

UNIVERSITY OF NAIROBI
INSTITUTE OF DIPLOMACY AND INTERNATIONAL STUDIES

**CHALLENGES AND OPPORTUNITIES IN NEGOTIATING TRANS-BOUNDARY
WATER MANAGEMENT AGREEMENTS IN THE POST-COLONIAL AFRICA: A
CASE STUDY OF THE NILE BASIN**

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OCTOBER, 2013

DECLARATION

This thesis is my original work and has not been submitted for the award of a degree of any other university.

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DEDICATION

This study is dedicated to my late father, Mr. Habil Menya and my mother Mrs. Clarice Menya who believed that through hard work nothing is unattainable and supported me throughout. My brothers George, the late Charles and Dennis, and my sisters Alice and Jane your prayers and love is immeasurable. To my loving wife Christine and dear son Bevan, I appreciate your immense support and understanding during the course of this work which a lot of times took me away from you.

I thank the Almighty God for each of you and ask for his abundant blessings upon all of you.

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May the Almighty God bless you with abundant love and care.

ABSTRACT

This study examined the opportunities and challenges in negotiating trans-boundary water agreements in Africa since the end of the colonialism, with emphasis being on the Nile basin. It analysed the topic under the two themes, namely; global trans-boundary water agreements and opportunities and challenges in negotiating the Nile river treaty. The study relied on two main sources of information to collect data, namely the primary sources pursued through interviewed schedules and published secondary sources.

The secondary sources were very important in enriching and putting into context the data obtained from the primary sources, including diplomatic missions in Nairobi, non-governmental organisations, inter-governmental organisations such as the Nile Basin Initiative head office in Entebbe, Uganda, all which were useful in understanding the opportunities and challenges in negotiating trans-boundary water agreements in Africa.

This study used the problem-solving approach as the theory within the systemic level of analysis. The approach was important because it calls upon the riparian countries to recognise the fact that water is not static but can become flexible and thereby end the perennial squabbles over water.

The study found that there are opportunities that accrue from cooperation in negotiating trans-boundary water agreements. However, these opportunities face serious challenges that lead to inter-state confrontations over the utilisation of the Nile river resources.

LIST OF ABBREVIATIONS

ATP	-	Applied Training Project
BATNA	-	Best Alternatives to a Negotiated Agreement
CBSIP	-	Confidence-Building and Stakeholder Involvement Project
CCF	-	Climate Change Fund
CICOS	-	International Commission of the Congo-Oubangui-Sangha Basin
CHR	-	International Commission for the Hydrology of the Rhine Basin
CIWA	-	Cooperation in International Waters in Africa
CNR	-	Commission for the Niger River
CFA	-	Cooperative Framework Agreement
CTCA	-	Commission for Technical Cooperation in Africa
ENSAP	-	Eastern Nile Subsidiary Action Programme
EWUAP	-	Efficient Water Use for Agriculture Project
GEF – IWP	-	Global Environment Facility International Waters Programme
HYDROMMET	-	Technical Cooperation Committee for the Promotion of the Development and Environmental Protection of the Nile Basin
ICCON	-	International Consortium for Cooperation on the Nile
ICPR	-	International Commission for the Protection of the Rhine
IGO	-	Intergovernmental Organisation
IWRM	-	Integrated Water Resources Management
NBI	-	Nile Basin Initiative
NBI-TF	-	Nile Basin Initiative Trust Fund
NBTF	-	Nile Basin Trust Fund
NCORE	-	Nile Cooperation for Results
NEL	-	Nile Equatorial Lakes
NELSAP	-	Nile Equatorial Lakes Subsidiary Action Programme
NGO	-	Non-governmental Organisation
NILECOM	-	Nile Council of Ministers
NMN	-	Nile Media Network
NRBA	-	Niger River Basin Authority
NRBC	-	Nile River Basin Commission
NTEAP	-	Nile Trans-Boundary Environmental Action Project
OERS	-	<i>Organisation des États riverains du Sénégal</i>
OMVS	-	<i>Organisation pour la mise en valeur de fleuve Sénégal</i>
PCCP	-	Potential Conflict to Cooperation Potential
RPTP	-	Nile Basin Regional Power Trade Project
SAP	-	Subsidiary Action Programmes
SDBSP	-	Socio-economic Development and Benefit Sharing Project
SVP	-	Shared Vision Programme
SVP-ECP	-	SVP Execution and Coordination Project
UNDP	-	United Nations Development Programme
UNFCCC	-	United Nations Framework Convention on Climate Change
WRPMP	-	Water Resources Planning and Management Project
TECCONILE	-	Technical Cooperation Committee for the Promotion of the Development and Environmental Protection of the Nile Basin
ZRA	-	Zambezi River Authority
ZESCO	-	Zambia Electricity Supply Corporation
ZESA	-	Zimbabwe Electricity Supply Authority
ZAMCOM	-	Zambezi Watercourse Management Commission

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CHAPTER ONE: INTRODUCTION TO THE RESEARCH PROBLEM

Background to the Study

The River Nile is considered one of the most important Trans-Boundary water resources in Africa. The Nile is the world's longest river with an approximate length of about 6,700 kilometres, covering 2.9 million cubic kilometres and serving a population of approximately 300 million within its basin¹. Its significance is also seen in the catchment area it covers, that consists of eleven countries namely Burundi, Kenya, Uganda, Tanzania, Rwanda, the Democratic Republic of Congo, South Sudan, Eritrea and Ethiopia which together form the upstream states, and the downstream states of Sudan and Egypt. The River Nile is supplied of its vast water resources from two major sources: the White Nile that flows through large parts of equatorial Africa, and originates from Lake Victoria, the world's second fresh water lake with a surface area of about 68,000 square kilometres covering Kenya, Uganda and Tanzania, Lake Albert, Lake Kyoga and Lake George. The White Nile, according to Terje Oestigaard provides approximately 15 per cent of the water to the Nile and enjoys all-year round rainfall; and the Blue Nile which comprise of the 85 per cent of River Nile's waters from Ethiopian Tributaries of Abbay, Sobat and Atbara. Unlike the White Nile, however, Blue Nile suffers from seasonal fluctuations though this cannot deprive it of its huge significance to the flow of River Nile. In this context therefore, the importance of the upstream states to River Nile cannot be underestimated.²

Since 1999, the governments of the riparian states have attempted to reach an agreement on a new treaty to govern the sharing of the River Nile's vast resources, which

¹ Apondi, Teresa J.A.; *The Conflict over the Management and Use of the Nile Waters and the Influence of the 1929 and 1959 Treaties on Riparian States*; 2006, Unpublished MA Thesis University of Nairobi, Nairobi p5

² Oestigaard, Terje; *Nile Issues: Small Streams from the Nile Basin Research Programme*; 2010, Fountain Publishers, Kampala pp8-9

according to the 1929 and 1959 Treaties, gave the downstream countries immense power in accessing and using its resources. Yet after tens, or even hundreds of such meetings by water experts, only Ethiopia has ratified the new Nile treaty (Cooperative Framework Agreement) in June 2013.³ The CFA is supposed to establish a permanent Nile River Basin Commission (NRBC) with the major objectives of managing the shared resources and fostering cooperation among the riparian states⁴. However, Egypt claims historical rights to the River Nile and so is Sudan. Both countries are opposed to the Article 5 of the CFA on the ‘Obligation not to cause significant harm’⁵ which they have stated threatens their water security, defined as protection of water for all human needs.⁶ But for the upstream States – Burundi, Kenya, Uganda, Tanzania, Rwanda, the Democratic Republic of Congo and Ethiopia, the colonial treaty that guarantees Egypt unrestricted access to the Nile River resources is not only out-dated but also neo-colonial.

Statement of the Research Problem

The CFA was opened for signing on May 14, 2010 during the Nile Council of Ministers (NILECOM) meeting held in Entebbe, Uganda⁷. The Treaty was to remain open for a year for majority if not all members to sign after which, it would become binding on all the riparian states. The hope was that within the year, more than half of the members would have signed the treaty to give it a firm legal backing as an intergovernmental organisation. To date only Burundi, Kenya, Uganda, Ethiopia, Tanzania and Rwanda have signed. Of the countries

³ Tekle, Tesfa-Alem (2013); *South Sudan backs Ethiopia's Nile dam; Sudan Tribune*; June 14, 2013; <http://www.sudantribune.com/spip.php?article46960> Retrieved on August 1, 2013 at 09:43EAT

⁴ Nile Basin Initiative; *Draft Agreement on the Nile River Basin Cooperative Framework*; 2007, NBI, Kampala p12

⁵ Article 5 (1) of the CFA, which the downstream states are opposed for fear that it could deny them unfettered access to the waters provides that: ‘Nile Basin States shall, in utilising Nile River system and Nile River Basin Water Resources in their territories, take all appropriate measures to prevent the causing of significant harm to other Basin States’

⁶ Ndaruzaniye, V., et al (2013); *Future Global Water Security in a Changing Environment*; Global Water Institute, Brussels p1

⁷ People Daily; *Four Nile Basin countries sign new water treaty amid strong opposition*; May 15, 2010 - <http://www.english.peopledaily.com.cn/90001/90777/90855/6986349.html> Retrieved on March 25, 2013 at 13:34hrs EAT

that have signed the CFA, only Ethiopia has ratified the same leaving the realisation of a permanent NRBC to manage the river's resources and foster cooperation in limbo. DR Congo which has all through the negotiations sided with the upstream States has suddenly been holding back from signing the Agreement. The secession of South Sudan in 2011, which has for all intents and purposes signalled its intention to cooperate more with the upstream States, will be of interest to the researcher, especially with regard to what it means to the CFA.

The proposed NRBC was meant to take over from the Nile Basin Initiative (NBI) which exists on what can only be classified as '*gentleman's agreement*' since it lacks any firm legal backing for its existence. The inherent legal weaknesses of the NBI mean that enforceability of the various conventions becomes a problem. Furthermore, accession by South Sudan to the bloc could also be problematic since NBI has no legal instruments that a new member such as South Sudan can sign on. NRBC was meant to also cure NBI's weakness in terms of generating funds. At the moment, because of the weak legal structure of the NBI, it cannot directly negotiate for funds from development partners for lack of proper guarantees. Instead, the World Bank administers a multi-donor Nile Basin Trust Fund (NBTF) which was established in 2003 "to provide a coordinated, streamlined and cost-effective vehicle to manage donor funds through the International Consortium for Cooperation on the Nile (ICCON)."⁸

This study looked at the opportunities and challenges in negotiating Trans-Boundary Water Management Agreement in Africa, with the focus on the riparian countries that share the Nile basin resources. It will examine why the downstream states have been reluctant to agree to a new framework for the purpose of understanding the challenges of arriving at an

⁸ Sudan Tribune; *NBI: Inauguration of the Nile Basin Trust Fund Committee*; March 16, 2004 <http://www.sudantribune.com/spip.php?article2123>; Retrieved on March 25, 2013 at 17:16hrs EAT

agreeable Trans-Boundary water management framework, the options available to the upstream states, the role of the international community in Africa's Trans-Boundary water issues as well as the role of South Sudan regarding the new Nile treaty that replaces the colonial one that Egypt signed with the British. The project also considered the future of the Nile Basin Initiative (NBI), as a semi-legal intergovernmental organization in managing the Nile river resources in the face of disagreements between the upstream and downstream states.

Research Objectives

The broad objective of this research was to provide a general understanding of the opportunities that exist in negotiating a lasting Trans-Boundary water agreement. The other objectives include:

1. To identify the challenges in negotiating Trans-Boundary water management agreements in the post-colonial Africa, (case study – Nile River); and
2. To offer recommendations of how to go about Trans-Boundary water management treaties for the development of Africa.

Research Questions

1. What challenges and opportunities exist in negotiating cross border Nile River water resource agreements in post-colonial Africa?
2. Do the challenges outstrip the opportunities accruable from the outcomes of the negotiations?

Justification and Significance of the Study

The researcher went out to gather data that could bridge the policy and academic lacuna on the management of Trans-Boundary water resources. The study adds to the ongoing debate on how best such resources can be harnessed for the development and prosperity of

the continent and point out the challenges that are inherent therein so that negotiators are aware of the same and can find ways to overcome such pitfalls without causing damage to the diplomatic relationships of the countries involved. There is therefore a policy and academic justification to this study and the researcher hopes that the knowledge generated from this exercise will fill some information gap and assist in policy formulation.

Policy Justification

As Apondi⁹ noted, cooperation based on sound policies is important in any negotiation platform to minimise dysfunctional conflicts. Major policies, according to Alfredson and Cungu, citing Davis *et al*,¹⁰ arise out of intricate negotiations that involve interests, choices between values and competition and competition between resources that bear resemblance to those of the River Nile. The realisation of the opportunities that underlie any Trans-Boundary water resource is important to policy makers to offer solutions rather than become sources of problems.

Academic Justification

This study will also add to the body of knowledge on the systemic level of negotiation and the negotiation models. This study therefore was also important to understand the competing negotiation approaches within the realm of international water-related agreements.

Literature Review

Structure of the Review

This section provides a critique of these past attempts in an effort to demonstrate the significance of the problem-solving model of negotiations. The literature review is drawn

⁹ Apondi, Teresa J.A.; *The Conflict over the Management and Use of the Nile Waters and the Influence of the 1929 and 1959 Treaties on Riparian States*; 2006, Unpublished MA Thesis University of Nairobi, Nairobi p9

¹⁰ Davis *et al*; cited in Alfredson, Tanya and Cungu, Azeta; *Negotiation Theory and Practice: A Review of the Literature*; EASYPol; FAO Policy Learning Programme, Rome, 2008

from books, academic materials, conference information, organisations documents, position papers and the internet. In order to build up on the theoretical framework for this research, it was necessary to review literature spanning from international water negotiations to the negotiations itself.

