Sink or Swim: Abrogating the Nile Treaties While Upholding the Rule of Law

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I. Introduction

Water is the foundation of life. Water is the cornerstone of public health and enables food and energy production, transportation and development. The unique transboundary nature of water, and specifically of the Nile River, creates tension among riparian States, which argue over how to allocate this limited resource. The Nile's 6,695 km long path flows through one of the most water-deficient parts of the world.[1] Though the Nile is the world's longest river, its water volume is much lower compared to other rivers of similar length, making it even more precious for its ten riparian countries.[2]

With the East African region stirred by political tumult and new foreign development dollars flowing into Nile projects, the threat of catastrophic conflict over the Nile is heightened. While the World Bank has consistently withheld funding from projects on the Nile that lack Egypt's consent, new foreign investment has proceeded despite Egypt's opposition.[3] As China and other foreign powers pursue food security through investments in foreign agriculture, water rights are increasingly valuable. Simultaneously, the population of the Nile Basin continues to grow at breakneck speed, increasing the local demand for food and water. There are more lives

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[1] Lisa Jacobs, Sharing the Gift of the Nile: Establishment of a Legal Regime for Nile Waters Management, 7 TEMP. INT'L & COMP. L.J. 95, 95 (1993).

[2] GREG SHAPLAND, RIVERS OF DISCORD: INTERNATIONAL WATER DISPUTES IN THE MIDDLE EAST 57 (1997). The riparian countries are Burundi, Democratic Republic of Congo, Egypt, Eritrea, Ethiopia, Kenya, Rwanda, Sudan, Tanzania, and Uganda. Eritrea has a more distant relationship to the Nile and only has observer status in the Nile Basin Initiative.

[3] *See* Mike Pflanz, *Egypt, Sudan Lock Horns With Lower Africa Over Control of Nile River,* Christ. Sci. Monitor, June 4, 2010, http://www.csmonitor.com/World/Africa/2010/0604/Egypt-Sudan-lock-horns-with-lower-Africa-over-control-of-Nile-River/%28page%29/2 ("'No donor or bank is going to agree to give money for a dam or an irrigation scheme if they know it's illegal in international law and does not have the backing of all the Nile nations, especially Egypt,' says Salif Diop, an expert in international water conflicts at the United Nations Environment Program in Nairobi." Professor Ashok Swain notes that Ethiopia "'has shown recently that it is not prepared to wait for basin-wide agreements to go ahead with large scale projects. What's changed to give them that confidence? China.'").

and more dollars at stake now than ever.

The inequitable allocation of the Nile's waters has raised serious concerns throughout the region for half a century. A legal solution is necessary. Egypt has repeatedly shown that it will not freely renounce its claimed historic right to the lion's share of the Nile's waters. Upstream States' threats to dam the Nile or otherwise utilize its waters have been met with Egyptian threats to wage war.[4] The dispute has always been an existential one for Egypt, a State that relies on the Nile for 90% of its water. Now, with growing populations and recurrent famines, the crisis has become existential for Ethiopia and the other upstream States.[5]

The deference to Egypt and the existing legal framework has eroded. After a decade of negotiations, six Nile riparian States recently signed a new Cooperative Framework Agreement ("CFA") to govern the management of the Nile Basin.[6] Egypt and Sudan stridently condemned the CFA. Meanwhile, over Egypt's vigorous threats, Ethiopia has begun construction on a massive dam on the Blue Nile that will create a lake twice the size of the river's source, Lake Tana.[7]

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[4] *See*, Fasil Amdetsion, *Scrutinizing the Scorpion Problematique: Arguments in Favor of the Continued Relevance of International Law and a Multidisciplinary Approach to Resolving the Nile Dispute*, 44 TEX. INT'L L. J. 1, 41 (2008) ("Following an assessment of an unpublished report by Hami el-Taheri, dealing with issues relating to the Nile, the Egyptian Parliament was adjourned amidst shouts of 'when are we going to invade Sudan?" and 'why doesn't the air force bomb the Ethiopian dams?'").

[5] *See Id.* at 41 ("Ethiopia's Minister of Foreign Affairs, Seyoum Mesfin, for instance, declared that Egyptian threats were an 'irresponsible instance of jingoism that will not get us anywhere near the solution of the problem' and that 'there is no earthly force that can stop Ethiopia from benefiting from the Nile.' Ethiopia's Minister of State for Foreign Affairs has also made it clear that 'talks or no talks, Ethiopia will exercise its rights to utilize its own water for its development.'").

[6] Nile Basin Initiative, *Burundi Signs the Nile Cooperative Framework Agreement*, Feb. 28, 2011, http://www.nilebasin.org/newsite/index.php?option=com_content&view=article&id=70:burundi-signs-the-nile-cooperative-framework-agreement-pdf&catid=40:latest-news&Itemid=84&lang=fr

[7] *See* Grand Millennium Dam, *Great Millennium Dam Move Ethiopia*, Apr. 11, 2011, http://grandmillenniumdam.net/great-millennium-dam-moves-ethiopia/.

Yet the CFA and the new Nile construction have failed to confront Egypt's central claim to its Nile water rights—a legal claim of right to the water based on colonial-era treaties. Only by answering the underlying legal claim, can the upstream States justify their actions on the world stage, bring long-term stability to the region, and provide investors and international actors with confidence that the rule of law will be upheld.

South Sudan's recent secession and the Arab Spring—a series of uprisings and government transitions throughout East Africa and the Middle East—have only heightened the need for a legal resolution to manage the Nile waters. New questions of state succession and shifting political alliances are inevitable in the coming years, necessitating a final legal solution that resolves both questions of state succession and political impasses.

Ultimately, a new framework for managing the Nile's waters is necessary to address water and food scarcity. While scholars and observers have long harbored hopes that some teleological process would lead to a peaceful resolution,[8] Egypt has continued to oppose any legal framework that diminishes her current water allocation.[9] Even in the face of Egyptian opposition and military threats, upstream riparian countries may move to exploit the Nile. This would be an unfortunate and unnecessary result to decades of negotiations, and emerging projects may unravel as politics shift or investment dries up due to the uncertainty of water rights. International law and international courts offer an alternative solution to meet multiple aims of upholding the rule of law, legitimizing new water allocations, stabilizing regional

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[8] *See, e.g.* Jutta Brunnée and Stephen J. Toope, *The Changing Nile Basin Regime: Does Law Matter?*, 43 HARV. L INT'L L. J. 105 (2002).

[9] *See* Dereje Zeleke Mekonnen, *The Nile Basin Cooperative Framework Agreement Negotiations and the Adoption of a "Water Security" Paradigm: Flight Into Obscurity or a Logical Cul-de-Sac?*, 21 EUR. J. INT'L L. 421 (2010) (arguing that Egypt's inclusion of "water security" in the Cooperative Framework Agreement is another ploy to mandate current water allocations).

expectations, and equitably allocating the Nile's waters.

International transboundary watercourse law has a lengthy and robust history developed through international agreements, conventions and judicial decisions. Indeed, "a clear view of the requirements of international law can provide States with a reference point from which to assimilate the diverse influences that shape their actions and interactions with their riparian neighbors."[10] With the colonial-era treaties complicating the picture in the Nile Basin, there is all the more reason for a legally binding decision that adjudicates the contested status of prior agreements.

While a legally binding decision is necessary, it will not be sufficient. As Ethiopia's unilateral actions demonstrate, sovereign States may act in their own perceived self interest despite international law. Enforcing international agreements against sovereign States can prove difficult and may be laden with geopolitics. Yet as Louis Henkin asserted, "almost all nations observe almost all principles of international law and almost all of their obligations almost all of the time."[11] Indeed, "empirical work since then seems largely to have confirmed this hedged but optimistic description."[12] While a Nile riparian may face an uphill battle enforcing a judgment against another riparian who has violated international law, a legal framework still "provides a way to engage complex political issues in a more neutral, less overtly power-laden, and perhaps

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[10] Keith Hayward*, Supplying Basin-Wide Reforms with an Independent Assessment Applying International Water Law: Case Study of the Dnieper River,* 18 COLO. J. INT'L EVNTL. L. & POL'Y 633, 633 (2007).

[11] LOUIS HENKIN, HOW NATIONS BEHAVE 47 (2d ed. 1979).

[12] Harold Hongju Koh, *Why Do Nations Obey International Law?*, 106 YALE L. J. 2599, 2599 (1997).

more predictable manner."[13]

Part II introduces the Nile and reviews the history of treaties that have governed the Nile Basin for more than 100 years**. Part III** confronts upstream riparians' arguments that the colonial-era treaties are void after independence. We argue that despite independence, the laws of state succession uphold territorial treaties such as those governing the use of the Nile. We then lay out the concepts of *rebus sic stantibus* and *jus cogens* to foreshadow their application to the Nile Basin. **Part IV** lays the groundwork for the application of these doctrines by describing the current food and water scarcity in the region and comparing the relative development of the various Nile riparians. **Part V** then applies the doctrines of *rebus sic stantibus* and *jus cogens* to those facts to conclude that the stark deprivation of vital human needs in the upstream countries sufficiently voids the colonial-era treaties. **Part VI** reviews the international transboundary watercourse law that would govern the Nile Basin in the absence of treaties and that would guide a court in adjudicating water rights. **Part VII** then proposes that the International Court of Justice ("ICJ") be charged with resolving the dispute over the validity of the treaties and the allocation of water rights in order to overcome the current political impasse.

II: The Nile and the Treaties Governing the Nile Basin

A. The Nile River

As the world's longest river, the Nile flows through states whose populations total more than 400 million.[14] This region of East Africa is one of the most water-deficient parts of the

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[13] Kal Raustiala & Anne-Marie Slaughter, *International Law, International Relations, and Compliance*, Handbook of Intn'l Rel. 538, 541 (2002).

[14] *See* Table 6, *infra*.

world.[15] The Nile's irregular flow and relatively low volume makes its management and control even more critical for its ten riparian countries.[16]

The tributaries that feed into the Nile are complex. The White Nile originates in the Great Lakes region, where the Kagera River from Rwanda and Burundi empties into Lake Victoria along with other rivers from Tanzania and Kenya.[17] Out of Lake Victoria, which is situated in Uganda, Kenya, and Tanzania, the White Nile flows through the Owen Falls Dam to Lake Albert where the Semliki River from the Congo joins.[18] As the White Nile enters southern Sudan, the flow is greatly reduced by evaporation and transpiration in the Sudd region's marshes.[19] The White Nile is then joined by the Sobat River from Ethiopia. The resulting flow unites in Khartoum with the Nile's other principal tributary, the Blue Nile from Ethiopia.[20] From thereon, the river is known as the Nile River and is joined by one more river, the Atbara from Ethiopia.[21] Ultimately, the Nile empties into the Mediterranean Sea.

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[15] Jacobs, *supra* note 1, at 95.

[16] Greg Shapland, *Rivers of Discord: International Water Disputes in the Middle East*, 57 (1997). The riparian countries are Burundi, Democratic Republic of Congo, Egypt, Eritrea, Ethiopia, Kenya, Rwanda, Sudan, Tanzania, and Uganda. Eritrea holds observer status in the Nile Basin Initiative.

[17] Jacobs, *supra* note 1, at 97.

[18] *Id.*

[19] Fred Pearce, *High and Dry in Aswan*, New Scientist, May 7, 1994, at 28; Zewde Gabre-Sellassie, *The Blue Nile and Its Basins: An Issue of International Concern*, in From Poverty to Development: Intergenerational Transfer of Knowledge, IGTK Consultation Paper Series No. 2 pp. 2-3 (Shiferaw Bekele ed., 2006).

[20] C.C.S.M., Reviews: Africa: The Nile, 28 The Geographical J. 387, 389-90 (1906) (reviewing Captain H.G. Lyons, The Physiography of The Nile and its Basin (1906)); Masahiro Murakami, *Managing Water for Peace in the Middle East,* pp. 55-57 (1995).

[21] Sohair S. Zaghloul, Mohammed El-Moattassem, & Ahmed A. Rady, *The International Congress on River Basin Management*, *in* The Hydrological Interactions Between Atbara River and the Main Nile at the Confluence Area, 787-90 (2007), *available at* http://www.dsi.gov.tr/english/congress2007/chapter_2/63.pdf.

Though mean flows for the Nile and its tributaries are constantly in flux, the following are reasonable volume estimates (measured at a particular city):[22]

White Nile (Malakal)	19.6 billion m^3 of water
Blue Nile (Khartoum)	49.7 billion m^3 of water
Atbara (Atbara)	11.7 billion m^3 of water
Main Nile (Aswan)	84.0 billion m^3 of water

The main Nile mean volume is calculated after evaporation and water losses. Without the water losses, the main Nile would contain approximately 90 billion m^3 of water. Evaporation and water losses also have significant impacts on other sources of the Nile. Lake Victoria loses approximately 3.5 billion m^3 of water annually, and Lake Albert loses 2.5 billion m^3 of water annually. The greatest water loss occurs in the Sudd, where 12 to 30 billion m^3 of water is lost each year.[23]

1. Climate

The Basin spans five vastly different climate regions. Downstream, Egypt and parts of Sudan have a dry, desert-like climate with precipitation of less than 200 mm a year. Sudan and small parts of Ethiopia have a steppe climate with rainfall ranging between 200 and 400 mm a year. The precipitation from these two climatic regions does not contribute any water to the Nile. Upstream, the Nile Basin contains the tropical rainforest climate, the tropical savannah climate and the highland (tropical) climate. These climates serve as the source of the Nile, receiving 1,400 to 1,800 mm of rainfall per year.[24]

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[22] Nurit Kliot, *Water Resources and Conflict in the Middle East,* 27 (1994).

[23] Kliot at 27.

[24] Kliot at 22.

2. Environmental Changes

Environmental changes in the Nile Basin significantly affect the amount of available water. Scientists have found that climate change indicates warming in the future. However, this warming's effect on the Nile is unclear. Some experts estimate that the Nile's flow will increase by as much as 30% while others estimate a decrease of up to 78%.[25] The uncertainty of future water flows creates even more anxiety over the existing water.

3. Riparian Countries

Ten countries border the Nile: Egypt, Sudan, Eritrea, Ethiopia, Uganda, Kenya, Rwanda, Burundi, Democratic Republic of Congo, and Tanzania.[26] The square kilometers of the Nile that flows through the top four countries is shown in Table 1.

