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Kenya's Foreign Policy and Geopolitical Interests: The Case of the Nile River Basin

Introduction

As one of the riparian states, the use of the Nile water by neighbouring countries has direct implications for Kenya's national interest. The evolution of Kenya's official water policy, particularly on the Nile River question, has been slow and ambiguous. The *Sessional Paper No. 10 of 1965 on African Socialism and its Application to Kenya*, for example, only directed the Government to prioritise its policies on poverty, illiteracy and diseases, with a special focus on water and sanitation services. Even Kenya's Constitution as well as the recently concluded 2004 draft constitution do not provide for water rights. Article 67 of the draft Constitution stipulates in part (Kenya 2004a):

Every person has the right: (a) to an environment that is safe for life and health; (b) to have the environment protected, for the benefit of present and future generations, through legislative and other measures that (i) prevent pollution and ecological degradation; and (ii) promote conservation; and secure ecologically sustainable development and use of natural resources while promoting economic and social development...

It was not until 1974 that the Government established the Ministry of Water Development. The issues relating to water policy were originally under the docket of the Ministry of Agriculture. However, a number of policies and development programmes have been put in place, particularly since the 1990s, in an attempt to synchronise and harmonise the country's national needs as well as to ensure a clear understanding of the implications of the Nile water policies pursued by the neighbouring states. The Nile River basin is shared by Burundi, the Democratic Republic of Congo (DRC), Egypt, Eritrea, Ethiopia, Kenya, Rwanda, Sudan, Tanzania, and Uganda and encompasses a total population of 160 million people. Of the ten riparian states, only Egypt and Kenya are not among the least developed countries.

Operational Research Questions

- (i) Are Kenya's foreign policy interests vis-à-vis the Nile River question influenced by her internal demand for water?
- (ii) Is Kenya's foreign policy behaviour vis-à-vis the Nile River question influenced not only by her internal demand for water but also the demand for water by the riparian states? Stability in the region is in the interest of the riparian countries, including Kenya. As a sovereign independent state, Kenya, like the other riparian states, has the right to question the validity and relevance of treaties entered into by the colonial countries that hold the potential of undermining the national interest and creating instability in the region. The 1929 Nile River agreement

entered into between Britain (the colonial power at the time) and Egypt on behalf of Kenya, Uganda and Tanzania, for example, remains a contentious issue for the riparian states.

- (iii) To what extent do these regional geo-political interlocking questions influence Kenya's foreign policy interests on the use of Nile water?

The 1929 Nile River treaty provides that Kenya, Uganda, Tanzania and Sudan cannot use the waters of Lake Victoria and the Nile without the acquiescence of Egypt. Paragraph 27 of the treaty, for example, stipulates in part that:¹

Save with the previous agreement of the Egyptian Government, no irrigation or power works or measures are to be constructed or taken on the River Nile or its branches or on the lakes from which it flows, so far as all these are in the Sudan or in countries under British administration, which would, in such 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.

The other key elements incorporated in the 1929 treaty, which have direct implications for Kenya's national interest, include the following:

- (i) 'The Nile Waters were to be shared between Egypt and Sudan, with Egypt and Sudan claiming rights to 48bn. m. and 4bn m. per year respectively.
- (ii) The dry season flow, between the 15th January and 15th of July, was entirely reserved for Egypt.
- (iii) Egypt claimed the right to monitor the flow of Nile Water into and out of upstream riparian countries.
- (iv) Egypt claimed the right to veto any upstream engineering works that would affect the flow of the Nile.
- (v) Egypt claimed the right to construct engineering works on the Nile without the consent of other riparian states' (Ng'wandu 2003).

This article examines Kenya's foreign policy interests on the Nile water question and the implications of the geopolitics of the region as well as the riparian states' policies for the country's national interest. The article is divided into four parts. Part One puts into perspective the theoretical claims to rights over waters and international drainage systems by sovereign states with a special focus on the Nile River basin and the concomitant implications for Kenya's national interest. A drainage basin is defined as:

'the entire area, known as a watershed, that contributes water both surface and underground, to the principal river, stream or lake or other common terminus. While the Nile and its tributaries flow directly into the Mediterranean Sea, Lake Victoria drains directly into the Nile, thus contributing water to that one terminus. Therefore the Lake Victoria Basin and the Nile basin contribute one drainage system' (Okidi 1994: 9).

Part Two focuses on the domestic context of Kenya's foreign policy interests in the Nile River basin. Part Three examines Kenya's involvement in the multilateral initiatives in the Nile River basin by the riparian states and the impact of these on the country's foreign policy interests. Part Four puts into context the impact of the Nile River basin geopolitics on Kenya's foreign policy interests.

Theoretical Perspectives on State Claims to Rights to River Waters and International Drainage Basins

The legal regime on claims to river waters and international drainage basins has evolved over the centuries (Garretson et al., 1976; Godana 1985; Chauhan 1987). These claims centre around four main competing theoretical legal rights to river waters and international drainage basins, namely: absolute territorial sovereignty; absolute territorial integrity; community of coriparian states; and limited territorial sovereignty (Okidi 1980: 403-406). At the end of its meeting in Helsinki in 1966, the International Law Association established what became known as the *Helsinki Rules*, which provided specific definitions of, among other things, an international drainage basin and a basin state. Article 2 of the *Helsinki Rules*, for example, states that 'an international drainage basin is a geographical area extending over two or more states determined by the watershed limits of the system of waters, including surface and underground waters, flowing into a common terminus' (International Law Association 1967). Analysis of these contending theoretical legal rights can provide a clearer basis for the assessment and contextualisation of Kenya's foreign policy interest regarding the Nile River waters and other related geopolitical questions.

