



REGIONAL WATER INTELLIGENCE REPORT

The Nile Basin and the Southern Sudan Referendum

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Figure 1. Map of the Nile Basin

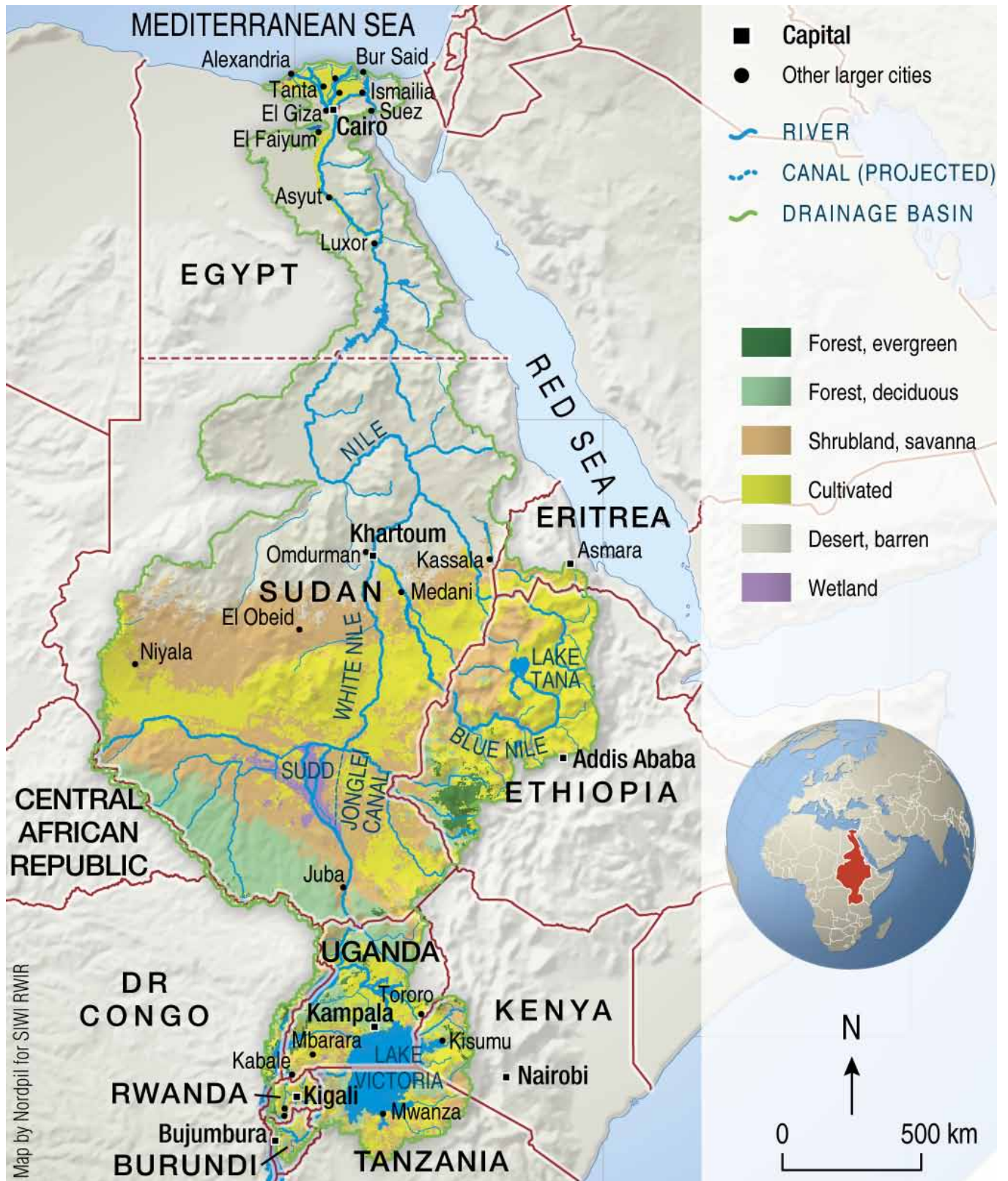


Figure 2. Map of Southern Sudan



List of abbreviations

AANRY	Annual Average Natural River Yield		Development
ABC	Abyei Boundaries Commission	IMF	International Monetary Fund
AEC	Assessment and Evaluation Commission	INC	Interim National Constitution
AMCOW	African Ministerial Conference on Water	LVFO	Lake Victoria Fisheries Organization
AU	African Union	NBI	Nile Basin Initiative
AUHIP	African Union High-Level Implementation Panel	NCP	National Congress Party
COMESA	Common Market for Eastern and Southern Africa	NDP	National Democratic Party
CFA	Cooperative Framework Agreement	NELSAP	Nile Equatorial Lakes Subsidiary Action Programme
CPA	Comprehensive Peace Agreement	NELSB	Nile Equatorial Lakes Sub Basin
DRC	Democratic Republic of Congo	NEPAD	The New Partnership for Africa's Development
EAC	East African Community	SAP	Strategic Action Programme
EAPP	East African Power Pool	OAU	Organization of African Unity
ECCAS	Economic Community of Central African States	PCA	Permanent Court of Arbitration
ENSAP	Eastern Nile Subsidiary Action Programme	PCP	Popular Congress Party
EPDRF	Ethiopian People's Democratic Revolutionary Front	PJTC	Permanent Joint Technical Commission
FTA	Free Trade Area	REC	Regional Economic Communities
GoS	Government of Sudan	RPF	Rwandan Patriotic Front
GoSS	Government of Southern Sudan	SACU	Southern African Customs Union
HEP	Hydro Electric Power	SADC	Southern African Development Community
ICC	International Criminal Court	SPLA	Sudan People's Liberation Army
ICSS	Interim Constitution of Southern Sudan	SPLM	Sudan Peoples' Liberation Movement
IGAD	Intergovernmental Authority on	TAC	Technical Advisory Committee
		TBC	Technical Border Committee
		UN	United Nations
		WWII	World War II

Note to the Reader

This Regional Water Intelligence Report (RWIR) examines the current political landscape in the Nile Basin and includes a political and legal analysis of the Southern Sudan independence referendum to be held on 9th January 2011.

The objective is to analyze key political events and their potential impact on Nile cooperation, within the framework of the Nile Basin Initiative (NBI), with a specific focus on the referendum in Southern Sudan. Some recommendations are explored that the international community could consider taking in the post referendum process to strengthen development and cooperation. The analysis of political events provides input to further analysis on the political economy of water in the Nile basin. The report does not provide a detailed overview of the NBI process to date which is provided elsewhere. Input to the RWIR is based on public referenced information and confidential interviews.

The Report was commissioned by the UNDP Water Governance Facility (WGF), part of the UNDP Water Governance Programme. The report is an independent study to inform UNDP and other actors interested in strategic decision making on current and future regional and national water programming and sustainable investments.

The WGF would like to thank the authors of the Report and colleagues for their inputs and comments.

For the Water Governance Facility,
Håkan Tropp and Alastair Morrison

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Regional Water Intelligence Reports (RWIR)

The purpose of the Regional Water Intelligence Reports (RWIR) is to provide regular updates on the political economy of transboundary water resources issues, management and development. The RWIR focuses on the socio-economic aspects of water management and highlight the links between water, energy, food and human security from a regional perspective.

Disclaimer: The analysis and policy recommendations of this Report do not necessarily reflect the views of the United Nations Development Programme, its Executive Board, or its Member States. The Report is an independent publication commissioned by the UNDP. It is the fruit of a collaborative effort by a team of consultants and advisers managed by SIWI.

1 Key Messages and Recommendations ¹

In a statement on November 16, 2010, the rotating UN Security Council President, “urged the parties to the Comprehensive Framework Agreement (CPA) to ensure peaceful, credible, timely and free referenda that would reflect the will of the people of Southern Sudan and Abyei”. The President of the Council further stated that “the Security Council emphasizes that the situation in Sudan represents one of the most urgent challenges facing the Council... and encourages the efforts to ensure that the referenda were held on 9 January 2011”.²

In a press statement on 11 December 2010, the African Union High Level Implementation Panel on Sudan (AUHIP), chaired by former South African President, Thabo Mbeki, stated that it “...is confident that the CPA partners can reach comprehensive and constructive agreements on all the post-referendum issues, informed by a commitment to the mutual viability of the North and the South, regardless of the outcome of the South Sudan Referendum.”³ The concerns voiced in the quotes above echo the key concerns this report is putting forward regarding the implications of forced unity versus secession by Southern Sudan from the North of Sudan.

This report is providing an analysis of transboundary water resources issues as they relate to the upcoming January referendum in Sudan. The report recognizes the cooperative efforts carried out through the Nile Basin Initiative (NBI) which has since 1999 provided an international platform for attempting to build trust between the riparians, identify and promote investment projects at the subsidiary level and support the negotiations on a basin wide compact. This report does not provide a detail analysis of the NBI since this information is available elsewhere. We are acknowledging good progress at the level of the subsidiary investment programs in the Nile Equatorial Lakes Region Subsidiary Action Program (NELSAP), in close partnership with the East African Community (EAC), and progress towards investment identification in the Eastern Nile Subsidiary Action Program (ENSAP). The Comprehensive Framework Agreement (CFA) on transboundary water management has for the time being not achieved an overall ten country compact. Instead, the Nile Equatorial Lakes Sub Basin (NELSB) countries, with the exception of the Democratic Republic of Congo (DRC), and Burundi, together with Ethiopia have signed the CFA resulting in political tensions and intensive diplomatic engagement between the Nile riparians.

The report is intended to inform the international community on the political and economical landscape in the Nile basin shaping the future of the cooperative processes on water resources management and development. It recommends possible preventive actions to consider to mitigate the impacts of a potential post referendum crisis and/or strengthen the positive outcomes of a referendum.

1.1 Key messages

The national and regional political economy in the Nile Basin

1. In the Nile Equatorial Lakes Region national politics are dominated the by EAC integration efforts and in the Eastern Nile by the high stakes taken by the authoritarian governments to

maintain power. From June 2010 to January 2011, four of the five EAC member countries have had/will have presidential elections. Rwandan Patriotic Front leader, Paul Kagame was re-elected as president in August 2010. The withdrawal of the opposition parties from Burundi’s national presidential elections in June 2010 resulted in an overwhelming majority vote for President Pierre Nkurunziza, who has been elected for another five year term. Kenya has been involved in a referendum which culminated in the promulgation of the new constitution in August 2010. Tanzania recently underwent its parliamentary and presidential elections on 31 October 2010, which saw Jakaya Kikwete sworn in for another five-year term on November 6th. Uganda’s presidential elections are expected to take place in January 2011 and maintain the current political leadership. The DRC’s presidential elections are expected to take place on 27 November 2011. The wave of presidential elections, and the retention of old leadership may have positive implications for institutional development on the Nile in terms of continuity. However, the EAC integration process has also been affected by the number of national elections interrupting the integration efforts.

In the Eastern Nile region national politics are dominant by authoritarian regimes. In Ethiopia the Parliamentary Elections this year were a show of absolute power of Ethiopian People’s Democratic Revolutionary Front (EPDRF), the ruling party of Prime-Minister Meles Zenawi. Demands by opposition parties for new elections were rejected by the highest courts in Ethiopia. Egypt continues to be under a state of Emergency Law. Parliamentary elections are planned for November/December 2010 with Presidential Elections planned for September 2011. The Muslim Brotherhood, the major opposition party, hopes to increase its representation in the Parliament and has agreed not to participate in the Presidential elections. At the international level, the International Criminal Court (ICC) issued a second warrant of arrest against the President of Sudan, Omar Hassan Ahmad Al Bashir in July 2010. In April 2010, Sudan had its first presidential poll in 24 years. The President continues to assure that the Referendum in Southern Sudan would take place in January 2011, and that a peace agreement for Darfur would be reached soon.

2. The integration agenda in the Nile- region is driven in the Nile Equatorial Lakes Region by the strengthening of the EAC and at the African wide level by the COMESA-EAC-SADC Tripartite Task Force. Regional integration provides an avenue for sharing tangible benefits from transboundary waters cooperation such as agriculture products and electricity from hydropower generation and intangible benefits such as water quality improvement and flood and drought management. The regional integration agenda is strong in the Nile Equatorial Lakes region and provides a forum for cooperation in many aspects including peace and security, trade, transport, natural resources management, and immigration. At the African level the African Union (AU) is moving Africa’s regional integration process. While the AU had displayed an instrumental commitment to regional integration, the practicalities of this commitment are less clear, particularly as it relates to institutional overlap. Currently, there are eight Regional Economic Communities (RECs) recognised by the AU, each established under separate treaties. Along with the AU and The New Partnership for Africa’s

Development (NEPAD), the African Ministerial Council on Water (AMCOW) is striving to provide supra-regional coordination on water resources management. In 2008, the Heads of State and Governments of the Common Market for Eastern and Southern Africa (COMESA), EAC and the Southern African Development Community (SADC) met in Kampala and called for the establishment of a single Free Trade Area covering the 26 countries of the three main RECs. While the approval process has met with delays strong progress can be noted and the Tripartite Free Trade Area (FTA) is set to be launched in January 2012 establishing a single economic market with a combined population of 527 million and a GDP of \$ 625 billion.

3. The progress towards an all encompassing Nile compact on transboundary waters will take time as history demonstrates. A considerable number of legal instruments that were inter alia supporting third country interests in the water and in agricultural production of the Nile riparians were concluded during the colonial period. There exists disagreement among Nile riparian States with respect to the validity of some of those treaties, as well as with respect to the question whether the 1959 Egyptian-Sudanese Agreement on the Full Utilization of the Water of the Nile also binds other riparian States. Bilateral and sub-basin agreements concluded since the 1970s indicate an increasing trend towards cooperation based on mutually beneficial use of the shared water resources. The CFA was negotiated in this spirit. For the time being, disagreements concerning the existing legal framework stand in the way of CFA adoption by all Nile riparian States. It seems of vital importance therefore that the relationships between the Nile riparians, which have been institutionalized through the NBI so far, are maintained in the future by all means possible.

Focus on Southern Sudan and the upcoming referendum on southern Sudanese self-determination

4. Southern Sudan's economy is entirely dependent on oil. About 98 per cent of the revenue in the South is generated in the oil sector. Oil is also a key driver of the entire Sudanese economy which complicates the relationship between South and North Sudan as many oil fields are located in the South. Currently the province of Abyei is the place where combined oil and referendum politics converge. The Abyei province is set to determine through a vote if it is to belong to the North or South in a separate election the day of the referendum in Southern Sudan.

5. Southern Sudan quickly needs to develop its power generation capacities. The region currently depends to a large extent on diesel fueled electricity generation. Fuel is supplied by truck from Khartoum. Southern Sudan has considerable hydropower potential. Feasibility studies show that the area has the potential of becoming a net exporter of hydropower generated electricity if the sector is developed. This would enable electricity supplies to Sudan as a whole in addition to the wider region by interconnecting currently isolated networks. It would provide diversification to Southern Sudan's economy lessening the dependence on oil.

6. Tribal conflicts in Southern Sudan directly or indirectly affect the majority of the people and impact the stability of the whole country. Tribal conflicts are among key concerns that might affect the upcoming elections. Tribal related violence has taken on

different proportions and has become more deadly since the signing of the CPA in 2005. This is mainly because a surge in available small-arms in circulation as well as the withdrawal of troops from the Sudan's Peoples Liberation Movement (SPLM) from rural areas coupled with weak implementation of the CPA in the South. Tribal identity still outweighs national identity constituting difficulties to promote common national agendas.

7. The Southern Sudan referendum appears to be on schedule. The Government of Sudan (GoS) and the SPLM and the SPLA signed the CPA on 9 January 2005. The two parties confirmed their commitment to six instruments previously agreed upon which were integrated into the CPA. The 2002 Machakos Protocol provides the general principles of governance between the national government and Southern Sudan and it states the right to self-determination through referendum for the people of Southern Sudan. At the end of the six year interim period an internationally monitored referendum will determine the future status of the people of Southern Sudan. The referendum appears to be on schedule for 9 January 2011. Delays cannot be excluded. The political and media campaigns have started, the civic education activities are taking place in several parts of Southern Sudan, and the registration process of voters was initiated on 15 November. A calendar with set milestones from November to January has been defined by the Government of Southern Sudan (GoSS).