Table 1: Area Share Per Country of the Nile River[27]

Area of Nile (km²)	**Constituent Countries**	**Share per country, area km²**	**Percent**
3,030,700	Sudan	1,900,000	62.7%
	Ethiopia	368,000	12.1%
	Egypt	300,000	9.9%
	Uganda	232,000	7.7%
	All other riparian countries combined	230,700	7.6%

[25] Waltina Scheumann and Manuel Schiffler, *Water in the Middle East: Potential for Conflicts and Prospects for Cooperation*, 146 (Springer 1998).

[26] *Id.*

[27] Kliot at 28.

Though Sudan has the largest share of drainage area of the Nile, it contributes no water to the Nile. Instead, this Sudd region contributes to most of the water loss of the Nile River.[28] On the other hand, Ethiopia contains the second largest drainage area of the Nile and also provides the majority of the water flow. While Egypt contains less than 10% of the Nile's drainage basin, it has rights to 75% of the flow, as established by treaties discussed below.

Most of the riparian countries are newly independent nations. Since independence from colonial rule, these States have tried to establish representative governments. However, the transition to democracy has not been smooth, with the political landscape littered with military coups, riots, and ethnic conflicts.[29] These constant upheavals damage and impede the development of the riparian countries' economies.

Each of these countries are classified as 'least developing countries', plagued with low life expectancy, high infant mortality, and low literacy rates.[30] Amidst the weak economies and tense political times, the Nile has always been an important source of stability for those who are entitled to her waters, as well as a source of conflict for those seeking to secure water rights. [31] This has played out over more than a century. The next section will explore the treaties that trace the tug of war of water rights.

B. Treaties Governing the Nile Basin

For more than a century, riparians States have negotiated water rights through a series of

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[28] Kliot at 29-30. Cross reference

[29] Arun P. Elhance, *Hydropolitics in the Third World: Conflict and Cooperation in International River Basins,* 62 (1999).

[30] Kliot at 74.

[31] P.P. Howell & J.A. Allan, *The Nile: Sharing a Scarce Resource,* 10 (1994).

treaties. Though upper riparian States debate the validity of the colonial-era Nile treaties, their arguments fail under the rule of law. Before analyzing the legal arguments, a historical analysis of the Nile treaties follows. This history informs the past, present, and future dialogue of the rule of law in the region. Of the numerous Nile treaties signed in the last century, "the 1929 and 1959 treaties [are the] most…significant and controversial,"[32] and the 1902 treaty is probably the most overlooked. This section reviews the colonial-era and post-colonial era agreements of riparian states.

Table 2: Legal Regime of the Nile, 1891-1993[33]

Type of Agreement	**State parties to the agreement**	**Contents of agreement and utilization patterns**	**Beneficiaries**	**Status at present**
Colonial Agreements				
1891 Protocol	Italy and Great Britain	Italy agreed not to construct any work on the River Atbara which might modify its flow	Egypt	Ethiopia argues it is no longer effective with end of colonial rule
Addis Ababa 1902	Great Britain and Ethiopia	Ethiopia committed itself not to construct or allow to be constructed any work across the Blue Nile, Lake Tana or the Sobat	Egypt	Ethiopia argues it is invalid

[32] Amdetsion, *supra* note 4 at 13. See, e.g., John Kamau, Can EA Win the Nile War?, The Nation (Kenya), Mar. 28, 2002 (discussing the controversy surrounding the treaties), *available at* http://chora.virtualave.net/ea-nile.htm.

[33] Kliot at 82-84.

London 1906	Great Britain and Congo	Redefined spheres of influence; Congo undertook upon itself not to construct any work on or near the Semliki or Isango	Sudan and Egypt	Congo argues that the agreement ceased to be effective with the end of colonial rule
London 1906 (1891)	Great Britain, Italy, France	The three states committed themselves to the preservation of the integrity of Ethiopia and confirmed the 1891, 1906 Agreements	Great Britain, Italy, France	No longer effective with end of colonial rule since agreement specified the colonial powers and not the States
Rome 1925	Great Britain and Italy	Great Britain obtained from the Abyssinian Government the concession to build a dam on Lake Tana to secure water rights in Egypt; the hydraulic rights of Egypt and the Sudan were recognized	Egypt and the Sudan	The agreement was found not binding in 1925 by the League of Nations
1929 Nile Agreement	Egypt/Great Britain (on behalf of the Sudan, Kenya, Tanganyika, Uganda)	The agreement allocated 48 billion m^3 of water to Egypt and 4.0 billion m^3 of irrigation water for the Sudan. No work of any kind could be undertaken on the Nile or on the Equatorial Lakes	Egypt and the Sudan	Egypt sees it as binding, the Equatorial states see it as not binding

		without Egypt's consent		
1934 London Agreement	Great Britain (on behalf of Tanganyika) and Belgium (on behalf of Rwanda and Burundi)	The agreement prevented any construction work which would damage the flow of the Kagera to Lake Victoria	Egypt and the Sudan	Disputed validity since it was signed before end of colonial rule.
Owen Falls Agreement 1949	Great Britain/Egypt and Uganda	Egyptian supervision of water discharges at the Owen Falls dam. Egypt took the responsibility for any damages resulting from the rising of Lake Victoria	Egypt, water; Uganda, hydro power	Binding
Owen Falls Dam 1950 Exchange of Notes	Great Britain and Egypt	To secure the cooperation of Uganda for Egyptian data collection in Lake Victoria	Egypt and the Sudan	Binding
Post Colonial Agreements				
1959 Agreement for the Full Utilization of the Nile Waters	Egypt and the Sudan	Construction of the Aswan Dam for flood control, irrigation water and electricity; Egypt would receive 55.5 billion m^3 and the Sudan 18.5 billion m^3.	Egypt and the Sudan	Still binding, but not on third parties
1967 Nile Hydro-meteorological Survey (with UNDP	Egypt, Kenya, Sudan, Tanzania, Uganda	To survey Lakes Kioga, Victoria and Albert; to measure water balance in Lake	Egypt, Kenya, Sudan, Tanzania, Uganda	Binding

Agreement)		Victoria catchment		
Kagera Basin Agreement 1977	Burundi, Rwanda, Tanzania and Uganda (joined in 1981)	Multipurpose development of the Kagera basin: hydropower, agriculture, trade, tourism, fisheries	Rwanda, Burundi, Tanzania	Binding
1993 Framework for General Cooperation Between Ethiopia and the Arab Republic of Egypt	Egypt and Ethiopia	General Cooperation commitment	Egypt and Ethiopia	Binding

1. Colonial-Era Treaties

This section refers to colonial-era treaties as those treaties signed before the 1950s, when foreign sovereigns controlled the Nile Basin.[34]

The majority of the colonial-era treaties favor Egypt because of its favored role to Great Britain. Despite the multiple European actors in the region, Great Britain effectively controlled the Nile River due to its control of Sudan, Egypt, Kenya, Tanzania and Uganda, as well as its military superiority. [35] Of the countries Great Britain controlled, Egypt was the most important

[34] With the exception of Ethiopia, all other States in the Nile Basin were under colonial rule from the 1880's until post World War II. Egypt became independent—after forty years of British rule and thirty years of monarchy—in 1953. Upstream British colonies of Kenya, Tanzania, and Uganda, gained independence in the early 1960's, around the same time that Burundi, Rwanda, and Congo gained independence from Belgium. [34] *See* Arun P. Elhance, *Hydropolitics in the Third World*: *Conflict and Cooperation in International River Basins*, 62 (1999).

[35] Arun P. Elhance, *Hydropolitics in the Third World*: *Conflict and Cooperation in International River Basins*, 68 (1999).

to the empire.[36] Great Britain valued its control over Egypt because of its strategic location and cotton production. Egypt's Red Sea ports were crucial for Britain's colonial trade, and the Suez Canal was the shortest route from Europe to India, the "Jewel of the British Crown." Egypt's production of high quality cotton for Great Britain's textile mills were especially important after the United States gained independence in 1776 and Great Britain no longer controlled the U.S. or its cotton production.[37] The cotton production was only possible through irrigation from the Nile. For these reasons, Egypt's stability was more important to Great Britain than that of other riparian States; and the most important factor for stability in Egypt was access to water.

Great Britain entered into a number of treaties to secure Nile water for Egypt.[38] The early agreements contracted by Great Britain included an agreement with Italy (1891),[39] Ethiopia (1902),[40] the Independent State of Congo (1906),[41] and with Italy and France (1906),[42] and another agreement with Italy in 1925. Each of these treaties signed by Great Britain were in protection and furtherance of Egyptian interests. The following sections will discuss these treaties.

a. 1891 Protocol

At the end of the 19th century, Great Britain had colonial power over Egypt and Sudan.

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[36] Michael M. Ogbeidi, *Egypt and Her Neighbours*, 96 (Publishers Express 2005).

[37] Elhance at 69.

[38] Kliot at 37-38.

[39] United Nations Legislative Series, Legislative Texts and Treaty Provisions Concerning the Utilization of International Rivers for Other Purposes Than Navigation, U.N. Doc. St/Leg/Ser.B/12, 127-28 (1963).

[40] Hertslet, The Map of Africa By Treaty, Vol. II, No. 100, 432-42 (3d ed. 1967) [hereinafter Hertslet].

[41] United Nations Legislative Series, Legislative Texts and Treaty Provisions Concerning the Utilization of International Rivers for Other Purposes Than Navigation, U.N. Doc. St/Leg/Ser.B/12, 99 (1963).

[42] Hertslet at 584-85.

In 1890, Italy was introduced to the hydro politics of the region through its colonization of Eritrea. Due to rising tensions regarding water allocation, Italy and Great Britain signed the Protocol of 1891 to demarcate their respective colonies. Italy agreed that she would not construct "on the Atbara, in view of irrigation, any work which might sensibly modify its flow into the Nile."[43]

Italy agreed to these boundaries since it had aspirations to conquer Ethiopia. However, Italy was unsuccessful in this venture, failing at the Battle of Dogali in 1887 and Battle of Adwa in 1896.[44] Ethiopia's successful resistance to colonization was "the most meaningful negation to the sweeping tide of colonial domination of Africa," and it gave Ethiopia particular clout as countries strived for control over the Horn.[45] For example, France, which had colonial aspirations "to gain…a foothold on the Nile,"[46] vied for Emperor Menelik of Ethiopia's support.[47] Emperor Menelik did not have to make a decision about support for France since an anxious Great Britain was prepared to fight any possible French encroachment on the Nile. France knew it was no match for Great Britain and it stepped away quietly, leaving the British control over the Nile.[48]

b. Treaty between Great Britain and Ethiopia 1902

[43] Protocol for the Demarcation of Their Respective Spheres of Influence in East Africa From Ras Kasar to the Blue Nile, art. III, Gr. Brit-Italy, Apr. 15, 1891.

[44] Paulos Milkias & Getachew Metaferia, The Battle of Adowa: Reflections on Ethiopia's Historic Victory Against European Colonialism 23, 27-28 (2005).

[45] Milkias & Metaferia at 32.

[46] Terje Tvedt, The River Nile in the Age of the British: Political Ecology and the Quest for Economic Power 48 (2008).

[47] Gebre Tsadik Degefu, The Nile: Historical, Legal, and Developmental Perspectives 35-36 (2003) (The French offered Ethiopia territorial concessions as well as 100,000 rifles).

[48] Amdetsion, *supra* note 4, at 18.

Worried about her cotton-growing interests which heavily depended on the Nile River, Great Britain, acting for Egypt and the Sudan, entered into the Treaty for a Delimitation of the Frontier with Ethiopia. The agreement settled the frontier between Sudan and Ethiopia and laid out provisions regarding the Nile's flow. Article III of the agreement reiterates the main thrust of the 1891 Protocol. It states that Ethiopia would not

> construct or allow to be constructed, any work across the Blue Nile, Lake Tsana or the Sobat, which would arrest the flow of their waters into the Nile except in agreement with His Britannic Majesty's Government and the Government of the Sudan.[49]

Since the 1902 agreement binds Ethiopia to such unfavorable terms, she has argued vigorously against it though she signed it as an independent country. After 1902, no agreements were entered into by Ethiopia regarding the Nile until 1993.

c. *Treaty between Great Britain and Leopold II, King of the Belgians in 1906*

King Leopold II of Belgium, acting on behalf of the Congo, signed a treaty with Great Britain on May 9, 1906. Article II of the treaty provides:

> The Government of the Independent State of the Congo undertakes not to construct or allow to be constructed, any work over or near the Semliki or Isango Rivers which would diminish the volume of water entering Lake Albert, except in agreement with the Sudanese Government.[50]

This language of not undertaking any projects that would diminish the river's flow is similar to the two previous agreements signed by Great Britain (the 1891 Protocol and the 1902 Agreement

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[49] Treaties between Great Britain and Ethiopia, and between Great Britain, Italy, and Ethiopia, relative to the Frontiers between the Anglo-Egyptian Soudan, Ethiopia, and Erythræa (Railway to connect the Soudan with Uganda), Art. III, Addis Abbaba, 15 May 1902.

[50] G.B. Treaty Series, No. 4 (1906), Cmd. 2920; British and Foreign State Papers, Vol. 99, 173; Hertslet, Africa, No. 165, 584-586; H.A. Smith, The Economic Uses of International Waterways, 166 (London, 1931).

with Ethiopia) and the later 1929 agreement. Therefore, this language and expectation was well known and not a surprise to any of the riparian countries.

d. Treaty between the Great Britain, France, and Italy in 1906

Later that year, the Tripartite Agreement was signed on December 13, 1906. The purpose of this agreement was to reconfirm the terms of the 1891 Protocol and the 1902 Agreement[51] at a time when Great Britain, France, and Italy were scrambling for influence in the Nile Valley. Each of the countries had interests in Ethiopia due to its importance to the flow of the Nile River. Great Britain relied on the Nile to irrigate its cotton fields in Egypt, which then supplied her textiles factories. France was interested in more economic power in Ethiopia, namely through its railroads. Italy still hoped to absorb northern Ethiopia into her Empire.[52] All three countries were wary of each other's intentions, especially since Ethiopia's Emperor Menelik II was growing older and had yet to name a successor. The countries feared political chaos would ensue after his death.[53] As a result, Article I discussed the maintenance of the status quo in Ethiopia as defined by previously signed agreements, which includes the 1902 agreement.

e. Exchange of Notes between Italy and Great Britain in 1925

Still concerned about her agricultural interests in Egypt, Great Britain wanted to secure her water rights to the Nile by control of the source, Lake Tana. Though Lake Tana is located in Ethiopia, she was not a part of the exchange of notes between Italy and Great Britain. The agreement stated:

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[51] Degefu at 102.