Absolute territorial sovereignty theory, commonly associated with the *Harmon Doctrine*, presupposes that a state has unlimited sovereign rights to natural resources within its territorial jurisdiction.² In this context, a riparian state is free to use its natural resources as well as the river waters of an international drainage basin that flow through its territory without any limitations (Correia and Silva 1999 and Hyde 1956). Under these circumstances, it is the lower riparian state that is affected if absolute territorial sovereignty is invoked by the upstream state, with potential implications for inter-state and regional conflicts. The US Attorney General Harmon during his ruling on the dispute involving US and Mexico over the Rio Grande River in 1895 stated that no rule, principles and precedents of international law, imposed any limitation on the US to allow sections of its river waters flow to Mexico. However, the theory of absolute territorial sovereignty has rarely been invoked in practice with respect to river waters and international drainage basins (Okidi 1980: 404). The *Harmon Doctrine* has been rejected by states generally because it violates the accepted principle of *sic utere tuo ut alienum non laedas* (use your own so as not to cause an injury to another). In situations where international drainage traverses a number of states, the riparian states in question have, in general practice, employed sets of consensual and co-operative rules to govern their claims recognising the importance of the principle of *pacta sunt servanda* (agreements are binding).

The *theory of absolute territorial integrity* or of *riparian rights* as it is also known, on the other hand, stipulates that an upstream country may not be involved in any activities that might affect the natural flow of the river waters which may have adverse implications on the downstream state. Clearly, absolute territorial sovereignty and absolute territorial integrity have the potential for exacerbating interstate and regional conflicts.

The notion of *Territorial integrity* takes a different approach with respect to the use of river waters and international drainage systems. Territorial integrity is commonly invoked by sovereign states to defend territory in their possession. It is the power which a sovereign state uses to exercise authority over its territory (Adar 1994:11). In

the context of river waters and international drainage systems, it gives the upper riparian state sovereign and natural water rights. For example, a river passing through a territory gives the state in question water rights, while at the same time the lower riparian state claims the right to demand the free flow of river waters. This may lead to conflict, and in general practice the upper riparian states have adopted co-operative and collective decision-making processes to curb conflicts.

The *Community of co-riparian states* (or community of interests) theory allows for collective rights to river waters and international drainage basins by the contiguous riparian states. The theory is embodied in the idea that the river waters and the international drainage systems constitute a common geographic and economic entity beneficial to the contiguous states that necessitate application of the doctrine of *equitable utilisation*. Community of interest theory is 'premised on the belief that integrated management is the most efficient approach to water course basin and requires collaboration and creation of institutions to implement joint policies' (Ayugi n.d.: 21). Specifically, the basin is treated as a single economic and geographic entity enjoyed by the states through established contractual obligations or agreements. The Nile Basin Initiative (NBI) process currently being negotiated by the riparian states is a practical example that attempts to operationalise the community of co-riparian thesis.

Limited territorial sovereignty theory (also called *theory of sovereign equality and territorial integrity*), attempts to operationalise the use of river waters and international drainage systems as in the case of community of co-riparian states theory. In other words, a state through which a river flows has the right to the use of its river waters provided that it does not hinder its use by the other riparian states. The underlying principle in this theory is the recognition of the rights of the upstream and downstream countries in the reciprocal and equitable share of the waters. Enshrined in the limited territorial sovereignty theory are the doctrines of equitable utilisation and an obligation not to cause significant harm (*sic utere tuo ut alienum non laedas*, which simply means that a riparian state, upstream or otherwise, must take cognisance of the rights of the other riparian states) (Schroeder-Wildberg 2002: 14).

These doctrines are codified in the 1966 Helsinki Rules and the 1997 United Nations Convention on Non-Navigational Uses of International Watercourses, also known as the UN Watercourses Convention (UN Doc. A/51/229/PV.99 [1997] and Birnie and Boyle 2002). The doctrines of *equitable utilisation* and *no harm* are incorporated in the Nile Basin Initiative (NBI), the objective of which is to find an acceptable international legal regime for the utilisation of the Nile River waters (Bruneel and Toope 2002). The question of equitable access to the river waters by the contiguous states, if accepted *in toto*, is central to the survival of the evolving international legal regime.

These theories provide useful tools in understanding claims over and the use of river waters and international drainage systems. However, for the purposes of this study *limited territorial sovereignty*, which has officially been incorporated in Kenya's foreign policy pronouncements, since the country became actively involved in the NBI, will be used to assess the country's interests. Kenya and Sudan are the only countries in the Nile River basin that voted in favour of the UN Convention on the Law of the Non-navigational Watercourses (UN Doc. A/51/229/PV.99(1997)).³ The central proposition underlying limited territorial sovereignty and community of co-riparian

states is that the use of resources within a state, river waters included, should not cause harm beyond its juridical boundaries.

The Domestic Context and Kenya's Foreign Policy Interests regarding the Nile Waters

Kenya has a territorial area of more than 580,000 sq. km., with over 85 percent of its 571,000 sq. km. of land area classified as arid and semi-arid, which makes Kenya, with its 1004m³ per capita per year in 2000, one of the chronically water-scarce countries in the Nile River basin. In 2000, for example, while Kenya's internal water flows amounted to 20 billion m³, water flow from the neighbouring Nile River basin countries reached 10 billion m³ in the same year (World Bank 2002: 152). A country falls in the category of being 'absolutely water scarce if it has less than 500m³ per capita, per year, as chronically water scarce with 500-1000m³ per capita per year and as water stressed if it has between 1000-1700m³ per capita per year' (Mason 2003: 105). In Kenya, the water area accounts for only 11,000 sq. km. It is estimated that more than 75 percent of Kenya's 32 million people occupy only 81,000 sq. km (Kenya 2005: 3).