The Process of Negotiations

The art of negotiations is one that has permeated many generations and Iklé¹¹ reinforces this assertion by stating that states have negotiated since the beginning of history as they have fought wars. However, as Zartman, asserts, there is no body of literature on negotiations as a social process although a lot of the act itself of negotiations had been undertaken, especially in international diplomacy. Zartman's assertion is that the discipline of negotiations has however emerged as a field of study giving rise to fruitful but competing approaches. As the debate on the competing approaches rages the integrity of the field is enhanced given that these competing approaches are drawn from both theoretical and experimental evidences and from case studies of the real world, hence providing tests of relevance and reality for the intellectual constructs.¹²

Zartman's assertion that there is no body of literature in so far as the process of negotiations is concerned is however contested by Bošnjaković¹³ who offers that negotiation in the context of international waters, in particular, goes through six phases namely:

- Preparatory or courtship stage or during which the process of negotiation is triggered;
- Main negotiation phase when the parties address and define the contents, as

¹¹ Iklé, F. C. (1964); *How Nations Negotiate*; New York, Harper & Row Publishers p ix

¹² Zartman, I. W. (1978); *Introduction*; in Zartman, I. W (ed); *The Negotiation Process: Theories and Applications*; London, Sage Publications pp7-11

¹³ Bošnjaković, Branko (2003); *Negotiations in the Context of International Water-Related Agreements*; a paper prepared within the framework of the joint UNESCO-Green Cross International project on the theme 'From Potential Conflict to Cooperation Potential (PCCP): Water for Peace', Croatia, University of Rijeka pp4-5

well as adoption or signing of the agreement, a process Bošnjaković refers to as engagement and wedding;

- Ratification phase and preparation of the of the work programme by the signatories or infancy stage;
- Coming into force and early implementation of the agreement or adolescence stage;
- Full implementation and negotiation of amendments and protocols to the agreement ('maturity and procreation'); and
- Major re-negotiation of the agreement because many parts of the agreement have become obsolete and other important elements are missing ('end of life cycle').

This concept of life cycle for policy development processes in environmental protection was first introduced by Winsemius¹⁴. Bošnjaković's proposition makes more sense since it not only offers the process negotiation takes, but also recognises its dynamism brought about by changes in technology and international political systems and politics as well as individuals involved.

Bartos¹⁵ seems to agree with Bošnjaković and argues that the more rigorous theories of negotiations start from the assumption of individual rationality. What this means is that each negotiator tries to maximise one's own pay-off or utility. This is common even in the everyday life of a customer and a seller where each of them seeks to maximise their gains. In the course of the bargaining an agreement emerges when there is equilibrium and the opposing interests are balanced. While this approach looks simplistic, Bartos states that

¹⁴ Winsemius, P. (1996); *Gast in eigen huis: beschouwingen over milieumanagement*; cited by Bošnjaković, Branko (2003); *Negotiations in the Context of International Water-Related Agreements*; Croatia, University of Rijeka pp4

¹⁵ Bartos, Otomar (1978); *Simple Model of Negotiation: A Sociological Point of View*; in Zartman, I. W (ed); *The Negotiation Process: Theories and Applications*; London, Sage Publications pp13-15

negotiations ought to be seen as a process involving dual and mostly conflicting motivations. The individual in a negotiation process is competitive and is keen to maximise his pay-off, but as a group, the negotiators are cooperative and work towards a fair solution. But since the individual is already working towards a maximum pay-off scheme or outcome, the idea of fairness as advocated by economists with their equilibrium theory is neither here nor there.

The above argument goes to reaffirm Thomas Hobbes thinking of 1651, cited in Bartos, that human beings are competitive by nature. Hobbes realist argument produces an anarchical system of self-interested units or states that only cooperate when it suits them and there is no law-giver or law-enforcer when extrapolated within the realm of international politics. The only way to keep the individual in check according to Hobbes was to sign a social contract that will create power in form of a central government with a monopoly of coercive authority and keep the individual in check. Hobbes argument was that covenants without the sword are but in vain. This model appeals to realists since its rational actor assumption include the self-interested motivation which realists ascribe to nation-states. With this argument, negotiation is only for self-interest and not cooperation. The only way the rational individual cooperates is by realising the sanctions that the society imposes for failing to cooperate. These sanctions, Bartos states, are above and beyond the equilibrating forces that lead to the formulation of the norm in the first place.¹⁶

Iklé¹⁷ while comparing negotiations and warfare stated that unlike warfare, the methods of negotiations have remained much the same. In Iklé's opinion, for nations to negotiate they must be willing to compromise, and both sides must be ready to make concessions. In other words, 'lose-lose situation' is the outcome of the negotiation process.

¹⁶ Bartos, Otomar (1978); *Simple Model of Negotiation: A Sociological Point of View*; in Zartman, I. W (ed); *The Negotiation Process: Theories and Applications*; London, Sage Publications pp13-15

¹⁷ Iklé, F. C. (1964); *How Nations Negotiate*; New York, Harper & Row Publishers pp1-6

Iklé cautioned that a negotiator should never make a threat he is not prepared to carry out because the consequences can be disastrous. Thus, in his definition of negotiations, Iklé said that the process occurs only in the presence of two elements, namely; there must be both common interest and issues of conflict. He argues that without common interest there is nothing to negotiate for, and without conflict also there is nothing to negotiate about. Hence negotiation, he said, is different from bargaining but a process in which explicit proposals are put forward ostensibly for the purpose of reaching agreement on an exchange or on the realisation of a common interest where conflicting interests are present.

The importance of negotiations, Iklé implies, cannot be overemphasised. It plays an important role in formalising turning points in international relations, in catalysing or at least clarifying changes that were caused by tacit bargaining or other processes, and in working out those finer shades in new arrangements between nations that the brute interplay of latent strength cannot define. Through negotiations, parties can change their positions and their mutual relations in many ways with the outcome being either tacit understandings between or among parties, a clarification of the points of disagreement, a re-orientation of national objectives, new commitments to third parties and propaganda effects.¹⁸

Level of Analysis Problem in Trans-Boundary Water Management Negotiations

David Singer states that the systemic level is the most comprehensive of the levels of analysis that are available. This is because, Singer states, it encompasses “the totality of interactions which take place within the system and its environment.” Singer’s argument is that by focusing on the system, the researcher or student of diplomacy is in a position to carefully study, analyse and understand the patterns of interaction that emanate from the system given the multiplicity of the actors who consist of the national actors that possess

¹⁸ Iklé, F. C. (1964); *How Nations Negotiate*; New York, Harper & Row Publishers pp1-6

strategic national interests, transnational actors including intergovernmental organisations (IGOs) and non-governmental organisations (NGOs) and supranational actors that derives its power and authority from the national actors. This allows the researcher to make generalisations, given that s/he would have understood the system, including what Singer refers to as ‘power configurations’ – the hierarchical nature of the world politics. Singer’s explicit defence of the systemic level of analysis is also founded on the premise that only the systemic level allows us to “examine international relations in the whole, with a comprehensiveness that is of necessity lost when our focus is shifted to a lower, and more partial, level.”¹⁹ From Singer’s argument, the international politics is of utmost significance.

International politics usually take place within the competitive and problem-solving frameworks of negotiations, according to Murray.²⁰ The competitive theory of negotiations, Murray asserts, is both a close approximation to the actual experience of negotiators and a general superiority of outcomes. On the other hand, the problem-solving negotiations offer ‘prescriptive superiority of their mode of conflict resolution in terms of outcomes’.

The two competing negotiations approaches - competitive and problem-solving frameworks - requires a keen understanding of the concept of preventive diplomacy, provided for in Article 99 of the UN Charter in order to keep global peace and security²¹ and expounded by Dag Hammarskjöld, a former UN Secretary General over half a century ago in reference to the diplomatic action taken, at the earliest possible stage, “to prevent disputes from arising between parties, to prevent existing disputes from escalating into conflicts and to

¹⁹ Singer, J. David; ‘The Level of Analysis Problem in International Relations’ in *World Politics*, Vol. 14, No.1 The International System: Theoretical Essays; October 1961 p80 <http://links.jstor.org/sici=0043-8871%2914%3A1%3C77%3ATLPIR%E2.0.CO%3B2-T> Accessed May 30, 2007 12:59EAT

²⁰ Murray, John S.; *Understanding Competing Theories of Negotiation* in *Negotiation Journal* April 1986, New York, Plenum Publishing Corp pp5-13.

²¹ Article 99 on the UN Charter states that: *The Secretary-General may bring to the attention of the Security Council any matter which in his opinion may threaten the maintenance of international peace and security*; UN, San Francisco, 1945

limit the spread of the latter when they occur.”²²

This concept of preventive diplomacy provides a good basis for understanding the need for acceptable ways of managing trans-boundaries water resources. Water is a major source of conflicts, not just the Trans-Boundary resources but even the inland resources. The latter conflicts when they erupt take an ethnic angle while the Trans-Boundary conflicts would lead to war between or among states if not properly managed.

With a proper policy generated from the opportunities that Trans-Boundary water negotiations offer, the UN Secretary General may not have to invoke Article 99 of the Charter, because, as Edwin Bakker states, tackling conflicts before they reach the point of armed conflict or mass violence is very inexpensive compared to the exorbitant bill for relief, protection, reconstruction and reconciliation activities in conflict areas.²³

Instead, the very people whose lives the resource touches would have found a better and home-grown means – an African solution to African problems, it is said - to manage the same way before the UN swings into action.

Summary of the Literature Review

In summary, the researcher observed that negotiating Trans-Boundary water management agreements has been with humanity for years, arising from the very importance of water to human life. Despite the institutionalisation of negotiation methods, through the 1815 Congress of Vienna’s Final Act to latter day treaties, the process of negotiating shared water resources has not been easy. However, through cooperation and viewing water resources as not static but dynamic, communities and states can harness a number of opportunities. This therefore calls for cooperation.

²² UN; *Preventive Diplomacy: Delivering Results; A report of the Secretary General* ; United Nations, New York 11-48586—September 2011—5,000

²³ Edwin Bakker; *Early Warning by NGOs in Conflict Areas*; undated manuscript

Theoretical Framework

This study was guided by the problem-solving framework of negotiations. According to Murray, the problem-solving negotiations offer ‘prescriptive superiority of their mode of conflict resolution in terms of outcomes. Several authors have referred to this theory by different terms such as coordinative (Pruitt), cooperative (Williams), problem-solving (Menkel-Meadow), integrative (Raiffa) and developmental model (Gulliver)²⁴ but whatever adjective is used, it comes to the problem-solving model. This theory was first articulated in by Roger Fisher and William Ury and advocates that negotiators need to work together for an agreement that is better for both, rather than no agreement at all.²⁵

The basic assumption of this theory, and which places it apart from the more ego-centric self interest and competitive model is that, problem-solver views the world as being controlled by an enlightened self-interest. It postulates that states should focus on the common interests for the benefits of cooperation to materialise even as they try to maximise returns for their own self. Menkel-Meadow asserts that negotiation is not about maximising individual gain but about looking for joint gain²⁶. Aviva²⁷ emphasised the point of cooperation, asserting that cooperation should even go beyond states to non-state actors and individuals. Aviva further quoted Niwat Roikaew, a Thai activist in the village of Chiang Kong, located on the Mekong River who was protesting an agreement among China, Laos, Burma and Thailand to blast rapids and reefs in a section of the upper Mekong River to make it navigable for ships up to 100 tonnes. The blasting would have denied the villagers the

²⁴ Cited in Murray, John S.; *Understanding Competing Theories of Negotiation* in Negotiation Journal April 1986, New York, Plenum Publishing Corp pp 5-13

²⁵ Fisher, Roger and Ury, William; ‘Getting to YES’ cited in Harvard Law School (2008); *Programme of Negotiation: Problem-Solving Approach*; <http://www.pon.harvard.edu/tag/problem-solving-approach/> Retrieved on June 05, 2013 at 13.20EAT

²⁶ Carrie Menkel-Meadow; *Chronicling the Complexification of Negotiation Theory and Practice*; 2009, p416, Georgetown Law Library <http://scholarship.law.georgetown.edu/facpub/29>

²⁷ Imhof, Aviva; *Fighting for their lives: Mekong River Communities take on Basin-Wide River-Development Schemes*; World Rivers Review Vol. 17 No. 5/6/December 2002; International Rivers Network, California p4

opportunity to collect edible seaweed and fishing. “Mekong is our mother. It provides all things for us and will do so forever, so we must fight for the life of the river,” Niwat Roikaew quoted by Aviva Imhof, said in protest to the blasting. Niwat’s efforts, Imhof reported gained support of activists in Thailand, Cambodia, Yunnan Province of China, the US, Australia, Japan, Canada and other countries. The communities, as problem-solvers joined efforts to protect their river, their homes and the ecosystem. Imhof summarised that more than before, this cooperation is needed.

For the problem-solver, cooperation is of utmost importance in order that it gains by trying to understand the merits as objectively as possible. The problem-solver also avoids confrontational debating techniques in the hope of convincing the others of its points from where it will gain. In this case, the negotiator ought to have a better grasp of the complex issues, factors and human dynamics behind important policy issues (Alfredson and Cungu).²⁸

According to Murray²⁹, the problem-solver is competitive but not antagonistic and considers negotiation and other voluntary processes as superior to non-voluntary methods such as adjudication.

The goal of the problem-solver is a mutually-agreeable solution that is fair to all parties and efficient for the community since the goal is the public welfare, natural resource management and local subsistence economies in order not to jeopardise the development and poverty reduction prospects of mainly the developing nations and avoid an increase in domestic conflicts.

²⁸ Murray, John S.; *Understanding Competing Theories of Negotiation* in Negotiation Journal April 1986, New York, Plenum Publishing Corp p2

²⁹ Ibid 23 pp5-13.

Hypotheses

This study was guided by the following hypotheses:

1. Negotiating Trans-Boundary water resource agreements comes with more opportunities than challenges in post-colonial Africa
2. There are many challenges in negotiating Trans-Boundary water resource agreements than there are opportunities
3. Trans-Boundary water agreements offer neither opportunities nor challenges

Research Methodology

The research relied on both primary and secondary data collection methods.

Primary Sources

The researcher conducted non-structured discussions and references to primary materials. Where possible, the researcher carried out face-to-face discussions with key officials in relevant Kenyan Ministries including those of Foreign Affairs, Water and Irrigation, the Attorney General's office, diplomatic representatives of the other riparian countries based in Kenya, relevant civil society groups, the Nile Basin Initiative Secretariat in Uganda, World Bank country office and High Commissions and Embassies of Canada, Denmark, European Commission, Finland, France, Netherlands, Norway, Sweden, United Kingdom based in Nairobi.

The researcher also had e-mail discussions and interview schedules with civil society groups, intergovernmental organisations such as the Nile Basin Initiative Secretariat in Uganda and scholars in this field.

Secondary Sources

The secondary materials for this research consist of treaties, conventions and statutes.