8. The issue of the status of the special border areas and borders can be a source of instability in the post referendum period. The Protocol on the resolution of the Abyei conflict stipulates that simultaneously with the referendum for Southern Sudan, the residents of the Abyei area will decide if the Abyei area retains a special status within the North or be part of Southern Sudan. The confirmation of the 1956 borders between North and South are subject to the results of the referendum on the Abyei area. The Protocol on the resolution of the Southern Kordofan and Blue Nile States conflict establishes that a popular consultation will take place in Southern Kordofan and Blue Nile States. The CPA will be submitted to the people of the two States through their respective elected legislatures. If the CPA is endorsed through the legislature, then the CPA becomes the final settlement of the conflict in that State.

9. Status of CPA and water. In 2010, the National Congress Party (NCP) and the SPLM signed a Memorandum of Understanding on Post-Referendum Issues and Arrangements. A joint negotiation team composed of members from each side will conduct the negotiations on post-referendum issues facilitated by the African Union and supported by Intergovernmental Authority on Development (IGAD) and the United Nations (UN). The negotiations address four key issues: citizenship; security; financial, economic and natural resources; international treaties and legal issues. Water is included in the third area. Currently, the national government exercises an exclusive competence on transboundary waters.

10. Lessons learned from secession. State building and adoption of constitutional laws take usually from 3 to 4 years. However, each case of secession is special. If the outcome of the 2011 referendum is secession, the fact that Southern Sudan disposes of an interim national constitution which remains in force until the adoption of a permanent constitution might smooth the process of setting up the governance structure of an independent State.

11. Four post referendum scenarios and transboundary water implications

Scenario 1 – Unity

In case that the majority outcome of the referendum is Unity, then Sudan remains one country. In this scenario, Southern Sudan is expected to get a more extended autonomy. Southern Sudan is likely to strive for more extended responsibilities with respect to infrastructure, oil, energy and water assets. The interim constitutions of the North and the South might possibly undergo some change and be replaced with permanent constitutions. Under this scenario North and South Sudan will likely negotiate an internal allocation of the water share attributed to Sudan under the 1959 agreement. Sources referenced in this report indicate the possibility that Unity is “forced” upon the South which in that case is likely to be accompanied by civil strife with regional implications.

Scenario 2 – Independence and succession to the 1959 Agreement

If Southern Sudan secedes from North Sudan, it will become the 11th riparian nation of the Nile Basin located downstream of the Nile Equatorial Lakes region and with strong connections to the Eastern Nile. The transition period until the State is recognized, functional and a constitution is adopted might take one or two years at best. If Southern Sudan decides to succeed into rights and obligations of the 1959 agreement, this would be a clear signal of alignment with the downstream riparians. This alignment with the downstream riparians is likely to undermine South Sudan’s ambitions to join the EAC. The 1959 Agreement provides for the construction of water conservation schemes in Southern Sudan. This is an implicit reference to the controversial Jonglei canal project. The likelihood of this scenario is therefore considered to be low.

Scenario 3 – Independence without succession to the 1959 Agreement

With respect to succession to international treaties, Southern Sudan has the possibility to adopt a position similar to the Nyerere Doctrine i.e. reviewing earlier treaties regarding their binding force. With respect to treaties dating from before 1956, it could claim that it was under colonial rule and that even after 1956 it continued its struggle for political autonomy and independence. In not accepting the binding force of the 1959 agreement, a possible sovereign Southern Sudan would signal alignment with the upstream neighbours. It might further decide to sign and ratify the CFA, a step that will most likely antagonise Northern Sudan and Egypt in particular if Southern Sudan becomes the sixth country to ratify. Article 40 in the CFA states that it is “open to signature by all States in whose territory part of the Nile River Basin is situated”. Should Southern Sudan become independent there are major benefits for it to join the EAC in the form of increased African trade, transport and electricity network connections and hard security. Southern Sudan currently has observer status in both COMESA and the EAC. Voices from the South about joining the EAC speak in favour of this scenario.

Scenario 4 – Independence and wait-and-see

As the Nile issues are not amongst the most pressing priorities in the post-referendum negotiations between North and South, the Government of Southern Sudan will not be obliged to take a public position immediately. This also gives time to the South to see the benefits, limitations and risks of all the options available. Keeping silent and not compromising to any positions gives leeway to Southern Sudan, as a new midstream riparian, to opt for aligning downstream or upstream at a later stage, if at all. In the meantime, Southern Sudan will be able to observe how the CFA and the NBI processes evolve independently of its own actions. Scenario 4 is the most likely scenario in the short-term.

12. IGAD and AU will play major roles in all the post referendum scenarios. Policy coherence and coordination between IGAD and the African Union (AU) is critically important in facilitating a smooth transition during the post-referendum period. IGAD’s members will likely be the first to make recommendations regarding Southern Sudan’s post-referendum status, but the AU’s participation in, and ultimate backing of, these recommendations is crucial if an independent South is to secure maximum legitimacy. The gravitas of the AU and the importance of its recognition cannot be ignored. The AU High-Level Implementation Panel (AUHIP) can play a leading role in lining up the Union’s 53 member states in support of realities on the ground.

1.2 Recommendations linked to the four scenarios

Transboundary waters may not be the most immediate issue to consider in a post-referendum phase considering the focus on security, citizenship and the management of oil revenue. However, a possible eleventh riparian state sharing the water resources on the Nile, strategically located in the middle of the basin and with major hydropower development opportunities and large areas of land that can be utilized for irrigation, demonstrate the potential of working through the NBI to unlock the development potential in the region. Southern Sudan is close to the growing market of the EAC from which major investment is flowing to the region. It is our view that scenarios one (Unity) and two (independence with succession to the 1959 agreement) are less likely than scenario three and four. With the EAC states together with Ethiopia (except Burundi) having signed the CFA, scenario three illustrates the possibility that Southern Sudan could sign the CFA as soon as a sovereign state has been established. Support from regional organizations will be crucial to ensure that a transition to a sovereign state can be made in a harmonious manner.

The following recommendations can be considered in relation to scenario three and four:

13. Within the framework of the NBI in the short term
a. Ensure close coordination between UN institutions operating in the Nile Basin region and the African Union on the management and development of transboundary waters. This can include

joint planning, training and investment support work. A stronger role of the AU in supporting the NBI process could be explored in partnership with AMCOW and NEPAD.

b. Strengthen the negotiation capacity on transboundary water management and development of a new independent Southern Sudan government during the post-referendum negotiations to promote effective energy development (oil and hydropower) and sustainable use of the transboundary water assets.

c. Undertake stakeholder analysis at a local level to understand tribal issues and how it relates to transboundary and local water management and development. The interrupted Jonglei canal project clearly illustrates the need to fully understand local needs and expectations.

d. Further the understanding of the development of the RECs, the roles of IGAD and AU in the NBI with the objective of strengthening regional institutional development through EAC, IGAD, AU and their roles in supporting the NBI.

e. Work with the NBI Secretariat, NELSAP, ENSAP, Technical Advisory Committee (TAC) and the Council of Ministers to define a support strategy in support of an independent Southern Sudan joining the NBI process of cooperation.

14. Within the framework of the NBI in the mid term

a. The infrastructure gaps in Southern Sudan are large. Options to explore benefits from the river and beyond should be actively explored in partnership with GoSS, the NBI institutions, EAC, Ethiopia, Northern Sudan and AU. This includes integrated studies in which water, energy, transport infrastructure, environment and climate change development scenarios are undertaken. Such studies can be build on the Strategic/Sectoral Social and Environmental Assessment (SSEA) methodology undertaken in the Nile Equatorial Lakes Region.⁴

b. Specific pre-feasibility and feasibility study support to the NBI and GoSS in assessing the hydropower development potential, power trading to the South, East and North, development of irrigated agriculture and environmental management.

c. Engage in long term dialogue with the COMESA-EAC-SADC single Free Trade Area partners to explore the role of NBI and Southern Sudan in its development.

2 Overview of the Nile Basin Political Landscape

2.1 National level

Burundi

In June 2010 President Pierre Nkurunziza was re-elected for a five year term. Opposition parties withdraw from the election in protest over what they considered to be an unfair electoral process. This resulted in an overwhelming majority vote for the CNDD-FDD, obtaining a two-thirds majority within parliament, in principle changing Burundi's political system from multiparty into single party dominance.⁵ Burundi's pre-election period experienced civil unrest.⁶ Burundi together with Rwanda became EAC members in 2007.⁷

Burundi's interest in the Nile is vested in the Kagera River on which it is highly dependent for development⁸, particularly hydropower generation. Burundi's consumptive water demand is relatively low and the country claims riparian rights to the Kagera River. Burundi has strategic interests in the Lake Victoria Basin and could benefit from regional co-operation.⁹ Burundi has in its international relations been constrained by political instability and internal violence contributing limited institutional capacity. Burundi has sought support from the NBI to level the playing field in the basin-wide negotiations.

Democratic Republic of Congo (DRC)

The DRC plans for presidential elections on 27 November 2011.¹⁰ The DRC has only recently expressed interest in the Nile¹¹. It is less dependent on the White Nile for its development, and as such its consumptive demands in the basin are relatively low.¹² During the time of President Mobutu Sese Seko, the DRC entertained an Egyptian proposal to build a transmission line from the Great Inga hydropower station to the Nile basin, which would eventually lead all the way to Europe.¹³ Currently, the two hydroelectric dams, Inga I and Inga II, operate at low output.

The DRC contributes significantly to Lake Victoria and Lake Albert flows and has therefore expressed interest in ascertaining its riparian rights,^{14 15} promoting tourism as well as fishing and shipping rights., DRC has expressed a newfound interest in co-operating in mutually beneficial basin management programmes such as on Lake Albert and Edward. The former Executive Director of the NBI was Congolese. DRC is backing the formation of a future basin-wide agreement.¹⁶

Ethiopia

Parliamentary elections were held in Ethiopia in June 2010. Contrary to the Parliamentary elections in 2005¹⁷, the Parliamentary Elections this year were a show of absolute power of EPDRF. The ruling party of Prime-Minister Meles Zenawi won 499 (91 per cent) of the 547 sets, EPRDF-allied parties won 35 seats, and the opposition or independent candidates won only two seats¹⁸. The elections were highly contested by the opposition, that have demanded new elections, saying the outcomes of the elections are the end result of campaigns of intimidation, fraud, harassment and violence by the ruling party.¹⁹ Demands by opposition parties for

new elections were rejected by the highest courts in Ethiopia, and results had been officially confirmed in June 2010.²⁰

The 2010 elections come to confirm the status quo in the Ethiopian political system, dominated by the ruling party EPDRF and its allies. Optimists see this as positive signal in economic terms, taking into account that the government of Meles Zenawi had been responsible for the country's recent good economic performance and open up for external investment.²¹ According to the International Monetary Fund (IMF), Ethiopia's economy grew 9.9 per cent in 2009 and was expected to grow 7 per cent in 2010.²² However, without opposition in the Parliament there are fears that the country will be governed in a more autocratic manner than in the past. At the same time the government is changing from within. A new Ministry was created merging Water resources and Energy in the same cabinet,²³ providing an indication of the priority given to hydropower development in Ethiopia.

The long-lasting border problem between Ethiopia and Eritrea is expected to continue in the regional agenda during 2010 and 2011. During 1998-2000 the two countries have disputed a border conflict with political contours.²⁴

The highlands of Ethiopia, the source of the Blue Nile and several other main tributaries, contribute roughly 85 per cent of its water resources".²⁵ The current hydro-power capacity of Ethiopia is 850 MW. Ethiopia's hydro-power potential is estimated to be 45,000 MW. The last three years electricity coverage in Ethiopia has increased from 17 to 33 per cent".²⁶

Egypt

Egypt is under a state of Emergency Law since the assassination of President Anwar Sadat in 1981.²⁷ This Law was placed by President Hosni Mubarak when he replaced Sadat as Head of State. The key concept of this Law is that counter-terrorism operations can be conducted without restrictions by ordinary legislation. Detention is not limited in accordance with specific legal criteria that regulate its duration.²⁸ According to observers the Emergency Law has been used by the regime to crack down any party or movement opposing the current political system.²⁹

November/December 2010: Parliamentary Elections

The first round of these elections will be held on November, 28; and the second round in December, 5. Parties will be disputing a total number of 454 seats in the Parliament. During the last elections, in 2005, the National Democratic Party (NPD, Mubarak's party) got the majority of the seats, although the outlawed Muslim Brotherhood was able to get a good representation in the Parliament, by participating in the elections with independent candidates.³⁰ This was made possible through an agreement between the Brotherhood and the ruling regime in 2005, where the ruling party allow the Brotherhood to participate as independents in the Parliamentary elections, and in exchange not run for the Presidential elections.³¹ In the upcoming elections, the same parties will be candidates. However, several of the opposition voices and parties are calling for a boycott of these elections, accusing the government of manipulating the election campaign, by arresting and attempting to

silence opposition groups.³² However the Muslim Brotherhood, the major opposition party, stated they will run for the next election and hope to increase its representation in the Parliament from 20 per cent (2005) to 30 per cent.³³

September 2011: Presidential Elections

The first presidential elections in Egypt were held in 2005 and President Hosni Mubarak, in power since 1981, was elected with 88.6 per cent of the votes.³⁴ Doubts remain if President Mubarak will be a candidate in the next elections, in particular due to his age (88 years old) and his failing health conditions.³⁵ In the last two to three years, Egyptian and international media have been publishing rumours about a 'family succession' or "inheritance power scheme" in Egypt, in which Gamal Mubarak, son of the President would assume power.³⁶ More recently, several names are being suggested as potential candidates to the Presidential elections although none of them officially confirmed.