There are five main drainage systems that provide water in Kenya and are determined largely by the Rift Valley. These include White Nile Basin (around Lake Victoria); the Rift Valley; Athi River; Tana River; and Ewaso Ngiro. Of these, the trans-boundary drainage system which covers the whole area west of the Rift Valley and drains into the upper White Nile Basin, Lake Victoria, and Lake Kyoga by numerous rivers, accounts for 54 percent of Kenya's fresh water and remains the mainstay of the country's water resources. Yet the Lake Victoria drainage basin with all its water resource potential remains the least developed. Kenya accounts for over 45 percent of surface water flows into Lake Victoria and the upper White Nile River, more than half of which is shared by the neighbouring riparian states (Kenya 2005: 3-5).

It is this trans-boundary drainage system and the interdependence nature of the use of the Nile waters that draw Kenya into the Nile water geopolitical equation.

Table 1: Nile River Riparian States and Geographical Areas within the Basin

Country	Country Area (Sq. km)	Area within the Nile Basin (Sq. km)	% of the total Nile Basin area	% of the country in the Nile basin
Burundi	27,835	13,260	0.4	47.6
DRC	2,345,410	22,143	0.7	0.9
Egypt	1,001,450	326,751	10.5	32.6
Eritrea	121,320	24,921	0.8	20.5
Ethiopia	1,127,127	365,117	11.7	32.4
Kenya	582,650	46,229	1.5	7.9
Rwanda	26,340	19,876	0.7	75.5
Sudan	2,505,810	1,978,506	63.6	79.0
Tanzania	945,090	84,200	2.7	8.9
Uganda	236,040	231,366	7.4	98.0
Total	8,919,072	3,112,369	100	

Source: Karyabwite, Diana, R, *Water Sharing in the Nile River Valley* (Geneva: UNEP/DEWA/GRID, 2000), p. 10.

Table 1 shows that only eight percent of Kenya's 580,000 territory or over 46,000 sq.km. falls within the Nile Basin, that is, two percent of the total Nile Basin. This small percentage of the basin accounts for what has been dubbed as 'the granary of the Kenya water resources' (Kenya 2005: 3).

As Table 1 indicates, nearly 64 percent of the total Nile basin falls within Sudan's territory, followed by Ethiopia, Egypt, and Uganda with a total of 12 percent, 11 percent, and seven percent respectively. On the other hand only three percent and two percent of the total Nile basin falls within the territories of Tanzania and Kenya respectively. As Table 1 shows, less than one percent of the total Nile basin falls within the territories of Eritrea, DRC, Rwanda, and Burundi. However, these figures change greatly when the geographical area of each country in the Nile basin is examined. For example, nearly all of Uganda's territory, that is, 98 percent, falls within the Nile basin, followed by Sudan (79 percent), Rwanda (76 percent), Burundi (48 percent), Egypt (33 percent), Ethiopia (32 percent), Eritrea (21 percent), and Tanzania (9 percent).

The intra-Nile basin water resources dependence brings another dimension into the region. Table 2 shows that the dependence ratio on water resources in the Nile River basin by Egypt, Sudan, Eritrea, Uganda, and Kenya in 1995 reached 97, 77, 68, 41, and 33 percent respectively.

Table 2: Water Resources and Availability Per Person in the Nile Basin States

Country	Internal Renewable Water Resources (IRWR) Km ³ /year	Actual Renewable Water Resources (ARWR) (km ³ /year)	Dependency Ration %	IRWR inhabitants, in 1994 (m ³ /inhab.)	ARWR per inhabitants In 1994 (m ³ /inhab)
Burundi	3.6	3.6	0.0	579	563
DRC	935.0	1019.0	8.2	21,973	23,211
Egypt	1.7	58.3	96.9	29	926
Eritrea	2.8	8.8	68.2	815	2,492
Ethiopia	110.0	110.0	0.0	2,059	1,998
Kenya	20.2	30.2	33.1	739	1,069
Rwanda	6.3	6.3	0.0	833	792
Sudan	35.0	88.5	77.3	1,279	3,150
Tanzania	80.0	89.0	10.1	2,773	2,998
Uganda	39.2	66.0	40.9	1,891	3,099

Source: Karyabwite, Diana, R, *Water Sharing in the Nile River Valley* (Geneva: UNEP/DEWA/GRID, 2000), p. 11.

Kenya ranked seventh in its actual renewable water resources, which reached 1,069 cubic metres per inhabitant in the Nile basin in 1994. As Table 2 indicates, the DRC topped the list in the Nile basin with over 23,000m³ actual renewable water resources per inhabitant in 1994, followed by Sudan, Uganda, Tanzania, Eritrea, and Ethiopia with 3,150m³, 3,099m³, 2,998m³, 2,492m³, and 1,998m³ per inhabitant in 1994 respectively. (Karyabwite 2000). The doctrines of equitable utilisation and obligation not to cause significant harm, if incorporated in the NBI regime and made operational, have the potential of laying the foundation for long-term and sustainable stability in the region, a desirable condition for Kenya's foreign policy interests.