The researcher will also rely on other secondary sources, such as books by eminent scholars found in libraries of institutions of higher learning, Ministries of Foreign Affairs, Water and Irrigation, the Attorney General's office, and credible and verifiable internet sources will come in handy for the verification of the data gathered from the primary sources as well as supplementing the same.

Scope and Limitations of the Study

Given that this study was funded solely by the researcher, shortage of resources negatively hampered on the researcher accessing certain places to meet with, mainly the primary sources; or even hiring research assistants to aid in data collection.

Secondly, certain groups of individuals proved uncooperative in the course of the research. In this case, some declined to respond to the interview schedules, while others were not willing to give certain information that could enrich the study.

There was also the limitation brought about by the plethora of legal regimes on the sharing and management of the River Nile Basin resources which the researcher could possibly not be in a position to access given the time constraints.

Chapter Outline

Chapter One: Introduction to the Study

This chapter introduced the topic of the research, the statement of the research problem, the research objectives, the justification and significance of the study, the literature review, theoretical framework, hypotheses, research methodology and the scope and limitation of the study.

Chapter Two: Global Trans-boundary Water Agreements

This chapter examined the concepts of Trans-Boundary water agreements. The chapter analysed how other regions in the world have exploited the challenges and the opportunities therein and from it derive the case of the Nile Basin, providing a historical perspective of the process. It also looked at the various categories of actors involved in the negotiations, generally, pointing out the significance of the States in the diplomacy of negotiations.

Chapter Three: Opportunities and Challenges in Negotiating the Nile River Treaty

This chapter examined the case study and utilise the primary data to analyse and create a basis for this study as well as place the topic into perspective.

Chapter Four: Critical Analysis

This is a scholarly chapter that brings together all the issues identified from Chapters One, Two and Three will discuss the issues surrounding the new Nile treaty and the attempts towards coming up with a new framework for the management of the Nile river resources. It considers the various roles and commitments of the actors involved in the process, and equally important, it will consider the role of South Sudan has had since it seceded from the Sudan on the process of negotiating a new agreement. Using the theoretical framework, it will analyse them to create new knowledge. It also tests the hypotheses identified in Chapter One.

Chapter Five: Conclusions and Recommendations

This chapter consist of the conclusion and recommendations by the researcher for further studies.

CHAPTER TWO: GLOBAL TRANS-BOUNDARY WATER AGREEMENTS

Introduction

This chapter examines the concept of Trans-Boundary water agreements highlighting examples of similar efforts elsewhere around the world to discover how they did it and the accruing benefits to concretise and offer comparisons with the case study of the Nile Basin. Trans-Boundary water agreements are understood to define the benefit sharing in the context of shared waters resources. The shared water resources are those that cross international boundaries. The shared water resources can arise from different situations such as where the source of the water body is one state while the water body is actually outside the boundaries of the source state. The sources could also come in from different countries which then flow into a single river or lake.

Because water is a scarce resource, countries that share into the benefits of these trans-boundary resources come up with agreements on how to manage the resources without causing harm to one another. According to Ramoeli there are over 260 shared river and lake basins in the world and over 60 of these are in Africa and 15 of these are shared between the member states of the Southern African Development Community (SADC). Ramoeli defines benefit sharing as “the process where riparian's cooperate in optimising and equitably dividing the goods, products and services connected directly or indirectly to the watercourse, or arising from the use of its waters.”³⁰ Other than allocating water, Bošnjaković³¹ states, the agreements on water also play the roles of developing and administering joint projects and to provide a minimum flow for shipping as well as agreements on pollution.

³⁰ Ramoeli, Phera (2010); *Sharing Benefits from Trans-Boundary Water Management: Results from Workshop on experiences from the Mekong River, Zambezi and the Nile*; 20–22 January, 2010, Vientiane, Lao P.D.R

³¹ Bošnjaković, Branko (2003); *Negotiations in the Context of International Water-Related Agreements*; a paper prepared within the framework of the joint UNESCO-Green Cross International project on the theme ‘From Potential Conflict to Cooperation Potential (PCCP): Water for Peace’, Croatia, University of Rijeka

African Benefit-Sharing Agreements

The Congo River

The Congo River, formerly known as the Zaire River is in west-central Africa and has a length of 4,700 kilometres. It is the second longest after the Nile, but in boasts of being the deepest river in Africa and has the world's second largest rainforest. The rain forest forms 18 per cent of the planet's remaining tropical rainforest, famous for Famous for the rare Okapi, a type of forest giraffe found only in the Congo basin.³² The river's source is the highlands of north-eastern Zambia between Lakes Tanganyika and Malawi but its resources are shared by the Democratic Republic of Congo (formerly Zaire), Republic of the Congo, the Central African Republic, Zambia, Cameroon, Tanzania and Angola.³³

The river's resources are managed through an intergovernmental organisation, International Commission of the Congo-Oubangui-Sangha Basin (CICOS). The agreement establishing the framework for the river system and creating CICOS was signed on November 6, 1999 by Heads of State of Cameroon, Central Africa, Congo and Democratic Republic of Congo. An addendum to the agreement extending the mandate of CICOS to Integrated Water Resources Management (IWRM) was signed on February 22, 2007, according to Ndala. IWRM's goal is to maximize basin-wide welfare by optimizing utility from water allocation to different stakeholders.³⁴

The countries in the Congo River Basin, through an addendum to the agreement established that members have to consult with each other, and also obtain CICOS opinion

³² The Congo; www.rainforests.mongabay.com/congo/ Retrieved on July22, 2013 at 16.34EAT

³³ Sautter, Gilles(2013); *Congo River*; <http://www.britannica.com/EBchecked/topic/132484/Congo-River> Retrieved on June 08, 2013 at 15.25EAT

³⁴ Mott MacDonald, "Rapid Assessment – Final Report Integrated Water Resources Management Strategy for the Zambezi River Basin, December 2007" cited in Beck, Lucas (2010); *Trans-boundary Water Allocation in the Zambezi River Basin*; Unpublished PhD Dissertation, Zurich Switzerland

before embarking on projects likely to have significant impacts on shared waters.³⁵ Through cooperation and information sharing among the members, Ndala asserts, the Congo basin has not only been able to conserve its precious rain-forest but also developed projects such as the 225 km Inga dam downstream of Kinshasa with the potential to produce 44,000 megawatts, Water transport promotion with support of Germany's GTZ and the World Bank, and monitoring of water resources.³⁶

Niger River

The Niger River in West Africa, with a length of 4,200 kilometres is the third longest river in Africa after the Nile and the Congo respectively. The Niger River resources are shared amongst the states of Guinea, Mali, Niger (from where it derives its name), Nigeria, Burkina Faso, Togo, Ghana, Ivory Coast, Liberia, Sierra Leone, Cameroon and Benin³⁷.

The legal regime that is used for the administration of this drainage basin has undergone a number of phases that began with the February 1960 early exploratory meeting between Mali and Nigeria to discuss the development of Niger River Basin. The impetus for these exploratory meetings, Godana³⁸ acknowledged, came from Niger whose President Hamari Diori established contacts with all the basin states and communicated his intention to convene an international conference for purposes of elaborating a statute for Niger River navigation and harmonisation of national plans for industrial and agricultural usage of the river's resources. Between 1960 and 1961, a number of contacts were made on the management of the Niger river basin resources, culminating in the May 1961 conference at Segou, Guinea under the auspices of the Commission for Technical Cooperation in Africa

³⁵ Ndala, Benjamin (2009); *Congo River Basin: Challenges and current initiatives*; a presentation at the 5th World Water Forum, Italy

³⁶ Ibid 47

³⁷ Godana, Bonaya A. (1985); *Africa's Shared Water Resources: Legal and Institutional Aspects of the Nile, Niger, and Senegal River Systems*; London, Frances Pinter Publishers pp84-87

³⁸ Godana, Bonaya A. (1985); *Africa's Shared Water Resources: Legal and Institutional Aspects of the Nile, Niger, and Senegal River Systems*; London, Frances Pinter Publishers 199-218.

(CTCA) ‘to discuss practical measures for ensuring the regular exchange of information’ and also ‘to establish channels of coordination and exchange of information’³⁹. The Segou conference covered a lot of groundwork and importantly, identified the danger posed by separate uncoordinated national projects with similar objectives. In other words, all the riparian states acknowledged this problem and sought for solutions, which is the focus of this study. The Segou conference identified the common problems and sought solutions. It was followed by the Italconsult Mission of 1962 which visited the capitals of the interested states and made reconnaissance trips to various points on the river to examine the national projects that the individual riparian states were undertaking on the basin; and the conclusion of the Final Agreements.

The Italconsult Mission paved the way for the February 1963 conference in Niamey, attended by seven out of nine riparian states. This initial conference, which was not attended by Mali and Mauritania, discussed a draft convention and statute of the river basin and its tributaries. Mali wanted the conference postponed. The two governments’ absence limited the other members to only drafting the relevant instruments which would then be circulated to all the riparian states for approval. According to Godana, even though the 1963 conference tackled all the substantive aspects of the future regime no formal agreement was reached until the second conference in October 1963 when seven out of nine accepted the text of the convention and an annexed statute to replace the 1885 Treaty of Berlin and the 1919 Convention of Saint-Germain-en-Laye. Mali again erected roadblock by presenting an alternative draft which sought to modify earlier drafts, including creating a Committee of the River Niger composed of relevant ministers from the riparian states to approve projects of

³⁹ Mazi Ray Ofoegbu (1971); *Functional Cooperation in West Africa: A Study of the Political and Legal Foundations for the Joint Development of Rivers and Lake Basins in West Africa*; cited in Godana, Bonaya A. (1985); *Africa's Shared Water Resources: Legal and Institutional Aspects of the Nile, Niger, and Senegal River Systems*; London, Frances Pinter Publishers p200

individual states. Mali's proposals were rejected and the Niger River regime came to existence though to date, a number of amendments have been made.

The riparian states have moved on, establishing an institutional framework, formerly Commission for the Niger River (CNR) to now the Niger River Basin Authority (NRBA) which is the vehicle for their cooperation. They adopted a problem-solving approach which identified the challenges they all had, or would experience in the future if each member is left to plan nationally without consulting the rest through negotiated agreements that started soon after their independence. In other words, the riparian states of the Niger Delta have realised that water is not a static resource but a dynamic source of wealth creation and from which the African states can harness a number of opportunities.

Zambezi River

The Zambezi River is the fourth-longest river in Africa, and the largest flowing into the Indian Ocean from Africa with the area of its basin being 1,390,000 square kilometres. Its source is Mwinilunga, a town in the North-Western Province of Zambia. The river's resources are however shared among the Southern African states of Zambia, Zimbabwe, Namibia, Mozambique and Angola.⁴⁰

Within the Zambezi River Basin, Beck asserts, there is an imbalance between water availability and population density which combined, have the potential source of conflict among the riparian states. This, he says requires a proactive management of water resources within the basin. So far, he identifies three main groups of interest in the concerned with water management in the Zambezi River Basin. These are, first, the technical bodies that look at the optimization of actual water allocations, seasonal flows, prevention of floods, and

⁴⁰ International Rivers; *Zambezi, River of Life*; <http://www.internationalrivers.org/campaigns/zambezi-river-of-life> Retrieved on Saturday June 08, 2013 at 15.05EAT

water quality in the river. They consist of the Zambezi River Authority (ZRA) and the big hydropower companies - Zambia Electricity Supply Corporation (ZESCO) in Zambia, Zimbabwe Electricity Supply Authority (ZESA) in Zimbabwe, and HCB for Cahora Bassa in Mozambique; secondly, the political authorities that include the Southern African Development Community (SADC) and the Zambezi Watercourse Commission (ZAMCOM); and finally, academic institutions conducting research on the Zambezi River Basin such as the Eduardo Mondlane University in Maputo, University of Zimbabwe in Harare and the University of Zambia in Lusaka.⁴¹

These imbalances, as Beck refers to them, meant that the negotiations that on the management of the Zambezi river took nearly a decade from early nineties before a draft agreement was produced in 1998. But in the same year the draft agreement was produced, Zambia withdrew out of reluctance to enter into any agreements which did not include mechanisms for allocation of water entitlements to the member states, leading to the termination of the negotiations.⁴² Zambia abandoned the process and did not even take part in the signing of the Zambezi River Commission Agreement which was signed in 2004. On the other hand, Malawi and Mozambique have been at loggerheads over the agreement, some time even going to the verge of war as the competitive nature for the control and utilization of the Zambezi river basin resources. In such a scenario, Manyangadze⁴³ found that despite establishing the Zambezi Watercourse Management Commission (ZAMCOM), basin-wide cooperation is weak leading to inadequate effective stakeholder participation in water

⁴¹ Beck, Lucas (2010); *Trans-boundary Water Allocation in the Zambezi River Basin*; Unpublished PhD Dissertation, Zurich Switzerland pp4-6

⁴² Susteric, Laura (2007); *Multilateral versus bilateral agreements for the establishment of river based organizations: comparison of legal, economic and social benefits in the Zambian experience*; Unpublished paper for the SADC-Southern African Development Community

⁴³ Manyangadze, Zvikomborero; *Zambezi River Basin Challenges and Issues*; a presentation to the GEO-UNESCO Joint Workshop on Earth Observation and Capacity Development for IWRM at River Basins in Africa : 12-14 January 2012, Nairobi, Kenya

resources development and management. In any case, by 2012 ZAMCOM had not been operationalised since 2004 as riparian countries have maintained a competitive approach to the management of the Zambezi River's resources. The competitive stance of the riparian countries, Manyangadze⁴⁴ observed, has also been detrimental to the basin-wide stakeholder participation which is necessary for cooperation to thrive within the basin.

Senegal River

This river measures 1,600 to 1,800 kilometres depending upon the author and the period.⁴⁵ It receives its name after the meeting of two separate rivers Bafing and Bakoye. Its basin covers Mauritania, Senegal, Liberia, Sierra Leone, Mali, the Gambia, Guinea Bissau and Guinea.