[52] *Id.* at 103.

[53] *Id.*

> Recognizing the prior hydraulic rights of Egypt and Sudan, [the Abyssinian Government with the Italian Government on their side] will engage not to construct on the headwaters of the Blue or White Niles or their tributaries or effluents any work which might sensibly modify their flow into the river.[54]

The Notes recognize the "prior" hydraulic rights of Egypt and Sudan:

> His Britannic Majesty's Government have every intention of respecting the existing water rights of the populations of the neighbouring territories which enter into the sphere of exclusive Italian economic influence. It is understood that, in so far as is possible and is compatible with the paramount interests of Egypt and the Sudan, the scheme in contemplation should be so framed and executed as to afford appropriate satisfaction to the economic need of these populations.

Great Britain and Italy sent notice of the agreement to Ethiopia. Ethiopia was incensed that it had not been involved in discussions and reacted by sending a letter to each government.[55]

To the Italian government:

> The fact that you have come to an agreement, and the fact that you have thought it necessary to give us a joint notification of that agreement, make it clear that your intention is to exert pressure, and this in our view, at once raises a previous question. This question which calls for preliminary examination, must therefore be laid before the League of Nations.

And to the government of Great Britain:

> The British Government has already entered into negotiations with the Ethiopian Government in regard to its proposal, and we had imagined that, whether that proposal was carried into effect or not, the negotiations would have been concluded with us; we would never have suspected that the British Government would come to an agreement with another Government regarding our Lake.

In this letter, Ethiopia references the 1902 agreement as if it is still in force. More than two decades later, the 1902 agreement seems to still be in force according to Ethiopia.

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[54] Okidi at 325-326.

[55] Kefyalew Mekonnen, *The Defects and Effects of Past Treaties and Agreements on the Nile River Waters: Whose Faults Were They?*, Ethiopians.com, *available at* http://www.ethiopians.com/abay/engin.html.

Not satisfied with the reprimanding letter, the Ethiopian government protested the agreement to the League of Nations, who found the agreement not binding on Ethiopia.[56] However, it is important to note that the League of Nations decision only referred to the 1925 Exchange of Notes and not to the 1902 Agreement, to which Ethiopia was a party.

f. 1929 Water Treaty

Because Great Britain's 1925 negotiations to control Lake Tana were unsuccessful, she looked to other means to secure the Nile's flow to Egypt. The most significant safeguard was the Agreement Between Egypt and Anglo-Egyptian Sudan of May 7, 1929.[57] In 1929, Britain's colonial empire controlled Sudan, Uganda, Tanzania, and Kenya. The two parties specifically mentioned in the treaty are Egypt and Sudan, although the treaty favors Egypt, allocating 48 billion m^3 of water to Egypt and 4 billion m^3 of water to Sudan. Section 4(b) of the agreement reiterates language from all previous agreements signed by Great Britain regarding the effect of water flow to Egypt:

> Save with the previous agreement of the Egyptian Government, no irrigation or power works or measures are to be constructed or taken on the River Nile and its branches, or on the lakes from which it flows, so far as all these are in the Sudan or in countries under British administration, which would, in such a manner as to entail any prejudice to the interests of Egypt, either reduce the quantity of water arriving in Egypt, or modify the date of its arrival, or lower its level.[58]

The language of the treaty applies the above provision to all riparian countries since it references all irrigation and power works or measures constructed on the lake. In addition to Egypt's power

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[56] Kliot at 82-84.

[57] Exchange of Notes Between His Majesty's Government in the United Kingdom and the Egyptian Government in Regard to the Use of the Waters of the River Nile for Irrigation Purposes. Cairo, 7 May 1929.

[58] Exchange of Notes Between His Majesty's Government in the United Kingdom and the Egyptian Government in Regard to the Use of the Waters of the River Nile for Irrigation Purposes. Cairo, Section 4(b), 7 May 1929.

to veto any Nile-related projects, she also had the right to develop Nile projects in upper riparian states.[59]

The disproportionate allocation is stark. Downstream Egypt was allocated 75% of the Nile's waters though it contributes almost nothing to the Nile's water balance. Ethiopia, from which 85% of the Nile flows, uses virtually none of the Nile water.[60] Upper riparian states' interests were clearly not taken into account in this treaty. This disproportionate allocation persists today with Egypt consuming 80% of the Nile flow and upper riparian states consuming 1.5%. *See* Table 3.

Table 3: Current Consumption of Nile Flow by Percentage[61]	
Country	**Consumption**
Egypt	80%
Sudan	18.5%
Ethiopia	1%
All other riparian states	0.5%

In 1929, this disproportionate allocation was accepted because Egypt's dry climate made the Nile essential for survival.[62] No other riparian country had a similar pressing need. The other States had tropical climates and enough precipitation to sustain their agriculture at the time. Numerous

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[59] Amdetsion, *supra* note 4 at 18. Kefyalew Mekonnen, The Defects and Effects of Past Treaties and Agreements on the Nile River Waters: Whose Faults Were They?, MediaEthiopia.com, http://www.ethiopians.com/abay/engin.html (last visited Feb. 23, 2009).

[60] Christopher L. Kukk & David A. Deese, *At the Water's Edge: Regional Conflict and Cooperation Over Fresh Water*, 1 UCLA J. Int'l L. & Foreign Aff. 21, 41-43 (1996-97).

[61] Kliot at 72.

[62] John Anthony Allan, *East Africa's Water Requirements: The Equatorial Nile Project and the Nile Waters Agreement of 1929*, *in* The Nile: Sharing a Scarce Resource, 81 (Cambridge University Press 1994).

Nile commissions dating as far back as 1894 exhibited an acceptance of Egypt's prior rights. The British Commission of 1914 recognized and respected Egypt's prior rights as well as proposed introduction of cotton cultivation in Sudan.[63] The British Commission of 1919 found that Egypt had a right to the amount of water she was actually using at the time, which amounted to all the natural flow of the Blue Nile until January 20.[64] The Nile Commission of 1920 found that existing rights of irrigation, which Egypt had established, should always have priority over new works. In 1925, The Report of the Joint Commission of His Majesty's Government of the United Kingdom and Northern Ireland and the Egyptian Government, established through an exchange of notes on January 25, 1925, contained findings most favorable for Egypt. The Commission was created "for the purpose of examining and proposing the basis on which irrigation can be carried out with full consideration of the interests of Egypt and without detriment to her natural and historic rights."[65] The Commission assessed the flow rates of the Nile for the past 960 years.[66] From these years of data, the Commission found that flow of the Nile to Sudan and Egypt were particularly important because their sole source of water comes from the Nile.[67] The Commission recommended that "[t]he natural flow of the river should be reserved *for* the benefit *of* Egypt from the 9th January, to the 5th July," or during the dry season,

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[63] Degefu at 121.

[64] *Id.* at 122.

[65] Notes Exchanged Between Ziwer Pasha and Lord Allenby, 26 January1925, Cairo, Egypt, reproduced in Arthur, Okoth-Owiro, *The Nile treaty: State Succession and International Treaty Commitments: A Case Study of the Nile Water Treaties*, Appendix A (2004).

[66] The Report of the Joint Commission of His Majesty's Government of the United Kingdom and Northern Ireland and the Egyptian Government, Para. 32 (1925).

[67] The Report of the Joint Commission of His Majesty's Government of the United Kingdom and Northern Ireland and the Egyptian Government, Para. 71 (1925).

since Egypt would not be able to survive otherwise.[68] These Commissions became the basis for the 1929 treaty.

The provision of the treaty prohibiting projects on the Nile that may affect the Nile's flow is consistent with the preceding agreements. Furthermore, the allocation of the water is in line with previous historical statements of Egypt's prior use from the Nile Commissions conducted in 1914, 1919, 1920, and 1925, just four years before the signing of this treaty.

However, over time as riparian states gained independence and a sense of nationalism, the water allocation, which mainly favored Egypt, became a point of contention. Countries wanted to develop their economies by building projects on the Nile, but the 1929 Treaty prevented them from affecting any of the flow to Egypt. [69] As Egypt gained, upper riparian countries suffered.[70]

Even though consistent with past agreements and commissions, the 1929 agreement is controversial. Egypt insists the 1929 Agreement is binding on Sudan, Uganda, Tanzania, and Kenya, which were under British rule when the agreement was signed.[71] Egypt's greatest argument that this treaty is binding on these States is a letter from Britain that was part of the 1929 Agreement. The letter states that "detailed provisions of this grant will be observed at all

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[68] The Report of the Joint Commission of His Majesty's Government of the United Kingdom and Northern Ireland and the Egyptian Government, Para. 88 (1925).

[69] Howell at 81.

[70] Kliot at 50-51.

[71] Gebre Tsadik Degefu, The Nile Waters: Moving Beyond Gridlock, Addis Trib. (June 11, 2004), *available at* http://allafrica.com/stories/200406110550.html.

times and under any conditions which may rise,"[72] which could encompass the condition of independence.

g. 1934 London Agreement

Great Britain (on behalf of Tanganyika) and Belgium (on behalf of Rwanda and Burundi) signed the 1934 Agreement regarding Water Rights on the Boundary between Tanganyika and Ruanda-Urundi-London on November 22, 1934.[73] It provides that neither government may undertake operations that would "pollute or cause the deposit of any poisonous, noxious or polluting substance in the waters of any river or stream."[74]

Rwanda and Burundi argue that this agreement does not give Egypt the right to veto any projects upstream, as was provided in the 1929 treaty. Rwanda and Burundi argue that the only requirement for projects mentioned in the 1934 agreement is that they do not pollute the waters. However, since the 1929 treaty bound all upstream States including Rwanda and Burundi, the provision did not need to be repeated in the 1934 agreement. Both countries were still bound by the 1929 provision that Egypt had veto power for any upstream projects.

h. The 1949 Owen Falls Dam Agreement

The Nile was and is the only source of water available in Egypt. Access to the Nile was not enough to ensure water security in Egypt since the Nile does not have a consistent flow year round. The Nile's dry season stretches from January until July and is subject to bad rainfall

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[72] Letter from Mohamed Mahmoud Pasha to Lord Lloyd (May 7, 1929).

[73] Agreement between the United Kingdom and Belgium regarding Water Rights on the Boundary between Tanganyika and Ruanda-Urundi-London, 22 November 1934.

[74] Agreement between the United Kingdom and Belgium regarding Water Rights on the Boundary between Tanganyika and Ruanda-Urundi-London, Para. 3, 22 November 1934.

years. The unpredictability of the Nile's flow created anxiety, which was expressed in the 1946 exchange of notes between Great Britain and Egypt. The exchange stressed the need for water security for cotton growing as well as sanitation and health. The Egyptian Minister especially stressed the need for a consistent supply of potable water. He wrote, **"**The supreme task of providing the rural villages of Egypt with adequate supply of potable water, as a means of public health security measures, has been the chief concern of all authorities since 1928."[75] The letter went on to state that only 25% of the population received potable water. The remaining 75% of the population consumed non-potable water and as a result, suffered from poor health.[76] The situation for Egypt was dire. Even if a system of purification suggested by the notes was implemented, Egypt would only be able to provide small towns with 20 liters per capita per day[77] when a minimum of 25 liters per day is required to sustain life.[78] Egypt's livelihood depended on more stable access to more water. As a result, Egypt began discussing the construction of a dam on Owen Falls in Uganda.[79]

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[75] *The Egyptian Minister for Foreign Affairs to His Majesty's Charge d'Affaires at Cairo*, Exchange of Notes Constituting an Agreement Between the United Kingdom of Great Britain and Northern Ireland and Egypt Regarding the Utilisation of Profits from the 1940 British Government Cotton Buying Commission and the 1941 Joint Angloegyptian Cotton Buying Commission to Finance Schemes for Village Water Supplies, Cairo, 7 December 1946.

[76] *The Egyptian Minister for Foreign Affairs to His Majesty's Charge d'Affaires at Cairo*, Enclosure, Exchange of Notes Constituting an Agreement Between the United Kingdom of Great Britain and Northern Ireland and Egypt Regarding the Utilisation of Profits from the 1940 British Government Cotton Buying Commission and the 1941 Joint Angloegyptian Cotton Buying Commission to Finance Schemes for Village Water Supplies, Cairo, 30 October1946.

[77] *The Egyptian Minister for Foreign Affairs to His Majesty's Charge d'Affaires at Cairo*, Enclosure, Exchange of Notes Constituting an Agreement Between the United Kingdom of Great Britain and Northern Ireland and Egypt Regarding the Utilisation of Profits from the 1940 British Government Cotton Buying Commission and the 1941 Joint Angloegyptian Cotton Buying Commission to Finance Schemes for Village Water Supplies, Cairo, 30 October1946.

[78] Kristin Stranc, *Managing Scarce Water in the Face of Global Climate Change: Preventing Conflict in the Horn of Africa*

[79] Elhance at 70.

On May 31, 1949, Great Britain and Egypt signed an agreement regarding the construction of the Owens Fall Dam in Uganda for storage of a year's worth of water in Lake Victoria. Construction and operation of the dam was to be done jointly by Egypt and Uganda. The language of the agreement reemphasized the 1929 Treaty in that Uganda may not "adversely affect the discharge of waters to be passed through the dam in accordance with arrangements to be agreed upon between the two Governments."[80]

The exchange of notes leading to the final Owens Fall Agreement occurred in three sections. First, an agreement regarded the logistics of constructing the dam.[81] Second, an agreement regarded the granting of a contract for construction of the dam.[82] The third section dealt with the financial arrangement for construction and maintenance of the dam.[83] The agreements suggested that the dam would be used for other uses than hydroelectric power.

The Owens Fall Dam completed construction in 1954. This agreement continues to be binding today since there has been no new agreement and Uganda continues to enjoy the power supply provided from the dam.

2. Post-Colonial Treaties

a. The Nile Waters Agreement of 1959

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[80] *His Majesty's Ambassador at Cairo to the Egyptian Minister for Foreign Affairs ad interim,* Exchange of Notes Constituting an Agreement Between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of Egypt Regarding the Construction of the Owen Falls Dam, Uganda, Cairo, 30 May 1949.

[81] United Nations Legislative Series, Legislative Texts and Treaty Provisions Concerning the Utilization of International Rivers for Other Purposes Than Navigation, U.N. Doc. St/Leg/Ser.B/12, 108-09(1963).