Multilateral Diplomatic Initiatives and Kenya's Foreign Policy Interests regarding the Nile Water Question

The central objective of the post-Cold War diplomatic initiatives by the riparian states has been to lay the groundwork for a comprehensive and consensual international legal regime on the use of the Nile River waters and the international drainage basin. It is an attempt to move away from *realpolitik* self-interest and mutual distrust reminiscent of the colonial and post-independence era in the region. The interlocking challenges notwithstanding, the riparian states have, over the years, attempted to establish politico-legal and economic institutional frameworks governing the use of the Nile waters and the international drainage system. Kenya and Ethiopia's role in these Nile basin multilateral negotiations that were held during, the 1960s to 1990s, particularly the Hydromet (1967-1992), Undugu (1983-1993), and the Technical Cooperation Committee for the Promotion of the Development and Environmental Protection of the Nile Basin (TECCONILE) (1992-1999), were minimal, participating mainly as observers (Swain 1997, Arsano 2004 and Allan 1999).

The underlying objective of the Hydromet project was to provide a clear baseline for measurements of the availability and needs of water in the White Nile as well as around Lakes Victoria, Kyoga and Albert (Brunnee and Toope 2002: 132). The Hydromet initiative led to the conclusion of the 1977 treaty by Burundi, Tanzania and Uganda, which provided for the Establishment of the Organisation for the Management and Development of the Kagera River Basin, also known as the Rusumo Treaty. The *Rusumo Treaty* provided for the management of the Kagera River basin. Whereas the UNDUGU (Swahili for brotherhood), initiated and dominated by Egypt, attempted, without success, to promote socio-cultural and economic co-operation among the riparian states on the use of the Nile River waters, the TECCONILE, on the other hand, led to the establishment of the Nile River Basin Action Plan (NRBAP) in 1995 and the Nile Basin Initiative (NBI) in 1999. The NBI process remains the central multilateral initiative put in place by the riparian states to negotiate an international legal regime for the use of the Nile River waters and the drainage system.

The administrations of Presidents Jomo Kenyatta (1963-1978) and Daniel arap Moi (1978-2002) were of the view that Egypt's dominance negated the spirit of cooperation, which for Kenya's foreign policy-makers jeopardised the chances for the conclusion of a comprehensive Nile River basin agreement. Kenya also did not accept being bound by the 1929 and 1959 Nile River treaties. The 1929 Anglo-Egyptian and 1959 Egyptian-Sudanese Nile River treaties were rejected by Kenya's parliament mainly because they were concluded when the country was still a colony and that the country had no international legal personality with rights and duties under international law.

Since attaining its sovereign status, Kenya has invoked what has become commonly known as the *Nyerere Doctrine* of state succession, particularly with respect to the Nile River treaties (Makonnen 1984).⁴ The Nyerere Doctrine or the 'optional doctrine' as it is also called, is generally premised on the 'clean slate' theory (or *tabula rasa*), which presupposes that a newly independent state cannot be bound by treaties entered into by the predecessor state without the express consent of the successor state (Kiplagat 1995). Specifically, the Nyerere Doctrine provides for three approaches to state succession.

First, once a state acquires its international legal personality as an independent sovereign state, treaties entered into on its behalf during the pre-independence years automatically cease to have any binding effect. It is for the newly independent state to renew treaty commitments of mutual interests without necessarily separating or dividing 'rights and obligations contained in the same text of an instrument' (Makonnen 1984: 55). Second, it provides for the legitimate sovereign right of a successor state to claim specific rights under international law. Third, even though the optional doctrine rejects certain treaties because of their nature, it does not disregard customary international law. Customary international law is regarded as positive particularly with respect to state boundaries (Rembe 1980, Okoye 1972 and Umzurike 1970). In other words, only treaties which contain obligations for the newly independent states to acquire the colonial boundaries and are territorial, real, dispositive, or localised, are respected (Knobelsdorf 2007).

In adopting the Nyerere Doctrine, Kenya has emphasised that it considers treaties which were not modified by mutual consent within a two-year period and 'which cannot be regarded as surviving according to the rules of customary international law to have terminated' (Huggins 2003: 6). Even though Kenya's foreign policy pronouncements on state succession have remained consistent, over the years the leaders exhibited ambivalence on the question of the Nile River riparian states' multilateral diplomatic negotiations (Kenya 2004b: 1386). Kenya's proactive involvement in the Nile River question began in 1999 with the establishment of the Nile Basin Initiative (NBI), a conglomeration of the riparian states (Huggins 2003: 2). The NBI was launched in February 1999, in Dar es Salaam, Tanzania, by the Council of Ministers of Water Affairs of the Nile Basin states (Nile-COM), and the process was officially named the NBI in May 1999. The Nile-COM is the central decision-making body of the NBI.⁵

In a Ministerial Statement issued in the Kenya National Assembly, Parliamentary Debates, the then Minister for Water Resources and Development, Martha Karua, stated Kenya's official position on the Nile Basin question. The Minister explained to Members of Parliament that 'all the ten riparian countries, Kenya included, are entitled to utilise the waters of the Nile Basin and that what' the Nile Basin Initiative 'is seeking is a formula for the *reasonable and equitable utilisation* by all the countries' (my emphasis) (Kenya 2004b: 1385). This remains Kenya's official foreign policy position on the Nile River basin question.

Kenya's official foreign policy positions on the Nile Basin issues have, to a large extent, been influenced by the Nile Basin Initiative. Specifically, Kenya's position generally falls within the 1966 Helsinki Rules and the 1997 United Nations Watercourses Convention, which are centred on the limited territorial sovereignty theory. Article IV of the Helsinki Rules stipulates that 'each Basin State is entitled, within its territory, to a reasonable and equitable share in the beneficial uses of the waters of an international drainage basin' (International Law Association 1967: Article IV). Article V, on the other hand, provides for the relevant factors which are to be considered reasonable and equitable within the meaning of Article IV (International Law Association 1967: Article V). These factors include:

- The geography of the basin, including in particular the extent of the drainage area in the territory of each basin State;

- The hydrology of the basin, including in particular the contribution of water by each basin State;
- The climate affecting the basin;
- The past utilisation of the waters of the basin, including in particular existing utilisation;
- The economic and social needs of each basin State;
- The population dependent on the waters of the basin in each basin State;
- The comparative costs of alternative means of satisfying the economic and social needs of each basin State;
- The availability of other resources;
- The practicability of compensation to one or more of the co-basin States as a means of adjusting conflicts among uses; and
- The degree to which the needs of a basin State may be satisfied, without causing substantial injury to a co-basin State.