Like in the Niger River, members of the Senegal basin embarked on attempts at getting to an agreement soon after the riparian states gained independence. In 1962, the Inter-State Committee, within the framework of the *Organisation pour la mise en valeur de fleuve Sénégal* (OMVS) became the third consecutive attempt by the basin States at establishing a cooperative framework for the management of the river's resources following the earlier Inter-State Committee and the creation of the Organisation of the Senegal River States. The riparian states have held a number of conferences with the 1962 in Conakry, Guinea, being the most significant as it brought all the then four independent states namely Guinea, Mali, Mauritania and Senegal and recommended the Inter-State Committee, with the assistance of the United Nations to undertake studies and works for harnessing of the resources of the river's basin⁴⁶. The *Organisation des États riverains du Sénégal* (OERS) succeeded the Inter-State Committee in 1968 with the goal of harmonising the development plans of the

⁴⁴ Ibid 59

⁴⁵ Godana, Bonaya A. (1985); *Africa's Shared Water Resources: Legal and Institutional Aspects of the Nile, Niger, and Senegal River Systems*; London, Frances Pinter Publishers pp91-93

⁴⁶ Ibid 57 pp218

different basin states.

Godana however observes that even with the creation of OERS, mistrust among the member states was still an issue. For instance, Senegal and Mauritania had their differences over partitioning of the river's waters. Senegal, Godana observed, favoured a border on the Mauritanian bank of the river while Mauritania was for a median line⁴⁷. The prevailing political differences between Senegal and Guinea also found their way into the negotiations, making the process more antagonistic, rather than cooperation. Each member state was intent on demonstrating its power over the other by interfering in the internal politics of each other. Furthermore, Godana noted that the goals of OERS were frustrated by their broad scope and by lack of funds to finance the projects, which in essence paralysed the organisation and all its activities came to a halt.

Matters became even worse when in March 1972, Mali, Senegal and Mauritania denounced the Convention of 1964 and later on pulled out of OERS leaving only three States. It meant the OERS could not survive with the remaining members and as would be expected, collapsed. The remaining three States negotiated a new legal regime, *Organisation pour la mise en valeur de fleuve Sénégal* (OMVS) as they attempted to carry on with the goal of cooperation.

Without going into the merits and the demerits of the agreements, one poignant point is that the negotiations on the management of the Senegal river basin has been more competitive rather than cooperative, with the regional politics and the character of the of the individual leaders finding their way into the negotiating rooms, hence jeopardising the process.

⁴⁷ Ibid 57

Europe and Middle Benefit-Sharing Agreements

Jordan River

In the Middle East, the Jordan River Basin's two largest streams, the Jordan River and the Yarmouk River are shared by Jordan and Israel, with Syria, Lebanon, and the Palestinian territories also having a stake.⁴⁸ The Israel-Jordan Treaty, they state, moved from war to water sharing after a long period of unilateral and unacceptable management of the Jordan River resources, spanning four and a half decades from 1948 to 1994. The 1994 treaty signed by both states, the authors argue, was a major accomplishment as it "detailed water sharing and seasonal transfers across borders but within the basin" even if it excluded other regional entities such as Syria, Lebanon and the Palestinian territories. It was however beset by the regional political relationships, security and arms control and the refugee crisis.⁴⁹

Danube River

The Danube is 2,780 kilometres and drains 817,000 square kilometres into the Black Sea. It covers Hungary in its entirety, nearly all parts of Austria, Romania, Slovenia, Slovakia, Serbia, Armenia, Kosovo, and significant parts of Bosnia-Herzegovina, Bulgaria, Croatia, the Czech Republic, Germany and Moldova⁵⁰. According to Bošnjaković,

The Danube is not only the geographical catchment area of the second largest river in Europe, but with its thirteen main riparian states, it represents a diversity of languages, of ethnic and religious groups, a history of population movements and conflict and displacement of people, which are still root causes for the lack of environmentally sustainable management today.⁵¹

⁴⁸ Susskind, Lawrence and Islam, Shafiqul; "Water Diplomacy: Creating Value and Building Trust in Trans-Boundary Water Negotiations," *Science & Diplomacy*, Vol.1, No. 3 September 2012

<http://www.sciencediplomacy.org/perspective/2012/water-diplomacy>

⁴⁹ Shamir, Uri; *Jordan River Case Study, Part II: The Negotiations and the Water Agreement between The Hashemite Kingdom of Jordan and the State of Israel*; Stephen and Nancy Grand Water Research Institute Technion, Israel Institute of Technology

⁵⁰ Bošnjaković, Branko (2003); *Negotiations in the Context of International Water-Related Agreements*; a paper prepared within the framework of the joint UNESCO-Green Cross International project on the theme 'From Potential Conflict to Cooperation Potential (PCCP): Water for Peace', Croatia, University of Rijeka pp15-16

⁵¹ Bendow, J (2002); 'International Cooperation in Water Management and Pollution Control in the Danube River Basin'

For all these environmental challenges, the riparian countries saw the need for cooperation which started with the 1985 Bucharest Declaration on its management especially with regard to pollution management. However the declaration was non-binding but an important step towards cooperative ecosystem approach. But co-operation has always been the guiding principle even in the face of difficulties.

Rhine River Basin

Dieperink⁵² described the negotiations over the Rhine River as a classic example of upstream–downstream conflict. Negotiations over the Rhine were hindered by the reluctance of the upstream states to come to agreement on pollution control. The upstream states were discharging chloride into the river which would then flow to the downstream states. However, despite the obvious problem, there was difficulty in securing compromises.

The Rhine River is found in Western Europe and has been one of the greatest rivers culturally and historically for its role in industrial transport during the industrial revolution in Europe. It flows from two small headways in the Alps of east-central Switzerland north and west to the North Sea, into which it drains through the Netherlands. The length of the Rhine was long given as 1,320 km, but this was changed in 2010 with a shorter distance of about 1,230 km.⁵³ Its importance to the western European nations was the cause of the conflict which started way back in the 18th century.

Cooperation, negotiation, and mediation in this region was characterised by alliances between states to oppose an aggressive third party though Spaulding⁵⁴ observed that cooperation on

Unpublished contribution to the 3rd Preparatory Seminar of OSCE; April 15-16 cited in Bošnjaković, Branko (2003); *Negotiations in the Context of International Water-Related Agreements*; a paper prepared within the framework of the joint UNESCO-Green Cross International project on the theme 'From Potential Conflict to Cooperation Potential (PCCP): Water for Peace', Croatia, University of Rijeka p15

⁵² Dieperink, C. (2010); *International water negotiations under asymmetry: Lessons from the Rhine chlorides dispute settlement (1931–2004)*; <http://www.springerlink.com>

⁵³ Encyclopaedia Britannica; *Rhine River*; <http://global.britannica.com/EBchecked/topic/501316/Rhine-River>

⁵⁴ Spaulding, R.; *Anarchy, Hegemony and Cooperation: International Control of the Rhine River 1789-1849*; Unpublished paper, UNC Wilmington

the Rhine started in 1815 following an ‘anarchic’ period prior to 1789 over the control of on the Rhine River despite a number of international treaties, imperial orders and agreements among local rulers and mediated agreements by thirds monarch when negotiations failed.

Then, seven States that held the Rhine territory namely Baden, Bavaria, Hessen-Darmstadt, Nassau, Prussia, France and the Netherlands agreed to cooperate after acknowledging the benefits of the French reforms. This led to the establishment of the *Zentralkommission für die Rheinschiffahrt* (Central Commission for the Rhine Navigation). The commission, Spaulding noted, served as the building block to the unification of the German states, besides being the forerunner to European supranational integration.

By 1972, the Rhine river basin states had made progress on the chloride pollution that Dieperink referred to, when a working group of the basin came up with measures to reduce the chloride load to store the waste salts from the French potassium mines, which was the biggest polluter. It took 73 years for the chlorides issue to disappear from the Dutch international political agenda which often clashed with France over the Best Alternatives to a Negotiated Agreement (BATNA).

As a hotly contested resource, the Rhine has had a number of agreements, starting with the 1815 Commission, the International Commission for the Hydrology of the Rhine Basin (CHR) and International Commission for the Protection of the Rhine (ICPR), all of which have emphasized cooperation and climate change mitigation.

Far East Benefit–Sharing Agreements

The Mekong River

The Mekong is a trans-boundary river in Southeast Asia with an estimated length of 4,350 kilometres with its source being the Lasagongma Spring in Mount Guozongmucha,

Qinghai, China and covers Thailand, Vietnam, Cambodia and Laos. In April, 1995 the four national governments of the lower Mekong River basin: Cambodia, Laos, Thailand and Viet Nam, signed an historic “Agreement on the Cooperation for the Sustainable Development of the Mekong River Basin.”

Negotiations for the Agreement took place between 1992 and 1995, and the four governments had to confront many complex and contentious issues. The 37 years of experience of cooperation under the two former agreements discussed below provided a strong desire and commitment to continue their joint efforts.

According to Radosevich and Olson⁵⁵, customary international law played a major role in the negotiations by providing a framework of principles which guided the negotiations; the negotiators accepted the basic principles of international water law and then negotiated on how to actualize the principles in the specific context of the Mekong river basin. Customary international water law is based upon general international legal principles and existing state practice in the management of international water resources. There are five general principles of customary international water law that were fundamental to discussion on a new Mekong Agreement namely, the Principle of International Waters which defines a watercourse to mean a system of surface and ground waters; Principle of Reasonable and Equitable Utilization that provides that all watercourse states are entitled to the reasonable and equitable uses and benefits of an international watercourse within their territory, and by implication, have a correlative obligation not to deprive other watercourse states of their right to reasonable and equitable utilization; Obligation not to Cause Significant Harm; Principle of Notification and Negotiations on Planned Measure, and; Duty to Cooperate.

⁵⁵ Radosevich, G. and Olson, D. (1999); *Existing and Emerging Basin Arrangements in Asia: Mekong River Commission Case Study*; Third Workshop on River Basin Institution Development June 24, 1999, The World Bank, Washington, DC

Third Party Actors in Trans-Boundary Water Negotiations

Negotiation, in the strict sense of the concept implies that only the parties to a conflict are involved in settling their differences. In other words, there should be no third party involvement. The involvement of a third party makes it not a negotiation anymore but mediation. In practice, and in particular in the negotiation over the River Nile management, the parties involved have not been restricted to just the riparian states but other actors that can be classified as external. King'oina⁵⁶ goes further to state that there are three types of actors in the act of diplomacy: states, non-state actors and individual actors. State actors form the Track One actors and engage in official diplomacy of which negotiation is central; non-state actors are referred to as Track Two actors while individuals form the Track One-and-Half actors. While states have traditionally dominated the conduct of diplomatic negotiation, Keohane and Nye⁵⁷ asserts that non-state actors and individuals are equally important in complimenting the activities of the state. Together, the three groups of actors play varying roles in the conduct of modern day diplomacy and in particular, in the diplomacy of negotiations.

In negotiations, Track One actors are oriented to realist thinking of power and manipulation that seeks to settle conflicts rather than resolve them, according to Mwangi⁵⁸. Such an outcome is short-lived. Mwangi further asserts that Track One diplomacy suffers from time constraints which could lead to a government making quick and thereby open the way for re-entry⁵⁹. Track one and half actors on the other hand carry the advantage of tapping into the influential members who are knowledgeable and skilled practitioners. They are also

⁵⁶ King'oina O. Enock; *Track Two Diplomacy in Environmental Security in the Nile Basin*; September 2010; Unpublished MA Thesis, University of Nairobi pp39-40

⁵⁷ Keohane, R.O and Nye Jr, J.S.; "Introduction" in Nye Jr, J.S and Donahue, J.D. (eds); *Governance in a Globalizing World*; Brookings Institution, Washington DC pp1-6

⁵⁸ Mwangi, M. (1994); *The International Management of Conflict in Africa: The Uganda Media 1985*; PhD. Dissertation, University of Kent at Canterbury, p69

⁵⁹ Mwangi, M (2000); *Conflict: Theory, Process and Institutions of Management*; Watermark Publications, Nairobi pp82-83

impartial and their training and contribution generates productive dialogue. According to King'oina⁶⁰, the unofficial positions of the Track One and Half actors also give them greater latitude to explore alternative perspectives. The Track One and Half actors also offer avenues for communication for State parties who would otherwise find it difficult to meet or engage each other directly. Track Two actors are equally important and at times may be affiliated to, and sponsored by official diplomacy or Track One actors. Despite the affiliation, McDonald⁶¹ argues that Track Two actors are not and cannot substitute the Track One actors. Instead, they operate parallel to each other or in support of each other. McDonald's⁶² assertion is that Track Two actors are important for two reasons; first, they reduce conflict by improving communication, increasing level of understanding, lowering anger, tension, fear, and misunderstanding between or among the adversary groups; and secondly, they change the psychological perception of Track One actors to be more open on particular issues. However, Farah⁶³ observes that the Track Two actors are less visible than Track One because their operations are influenced by informal structures and also, they are less driven by power.

Conclusion

This chapter offered theoretical bases for the concept of trans-boundary water agreements tracing the history of Trans-Boundary water management agreements from the 1815 Congress of Vienna to the 2002 Nile conferences. It also looked at the examples of the world's major trans-boundary water agreements, offering snippets of the challenges and opportunities for negotiating the same. In all the examples of trans-boundary agreements

⁶⁰ King'oina O. Enock; *Track Two Diplomacy in Environmental Security in the Nile Basin*; September 2010; Unpublished MA Thesis, University of Nairobi p42

⁶¹ McDonald, J. W. and Bendahmane, D. B. (1987, eds); *Conflict Resolution: Track Two Diplomacy*; Foreign Service Institute, Washington p1 cited in King'oina O. Enock; *Track Two Diplomacy in Environmental Security in the Nile Basin*; September 2010; Unpublished MA Thesis, University of Nairobi p42

⁶² Ibid 72 pp43-44

⁶³ Farah, I. Q. (2000); *Dual Diplomatic Approaches in Conflict Management: The International Peace Initiative in Somalia, 1991-1999*, Unpublished MA Thesis p45

discussed, the emphasis seems to be on co-operation, even if there are obstacles to that very co-operation. It means that riparian countries acknowledge the importance of co-operation for effective management of shared water resources. The chapter also considered the various categories of actors involved in a negotiation process who are all interested in the conflict and/or the outcome of the negotiations.

CHAPTER THREE: OPPORTUNITIES AND CHALLENGES IN NEGOTIATING THE NILE RIVER TREATY

Introduction

This chapter examines the case study and utilises the primary data to analyse and create a basis for this study as well as place the topic into perspective. It draws from Chapter Two which considered the concept of trans-boundary water agreements to analyse the theme of opportunities and challenges in negotiating the resources of the Nile River. It highlights issues of negotiations; show the impact of riparian States and their commitment to the new Nile Treaty and the impact of third party actors.

