderstanding. As long as disputes over water linger unsettled, it is bound to have a spillover effect on development of amicable relations among riparian states.¹¹³

The water challenges for Africa are daunting and numerous. Africa must reduce the proportion of people without access to water by 50% by 2015 as specified in the Millennium Development Goals. As African deal with unfavourable geographical distributions like in the Nile basin, it also had to deal with other threats like climate variability, desertification and striking water bodies.

¹¹² Op cit

¹¹³ Op cit

CHAPTER FOUR

ANALYSIS OF ENVIRONMENTAL CONFLICTS EMERGING AND THEIR SOCIO-ECONOMIC SIGNIFICANCE

4.0 Manifestations of Environmental Conflicts

Water can be a catalyst for war or peace. The most pressing issue of this Millennium is the management of limited fresh waters of the world. The natural availability of water has decreased as a result of many factors. Suddenly regions are experiencing water scarcity, many for the first time. Water scarcity can lead to disputes between states and can result to violent conflicts.¹¹⁴

Water scarcity is the key manifestation of water related tensions among riparian states. Water “scarcity” is a situation where there is insufficient water to satisfy normal requirements. Water scarcity whatever its dimension, makes societies feel vulnerable hence the need for greater water security among the Nile riparian states.

What makes the Nile river basin unique and challenging is the almost total absence of any meaningful co-operation and comprehensive agreement among the ten riparian states. The greatest and significant manifestation of tension and conflict has to do with the activities of the lower riparian states, namely Egypt and Sudan. Egypt and Sudan seem determined to appropriate the entire flow of the Nile to the exclusion of the other riparian partners. Both history and nature have colluded to led credence to the deep-seated desire, sustained by the myth that “Egypt is the gift of the Nile” to assert monopolistic claim over the course of the Nile river, historically,, the reasons for such unfair status quo is

¹¹⁴ Op cit

attributable to British Colonialism which has had deep interest in the control of the Nile

.¹¹⁵

The upper riparian countries have at one time or the other been embroiled in armed conflicts and general instability with exception of Kenya and Tanzania. They were thus unable to give full attention to the development of clear water resources policies. As such, in the absence of formidable challenges, Egypt carried out a series of major water projects that had the consequence of not only appropriating large portions of the Nile waters, but also bringing the flow within its jurisdiction.¹¹⁶

Egypt has always controlled the vast Nile water course beginning as early as 1900. Since 1962, specifically, the administration of the Nile control has been in the hands of the Ministry of Irrigation of Egypt. The legal basis for the presence of Egyptian control in Uganda for instance is founded in the Agreement for the construction of the Owen falls dam.¹¹⁷ The agreement provides for the presence of a resident Egyptian Engineer at the Owen falls at all times together with his assistants.

Egypt and Sudan have continued to act as if the Nile starts and ends in Egypt. They have refused to heed the call by other riparian states for the equitable utilization of the Nile waters. Egypt and Sudan have found it in their common strategic interest to forge

¹¹⁵Op cit

¹¹⁶Op cit

¹¹⁷Op cit

common positions and challenge any move by upstream countries to utilize water from the Nile .¹¹⁸

With the aim of consolidating absolute control over the Nile, Egypt proceeded with construction of the Aswan High Dam in its own territory by rejecting other less controversial projects like the century scheme.¹¹⁹ The century scheme was a plan which aimed at building series of dams along the entire course of the Nile to regulate and optimize the use of the river among all the riparian states.

All the proposals under the century scheme were abandoned by Egypt in favour of construction of the Aswan High Dam which would provide Egypt with adequate supply of water and complete control over the whole Nile. The principal objective of the High Aswan Dam was to secure a source of water within Egyptian territory and creating a strong bargaining position in future hydro politics with neighbours.

The Egyptian policy towards the use of the Nile waters maybe summed up as a “water security policy”. It is a policy which among other things intends to block all venues to issues that are related to water redistribution. This policy also considers all the pre-existing agreements on the utilization of the Nile waters as sacrosanct and non-amendable. The Egyptians have so far tried to safeguard their water policy by making continuous threats of war. Indeed president Anwar Sadat was quoted in 1979 as saying that “the only matter that could take Egypt to war again is water”. In the same breath, the

¹¹⁸ Op cit

¹¹⁹ Op cit

then Egyptian Minister for Foreign affairs (later to become United Nations Secretary General) stated in 1986 “the next war in our region will be over waters of the Nile, not politics”.