The principle of equitable and reasonable utilisation is also provided for in Article 5 of the 1997 United Nations Watercourses Convention. Article 6 on the other hand sets out factors relevant for its operationalisation (UN Doc. A/RES/51/229 (1997)). While the Helsinki Rules have been acceded to by member States, Kenya included, the United Nations Watercourses Convention is not yet in force.

Kenya's Minister for Water Resources and Development also outlined the objectives of the NBI, which she identified as follows (Kenya 2004b: 1384-1385):

- To develop the water resources of the Nile Basin in a sustainable and equitable manner;
- To ensure prosperity, security and peace for all people in the basin;
- To ensure efficient water management and optimal use of the resources and promote cooperation and joint action between the riparian countries; and
- To improve the socioeconomic status of the member states through harnessing their resources and promoting economic integration.

The socioeconomic issues, particularly the survival of the people of Kenya around Lake Victoria and the exponential domestic demands for water and hydroelectric power, among other related socioeconomic reasons, have contributed immensely to Kenya's proactive involvement in the Nile River basin initiatives. By 2010, for example, it is estimated that the demand for water in Kenya will account for 15 percent of the total available water in the country (Kenya 2002). A total of nearly 11 million people or 40 percent of Kenya's population, that is, 1,200 people per sq. km., the highest in the country and one of the highest in the world, occupy 8.4 percent of Kenyan part of Lake Victoria Basin (Huggins 2003: 7).

Lake Victoria Basin and the Nile River Basin form one drainage system. Kenya's jurisdiction over Lake Victoria is over six percent with the shoreline and surface water resources of the Lake Basin accounting for 50 percent and 17 percent respectively (Huggins 2003: 7). While ten rivers originating from Kenya, namely Kibos, Kuja, Mawa, Migori, Nyando, Nzoia, Riara, Sio, Sondu-Miriu, and Yala, feed Lake Victoria, four Ugandan rivers and six Tanzanian watercourses feed the lake (Huggins 2003: 7). In comparison to Tanzania and Uganda, Kenya contributes the largest volume of water,

that is, more than 40 percent, into Lake Victoria (Okidi 1994: 12). Even though the Lake Basin is endowed with rich natural resources as well as fish, forest products and fertile agricultural soils, more than 60 percent of Kenya's poor population live within the Lake Victoria basin (Huggins 2003: 7, Dawo 1995 and Institute of Economic Affairs 2002). The NBI, therefore, provides an opportunity for Kenya to establish sustainable socioeconomic development policies that can promote the livelihood of the people of the region.

One of the main interests of Kenya in the NBI process is the establishment of a cooperative framework that will enable the riparian countries, Kenya included, to realise tangible benefits in the spirit of 'reasonable and equitable utilisation' of the Nile Basin. The Nile-COM, with the help of its technical wing, the Nile Technical Advisory Committee (Nile-TAC) and the Nile Secretariat (Nile-SEC) at its Headquarters in Entebbe, Uganda, is laying the foundation for this spirit of trust and confidence among the riparian states (Ayugi nd: 31-33). In order to achieve its central mandate of building confidence and trust as well as promoting sustainable socioeconomic development through the equitable utilisation of, and benefit from, the common Nile Basin water resources, the NBI established two main programmes between 1999 and 2001, namely the Shared Vision and Policy and Guidelines (SVPG) and the Subsidiary Action Programme (SAP).⁶

Since its inception, the SVPG has provided an opportunity for the riparian countries to manage, through technical experts, specific projects (Huggins 2003: 3-4 and Brunnee and Toope 2002: 138) on:

- Nile Transboundary Environmental Action.
- Nile Basin Regional Power Trade.
- Efficient Water Use for Agricultural Production.
- Water Resources Planning and Management.
- Confidence Building and Stakeholder Involvement (Communication).
- Applied Training.
- Socioeconomic Development and Benefit-Sharing.

These projects are considered by the riparian states as tangible rallying points for cooperative socioeconomic development in the Nile Basin. Envisaged in the Shared Vision project is 'sustainable socioeconomic development through the equitable utilisation of, and benefit from, the common Nile Basin water courses' by the riparian states (<http://www.nilebasin.org/nbiprocess.htm>).

The SAP projects, on the other hand, are divided into two main sub-Nile basin riparian groups. The first is the Eastern Nile Subsidiary Action Programme (ENSAP) comprising of Egypt, Ethiopia, Eritrea, and Sudan. The other programme is the Nile Equatorial Lakes Subsidiary Action Programme (NELSAP), comprising of Burundi, DRC, Egypt, Kenya, Rwanda, Sudan, Tanzania, and Uganda sub-Nile basin groups. The NELAP deals with a spectrum of programmes, which include among others, efficient water use in agriculture; natural resource management; and resource management and development. These are important programmes in which Kenya is involved in various capacities. The Mara River basin shared by Kenya and Tanzania and the Sio-Malaba-Malakisi water project involving Kenya and Uganda are some of these examples.