This Chapter relies on primary data to build a conceptual basis though secondary data has also been incorporated in the background of the study, both aimed at incorporating the various positions and voices involved in the process of finding a Cooperative Framework Agreement (CFA) for the Nile riparian countries. The aim is to generate knowledge for the study.

Background

The River Nile, which is considered one of the most important Trans-Boundary water resources in Africa, is also the world's longest river with an approximate length of 6,700 kilometres, covering 2.9 million cubic kilometres and serving a population of approximately 300 million within its basin⁶⁴. Its catchment area covers eleven countries namely Burundi, Kenya, Uganda, Tanzania, Rwanda, the Democratic Republic of Congo, South Sudan, Eritrea

⁶⁴ Apondi, Teresa J.A.; *The Conflict over the Management and Use of the Nile Waters and the Influence of the 1929 and 1959 Treaties on Riparian States*; 2006, Unpublished MA Thesis University of Nairobi, Nairobi p5

The river's flow is sustained by two major sources namely the White Nile which according to Oestigaard⁶⁵ provides approximately 15 per cent of the water to the Nile River and all that flows through large parts of equatorial Africa, and originates from Lake Victoria that covers Kenya, Uganda and Tanzania; Lake Albert, Lake Kyoga and Lake George. The second major source of the River Nile is the Blue Nile which comprise of the 85 per cent of River Nile's waters from Ethiopian Tributaries of Abbay, Sobat and Atbara.

More than 150 million people in the basin directly rely on the Nile for their livelihood, either as a source of water for domestic use, fishing, irrigation or source of hydro-electric power. However, Oloo⁶⁶ and Pearce⁶⁷ projected that by 2030, the population within the basin could double. This therefore means that there could be more pressure for more water.

The Opportunities for the Nile Basin Countries

The literature analysed in Chapter One offers insights into the opportunities that the Nile riparian countries can obtain from the negotiations for a new Cooperative Framework Agreement (CFA). Susskind and Islam offered that the riparian countries need to begin seeing water as a flexible, rather than a rigid and limited resource.⁶⁸ The argument here is that while there are considerable challenges to the negotiations, the Nile basin also offers many opportunities that the member States can harness for their national and regional development. Diplomatic negotiations are described as a vehicle of communication and stakeholder

⁶⁵ Oestigaard, Terje; *Nile Issues: Small Streams from the Nile Basin Research Programme*; 2010, Fountain Publishers, Kampala pp8-9

⁶⁶ Oloo, A. (2007) 'The Quest for cooperation in the Nile Water Conflicts: The Case of Eritrea'; *African Sociological Review*, Vol 11 Issue 2, pp95-105

⁶⁷ Pearce, P. (2010); 'Does Egypt Own the Nile? A Battle Over Precious Water' in *Yale Environment 360* http://e360.yale.edu/feature/does_egypt_own_the_nile_a_battle_over_precious_water/2297/ Retrieved on May 14, 2013 at 15.30EAT

⁶⁸ See, Chapter One

management. Alfredson and Cungu⁶⁹, in addressing the opportunities of negotiations observed that negotiations can play a vital role in assisting policy-makers to obtain a better grasp of the complex issues, factors and human dynamics behind important policy issues.

In order to understand the opportunities that accrue from negotiations, this section will highlight these opportunities that Nile basin riparian countries stand to gain from the process as well as when they finally come to an agreement on the CFA. So as to avoid digressing from the subject since the opportunities could be wide; examining the topic will be done within the confines of the scholarly principles and perspectives of diplomatic scholars. This will be guided by the Grzybowski-McCaffrey-Paisley mutual gains approach⁷⁰ will be utilised to trace the opportunities in negotiating the CFA in the post-colonial period. The Grzybowski-McCaffrey-Paisley mutual gains approach is defined as a process model based on experimental findings and hundreds of real-world cases, that lays out various steps for negotiating better outcomes, often including equitable sharing of the benefits while protecting relationships and reputation. The model's central tenet is that a vast majority of negotiations in the real world involve parties who have more than one goal or concern in mind and more than one issue that can be addressed in the agreement they reach. Grzybowski, McCaffrey and Paisley stated that the mutual gains approach allows parties to improve their chances of creating an agreement superior to existing alternatives.

Lachs⁷¹ also noted that diplomatic negotiations that aim at permanent relationship between or among States by treaty or otherwise, serve the States' maintenance and solve the problems that arise in the life-time of those relations. In other words, and more so serve in the

⁶⁹ Alfredson, Tanya and Cungu, Azeta; *Negotiation Theory and Practice: A Review of the Literature*; EASYPol; FAO Policy Learning Programme, Rome, 2008 p2

⁷⁰ Grzybowski, *et al*; *Beyond International Water Law: Successfully Negotiating Mutual Gains Agreements for International Watercourses*, A paper at a conference on 'Critical Intersections for Energy and Water Law: Exploring New Challenges and Opportunities', Calgary, Alberta May 20-21, 2009, University of Calgary pp139-155

⁷¹ Lachs, Manfred (1985); 'International Law, Mediation and Negotiation' in Lall, S.A (ed); *Multilateral Negotiation and Mediation: Instruments and Methods*; Pergamon Press, New York pp183-184

pacific settlement of disputes. For analytical purposes of this study, emphasis will be on opportunities that accrue for all the riparian countries, namely Burundi, DR Congo, Egypt, Eritrea, Ethiopia, Kenya, Rwanda, South Sudan, Sudan, Tanzania, South Sudan and Uganda. The opportunities accruing from negotiating the new Cooperative Framework Agreement (CFA) for the Nile Basin that benefit all the riparian countries include, cooperation and promotion of friendly relations, development of climate change resilient programmes, environmental conservation, joint infrastructure development programmes, joint agriculture development programmes. The same are analysed in the following section in depth. Cooperation and promotion of friendly relations kicks off the analysis.

Cooperation and Promotion of Friendly Relations

Cooperation and promotion of friendly relations involves developing and promoting a wide array of relations in various fields such as commercial, scientific, educational and cultural. It is a fundamental rationale for establishing diplomatic relations⁷² by countries to protect their interests from harm, starting with the balance of power system in the 18th and 19th century following the end of the Napoleonic Wars (1815) until the outbreak of the first World War (1914) whereby nations attempted to stabilise international relations by creating systems of alliances to balance the power of one group of nations against the power of another and thus discourage war; to the rather unsuccessful collective security under the League of Nations at the end of the first World War in 1919, to the formation of the United Nations in the post-Second World War era in 1945 and to the recent proliferation of regional security mechanisms through the regional integration as a result of the disappointments with the UN system⁷³. Cooperation, or collaboration, as expounded by O’Neill⁷⁴, who looks at the

⁷² Mudida, R. (2009); *Diplomacy Course 2009-2010*; Unpublished manuscript, Hekima College Institute of Peace Studies and International Relations

⁷³ Dye, Thomas R. (1994); *Politics in America (2nd ed)*; Prentice-Hall Inc. New Jersey pp657-689

outcome rather than the process of obtaining that collaboration. In fact, she cautions against analysing the context of such collaboration but rather the implementation of the outcome of the collaborative efforts.

In the course of this research it was evident that the riparian countries were keen to maintain friendly relations. The way out for them was to cooperate even if at the most minimal level so as to safeguard their interests from possible harm or competition from each other as well as from outside the block. Despite their agreements over the CFA, the study found that cooperation among the Nile riparian countries was the overarching desire and the threats that they each employ at the negotiating table is nothing more than to make the other riparian countries adopt their points of view so as to foster cooperation. State and intergovernmental respondents pointed out at the two-year US\$15 million Nile Cooperation for Results (NCORE) for offering a platform to foster the cooperation. The NCORE project also further offers the knowledge based analysis of trans-boundary options for sustainable basin-wide cooperative planning, management and development of the shared Nile Basin water resources⁷⁵. The state of cooperation has been a major concern for the riparian states and was one of the agenda items at the 21st NILECOM meeting on June 20, 2013 in Juba, South Sudan.⁷⁶

Development of Climate Change Resilient Programmes

The phenomenon of climate change has become the biggest threat to the survival of many states. Climate change is the human expansion of the greenhouse effect, that is, the

⁷⁴ O'Neill, K.M. (2005); *Can Watershed Management Unite Town and Country?*; in Krannich, R. (ed); *Society and Natural Resources: An International Journal*; Vol 18 No.3; Taylor and Francis Group, Philadelphia pp241-243

⁷⁵ NBI; *Nile Cooperation for Results*;

http://www.nilebasin.org/newsite/index.php?option=com_content&view=article&id=156%3Anile-cooperation-for-results&catid=78%3Ancore&Itemid=142&lang=en Retrieved on August 7, 2013 at 22.10EAT

⁷⁶ Akec, Paul Mayom (2013); *21st Nile Council of Ministers Meeting: Press Statement by Hon. Paul Mayom Akec*
http://www.nilebasin.org/newsite/index.php?option=com_content&view=article&id=159%3A21st-nile-council-of-ministers-meeting-press-statement-by-hon-paul-mayom-akec&catid=40%3Alatest-news&Itemid=84&lang=en

warming that results when the atmosphere traps heat radiating from earth toward space. The impact of climate change is warmer temperatures, more evaporation and precipitation, and also the shifting climate patterns may change the areas where crops grow best and affect the makeup of natural plant communities⁷⁷. The impact of climate change is massive, threatening many world economies, more so to the agriculture-oriented economies of Africa. Furthermore, climate-induced trans-boundary migrations have the potential of flaring up tensions among communities.

From the research, it was apparent that not a single country can deal with climate change and therefore countries of the world come together to the negotiating table to discuss common approaches to mitigating the impacts of the global phenomenon. The Nile riparian countries, united by the shared resources of the Nile River are no exception and through negotiations are developing climate change resilient programmes for the survival of the common resource they share as well as the survival of their economies. From the negotiation tables, they have developed common approaches to dealing with climate change. For instance, the riparian States have a strategy for climate change adaptation and mitigation while NBI has developed guidelines for climate change adaptation for water-related investments while insisting on mainstreaming of climate change adaptation and mitigation measures in NBI investment programmes and projects. Respondents cited the joint approach the Nile basin states adopted at the 2011 United Nations Framework Convention on Climate Change (UNFCCC) conference in Durban, South Africa to demand elimination of the challenges in accessing the US\$100 billion Climate Change Fund (CCF) for developing countries. In March 2013, the Nile riparian states launched a two-year water resources

⁷⁷ NASA; *A blanket around the Earth*; Earth Science Communications Team, NASA Jet Propulsion Laboratory, California Institute of Technology; <http://climate.nasa.gov/causes/> Retrieved on Monday August 26, 2013 at 23:16EAT

management and development project worth \$15 million to fight climate change within the Nile basin, funded by the Nile Basin Trust Fund for \$13.8 million and the Cooperation in International Waters in Africa (CIWA) trust fund for \$1.5 million as demonstration to their commitment to fight the harmful impacts of climate change within the basin. The funds were to be administered by the World Bank.⁷⁸

Environmental Conservation

Environmental conservation is a policy issue that aims at safeguarding the natural resources, preserving the current state of natural environment and, where possible, reversing its degradation.⁷⁹ Environmental conservation requires concerted efforts to sustainably use the natural resources. Sustainable environmental use is important to ward off possible break-out of intercommunity and inter-State conflicts for a peaceful, secure and stable co-existence. The NBI's Shared Vision Programme (SVP) aims to support establishment of an enabling environment for cooperative development. According to UNDP Project document, the aim of the project is to develop a framework for basin-wide environmental action linked to trans-boundary issues within the context of the Nile Basin Initiative's (NBI's) SVP under the Global Environment Facility's International Waters Programme (GEF - IWP).

This was brought in the course of the research whereby respondents cited the programmes that the Nile Basin countries have initiated for environmental conservation. These, the respondents said included information-sharing programmes, water-shed management programmes, harmonisation of national development policies and joint regular

⁷⁸ Menya, W. (2013); *Kenya: Nile States Launch Sh1.3 Billion Climate Change Project*; The Star Newspaper, The Star Publications Ltd; <http://allafrica.com/stories/201303182494.html>; Retrieved on August 31,2013 at 09:46am EAT

⁷⁹ Business dictionary; *Environmental Protection*; <http://www.businessdictionary.com/definition/environmental-protection.html#ixzz2dWkzPlhq> Retrieved on August 22, 2013 at 19.07 EAT

assessment reports.

Joint Energy and Infrastructure Development Programmes

Access to electricity is a priority for the Nile Equatorial Lakes (NEL) countries' economies because it is a prerequisite for poverty reduction and economic growth. According to NBI, majority of NEL countries have very low access to electricity, with an average of per cent which affects their industrialisation and could also discourage potential investors. However, through the Regional Transmission Interconnection Project, over 769 kilometres of 220 kV and 110 kV transmission lines and associated sub-stations are to be constructed to interconnect electric grids in Kenya, Uganda, Tanzania, DR Congo, Rwanda and Burundi.⁸⁰

During the 10th anniversary of the NBI, for instance, it was Kenya and Tanzania announced an initiative to set up a power link while transmission lines were also set up to connect Ethiopia and Sudan. This was part of the East African Power Pool covering ten countries including Burundi, the Democratic Republic of Congo, Djibouti, Egypt, Ethiopia, Kenya, Rwanda, Sudan, Tanzania and Uganda. NBI also indicated that among future power investments would include the Regional Rusumo Falls Hydropower Project that covers Burundi, Rwanda and Tanzania, and the Joint Multi-purpose Project targeting Egypt, Ethiopia and Sudan.⁸¹ All these were aimed at averting future energy crises within the Nile basin.

Joint Agriculture Programmes

The NBI through its Subsidiary Action Programs (SAPs) promotes investments in three critical areas of priority to all Member States namely power, agriculture and river basin management. The agriculture component is so critical to the basin States because it accounts for about one quarter of the Gross Domestic Product (GDP) and absorbs 30-92 per cent of the

⁸⁰ NBI (2011); *Kenya and the Nile Basin Initiative: Benefits of Co-operation*; NBI Entebbe p9

⁸¹ Menya, W. (2009); *Tanzania power link to ease energy crisis*; Business Daily December 28 2009 at 00:00 <http://www.businessdailyafrica.com/Corporate-News/-/539550/831704/-/14xv5tsz/-/index.html> Retrieved on August 27, 2013 at 14.29EAT

labour force.⁸² The Lake Edward and Lake Albert Fisheries project along the borders of DR Congo and the Republic of Uganda aims at promoting fishermen organisations, building capacity for improved fish and water resources monitoring and supporting consultative planning for management and development of the fish resources.⁸³ All the Nile riparian countries' economies are agriculture-driven thus the importance attached to agriculture by all the member States.