Egypt is the riparian that is the most dependent on the Nile waters for its socio-economic development.³⁷ Despite using 95 per cent of its allocated water for irrigation, it still imports over 50 per cent of its food grains. Increasing Egyptian demand for food places further pressure on the water supply.³⁸ Historically, Egypt has been able to impose solutions to water resources and development preferred by itself.³⁹ The new Executive Director for the NBI is Wael Khairy, an Egyptian.⁴⁰

Kenya

Kenya is planning for presidential elections in December 2012. In August 2010, Kenya adopted a new constitution. The new constitution is central to political reforms aimed at averting a repeat of the 2008 post-election violence that also hurt regional trade and blocked petrol, diesel and heavy oil transport flows to the coastal cities of Mombasa, Kenya and Dar es Salaam in Tanzania. The international community has deplored the Government of Kenya's invitation to Sudanese President Omar al-Bashir to attend the constitution's adoption ceremony, given the International Criminal Court arrest warrants against President al Bashir.⁴¹

The constitution declares that, "Every person has the right to a clean and healthy environment, which includes the right to have the environment protected for the benefit of present and future generations through legislative and other measures and the right to clean water (Art.43 (d))."⁴² Kenya has major interests in Lake Victoria, evident in its membership status in all regional co-operative arrangements regarding the lake. In terms of basin-wide relations Kenya has always seen itself as a "broker" in the Nile basin and has never exhibited much interest in any binding agreements on water use.⁴³

Rwanda

Paul Kagame of the Rwandan Patriotic Front (RPF) won Rwanda's presidential elections that took place on 9 August 2010, and was re-elected for a second term on 11 August, 2010. Internally, opposition and human rights groups said the election lacked credible competition, while externally, the United Nations and the European Union expressed concerns about the deteriorating human rights situation in Rwanda ahead of the election.⁴⁴ Rwanda, centrally located between francophone and Anglophone

Africa will gain from regional co-operation and has worked hard to become a member of the EAC (2007⁴⁵) and contribute to the integration efforts.⁴⁶

Rwanda has similar interests to Burundi. It too, is blessed with high and regular rainfall and it is also mainly interested in strengthening its hydropower capabilities.^{47 48} The Kagera River inflow is hugely important to the water balance of Lake Victoria, in which Rwanda is a key riparian player. It is also in support of a new basin-wide agreement.⁴⁹

Sudan

At the national level, in April 2010, Sudan had its first presidential poll in 24 years.⁵⁰ These Presidential elections were set up under the 2005 CPA that ended more than two decades of North-South civil war and saw the formation of a power-sharing agreement between the SPLM and the National Congress Party. President Omar al-Bashir won the elections with 68 per cent of the vote.⁵¹ The main opposition parties withdrew their candidates, accusing al-Bashir of widespread vote rigging.⁵² In the South, Salva Kiir, the leader of the SPLM, won the election in the presidential poll in Sudan's semi-autonomous southern region, with 92.9 per cent of the votes.⁵⁴ The elections in the South were a first test for the referendum process, whereby Southern Sudan will opt for unity or secession from North Sudan. The pre-election campaign period had been a political test for Sudan with several delays.⁵⁵ Although the legitimacy of the final results was questioned by some, the fact is that Sudan had its first multi-party elections since 1986.⁵⁶ President Bashir continues to assure that the Referendum in Southern Sudan would take place in January 2011, and that a peace agreement for Darfur would be reached soon.⁵⁷

According to GoSS officials, Southern Sudan has a comparative advantage in its natural resources, particularly oil assets, land and water for agriculture. GoSS officials have likened independence of Southern Sudan to "agricultural independence" and claim that it can become the breadbasket of the continent and the Middle East.^{58 59}

Sudan is relatively less dependent on the waters of the Nile than Egypt as it has extensive rainfed areas within its borders.⁶⁰ However it has a large potential for irrigated agriculture drawing water from the Nile.⁶¹ About 60 per cent of the waters of the Nile flow through Sudan with the White Nile (western branch) and Blue Nile (eastern branch) converging in Khartoum in Northern Sudan. The White Nile passes through Southern Sudan. The North and the South both claim to have agreed on continued cooperation on water sharing governed by the agreed quotas in the NBI.⁶²

Regarding the role of Egypt, downstream to Sudan, GoSS officials have assured their Egyptian counterparts that if the South becomes independent, they would first review existing water usage with the North and operate within Sudan's current allocation of 25 per cent of the flow, thus not affecting the Egypt's allocated flow.⁶⁵ GoSS officials have stated their commitment to preventing excessive loss of water but want Egypt to recognize the development needs of Southern Sudan.⁶⁶ Some Egyptian officials have expressed concern that an independent Southern Sudan could join the East African states and then object to the standing water sharing agreements.⁶⁸

Tanzania

Tanzania held parliamentary and presidential elections on 31 October 2010. President Jakaya Kikwete was sworn in for another

five-year term on 6 November 2010. Tanzania's GDP growth rate is increasing incrementally (estimated at 6.4 per cent in 2010 and 7.1 per cent in 2011 by the Economist Intelligence Unit) and has a low and stable inflation rate.⁷⁰ Tanzania is a member of the EAC, along with Kenya and Uganda and is also a SADC member state.

Tanzania is endowed with more transboundary waters than any country in Africa,⁷¹ sharing twelve international rivers and lakes with other nations.⁷² The institutional framework for water governance in Tanzania is provided by the National Water Policy (NAWAPO) of July 2002, although Tanzania is undergoing a review of its policies particularly as it relates to current and future transboundary challenges including the falling lake levels of Lake Victoria. In terms of the Nile waters, Tanzania has stated its needs as: wanting to exercise its riparian rights on Lake Victoria, having great interest in developing and conserving the resources of the Lake Victoria sub-basin, and having an interest in developing tourism and agriculture.⁷³ It poses a relatively smaller threat to the quantity and the quality of the Nile River, and would benefit from basin-wide co-operation.⁷⁴

Uganda

Uganda will follow the election trend in the Nile Equatorial Lakes Sub-basin (NELSB) region with the upcoming presidential elections planned for January 2011. Familiar faces are expected to stay in power for another term in office.

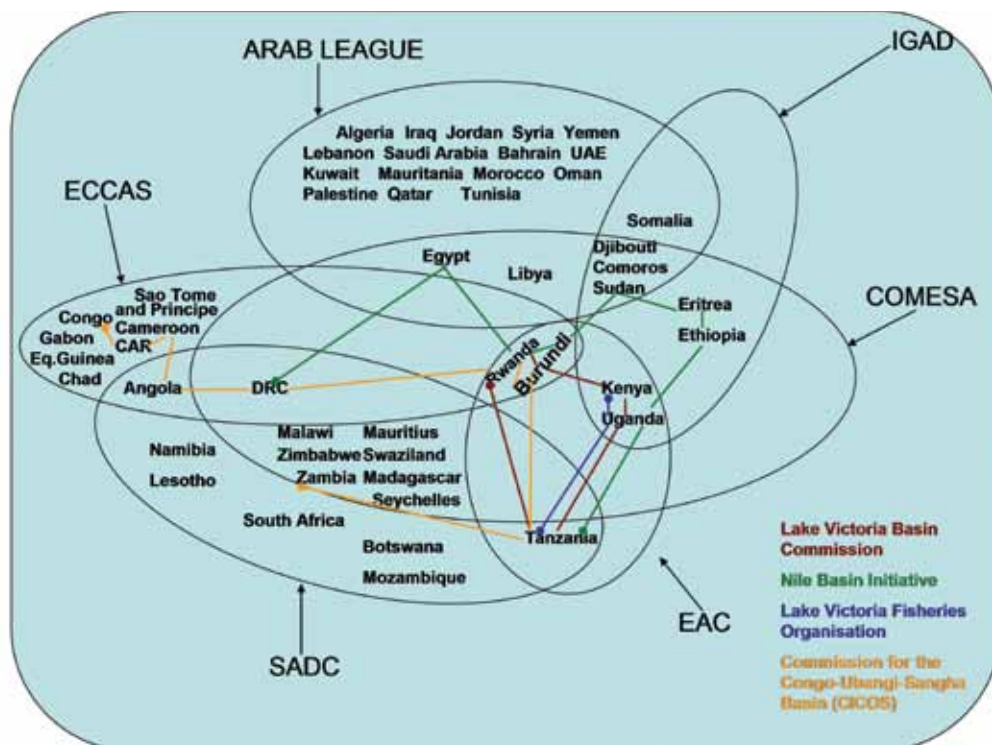
Uganda is a key riparian on the Nile as regards its water contribution.⁷⁵ The abundant rainfall in Uganda and the characteristics of the hydrology of the Sudd, makes consumptive demands not a serious threat to downstream users.

According to Uganda's National Water Policy of 1999, "it is in Uganda's interest to ensure that the good water quality in the water bodies within the national boundaries is maintained for sustainable use".⁷⁶ Based on Uganda's overall policy objectives of good neighbourliness and promotion of regional co-operation

for optimal use, Uganda's policy principles therefore adhere to the various accepted principles of international law, regional and basin-wide bodies of co-operation such as EAC and its Lake Victoria Basin Commission, IGAD, Lake Victoria Fisheries Organization (LVFO), etc.⁷⁷ Uganda has a strong interest in ensuring its entitlement in future Nile water agreements, and also expects to benefit from basin-wide co-operation programmes in particularly in hydropower and agriculture development.⁷⁸ The ongoing 250 MW Bujagali Hydropower scheme (Independent Power Project) on the main stem of the Nile was developed subsequent to receiving no objection from the NBI partners.⁷⁹

2.2 Regionalisation processes

The AU is the culmination of Africa's regional integration mission, which saw the rapid increase in the number of integration-based institutions in the 1980s through the Lagos Plan of Action and the Final Act of Lagos. This integration agenda was formalised in the 1990s upon the adoption of the Abuja Treaty establishing the Regional Economic Communities, and again in the year 2000, which saw the development of the Constitutive Act establishing the AU. AU's predecessor the Organization of African Unity (OAU), has been referred to as the "custodian of the norms of international society that restrictively defined self-determination" and "whose rigid and inflexible adherence to the principles of international society undermined the maintenance and promotion of peace and security."⁸⁰ This refers to the OAU's stance of non-interference regarding intra-state conflicts. In contrast, the AU and its Constitutive Act have created a fundamental shift to better address human rights and poor governance issues.⁸¹ In terms of water governance, the AU has influenced regional policy frameworks through its Commissioner for Agriculture and Water, as well as the complete development agenda of the Water Programme of NEPAD. Along with the AU and NEPAD, the African Ministerial Council on Water (AMCOW), formed in 2002, also aims to provide supra-



regional coordination of water resource management although it still needs to develop into this role institutionally.

While the AU has displayed an instrumental commitment to regional integration, the practicalities of this commitment are less clear, particularly as it relates to institutional overlap. Currently, there are eight RECs recognised by the AU, each established under a separate regional treaty:

- the Arab Maghreb Union (UMA)
- the Common Market for Eastern and Southern Africa (COMESA)
- the Community of Sahel-Saharan States (CEN-SAD)
- the East African Community (EAC)
- the Economic Community of Central African States (ECCAS)
- the Economic Community of West African States (ECOWAS)
- the Intergovernmental Authority on Development (IGAD)
- the Southern Africa Development Community (SADC)

All NELSB states are party to more than one of the above-mentioned RECs, which has resulted in a highly complex institutional landscape of overlapping memberships.⁸² This formed the theme of the 2006 Banjul summit, and at the July 2007 Accra summit the Assembly finally decided to adopt a Protocol on Relations between the African Union and the Regional Economic Communities.⁸³ This protocol is intended to facilitate the harmonisation of policies and ensure compliance with the Abuja Treaty and Lagos Plan of Action t.

Trade policy experts have warned of technical inefficiencies and the high costs of overlapping membership.⁸⁴ Traders have to operate within a number of trade regimes each with its own tariff rates, rules of origin and procedures. Recent non-tariff barrier disputes between Zambia and Kenya over the latter's exports of cooking oil to Zambia, are noteworthy.⁸⁵ Specifically, Zambia has pleaded to the COMESA Council of Ministers to send an independent verification committee of experts to Nairobi to address its concerns over Kenya's exports of palm-oil based cooking fat to Zambia. Zambia has long argued that imports entering its borders of palm-oil based cooking fats from Kenya should be subjected to extra verification and scrutiny to determine whether or not they comply with COMESA's rules of origin.⁸⁶ These concerns worsen as the risk of trade deflection increases when goods that have been preferentially imported from country A (a member of REC X) by country B (a member of both REC X and REC Y) are subsequently preferentially re-exported to country C, which is only a member of REC Y. The official barriers to trade become very porous in such situations.⁸⁷

The EAC, already a Common Market, has four Member States in COMESA (Burundi, Kenya, Rwanda and Uganda) and one Member State in SADC (Tanzania). Moreover, five SADC Member States are also members of the Southern African Customs Union (SACU) (Botswana, Lesotho, Namibia, South Africa, and Swaziland). There are, therefore, ten countries in the region that are already members of existing customs unions. However, these ten Member States (as well as the other non-Members to existing customs unions) have also been involved in negotiations to establish alternative customs unions to the ones they currently belong to.⁸⁸ COMESA and SADC share seven Member States that are not part of any customs union but are involved in customs unions preparatory negotiations.⁸⁹ Therefore, of the twenty-six countries that constitute the combined membership of COMESA, EAC and

SADC, seventeen (or almost two-thirds of the total membership) are either in an existing customs union, or participating in negotiating an alternative customs union to the one they belong to, or are in the process of negotiating two separate customs unions which would be contrary to WTO rules.⁹⁰ In order to resolve these challenges, the three Regional Economic Communities (SADC, EAC, and COMESA) formed a Tripartite Taskforce with a view to harmonise their trade related programmes, and to eliminate duplication of efforts. Greater integration within regions as well as between regions has therefore not only been desirable, but a necessity to grapple with institutional complexity.

2.2.1 The Tripartite Task Force – EAC, COMESA and SADC

On the 22 October 2008, the Heads of State and Government of COMESA, EAC and SADC met in Kampala and called for the establishment of a single Free Trade Area covering the 26 countries of the three RECs. Currently, draft FTA proposal documents are under review, and it is expected that at the next Tripartite Summit, the Heads of State and Government will pronounce themselves on the way forward on the establishment of the single FTA.⁹¹ The objective of the FTA proposal is to establish the FTA on a tariff-free, quota-free, exemption-free basis by combining the existing FTAs of COMESA, EAC and SADC. The Tripartite FTA will focus on building robust infrastructure programs designed to catalyse the regional market through interconnectivity (facilitated for instance by all modes of transport, telecommunications and energy interconnections) and to promote competitiveness (for instance through adequate supplies of energy).⁹² Once the FTA Agreement is signed, Member States will have until December 2011 (or within 6 months of signing), to get their domestic processes ready for the ratification of the Agreement, including the establishment of support institutions and through the adoption of customs procedures and instruments.⁹³ While the approval process has met with delays due to the inability to set an agreeable date for the Tripartite Summit to meet, it is proposed that once this approval process is confirmed, the Tripartite FTA should be launched in January 2012.⁹⁴

The Tripartite FTA opens up a larger market to its Member States. A single economic space of this nature will therefore be more attractive to investment and large scale production. The EAC, COMESA and SADC currently have a combined population of 527 million and combined GDP of \$ 625 billion.⁹⁵ Estimates show a growth in exports among the 26 Tripartite countries from USD 7 billion in 2000 to USD 27 billion in 2008, and a growth in imports from USD 9 billion in 2000 to USD 32 billion in 2008.⁹⁶ This trade increase was in large part, a result of the free trade area initiatives of the three organisations. The Tripartite FTA could therefore address the current challenges of multiple memberships by advancing harmonisation, integration and coordination initiatives. If successful, the Tripartite will greatly contribute to Africa's economic integration. However, it remains to be seen how exactly these three REC's, each with its own unique historical trajectory, each Member State with its own political membership agenda, will merge.

2.3 A history of Nile agreements

A brief outline of colonial history of the 10 Nile Basin States is provided in appendix 6.2 to provide a backdrop to questions concerning termination, continuation and contestation of treaties that form part of the legal framework of the Nile Basin. Most of the Nile Basin was for a long period of time under British colonial influence. In the early 1900s, the United Kingdom had become reliant on agricultural exports from Egypt and the region.⁹⁷ A number of legal instruments that were *inter alia* supporting colonial interests in water and in agricultural production have been concluded during this period. Today, there exists disagreement among a number of Nile riparian States with respect to the binding force of some of the treaties listed in appendix 6.2.1, most notably with respect to the 1929 and 1959 agreements.

Claim to completeness of analysis of the legal framework cannot be made; there exist inter-governmental agreements and governmental documents that have never been published⁹⁸ or are not easily available for other reasons, and yet might be of legal relevance. The analysis is based on a textual analysis of available legal instruments.

2.3.1 Agreement on the Nile River Basin Cooperative Framework (CFA)⁹⁹

The Agreement on the Nile River Basin CFA is an instrument negotiated by the Nile riparian countries. The agreement outlines general principles of cooperative water resources management with respect to protection, utilization, conservation and development of the Nile River System. The principles according to which the System is to be used are the following; cooperation, sustainable development, subsidiarity, equitable and reasonable utilization, prevention of the causing of significant harm, the right of Nile Basin States to use water within their territories, protection and conservation, information concerning planned measures, community of interest, exchange of data and information, environmental impact assessment and audits, peaceful resolution of disputes, water as a finite and vulnerable resource, water has social and economic value, and water security (Article 3). The agreement envisages the establishment of a permanent joint mechanism, the Nile River Basin Commission (Article 15), which “shall succeed to all rights, obligations and assets of the Nile Basin Initiative at entry into force of the CFA (Article 30). Article 14 of the CFA which deals with water

security is incomplete. Paragraph (b) of the article provides that it will be the task of the Nile River Basin Commission to resolve the text of the provision within six months after its establishment. Annex on Article 14 (b) to the CFA provides two text options which have been proposed for the paragraph in question. The CFA is open to signature, ratification or accession “by all States in whose territory part of the Nile River Basin is situated” (Articles 40 and 41). Thus based on a textual interpretation of the agreement, the treaty would be open for accession by an independent South Sudan under the scenario that it eventually becomes an independent State *de lege*.