[82] United Nations Legislative Series, Legislative Texts and Treaty Provisions Concerning the Utilization of International Rivers for Other Purposes Than Navigation, U.N. Doc. St/Leg/Ser.B/12, 110-11 (1963).

[83] United Nations Legislative Series, Legislative Texts and Treaty Provisions Concerning the Utilization of International Rivers for Other Purposes Than Navigation, U.N. Doc. St/Leg/Ser.B/12, 114-115 (1963).

With Egypt still facing such a dire water situation, as highlighted in the 1946 Exchange of Notes, it was still very much in the country's interest to ensure a stake of the Nile's water. Therefore when Sudan gained independence from Great Britain in 1956 and claimed that it was not bound by any treaty entered into on her behalf by the British government, Egypt agreed to reallocate the Nile flow in the treaty of 1959.

The Nile Waters Agreement of 1959 was signed between Egypt and Sudan on November 4, 1959. The new allocation gave 55.5 km³ to Egypt and 18.5 km³ to Sudan, leaving no allocation of water to other riparian countries. The countries were clear to emphasize that the 1959 Treaty did not replace the 1929 treaty. Instead, this new agreement was an adaptation and extension of the 1929 Agreement. The preamble of the 1959 Agreement stated that the 1929 Treaty only provided for partial use of the Nile's water, so the Nile's water was not fully allocated. The 1959 Agreement would allocate for full utilization of the Nile waters. By signing, Sudan was renouncing any claim to the invalidity of the 1929 Agreement.

The Agreement was based on the following data:[84]

> Average Nile flow in Aswan is 84 billion m³
> Evaporation losses from Lake Nasser is 10 billion m³
> Available water is 74 billion m³

The 1959 agreement also gave Egypt the right to construct the Aswan High Dam.[85] In Section 5 of the treaty, Egypt and Sudan reiterate the power to approve or veto any projects on

[84] Kliot at 43.

[85] Amdetsion, *supra* note 4 at 20.

the Nile as set forth in the 1929 treaty.[86] The 1959 Agreement is still binding on Egypt and the Sudan.

Upper riparian States argue that they are not bound by the 1959 Agreement to which they were not a party.[87] However, since the 1959 Agreement did not replace or render the 1929 Agreement void, the countries that were bound by the 1929 Agreement continue to be bound by the 1929 Agreement and its extension: the 1959 Agreement.

b. 1967 Nile Hydro-meteorological Survey (with UNDP Agreement)

On August 17, 1967, Egypt, Kenya, Sudan, Tanzania, Uganda, the United Nations Development Programs (UNDP) and the World Meteorological Organization (WMO) signed an agreement for the hydro-meteorological survey of Lake Victoria, Kyoga, and Albert.[88] Its purpose was to measure the water level of Lake Victoria and its flow to the Nile.[89]

This agreement, like the 1949 Owens Fall Dam Agreement, indicates the willingness that Egypt and Sudan to enter agreements with other riparian countries. In both agreements, Egypt and Sudan recognize the need for cooperation among riparian states to achieve an end sum greater than its parts. With water resources shrinking and populations exploding, the need for

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[86] "[A]n agreement to construct any works on the river, outside the boundaries of the two Republics, the Joint Technical Commission shall after consulting the authorities in the Governments of the States concerned, draw all the technical execution details and the working and maintenance arrangements. And the Commission shall, after the sanction of the same by the Governments concerned, supervise the carrying out of the said technical agreements."

[87] Amdetsion, *supra* note 4 at 15. *See Quenching Egypt's Growing Thirst for Water*, RADIO NETH. AFRIQUE, Sept. 3, 2007, http://www.bureauafrique.nl/autresdepartements/africa/waterweek/Wateregypt (last visited Feb. 23, 2009).

[88] Report of the Hydrometeorological Survey of the Catchments of Lakes Victoria, Kyoga, and Albert (Burundi, Egypt, Kenya, Rwanda, Sudan, United Republic of Tanzania, and Uganda), 1 Meteorology and Hydrology of the Basin Part II Vol. 1, Part 1, 9 (1974)

[89] United Nations Legislative Series, Legislative Texts and Treaty Provisions Concerning the Utilization of International Rivers for Other Purposes Than Navigation, U.N. Doc. St/Leg/Ser.B/12, 144 (1963).

cooperation continues to the present day.

c. Kagera Basin Agreement 1977

Burundi, Rwanda and Tanzania signed an agreement for the establishment of the Organization for Management and Development of the Kagera River Basin on August 24, 1977.[90] The agreement does not mention the 1929 or 1959 treaties. No mention is made of Egypt, Sudan or any other riparian country except in Article 19, which provided "agreement is open to accession by Uganda", which joined in 1981. The Commission to oversee the implementation of this agreement is composed of a representative from each of the three signatories.

Chapter I of the agreement focuses on the projects to be carried out in the Kagera Basin. Article 2 provides an exhaustive list of projects:

(a) Water and hydropower development

(b) The furnishing of water and water-related services for mining and industrial operations, potable water supplied for other needs

(c) Agriculture and livestock development, forestry and land reclamation

(d) Mineral exploration and exploitation

(e) Disease and pest control

(f) Transport and communications

(g) Trade

(h) Tourism

(i) Wildlife conservation and development

(j) Fisheries and aquacultural development

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[90] Agreement for the establishment of the Organization for the Management and Development of the Kagera River Basin Concluded at Rusumo, Rwanda, on 24 August 1977. No. 16695.

(k) Industrial development including fertilizer production, exploration and exploitation of peat

(l) Environmental protection

Though this list seems to give the three countries authority to initiate many types of projects, its blatant disregard of the 1929 treaty greatly weakens the power of this agreement. This treaty can only be analyzed through the lens of the 1929 treaty. Only after Egypt approves the projects, as provided in the 1929 and 1959 treaties, can this agreement come into effect. This agreement builds upon the 1929 and 1959 treaties, but does not abrogate them.

d. 1993 Framework for General Cooperation Between Ethiopia and the Arab Republic of Egypt

After the 1902 agreement, Ethiopia did not sign any agreements with Egypt until the 1993 Framework for General Cooperation Between Ethiopia and the Arab Republic of Egypt. In the preamble, the countries acknowledge "their long history of close relations and linked by the Nile River with its basin as a center of mutual interest."[91] Due to the countries' mutual interest in the Nile Basin, they committed to "good neighbourliness." However, the framework is very vague and lacks any specific commitments. For example, Article 4 states:

> The two parties agree that the issue of the use of the waters shall be worked out in detail through discussions by experts from both sides, on the basis of the rules and principles of international law.

Article 4 does not set up a commission or even specify the experts to be used in negotiations. All eight articles of this agreement are equally evasive in setting concrete terms of how to create peace and a collaborative nature between the two countries regarding the Nile River.

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[91] 1993 Framework for General Cooperation Between Ethiopia and the Arab Republic of Egypt, 1 July 1993.

Article 5 states that neither country may engage in activity that "may cause appreciable harm to the interests of the other party." Though not stated explicitly, this seems to be a reaffirmation of the 1902 agreement and the 1929 treaty language that no works can be undertaken which may "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."[92] Since the majority of the Nile's flow comes from Ethiopia and Egypt is downstream of Ethiopia, Article 5 seems to apply to projects potentially undertaken by Ethiopia.

Even if Ethiopia argues that she is not bound by the 1902 Agreement, Ethiopia commits to causing no harm to Egypt in the 1993 Agreement, a proposition which Egypt has argued is tantamount to preserving the status quo. Furthermore, the 1993 Agreement is still binding. The next Part confronts the arguments made by Ethiopia and other upstream riparians to invalidate the colonial-era treaties and concludes that despite state succession, the colonial-era treaties are still binding.

III. State Succession, Changed Circumstances, and *Jus Cogens*

Once they gained independence in the 1950s and 1960s, all of the Nile riparian States other than Egypt and Sudan renounced the colonial-era Nile water treaties signed on their behalf by their colonizers. Sudan threatened to renounce the 1929 Treaty, which resulted in a new agreement between Egypt and Sudan in 1959. Tanzania announced its eventual withdrawal from the 1929 Treaty via the Nyerere Doctrine with Uganda and Kenya following suit. Though not grounded in the same theory of state succession, Ethiopia declared its entitlement to the Nile's

[92] Exchange of Notes Between His Majesty's Government in the United Kingdom and the Egyptian government in Regard to the Use of the Waters of the River Nile for Irrigation Purposes, Mohamed Mahmoud Pasha to Lord Lloyd, Cairo, Egypt, 7 May 1929.

waters despite the 1902 Treaty it signed as an independent State. Rwanda, Burundi, and the Democratic Republic of Congo have also renounced their colonial-era obligations.[93]

Unflinchingly, Egypt has maintained that the other riparian States are bound to these colonial-era treaties, granting to Egypt the vast majority of water and veto power over any projects that would interrupt the Nile's flow. The former colonial States typically turn to the law of state succession to declare the treaties abrogated. Even Ethiopia's argument to abrogate the 1902 Treaty turns largely on its novel interpretation of state succession law. The upper riparians' arguments that state succession invalidates colonial-era treaties are not without merit, though they ultimately fall short for several reasons.

In the most comprehensive statement of the law, the United Nations adopted the Vienna Convention on State Succession in Respect of Treaties in 1978 ("1978 Convention"),[94] which

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[93] The Democratic Republic of Congo signed an agreement as an independent state—the Independent State of Congo or Congo Free State—in 1906 with the United Kingdom restricting its use of the Nile. *See* S. Ahmed, Principles and Precedents in International Law Governing the Sharing of Nile Waters, in THE NILE: SHARING A SCARCE RESOURCE, P.P. Howell and J.A. Allan, eds., 351, 356 (1994) ("Agreement between Great Britain and the Congo Free State. . . signed in London on May 9th 1906 bringing modification to the Brussels Agreement of May 12th 1894. In its third article of the 1906 Agreement the Government of the Congo Free State undertook not to construct or allow to be constructed, any work on or near the Simliki or Isango rivers, which might reduce the volume of waters flowing into Lake Albert, except in agreement with the Government of the Anglo-Egyptian Sudan.") France later colonized Middle Congo (Brazzaville) and Belgium colonized Belgian Congo (Leopoldville), both of which became independent in 1960 and joined to form the Republic of Congo. *See* THE EFFECT OF INDEPENDENCE ON TREATIES: A HANDBOOK, THE INTERNATIONAL LAW ASSOCIATION 4 (1965) (showing a chart of independence). The Republic of Congo later became Zaire and then the Democratic Republic of Congo.

"Great Britain (on behalf of Tanganyika) and Belgium (on behalf of Rwanda and Burundi) signed in London on 23rd November 1934, concerning the Kajera river, one of the tributaries of Lake Victoria. . . " preventing construction work which would damage the flow of the Kagera to Lake Victoria. *Id.*, at 357. *But see* Okidi, at 340 (claiming that "we have not seen a treaty, imposing any obligations on Zaire, Rwanda, or Burundi" relating to the Kagera Basin as a tributary to the Nile). This claim is false – clearly Belgium did sign agreements on their behalf. However, absent agreements binding Burundi and Rwanda to Sudan or Egypt, Burundi and Rwanda may seek mutual abrogation or renegotiation of their obligations under the 1934 agreement with Tanzania, as she is the successor-state to Great Britain in this agreement.

[94] 1978 Vienna Convention on State Succession in Respect of Treaties, 17 ILM 1488 (1978) [Aug. 23, 1978, 1946 U.N.T.S. 3]. It is debatable how much the Convention did to capture the actual state of international law. *See, e.g.*, Reply of the Republic of Hungary in the *Gabçikovo-Nagymaros Project* case, p173, ¶3.157 (asserting that the 1978 Convention "is widely regarded as an unsuccessful exercise in international law-making and which does not

entered into force in 1996.[95] The 1978 Convention partially enshrined the "clean slate" principle underlying the Nyerere Doctrine; the rationale offered by newly independent States that successor States are not bound by any treaties entered into by their colonial predecessors.[96] Yet, there are several factors that complicate the picture. For one, Article 7 of the 1978 Convention limits its application to future State successions.[97] More importantly, Article 12 excepts from the "clean slate" principle treaties that relate to the rights and obligations of foreign States' use of *territory*. In applying Article 12, the ICJ held that treaties respecting the use of international watercourses are *territorial* treaties for the purposes of the Convention and remain valid even after state succession.[98]

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correspond to subsequent practice") (quoted in MATTHEW CRAVEN, THE DECOLONIZATION OF INTERNATIONAL LAW: STATE SUCCESSION AND THE LAW OF TREATIES 16 n.50 (2007)). Yet Egypt and Ethiopia are both became parties to the Convention in the 1980s—binding themselves to it—while Sudan and the Democratic Republic of Congo both signed the Convention in 1978 without ratifying it. *See* United Nations Treaty Collection, Chapter XXIII Law of Treaties, 2. Vienna Convention on Succession of States in Respect of Treaties, Status as at Feb. 27, 2011 *available at* http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XXIII-2&chapter=23&lang=en.

[95] The 1978 Convention entered force on November 6, 1996 in accordance with Art. 49(1). *Id.*

[96] 1978 Convention, Art. 16 ("PART III. NEWLY INDEPENDENT STATES SECTION 1. GENERAL RULE. *Article 16. Position in respect of the treaties of the predecessor State.* A newly independent State is not bound to maintain in force, or to become a party to, any treaty by reason only of the fact that at the date of the succession of States the treaty was in force in respect of the territory to which the succession of States relates.").

[97] 1978 Convention. Article 7: *Temporal application of the present Convention* makes clear that the Convention only applies prospectively, though that this is "without prejudice to the application of any of the rules set forth" already applicable under international law. In the 1960s, at the time of independence, the state of international law leaned towards principles of continuity of law. The 1978 Convention represented a progressive development of international law that would not necessarily have applied at the time the Nile riparians gained independence. *See* Craven 80-90 (discussing the debate between two scholars, one representing the "universal succession" doctrine—that all treaties devolve onto successor states to maintain the continuity of law—and one the "clean slate" doctrine; and noting that the "clean slate" doctrine was part of a progressive development that gained traction in the late 1960s, while the 1978 Convention, while progressive in some respects, still relied heavily on the work of D. O'Connell, who favored the continuity of law).

[98] *Gabçikovo-Nagymaros Project (*Hungary/Slovakia*)*, Judgment, I. C. J. Reports 1997 ¶123. Though the relevant paragraph focuses on the *navigational* aspect of the transboundary waters, the treaty the ICJ upholds was principally focused on non-navigational uses of the Danube's waters—the very issue at stake with the Nile waters treaties.