The research found that the negotiations among the Nile basin riparian States have normally centred on finding ways to improve the agricultural. The respondents view was that before the basin countries move fully into industrialisation and service industries, agriculture provides the best option of remaining relevant in the international markets. The respondents asserted that by approaching the international market as a block, they can bargain and get better prices for their produce, which is mainly exported in raw format than when the individual members trade in the international market on their own. In addition, there is the benefit of accruing from sharing information on how to improve their agricultural produce and attracting investors into the riparian countries by applying uniform requirements and procedures for potential investors.

Attracting more donor funds and input

Unity is strength and the Nile riparian countries understand this quite well. Thus, instead of negotiating as individual States with the donors, they approach them as a block. This, the respondents said has seen donors pour money into the NBI projects though the World Bank administered Nile Basin Trust Fund (NBTF). The Fund was established ten years ago to harmonize donor contributions to NBI for the management of the resources of

⁸² NBI; (2011); *Burundi and the Nile Basin Initiative: Benefits of Co-operation*; NBI Entebbe p8

⁸³ NBI (2011); *Unlocking the Nile Basin's Development Potential: Benefits of Cooperation - DR Congo Benefits of Cooperation*; DR Congo; NBI, Entebbe p12

the Nile River. Among the donors to the fund have been Canada, Denmark, Netherlands, Norway, Sweden, the United Kingdom, Finland, France, Germany, Italy, Latvia, Estonia, the EU and various UN agencies such as UNDP and the FAO. In those ten years, NBI has largely been reliant on the \$150 million pledge to NBTF, the World Bank managed multi-donor trust fund for its basin-wide projects since 2003. For instance, by 2008, NBTF had contributed \$130 million surpassing the riparian countries' membership contribution of \$14.4 million by nearly ten times.⁸⁴ In other words, by coming onto the negotiating table towards a new Cooperative Framework Agreement, the Nile basin countries have been able to attract more funding from international development partners than they could have done on their own as individual States.

The Challenges for the Nile Basin Countries

Mistrust and Misunderstandings among the Nile riparian States

Since 1999, the Nile countries have been negotiating the new Nile river treaty, the Cooperative Framework Agreement (CFA) to no avail. The CFA is supposed to establish a permanent Nile River Basin Commission (NRBC) with the major objectives of managing the shared resources and fostering cooperation among the riparian states⁸⁵. However, Egypt claims historical rights to the River Nile and so is Sudan. Both countries are opposed to the Article 5 of the CFA on the 'Obligation not to cause significant harm'⁸⁶ which they have stated threatens their water security, defined as protection of water for all human needs.⁸⁷ But for the upstream States – Burundi, Kenya, Uganda, Tanzania, Rwanda, the Democratic

⁸⁴ NBI; *NBI makes progress towards resource mobilization*; Nile News, A quarterly newsletter of the Nile Basin Initiative Vol 10 Issue 2 June 2013 p8

⁸⁵ Nile Basin Initiative; *Draft Agreement on the Nile River Basin Cooperative Framework*; 2007, NBI, Kampala p12

⁸⁶ Article 5 (1) of the CFA, which the downstream states are opposed for fear that it could deny them unfettered access to the waters provides that: '*Nile Basin States shall, in utilising Nile River system and Nile River Basin Water Resources in their territories, take all appropriate measures to prevent the causing of significant harm to other Basin States*'

⁸⁷ Ndaruzaniye, V., et al (2013); *Future Global Water Security in a Changing Environment*; Global Water Institute, Brussels p1

Republic of Congo and Ethiopia, the colonial treaty that guarantees Egypt unrestricted access to the Nile River resources is not only out-dated but also neo-colonial.

Failure to agree on the CFA and the prolonged negotiations has been blamed for the pulling out of donors who have been supporting the joint riparian countries activities through the World Bank administered Nile Basin Trust Fund at the end of 2014.⁸⁸ The pulling out of NBTF has necessitated the members of the riparian countries to begin a search for a new vehicle for funding, Nile Basin Initiative Trust Fund (NBI-TF) to keep their activities going, including the running of the NBI and the organisation of the negotiations.

The research found that the misunderstandings had the potential of driving a wedge among the riparian countries and prolonging the costly negotiations more and even lead to what Egyptian President Anwar Sadat in 1979 said: “The only matter that could take Egypt to war again is water,” and reiterated in 1988 by then-Egyptian Foreign Minister Boutros Boutros-Ghali, who later became the United Nations’ Secretary-General, who predicted that the next war in the Middle East would be fought over the waters of the Nile, not politics.⁸⁹

The Complexification by South Sudan to the Downstream States

When the negotiations over the new Cooperative Framework Agreement began in 1999, the South Sudan was part of the former Sudan before it seceded on July 9, 2011 after years of civil war. Since its secession the independent South Sudan has not hidden the fact that it intends to align itself with the upstream states against Egypt and Sudan. In fact, South Sudan signed the Cooperative Framework Agreement, which Egypt and Sudan have rejected, in June 2013. Paul Mayom Akec, the South Sudan's Minister of Irrigation and Water Resources had said that his government would implement the agreement as soon as

⁸⁸ NBI; *NBI makes progress towards resource mobilization*; Nile News, A quarterly newsletter of the Nile Basin Initiative Vol 10 Issue 2 June 2013 p8

⁸⁹ Mbote, P. K. (2007); ‘Water, Conflict, and Cooperation: Lessons From the Nile River Basin’ in *Navigating Peace*; Woodrow Wilson International Centre for Scholars January 2007 No.4 p1

parliament ratifies it.⁹⁰ In mid-August 2013, South Sudan Council of Ministers passed a unanimous a resolution endorsing the country's bid to join the Nile Basin Initiative (NBI). In addition, South Sudan is one of the few countries that have openly supported Ethiopia's controversial Grand Renaissance dam which Egypt vehemently opposes.⁹¹

There is a school of thought that South Sudan could become Egypt's new headache over Nile water treaty. Even Egypt was coy about the South gaining independence from Khartoum for fear that "a non-viable state" would threaten Egypt's stranglehold on the River Nile waters because it would side with the upstream states such as Kenya, Uganda, Rwanda, Burundi, Tanzania, DR Congo and Ethiopia.⁹²

From the research, it was no different as Egyptian respondents, who included government officials, water experts and journalists felt South Sudan was complicating the equation in so far as retaining its stranglehold on the Nile waters is concerned. As a new state, the Egyptian respondents held that South Sudan was at liberty not to recognise the 1929 and 1959 colonial treaties and therefore would decide to use the Nile waters without paying attention to what the colonial treaties. South Sudan authorities on the other hand insisted that they had no sinister motive. Instead, all they wanted is fairness in access and utilisation of the river Nile's resources.

Unilateral national development projects on the River Nile

The 1929 and 1959 colonial treaties required a consultative forum by the riparian

⁹⁰ AlJazeera (2013); *South Sudan set to sign new Nile agreement*; AlJazeera 20 Jun 2013 09:44; <http://www.aljazeera.com/news/africa/2013/06/201362075235645727.html> retrieved on August 2, 2013 at 21.39EAT

⁹¹ Tekle, Tesfa-Alem (2013); *South Sudan backs Ethiopia's Nile dam*; *Sudan Tribune*; June 14, 2013; <http://www.sudantribune.com/spip.php?article46960> Retrieved on August 1, 2013 at 09.43EAT

⁹² Menya, W. (2011); *Why South Sudan is Egypt's new headache over Nile water treaty*; *Daily Nation* Saturday, July 23, 2011; <http://www.nation.co.ke/news/world/-/1068/1206550/-/13u0adg/-/index.html> Retrieved on August 1, 2013 at 09.47EAT

countries and express permission from Egypt before going ahead to initiate development projects on either the river Nile's sources or along the river it. However, and more recently, the Grand Renaissance dam in Ethiopia did not make reference to Egypt, causing untold tension between the two countries. William Lloyd George⁹³, a journalist with the Time World in Addis Ababa, Ethiopia, could not have captured the simmering tension that has ensued between Egypt and Ethiopia over the Grand Renaissance dam better;

The heat is stifling but the construction workers and red-hatted engineers don't let up. Mechanized excavators batter into the mighty, arid peaks on either side of the site of Ethiopia's Grand Renaissance dam, set to be the largest in Africa. The foundations are growing. The dark brown waters of the Nile River flow through the site. But the punishing sun and tough terrain aren't the only challenges facing the dam's progress. Downstream, Egypt is furious — and some politicians there have talked in private of war. Ethiopia is defiant.

Respondents were divided between the upstream and downstream countries, with those from Egypt and Sudan in opposition of the Ethiopian dam while those from the upstream states either supported or wanted the two countries to have a joint session to air out their differences without reverting to threats of war or diplomatic tiff which they said would harm the cooperation and joint development programmes within the Nile basin.

Influence of Third Party Actors

As observed in Chapter Two, the actors to the Nile Basin negotiation are not just the riparian countries.⁹⁴ Instead there are other actors who all come with varied interests, either in the conflict situation itself or on the outcome of the negotiations. The actors in the Nile basin

⁹³ George, W. L. (2013); *Ethiopia's Plan to Dam the Nile Has Egypt Fuming*; Time World June 28, 2013; <http://world.time.com/2013/06/28/ethiopias-plan-to-dam-the-nile-has-egypt-fuming/#ixzz2dYPod1LQ> Retrieved on August 23, 2013 at 12.28EAT

⁹⁴ See, Chapter Two for details on the Global Trans-Boundary Water Agreements

negotiations can thus be dichotomised into riparian States, external states outside the basin and non-state actors and individuals.

There was a feeling among the respondents that the World Bank, some Western countries, Russia and China were influencing the negotiations for their own benefit. For instance, respondents from the upstream states felt that China and some western nations was asking the upstream governments to go slow on the Cooperative Framework Agreement (CFA) in exchange for development aid. Their intervention, the respondents said was for their own benefits especially those that they expected to obtain from Egypt which still remains an important ally for the Western governments.

Conclusion

The foregoing chapter analysed the primary data of the case study with a view to put the topic in context. From the field, the respondents identified the opportunities available to the Nile riparian countries in negotiating the CFA as fostering cooperation and friendly relations by sharing the negotiating table; being able to attract more donor funds and input through because of the enhanced bargaining power they have as a block; joint agriculture, energy and infrastructure development programmes for the region. They also felt that the countries would also be able to conserve the environment better through cooperation and sharing information as well as being able to jointly develop climate change mitigation programmes. On the other hand, the respondents were also able to point out at the obstacles that the Nile basin countries must navigate in the process of negotiations which include misunderstandings amongst them, unilateral national development projects, influence of third party actors and the place of the South Sudan which has the potential of complexifying the process.

CHAPTER FOUR: CRITICAL ANALYSIS

Introduction

This is a scholarly chapter that brings together all the issues identified from Chapters One, Two and Three in order to discuss the issues surrounding the new Nile basin and the attempts by the riparian countries towards settling on a new framework for the management of the Nile river resources. It considers the various roles and commitments of the actors involved in the process, and equally important, it will consider the role of South Sudan has had since it seceded from the Sudan on the process of negotiating a new agreement. Using the theoretical framework, it will analyse them to create new knowledge. It also tests the hypotheses identified in Chapter One. Chapter Two analysed the global picture of trans-boundary water agreements in order to identify the methods and benefits thereof while Chapter Three was concerned with the case study and analysed the primary data obtained from the field.

In reality, Chapters Two and Three examined the core of this study. The opportunities and challenges identified therein are those that concern trans-boundary water agreements. The purpose of this Chapter Four therefore is to bring together all the issues already identified, plus others in a critical assessment of trans-boundary water agreements in Africa in the post-colonial period. Furthermore, this chapter will utilise the objectives identified in Chapter One⁹⁵ to examine how they help the study to navigate to its hypothesis. Chapter Four will therefore summarize the discussions raised and critically address main issues of the previous chapters against the backdrop of the theoretical framework that was identified in Chapter One of this study. To start off, this section delves into the theoretical framework identified in Chapter One before analysing the opportunities and challenges in negotiating

⁹⁵ See, Chapter One on the Introduction to the Research Problem

trans-boundary water agreements in post-colonial Africa.

Problem-Solving Approach to Negotiations

This study adopted, as the guiding theoretical frame work the problem-solving approach which in the end results mutual gains for all the parties concerned, as opposed to the competitive approach which is more realist and aims at amassing power. The problem-solving approach's basic postulation is that states should focus on the common interests for the benefits of cooperation to materialise even as they try to maximise returns for their own self. Menkel-Meadow asserts that negotiation is not about maximising individual gain but about looking for joint gain.⁹⁶

The problem-solving approach recognises that there are challenges to any diplomatic negotiation but advocates for postponement of commitments while further exploring how to maximise and fairly distribute the value of any agreement. Under this approach, it makes sense for one party to forego the short-term gains for long-term gains that would also prevent re-entry of conflicts. The emphasis of this theory is on the parties' underlying interests rather than their positions, and encourages parties to maintain and build their relationship even if they disagree rather than creating an adversarial process.⁹⁷

Aviva Imhof⁹⁸ emphasised the point of cooperation, asserting that cooperation should even go beyond states to non-state actors and individuals. It is on this premise that the problem-solving approach was found to be the most appropriate theoretical frame work for this analysis.