The agreement was opened for signature on 14 May 2010 for a period of one year until 13 May 2011.¹⁰⁰ The text has not been adopted by all negotiating parties. Opening of a treaty for signature which has not been adopted by all negotiating parties is a situation that occurs on occasion for example with respect to multilateral conventions.¹⁰¹ So far five States – Ethiopia, Kenya, Uganda, Tanzania and Rwanda – have signed the agreement.¹⁰² After six States have ratified the agreement, the latter enters into force on the sixtieth day following the date of deposit of the sixth instrument of ratification¹⁰³ or accession with the African Union (Article 42). The African Union is the designated depository of the treaty. With entry into force of the agreement, the Nile River Basin Commission will be legally established and succeeds to all rights, obligations and assets of the Nile Basin Initiative (Articles 15 and 30).

Binding force of international treaties on third States

With respect to the binding force of treaties on third States the 1969 Vienna Convention on the Law of Treaties codified the following rules; “A treaty does not create either obligations or rights for a third State without its consent” (Article 34). “An obligation arises for a third State from a provision of a treaty if the parties to the treaty intend the provision to be the means of establishing the obligation and the third State expressly accepts that obligation in writing” (Article 35). While treaties do not apply retroactively, the 1969 Vienna Convention is widely recognized as codifying customary law and its provisions have been applied by international courts and tribunals to treaties predating the entry into force of the Convention. Of the Nile Basin States, DR Congo, Egypt and Rwanda are contracting parties, Ethiopia and Kenya have signed but not ratified the 1969 Convention.¹⁰⁵

CFA Timeline

14 May 2010–13 May 2011 ¹⁰⁴	Open for signature
60th day after deposit of 6th instrument of ratification	Entry into force
Upon entry into force	Establishment of the Nile River Basin Commission <i>de lege</i>

3 Political and Legal Analysis of the Upcoming Southern Sudan Referendum 2011

3.1 *Administrative structure in the North and South*

Sudan is divided into twenty-five states; fifteen of them are located in northern Sudan and ten in Southern Sudan. The Sudanese National Assembly adopted the Interim National Constitution (INC) on 6 July 2005.¹⁰⁶ The INC recognizes the commitment of Sudan to comply with the Cooperative Peace Agreement (CPA) and to give constitutional support to the Protocol on the resolution of the conflict in the Abyei and the Protocol on the resolution of the conflict in Southern Kordofan and Blue Nile States.¹⁰⁷ A Bill of Rights is included in the INC protecting, inter alia, the right to life and human dignity; the right to personal liberty; the prohibition of slavery, forced labour and torture; the equality before the law and the fair trial.¹⁰⁸ The source of legislation for the Northern States of Sudan is the Sharia.¹⁰⁹

Southern Sudan is a decentralised State consisting of ten states.¹¹⁰ The President of the GoSS, Salva Kiir Mayardit, signed the Interim Constitution of Southern Sudan (ICSS) on 5 December 2005.¹¹¹ The 2005 December Constitution is the supreme law of Southern Sudan.¹¹² The Southern Sudan Constitution provides two scenarios in relation to the outcome of the 2011 referendum. Its Article 208 states that:

“(6) Should the outcome of the referendum on self-determination confirm unity, the current system of governance established under this Constitution shall remain in force and all the institutions established under it shall continue to function in accordance with the provisions thereof until a permanent Constitution is promulgated.

(7) If the outcome of the referendum on self-determination favours secession, this Constitution shall remain in force as the Constitution of a sovereign and independent Southern Sudan, and the parts, chapters, articles, sub-articles and schedules of this Constitution that provide for national institutions, representation, rights and obligations shall be deemed to have been duly repealed”.

A Bill of Rights has been included in the Interim Constitution.¹¹³ All international human rights treaties, covenants and instruments ratified by the Republic of the Sudan are an integral part of the Bill.¹¹⁴ The first session of the Transitional Southern Sudan Legislative Assembly has taken place in September 2005.¹¹⁵

3.1.1 *Special areas*

Abyei area

The Abyei area is located between the North and South of Sudan and is defined by the CPA as “a bridge between the North and the South, linking the people of Sudan”.¹¹⁶ It contains parts of the Bahr river basin and of the Sudd, one of the world’s largest wetlands.¹¹⁷

The Protocol on the resolution of the Abyei conflict stipulates that simultaneously with the referendum for Southern Sudan, the residents of the Abyei area will decide if the Abyei area retains a special status within the North or be part of Southern Sudan.¹¹⁸ The “residents of Abyei Area” are defined as “the Members of

Ngok Dinka community and other Sudanese residing in the area.” This Protocol significantly singles out “the members of Ngok Dinka community,” and merely makes a general reference to “other Sudanese,” without mentioning any other specific community.¹¹⁹ The residents of the Abyei Area will be called upon to cast their separate ballot irrespective of the outcome of the referendum in Southern Sudan. The outcome of the latter will be relevant with respect to the consequences of the choice made by the residents of the Abyei area. Indeed, they may find themselves north or south of an international boundary if Southern Sudan secedes.

Southern Kordofan and Blue Nile States

The Protocol on the resolution of the Southern Kordofan and Blue Nile States conflict establishes that a popular consultation will take place in Southern Kordofan and Blue Nile States. The CPA will be submitted to the people of the two States through their respective elected legislatures. If the CPA is endorsed through the legislature, then the CPA becomes the final settlement of the conflict in that State.¹²⁰ Should any of the two legislatures of the two States, after reviewing the agreement, decide to rectify any shortcomings in the constitutional, political or administrative arrangement of the CPA, such legislature should engage in negotiations with the national government with the view to rectifying these shortcomings.¹²¹ The process of consultation is behind schedule. The delay is due not only to the difficulty of the task but also because the CPA requires that the popular consultation be conducted by the elected State legislature. In Southern Kordofan the elections are expected for February 2011; the Blue Nile State Assembly appointed a commission that will conduct the consultations over the following months.¹²²

The issue of borders

The 1956 borders between North and South are inviolable subject to the results of the referendum on the Abyei area.¹²³ The CPA provides for a Technical ad hoc Border Committee (TBC)¹²⁴ which was created by Presidential Decree on 29 September 2005.¹²⁵ However, the TBC did not start working on the mapping of the 1956 border between North and South until January 2007.¹²⁶ The demarcation between north and south borders has still to be finalised.¹²⁷ The fact that borders are still to be demarcated might be a source of instability for Southern Sudan.

The CPA

The CPA establishes an Abyei Boundaries Commission (ABC) charged with the demarcation of the Abyei area, which is defined “as the area of the nine Ngok Dinka chiefdoms transferred to Kordofan in 1905”. Once the Commission finished its works, the national government and the SPLM did not agree on whether the ABC Commission exceeded its mandate in the demarcation of the area; they decided to submit this dispute to an arbitral tribunal established under the rules of the Permanent Court of Arbitration (PCA) on 7 July 2008.¹²⁹ The award does retain the conclusion of the ABC Commission in respect to the northern and southern boundary lines of the Abyei area¹³⁰ and found that the ABC ex-

ceeded its mandate in some other locations (eastern and western boundaries).¹³¹ The parties committed themselves to abide by and implement this decision.¹³² One of the five judges of the arbitral Tribunal noted that the demarcation of the Abyei area made by the Tribunal risks endanger the access of nomadic people, such as the Misseriya, to the waters of the Bahr river.¹³³

3.2 *Content of the Comprehensive Peace Agreement (CPA)*

The arbitral tribunal, already mentioned indicated in its 2009 award on the delimitation of the Abyei area that the CPA is not an international treaty but an agreement “between the government of a sovereign state, on the one hand, and, on the other, a political party/movement” which “may – or may not – govern over a sovereign state in the near future”.¹³⁴ The CPA is part of the constitutional laws of Sudan¹³⁵ and Southern Sudan¹³⁶ Agreements concluded between a State and the proponents of the independence of a territory may become “international agreements” when a new State is created.¹³⁷

The GoS and the SPLM/A signed the CPA on 9 January 2005. The two parties confirmed their commitment to the following instruments previously agreed upon, which were integrated into the CPA: the Machakos Protocol of July 22, 2002; the Protocol on Security Arrangements of September 25, 2003; the Protocol on Wealth-Sharing of September 25, 2003; the Protocol on Power-Sharing of May 26, 2004; the Protocol on the Resolution of Conflict in Southern Kordofan and the Blue Nile States of May 26, 2004; and the Protocol on the Resolution of the Conflict in the Abyei of May 26, 2004.

The 2002 Machakos Protocol provides the general principles of governance between the national government and Southern Sudan and it states the right to self-determination through referendum for the people of Southern Sudan.¹³⁸ At the end of the six year interim period an internationally monitored referendum will determine the future status of the people of Southern Sudan. The referendum will “confirm the unity of the Sudan by voting to adopt the system of government established under the Peace Agreement; or ... vote for secession”.¹³⁹ The Power-Sharing Protocol contains norms on the distribution of powers between the national government and the government of Southern Sudan and includes the obligation to comply with multilateral human rights treaties to which Sudan is or becomes a Party.¹⁴⁰

The 2004 Wealth-Sharing Agreement establishes the principles for an equitable sharing of common wealth. The CPA creates a National Land Commission and a Southern Sudan Land Commission charged with the resolution of land disputes.¹⁴¹ A National Petroleum Commission is also put in place.¹⁴² Oil revenues are shared between the National Government and the Government of Southern Sudan. Moreover, 2 per cent of oil revenues have to be allocated to the States producing oil.¹⁴³ The CPA also provides that the SPLM appoints “a limited number of representatives to have access to all existing oil contracts”¹⁴⁴ and the sharing of non-oil revenues such as taxes.¹⁴⁵

3.2.1 *CPA and water*

The 2004 Power-Sharing Protocol establishes exclusive competence of the National Government on “the Nile Water Commission, the management of the Nile Waters, transboundary waters and

disputes arising from the management of interstate waters between Northern states and any dispute between Northern and Southern states.”¹⁴⁶ This is reiterated in the INC and in the ICSS.¹⁴⁷

The CPA lists the powers of the Government of Southern Sudan which include “[the] co-ordination of Southern Sudan services or the establishment of minimum Southern Sudan standards or the establishment of Southern Sudan uniform norms” in a number of areas including provision of water and waste management services.¹⁴⁸ The government of Southern Sudan has therefore the responsibility in the provision of water services. The powers of Southern Sudan further include, “[d]isputes arising from the management of inter-state waters strictly within Southern Sudan”.¹⁴⁹ This is reiterated in the Interim National Constitution of the Republic of Sudan and in the Interim Constitution of Southern Sudan.¹⁵⁰ Regarding Southern Kordofan and Blue Nile States, the CPA establishes that the national and state governments have concurrent legislative and executive powers in projects on water and waste management.¹⁵¹

3.2.2 *Post-referendum negotiations*

On 23 June 2010, the NCP and the SPLM signed a Memorandum of Understanding on Post-Referendum Issues and Arrangements.¹⁵² A joint negotiation team composed of six members from each side will conduct the negotiations on post-referendum issues.¹⁵³ The negotiations will be facilitated by the African Union High-Level Implementation Panel (AUHIP) and supported by IGAD, the IGAD partners’ forum and the UN.¹⁵⁴ The negotiations will be further supported by a joint technical secretariat composed of six members that will coordinate and liaise with the Assessment and Evaluation Commission (AEC). The AEC will provide administrative support to the joint technical secretariat.¹⁵⁵ The parties agreed to cluster the post-referendum negotiations into four working groups: citizenship; security; financial, economic and natural resources; international treaties and legal issues.¹⁵⁶ Water is included in the third working group on financial, economic and natural resources. All working groups will be composed of 3-5 negotiators from each side.¹⁵⁷

3.3 *Other peace agreements*

3.3.1 *Eastern Sudan Peace Agreement*

In addition to the CPA, the government of Sudan signed a peace agreement with the Eastern Sudan Front Sudan in Asmara on June 19, 2006.¹⁵⁸ The Eastern Sudanese parties are continuing to accuse the government of failing its obligations under the agreement; they are complaining that the government should increase financial support to development in these areas.¹⁵⁹ An international conference for rehabilitation and development of East Sudan is scheduled in Kuwait in December.¹⁶⁰ One of the priorities will be to increase funds in order to improve water and sanitation infrastructure.

3.3.2 *Darfur peace process*

After months of negotiations and pressure from the international community, the government of Sudan signed the Darfur peace agreement with a faction of the Sudan Liberation Movement/Army

and the Justice and Equality Movement in Abuja in May 2006. The agreement did not succeed to bring peace in Darfur and a new negotiation process is taking place. A joint mediation of the AU and the UN Chief Mediator for Darfur is attempting to ensure an inclusive peace process in Darfur. Two framework agreements have been signed under the auspices of the AU/UN joint mediation: one agreement has been signed between the government of Sudan and the Justice and Equality Movement and the other one has been signed with the Liberation Justice Movement.¹⁶¹ The joint mediation is currently developing a comprehensive peace agreement and pursuing efforts to involve all parties to the conflict.¹⁶²

3.4 A legal analysis of secession

Recent experience with the emergence of new States has highlighted that each case of secession has its specific features. For example, while a referendum on the independence took place in Eritrea and East Timor, the emergence of Slovakia and the Czech Republic was the result of the dissolution of Czechoslovakia decided by vote of the federal parliament. In the case of Kosovo, the Serbian government was of the opinion that the declaration of independence did not produce legal effects neither in Serbia nor in the international legal order¹⁶³ and it requested an advisory opinion on the legality of the unilateral declaration to the International Court of Justice.¹⁶⁴ While the Court did not address the question of statehood of Kosovo, it advised that Kosovo's declaration of independence did not violate any international law.¹⁶⁵ The drafting process of constitutional laws in States that secede can take a few years. In Eritrea the referendum on independence was held in May 1993 and the Constitution was enacted four years later (May 1997).¹⁶⁶ In East Timor the same process took about three years (referendum in 1999, constitution enacted in 2002). The dissolution of Czechoslovakia was the result of three years of negotiations between the constituent republics.¹⁶⁷ United Nations organizations and other regional organizations play an important role in State building where new States emerge. The UN is often tasked with the organisation and supervision of referenda on independence (e.g. East Timor, Eritrea). The UN Security Council established the UN Interim Administration Mission in Kosovo (UNMIK) and the UN Transitional Administration in East Timor (UNTAET) which exercise(d) legislative and executive functions. In addition, the UN and the African Union established a mission to monitor the 2000 peace agreement between Eritrea and Ethiopia.¹⁶⁸ The European Union established an international civil and security presence in Kosovo (known as EULEX).¹⁶⁹

3.4.1 Separation of parts of the territory of a State

In the same way as each case of emergence of a new sovereign State is characterized by its own distinctive features, legal responses and legal doctrine on secession are not uniform. A broad notion of the term secession includes all forms of separation of States, where the predecessor State continues to exist with a diminished territory and population.¹⁷⁰ International doctrine distinguishes between various categories of separation that can be summarized as three types; secession in a strict sense, separation with consent and dissolution.

Secession, in a strict sense, "is the creation of a new independent entity through the separation of part of a territory and population of an existing State, without the consent of the latter"¹⁷¹

(e.g. Bangladesh). The predecessor State continues to exist. International law neither encourages nor prohibits peaceful secession.¹⁷² In cases of separation not linked to former colonies, State practice almost exclusively precludes secession without the consent of the predecessor State as a legitimate way to statehood. Bangladesh was probably the only non post-colonial sub-state entity that has been successful in emerging as a new State without such consent.¹⁷⁴

In cases of separation of part of a territory with consent, the predecessor State also continues to exist.¹⁷⁵ (e.g. dismantlement of the Soviet Union with exception of Baltic States, Russia inherited the treaties and rights of the Soviet Union).