> . . . The [1977] Treaty [between Hungary and Czechoslovakia] also established the navigational régime for an important sector of an international waterway, in particular the relocation of the main international shipping lane to the bypass canal. In so doing, it inescapably created a situation in which the interests of

Thus, even in the straightforward attempt of the former British colonies—Kenya, Tanzania, Uganda—to abrogate the 1929 Treaty, state succession law does not succeed in voiding the treaty. The same principle would apply to claims made by Burundi, Rwanda, and the Democratic Republic of Congo. Under state succession law, Ethiopia's novel claim that she is not bound by her 1902 agreement stands on still shakier footing.

Yet there are other applicable principles of international law at play that might serve to abrogate unjust treaties and allow for a more equitable allocation of Nile waters. The principle of *rebus sic stantibus* (changed circumstances), enshrined in the 1969 Vienna Convention on the Law of Treaties ("Treaty Convention") art. 62,[99] is related to the law of state succession and is an independent justification for the abrogation of treaties. Where there has been a fundamental change in circumstances, a treaty is void. Yet, the principle of *rebus sic stantibus* has never

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> other users of the Danube were affected. Furthermore, the interests of third States were expressly acknowledged in Article 18, whereby the parties undertook to ensure "uninterrupted and safe navigation on the international fairway" in accordance with their obligations under the Convention of 18 August 1948 concerning the Régime of Navigation on the Danube.
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> In its Commentary on the Draft Articles on Succession of States in respect of Treaties, adopted at its twenty-sixth session, the International Law Commission identified "treaties of a territorial character" as having been regarded both in traditional doctrine and in modern opinion as unaffected by a succession of States *(Official Records of the United Nations Conference on the Succession of States in respect of Treaties,* Vol. III, doc. A/CONF.80/16/Add.2, p. 27, para. 2). The draft text of Article 12, which reflects this principle, was subsequently adopted unchanged in the 1978 Vienna Convention. The Court considers that Article 12 reflects a rule of customary international law; it notes that neither of the Parties disputed this. Moreover, the Commission indicated that "treaties concerning water rights or navigation on rivers are commonly regarded as candidates for inclusion in the category of territorial treaties" *(ibid.,* p. 33, para. 26). The Court observes that Article 12, in providing only, without reference to the treaty itself, that rights and obligations of a territorial character established by a treaty are unaffected by a succession of States, appears to lend support to the position of Hungary rather than of Slovakia. However the Court concludes that this formulation was devised rather to take account of the fact that, in many cases, treaties which had established boundaries or territorial régimes were no longer in force *(ibid,* pp. 26-37). Those that remained in force would nonetheless bind a successor State.
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> Taking all these factors into account, the Court finds that the content of the 1977 Treaty indicates that it must be regarded as establishing a territorial régime within the meaning of Article 12 of the 1978 Vienna Convention. It created rights and obligations "attaching tom the parts of the Danube to which it relates; thus the Treaty itself cannot be affected by a succession of States. The Court therefore concludes that the 1977 Treaty became binding upon Slovakia on 1 January 1993.

[99] May 23, 1969, 1155 U.N.T.S. 331 (*rebus sic stantibus*).

successfully abrogated a treaty,[100] and the fact of state succession alone does not meet the *rebus sic stantibus* threshold for territorial treaties in this context.

The international law principle that may go furthest in abrogating these colonial-era treaties is *jus cogens*, the principle that some agreements between sovereigns can violate accepted fundamental values shared by the international community and are therefore void *ab initio*. While the treaties entered into during the colonial era did not violate *jus cogens* at the time of their signing, the explosion of population and the concomitant scarcity of water to meet vital human needs may render the extant treaties void. In light of the insufficiency of state succession law to void the colonial-era treaties, the strongest doctrinal approach to abrogating the colonial-era treaties would be to combine the principles of *rebus sic stantibus* with *jus cogens*.

This Part will outline the arguments for abrogating the colonial-era treaties made by Ethiopia, Tanzania, and Sudan; outline and apply the law of state succession to those arguments; and then summarize the principles of *rebus sic stantibus* and *jus cogens*. Part IV will lay the factual groundwork for applying these principles, and Part V will elaborate on them as a doctrinal vehicle and apply them to the Nile Basin dispute.

A. Post-Colonial Responses to Nile Waters Treaties

1. Ethiopia Rejects the Nile Waters Agreements

The 1902 Treaty is often ignored in the literature and in practice. Amdetsion writes, "By contrast to the cooperation seen in Egyptian-Sudanese relations, Ethiopia has not entered into

[100] The principle of *rebus sic stantibus* is enshrined in Vienna Convention on the Law of Treaties, May 23, 1969, 1155 U.N.T.S. 331, art. 62. *See* CRAVEN 54 n.216 (noting that *rebus sic stantibus* "has never been ground as a justifiable basis for the termination of an agreement").

any binding treaties with either Egypt or Sudan concerning the allocation of the Nile's waters."[101] The Eritrean representative to the Nile Basin Initiative noted that the 1902 Agreement has never been brought up at NBI meetings, while the 1929 and 1959 treaties are consistently mentioned.[102] Yet, on May 15, 1902 in Addis Ababa, Ethiopia and the United Kingdom (acting for Egypt and the Anglo-Egyptian Sudan), signed a treaty regarding the frontiers between the Anglo-Egyptian Sudan, Ethiopia and Eritrea. Article III of the treaty concerned the Nile waters originating in Ethiopia and provided:[103]

> His Majesty the Emperor Menelik II, Kind of kings of Ethiopia, engages himself towards the Government of His Britannic Majesty not to construct or allow to be constructed, any works across the Blue Nile, Lake Tsana or the Sobat, which would arrest the flow of their waters into the Nile except in agreement with his Britannic Majesty's Government and the Government of the Sudan.[104]

The other treaties concluded among the U.K., Italy, and France would not have bound Ethiopia because Ethiopia remained an independent sovereign during the time period that such agreements were signed.[105] Yet there is no question that Ethiopia bound itself to the 1902 treaty.

Given the starkly unfavorable terms, Ethiopia has nonetheless repeatedly argued that the 1902 treaty is void. Eminent international law and water scholar Dante Caponera summarized Ethiopia's arguments questioning the validity of the agreement in the late 1950s as the rest of East Africa moved towards independence:

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[101] Amdetsion, *supra* note 4 at 12.

[102] Author's Interview with Mebrahtu Iyassu, Director General, Water Resources Department, The State of Eritrea, March 11, 2011 in Asmara, Eritrea. Mr. Iyassu is a Nile Bain Initiative TAC member and attended the Nile-COMM Meetings on behalf of Eritrea, though Eritrea is only an "observer" to the NBI.

[103] *See* Okoth-Owiro, at 6-7; O. Okidi at 324.

[104] CITE 1902 Treaty.

[105] For instance the 1906 agreement among Italy, France, and the U.K.; and the 1925 exchange of Notes between the U.K. and Italy.

1. The agreements… between Ethiopia and the UK have never been ratified. Customary rights which might appear from the behaviour between lower riparians and Ethiopia would not be binding on the latter country if a purely positivistic approach toward interpretation of the sources of international law would be upheld.
2. Ethiopia's 'natural rights' in a certain share of the waters in its own territory are undeniable and unquestioned. However, no treaty has ever mentioned them. This fact would be sufficient for invalidating the binding force of those agreements, which have no counterpart in favour of Ethiopia. In Roman law such a pact would be null and void; it is likewise in international law. This is explainable by the international political conditions of Ethiopia in 1902.
3. The agreements were signed between Ethiopia and the UK (for Egypt and the Sudan). Since the latter question the validity of their own water agreements, Ethiopia, which had not one single benefit from them, had even greater reason for claiming of their unfairness and invalidity. The research for new agreements by Egypt and Sudan demonstrates the non-viability of these agreements.
4. The UK in 1935 recognized the annexation of the Ethiopian Empire by Italy… UK's recognition of annexation is an act which invalidated all previous agreements between the two governments. Ethiopia has never asked for renewal of the Nile agreement after such recognition.[106]

To take these arguments in turn: The first is inadequate on its face. Even if one were to take a purely positivistic approach to law, Ethiopia would be bound to the terms of the 1902 Treaty that she signed. She's not constrained solely by "customary rights" or "behaviour" but by the terms of a treaty.

The second argument combines three premises: (1) that Ethiopia has a "natural right" to a portion of waters originating in her territory, (2) that Ethiopia didn't benefit from the treaty, and (3) that Ethiopia did not freely enter into the treaty because of the geopolitics of the time.

(1) Ethiopia should be careful what "natural rights" arguments she makes, given Egypt's heavy reliance on its "historic" and "natural" rights in the same waters. Indeed contemporary international watercourses law has decisively said that a State is neither entitled to an absolute

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[106] O. Okidi, at 324 (quoting D.A., Caponera, *The Nile: Legal and Technical Aspects*, mimeo paper of August 1958, English translation of the Italian *Bachino Internationale del Nilo Consideration Giurridishe* in XIV LA COMMUNITE INTERNATIONALE 45-46 (Jan. 1958).).

sovereign right to waters that originate in its territory, nor are downstream States entitled to an absolute right to the unadulterated flow of those waters. Part VI discusses these two theories—absolute territorial sovereignty and absolute territorial integrity—in great detail. Ultimately, while Ethiopia *may* be entitled to an equitable portion of the water in its Nile tributaries, it has no natural right that trumps a valid treaty.

(2) Ethiopia clearly *did* stand to benefit from its 1902 agreement with Great Britain. By linking itself to the unadulterated flow of the Nile to Egypt, Ethiopia bought itself the possibility of British support against Italian incursions or at minimum, British neutrality. Italy had already agreed in 1901 to manage water relations with Great Britain,[107] and if Britain had seen an independent Ethiopia as a threat to the Nile's headwaters, then Britain may have later backed Italy in her attempts to gain control over Ethiopia. In fact Ethiopia's strategy appears to have paid immediate dividends. In 1906, Great Britain, Italy and France signed an Agreement, providing, "In the event of the status quo being disturbed, France, Great Britain and Italy shall make every effort to preserve the integrity of Ethiopia."[108]

(3) While it's clear that Great Britain likely had the upper hand in negotiating the treaty, it's unlikely that such geostrategic calculations can amount to a "duress" defense that would render the agreement void. At least one other Ethiopian scholar has argued the duress defense.[109] Rather, this type of political consideration, unmentioned in the text of a treaty, is often—if not always—at work in international negotiations.

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[107] *See Id.,* at 325 (referring to the Protocol of April 1901 between Italy and Great Britain regulating use of water on the River Gash).

[108] HERTSLET, THE MAP OF AFRICA BY TREATY. Vol. II No. 100, at 436, 442 (3rd Edition, 1967) (quoted in O. Okidi, at 325).

[109] Degefu at 97.

The third argument again relies inappropriately on the notion that Ethiopia gained nothing from the treaty. Even discounting this part of the argument, it doesn't follow logically that Ethiopia's obligations under the treaty are void simply because Sudan and Egypt later reformulated their apportionment of the Nile waters wholly outside of the context of the 1902 Treaty. There may be other evidence to support the notion that Great Britain didn't intend for the 1902 Treaty to remain in force perpetually, but that evidence—if it exists—has not been sufficiently marshaled by Ethiopia. The third subsection speaks to the context in which Sudan compelled a renegotiation of the 1929 Treaty and signed the 1959 Treaty. There, the main point of contention is whether the 1959 Treaty abrogated the 1929 Treaty, but in no way is the 1902 Agreement implicated.

Finally, Ethiopia and various scholars place the most weight on the fourth argument, that because fascist Italy annexed Ethiopia in the 1930s—and because the United Kingdom officially recognized this annexation—that Ethiopia's prior international agreements were wiped clean.[110] This is essentially a modified "clean slate" state succession claim. As subpart B details, the "clean slate" doctrine doesn't apply to *territorial* treaties, including those involving non-navigational uses of transboundary waters. Moreover, Ethiopia's claim fails to stand on all fours with the traditional state succession arguments. Ethiopia was annexed for only five years, during which time several countries including the United States never recognized Italian control,[111] though Britain, Japan, and other European nations did. It would be a cruel trick if international

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[110] Degefu, at 111 (Great Britain recognized the Italian occupation of Ethiopia from 1935 until 1941 in the Italian Peace Treaty of 1947).

[111] U.S., Department of State, Publication 1983, *Peace and War: United States Foreign Policy, 1931-1941* (Washington, D.C.: U.S., Government Printing Office, 1943), pp.28-32 *available at:* http://www.mtholyoke.edu/acad/intrel/WorldWar2/italy.htm.

law were to construe a five-year period of coerced annexation as invalidating all of its previously enforceable rights and obligations. Or perhaps more perversely and even less likely, States could temporarily agree to be "annexed" in order to then declare independence and shirk prior unfavorable agreements.

Most devastatingly, in order to argue that the 1902 boundary with Eritrea was still valid, Ethiopia recently relied on portions of a 1902 agreement signed only months earlier that appeared as an Annex to the 1902 Treaty. During the border war with Eritrea and the international commission that resolved the boundary dispute, Ethiopia invoked several articles of the Annex, arguing strenuously for their continuing validity.[112] While borders are admittedly the *most* continuous legal agreements, it strains comprehension to suggest that *territorial* provisions contained in adjacent articles within the same agreement simultaneously could be void.

Despite the lack of merit to these arguments, Okidi reiterated them in 1994 to explain Ethiopia's contemporary contention that the 1902 Treaty is not in force.[113] Okidi takes for granted that the 1902 treaty ceased to be in effect, though he cannot pinpoint the exact moment when the treaty became invalid.[114] Rather, through a murky amalgamation of these weak arguments, he seeks inappropriately to sum them into a basket of reasons that outweighs the rule

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[112] Permanent Court of Arbitration, Eritrea-Ethiopia Boundary Commission, *Decision on Delimitation of the Border Between Eritrea and Ethiopia,* Apr. 13, 2002, at 57-59, *available at* http://www.pca-cpa.org/showpage.asp?pag_id=1150 (noting that the agreement relied upon in the border dispute appeared as an Annex to the May 15, 1902 Treaty, *id.* at ¶5.9, and that the Boundary Commission "found that there appeared to be no dispute between the Parties with regard to this portion of the border," *id.* at ¶5.7).

[113] *See* O. Okidi, at 324.