⁹⁶ Carrie Menkel-Meadow; *Chronicling the Complexification of Negotiation Theory and Practice*; 2009, p416, Georgetown Law Library <http://scholarship.law.georgetown.edu/facpub/29> op cit

⁹⁷ Moffitt, M.L and Bordone, R.C. (eds 2005); *Handbook on Dispute Resolution*; cited in Harvard Law School (2008); *Programme of Negotiation: Problem-Solving Approach*; <http://www.pon.harvard.edu/tag/problem-solving-approach/> Retrieved on June 05, 2013 at 13.20EAT

⁹⁸ Imhof, Aviva; *Fighting for their lives: Mekong River Communities take on Basin-Wide River-Development Schemes*; *World Rivers Review* Vol. 17 No. 5/6/December 2002; International Rivers Network, California p4

Negotiating Trans-Boundary Water Agreements

Tanya Alfredson & Azeta Cungu⁹⁹ assert that negotiation is a central component of national, one may also add, international policy-making process because it sets the agenda, assigns duties to policy-makers, explores options, offer solutions and secure the needed support from relevant parties. The authors further state that negotiations are vehicles of communication and stakeholder management to enable policy-makers have better grasp of the issues at hand, which sometimes could be as complex as what Mwangi¹⁰⁰ refers to as the grand strategy (the national security). The prospects, progress, and products of negotiations process, according to Bošnjaković¹⁰¹ are determined by nine factors namely; initiating the development leading to formal negotiation; organisational setting, procedural rules and negotiation culture; balancing of interests; windows of opportunity that promote and accelerate negotiations; relationship and synergy; role of technology, research and monitoring in the negotiation process; negotiation on implementation and compliance; role of human rights, transparency and participation and; role of management and financing issues in the negotiation process.

Out of Bošnjaković's postulation, two very important questions with regard to agreements on the shared water resources need to be addressed and which have immense bearing on the time within which an agreement is obtained and the possibility of re-entry of the conflict situation. First is whether multi-lateral negotiation forums should arrive at the collective decisions by consensus or majority rule. Blomquist & Schagler¹⁰² argue that while

⁹⁹ Alfredson, Tanya and Cungu, Azeta; *Negotiation Theory and Practice: A Review of the Literature*; EASYPol; FAO Policy Learning Programme, Rome, 2008

¹⁰⁰ Mwangi, Makumi (2008); *Coordination of National Security Strategy: Perspectives on Grand Strategy Formulation in Kenya*; NDC Occasional Papers on Security No. 1 National Defence College pp1-4

¹⁰¹ Bošnjaković, Branko (2003); *Negotiations in the Context of International Water-Related Agreements*; a paper prepared within the framework of the joint UNESCO-Green Cross International project on the theme 'From Potential Conflict to Cooperation Potential (PCCP): Water for Peace', Croatia, University of Rijeka p1

¹⁰² Blomquist, W. & Schagler, E. (2005); *Political Pitfalls of Integrated Watershed Management*; in Krannich, R. & Buttel, F.H. (eds); *Society and Natural Resources: An International Journal*; Vol 18 No.2; Taylor and Francis Group, Philadelphia

consensus is usually more appealing to majority, obtaining the same is a monumental challenge. A case in point is the failure of the League of Nations, whose failure to garner consensus in most of its decisions led to the bloodiest and costliest Second World War. Consensus was simply unattainable, because from a Machiavellian realist perspective, international organisations through which States practice multilateral diplomacy are just venues for power politics to take place.¹⁰³ Every country seeks to maximise its gains which makes consensus very difficult to achieve, more so in a multilateral setting. However, consensus as a decision-making method appeals because it protects the minority and/or non-traditional interests and concerns, according to Blomquist & Schagler. On the flipside, Buchanan & Tullock¹⁰⁴ argue that the consensus method may impede collective action by presenting each individual with a veto, thus leading to gridlocks as the individuals exercise their veto power, or what the authors term as ‘something-for-everyone’ form of distributive policy so as to buy off each other’s veto or interest. Consensus, Blomquist & Schagler assert, only works where the issues are relatively narrow and affect all the participants similarly. Majority rule on the other hand adopts the approach of numbers and capabilities, both military and economic, rather than issues which does not augur well for a long-term problem-solver.

The second negotiation concern that this analysis is interested in is whether or not to incorporate non-local communities – which this study considers as the third party actors. There are those who are strongly for inclusion of all parties affected or affecting a water resource, whether located within the watershed or not.¹⁰⁵ Conversely, Blomquist & Schagler

pp105-108

¹⁰³ Osakue, Dawn (2010); *Consensus in International Organisations*; http://www.academia.edu/1129905/Consensus_in_International_Organisations
Retrieved on August 28, 2013 at 14:02EAT

¹⁰⁴ Buchanan, J. & Tullock, G. (1962); *The Calculus of Consent*; Michigan, University of Michigan Press

¹⁰⁵ Bates, et al (1993); Searching out the headwaters: Change and rediscovery in Western water policy, Washington DC, Island Press p197 cited in Blomquist, W. & Schagler, E. (2005); Political Pitfalls of Integrated Watershed Management; in Krannich, R. & Buttel, F.H. (eds); *Society and Natural Resources: An International Journal*; Vol 18 No.2; Taylor and Francis Group, Philadelphia pp106

argue that non-local communities might come up with decisions that have devastating impacts on the local community. Opening up the negotiations forum to non-local communities may provide arenas in which interests of powerful, non-resident players often dominate the interests of small-scale local users, according to Young.¹⁰⁶ For NBI this is also very true. The Nile riparian countries are in a dilemma on how to handle the third party actors since they have, for all intents and purposes, sustained the activities of the riparian states through the Nile Basin Trust Fund (NBTF).

Furthermore, there is the media which Kingoina¹⁰⁷ asserts is important to the enhancement of public diplomacy in the Nile basin. Within the Nile basin, the media have a structure, the Nile Media Network (NMN) based in Entebbe, Uganda through which they promote dialogue around the negotiations over the Nile basin. Besides the framework of NMN, there are other mainstream media outlets and blogs that fan discussion around the Nile basin. The media, Gilboa¹⁰⁸ acknowledges, operate in three shades namely basic variant, non-state transnational variant and the domestic public relations variant. Basic variant is where media is used to win critical battle for the minds of people in countries with hostile governments by creating a favourable image for a country's policies, actions, political and economic goals. Non-state variant argues that within the international systems, non-state actors can utilise the power of the media to promote relations between or among states. Lastly, the domestic public relations variant is where a government hires a public relations firm in the target group to achieve its goals. For instance, in 2009 Kenya government hired, a

¹⁰⁶ Young, O. (2002); Institutional interplay: The Environmental Consequences of Cross-Scale interactions; p271; cited in Blomquist, W. & Schagler, E. (2005); Political Pitfalls of Integrated Watershed Management; in Krannich, R. & Buttel, F.H. (eds); *Society and Natural Resources: An International Journal*; Vol 18 No.2; Taylor and Francis Group, Philadelphia pp107

¹⁰⁷ King'oina O. Enock; *Track Two Diplomacy in Environmental Security in the Nile Basin*; September 2010; Unpublished MA Thesis, University of Nairobi p83

¹⁰⁸ Gilboa, E.; 'Diplomacy in the Media Age: Three Models of Uses and Effects' in *Diplomacy and Statecraft*, Vol 12, 2001 p221 cited in King'oina O. Enock; *Track Two Diplomacy in Environmental Security in the Nile Basin*; September 2010; Unpublished MA Thesis, University of Nairobi p84

Washington DC based CLS Associates for \$1.7 million over two years to improve its image after the post-election violence.¹⁰⁹ These two issues are very important in determining the success or failure of any negotiation process.

Harnessing the Benefits in Negotiating the New Nile Treaty

Through negotiations, states are able to address their diverse interests for purposes of peaceful co-existence. From the survey, it emerged a number of benefits that the riparian States can harness. However, they have to start by seeing water, not as a static resource but a flexible resource as advocated for by Susskind and Islam.¹¹⁰

Lawrence Susskind and Shafiqul Islam¹¹¹ recognise that the difficulties in the water negotiations are due to rigid assumptions of how water must be allocated. Susskind and Islam opine that with such rigid positions, there are only absolute winners and losers. On the other hand, the realisation that water is a flexible resource coupled with building of trust, they assert, can lead to countries reaching agreements beneficial to all their citizens and national interests. Their argument is however that through proper negotiations, the international waters can be harnessed for the good of all. For instance, the Israeli-Jordan Treaty, which demonstrates the value of trust, and going forward, adopt innovative technologies and collaborative administration to facilitate problem-solving and sustainability of the resource. They state that when countries face contending water claims, the biggest obstacle is uncertainty - of information, of action and of perception – which when combined, deprive the nations the sense of security and lead to mistrust. However, Susskind and Islam assert that the

¹⁰⁹ Kelley, K.J. (2009); Kenya: Government Hires Top US Image Firm;

<http://allafrica.com/stories/200908180408.html?mstac=0>

¹¹⁰ Susskind, Lawrence and Islam, Shafiqul; “*Water Diplomacy: Creating Value and Building Trust in Trans-Boundary Water Negotiations*,” Science & Diplomacy, Vol.1, No. 3 September 2012

<http://www.sciencediplomacy.org/perspective/2012/water-diplomacy>

¹¹¹ Susskind, Lawrence and Islam, Shafiqul; “*Water Diplomacy: Creating Value and Building Trust in Trans-Boundary Water Negotiations*,” Science & Diplomacy, Vol.1, No. 3 September 2012

<http://www.sciencediplomacy.org/perspective/2012/water-diplomacy>

difficulties can be overcome by not viewing the water as a fixed resource – “one provided by nature in a given quantity that is either static or diminishing” – but rather finding ways to improve overall efficiency of water use to “create more water” through a cooperative approach to negotiations.

Yasir Mohammed and Makonnen Loulseged¹¹² supports the above view, stating that that by viewing water as a static resource, inhabitants of the Nile basin, despite being endowed with vast natural resources, still face considerable challenges. However, the authors state that through cooperation, these benefits can be harnessed to yield major benefits in terms of food, energy production as well as improving the general welfare of the inhabitants of the basin. The authors state that the NBI has attempted to harness these benefits through the Strategic Action Programme that promotes a Shared Vision Programme and two investments Subsidiary Action Programmes (SAP). The Shared Vision Programme (SVP) comprises of eight projects namely the Applied Training Project (ATP), the Nile Trans-Boundary Environmental Action Project (NTEAP), the Nile Basin Regional Power Trade Project (RPTP), the Efficient Water Use for Agriculture Project (EWUAP), the Water Resources Planning and Management Project (WRPMP), the Confidence-Building and Stakeholder Involvement Project (CBSIP), the Socio-economic Development and Benefit Sharing Project (SDBSP) and the Shared Vision Programme- Execution and Coordination Project (SVP-ECP). All these, coupled with SAP, which has the Eastern Nile Subsidiary Action Programme (ENSAP) and the Nile Equatorial Lakes Subsidiary Action Programme (NELSAP), Yasir and Makonnen assert are opportunities that have resulted from the negotiations of the CFA.

¹¹² Mohammed, Yasir and Loulseged, Makonnen; *The Nile Basin Water Resources: Overview of Key Research Questions Pertinent to the Nile Basin Initiative*; 2008, Colombo; International Water Institute Working Paper 127 pp1-26

Grzybowski, *et al*¹¹³ in furthering the flexibility of water as a resource identifies that water can be used to support agriculture, and through that sustain livelihoods. The agricultural aspect, the authors declare, gave rise to water agreements negotiated some 5000 years ago. On the other side, the authors identify the use of water for energy, which in this case includes water for hydropower and biofuels, both of which increase with the demand for energy generally. Grzybowski, *et al* supports a mutual gains approach to negotiation for better outcomes, often including equitable sharing of the benefits. For cross-border water resources, the authors offer that with the recognition of the mutual gains approach, focus on negotiations can shift away from limiting impacts on sovereignty to planning and devising ways and means to maximise benefits negotiations, a concept they christen as ‘open negotiations’ as opposed to ‘narrow negotiations’, the latter of which bogs down negotiators with simplistic and time wasting definitions of tributaries, for instance.

Origin and Challenges of Negotiating Trans-Boundary Water Management Agreements

The colonial treaties and protocols signed between 1891 and 1959, either between Britain and Italy and Britain and Egypt as well as Egypt and Sudan left out the upstream States. In effect, they granted Egypt a monopoly over access to the Nile waters, a dangerous trend considering that water is a strategic natural resource that countries and governments have depended upon for their survival. This is no different within the Nile basin.

Bonaya Godana¹¹⁴, alluding to the unquestionable socio-economic significance of the great watercourses such as the Yangtze, the Hwan-Ho, the Indus, the Ganges, the Rhine and the Nile recognises that they also come with challenges, mainly arising from water rights,

¹¹³ Grzybowski, *et al*; *Beyond International Water Law: Successfully Negotiating Mutual Gains Agreements for International Watercourses*, A paper at a conference on ‘Critical Intersections for Energy and Water Law: Exploring New Challenges and Opportunities’, Calgary, Alberta May 20-21, 2009, University of Calgary pp139-155

¹¹⁴ Godana, Bonaya Adhi; *Africa's Shared Water Resources: Legal and Institutional Aspects of the Nile, Niger, and Senegal River Systems*; 1985, London, Frances Pinter Publishers pp20-23, 101-120

whereby states seek the regulation of water. This is not something new but existed even in ancient periods. Godana's contention that the interest of the State is not only limited to national waters but extends to international waters is a valid point which gave rise to the international water laws that began with Final Act of the 1815 Congress of Vienna that sought to settle the issues arising from the French Revolutionary Wars, the Napoleonic Wars, as well as the dissolution of the Roman Empire. From Godana's contention, the challenges are real.

Pre-Colonial Water Agreements in Africa

Agreements on Trans-Boundary water management predate history. Godana¹¹⁵ asserts that rivers have played a significant role in the progress of humanity, as well as the origins of the organisation of the State have been traced from water rights. Godana cites Du Bois who argues that "Civilisation flowed to man along the valley of great rivers where the soil was fertile...and where the waters carried him to other peoples who were thinking of the problems of human life and solving them in varied ways"¹¹⁶

The international river law emanated largely from the 1815 Congress of Vienna. Article 108 of the Final Act of the Congress stipulated that the powers whose territories were traversed by a navigable river undertook to regulate by common agreement all the issues relating to navigation on all such rivers. Godana affirms that Articles 108 to 116 of the Act represented the first multilateral attempt to regulate international rivers in Europe.