Dissolution takes place when the territory and population of a State splits and two or more new States are formed. The predecessor State ceases to exist. (e.g. Czechoslovakia as a negotiated dissolution).

Separation of part of a territory of a State happens in general either by unilateral declaration of the appointed or self-appointed authorities of that territory (e.g. Bangladesh, Kosovo, Abkhazia), referendum, or based on negotiation (e.g. Czechoslovakia and in the case of the Soviet Union). A key factor for the emergence of a 'newly independent State'¹⁷⁶ as a sovereign State and as member of the international society of States is its recognition by other States. This recognition has constitutive character with respect to the legal personality of a new State, provided existence at the same time of all other necessary elements of a State (territory, population, and government in control of the former). Entities such as Somaliland have the de facto appearance of independent States, but by the fact that they have not been recognized, they do not constitute States *de jure*.¹⁷⁷

Where separation happens based on a negotiated agreement between the predecessor State and successor State(s), international recognition of the new entity as a State does not pose problems in practice. A key factor, for example, in the emergence of independent States of the former Soviet Republics was the mutual consent of the constituent Republics to dismantle the Union.¹⁷⁸ Where separation takes place based on unilateral declaration, State practice usually requires consent of the predecessor State, or as in the special case of Yugoslavia, at a minimum, evidence of the expressed will of the people to separate.¹⁷⁹

3.4.2 Principles of international law to be considered in case of secession

State sovereignty. A state is considered to be sovereign in legal terms if it has a territory, a population, and a government in control of the former, and has been accepted by a substantial number of sovereign States as equal member of the international society of States.¹⁸⁰ Sovereign States are equal in rights and *de jure* independent in the creation of internal (national) and external (international) law. Sovereignty is the capacity to assert external independence from interference by third parties in practice and law. Thus a corollary principle of State sovereignty is the principle of non-interference in domestic affairs of another State.¹⁸¹ In legal terms, sovereignty describes the scope of rights and duties of a state as a participant in the international society of states.

Territorial integrity

Territorial integrity is an element of State sovereignty. States must refrain from the use of force threatening the territory of other States and they are prohibited from acquiring a territory by force.¹⁸²

The principle of territorial integrity contributes to ensure stability and peace in international relations¹⁸³ and is complemented by the obligation to respect the equality of rights between States.¹⁸⁴

The principle of *uti possidetis juris*

The principle of *uti possidetis juris* originated in Central and South America and was then applied in Africa. It involves the preservation of boundaries existing under the colonial regimes.¹⁸⁵ In Africa, the boundaries of many States were drawn following this principle with the hope of preventing boundary disputes at and after decolonization. In 1964, the African Union adopted a resolution affirming the commitment of member States “to respect the frontiers existing on their achievement of national independence”.¹⁸⁶ The principle of *uti possidetis juris* is a general rule of international law.¹⁸⁷ It does not prohibit modifications of frontiers that are agreed between States.¹⁸⁸

The right of people to self-determination

The right to self-determination is one of “the essential principles of contemporary international law”.¹⁸⁹ While it is unanimously recognized that the principle of self-determination has been applied to the creation of new States after colonization and foreign occupation,¹⁹⁰ the relevance of this principle in other contexts is controversial. The existing international practice illustrates that the principle of self-determination is not recognized as giving rise to unilateral rights of secession.¹⁹¹ It is limited to rights of self-administration and to the right of people to dispose of natural wealth and resources.¹⁹² According to Article 1.2 common to the 1966 International Covenant on Civil and Political Rights and the 1966 International Covenant on Economic, Social and Cultural Rights: “All peoples may, for their own ends, freely dispose of their natural wealth and resources without prejudice to any obligations arising out of international economic co-operation, based upon the principle of mutual benefit, and international law. In no case may a people be deprived of its own means of subsistence”.

3.4.3 Succession to international treaties and transboundary waters

The doctrine of state succession is characterized by legal uncertainty. A number of academic theories have been proposed, the content of which remains subject to doctrinal debate (e.g. theory of universal continuity of treaties versus the theory of *tabula rasa*). State ‘succession in law’ consists of any change of sovereignty over a certain territory, where the new sovereign succeeds in the legal rights and obligations of the old sovereign.¹⁹³ State practice with respect to succession is not coherent and often determined not by legal but political considerations on a case to case basis.

An international instrument governing succession into legal rights and obligations, the Vienna Convention on Succession of States in Respect of Treaties, has been adopted on 23 August 1978 and entered into force in 1996.¹⁹⁴ Some Nile riparian States have signed (Sudan)¹⁹⁵ and ratified (Egypt and Ethiopia)¹⁹⁶ this Convention. The dichotomy of the theory of *tabula rasa* for colonies and that of universal continuity for all other cases of State succession as stipulated by Vienna Conventions has not been reflected in subsequent State practice.¹⁹⁷ The 1978 Vienna Convention contains some rules of customary international law: rights and obligations relating to the territory, e.g. those establishing boundaries or

boundary regimes are not affected by States’ succession and they therefore bind successor States.¹⁹⁸

It has been argued that agreements relating to the use of international rivers could be included in the category of treaties automatically binding successor States as they are considered by some as related to the territory.¹⁹⁹ However, newly independent States have often declined to be bound by water agreements concluded by predecessor States (e.g. Tanzania).²⁰⁰ A distinction should be made between rights and obligations concerning international rivers that are of territorial character and those rights and obligations that concern the waters flowing in a river in their characteristics as a natural resource. Established navigation rights are the equivalent to rights of passage over a State’s territory taking advantage of the specific surface texture of water; they are inherently linked to territory of a State and therefore are not affected by succession. Automatic continuity of rights and obligations that relate to water use as a resource use, such as water supply to non-riparian population would constitute an *ex ante* restriction of sovereignty of the new State with respect to its right to dispose of natural resources on its territory.

With respect to multilateral treaties signed by a large number of Parties continuation of treaty obligations and succession does not require explicit or implied acceptance by other signatories, but can be effectuated by notification to the depository. Succession into bilateral or plurilateral²⁰¹ treaties generally requires acceptance by other contracting Parties.²⁰²

3.5 Legal implications in case of separation of the Southern Sudan

3.5.1 Succession/continuation of international treaties

In case of successful separation and emergence as a new sovereign State, South Sudan will have to decide on how to proceed on succession with respect to international treaties currently applicable in the territory; e.g. (a) apply universal continuity by unilateral declaration of succession, or (b) review each treaty and declare subsequently whether to be bound or not.

It has to be noted that whatever a newly independent State of South Sudan decides on this matter does not guarantee that this decision is automatically accepted by other contracting Parties to respective treaties; response to a unilateral declaration of universal continuity of international treaties can be varied. According to international customary law, rights and obligations relating to territory remain unaffected by succession. With respect to multilateral conventions, succession poses few problems. Accession to these treaties can be effectuated by South Sudan by notification to the depository. Accession is generally not contended by other contracting Parties, since in most cases the objective of multilateral conventions is to unite as many States as possible under its geographic scope of application (e.g. international human rights covenants, multilateral environmental agreements). With respect to bilateral and plurilateral²⁰³ treaties in force, where they do not include any provision regarding State succession, a unilateral declaration of succession by South Sudan would need to be accepted by other contracting Parties. For example, the occasion of the emergence of two new States after the dissolution of Czechoslovakia has been seized by other contracting Parties as an opportunity to renegotiate some of the former treaties; the US, Switzerland and Denmark

decided on a case by case basis whether succession into individual treaties was acceptable. Austria considered the *tabula rasa* principle as applicable.²⁰⁴ Membership in international organisations usually requires the deposit of candidature for membership and subsequent acceptance of the new candidate by the organization (or its existing members).

3.5.2 Status of the Cooperative Framework Agreement

The CFA is open to signature and ratification to South Sudan should it emerge as a new sovereign State. According to Article 40 the CFA, “open for signature by all States in whose territory part of the Nile River Basin is situated” (Article 40). The same formula is reiterated in Article 41 on Ratification and Accession to the treaty.²⁰⁵ These provisions indicate an intention of the negotiating Parties that any riparian State, including a new riparian State of South Sudan, can become a contracting Party of the treaty.

Concerning membership of South Sudan in the joint management organisation, and before entry into force of the CFA, membership in the Nile Basin Initiative (NBI) of a new State is conditioned on acceptance by current NBI member States. After entry into force of the CFA or in case South Sudan becomes the 6th country ratifying the CFA, membership to Nile River Basin Commission (NBRC) is determined by the entry into force of the treaty and its legally binding effect on the signatory parties. According to Article 30, the NBRC becomes the legal successor of the NBI at entry into force of the CFA. The potential situation where the NBRC is legally established with a smaller membership than the current NBI is not regulated by the CFA. The CFA leaves a legal void with respect to succession in NBI rights, obligations and assets of a smaller NBRC. Repartition of NBI rights, obligations and assets should ideally become subject to negotiations between new NBRC member States and former NBI but non-NBRC member states.

4 Key drivers in post referendum scenarios

4.1 *Land and Resource-related Conflicts*

Conflicts in the Horn of Africa are inter-related and engrained in regional and local natural resource management. Insecurity issues threaten peace-building in the Southern Sudan and spillover into neighboring states such as Kenya, Uganda, Ethiopia, and Eastern DRC. Communities in Southern Sudan face multiple types of violence stemming from local, national, or regional tensions.²⁰⁶ The causal factors for this include: a tense political setting, a highly militarized society in terms of access to weapons, a low threshold before disputes turn violent, tribalism, religious issues and lack of institutional capacity to provide security and to prevent, contain and solve conflicts.²⁰⁷ Access to water for pastoralists is also a primary determining factor of conflict. According to the ICG, by providing pastoralist communities with improved water storage and alternative sources, their need to migrate seasonally with cattle would be reduced substantially.²⁰⁸ Recently, violence involving armed units has decreased and inter- and intra-communal fighting has grown involving agro-pastoralists, nomads and farmers.²⁰⁹ Issues related to environmental degradation and climate change have also been suggested as determining factors of the war in Darfur.²¹⁰

There is confusion over the implications of Sudan People's Liberation Movement/Army's (SPLM/A) slogan 'land belongs to the people,' a principle believed to be in the CPA even though it is vague on how land is to be administered in Southern Sudan.²¹¹ The Southern Sudan Land Commission has been mandated to deal with land issues, but has faced enormous challenges fulfilling this mandate due to a lack of funding and staff. The passing of the Land Act, 2009 in February has been a positive development in this regard, but it is generally accepted that it needs further clarification and interpretation. Land and natural resource management issues are, however, only one set of factors of many inter-related processes fuelling local violence in the Southern Sudan. Peace with its potential for social and economic change and its typical expansion of state capacity increases the demand for land and may increase the potential for initiating and exacerbating disputes over land and natural resources in the Southern Sudan.²¹³ For instance, in the three contested areas of Southern Blue Nile and Southern Kordofan (Nuba Mountains and Abyei), land grabbing by merchants and other investors for the purpose of establishing mechanized farming schemes, combined with intensified disputes over rights to grazing and farming land is one such example of how a context of peace-building and economic development could increase or perpetuate conflicts of this nature.

4.2 *Food (in)security*

South Sudan requires irrigation to grow more food, as a huge percentage of its crops are rain-dependent. Food insecurity plays a direct role in exacerbating conflicts in Jonglei and elsewhere in Southern Sudan. Due to large-scale shortages in Jonglei, Upper Nile and Warrap states, the World Food Program recently resorted to air drops. According to the ICG, this is an expensive, unsustainable response that amounts to return to civil war emergency conditions.²¹⁴ Almost 4,000 metric tons, at a cost of nearly \$6 million, have been delivered to twelve drop zones in Pibor, Pochalla,

Akobo, Nyirol, Wuror, and Ayod counties. This sizeable food deficit could result in greater competition for scarce resources, and thereby increasing the potential for conflict.²¹⁵ Food insecurity has forced communities in Akobo and Pibor counties to move beyond their normal territories in search of food. This increased stress exposes individuals to further attacks. Scant rainfall and weak harvests mean the hunger gap – the period between depletion of food stores and a new harvest – is extended by several months. When this coincides with pastoralist migration in search of grazing land, the likelihood of tension increases as demand for grazing areas increases.²¹⁶ Further strengthening trade routes to EAC appears to be an ongoing strategy to increase food security including direct trade with countries like South Africa under particular free trade agreements as determined by the EAC or the EAC-COMESA-SADC tripartite task force.

4.3 *Southern Sudan: where oil meets water and hydropower assets*

4.3.1 *Oil assets*

Oil is vital for Sudan's economy. For South Sudan oil makes up 98 per cent of total revenues in 2010²¹⁷ and 65 per cent in Khartoum.²¹⁸ In 2008, according to the International Monetary Fund, oil represented 95 per cent of Southern Sudan's export revenues.²¹⁹ The rapid economic growth of Sudan the last decade is exclusively due to oil production and export.²²⁰ About 75 per cent of Sudan's known oil reserves of 6.3 billion barrels lie in the south.²²¹ The pipeline that pumps the crude oil to export stations and refineries run through the north, which leaves the south dependent on the North to sell the oil. It is stated in the CPA that oil related income should be distributed equally between North and South.

After the end of the first civil war, in the early seventies, opportunities to begin oil exploration in Southern Sudan became possible. In 1974 the American oil company Chevron was granted a concession in the south and in 1978 oil was discovered.²²² According to the peace agreement crafted in Addis Ababa (1972) peace agreement, the GoS got rights to control oil exploration and production, however GoSS were entitled to government profits on exports from the region and taxes from private businesses. In the early eighties Sudanese president Muhammad Ja'far Numeiri began to redistribute, re-draw and manipulate borders and territories in the South in an ongoing effort to side-step outcomes of the peace agreement. An outcome of this was the Unity Province (referred to by GOSS as Western Province) established as a shared asset between north and south. This and other²²³ actions spurred animosity between South and North Sudan, catalyzing the formation of the SPLA and the launch of the South's armed struggle against the North. Oil fields under foreign operation were targeted in fighting prompting the suspension of activities by Chevron and other international companies. Consequently Khartoum focused its effort on securing oil producing areas to avoid similar situations thus making oil resources central to the conflict as control over these areas provided levers in subsequent negotiations.²²⁴

Since 1997, U.S. companies and citizens have been barred from conducting business in Sudan, and Sudanese government assets

in the U.S. have been frozen.²²⁵ In absence of US investments other countries from Asia, the Middle East and Europe have filled the vacuum, especially China. New investments have enabled the development of Sudan's oil industry and related industries. China is presently the largest investor in the country and more than 60 per cent of oil exports are destined for China.²²⁶

The perceived weaknesses in the implementation of the CPA constitute fuel for conflict related to the ownership of oil assets. Currently this process is concentrated to the oil rich Abyei region. Implementation of borders was specifically expressed to be decided immediately as a consequence of the signing of the CPA but the process was effectively blocked by the NCP.²²⁷ As have the establishment of an agreed Abyei Region Referendum Commission (an act signed by President Omar Al Bashir in December 2009). The armed conflict in the region served as model for the hostilities in Darfur by use of tribal militias.²²⁸ Without Abyei's oil, the south's ability to economically sustain independence would be much more difficult. Khartoum is actively seeking to keep control of southern oil reserves without which the north would face severe economic problems.²²⁹

4.3.2 Hydropower and regional power markets

Power supply in southern Sudan is poor as consequence of neglect from the central government. Most businesses have to generate their own power supply. Stand-by diesel generators are the most common solution. Diesel is often transported at a high price from Khartoum by truck to provide for a growing demand.