The Egyptians consider the Sudan as their key ally to their appropriation of the Nile waters. Ethiopia has all along aired its grievances for being systematically excluded from all Nile related treaties. It has on many occasions reiterated its natural right to use the portion of the Blue Nile that flows in its territories. It has a very serious justification for such a claim. Its population, recurrent drought and the crippling dependence on rain-fed agriculture, the need for using the Nile waters is more pressing than ever before. Indeed, it has been observed that the growth in the demand for food is probably the single most important cause of pressure on water resources. The need to utilize the Nile waters by Ethiopia for irrigation cannot be over emphasized. This is particularly so given that over the last generation; most of the increment in food supply has been obtained by an expansion in irrigated farming.

The Nile status quo is such that Ethiopia whose name has almost become synonymous with drought and famine is condemned to just standing by while Sudan and Egypt utilizes the entire water flow. The two countries continue to introduce new mega-irrigation projects at will. Whenever, upper riparian countries elect to resort to unilateralism in utilizing the Nile waters, Egypt cries foul.

At the East African legislative assembly, a Ugandan Member of Parliament questioned the usefulness of the Owen falls agreement. According to Honourable Yuna Kanyomoze, Egypt continued to use more water than agreed. Further he observed that Egypt also refused to participate in the conservation of Lake Victoria. He further stated that, “*what bothers me is that when Uganda developed a scheme to divert the Nile to Karamoja, the plan was opposed by Egypt, yet for them they can do anything with the Nile waters*”.¹²⁰

In Kenya, the then Minister for Energy Honourable Raila Odinga; accused Egypt of planning to ‘export’ the water to Sinai via a tunnel.¹²¹ In an earlier edition of the Daily Nation, Honourable Odinga had been quoted as saying of the Nile treaties “*why should we be denied the use of our water in the name of conserving it for others downstream.*”¹²²

The pronouncements by politicians did not relent and in March 2004, the Kenyan Minister for water then Martha Karua, was quoted as saying, ‘*the held belief that Egypt stopped us from or any of the ten riparian countries from utilizing the Nile waters is totally erroneous and misleading*’.¹²³

For whatever reasons, all the TEN countries have not been in a position to utilize the Nile waters equally. Egypt has been the most aggressive user next in line is, Sudan and to a very limited extent Uganda.

¹²⁰ Daily Nation 28/3/2002

¹²¹ ibid

¹²² ibid

¹²³ ibid

The Egyptian Ambassador to Ethiopia Marawen Bad was quoted as stating that *'the concern with the Nile waters by Egypt is not just a national security issue but rather a national survival obsession'*.¹²⁴ These have not been the only open threats of force but there have been other instances of conflict-laden statements issued by Egyptian leaders. In 1991, Cairo warned that it, was ready to use force to protect its access to the waters of the Nile in case Ethiopia and the Sudan plan to build dams on the Nile.

The Ethiopian Foreign Minister Seyoum Mesfin considered Egypt's continuous threats as an

*'...irresponsible instance of jingoism that will not get us anywhere near the solution of the problem...there is no earthly force that can stop Ethiopia from benefiting from the Nile.'*¹²⁵

The share of Ethiopia in terms of the Nile's drainage area, length and above all, mean discharge, warrant the relative importance of all the three rivers that originate in Ethiopia. The paradox lies in the fact that; although Ethiopia provides 85% of the Nile waters, it has systematically been excluded from any of the existing treaties while not allowing it to optimally utilize the portions of the Nile water that flow within its territory. As seen above, the various pronouncements by politicians and leaders of various countries among the Nile riparian states, although not openly acknowledged, points to tensions that would not augur well with development of the states in all aspects of development.¹²⁶

¹²⁴ ibid

¹²⁵ ibid

¹²⁶ Op cit

4.1 Socio-Economic Significance of the Tensions to Regional Trade

Disputes over allocation of natural resources have lent themselves, at least in the view of competing governments to military solutions. But this is not always the solution. Water disputes are still characterized by competing demand. Countries are today more aware than ever before that water is not only a social and environmental good but an economic good as well. Economic efficiency, i.e. the ability to produce the same or more goods with fewer resources – is a key policy in most countries, one that is directed at water conservation.¹²⁷

The sharing of international waters and collaborative programmes between riparian states to develop them is of great importance not only along the Nile basin but throughout the world. The uses of the water of international rivers like the Nile is governed by the Helsinki rules that embraces the concept of a drainage basin as an economic and geographic spatial unit in which water resources are treated as common property of all basin states.¹²⁸ As such, each state is entitled within its territory to a reasonable and equitable share of the water and it's obliged not to develop projects that would cause appreciable harm to another riparian state.