Regional Geopolitical Questions and Kenya's Foreign Policy Interests regarding the Nile Basin

This section addresses the geopolitical situation in the Nile Basin and its impact on Kenya's national interests and foreign policy posture. The concept geopolitics refers to the 'relationship between geography and politics and their consequences for states' national interests and relative power' (Kegley and Wittkopf 1999: 16). A country's geographic location, physical terrain, and national frontiers are central in determining its relative influence and survival vis-à-vis the contiguous states in the region. The analysis in this section is not concerned with the competing theses on geopolitics per se, but rather how Kenya's location within the Nile Basin influences its national interest and foreign policy behaviour (Harkavy 1983, Kissinger 1994, Sprout 1963, and Tualhail 1996).

A number of interlocking, centrifugal, centripetal and interrelated geopolitical factors influence Kenya's foreign policy posture. First, due to the high population growth rate, which reached three percent between 1980 and 2000, demand for access to fresh water became a major challenge for the country. Scarcity of water resources, with only 31 percent of the rural population in the Nile basin region having access to improved water, will continue to remain a concern for the country's leadership (World Bank 2002: 151). In 2004, the rural population in Burundi, Uganda, Ethiopia, Rwanda and Eritrea reached 90, 88, 84, 80, and 80 percent respectively. On the other hand, the rural population in Tanzania, Sudan, Kenya, and Egypt accounted for 63, 60, 59, and 58 percent of the total population respectively in 2004 (FAO 2006: 7-10).

Second, Kenya is one of the dominant trading partners in the Nile basin region, which makes the issue of stability a major concern for the country's foreign policy-making establishment. In the East African region, for example, Kenya is the largest trading partner, exporting \$23m worth of goods and services in 2001, compared to \$10m and \$2m for Tanzania and Uganda respectively. The share of imports by Kenya, Tanzania and Uganda within the East African Community (EAC) in 2001 totalled \$1m, \$7m, and \$49m respectively. Stability in the Nile basin is an important factor in the transboundary trade ((McInyre 2005: 5). The admission of Burundi and Rwanda as full members of the EAC in 2006 will broaden the scope of economic opportunities for Kenya.

Third, the Nile basin remains one of the most volatile and conflict-prone regions in Africa in the post-Cold War era, experiencing internal civil wars (Burundi, the DRC, Ethiopia, Rwanda, Sudan, and Uganda) and inter-state conflicts (Eritrea-Ethiopia, Ethiopia-Somalia, DRC-Rwanda-Sudan-Uganda) – conditions which have had adverse effects on trade in the region. The civil war in the DRC in the 1990s entangled a number of Nile basin riparian state and non-state actors as well as others beyond the region, creating interlocking and complex geopolitical scenarios. For example, while the Angola-Chad-Namibia-Sudan-Zimbabwe axis supported the government of Laurent Kabila, the Burundi-Rwanda-Uganda axis was directly involved in the conflict, accusing the DRC of providing material and logistical support for rebel groups responsible for launching attacks on their territories.

The Rwandese government invaded the DRC in pursuit of the rebels such as the Banyamulenge, Mayi Mayi, Interahamwe, and the ex-Rwanda Armed Forces (Forces Armées Rwandaises, ex-FAR). Rwanda also supported Rally for Congolese

Democracy (RCD), a rebel group, which was fighting the government of Laurent Kabila. Uganda, on the other hand was directly involved in the conflict in the DRC in order to contain the West Bank Nile Front (WBNF), Allied Democratic Forces (ADF), and the Lord's Resistance Army (LRA) rebel groups. As a quid pro quo, Uganda also provided military and logistical support to the Movement for the Liberation of Congo (MLC). Burundi was drawn in the conflict because of the Front pour la defense de la democratie (FDD), responsible for incursions into Burundi across the DRC-Burundi border in the 1990s. Sudan's entanglement in the DRC conflict was on the side of the government of the DRC because of Uganda's historical support for the Sudan People's Liberation Movement/Army (SPLM/A). Similarly, Sudan has historically supported the LRA and the WBNF (Adar 2000).

Fourth, the continued stalemate between Ethiopia and Eritrea following their 1998-2000 war over the Bardenme border question and the unresolved Darfur crisis are some of the main obstacles to the NBI process. Ethiopia and Eritrea are yet to implement and recognise in toto the 2002 ruling by the International Ethiopia-Eritrea Border Commission (IEEBC) over the disputed border areas.⁷ The broader mandate given by the United Nations Security Council to the United Nations Mission in Sudan (UNMIS) has ushered in new hope for the resolution of the Darfur crisis.

Fifth, the level of dependence on the Nile Basin by the riparian states brings in another dimension of conflict into the region. The riparian countries account for 40 percent of Africa's over 800 million people, of whom 70 percent occupy the Nile Basin (El-Fadel, El-Sayegh, El-Fadl, and Khorbotly 2003: 107). As Table 3 indicates, five riparian countries in the region namely, Egypt, Uganda, Sudan, Rwanda, and Burundi, are heavily dependent on the Nile basin, with 85, 75, 74, 72, and 58 percent of their countries' populations occupying the basin respectively. The population of Ethiopia, Kenya, Eritrea, Tanzania, and the DRC occupying the Nile River Basin reached 35, 32, 30, 16, and 4 percent respectively.

Table 3: Population Patterns in the Nile Basin

Country	Basin population density (hab/sq. km)	Basin population (million)	Country population (million) 1990	Country population (million) 1998	% of the country's population within the Nile basin
Burundi	250	3	6	6	58
DRC	88	2	44	49	4
Egypt	163	48	56	66	85
Eritrea	36	1	3	4	30
Ethiopia	53	19	55	60	35
Kenya	179	9	28	29	32
Rwanda	276	6	8	7	72
Sudan	11	21	28	28	74
Tanzania	40	5	30	32	16
Uganda	67	16	21	21	75
Total		130	279	301	46

Source: Karyabwite, D. R., *Water Sharing in the Nile River Valley*. Project GNV11: Using GIS/Remote Sensing for the Sustainable Use of Natural Resources (Nairobi: UNEP, 2000), p. 33.