At the Berlin Conference of 1885 when the colonial powers partitioned Africa, Chapters I and VI of the Treaty related to navigation on the Congo and Niger rivers. At the Berlin Conference, representatives from the United States and other western powers settled their differences over administration of Africa's Congo region and set up policies for the

¹¹⁵ Godana, Bonaya A. (1985); *Africa's Shared Water Resources: Legal and Institutional Aspects of the Nile, Niger, and Senegal River Systems*; London, Frances Pinter Publishers pp21-31

¹¹⁶ Du Bois, W.E.B. (1947); *The World and Africa*; New York International Publishers p98 cited in Godana, Bonaya A. (1985); *Africa's Shared Water Resources: Legal and Institutional Aspects of the Nile, Niger, and Senegal River Systems*; London, Frances Pinter Publishers p21

colonization of the rest of Africa such that by 1914 European nations controlled 90 percent of the African continent. The General Act, in part thus stated:

The trade of all nations shall enjoy complete freedom—

In all the regions forming the basin of the Congo and its outlets. This basin is bounded by the watersheds (or mountain ridges) of the adjacent basins, namely, in particular, those of the Niari, the Ogowé, the Schari, and the Nile, on the north; by the eastern watershed line of the affluents of Lake Tanganyika on the east; and by the watersheds of the basins of the Zambesi and the Logé on the south. It therefore comprises all the regions watered by the Congo and its affluents, including Lake Tanganyika, with its eastern tributaries.¹¹⁷

In other words, the Western powers were negotiating the use and management of African Trans-Boundary water resources during the partition of Africa without the continent's involvement. The agreements were therefore between and/or among the colonial powers. And in so far as the Nile is concerned, Egypt has used and been dependent on the Nile since the dawn of civilisation and claims historic rights to use the Nile waters. Egypt has also argued that the upstream states have no tradition for use and control of the resources of the Nile. Moreover, Egypt argues that the upstream states have alternative sources of water unlike it which is nearly 98 per cent dependent on the river's waters.¹¹⁸ By claiming historic rights, they in a way owned and controlled the river's resources. As such, there was no agreement between Egypt and the upstream states in the pre-colonial period that has been documented. The treaties that have been documented are those Egypt signed with Britain which was the colonial power.

¹¹⁷ The Berlin Conference (1885); *General Act of the Conference at Berlin of the Plenipotentiaries of Great Britain, Austria-Hungary, Belgium, Denmark, France, Germany, Italy, the Netherlands, Portugal, Russia, Spain, Sweden and Norway, Turkey [and the United States] dealing with Africa*; The McGraw-Hill Companies, Inc.

¹¹⁸ Oestigaard, Terje; *Nile Issues: Small Streams from the Nile Basin Research Programme*; 2010, Fountain Publishers, Kampala pp8-9

Colonial and Post-Colonial Nile Basin Treaties 1929-2002

The 1891 Protocol between Britain and Italy to demarcate their spheres of influence in Eastern Africa sought to protect Egypt's interest in the Nile waters in exchange of access to Suez Canal which was an important passage to India, Britain's Asian colony is considered the first colonial Treaty on the management of the River Nile. Later on in 1929, the Treaty between the upstream states and Egypt was signed. In the Treaty, Great Britain, on behalf of East African colonies, granted Egypt unhindered access to the resources of the River Nile. The 1929 Nile Water Agreement stated that:

“no irrigation or power works or measures are to be constructed or taken on the River Nile and its branches, or on the lakes from which it flows...in such a manner as to entail any prejudice to the interests of Egypt, either reduce the quantity of water arriving in Egypt, or modify the date of its arrival, or lower its level.”¹¹⁹

In exchange, Egypt was going to allow Britain the use of the Suez Canal which Britain considered extremely important for its interests in Asia. The net product of this treaty, Apondi acknowledges, was the allocation of control of the river's resources to Egypt ¹²⁰. Wenje restates this position, saying the 1929 Treaty gave Egypt exclusive rights over the Nile and the East African states were required to obtain express acquiescence from Egypt for high-powered projects such as the hydro-electric power projects or construction of dams along the rivers that drain into the Lake Victoria. He affirms that the reason the CFA has more or less stalled is because Egypt and its northern partner Sudan want a clause on water security and with it acknowledge the 1929 and 1959 treaties, while the upstream states insist on equitable utilisation of the resources of the river without causing *significant* harm to the other riparian

¹¹⁹ Ibid 43 p10

¹²⁰ Apondi, Teresa J.A.; *The Conflict over the Management and Use of the Nile Waters and the Influence of the 1929 and 1959 Treaties on Riparian States*; 2006, Unpublished MA Thesis University of Nairobi, Nairobi p5

states.¹²¹

These early treaties were just between the British, which was the colonial power in most of the upstream states, and Egypt to the North of Africa. The purpose and outcome of these early Nile treaties, the author asserts, was the allocation of control of the river's resources to Sudan (mainly the North) and Egypt. Since that time, there have been many transnational organisations established within the framework of the 1929 and 1959 Nile Treaties. In 1959, as earlier alluded to in this study, Egypt and Sudan signed the agreement for Full Utilisation of the Nile Waters to replace the 1929 treaty. The 1959 treaty, made before all the East African states became independent, provided that the two downstream states would share the Nile waters with Egypt getting the bulk of it (55.5 billion cubic metres) each year and Sudan remaining with 18.5 billion cubic metres with the rest disappearing through evaporation¹²², an agreement disputed by upstream states over its shortcoming in turning a blind eye to the role the upstream states play in sustaining the flow of the Nile. The 1959 treaty for all intents and purposes denies the upstream states utilisation of the resources of the river despite the same treaty requiring them to effectively manage its source for uninterrupted flow.

Thus in 1999, the riparian states began negotiating the CFA that Oestigaard notes, lays down principles of cooperative water resources management among all the riparian states. The 1999 process established the Nile Basin Initiative (NBI), an exceptional collective basin-wide initiative by the riparian states which envisages a new path for achieving poverty eradication within the basin through a Shared Vision Programme (SVP) and two Subsidiary

¹²¹ Wenje, Perez (communication expert and HEMNET Regional Technical Reviewer); Personal telephone interview on Sunday June 09, 2013 at 18.33EAT

¹²² Oestigaard, Terje; *Nile Issues: Small Streams from the Nile Basin Research Programme*; 2010, Fountain Publishers, Kampala pp10-14

Action Programmes (SAPs), according to Mohammed and Loulseged.¹²³

However, before the negotiations began within the framework of NBI, Waterbury¹²⁴ and Okidi¹²⁵ state that there were other bilateral and even multilateral initiatives and joint cooperation which came after the independence of the East African states. These include the Technical Cooperation Committee for the Promotion of the Development and Environmental Protection of the Nile Basin (HYDROMMET) project from 1967 to 1992 in the Equatorial Lakes, later converted to TECCONILE in 1993 focusing on development agenda. There were also the ‘Nile 2002 conferences’ that started in 1993 up to 2002 for scientific debates and what Mohammed and Loulseged refer to as informal dialogues on Nile issues.

Apondi¹²⁶ points out that some of these organisations created for the management of the Nile Basin resources have functioned well but others have “suffered from structural shortcomings from the treaties.” She points out that the NBI, for instance has suffered from a narrow focus and exclusion of certain decision makers in decision-making, though it should be noted that under the treaty establishing the NBI, there is rotational chairmanship among the NILECOM members as well as the head of the secretariat, which must be a member of the riparian state, and also holds the position on a rotational basis. It is however factual in stating that one of the key challenges to the realisation of the NRBC has been the mood of mistrust. This has led to walk-outs from the negotiating tables by mainly the downstream members, who though outnumbered¹²⁷ feel that the upstream states have ulterior motives of

¹²³ Mohammed, Yasir and Loulseged, Makonnen; *The Nile Basin Water Resources: Overview of Key Research Questions Pertinent to the Nile Basin Initiative*; 2008, Colombo; International Water Institute Working Paper 127 pp2-3

¹²⁴ Waterbury, J. (1979); “Hydropolitics of the Nile Valley”, Syracuse, Syracuse University Press p301, cited in Mohammed, Yasir and Loulseged, Makonnen; *The Nile Basin Water Resources: Overview of Key Research Questions Pertinent to the Nile Basin Initiative*; 2008, Colombo; International Water Institute Working Paper 127 p3

¹²⁵ Okidi, C.O. (1990); “History of the Nile and Lake Victoria Basins through Treaties”, cited in Mohammed, Yasir and Loulseged, Makonnen; *The Nile Basin Water Resources: Overview of Key Research Questions Pertinent to the Nile Basin Initiative*; 2008, Colombo; International Water Institute Working Paper 127 p3

¹²⁶ Apondi, Teresa J.A.; *The Conflict over the Management and Use of the Nile Waters and the Influence of the 1929 and 1959 Treaties on Riparian States*; 2006, Unpublished MA Thesis University of Nairobi, Nairobi op cit

¹²⁷ The membership to NBI is such that there are only two downstream states – Egypt and Sudan- to eight upstream states –

taking away their historical rights to the river's resources.

There are also real issues - the ones Apondi refers to as "alleged bottlenecks to the 1929 and 1959 treaties." For instance, Egypt only saw the need to contribute to the maintenance and sustainability of the sources of Nile River to upstream countries after the CFA was opened for signing in 2010. A number of diplomatic efforts by Cairo to influence some upstream states with promises of financial support so as not to sign the treaty became very visible after the CFA had been opened for signature in 2011. Furthermore, the unilateral decisions the author refers, attributing mainly to upstream states have also been committed by the upstream states through walk-outs and conflicting media statements.

But negotiating Trans-Boundary water agreements calls for patience and time, given that water is a very important natural resource. Juha Uito and Alfred Duda¹²⁸ acknowledge that negotiations in the North American Great Lakes and the Rhine Basin countries each took 20 to 30 years, accompanied with a series of treaty revisions for the agreements. To hasten the process, Uito and Duda recommend the involvement of official inter-ministerial committees of national and sub-national governments in each country – NILECOM in the case of the Nile - to undertake the work of negotiations instead of establishing supranational international organisations to do the work. In this case, Uito and Duda are silent on the role of supranational organisations such as the NBI and its envisaged successor, the NRBC. However, while the negotiations may be speeded up through inter-ministerial committees, the role of the supranational organisations cannot be ignored as they offer a secretariat for the negotiations, as custodians of the treaties and as implementers. And for the Nile situation, whose members largely depend on donor funds, managed by NBTf committee, individual

Burundi, DR Congo, Ethiopia, Kenya, Rwanda, Tanzania, South Sudan and Uganda. Eritrea participates in the forums as an observer.

¹²⁸ Uito Juha and Duda Alfred; *Management of Trans-Boundary Water Resources: Lessons from International Cooperation for Conflict Prevention*; The Geographical Journal, Vol. 168, No. 4, December 2002, pp365-378

countries would not find it easy to negotiate and guarantee the grants and loans.

The bottom line, as King'oina¹²⁹ acknowledges, is that negotiations around international water agreements are arduous and the Nile, despite being endowed with vast resources has not escaped the same trap of the uncertainties of information, action and of perception. In that way, the Basin's inhabitants continue to experience water scarcity, poverty, insecurity, a history of disputes and a rapidly growing population that also demands for water.

¹²⁹ King'oina O. Enock; *Track Two Diplomacy in Environmental Security in the Nile Basin*; September 2010; Unpublished MA Thesis, University of Nairobi

CHAPTER FIVE: CONCLUSIONS AND RECOMMENDATIONS

Conclusions

This study has answered its main questions of the competing challenges and opportunities to negotiating cross border Nile River water resource agreements in post-colonial Africa, and whether those challenges outstrip the opportunities accruable from the outcomes of the negotiations. These questions were answered within the realm of the problem-solving and the competitive approaches. The findings, presented in short in this chapter, are structured around a number of points pertaining to the topic of the study.

From the start, it was recognised that the struggles over shared water resources have predated colonialism. In the pre-colonial era for instance, the struggle over water was on navigation rights. The Nile riparian countries have not been spared of the same struggle, with the upstream states disowning the 1929 and 1959 treaties that granted Egypt and Sudan to an extent, the monopoly over the utilisation of the resources of the Nile River. However, recent developments have witnessed a serious challenge by the upper riparian states Egypt's monopolization of control over the Nile waters by undertaking a number of unilateral development projects.

While the attainment of the Cooperative Framework Agreement (CFA), the treaty which ought to replace the colonial treaties still remains a challenge, the Nile basin countries have discovered the opportunities that could bring them together through basin-wide agreements, starting with HYDROMET in 1967 mainly aimed at the development of the region in the fields of agriculture, watershed management, climate change mitigation, infrastructure and energy development as well as for basin-wide cooperation. The opposition to the colonial era treaties gave rise to the start of the negotiations for the CFA, a process that

is yet to be concluded after Egypt and Sudan declined to sign on to the agreement being pushed by the upper riparian states. Recent developments on the Nile have however presented serious challenges to cooperation upon which the development programmes are anchored. For instance, the Grand Renaissance Dam in Ethiopia has caused considerable tension between Egypt and Ethiopia while the role of the third party actors, in amongst themselves have varied interests cannot be ignored. In other words, the riparian countries ought to find the most beneficial way of dealing with the third party actors who could prolong the process and even widen the differences.

For the theoretical framework of this research, it was noted that the flexibility, rather than rigidity of water as a resource offers more opportunities than the challenges. The problem-solving approach used in this study advocates for cooperation to maximise the benefits. In other words, the Nile countries ought to make the most of the things that bring them together as opposed to the challenges that set them apart because that is the start of further agreements that could unlock the stalemate over the CFA.

In summary, whether the riparian countries adopt a realist or liberal angle, the returns to any future 'water war' scenario appear likely to be low. On the other hand, the certainty of benefitting from future cooperation appears relatively higher than in the past. Therefore, through cooperation, we have found that opportunities of negotiating and concluding the CFA far outweigh the challenges, some of which are introduced by third party actors who intend to gratify their interests at the expense of the basin States. It is therefore important for the countries of the Nile basin to start looking at the opportunities that bring them together for mutual gains rather than the challenges that keep them apart.

Recommendations

The conflict over the Nile basin still remains a major issue that needs to be looked at further to find a lasting solution to the management of its resources. Further research is needed to study the role of the track two actors and tracks one and half actors in the diplomacy of negotiating the trans-boundary water management of Africa's longest river.

Furthermore, the level at which the shared water resources should be negotiated needs to be looked at critically, whether States should lead the efforts or the communities that use the resources are best suited to deal with the issue. This is because of the criticism that State actors spend a lot of resources but the benefits does not, or takes much longer to trickle down to the intended recipient of the negotiated benefits.

I would also recommend that African governments train and develop their capacities in diplomatic negotiations so that they can reap maximum benefits from the negotiations. As it is, the capacity is still lacking.

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