When water is a major factor of production in the economy; such as in agriculture, then its role in the livelihoods of a majority is critical. The significance of such water in terms of international relations makes water scarcity an easy focus for national and communal anxiety. In this region, water is insufficient to much regional food production needs.

¹²⁷ Op cit

¹²⁸ Op cit

Such a resource deficit can be politically stressful if it is detected by users through an evident reduction in availability.

Despite the extra-ordinary natural endowments and rich cultural history of the Nile basin, people still face considerable challenges. Today the basin is characterized by poverty, instability, rapid population growth and environmental degradations. Four of the Nile riparian countries are among the world's ten poorest Nations. The Nile holds significant opportunities for win-win development that could enhance food production, energy development, environment conservation and other related development activities in the region.¹²⁹

The threat of water scarcity and subsequent tensions exemplify the relationship between environmental and political interests. Change in water usage or development of water resources poses a challenge to the present status quo. The present status quo (with Sudan and Egypt as major beneficiaries) threatens to alter the quality of life of the Nations involved and restricts policy options.

Thus state security involves the ability of states and societies to maintain their independent identities as well as their physical and functional integrity. The impacts of resource scarcity, specifically water, carry many political implications in local state, regional and international spheres. In all water conflicts there exists an asymmetrical

¹²⁹ Op cit

situation whereby, the upper riparian, through means of hydrological situation can control the quantity and quality of water flow.¹³⁰

Social inequalities in water distribution, use and development create a great problem in establishing co-operation and avoiding local state, regional and international tensions and conflict. Thus considering the principal forces that conspire to create scarcity and its potential to incite conflict or dispute it appears that unequal distribution often plays the most important role.

Adverse consequences of water development and use complicate social concerns, which include contamination of downstream water supplies, dislocation of people because of dam construction. Land degradation combined with a growing pressure on water resources becomes a key category of environmentally induced conflicts. Environmental scarcity generates intermediate social effects like poverty and migration that are interpreted as conflicts immediate cause. The intermediate social effects including constrained economic productivity, population movements, and social segmentation and weakening of states can cause ethnic conflicts insurgencies and coup d'états.

The danger of actual violence over water issue is most likely to occur when there is a sudden change in the situation in regard to water e.g. when a new dam results in the displacement of whole communities. There is also increased danger of conflict when institutions are not in place or are too weak to successfully negotiate water issues. Today politicians and leaders make pronouncements that water shortages may cause conflict.

¹³⁰ Op cit

However such inflammatory rhetoric that wars over water are inevitable often results in missed opportunities for using water resource issues to promote co-operation between peoples and nations. The abundance or scarcity of resources decides the direction a society will take in development.¹³¹

At the Intra Africa trade level all the Nile riparian states with the exception of Tanzania belong to the Common Market for Eastern and Southern Africa [COMESA].¹³² COMESA is a preferential trading area with twenty member states stretching from Libya to Zimbabwe. Tanzania moved out of the trading block in September 2000. Granted the various pronouncements by Leaders and Politicians among the Nile riparian states, some made as recently as the year 2004 a critical concern emerges. If the latent tensions on the utilization of the Nile waters are not properly handled the disquiet and disenchantment among majority riparian states particularly the upper riparians may creep into other areas.

When the Treaty establishing COMESA was signed in 1993, its main focus was stated as the formation of “a large economic and trading unit that is capable of overcoming some of the trade barriers that are faced by individual states.”¹³³ Indeed the COMESA Treaty binds together the free independent states, which have agreed to co-operate in exploiting their natural and human resource for the common good of all their peoples. Therefore, on the one hand it can be argued, under COMESA, all the Nile riparian states recognize and acknowledge that peace, security and stability are basic factors in providing investment, development, trade and regional economic integration. Success or failure of a regional

¹³¹ Op cit

¹³² Op cit

¹³³ ibid

integration initiative should be evaluated in the context of the objectives it sets to achieve, and the political, economic and institutional context under which it operates.