Sixth, in a region where there is heavy dependence on agriculture, the risk of regional conflicts and civil wars remains a major concern for Kenya's foreign policy-makers as well as those of the riparian states. The region through which the Nile River traverses is also one of the driest, water-scarce and water-stressed areas in Africa (Sandwidi and Stein 2003: 1). The average water use by the riparian states for agricultural, domestic, and industrial economic activities accounted for 71, 21, and 8 percent respectively. The water use for agricultural production in Sudan, Eritrea, Tanzania, Ethiopia, Burundi, Egypt, and Kenya in 2004 reached 97, 95, 93, 93, 82, 78, and 64 percent respectively (FAO 2006). Kenya's per capita water availability is projected to decrease from 636 cubic metres in 1990 to 235 cubic metres by the year 2025 (Swain 2002). On the other hand, Kenya's population is estimated to increase from 30 million in 2000 to nearly 40 million by 2015. The population growth rate for the Nile River Basin riparian states is projected to increase steadily to two percent between 2000-2015, the highest in the world (World Bank 2002: 49-50). These interlocking and interrelated state and human variables have led to strained relations and conflict among the riparian states over the decades and remain the central litmus test for multilateralism in the Nile Basin.

Table 4: Armed Forces and Military Expenditures of the Nile Basin Riparian States^x

Nile Basin Riparian States	Military Expenditures US\$ million			US\$ per capita			% of GDP			No of Armed Forces (000)	Estimated Reservists (000)	Paramilitary (000)
	2003	2004	2005	2003	2004	2005	2003	2004	2005			
Country	2003	2004	2005	2003	2004	2005	2003	2004	2005	2007	2007	2007
Burundi	42	45	50	6	6	6	7.0	6.6	6.1	35	0	31
DRC	119	196	150	2	3	2	2.1	3.0	2.1	51	0	0
Egypt	2732	3589	3834	37	47	49	4.0	4.5	4.5	469	479	330
Eritrea	147	72	65	33	16	14	18.2	7.7	6.3	202	120	0
Ethiopia	279	348	300	4	5	4	4.3	4.3	3.1	153	0	0
Kenya	247	266	353	8	8	10	1.6	1.7	1.8	24	0	5
Sudan	400	426	426	10	11	11	2.3	2.0	1.6	105	0	18
Tanzania	132	122	Na	4	3	NA	1.3	1.1	NA	27	80	1
Rwanda	69	45	56	9	5	7	3.9	2.5	2.5	33	0	2
Uganda	158	168	196	6	6	7	2.4	2.4	2.3	45	0	2

Source: International Institute for Strategic Studies, *The Military Balance* (London: Routledge, 2007): 407 and 410.

Key: ^xDepending on the source used, figures tend to vary in almost all the categories.

The multilateral diplomatic initiatives since the 1990s by the riparian states to transform the decades-old imbalances in the use of the Nile River waters and the international drainage system, which favours Egypt, have ushered in a new geopolitical scenario into the region. A number of the riparian states, particularly Ethiopia, Kenya, Sudan, Tanzania, and Uganda, have publicly stated that the 1929 treaty no longer binds them. The Egyptian leadership has repudiated these decisions over the years. The then Egyptian President Anwar Sadat once emphatically stated,

'the only matter that could take Egypt to war again is water' (Dawoud 2001). Boutros Boutros-Ghali, then Minister of Foreign Affairs of Egypt and later United Nations Secretary-General, for example, once observed: 'the next war in our region will be over the waters of the Nile' (Hillel 1994: 266 and Klare 2001: 59). Even though numbers alone are not the only measurable attributes that can adequately explain a country's military power, Table 4 shows that Egypt is clearly the preponderant military player in the Nile Basin. Table 4 indicates that the Egyptian military spending in 2005, for example, was more than twice the military expenditures of the nine riparian states combined. In comparison to the other riparian states, Egypt's military strength is also visible in all categories, that is, the armed forces, reservists, and paramilitary personnel. Of all the riparian states in the region, Kenya has the least number of military personnel, followed by Tanzania. The likely explanatory factor is the relative stability experienced by the two countries since their independence in the 1960s in a region replete with instability and civil wars.

Egypt's uncompromising stance over the years on the Nile Basin question, I would argue, has contributed to the unsuccessful multilateral diplomatic initiatives and the conclusion of a comprehensive and tangible international legal regime based on the 'reasonable and equitable utilisation doctrine'. Egypt maintains a High Command known as *Waraa-el-hidoud* (beyond the borders) specifically established to intervene in each Nile River riparian state 'in case of a direct threat to the flow of the Nile' (Bullock and Darwish 1993: 79). For example, in 1977 when Ethiopia planned to divert some water from the Blue Nile for irrigation for food production because of frequent droughts and famine, Egypt's response was the threat of war. The then Egyptian President Anwar Sadat declared that 'if Ethiopia undertakes any action that will affect our full rights to the Nile waters, there is no alternative to the use of force. We will retaliate when something happens but we have to be ready with plans and alternatives to firmly stop any action' (Okidi 1994: 61).