[114] *See* O. Okidi, at 339 (writing without clarification as to which point holds legal water in abrogating the 1902 treaty, "[u]nder the treaties examined here, Ethiopia, Kenya and Tanzania are not under any obligation regarding the use of water flowing to Lake Victoria and the Nile Basin).

of law, while acknowledging that each argument is itself not necessarily persuasive.[115]

Ethiopia has maintained its opposition to the 1902 Treaty, often simply by asserting its right to use the Nile's waters without mentioning the treaty whatsoever.[116] Naturally, Ethiopia opposed the 1959 Treaty between Egypt and Sudan, as it further assumed that those two countries were entitled to the overwhelming majority of the Nile waters. Ethiopia weighed in to assert its water rights by sending an Aide Memoir in 1957 to all diplomatic missions in Cairo, proclaiming:

> Ethiopia has the right and obligation to exploit its water resources for the benefit of present and future generations of its citizens [and] must, therefore, reassert and reserve now and for the future, the right to take all such measures in respect of its water resources.[117]

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[115] O. Okidi, at 324 ("The points listed here are important because they underscore the fact that Ethiopia did not, in the 1950s, recognize the treaty as binding. Whether the arguments are persuasive is a different matter. . . . [T]he argument about British recognition of the Ethiopian connection might be the more forceful [of the arguments], although the legal consequences of war are not entirely clear-cut."). Okidi further argues that the 1929 Treaty is invalid under the "clean slate" doctrine of state succession. Yet his argument seems to be mostly that the 1929 Treaty was not beneficial to the former British colonies Kenya, Tanzania, and Uganda and thus can be wiped away while treaties that were to their benefit remain in force. He makes this clear in his discussion of the Owen Falls Dam agreements signed between Egypt and Britain (on behalf of Uganda) between 1949 and 1953. *Id*. 330-33. "The agreement may be assumed to be binding upon Uganda whatever the change of government, so long as Uganda continues to enjoy the power supply [generated by the dam], provided that there was no new agreement and neither party renounced this agreement. Egypt assumed further obligations vis-à-vis the other two riparians of [L]ake [Victoria] , Kenya and Tanzania. . . . The binding force of that obligation seems to remain, even though Kenya and Tanzania have secured their independence. That Kenya and Tanzania after their independence may not have acceded to the Owen Falls Agreement is not of any legal consequence as regards the obligation Egypt undertook toward them. . . . The law of treaties requires, further, that should Egypt and Uganda decide to modify or revoke the stipulations relating to third party rights, they are under obligation to seek the concurrence of Kenya and Tanzania." *Id.* 332. This argument stands in stark opposition to the Nyerere Doctrine, holding that all colonial treaties are void unless renegotiated by the newly independent states or continue under customary international law, which Okidi argues invalidates the 1929 Treaty. The distinct reason why Egypt would still have obligations to Tanzania and Kenya under the Owen Falls Agreement but that Tanzania, Kenya and Uganda would *not* have obligations to Egypt under the 1929 Treaty seems to be the party who benefits.

[116] *See* Amdetsion, *supra* note 4 at 28 ("In the 1971 U.N. Water Conference at Mar del Plata, Ethiopia stated that if a basin-wide agreement was not reached to regulate the Nile, countries should proceed with unilateral appropriation. Ethiopia voiced similar displeasure with the 1959 Agreement at an OAU summit in Lagos, denouncing Egyptian plans to develop the Nile.")

[117] TESFAYE TAFESSE, THE NILE QUESTION: HYDROPOLITICS, LEGAL WRANGLING, MODUS VIVENDI AND PERSPECTIVES 95 (2001) (quoted in Amdetsion, *supra* note 4 at 27-28).

In the context of the Cold War, the United States supported Ethiopia as a Western ally against the Soviet-backed Egypt.[118] The United States National Security Council cited the need for regional countries to "take[] into account Ethiopia's interests" and that "[n]o step should be taken without getting permission from Ethiopia, without taking into account Ethiopia's legal right."[119] However, U.S. policy towards the Nile didn't extend beyond rhetoric.[120] Ethiopia continued to founder in its water development. Amdetsion attributes this to the World Bank's policy of not funding Nile water projects without the consent of Egypt and to Ethiopia's entry into the Soviet camp, undermining its sphere of influence in the West.[121] Yet Ethiopia's relations with the West remained strong until the communist Dergue took power in the mid-1970s[122] and the World Bank's policy was in fact consonant with international law enforcing the 1902 Treaty. Thus, while the United States' geopolitical positioning might have nodded towards Ethiopian water rights, such political arguments have no bearing on the binding nature of the 1902 Treaty. The U.S. may have found it politically expedient to call for Ethiopian interests to be considered, and nothing in the 1902 treaty (or any treaty) would create a barrier to Egypt being considerate of its neighbor. Yet, the World Bank was legally correct in withholding funds from Ethiopian projects on the Nile, whether it was motivated by shifting Western interests or not. Therefore, while Ethiopia has made several political, policy and flimsy legal arguments and has managed to all but erase the 1902 Treaty from regional dialogue, Ethiopia hasn't made a compelling legal

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[118] *See* Amdetsion, *supra* note 4 at 20-21.

[119] National Security Council, Draft United States Foreign Policy Statement, Dec. 30, 1960 (N.S.C. 6028) quoted in Gabre-Sellassie, The Blue Nile, at 21.

[120] Amdetsion, *supra* note 4 at 21.

[121] *Id*.

[122] *See* ROBERT G. PATMAN, THE SOVIET UNION IN THE HORN OF AFRICA: THE DIPLOMACY OF INTERVENTION AND DISENGAGEMENT 150-175 (1990).

argument to abrogate its obligations under the 1902 Treaty.

2. Tanzania Declares a "Clean Slate" with the Nyerere Doctrine

When Tanganyika[123] became independent from Great Britain in 1961, it followed a much clearer path with respect to its treaty obligations—it declared them prospectively void if not reaffirmed by Tanganyika within two years. President Julius Nyerere announced to the world his country's policy, making a unilateral break from the practice of signing devolution agreements—wherein successor States adopted many of their colonial predecessors' rights and obligations.[124] In essence, Nyerere's formulation adopted the *tabula rasa* or "clean slate" principle—where "successor [S]tates do not inherit obligations arising out of the treaties concluded by their predecessors"[125]—with slight modifications. The "Nyerere Doctrine" was imitated by multiple newly independent African States[126] and was proclaimed as a progressive development towards

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[123] In 1964 Tanganyika joined with Zanzibar to become modern-day Tanzania.

[124] *See* P. K. MENON, THE SUCCESSION OF STATE IN RESPECT OF TREATIES, STATE PROPERTY, ARCHIVES, AND DEBT 7-8 (1991) (noting "Towards the beginning of the sixties, newly independent States started realizing the dubious legal consequences of devolution agreements" and that Tanganyika's action was unilateral).

[125] *See* Amdetsion, *supra* note 4 at n.187 (citing Yehenew Walilegne, The Nile Basin: From Confrontation to Cooperation, 27 Dalhousie L.J. 503, 511 (2004). See also A.P. Lester, State Succession to Treaties in the Commonwealth, 12 Int'l & Comp. L. Q. 475, 477 (1963) ("[N]ewly independent States which do not result from a political dismemberment and cannot fairly be said to involve political continuity with any predecessor, start life with a clean slate in the matter of treaty obligations ...."). . . .).

[126] P. K. MENON, THE SUCCESSION OF STATE IN RESPECT OF TREATIES, STATE PROPERTY, ARCHIVES, AND DEBT 8 (1991) (noting that "The precedent set by Tanganyika in 1961 was followed by at least twenty-three countries until 1974, including Bahamas, Barbados, Botswana, Fiji, Guyana, Kenya, Lesotho, Malawi, Mauritius, Tonga, Uganda, and Zambia.). *See* OFFICIAL RECORDS OF THE UNITED NATIONS CONFERENCE ON THE SUCCESSION OF STATES IN RESPECT OF TREATIES, Vol. III, doc. A/CONF.80/16/Add.2, p. 20, § 6 (quoting from the declarations of *inter alia* Uganda and Kenya), p. 21 § 11 (quoting Rwanda's statement), § 12 (quoting Burundi's statement). *See also*, Christina Carroll, *Past and Future Legal Framework of the Nile River Basin*, 12 GEO. INT'L. ENVTL. L. REV. 269, 278-79 (1999) ("In determining whether colonial treaties were binding on them, newly independent states in the Nile region did not cite any particular school of international law, but developed their own justifications for renouncing colonial treaties. According to the Nyerere Doctrine, developed by Tanzania, treaties applying to territories under British colonial administration lapsed when the territories became independent. Under this doctrine, the colonial treaties are not binding on the newly independent states because the new states never took part in the negotiations creating the obligations under the treaties. Thus, Tanzania, Uganda, and Kenya argued that the 1929 exchange of notes lapsed when they became independent in 1961, 1962, and 1963 respectively. Egypt, however, maintained that

empowering these new, free States.[127]

The 1978 Convention mostly adopted the "clean slate" approach for newly independent States. However, the 1978 Convention and principles of international law maintain that territorial treaties, including those governing international watercourses, remain in force despite state succession.[128] Thus, while the Nyerere Doctrine has been mostly enshrined into international law, Nyerere's assertion that Tanganyika could abrogate the 1929 Nile Waters Agreement is not good law.

In a 1961 declaration to the Secretary-General of the United Nations, the Government of Tanganyika articulated what would become known as the Nyerere Doctrine.

> As regards bilateral treaties validly concluded by the United Kingdom on behalf of the territory of Tanganyika, or validly applied or extended by the former to the territory of the latter, the Government of Tanganyika is willing to continue to apply within its territory on a basis of reciprocity, the terms of all such treaties for a period of two years from the date of independence—unless abrogated or modified earlier by mutual consent. At the expiry of that period, the Government of Tanganyika will regard such of these treaties which could not by the application of rules of customary international law be regarded as otherwise surviving, as having terminated."[129]

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the 1929 exchange of notes remained applicable "pending further agreement.'"); Okoth-Owiro, at 14 (noting that Tanganyika's approach was followed by Kenya, Uganda, Burundi and Rwanda).

[127] For a detailed discussion of the Nyerere Doctrine see, YILMA MAKONNEN, THE NYERERE DOCTRINE OF STATE SUCCESSION AND THE NEW STATES OF EAST AFRICA (1984). See also, MUDIMURANWA A. B. MUTITI, STATE SUCCESSION TO TREATIES IN RESPECT OF NEWLY INDEPENDENT AFRICAN STATES (1976). For a discussion of the Nyerere Doctrine, state succession and African socialism, see YILMA MAKONNEN, INTERNATIONAL LAW AND THE NEW STATES OF AFRICA (1983).

[128] 1978 Convention, Article 12. *See* Subpart B for a full discussion.

[129] Problems of State Succession in Africa: Statement of the Prime Minister of Tanganyika, 11 INT'L & COMP. L.Q. 1210, 1211 (1962). *See also*, OFFICIAL RECORDS OF THE UNITED NATIONS CONFERENCE ON THE SUCCESSION OF STATES IN RESPECT OF TREATIES, Vol. III, doc. A/CONF.80/16/Add.2, p. 18, § 2. (discussing Article 9 of the 1978 Convention).

The Government also sent a Note to Great Britain, Egypt, and the Sudan in regards to the 1929 Nile Waters Agreement.

> The Government of Tanganyika, conscious of the vital importance of Lake Victoria and its catchment area to the future needs and interests of the people of Tanganyika, has given the most serious consideration to the situation that arises from the emergence of Tanganyika as an independent sovereign [S]tate in relation to the provisions of the Nile Waters Agreements on the use of the waters of the Nile entered into in 1929 by means of an exchange of notes between the Governments of Egypt and the United Kingdom. As the result of such considerations, the Government of Tanganyika has come to the conclusion that the provisions of the 1929 Agreement purporting to apply to the countries under British Administration are not binding on Tanganyika. At the same time, however, and recognizing the importance of the waters of the Nile that have their source in Lake Victoria to the governments and people of all riparian [S]tates, the Government of Tanganyika is willing to enter into discussions with other interest governments at the appropriate time, with a view to formulating an agreeing on measures for the regulation and division of the waters in a manner that is just and equitable to all riparian [S]tates and the greatest benefit to all their peoples.[130]

On its face, Nyerere's position is entirely reasonable. In fact, contemporary international water law urges basin-wide management and equitable utilization. Yet these principles are designed to operate in the absence of specific bilateral agreements and they do not alone overcome a legally binding treaty that failed to square with these principles. In reply to Tanganyika, Egypt "maintained that pending further agreement, the 1929 Nile Waters Agreement, which had so far regulated the use of the Nile waters, remained valid and applicable."[131]

"Although the tabula rasa doctrine has gained widespread acceptance, the laws governing succession of [S]tates to treaties remains murky (a 'juridical gray zone' as described by Bruno

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[130] Okoth-Owiro, at 14; *See* OFFICIAL RECORDS OF THE UNITED NATIONS CONFERENCE ON THE SUCCESSION OF STATES IN RESPECT OF TREATIES, Vol. III, doc. A/CONF.80/16/Add.2, p. 33, § 27 (commenting on Article 12, discussing Tanganyika's declaration).

[131] OFFICIAL RECORDS OF THE UNITED NATIONS CONFERENCE ON THE SUCCESSION OF STATES IN RESPECT OF TREATIES, Vol. III, doc. A/CONF.80/16/Add.2, p. 33 § 27 (commenting on Article 12).

Simma) with State practice historically being extraordinarily inconsistent."[132] The 1978 Convention differentiated among different pathways towards state succession, largely crediting the *tabula rasa* formulation in the newly independent state context,[133] while largely rejecting it in the context of uniting or separating states.[134] In arguing that the 1929 Treaty is void, Amdetsion notes that after decades of disparate state practice, "international consensus seems to have coalesced in favor [of the "clean slate"] doctrine after the inconsistencies of the 1960s and 1970s."[135] He then cites the various exceptions to the doctrine, while ignoring the most relevant exception that defeats his point with respect to the 1929 Treaty—*territorial* treaties.[136]

The Nyerere Doctrine gained popularity and praise throughout Africa. Uganda and Kenya both made similar declarations upon independence.[137] The doctrine's underlying principle was largely adopted into international law, that newly independent states should not be bound by their predecessors' international agreements. Yet even giving the twin Nyerere and

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[132] Amdetsion, *supra* note 4 at 24.