In the case of regional integration in Africa, all regional groupings—including COMESA, set out to eventually form a common market area among member countries. Experience has shown that civil strife, political instability and cross border disputes in the region can seriously affect the ability of the countries to develop their individual economies as well as their capacity to participate and take full advantage of required integration arrangement under COMESA. This suggests that more often than not, governments failed to implement the COMESA treaty objectives like the elimination of all trade barriers.¹³⁴ Within COMESA, successive rounds of multilateral trade negotiations have led to a decrease in the use of tariffs as barriers to trade. However the reduction in tariffs does not mean an elimination of all barriers. There are usually non-tariff barriers. The term non-tariff barrier is mostly used to indicate policy interventions which affect and distort the trade in goods and services. By allowing water use tensions and disputes to simmer, the state members' within the Nile basin community are bound to entrench a structural non-tariff trade barrier. For instance, by virtual of using the Nile waters, Egypt's agricultural production both for domestic and export is high. Indeed Egypt exports many agricultural commodities to the East African states. It may therefore be argued that by insisting that the East African states should not abstract the Nile waters for irrigation is to render those countries dependent on it for the agricultural produce that

¹³⁴ Op cit

it exports to them. As such, the evident mistrust and suspicion between the Nile co-riparians necessarily acts as a barrier to the achievement of the COMESA goals.¹³⁵

It cannot be gainsaid that if there are unaddressed issues regarding use of the Nile waters, then meaningful trading under COMESA may not be effectively and productively pursued. Indeed, an economic integration scheme where countries are at different levels of economic development coupled with disproportionate use of a natural resource like the Nile, the commitment to implement agreed upon treaty could be adversely affected. In the Nile basin, an accident of history and geographic circumstances has complicated the relationship between upper and lower riparian. This has further been exacerbated by utterances by leaders. Given that Egypt and Sudan have always taken a common stand regarding Nile water use, it is suggested that the East African Community, comprising of five riparian states, should take a common position as well. Indeed it may be desirable that the East Africa region be transformed into a Single Political Unit for purposes of the exercise of sovereignty.¹³⁶

Such a position if informed by a desire to counter the position taken by Egypt and Sudan, will only undermine the greater goals set by COMESA at large. The COMESA trading bloc provides a big market for exchange of goods and services. The aims of COMESA have been designed so as to remove the structural and institutional weaknesses in

¹³⁵ *ibid*

¹³⁶ *Op cit*

member states. Its agenda is to deepen and broaden the integration process among member states through adoption of comprehensive trade liberation measures.¹³⁷

Clearly therefore, it is vitally important the leaders in the Nile basin be proactive in seeking real and lasting solutions to utilization of the Nile waters. It is commendable that leaders have set up the Nile Basin Initiative (NBI) as an attempt to address these thorny issues.¹³⁸ However it is sad that the political leaders are still heard making inflammatory remarks regarding the Nile Waters and its sharing. A serious commitment and fidelity to any Initiative that will lead to understanding and consensus in water use is of paramount importance.

To derive maximum benefits, avoid wastage and save water, it is absolutely essential that states sharing the Nile forge closer co-operation to optimize this finite commodity. Actually it is in their very own interest (states) to conserve and develop the shared waters through consultation and co-operation.

4.2 Summary and Conclusions

The Helsinki rules which are, widely adopted as a basis for International negotiations and collaborations on River basin development embrace the concept of a common drainage as common property. These rules rest on the principle that each basin state is entitled, within its territory to a reasonable and equitable share of the beneficial use of the waters of the basin. Among the relevant factors to be considered in measuring an “equitable share” are

¹³⁷ Op cit

¹³⁸ Op cit

geography, hydrology and climate of the basin in each concerned state, past and existing water users, social needs of each basin state and the degree to which the needs of a basin state and the degree to which the needs of a basin state may be satisfied without causing substantial injury to another state in the basin. Reasonable and equitable water resource decision making is at the core of good governance where is emphasis is more on cooperation than conflicts.

Achieving efficient and equitable water allocation among the Nile riparians will require an understanding of basin riparian uses and other climatic conditions. At the heart of the Nile basin water uses disputes are the existing agreements with respect to the water of the Nile. These bilateral treaties, have established different "categories" among the Nile states, which applies to those states that had concluded agreements, and those that remained excluded. As a result, the treaties have permitted the adoption of legal rhetoric that is entirely self-serving, fostering competition rather than cooperation.