More than 80 per cent of Sudan's economically feasible hydropower potential has not been exploited to date (2007).²³⁰ Southern Sudan has potential for hydropower installations ranging from large to small scale structures. The greatest hydropower potential along the Nile River in Southern Sudan lies between Nimule and Juba. The hydropower potential in Southern Sudan has been studied several times. Assessments have shown that there are several sites that are feasible for hydro electric installations. A comparably comprehensive feasibility study of South Sudan was carried out during the 1980s (Bonifica S.p.A 1983) with aim to assess the hydro power potential in the area. The study further explored the potential to cater to urban centers as well as future agricultural and

industrial demands. The study assessed the Bahr el- Jebel Hydro Electric Power (HEP) system including the sites of Fula, Bedden Rapids, Lakki, and Shukoli to be developed in a two phased strategy. The HEP potential estimated in the system was determined to be 1,045 MW with a production capacity of 7,230 GWh annually. The first phase would involve Lakki dam as main electricity supplier of Juba and connected towns. The estimated cost to develop a southern integrated energy system according to this approach was estimated to approximately 2 billion USD, including a 1,400 km long transmission line to Khartoum.²³¹ Besides power generation the dam systems would also yield benefits related to flood control mitigating flood risk in the Sudd marsh lands with minimum loss to power generating capabilities.

Assuming the possibility of regulations along the Albert Nile and storage in connections to Ugandan lakes the second phase could be developed. The additional flow along the Juba/Nimule stretch the mentioned measures would provide would allow an increase in capacity to approximately 1,525 MW at an additional cost of 130 million USD.²³²

The study concluded that the Juba/Nimule stretch potentially has a surplus of hydropower and supply widely exceeds southern Sudan demand for the foreseeable future. As such there are concrete possibilities of the region becoming a local/regional exporter of electricity by interconnecting to other power grids/pools. The major power transmission routs would then go in a north south direction from Juba to the North and eventually connecting to the East African Power Pool (EAPP) and Uganda. At the end of phase two an estimated 1 400 MW could be transmitted. The estimated cost of integrating southern Sudan to the greater regional power market was estimated in the study to 600 million USD.²³³

4.3.3 The Jonglei diversion canal

The Sudd, one of the largest wetland areas in the world, has a very high evapotranspiration rate. More than 50 per cent of the inflow is evaporated out of the Sudd swamps, resulting in less water availability in downstream areas. This loss of water has since long been regarded a problem for both Sudan and Egypt. Consequently Egypt, later joint with Sudan, developed ideas on increasing the flows to down-stream areas. Plans for a diversion canal were developed during the decades after WWII and construction started in 1978

Table 1

Large/medium scale HEP installations	Capacity MW
Fula	approx. 720 MW
Bedden Rapids (Juba)	approx. 400 MW
Lakki	210 MW
Shukoli	210 MW
Mini-hydros	
Kinyetti I – IV	total of 3.5 MW (combined)
Yei I	3 MW
Sue	12 MW
Others along Kijo and Kaia, Yei and Sue rivers and small tributaries	Not available

Source: Bonifica S.p.A 1983 and ACRES report 0411

but came to a halt as civil war ravaged Sudan the following decades. By then 240 km of the planned 360 km had been completed. In 2008 Sudan and Egypt agreed to take up construction again to finish the canal.²³⁴

While producing potential benefits to primarily Egypt and Northern Sudan the project has been opposed by Southern Sudan as negative impacts from the project is estimated to affect areas locally in Southern Sudan.²³⁵ Local communities living around the canal risk being affected by the great barrier the canal constitutes and it will potentially affect seasonal cattle migrations and raise new land ownership issues among southern tribes.²³⁶ GoSS officials have been stating their reservations towards the project, calling for a revision of the project plans and greater dialogue between concerned parties.²³⁷ The Jonglei canal is mentioned as a contributing factor that ignited the last civil war. The GoSS position clearly means that it is uncertain whether the project will actually go ahead.²³⁸

4.4 Tribal issues

Southern Sudan has 10 major tribal groups the largest being the Dinka (40 per cent) and the Nuer (20 per cent).²³⁹ Tribal conflicts are not new among Nilotic²⁴⁰ groups and other pastoral and nomadic communities inhabiting the Nile region. Tribal conflicts in Southern Sudan are caused by competition for scarce resources (grazing land, drinking water), cattle (used as currency)²⁴¹ and ethnic animosity. The civil war between the North- and Southern Sudan intensified tribal violence. The war increased the circulation of small arms in the region. The weak implementation of the CPA in the South and the continued perceived inability of the GoSS²⁴² to provide services to different population groups have kept conflicts going. Several sources²⁴³ suggest increased and intensified tribal confrontations in several southern areas, particularly Jonglei, Lakes, Unity, Mvolo, Mundri and East counties in Western Equatorial and Warrap States. In 2009 approximately 100 separate tribal conflicts were reported resulting in 400 000 new displaced people.²⁴⁴

The largest of South Sudan's 10 states, Jonglei, is a hot spot for tribal violence. Jonglei with 1.3 million inhabitants is severely underdeveloped. It houses numerous ethnic groups that migrate in pursuit of cattle, diminishing water resources and grazing areas. In the past, conflicts were mainly seasonal, inter-tribal/clan-based, and often triggered by competition over resources.²⁴⁵ During 2009 however, a pattern of changes could be detected. Conflict was more prolonged than earlier years and did not follow typical seasonal cycles.²⁴⁶ The aggravated spiral of violence in Jonglei and other regions in the latest years has several potential reasons. Virtually non-existent infrastructure, pervasive tribalism, chronic food insecurity, un-resolved land disputes, under-developed justice systems as well as perceptions of state bias are some of the more common reasons given for conflict.²⁴⁷

Fears of the North intervening in the tribal conflicts are not considered critical by the UNMIS (United Nations Missions in Sudan), who consider local factors to be the key drivers behind conflicts.²⁴⁸ Local and tribal identities outweigh national unity in Southern Sudan and the shared vision of an independent Southern Sudanese state. Tribal identity and loyalty plays a dominant role in all aspects of political life in the region.²⁴⁹

Tribal conflicts are also of a crossborder character as exemplified by the Ilemi- triangle. The Ilemi is about 14,000 km² and claimed by Sudan, Ethiopia and Kenya. The Triangle is home to five major ethnic groups; the nomadic Turkana in Kenya, the Didinga and Toposa in Sudan, the Nyangatom, who move between Sudan and Ethiopia, and the Dassenach in Ethiopia.²⁵⁰ The potential presence of oil in the region has exacerbated tensions.²⁵¹ The Ilemi triangle holds potential for increased instability between countries on the horn of Africa and peace in Southern Sudan is a pre-requisite for peace in the triangle itself".²⁵²

5 Hydropolitics and Post Referendum Scenarios

5.1 Outlook

Several scenarios have been developed by think tanks that look into the overall political economy of referendum and the oil issue.²⁵³ Our ambition is not to repeat these but instead look at the issue from the point of view of hydropolitics taking into account the overall socio-economic context. The transboundary water issues may not be of an immediate concern in the post referendum negotiations but the link to electricity supply, food, trade and security are critical. A separation of Southern Sudan from the North in 2011 is very likely to involve violence.²⁵⁴ The knock-on effects of renewed large-scale conflicts could be considerable for the rest of the Horn of Africa and Kenya, Uganda and Eastern DRC in particular.²⁵⁵

Increased regional tensions would translate into more acute political divisions on the continent and make the African Union's governance work more difficult. However, neighbouring countries are also articulating their support in the media. Kenya's Prime Minister Raila Odinga, for example, has called on East African countries to support South Sudan for investment and stability. Kenya, East Africa's biggest economy, is already showing evidence of increased trade and investment in Southern Sudan. Kenya Commercial Bank has ten branch offices in Southern Sudan, while Equity Bank Ltd., Kenya's top lender by customers, has four. Similarly, East Africa Breweries Ltd., Diageo Plc's Kenyan unit, plans to construct a 700,000-hectoliter (18.5-million gallon) plant in Juba.

Kenya, Uganda, Ethiopia, and Egypt are therefore the most influential regional states, along with Eritrea and Libya. If the referendum is held successfully, in accordance with the CPA and the Interim National Constitution, and Khartoum endorses the process, recognition of a new Southern state should prove relatively uncomplicated for the region and CPA signatories.²⁵⁷ However, if the process falters, particularly if the GoS attempts to manipulate, deny or delay the process or its result, regional states and institutions will need to consider how best to respond to, and how to salvage the CPA and the right of self-determination and to avoid a renewed conflict.

Representatives of Southern Sudan have also expressed the intention to join the EAC once the January referendum has been concluded.²⁵⁸ Southern Sudan has observer status in both the EAC and COMESA. Increasing economic and political stability of upstream countries²⁵⁹ enable them to develop their water resources to meet national development needs.²⁶⁰ They now have financial support, (from both their own resources, and external donors such as the World Bank and China), that was not available a decade ago.²⁶¹ However, several elections in the NELSB countries could affect regional integration efforts and institutional development. The issue of Nile water has been used in electoral campaigns in the Nile Equatorial Lakes region, in order to win voters with promises of water rights.²⁶²

Cross-border trade and the benefits that can be derived between EAC and Southern Sudan are particularly noteworthy. East African businessmen and potential investors are making preparations for increased trade by sending food, consumer goods and construction materials into the region every day.²⁶³ In the 2009 Ugandan Bureau of Statistics Report, it was reported that Uganda informal

cross-border sales alone into Southern Sudan reached more than USD 900 million in 2008, which is double the 2007 figure and almost double the value of Uganda's exports to the European Union.²⁶⁴ The five-year period of peace in Sudan and the relatively political stability in northern Uganda have been good for Ugandan traders. The cross-border trade is facilitated by the ongoing re-construction and development of the road connecting Juba to Uganda and the rest of East Africa. Should Southern Sudan become independent, an increase in trade between Southern Sudan and Uganda is likely due to the proximity to the greater EAC market. The driving distance from Juba to Kampala, Uganda, is 785 km while Khartoum, Sudan's capital, is almost the double distance.²⁶⁵

Apart from the road connecting Juba to Uganda, several major proposed regional projects connecting East Africa are noteworthy. These include a new sea port in Lamu, on Kenya's Indian Ocean coast; a railway network updating existing lines and connecting Juba to Kenya, Uganda, and Ethiopia (although the feasibility of this still needs to be ascertained due to the incompatibility of national rail systems and the cost to change this); as well as an extension of the Trans-African Highway Network linking South Sudan to Kenya's Mombasa port.²⁶⁶ A proposal is also being discussed to construct a 1,400-km pipeline from Juba to the Lamu port, which could yield significant dividends and open up greater Kenyan territory to economic development.²⁶⁷ The pipeline is estimated to cost \$1.5 billion. A new pipeline would also offer an alternative to the existing export route, which runs roughly 1,600 km to Sudan's Red Sea port (Port Sudan, in the North), and thus reducing Southern Sudan's dependence on Khartoum.²⁶⁸

Socially and culturally, Southern Sudan has closer cultural ties to the EAC group of countries than to the mostly Muslim Northern Sudan, even though tribal rivalry remains a key issue. The likely catalyst in the East African region is therefore trade and infrastructural development of roads, trains and energy development and interconnectors.

5.2 Four scenarios for Southern Sudan

It is our assessment that the referendum will take place on 9 January 2011 with the possibility of delays. The political and media campaigns have started, the civic education activities are taking place in several parts of Southern Sudan, and the registration process of voters was initiated on 15 November. A calendar with set milestones from November to January has been defined by the GoSS. Preventive actions by the development partners to the NBI to mitigate the impacts of a potential post referendum crisis to strengthen positive outcomes of an independence referendum will be critical under all scenarios.

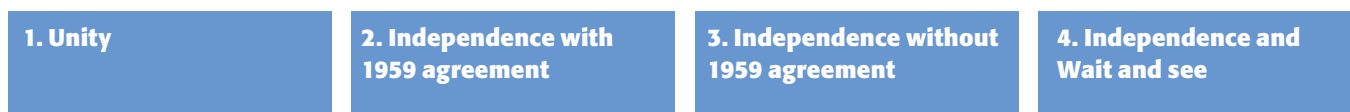
Security concerns are critical for all key states. Kenya has a strong interest in seeing the CPA implemented successfully, particularly considering the key role it played in leading the regional Intergovernmental Authority on Development (IGAD) peace process that resulted in the CPA.²⁶⁹ Kenya has a large economic stake in Southern Sudan's independence and plans to benefit from the development of a considerable market and major infrastructure development in the South in particular as a conduit for oil.²⁷⁰ Kenya has long managed to support the South without being antagonistic to the North.

Uganda has been the most vocal and open neighbouring country, about its support for Southern Sudan's independence. This is because of Uganda's need for a stable buffer on its northern border, to keep the Lord's Resistance Army (LRA) insurgency at bay and to prevent any encroachment southwards.²⁷¹ As previously noted, trade has tripled in recent years with the South, which is now the largest importer of Ugandan goods.²⁷² Although Uganda's official policy is to respect the CPA and the will of the Southern people, some officials in Kampala are privately encouraging independence.²⁷³

Egypt's position is clear in support of unity, for concern that secession could lead to instability in both North and South Sudan, opening the door for extremist elements that could destabilise the region, just as Khartoum hosted Osama bin-Laden, al-Qaeda and other extremist groups in the mid- and late-1990s.²⁷⁴ Given this stance, Egypt opposed the inclusion of self-determination in the CPA talks, rather opting to promote its own initiative premised on unity. It has redoubled diplomatic efforts to prevent partition, in part because it fears a new state – and an unstable one at that – could pose a threat both to regional stability and its supply of Nile water.²⁷⁵

Ethiopia has expressed its support of Southern Sudan, but due to the need to balance multiple interests, it has remained neutral on the South's independence.²⁷⁶ For example, Ethiopia provided military support to the SPLM in the 1990s, to counter Islamist elements in Khartoum whose destabilising activities posed a threat to Ethiopian and regional security.²⁷⁷ Regional security still remains Ethiopia's primary concern, largely as a result of the volatile situation in Somalia, the continued confrontation with Eritrea and its own domestic fragility.²⁷⁸

Our four scenarios are illustrated below:



The 1959 Treaty between Egypt and Sudan is not the only contentious (water) treaty in case of secession; it has been singled out because we consider it to be one of the major roadblocks with respect to legal development and to development of the Nile water resources.

Scenario 1 – Unity

In case that the majority outcome of the referendum is Unity, then Sudan remains one country. In this scenario, Southern Sudan is expected to get a more extended autonomy. Southern Sudan is likely to strive for more extended responsibilities with respect to infrastructure, oil, energy and water assets. The interim constitutions of the North and the South might possibly undergo some change and be replaced with permanent constitutions (see Arts. 226.9 of the INC and 208.6 of the ICSS). Under this scenario North and South Sudan will likely negotiate an internal allocation of the water share attributed to Sudan under the 1959 agreement. The likelihood of this scenario is low as the current information available points towards a referendum outcome that will result in secession. One possibility is that unity is “forced” upon the South most likely to be accompanied by civil strife and major negative regional implications.²⁸⁰

Scenario 2 – Independence and succession to the 1959 Agreement

If Southern Sudan secedes from North Sudan, it will become the 11th riparian of the Nile Basin. It is located downstream of the Nile Equatorial Lakes region and has strong connections to the Eastern Nile. The transition period until a new State is recognized, functional and a constitution is adopted might take one or two years at best. If independence is accompanied by internal (armed) power struggles in South Sudan, this period will take longer.

Under this scenario, one of the issues to be tackled is what would be the position of Southern Sudan towards the 1959 Agreement? If Southern Sudan decides to succeed into rights and obligations of this agreement, this would be a clear signal of alignment with the downstream riparians. If the North Sudan and Egypt agree to this succession, water allocations under the agreement would need to be renegotiated. It is unlikely that Egypt would accept a reduction of its allocated share. North and South would have to negotiate within the current allocation to Sudan. The Fifth Article of the Agreement, which requires a unified position in negotiations concerning Nile waters with any other riparian State, would also apply to South Sudan. The requirement of a unified negotiation position would curtail South Sudan's freedom in engaging in project with its upstream neighbours.

This alignment with the downstream riparians is likely to undermine South Sudan's ambitions to join the EAC. Furthermore, the 1959 Agreement provides for the construction of water conservation schemes in Southern Sudan. This is an implicit reference to the Jonglei canal project, a project which is not very popular in the South. The likelihood of this scenario is therefore considered to be low.