[133] 1978 Convention Part III. Newly Independent States, esp. Art. 16.

[134] 1978 Convention Part IV. Uniting and separation of States, esp. Art. 31.

[135] Amdetsion, *supra* note 4 at 24.

[136] *See Id.* at 24-25 (acknowledging in the 1978 Convention a "latent ambiguity" in the "clean slate" principle expressed in Article 16, and discussing that "these agreements continue to be valid with respect to new states when they reflect norms of customary international law [or] . . . when there is a possible continuity in identity between a present state and its previous incarnation . . . [or] more plausibl[y] [that even newly independent states] do inherit certain treaties which deal with boundaries that are 'territorial, real. . .or localized;'" then only citing the Article 11 boundary exceptions and ignoring the Article 12 territorial exceptions).

[137] *See* THE EFFECT OF INDEPENDENCE ON TREATIES: A HANDBOOK, THE INTERNATIONAL LAW ASSOCIATION 117-18 (1965) (reprinting the letter Uganda sent to the UN Secretary General on Feb. 12, 1963 reiterating the same proposed course of action as Nyerere's declaration); Okidi, at 329 (noting that "Kenya did, upon independence, adopt a position similar to the Nyerere Doctrine of succession to treaties, submitting that the Government of Kenya was willing to grant two years grace period in which the treaties would apply on the basis of reciprocity, or be modified by mutual consent. But those treaties which were not so modified or negotiated within the two years and 'which cannot be regarded as surviving according to the rules of customary international law will be regarded as having been terminated.' This would indicate that the [1929 Nile waters] treaty ceased to have effect with respect to Kenya as from December 12, 1965.").

clean slate doctrines their the most generous reading, the legal history is clear that the 1929 Nile Waters Agreement is still binding on Tanzania, Uganda and Kenya as successor states to Great Britain because of its territorial nature. Subpart B will discuss the legal principles in more detail, but first the next subsection addresses another legal argument offered by various states and scholars: that the 1929 Treaty was invalidated by the 1959 Treaty between Egypt and Sudan and their state practices.

3. The Effects of Egyptian and Sudanese State Practice and the 1959 Agreement for the Full Utilisation of the Nile Waters

After Sudan gained independence on January 1, 1956,[138] the new government "rejected the 1929 'treaty,' demanding an increase in the share of water to which Sudan was entitled."[139] Egypt sought to maintain cooperative relations with Sudan to ensure the completion of the Aswan High Dam.[140] On November 8, the two parties signed the Agreement for the Full Utilisation of the Nile Waters, increasing Sudan's share of the Nile's waters while continuing to allocate the large majority to Egypt.[141] This renegotiation raises the question of whether the 1959 agreement in effect voided the validity of the 1929 Treaty. Okidi claims that "Egypt considered the 1929 Agreement temporary pending determination of the political future of the

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[138] *See* THE EFFECT OF INDEPENDENCE ON TREATIES: A HANDBOOK, THE INTERNATIONAL LAW ASSOCIATION 6 (1965) (listing the various States that had gained independence as of 1965).

[139] Amdetsion, *supra* note 4 at 19-20 (quoting Manuel Schiffler, *Conflicts Over the Nile or Conflicts on the Nile?*, in WATER IN THE MIDDLE EAST: POTENTIAL FOR CONFLICTS AND PROSPECTS FOR COOPERATION 137, 140 (Waltina Scheumann & Manuel Schiffer eds., 1998). *See also*, Okoth-Owiro, at 13 (noting "Sudan denied the continued validity of the 1929 Nile Waters Agreement. In fact Egypt was compelled to negotiate a new treaty with its southern neighbour. . . .").

[140] *See* Amdetsion, *supra* note 4 at 19-20; Schiffler, at 140.

[141] CITE 1959 Treaty. *See also* Manuel Schiffler, *Conflicts Over the Nile or Conflicts on the Nile?* (stating that this Agreement "has until today been observed and is in many aspects regarded as a model for the allocation of water by mutual consent on international rivers.").

Sudan" and thus the 1929 Treaty should not "have longer life for Kenya, Tanzania, or Uganda" than it did for Sudan.[142] He further claims that in negotiating the 1959 Agreement, Egypt and Sudan "were beginning nearly with *tabula rasa* as far as the utilization and control of Nile waters was concerned. . . ."[143]

Yet far from unambiguously invalidating the 1929 Treaty, the 1959 Agreement continued to recognize the framework established in 1929. Indeed, in 1965 the International Law Association noted the "new agreement between Egypt and the Sudan was signed in 1959, wherein the existing rights were maintained in force. . . ."[144] The preamble of the 1959 Agreement implied that this new agreement was an adaptation and extension of the 1929 Treaty, expanding the parameters of water use—not invalidating them.[145] The very first provision lays out and affirms the continuity of the 1929 water allocations, assigning 48 million m^3 to Egypt and 4 million m^3 to Sudan.[146] The "full utilization" was not an abrogation of the previous

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[142] Okidi, at 329.

[143] *Id.*, at 333.

[144] THE EFFECT OF INDEPENDENCE ON TREATIES: A HANDBOOK, THE INTERNATIONAL LAW ASSOCIATION 353 (1965).

[145] 1959 Treaty ("And as the Nile waters Agreement concluded in 1929[3] provided only for the partial use of the Nile waters and did not extend to include a complete control of the River waters. . .").

[146] 1959 Treaty

First: THE PRESENT AQUIRED RIGHTS:

> 1. That the amount of the Nile waters used by the United Arab Republic unto this Agreement is signed shall be her acquired right before obtaining the benefits of the Nile Control Projects and the projects which will increase its yield and which projects are referred to in this Agreement; The total of this acquired right is 48 Milliards of cubic meters per year as measured at Aswan.
>
> 2. That the amount of the waters used at present by the Republic of Sudan shall be her acquired right before obtaining the benefits of the projects referred to above. The total amount of this acquired right is 4 Milliards of cubic meters per year as measured at Aswan.

agreement, but rather a recognition that the Nile produced, or could produce with technical improvements, more water than the 1929 Treaty specifically allocated.[147]

Commentators also offer a straw-man argument—that Egypt and Sudan seek to bind other riparians as third parties to the 1959 Agreement.[148] Without a doubt, two States cannot bind non-signatory third parties. But these are not the legal stakes here. Rather, the argument is, as above, that the 1902 and 1929 treaties remain operative, and that the 1959 Agreement between Sudan and Egypt to augment their bilateral relations has no bearing on the prior agreements between Egypt and other riparians.

Okidi offers a stronger and more specific argument. In negotiating the 1929 Treaty, he writes, "The Egyptian government pointed out that. . . Egypt reserved the right to renegotiate the issue [of water rights] at the time of consideration of the future of the Sudan. In [the 1929

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[147] *But see,* Okoth-Owiro, at 13 (citing a statement made by the United Kingdom on August 27, 1959:

> --the territories of British East Africa will need for their development more water than they at present use and will wish their claims for more water to be recognized by other states concerned. Moreover, they will find it difficult to press ahead with their own development until they know what new works downstream states will require on the headwaters within British East African Territory. For this reason the United Kingdom Government would welcome an early settlement of the whole Nile waters question.

Though compelling evidence that the United Kingdom recognized that *its* territories would require more water than they presently used, this statement does not indicate that the extant treaties were invalid, but simply that new terms might benefit the development of the upper riparians, and that such revision may indeed be desirable.

[148] *See, e.g.*, Amdetsion, *supra* note 4 at 27

> Both countries continue to argue (and Egypt in particular) that all Nile riparian states must abide by the Agreement's terms, despite the fact that no upper riparian state was a party to the 1959 Agreement. The upper riparian states had good cause to object to the Agreement's validity. Their strongest argument against the applicability of the 1959 Agreement, is also the simplest. Not a single upper riparian state is a signatory to the 1959 Agreement, and not one amongst them was ever consulted in the negotiations leading to the Agreement. As per Article 34 of the Vienna Convention of the Law of Treaties, "A treaty does not create obligations or rights for a third party without its consent." Ethiopia could also avail itself of this argument to repudiate the 1959 Agreement, as well as the 1929 Agreement, since it was an independent state not represented by Great Britain in negotiations.

agreement] Egypt made it clear, as a matter of principle, that the 1929 agreement was to be temporary, and its terms viewed as condition on future political developments."[149] Okidi's strongest claim lies in the final paragraph of Egypt's note assenting to the terms of Britain's correspondence:

> The present agreement can in no way be considered as affecting the control of the river which is reserved for free discussion between the two Governments in the negotiations on the question of the Sudan.[150]

This argument has two implications. First, and quite plausibly, the 1929 agreement was subject to later amendment pending the political status of the Sudan. Second, and less plausibly, the 1929 agreement ceased to bind other British colonies when Sudan and Egypt renegotiated in 1959. Without entering the subjective intentions of the two parties to the 1929 Treaty, it is clear that the central outstanding issues related to the allocation of water to and political status of Sudan—not the rights of other riparian colonies or Egypt's ability to veto projects farther upstream. Nonetheless, this remains Kenya, Tanzania, and Uganda's strongest legal argument against the validity of the 1929 Treaty, though they assert it less often than other theories.

Separately, several scholars have also argued that the colonial Nile agreements are invalid "based on the Egyptian and Sudanese practice of denouncing treaties signed by Britain on their behalf if they no longer reflect their development needs."[151] This reasoning is familiar to

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[149] Okidi, at __.

[150] 1929 Treaty, Note from Pasha to Lord Lloyd.

[151] Carroll, at 279 (citing Joseph Dellapenna, *The Nile as a Legal and Political Structure, in* THE SCARCITY OF WATER 121, 128 (Edward H.P. Brans et al. eds., 1997); Okidi, C. O. Okidi, *History of the Nile Basin and Lake Victoria Basins Through Treaties*, at 324; Yimer Fisseha, *State Succession and the Legal Status of International Rivers, in* THE LEGAL REGIME OF INTERNATIONAL RIVERS AND LAKES 177, 189 (Ralph Zacklin & Lucius Caflisch eds., 1981)). *See also*, Amdetsion, *supra* note 4 at 26 (citing to Carroll); Valerie Knobelsdorf, *The Nile Waters Agreements: Imposition and Impacts of a Transboundary Legal System*, 44 COLUM J. TRANSNAT'L L. 622, 635 (2006) (same).

any elementary school student who has seen his classmate get away with something—you broke the teacher's rules so now I should get to break the rules too. This logic may appeal to political sensibilities, a sense of fairness, or even have bearing on state practice; it's broad and indiscriminate application to "development needs" doesn't, however, fit with the law. The 1929 Treaty cannot be invalidated under the theory that Egypt and Sudan abandoned *other* treaties that impeded their development. If such an all-encompassing tit-for-tat rule applied, then treaties would ultimately lack *any* binding force where one party had abrogated some unrelated treaty at whatever point in history.

B. International Law of State Succession

The international law of state succession has struggled to parse out what rights and obligations pass from a predecessor State to its successor State. "State Succession arises when there is a definitive replacement of one state by another in respect of sovereignty over a given territory in conformity with international law."[152] State succession does not entail an automatic transfer of rights and obligations from the predecessor to the successor, and state practice with respect to state succession has varied widely.[153] Throughout the 1950s and 1960s most successor states were former colonial possessions of European predecessors, whereas the 1980s and 1990s saw the break up of the Soviet Union and the emergence of successor states through various

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[152] Okoth-Owiro, at 10.

[153] *See Id*. ("State succession is an area of great uncertainty and controversy. [State practice varies and] [n]ot many settled legal rules have emerged as yet. . . . In other words, it is not clear, from either writings on international law or the practice of states, how and to what extent a legal principle of state succession applies in the sense of the transmissibility of rights and obligations from one state to another. For state succession in fact does not entail automatic juridical substitution of the factual successor state in the complex sum of rights and obligations of the predecessor state (Godana, 1985:134).").

secessions and combinations of predecessor states.[154] These different pathways to statehood help to confound the emergence of a single legal framework. The international legal community has attempted to define, in particular, what bearing state succession has on treaties signed, debts incurred, and property owned by predecessor states.[155] "The Committee on State Succession set up by the International Law Association in 1961 examined the effect of independence on treaties and after four years of study felt that 'the problem is too novel and the practice insufficiently coherent to permit it to take attitude with respect to the law.'"[156]

Two opposing theoretical views have defined the debate as to what happens to treaty rights and obligations upon state succession. On the one end of the theoretical debate stands the theory of "universal continuity"—that all rights and obligations of the predecessor state devolve upon the predecessor—and on the other side the "clean slate" theory—that nothing devolves. Max Huber, a titan of international law and the ICJ in the first half of the 20th century, championed the theory of continuity. While on the other hand, scholars such as Berriedale Keith go "to the other extreme and den[y] that there can be any succession to treaty rights and obligations."[157] Despite the gulf between the two theories, international law has firmly landed somewhere in the middle, embracing the "clean slate" doctrine for the newly independent states that emerged during decolonization, while maintaining a limited set of important exceptions to

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[154] *See* MATTHEW CRAVEN, THE DECOLONIZATION OF INTERNATIONAL LAW: STATE SUCCESSION AND THE LAW OF TREATIES (2007) (discussing the variance in state practice and in the codification of the law based on the pathways to state succession).

[155] While this paper focuses on the 1978 Convention regarding treaties, the U.N. also signed the 1983 Vienna Convention on Succession of States in Respect of State Property, Archives, and Debts.

[156] P. K. MENON, THE SUCCESSION OF STATE IN RESPECT OF TREATIES, STATE PROPERTY, ARCHIVES, AND DEBT viii (1991) (quoting THE EFFECT OF INDEPENDENCE ON TREATIES: A HANDBOOK, THE INTERNATIONAL LAW ASSOCIATION xiii (1965)).

[157] P. K. MENON, THE SUCCESSION OF STATE IN RESPECT OF TREATIES, STATE PROPERTY, ARCHIVES, AND DEBT vii (1991).

the "clean slate" that survive state succession. Among these exceptions, *territorial* treaties remain in force despite state succession.