Generally, the treaties have not addressed the water problems in the basin and are ill-suited to promote future good relations among the basin states, given the strategic concern that impelled them in relation to the Nile, the securing of control over or access to its waters. In the absence of a comprehensive agreement, one cannot envision a cooperative system among the basin states. This could give rise to a scramble over the resources and ultimately lead to conflicts. This is likely because the riparian states disadvantaged by the agreements, have pointed out their unfairness and have called for a basis on which a fair and equitable agreement is put in place. Taking into consideration

the demands of the upper riparian states to have a share of the water, one can safely say that the treaties do not accommodate the interests of all the riparian states.

The quest, by the lower watercourse states, to maintain the status quo, on the one hand, and the need for a new water accord, called for by the upper states, on the other, have jeopardised the potential to reach a mutual agreement among the Nile riparian states. Resolving the conflicts over the Nile is possible, but only if a new agreement, which differs significantly from those already in existence, is reached. This is ascribed to the fact that the issue differs from state to state. For instance, for Ethiopia cooperation on the water of the Nile, is contingent on a decision to renegotiate the 1959 Agreement, since it allocated the whole water to Egypt and the Sudan alone.

Both the early colonial-authored agreements and the 1959 agreement favoured Egypt in particular, and, hence, Egypt wants them to remain unchallenged, but Ethiopia is not willing to recognise Egypt's claims over the water, and has consistently been airing its grievances and objection against it. The other watercourse states, namely, Uganda, Tanzania, and Kenya, consider the 1959 agreement to be a matter between the two lower riparian states only. As far as the agreements go, they were concluded between Sudan and Egypt but most importantly, even where their colonial master, Britain was involved, the other East African states were not yet in existence as they had not been granted independence. Article 16 of *Vienna Convention on Succession of States in respect of Treaties* provides;

“A newly independent State is not bound to maintain in force or to become a party to, any treaty by reason only of the fact that at the date of the

*succession of States the treaty was in force in respect of the territory to which the succession of States relates...*¹³⁹

Thus upon independence, a state cannot escape compliance with customary international Law. However, there is no consensus at International law that new states are bound by treaties entered into by its predecessor. Having been a dependent territory, the state was without sovereign autonomous control over the conduct of its foreign affairs. Upon independence, it assumes a new international identity. Under the ‘clean slate’ theory, a new state can choose to be bound by the old treaties or not.

Therefore owing largely to the bilateral nature of the Nile Agreements, and the fact of state succession after independence, the upstream states maybe of the opinion that the Treaties are not binding on them and as such have no place in the integrated development of the Nile basin . Indeed they may be deemed as posing an obstacle to coordinated regional development. Thus, among the riparian states, the agreements seriously hinder cooperation leading to the settlement of the disputes.

Cooperation over shared water resources presupposes the existence of legal framework. It cannot be sustained without a legal arrangement in place. There have been efforts made by some riparian states, to achieve cooperation on issues of management and development of the water of the Nile. The attempts to cooperate to create institutional schemes were doomed to failure, mainly because they addressed the problem on a small scale and did not also attract the confidence of all the riparian states. All the past attempts

¹³⁹ *Vienna Convention on Succession of States in respect of Treaties*

have been characterized by setbacks, until the launching of the present cooperative mechanism, the Nile Basin Initiative (NBI).¹⁴⁰

The Nile Basin initiative is an ambitious initiative to establish regional co-operation and mutually beneficial relationship among the Nile Basin countries. The initiative was founded in 1998 in Arusha Tanzania. Under the initiative the Nile countries have adopted the Nile River basin strategic action programme which sets the policy guidelines for co-operation on the Nile.¹⁴¹ The NBI creates a flicker of hope in the basin. It represents a new approach, since two of its programmes, namely, the Strategic Action Programme and the Shared Vision Programme, are based on equitable utilisation of the water of the Nile, its sustainable development, efficient water management, ensuring cooperation and joint action.⁴⁸ This constitutes a departure from the past trend of unilateral uses and management of the water, in the sense that it attracted the support of almost all the riparian states and specifically emphasised the issues of fair water allocation, joint management and development of the resource.

In the light of the prevailing disputes, and the mistrust and suspicion among the riparian states, which typify the basin, securing the participation, under the umbrella of the NBI, of all the states involved in the issues of the Nile, is a major breakthrough in the move towards cooperation.