Scenario 3 – Independence without succession to the 1959 Agreement

In a similar manner to Scenario 2, the length of the transition period to a functional independent State will depend on whether the period is marked by international peace or on the intensity of internal power struggles. With respect to succession to international treaties, Southern Sudan could follow the Nyerere Doctrine; reviewing earlier treaties regarding their binding force. With respect to treaties dating from before 1956, it could claim further that it was under colonial rule and that even after 1956 it continued its struggle for political autonomy and independence.

In not accepting the binding force of the 1959 agreement, a possible sovereign Southern Sudan would signal alignment with the upstream neighbours. It might further decide to sign and ratify the CFA, a step that will most likely antagonise Northern Sudan and Egypt in particular if Southern Sudan becomes the sixth country to ratify. The treaty States states in Article 42 that it shall enter into force “on the sixtieth day following the date of the deposit of the sixth instrument of ratification or accession with the African Union”. In order to change this requirement, the treaty text needs to be reopened for negotiation which is unlikely.

The treaty does not limit signature to the ten States listed. Article 40 states that it is “open to signature by all States in whose territory part of the Nile River Basin is situated”.

Scenario 4 – Independence and wait-and-see

Scenario 4 is the most likely scenario in the short-term. As the Nile issues are not amongst the most pressing priorities in the post-referendum negotiations between North and South, the Government of Southern Sudan will not be obliged to take a public position immediately. This also gives time to the South to see the benefits, limitations and risks of all the options available. Keeping silent and not compromising to any positions gives leeway to Southern Sudan, as a new midstream riparian, to opt for aligning downstream or upstream at a later stage, if at all. In the meantime, Southern Sudan will be able to observe how the CFA and the NBI processes evolve independently of its own actions.

6.2 Colonial background and treaty time line

Burundi²⁸¹

Burundi achieved independence on 1 July 1962. The country came under German East African Administration in 1899 until it was occupied by Belgian troops in 1916. The League of Nations mandated the territory of modern day Rwanda and Burundi (then Ruanda-Urundi) to Belgium, and was turned into a United Nations Trust Territory under Belgian administration after World War II.

DR Congo²⁸²

The area of the Democratic Republic of the Congo was under Belgian colonial administration since 1885 until its independence on 30 June 1960.

Egypt²⁸³

British occupation and virtual inclusion of Egypt within the British Empire lasted from 1882 until 1922, when the United Kingdom unilaterally declared Egyptian independence. British military and political influence continued until after World War II, also due to the interest of the British Empire in access and control over the Suez Canal.

Eritrea

Eritrea was colonized by Italy in 1885, and put under British military administration in World War II. "In 1952, a UN resolution federating Eritrea and Ethiopia went into effect.²⁸⁴ In 1962, the area was annexed by and integrated into Ethiopia.²⁸⁵ The country gained independence in 1993.

Ethiopia

Ethiopia was an independent monarchy, with the exception of a five year occupation by Italy (1936-1941) and until the emperor Haile Selassie was deposed by a military government (the Derg) in 1974. Opposition movements ended the Derg government in 1991.

Kenya²⁸⁶

Kenya became independent in 1963. The area formed part of Britain's East African Protectorate established in 1895, and officially became a British colony in 1920.

Rwanda²⁸⁷

Rwanda (as Burundi) achieved independence on 1 July 1962 after a UN General Assembly resolution had terminated Belgian trusteeship over the territory. Its previous colonial history is similar to Burundi's. The people submitted to German protectorate in 1899. The German's were overpowered by Belgian troops in 1915. (For remainder of colonial period see 'Burundi').

Sudan

Sudan achieved independence in 1956. Before then, the Anglo-Egyptian Sudan was effectively administered as a British colony (1899-1956). A number of sources cite that from 1924 to 1956 the British had governed the North and South of Sudan as two separate entities.²⁸⁸ The first North-South civil war (1955-1972) erupted in Sudan on the eve of independence; because the Khartoum-led government reneged on promises to establish a federal State structure and to provide regional autonomy to the South.²⁸⁹

Tanzania²⁹⁰

Tanzania achieved full independence on 9 December 1961. Anglo-German agreements from 1886 and 1890 delineated respective spheres of influence. Colonial control of Germany over Tanganyika ended after World War I. Most of the territory passed to British control under a League of Nations mandate. After World War II, the entire area of Tanganyika became a UN trust territory under British control.

Uganda²⁹¹

The country achieved formal independence on 9 October 1962. The area has started to come under British influence in 1888. An Anglo-German agreement of 1890 confirmed British dominance over Kenya and Uganda; the Kingdom of Buganda was integrated into the British protectorate in 1894.

6.2.1 Treaty timeline

Date	Parties to Treaty	Name of Treaty
1891	Great Britain, Italy	<p><i>Protocol between the Governments of Her Britannic Majesty and of his Majesty the King of Italy for the Demarcation of their Respective Spheres of Influence in Eastern Africa.</i>²⁹²</p> <p>The treaty defines the territorial boundaries of the Italian sphere of influence, and enjoins the Italian Government from initiating irrigation works on the Atbara which may alter the rate of flow on the Nile.</p>
1902	Great Britain, Ethiopia	<p><i>Treaty between Great Britain and Ethiopia on the Delimitation of the Frontier between Ethiopia and Sudan.</i>²⁹³</p> <p>The treaty defines the boundary line between Ethiopia and Anglo-Egyptian Sudan. By this treaty, Ethiopia accepts the obligation “not to construct and authorize construction of any structures on the Blue Nile, Lake Tana or Sobat which would have the effect of obstructing the flow of their waters into the Nile” except with prior agreement of the British and Sudanese Government</p>
1906	Great Britain, Congo	<p><i>Agreement between Great Britain and the Independent State of the Congo, amending the agreement signed at Brussels 12 May 1894.</i></p> <p>The treaty determines the boundary line between Belgian Congo and the Sudan. The Government of Congo is enjoined to “construct or allow the construction of structures on the Semliki or the Isango, or nearby, which would reduce the volume of water entering Lake Albert except with the consent of the Sudanese Government.”²⁹⁴</p>
1906	Great Britain, France, Italy	<p><i>Agreement between Great Britain, France and Italy Concerning Abyssinia.</i>²⁹⁵</p> <p>The three States agree to respect their individual interests and their common interest in maintaining the integrity of Ethiopia. They agree inter alia to safeguard “the interests of Great Britain and Egypt in the Nile Basin, and more specifically, with regard to the control of the waters of this river and its tributaries”.</p>

1925	Great Britain, Italy	<p><i>Exchange of Notes between the United Kingdom and Italy Concerning the Obtaining of Concessions for the Construction of a Dam over Lake Tana and a Railway Line Passing through Abyssinia from Eritrea to Italian Somaliland.</i>²⁹⁶</p> <p>By this Exchange of Notes the United Kingdom and Italy commit to use good offices in supporting each other's requests for concessions from the Ethiopian Government to build inter alia a dam over Lake Tana to harness water reserves (UK interest) and a railway from Eritrea to Italian Somalia (Italian interest). The UK, in the case that it obtains permission to build the dam with the help of Italian good offices, commits to acknowledge "an exclusive Italian economic influence in the western part of Abyssinia" and promises to support Italy in the process of seeking such a concession from the Ethiopian government, under the condition that Italy recognizes the former hydraulic rights of Egypt and the Sudan and does not engage to construct structures on Nile sources, tributaries and effluents that may significantly change rates of flow on the main river. This agreement by exchange of notes can be seen as a case of application of the tripartite agreement of 1906.</p>
1929	Great Britain Egypt	<p><i>Exchange of Notes between Great Britain and Egypt in regard to the Use of the Waters of the River Nile for Irrigation.</i>²⁹⁷</p> <p>Purposes At the time of conclusion of this agreement, the territories of Sudan, Kenya, Tanzania and Uganda were under colonial control of Great Britain. The agreement is "essentially directed towards the regulation of irrigation arrangements on the basin of the [1925] Nile Commission Report" ²⁹⁸ which forms integral part of the agreement. The 1925 Nile Commission report outlines seasonal water drawing rights for irrigation in Sudan. In its conclusions the Commissions states that it "foresees that it will be necessary from time to time review the questions discussed in" its report, and that it "has endeavoured to find a practical and workable basis for irrigation and to foresee, and, as far as possible, to provide for any difficulty that may arise in the future." In addition to the findings of the Commission Report, the 1929 agreement grants representatives of the Egyptian Irrigation Service in Sudan the liberty to cooperate with the Resident Engineer at Sennar Dam to monitor discharges. Furthermore the parties agree that with the exception of prior consent of the Egyptian Government "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, as 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." Finally, as already expressed in a note from 26 January 1925 (included in the 1925 Nile Commission Report), the British government reconfirms in its response establishing the agreement of 1929 that it "acknowledges the natural and historic rights of Egypt in the waters of the Nile".</p>

1929	Great Britain Egypt	<p>Upon independence, the Sudan stated that it rejected the continued binding force of the 1929 agreement,²⁹⁹ and so did Tanzania within the two year period it gave itself in order to review the binding force of colonial treaties by a Note of 4 July 1962.³⁰⁰ The reference to the 1929 Agreement in the preamble of the 1959 Agreement between Sudan and Egypt on the full utilization of the Nile Waters has been interpreted by some as evidence that Sudan has in fact not renounced to the continued binding force of the 1929.³⁰¹ To the declaration of Tanzania, Egypt responded that pending conclusion of new arrangements it considered the 1929 Nile Waters Agreement as valid.³⁰² Kenya and Uganda, did not specifically contest the devolution of the 1929 Agreement; yet, they both adopted declarations upon independence that those colonial treaties “which cannot be regarded as surviving according to the rules of customary international law as having terminated” after a period of two years since independence.³⁰³ The continued binding force of the 1929 Agreement remains until today a subject of discussion and disagreement in legal doctrine as well as among governments.³⁰⁴</p>
1934	Belgium, Great Britain	<p><i>Agreement between the United Kingdom and Belgium regarding Water Rights on the Boundary between Tanganyika and Ruanda-Urundi.</i>³⁰⁵</p> <p>The agreement defines water rights and use of rivers and streams which form part of the boundary between the two territories or which flow from one to the other territory. The agreement regulates water diversion and water use for mining operations, stipulating that where diversion occurs, water shall be returned to the natural bed after use without substantial reduction in volume. Water pollution by poisonous or noxious substances is to be avoided. Traditional fishing, navigation and water use rights by riparian population of both countries are maintained on contiguous stretches of the rivers. This agreement lapsed after independence of the territories concerned.³⁰⁶</p>
1949/1953	Egypt Great Britain	<p><i>Exchange of Notes between the United Kingdom and the Egyptian Government on the Construction of Owen Falls Dam.</i>³⁰⁷</p> <p>The notes from 1949 indicate that the agreement is concluded in the spirit of the Agreement from 1929. The objective of the Owen Falls Dam is to provide hydroelectricity to Uganda and to serve Egyptian irrigation interests by creating a reservoir at Lake Victoria. Both governments cooperate in the design and implementation. Tenders are issued by the Ugandan Electricity Corporation; contracts are awarded after both Governments have communicated their consent. Egypt's interests are represented by an Egyptian engineer present at the worksite during construction, and an Egyptian resident engineer who controls flow of water once the dam is constructed together with the Ugandan Electricity Corporation. The Corporation ensures that the operation of the dam is “not prejudicial to the interests of Egypt in accordance with the 1929 Agreement. A subsequent exchange of notes from 1952/53 concerns cost sharing arrangements and compensation with respect to the construction and operation of the Owens Falls Dam.</p>

1959	Egypt Sudan	<p><i>Agreement between the Republic of the Sudan and the United Arab Republic on the Full Utilization of the Waters of the Nile.</i>³⁰⁸</p> <p>The agreement was prompted in part by Egyptian construction of the Sudd el Aali Reservoir at Aswan and by the mutually perceived need of new hydraulic projects in order to make full use of the Nile Waters. The two States agree that acquired rights up to the date of conclusion of this agreement consist in 48 bcm per year for Egypt and 4 bcm per year for Sudan (First Article). The two parties agree that Egypt constructs the Sudd-el-Aali and Sudan shall construct "the Roseires Dam on the Blue Nile and any other works which the Republic of Sudan considers essential for the utilization of its share, and including projects for the increase of the River yield (Para 1 and 2 Second Article; Third Article). The annual average natural River yield (AANRY) of water at Aswan is estimated at 84 bcm (Para 3 Second Article). The two States agree to share the net benefit from the Sudd el Aali reservoir (Net benefit = AANRY – acquired rights – average loss of over-year storage) at the ration of 14 ½ for the Sudan and 7 ½ as long as the average river yield remains in the limits of 84bcm. Paragraph 4 Second Article provides a calculation of what this means in case the average yield remains at 84bcm and if average storage losses remain equal to 10bcm; this means that 18.5 bcm shall be for Sudan, and 55.5 bcm for Egypt. If the average yield increases, the increase is divided between the two in equal shares. In case of low years, when low levels in the Sudd el Aali reservoir do not permit drawing of full requirements, the Permanent Joint Technical Commission (PJTC) devises a faire arrangement to be followed by both parties upon their approval (Para 1 (e) Fourth Article). The agreement between Egypt and Sudan further provides that the two parties agree on a unified view ahead of any negotiations with any other Nile riparian States and concerning Nile waters (Para 1 Fifth Article). If such negotiations result in an agreement to construct works on the river outside of Egyptian and Sudanese territory, the PJTC shall draw all technical details and supervise implementation of technical arrangements (Para 1 Fifth Article). Egypt and Sudan also commit to adopt a unified view in case other riparian States claim a share in the Nile waters; and if this results in the allocation of water to another Nile riparian State, the allocated amount is deducted in equal parts from the shares Egypt and Sudan have established by this agreement.</p> <p>According to media outlets and reports, these provisions as well as questions concerning the binding force of the 1929 Agreement and whether 'acquired rights' of Egypt and Sudan should be accepted by other riparian States have been the subject of disagreements among the Nile Basin States with respect to Nile cooperation.³⁰⁹</p>
1977	Burundi Rwanda Tanzania Uganda*	<p><i>Agreement for the Establishment of the Organization for the Management and Development of the Kagera River Basin.</i></p> <p>(Organization has been formally dissolved on 7 July 2004)</p>
(1991)**	Ethiopia/ Sudan Egypt/ Uganda	<p><i>Agreement on peace and friendship between Ethiopia and Sudan.</i></p> <p><i>Agreement between Egypt and Uganda.</i></p> <p>Several sources cite two additional accords concluded in 1991,³¹⁰</p> <p>1) Agreement on peace and friendship concluded between Ethiopia and Sudan. The legal nature of the text is not certain; it has sometimes been qualified as a declaration. Provisions regarding to the Nile concern the need for establishment of a joint technical commission, recognition of "equitable entitlements to the uses of the Nile waters without causing appreciable harm to one another".³¹¹</p> <p>2) An Agreement between Egypt and Uganda in which the latter supposedly commits itself to honour colonial agreements.³¹²</p>
1993	Egypt Ethiopia	<p><i>Framework for General Cooperation between Egypt and Ethiopia.</i>³¹³</p> <p>By this agreement the two parties agree that matters relating to the Nile should be discussed in detail by experts and according to principles of international law. They agree to refrain from activities related to Nile water which "may cause appreciable harm to the interests of the other party". They further agree on conservation and protection of Nile waters, cooperation in mutually advantageous projects on the Nile, and on endeavouring "towards a framework for effective cooperation among countries of the Nile basin for the promotion of common interest in the development of the Basin."</p>
2003	Kenya Uganda Tanzania	<p>Protocol for Sustainable Development of Lake Victoria Basin.</p> <p>Agreement between Tanzania, Kenya, Uganda, Rwanda and Burundi, concluded under the auspices of the East African Community, in which the parties agree to cooperate on sustainable development and management of the basin based on the concept of IWRM. The agreement establishes the Lake Victoria Basin Commission.</p>
(2010)***		<p>Agreement on the Nile River Basin Cooperative Framework.³¹⁴</p> <p>See analysis in report.</p>

* Joined the Organization in 1981.