Conclusion

The persistent Egyptian threat over the decades notwithstanding, there is a shift towards cooperative multilateral diplomacy, particularly since the 1990s with the Nile River Basin riparian states' foreign policy-makers employing diplomacy as the best option for the utilisation of the Nile River waters. Specifically, there is a paradigm shift by the riparian states from unilateralism to multilateralism in pursuit of a workable international legal regime for the utilisation of the Nile River basin (Nicol 2003: 3). The relative stability which prevails in the region following the peace initiatives in Burundi and the DRC as well as the 2005 Comprehensive Peace Agreement (CPA) between the Government of Sudan and the Sudan People's Liberation Movement/Army (SPLM/A), has ushered in a window of hope and opportunities for the conclusion of a comprehensive international legal regime on the Nile River basin through multilateral diplomacy.

The outcome of an acceptable legal regime is contingent upon the willingness of the Nile basin countries to set aside their national interests for the general good of the region. Kenya's proactive involvement in the NBI negotiations is a clear indication of the perception of foreign policy-makers regarding the role the country needs to play vis-à-vis its national interests on the Nile River question. These developments and

other internal and external factors are slowly influencing and transforming the geopolitical scenario in the Nile basin region.

First, the end of the Cold War has ushered in a new epoch in global affairs, burying the so-called satellite states thesis inherent in the East-West bipolar system, with the Ethiopia-Somalia proxy war of 1977-78 serving as a good example in the region at the time. Second, the transformation of the Organisation of African Unity (OAU) into the African Union (AU), with a mandate to promote continental multilateral diplomacy and to guard against war crimes as well as the right to intervene in the internal affairs of member states if situations so warrant (as enshrined in the Constitutive Act of the AU), is laying the foundation for bilateral and multilateral 'African solutions to African problems' based on legalistic and normative values. As I have explained, the cases of Burundi, the DRC, Rwanda, and Sudan serve as good examples. Yet, the unresolved conflict in Darfur, which has claimed over 300,000 lives and displaced more than two million people remain contentious. The decision by government of Sudan to allow the deployment of an expanded UN-backed African Mission in Sudan (AMIS) peace-keeping force in Darfur is a positive sign that could lead to the tangible resolution of conflict between the belligerent parties involving the Sudan Armed Forces (SAF) and the *Janjaweed* (men on horses) and the Sudan Liberation Movement/Sudan Liberation Army (SLM/A) and Justice and Equality Movement (JEM). The perpetual instability in Somalia following the overthrow of Siad Barre in 1991 still poses major challenges for the Nile basin riparian states.

Third, there is a shift towards what has been called a process of 'dialogue accumulation' by the riparian states that is 'the result of numerous meetings between representatives from different conflict parties over the years in various formal and informal settings' (Mason 2003: XVI). Countries such as Kenya and Ethiopia that originally adopted ambivalent attitudes in the negotiations have, since the establishment of the NBI, been fully involved in the process. Specifically, step-by-step or project-by-project approaches and the identification of an underlying acceptable legal framework have accommodated the interests of the riparian states.

Notes

1. United Nations, *Yearbook of the International Law Commission*, Vol 1, No. 1 (New York: United Nations Publication 1975: 44). See also Nasila S. Rembe, 1980, *Africa and the International Law of the Sea: A Study of the Contribution of African States to the Third United Nations Law of the Sea* (Alphen aan den Rijn: Sijthoff and Moordhoff, 1980); Felix C. Okoye, *International Law and the New African States* (London: Sweet and Maxwell, 1972); and Oji Umzurike Umzurike, 'International Law and Colonialism in Africa: A Critique', *Eastern Africa Law Review* 3 (April) (1970): 41-62.
2. For details on the Harmon Doctrine, see McCaffrey, S. C., 'The Harmon Doctrine One Hundred Years Later: Buried, Not Praised', *Natural Resources Journal* 36 (2) (1996): 549-590.
3. Voting pattern in the UN by the riparian states: In favour: Kenya and Sudan; Against: Burundi; Abstained: Egypt, Ethiopia, Rwanda and Tanzania; Absent: Eritrea, Uganda and Zaire (DRC). Burundi, China and Turkey were the only UN Member States that voted against the resolution. In total 103, 27, and 32 voted in favour, abstained, and absent, respectively. For the text of the Convention, see <http://untreaty.un.org/ilc/texts/instruments/english/conventions/831997.pdf>.

4. For the evolution and meaning of the Nyerere Doctrine, see Makonnen, Y, *The Nyerere Doctrine of State Succession and the New States of East Africa*, Dar es Salaam: Eastern Africa Publications, 1984. See, also Nyerere, J. K, 'Problems of State Succession in Africa: Statement of the Prime Minister of Tanganyika', *International and Comparative Law Quarterly*, Vol 11 (1962) and, Seaton, E. E and Maliti, S. T. M, 'Treaties and Succession of States and Governments in Tanzania', in *African Conference on International Law and African Problems* (Lagos: Carnegie Endowment for International Peace and the Nigerian Institute of International Affairs, 1967).
5. The Nile Team or Friends of the NBI comprising of the United Nations Development Programme (UNDP), the World Bank, and Canadian International Development Agency (CIDA) have provided the needed financial support to the NBI process. On the developments on cooperative diplomacy in the Nile River basin see, for example, Yacob, Yosef, *From Undugu to the Nile Basin Initiative: An Enduring Exercise in Futility*. File://E:/NileRiver/The NileByYacobz.htm.
6. On these developments, see Nile Basin Initiative, *Policy Guidelines for Nile River Basin Strategic Action Programme*, Council of Ministers of Water Affairs of the Nile Basin States, <http://www.nilebasin.org/documents/TACPpolicy.html>.
7. For details on the ruling by the Commission, see generally, International Eritrea-Ethiopia Boundary Commission, *Decision Regarding the Delimitation of the Border Between the State of Eritrea and the Federal Democratic Republic of Ethiopia* (The Hague: Boundary Commission, 2002).

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