In spite of its success in terms of bringing all the riparian states together, there are challenges ahead for the Nile Basin Initiative. One of the challenges facing the Initiative

¹⁴⁰ Op cit

¹⁴¹ *ibid.*

is the lack of a legal framework involving all the stakeholders. Egypt wants a position that maintains the status quo, and then puts forward the notion that the existing agreements are unchanging and sacrosanct. Ethiopia calls for the agreements to be scrapped and replaced by other properly negotiated agreements. The upper states cannot understand how the lower states can lay claim to a lion's share of the water to an extent that they, the upper states, cannot freely abstract the Nile water basin waters without permission from the lower states.

The East African States have in particular been unhappy with the situation and this has lately been manifested by utterances from political leaders in the region. Thus, the fate of the existing agreements poses a threat to the full realization and implementation of the objectives of the NBI. The formation of NBI however does not; signify an assurance by the lower riparian states of their intention to disregard the existing agreements. This is because firstly, according to Egypt, it is extremely difficult, if not impossible, for it to make concessions which would have an impact on the amount of water allocated to it, in order to allocate more water resources to the other riparian states. This it contends is because it proposes to meet its future food requirements through desert reclamations, which will require an increased use of water. Secondly, Egyptian's favour wide-ranging regional schemes, that downplay the importance of water sharing and want to put in place integrated development projects on such issues as environmental concerns, tourism, etc,

Clearly, the destiny of the NBI largely rests on the rescinding of the 1959 Agreement. Yet, unless the riparian states agree to set up a legal framework on how to deal with the

uses of water they share, it is difficult, if not impossible, to resolve conflicts over water, and strike a balance between issues of sovereignty related to water and the need of all the concerned riparian states for water. The conclusion of bilateral and multilateral treaties, depending on the number of the riparian states involved, has always been instrumental in reducing disputes among riparian states and in enhancing cooperation. Cooperation over shared water resources is unlikely to be put in place and maintained without a legal framework in place. The African water vision has been designed to avoid the disastrous consequences of threats to development brought about by lack of sharing. The shared vision is for *“an Africa where there is an equitable and sustainable use and management of water resources for poverty alleviation, socio-economic development regional co-operation and the environment”*.

The New Partnership for Africa’s Development (NEPAD) is a vision and strategic framework for Africa’s renewal.¹⁴² Article 71 of the framework states *“Africa leaders have learned from their own experiences that peace, security democracy, good governance, human rights and sound economic management are conditions for sustainable development”*. Thus the larger African continent has as its key objectives development of the continent. Article 74 of NEPAD inter alia provide *“Efforts to build African’s capacity to manage all aspects of conflicts must focus on the means necessary to strengthen existing regional and sub-regional institutions in three key areas, inter alia: prevention, management and resolution of conflict...”*. Our view is that the Nile basin states have got just such a challenge. This challenge must be met if the greater goals of COMESA and NEPAD are to be realized. It behooves the leaders of the basin States to

¹⁴² Declaration on the implementation of the New Partnership for Africa’s development (nepad)

develop strategies for co-operation on the utilization of the Nile resource. In particular they should build on existing arrangements, and programmes of action taking into account the interest of all riparian states.

The hydro politics of water in the Nile that tends to see a “Zero Sums” game where one player’s gain is seen as the other’s loss is incompatible with the hydrological character of water. Continued lack of co-operation in its utilization exacerbates tension. Thus interdependency between the riparian states dictates against the taking of unilateral actions affecting the natural basin. Customary international Law has in the past developed rules with regard to equal use of the waters of international rivers. The *Permanent court of International Justice* in the *Oder case* observed that;

‘...the community of interests in a navigable river becomes the basis of a common legal right, the essential features of which are the perfect equality of all riparian states in the use of the whole course of the river and the exclusion of any preferential privilege of any riparian state in relation to others...’¹⁴³

Again the International court of Justice (ICJ) in the *Gabcikovo-Nagymaros project* case citing the, Convention on the Law of the non-navigable uses of international watercourses said; *‘...watercourse states shall participate in the use, development and protection of international watercourse in an equitable and reasonable manner. Such participation includes both the right to utilize the watercourse and a duty to cooperate in the protection and development thereof....’¹⁴⁴*

¹⁴³ Case Relating to the Territorial Jurisdiction of the International Commission of the River Oder (Series A No 23 -Series C No 17-11)

¹⁴⁴ Convention on the Law of the non-navigable uses of international watercourses

In 1992, the convention on the protection and use of Transboundary watercourse and international lakes was adopted in Helsinki within the framework of United Nations economic commission for Europe. The convention calls for parties to establish monitoring programmes, to cooperate in research and development projects and to exchange relevant information as early as possible.