** Treaties referred to in secondary literature, treaty texts not available.

*** Treaty opened for signature on 14 May 2010 until 13 May 2011³¹⁵, not in force.

6.3 South Sudan Facts³²⁷ – September 2010

General

- Land mass: ca 640,000 km²
- Population: 7.5- 9.7 million (estimated to grow with 3 million coming six years by natural growth and return of refugees and internally displaced)
- Religion: Christianity 20 per cent, Islam 10 per cent other 70 per cent
- Life expectancy: 42 years

Income/Food Security

- 50.6 per cent of the population live on roughly 1 USD a day
- 4.3 million vulnerable people require food assistance in 2010
- 1.5 million face severe food insecurity in 2010

Maternal Mortality/Child Mortality

- One out of seven women who become pregnant will probably die from pregnancy-related causes³¹⁶
- 0.6 per cent of mothers do not receive antenatal care at all³¹⁷
- Only 10.2 per cent of deliveries are attended by skilled birth attendants
- There are only 13.6 per cent institutional (hospital) deliveries³¹⁸
- Contraceptive prevalence is only 3.5 per cent
- There are only an estimated 100 certified midwives³¹⁹
- Although the infant mortality rate has decreased, it still stands at 102 per 1,000 live births
- While the under-five mortality rate has decreased, one out of every 7 children will die before their fifth birthday (135 per 1,000 live births)

Water and Sanitation

- More than 50 per cent of the population do not have access to improved drinking water
- Only 6.4 per cent of the population have access to improved sanitation facilities

Primary Education

- Less than 50 per cent of all children receive 5 years of primary school education
- While 1.3 million children are enrolled, only 1.9 per cent complete primary school education
- For every 1,000 primary school students there is only one teacher³²⁰
- 85 per cent of adults do not know how to read or write³²¹

Gender

- 92 per cent of women cannot read or write³²²
- Only 27 per cent of girls are attending primary school³²³
- A 15 year-old girl has a higher chance of dying in childbirth than completing school

Displacement

- Since the beginning of 2010, an estimated 190,000 people have been displaced by inter-ethnic and armed conflicts in Southern Sudan. In 2009, the figure was 391,000 – more than double the number for 2008 which stood at 187,000³²⁴

Immunisation/Malaria

- Southern Sudan has one of the lowest routine immunisation coverage rates in the world
- Only about 10 per cent of children are fully vaccinated³²⁵
- Only 28 per cent of children receive measles vaccination before their first birthday
- Malaria is considered hyper-endemic in Southern Sudan, accounting for more than 40 per cent of all health facility visits and 80 per cent of household do not have treated bed nets³²⁶

7 Key Notes

- ¹ References for the key messages and recommendations section are found in the main body of the report. References noted in this section that are not found in the main body of the text are noted.
- ² www.un.org/News/Press/docs/2010/sc10086.doc.htm, Security Council SC/10086
- ³ www.africa-union.org/root/ar/index/AUHIP%20Press%20Statement%2011-%2012-%202010.pdf, accessed 21 December, 2010
- ⁴ Strategic/Sectoral Social and Environmental Assessment of Power Development Options in the Nile Equatorial Lakes Region
- ⁵ Water Emergency Relief (WER) (2010) “Burundi Election Update” 21 September 2010. Accessed 25 October 2010. www.wer-uk.org/latest-news/burundi-election-threatens-stability.
- ⁶ Ibid.
- ⁷ www.eac.int/about-eac/quick-facts.html
- ⁸ Tadesse, 2008, pp 3.
- ⁹ Waterbury, 2002.
- ¹⁰ www.news24.com/Africa/News/DRC-election-date-set-20100810
- ¹¹ Waterbury, 2002, pp 5.
- ¹² Tadesse, 2008, pp 4.
- ¹³ Waterbury, 2002, pp 5.
- ¹⁴ Tadesse, 2008, pp 4.
- ¹⁵ Waterbury, 2002, pp 5.
- ¹⁶ Tadesse, 2008, pp 4.
- ¹⁷ “Ethiopia Legislative Elections 2005 Final Report” (European Union Election Observer Mission, Brussels, 2005), www.hrw.org/en/news/2005/06/14/ethiopia-crackdown-spreads-beyond-capital
- ¹⁸ www.guardian.co.uk/world/2010/may/26/ethiopia-election-result-meles-zenawi, www.google.com/hostednews/afp/article/ALeqM5ijupIuUVax2TRM0ZE8f1PxMsoUuA
- ¹⁹ www.voanews.com/english/news/special-reports/world-and-regional/Ethiopia-Votes-93787279.html
- ²⁰ <http://af.reuters.com/article/topNews/idAFJJOE66JORW20100720>
- ²¹ www.businessweek.com/news/2010-05-21/ethiopia-s-meles-heads-for-vote-win-as-west-gives-aid-update1-.html, www.reuters.com/article/idUSTRE64L2F220100523?pageNumber=1
- ²² http://online.wsj.com/article/SB10001424052748704513104575256283824022358.html?mod=WSJ_WSJ_US_World
- ²³ http://nazret.com/blog/index.php/2010/10/05/ethiopia_pm_meles_assigns_cabinet_member
- ²⁴ Gilkes, Patrick and Plaut, Martin. The War Between Ethiopia and Eritrea, Foreign Policy in Focus Volume 5, Number 25 August 2000, www.globalsecurity.org/military/world/war/eritrea.htm
- ²⁵ www1.american.edu/ted/ice/bluenile.htm, http://siteresources.worldbank.org/EXTWAT/Resources/4602122-1213366294492/5106220-1234469721549/33.1_River_Basin_Management.pdf
- ²⁶ Royal Norwegian Embassy in Addis Ababa 2010
- ²⁷ www.nytimes.com/2010/05/12/world/middleeast/12egypt.html
- ²⁸ <http://egyptelections.carnegieendowment.org/2010/09/09/emergency-law>
- ²⁹ www.carnegieendowment.org/publications/index.cfm?fa=view&id=19069
www.newstatesman.com/blogs/the-staggers/2010/10/egypt-media-eissa-government
- ³⁰ www.ikhwanweb.com/uploads/lib/3Z77D9TTFPH5FGH.pdf
- ³¹ www.cfr.org/publication/9319/muslim_brotherhood_and_egypts_parliamentary_elections.html
- ³² www.irinnews.org/Report.aspx?ReportID=25762
- ³³ www.voanews.com/english/news/Egypt-Opinion-Muslim-Brotherhood-to-Run-in-Parliamentary-Election-104634599.html
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- ³⁵ www.reuters.com/article/idUSTRE66J6UD20100720
- ³⁶ <http://egyptelections.carnegieendowment.org/2010/09/09/profile-of-gamal-mubarak>
<http://news.bbc.co.uk/2/hi/africa/8364369.stm>, www.alarabiya.net/articles/2010/11/12/125879.html
- ³⁷ Waterbury, 2002, pp 4.
- ³⁸ Swain, A (2008) “Mission not yet accomplished: Managing water resources in the Nile River Basin”, *Journal of International Affairs*, spring/summer, vol. 6(2): 204.
- ³⁹ Waterbury, 2002, pp 4.
- ⁴⁰ www.nilebasin.org
- ⁴¹ “The African Union, the International Criminal Court, and al-Bashir visit to Kenya”, 15 September 2010, available www.reliefweb.int/rw/rwb.nsf/db900SID/ASAZ-89BDR2?OpenDocument
- ⁴² 2010 Constitution of Kenya, Article 42.
- ⁴³ Waterbury, 2002, pp 4.
- ⁴⁴ Amnesty International (2010) Pre-election attacks on Rwandan politicians and journalists condemned, 5 August 2010. Accessed 27 October 2010. <http://www.amnesty.org/en/news-and-updates/pre-election-attacks-rwandan-politicians-and-journalists-condemned-2010-08-05>

- ⁴⁵ www.eac.int/about-eac/quick-facts.html
- ⁴⁶ www.nation.co.ke/oped/Opinion/Rwanda%20attitude%20towards%20EAC%20should%20%20be%20emulated/440808/938828/-/4twpx3z/-/index.html
- ⁴⁷ Tadesse, 2008, pp 4.
- ⁴⁸ Waterbury, 2002, pp 5.
- ⁴⁹ Tadesse, 2008, pp 4.
- ⁵⁰ <http://news.bbc.co.uk/2/hi/8613572.stm>
- ⁵¹ <http://english.aljazeera.net/news/africa/2010/04/201042612282143933.html>
- ⁵² <http://english.aljazeera.net/focus/sudanelection/2010/04/201041192516623313.html>
- ⁵⁴ www.middle-east-online.com/english/?id=38645
- ⁵⁵ www.reuters.com/article/idUSTRE6300VN20100401
- ⁵⁶ <http://english.aljazeera.net/focus/sudanelection/>
- ⁵⁷ <http://english.aljazeera.net/news/africa/2010/04/201042612282143933.html>
- ⁵⁸ www.goss.org.za/business_opportunities.html
- ⁵⁹ Ibid.
- ⁶⁰ Waterbury, 2002, pp 4.
- ⁶¹ Ibid.
- ⁶² www.sudantribune.com/North-south-Sudan-reach.html
- ⁶⁵ ICG, 2010, pp 11.
- ⁶⁶ Ibid.
- ⁶⁸ Ibid.
- ⁷⁰ Dagne, T. (2010) Tanzania: Background and Current Conditions. CRS Report for Congress. Congressional Research Service, Washington D.C.
- ⁷¹ Mutayoba, W. (2008) "Tanzania: Water Resources Management Structure". Symposium on Science and Policy Linkages. Entebbe, Uganda. 24-26 September 2008. United Nations University.
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- ⁷⁷ Ibid.
- ⁷⁸ Ibid.
- ⁷⁹ Burnside Appendix B.1 History of Riparian Agreements Respecting the River Nile (Source: Appendix B.1 - AESNP Hydropower Facility EIA, March 2001)
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- ⁸² Jacobs, I. (2010) *Norms and Transboundary Cooperation: the cases of the Orange-Senqu and Nile Rivers*. (PhD Thesis) St. Andrews University, Scotland.
- ⁸³ Decision on the Protocol on Relations between the African Union and the Regional Economic Communities (RECs), Assembly AU/Dec.166 (IX).
- ⁸⁴ Tralac (2008) "The Interim SADC EPA Agreement: Legal and Technical Issues and Challenges".
- ⁸⁵ The EastAfrican (2010) "Trade disputes between Comesa countries and overlapping membership spell double trouble" By Jaindi Kisero, Posted Monday, October 18 2010 at 19:20. <http://www.theeastafrican.co.ke/business/-/2560/1034244/-/cemse8z/-/>. Accessed 26 October 2010.
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- ⁸⁸ Mwapachu, J.V. (2010) COMESA-EAC-SADC Tripartite Framework: State of Play, Report by the Chair of the Tripartite Task Force July, 2010. Accessed 26 October 2010 <http://www.eac.int/tripartite-summit.html>.
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- ⁹⁴ Ibid.
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- ⁹⁸ For example an agreement from 18 October 1952 regarding water infrastructure in Sudan, cited in Godana (1985), p. 145/166.
- ⁹⁹ Available on the website of the International Water Law Project at http://internationalwaterlaw.org/documents/regionaldocs/Nile_River_Basin_Cooperative_Framework_2010.pdf (last viewed 24 October 2010)
- ¹⁰⁰ Nile Basin Initiative, “Agreement on the Nile River Basin Cooperative Framework opened for signature”, available at www.nilebasin.org/index.php?option=com_content&task=view&id=165&Itemid=1 (last viewed 13 November 2010)
- ¹⁰¹ The UN Convention on the Law of the Non-navigational Uses of International Watercourses has been adopted with 106 votes in favor, 26 abstentions and 3 votes against.
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- ³⁰⁰ Godana (1985), p. 148, Okoth-Owiro (2004), p. 17.
- ³⁰¹ Godana (1985), pp. 144f; See also Egypt State Information Service, “Egypt and the Nile Basin Countries”, available at <http://www2.sis.gov.eg/En/Politics/Foreign/EAfrica/ENileBasin/040310040000000001.htm> (last viewed 24 October 2010)
- ³⁰² Godana (1985), p. 149
- ³⁰³ This approach follows the “Nyerer doctrine” adopted by Tanzania. Godana (1985), p. 151
- ³⁰⁴ See Godana (1985), p. 151-153, Okoth-Owiro (2004), pp. 17f.
- ³⁰⁵ UNTS vol. 42 (1938), available at <http://ocid.nacse.org/tfdd/tfdddocs/110ENG.pdf> (last viewed 24 October 2010)
- ³⁰⁶ Godana (1985), p. 153-155.
- ³⁰⁷ Exchange of notes from 19 January 1949, February 1949, 30 May 1949, 31 May 1949, 16 July 1952 and 5 January 1953 reproduced in Arsano (2007), pp. 300-305.
- ³⁰⁸ UNTS vol. 453, I-6519, available at <http://treaties.un.org/doc/Publication/UNTS/Volume%20453/volume-453-I-6519-English.pdf> (last viewed 24 October 2010)
- ³⁰⁹ See for example, “Egypt and Thirsty Neighbours are at odds over the Nile”, New York Times, 25 September 2010, available at www.nytimes.com/2010/09/26/world/middleeast/26nile.html?_r=2&adxnnl=1&adxnnlx=1285633152-lkXFXF-DOx6181K7eKyDtQ (last viewed 24 October 2010); “Nile Basin Countries Fail to Sign River Treaty Again”, Circle of Blue WaterNews, 4 May 2010, available at <http://www.circleofblue.org/waternews/2010/world/africa/nile-basin-countries-fail-to-sign-river-treaty-again/> (last viewed 24 October 2010); “Africa: upstream states challenge Egypt over Nile waters”, WASH news Africa, 19 June 2010, available at <http://washafrika.wordpress.com/2010/06/19/africa-upstream-states-challenge-egypt-over-nile-waters/> (last viewed 24 October 2010); “East Africa: Nile Basin Ministers to Meet in Ethiopia”, The New Times, 25 June 2010, available at <http://allafrica.com/stories/201006250002.html> (last viewed 24 October 2010)
- ³¹⁰ We have not been able to find copies of these accords.
- ³¹¹ G. Shapland, Rivers of discord: international water disputes in the Middle East, St. Martin’s Press, New York, 1997, p. 81. (hereinafter “Shapland (1997)”)
- ³¹² See G. Tenywa, “Nile Water Politics – Uganda Dilemma”, The New Vision, 19 May 2009, available at <http://allafrica.com/stories/200905200289.html> (last viewed 24 October 2010), and also Egypt State Information Service, “Egypt and the Nile Basin Countries”, available at www2.sis.gov.eg/En/Politics/Foreign/EAfrica/ENileBasin/040310040000000001.htm (last viewed 24 October 2010)
- ³¹³ Reproduced in Arsano (2007), pp. 313f; and available at , <http://www.fao.org/docrep/w7414b/w7414b0p.htm#TopOfPage> (last viewed 24 October 2010)
- ³¹⁴ Available on the website of the International Water Law Project at http://internationalwaterlaw.org/documents/regionaldocs/Nile_River_Basin_Cooperative_Framework_2010.pdf (last viewed 24 October 2010)
- ³¹⁵ Nile Basin Initiative, “Agreement on the Nile River Basin Cooperative Framework opened for signature”, available at www.nilebasin.org/index.php?option=com_content&task=view&id=165&Itemid=1 (last viewed 13 November 2010)
- ³¹⁶ Based on reporting from WHO 2010
- ³¹⁷ WHO Report 2010
- ³¹⁸ WHO Report 2010
- ³¹⁹ MOH Survey 2009
- ³²⁰ UNESCO 2009
- ³²¹ Alternative Education Systems Unit in the Ministry of Education, UNESCO 2008
- ³²² Ibid
- ³²³ SSCSE
- ³²⁴ OCHA EP&R 2010
- ³²⁵ WHO Report 2010
- ³²⁶ South Sudan MDG Report 2005, UNDP 2006
- ³²⁷ All data unless referenced are from the Sudan Household Survey 2006 to 2010