Reaching an amicable solution in negotiations over an international river may prove frustrating and at times insurmountable if left only to the concerned parties. However the participation of third parties may play a significant role. For instance, the role of the World Bank in inducing the 1960 Indus water Treaty between India and Pakistan is to be emulated.¹⁴⁵ In the action plan, the states have a shared vision on the uses of the Nile waters. The principle objective of the vision is *“to achieve sustainable socio-economic development through equitable utilization of and benefit from the common Nile Basin Water resources”*.¹⁴⁶

However, the greatest threats to the success of the initiative are the media pronouncements by political leaders. Most of the pronouncements highlighted above, were made after the Nile Basin initiative was formed. Leaders must give the nascent initiative an opportunity to work without making political remarks that only goes to undermine the Initiative.

For instance the unilateral decision by Tanzania to appropriate Lake Victoria waters in February 2004 clearly goes against any anticipated success of the initiative. Forums like the Nile Basin Initiative should be supported because they inspire hope that a solution can

¹⁴⁵ Op cit

¹⁴⁶ ibid

be achieved. There is a major need to maintain the integrity of the river system itself in the face of rapidly rising demand, while at the same time demonstrate how the river can be utilized more productively and equitably.

If the NBI is to work it also needs to be able to demonstrate early success. This will also help in the spill-over effect on a range of development issues, including increasing the social and economic stability that is essential to helping to achieve political stability in conflict-prone regions. Although such initiatives as the NBI can help, the degree to which this will happen will really depend on the political goodwill that the leaders of the Nile Riparian states are willing to invest in the process. It is therefore necessary to make economic and political decisions compatible with social objectives that have efficiency and equity considerations. While economic efficiency is concerned with the amount of wealth that can be generated by a given resource base; equity deals with the distribution of the total wealth among the sectors and individuals of society.

BIBLIOGRAPHY

- Abdalla K. M, 2006 ‘The Institutional and legal Arrangements in the Nile River Basin: Suggestions to Improve the Current Situation toward Adaptive Integrated Water Resources Management’ www.iahs.info
- Andre N, 1993 The legal regime for transboundary water pollution: Between discretion and constraint, *International Environmental Law & Policy series*, Martinus Nijhoff
- Beato A. M, 1994 Newly Independent and Separating States Succession to Treaties: Considerations on the Hybrid Dependency of the Republics of the Former Soviet Union. *American University International Law Review* 9, No. 2 pp 525-558)
- Borlin M, 1971 Econometric Model for River Basin Planning, Organization for Economic Co-operation and Development (OECD)
- Burleson E, 2006 “Middle Eastern and North African Hydropolitics- From Eddies of Indecision to Emerging International Law” *the Georgetown int’l Envtl. Law Review* [Vol. 18]
- Burleson E, 2008 Water Is Security *Environmental Law. & Policy*
- Cascao A. E. et al, 2010 “Power, Hegemony and Critical Hydropolitics” <http://www.uea.ac.uk>
- Dasgupta A.K, 1981 “The Applicability of cost- Benefit Analysis to Integrated River Basin Development” – Delhi, Institute of Economic Growth, (<http://www.ponline.org>)
- Declaration on The Implementation of The New Partnership for Africa’s Development (NEPAD) <http://www.africa-union.org>
- Dinar Ariel, et al, 1997“Water Allocation mechanisms Principles and Examples” World Bank, Agriculture and Natural Resources Department (elibrary.worldbank.org)
- Eckstein Gabriel et al, 2003 “A hydro-geological approach to transboundary ground water resources and international law” *American University International Law Review Volume 19 | Issue 2* pg 201-258
- Garbutt J, 1995 *Environmental Law A Practical Handbook*, Chancery Law Publishing Limited, 2nd Edition
- Godana B, 1985 *Africa’s shared Water Resources – Legal and Institutional Aspects Nile, Niger and Senegal Rivers*. Frances Pinter (Publishers) London

- Groom A.J.R, 1990 “Paradigms in Conflict: the strategist the conflict Researcher and peace researcher” *Conflict Readings in Management and Resolution*, J. Burton Ed, Macmillan pp71-98
- “Helsinki Rules on uses of waters of International Rivers” 1966 Adopted by the International Law Association at the 52nd Conference held at Helsinki in August.
- “Charter of Economic Rights and Duties of State” 1974 Adopted by the United Nations General Assembly
- Kameri-Mbote P, 2007 “Water, Conflict, and Cooperation: Lessons from the Nile River Basin” (www.wilsoncenter.org)
- Kirmani S. S. et al, 1994 “International Inland Waters- Concepts for a More Active World Bank Role” WorldBank Technical Paper 239
- Le`vite Herve`,et al, 2003 “Resolving water use conflicts through stakeholder participation: issues and examples from the steelport Basin South Africa” *African Water Journal*, Pilot Edition
- Lumumba PLO, 2005 ‘The interpretation of the 1929 Egypt-British Nile Waters Treaty and its legal Relevance and implications on the stability of the Region.’ *Law Society of Kenya Journal* Volm 1 No2 pp2-18
- Mark Z. et al, 2006 ‘Hydro-hegemony – a framework for analysis of trans-boundary water conflicts’ *Water Policy Journal* pp 435–460
- Mohammed A, 2004 “The Nile Question: The Accords on the Water of the Nile and Their Implications on Cooperative Schemes in the Basin” <https://biblio.ugent.be/publication>
- Mwagiru .M., 2000 *Theory; Process and Institutions of Management*, Watermark Printers,
- Mwagiru .M, 2004 *Diplomacy – Documents, Methods & Practice*, IDIS Publications on International Studies
- Nicol A, 2003 “The Nile: moving beyond cooperation” Water Policy Programme, ODI(webworld.unesco.org/water/wwap/pccp/pubs/)
- Okidi.C.O, 1980 “Legal and Policy Regime of Lake Victoria and Nile Basins”. *Indian Journal of International Law* Volm 20, pp 395-447
- Owiro A.O, 2004 ‘The Nile Treaty’- State Succession and International Treaty Commitment: A case study of the Nile Water Treaties’ *Law & Policy Research Foundation* pp2-43

- Richardson C, 2011 “Relative Deprivation Theory in Terrorism: A Study of Higher Education and Unemployment as Predictors of Terrorism Politics”,<http://politics.as.nyu.edu>
- Salem A.A, 2010 ‘The Myth and Reality of the North-Sub Saharan Split in the Nile Basin: Empirical Evidence and Theoretical Explanations’ www.zu.ac.ae
- Schroeder-Wildberg E, 2002 ‘The 1997 International Watercourses Convention – Background and Negotiations’ www.internationalwaterlaw.org pp5-30
- Shaw, M. N., 2008 *International Law*, (Cambridge: Cambridge University Press,)
- Sylvia Schweitzer, 2008 “What determines violent conflicts over natural resources? Evidence from land conflicts in South Africa and Zimbabwe” (www.sarpn.org/documents/.../)
- ‘Summaries of Judgments, Advisory opinions and orders of the Permanent Court of international Justice’ 2012 United Nations New York, United Nations Publication (untreaty.un.org/cod/PCIJ)
- Tesfaye Tafesse, 2008 ‘an appraisal of transboundary water dispute resolution in the Nile basin’ <http://www.inweb.gr>
- ‘The common market for eastern and southern Africa (Comesa) Treaty’; United Nations Treaty Series Annex A, Volume 2005; Volume 2319
- Convention on the Law of the Non-navigational Uses of International Watercourses 1997 <http://untreaty.un.org>
- ‘United Nations Millennium Declaration,’ 2000 Resolution adopted by the General Assembly of the United Nation
- Vayrynen R.M et al, 1991 “International conflict and Environmental Degradation” in R. Varyene (ed) *New Directions in conflict Theory: Conflict Resolution and Conflict Transformation* (London sage)
- ‘Vienna Convention on Succession of States in respect of Treaties’ 1978 United Nations, Treaty Series, vol.,
- Wallerstein .I, 1976 *The Modern World-System: Capitalist Agriculture and the Origins of the European World-Economy in the Sixteenth Century*. New York: Academic Press.
- Waterbury J.J, 1982 ‘Riverains and Lacustrines – Towards Co-operation in the Nile Basin’. <http://www.princeton.edu>