Multiple codifications of the law have recognized that treaties that assign rights and obligations with respect to territory survive state succession. The commentary to these codifications clarifies that non-navigational uses of international rivers is included within the ambit of territorial treaties. Indeed, these commentaries specifically mention the 1929 Nile Waters Agreement as falling within the category of territorial treaties. The first of these codifications was the incomplete effort of the International Law Association in 1965, when it published The Effect of Independence on Treaties. The International Law Commission also took up the topic in 1963 and codified the law in the Convention passed by the United Nations in 1978.[158]

Territorial treaties belong to a broader class of agreements known as "dispositive", "localized", or "real" that many have argued devolve automatically upon successor states.[159] "It is traditional that a certain category of treaties, known as 'dispositive', survive changes of sovereignty because they are less contractual than in the nature of territorial settlements."[160] In other words, dispositive treaties create rights and obligations *in rem* that cannot be extinguished by succession. As the ILA said in 1965, "Boundary provisions in treaties are the clearest

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[158] *See* P. K. MENON, THE SUCCESSION OF STATE IN RESPECT OF TREATIES, STATE PROPERTY, ARCHIVES, AND DEBT viii (1991).

[159] *See* Okoth-Owiro, at 11 (noting this terminology and citing scholars from the 1930s-50s).

[160] THE EFFECT OF INDEPENDENCE ON TREATIES: A HANDBOOK, THE INTERNATIONAL LAW ASSOCIATION 352 (1965); *but see* Okoth-Owiro, at 12 (arguing that British practice does not appear to recognize this "dispositive" distinction, citing that in the opinion of Lester (1963) "both in theory and according to British and Commonwealth practice, localized treaties are no exception to the general rule that bilateral treaties do not devolve upon successor states" and according Brownlie (1990)).

examples of such continuing delimitation. Aside from boundary provisions, however, the characterization of treaty clauses as dispositive must in each instance be controversial."[161] Boundary provisions have the clearest practical consequences. Abolishing all international borders of a predecessor state would severely destabilize the region. The same might be said of other territorial agreements, but the consequences are less clear-cut.

Tanzania and other Nile riparians explicitly recognized that some dispositive treaties would survive state succession, even absent any renegotiation. At the first regular session of the Organization of African Unity, held in 1964 in Cairo, all member states resolved and pledged themselves "to respect the borders existing on their achievement of national independence."[162] The "Cairo Declaration" continues to be widely accepted by African states today.[163]

The Nyerere Doctrine itself stated that Tanganyika would "regard such of these treaties *which could not by the application of rules of customary international law be regarded as otherwise surviving*, as having terminated,"[164] thus excepting where customary international law mandated treaty continuity. In June 1962, Nyerere gave a speech indicating that despite the announcement of the Nyerere Doctrine, such a policy had "no relevance" on the issue of defining

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[161] THE EFFECT OF INDEPENDENCE ON TREATIES: A HANDBOOK, THE INTERNATIONAL LAW ASSOCIATION 353 (1965) (noting also that "Among the treaties which are sometimes said to be dispositive are those relating to rivers, railways, and economic regimes. However, each treaty must be examined to determine its dispositive character.").

[162] Resolution Adopted by the First Ordinary Session of the Assembly of Heads of State and Government Held in Cairo, UAR, from 17 to 21 July 1964: Border Disputes Among African States, OAU Doc. AHG/Res. 16(I) (1964), *available at* http://www.africa-union.org/official_documents/Heads%20of%20State%20Summits/hog/bHoGAssembly1964.pdf.

[163] *See* Mupenda Wakengela & Sadiki Koko, *The Referendum for Self-Determination in South Sudan and Its Implications for the Post-Colonial State in Africa*, 3 CONFLICT TRENDS 20, 21 (2010) (noting that in contrast to South Sudan's move to seceded, "the dominant ideology among African states" is "informed by the historical Organisation of African Unity's (OAU) 1964 Cairo Declaration on the intangibility of borders inherited from colonization").

[164] Nyerere Doctrine declaration (emphasis added).

the boundary between Tanganyika and Nyasaland.[165] In other words, it was clear at the time that boundary treaties withstood state succession, even under Nyerere's own reading of the Nyerere Doctrine. Kenya's similar declaration contained an additional paragraph which is of some interest in connection with so-called dispositive treaties which reads:

> Nothing in this Declaration shall prejudice or be deemed to prejudice the existing territorial claims of the State of Kenya against third parties and the rights of a dispositive character initially vested in the State of Kenya under certain international treaties or administrative arrangements. . . .[166]

Thus, the Nyerere Doctrine and its riparian successors did not advocate for a completely "clean slate", but rather one that acknowledged the ongoing validity of dispositive treaties.[167] Ethiopia has also recognized that certain dispositive treaties survived state succession,[168] including the boundary provisions of the 1902 agreement with Britain.

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[165] THE EFFECT OF INDEPENDENCE ON TREATIES: A HANDBOOK, THE INTERNATIONAL LAW ASSOCIATION 362-63 (1965).

[166] OFFICIAL RECORDS OF THE UNITED NATIONS CONFERENCE ON THE SUCCESSION OF STATES IN RESPECT OF TREATIES, Vol. III, doc. A/CONF.80/16/Add.2, p. 20, § 6.

[167] *See, e.g.*, OFFICIAL RECORDS OF THE UNITED NATIONS CONFERENCE ON THE SUCCESSION OF STATES IN RESPECT OF TREATIES, Vol. III, doc. A/CONF.80/16/Add.2, pp. 32-33, §§ 23-24 (commenting on Article 12). Great Britain (on behalf of Tanzania) and Belgium (on behalf of Zaire, Rwanda, and Burundi) had signed two agreements concerning the administration of the sea-port Dar es Salaam. Tanzania based its claims to invalidate theses Belbases Agreements of 1921 and 1951 not on a "clean slate" doctrine of state succession, but rather on the limited competence of the British to sign agreements on its behalf. "[B]y resting its claim specifically on the limited character of an administering Power's competence to bind a mandated or trust territory, it seems by implication to have recognized that the free port base and transit provisions of the [1921 and 1951] agreements were such as would otherwise have been binding upon a successor State." *Id.*

[168] *See, e.g.,* OFFICIAL RECORDS OF THE UNITED NATIONS CONFERENCE ON THE SUCCESSION OF STATES IN RESPECT OF TREATIES, Vol. III, doc. A/CONF.80/16/Add.2, pp. 29-30, § 12 (noting that with respect to Somali-Ethiopian and Somali-Kenyan boundary disputes "when Somalia achieved independence in I960, it refused to recognize the validity of the treaties made by the colonial powers" while "*Ethiopia and Kenya, which is itself also a successor State, take the position that the treaties in question are valid and that, being boundary settlements, they must be respected by a successor State*") (emphasis added) (internal quotations omitted).

As for the 1929 Nile Waters Agreement, Egypt has asserted that the treaty remains in force under the laws of state succession.[169] Despite the above, Nyerere later explicitly announced that the 1929 Agreement did not bind Tanganyika upon independence.[170] When it reviewed the issue in 1965, the ILA acknowledged that the status of the Agreement would likely be disputed, but that "[t]he 1929 Nile Waters Agreement between Great Britain and Egypt . . . is widely regarded by theorists as constituting an agreement of a territorial character 'so as to require its respect by successor States.'"[171] In the same publication the ILA lists "British Treaties which could give rise to considerations of dispositive character."[172] The list includes the 1929 Agreement,[173] a 1938 agreement between Belgium and the U.K. regarding water rights between Tanganyika and Ruanda-Urundi,[174] and the 1953 Owen Falls Dam exchange of notes,[175] among other agreements relating to international rivers and boundaries. The ILA didn't seek to

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[169] Okoth-Owiro, at 16.

[170] *See* Statement of Nyerere, *supra* note 137, noting that some treaties would remain in force because of customary international law ("At the expiry of that period, the Government of Tanganyika will regard such of these treaties *which could not by the application of rules of customary international law be regarded as otherwise surviving*, as having terminated." (emphasis added)).

[171] THE EFFECT OF INDEPENDENCE ON TREATIES: A HANDBOOK, THE INTERNATIONAL LAW ASSOCIATION 353 (1965) (noting that "The extent to which [Kenya, Tanganyika, and Uganda] are bound by the Agreement after independence may soon be called into question. In the Tanganyika Parliament, on the same day on which the Prime Minister made the general declaration concerning Tanganyika's attitude to treaties, . . . the Parliamentary Secretary to the Minister of Agriculture replied in answer to a question whether Tanganyika was affected by the Nile Waters Agreement: 'The extent to which these provisions will remain binding on Tanganyika after independence is now being considered by the Government and, for the time being, we reserve our position.'" *Id.* 353-54). Of course, after withholding specific comment, Nyerere later clarified that Tanganyika would not be bound by the 1929 Agreement, *see supra* note 138.

[172] THE EFFECT OF INDEPENDENCE ON TREATIES: A HANDBOOK, THE INTERNATIONAL LAW ASSOCIATION 355-60 (1965).

[173] *Id.*, at 356.

[174] *Id.*, at 358. The brief description of this treaty seems to be similar to the description of what has been described elsewhere as a 1934 treaty between the same parties. It's unclear if the year is falsely attributed in one place or the other or if there are indeed distinct treaties referenced.

[175] *Id.*, at 359.

conclusively establish whether or not each of these treaties would remain in force, but highlighted that they fell into the dispositive basket.

The 1978 Vienna Convention on Succession of States in Respect of Treaties attempted a more concrete codification of the law, accounting for different pathways to state succession and addressing head-on the different categories of dispositive treaties. Notably, the 1978 Convention has been in force since 1996, and Egypt, Ethiopia, Sudan and the Democratic Republic of Congo are all parties to it.[176] The Convention divides into seven Parts: I. General Provisions, II. Succession in Respect of Part of Territory (where part of an existing State's territory becomes part of another existing State), III. Newly Independent States, IV. Uniting and Separating States, V. Miscellaneous Provisions, VI. Settlement of Disputes, and VII. Final Provisions. The General Provisions and Part III generally apply to the Nile riparians.

Among the notable general provisions, Article 9 declares that a unilateral declaration by the successor State does not, on its own, have legal significance. The Nyerere approach, much like Ethiopia's, was unilateral, and as such did not have any *per se* legal significance.[177] A new State could not simply unilaterally select which treaties it would continue to enforce and which ones it would consider invalidated. Nor, under Article 8, could a successor State bind itself and other parties to treaties merely by virtue of a devolution agreement between it and the predecessor State.

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[176] *Available at*: http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XXIII-2&chapter=23&lang=en (all four are parties to the Convention without reservation).

[177] P. K. MENON, THE SUCCESSION OF STATE IN RESPECT OF TREATIES, STATE PROPERTY, ARCHIVES, AND DEBT 8-9 (1991) (noting that "Unilateral declarations are not treaties. They are not subject to the procedures applicable to treaties. They are not sent to the United Nations Secretary-General in his capacity as registrar and publisher of treaties under Article 102 of the United Nations Charter. The declarations have not been published as treaties in the United Nations *Treaty Series*.").

The Convention also separates dispositive treaties into two distinct categories: "boundary regimes" in Article 11 and "other territorial regimes" in Article 12. Article 11 was a logical extension of Article 62 §2(a) of the 1969 Vienna Convention on the Law of Treaties,[178] and states:

> *Boundary regimes.* A succession of States does not as such affect: (a) a boundary established by a treaty; or (b) obligations and rights established by a treaty and relating to the regime of a boundary.

Article 12 excepts military bases, and otherwise states:

> *Other territorial regimes*
>
> 1. A succession of States does not as such affect: (*a*) obligations relating to the use of any territory, or to restrictions upon its use, established by a treaty for the benefit of any territory of a foreign State and considered as attaching to the territories in question; (*b*) rights established by a treaty for the benefit of any territory and relating to the use, or to restrictions upon the use, of any territory of a foreign State and considered as attaching to the territories in question.
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> 2. A succession of States does not as such affect: (*a*) obligations relating to the use of any territory, or to restrictions upon its use, established by a treaty for the benefit of a group of States or of all States and considered as attaching to that territory; (*b*) rights established by a treaty for the benefit of a group of States or of all States and relating to the use of any territory, or to restrictions upon its use, and considered as attaching to that territory.

The International Law Commission's commentary sheds light on how "territory" should be interpreted. In its first paragraph of commentary on Article 12, the ILC includes "the use of international rivers" in its definition of "territorial treaties."[179] In its review of state practice, the ILC noted again, "Treaties concerning water rights or navigation on rivers are commonly

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[178] "A fundamental change of circumstances may not be invoked as a ground for terminating or withdrawing from a treaty: (*a*) if the treaty establishes a boundary; . . ."

[179] OFFICIAL RECORDS OF THE UNITED NATIONS CONFERENCE ON THE SUCCESSION OF STATES IN RESPECT OF TREATIES, Vol. III, doc. A/CONF.80/16/Add.2, p. 27, § 1 (commenting on Article 12, ". . . The question of what will for convenience be called in this commentary "territorial treaties" is at once important, complex and controversial. In order to underline its importance the Commission need only mention that it touches such major matters as international boundaries, rights of transit on international waterways or over another State, *the use of international rivers*, demilitarization or neutralization of particular localities, etc." (emphasis added)).

regarded as candidates for inclusion in the category of territorial treaties."[180] The ILC also cites the 1929 Nile Waters Agreement, though concludes only that the parties continue to dispute the validity of the treaty.[181]

Under Part III of the 1978 Convention (Newly Independent States), the ILC largely adopted the "clean slate" approach for States that came into existence as a result of the decolonization of the post-World War II period. Article 16 articulated this basic proposition:

> *Position in respect of the treaties of the predecessor State.*
>
> A newly independent State is not bound to maintain in force, or to become a party to, any treaty by reason only of the fact that at the date of the succession of States the treaty was in force in respect of the territory to which the succession of States relates.

Yet Article 16 does not eliminate the *boundary* and *territorial* exceptions articulated in Articles 11 and 12. The ILC commentary again reflects this, noting, "Considerable support can be found among writers and in State practice for the view that general international law does impose an obligation of continuity on a newly independent State in respect of some categories of its predecessor's treaties."[182] The ILC, in fact, supports this notion by reference to the declarations

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[180] OFFICIAL RECORDS OF THE UNITED NATIONS CONFERENCE ON THE SUCCESSION OF STATES IN RESPECT OF TREATIES, Vol. III, doc. A/CONF.80/16/Add.2, p 33, § 26 (commenting on Article 12).

[181] OFFICIAL RECORDS OF THE UNITED NATIONS CONFERENCE ON THE SUCCESSION OF STATES IN RESPECT OF TREATIES, Vol. III, doc. A/CONF.80/16/Add.2, p. 33, § 27 (commenting on Article 12, noting that Egypt maintains the Treaty's validity, while Tanzania disputes it, though alluding to the argument that the U.K. lacked competency to bind Tanzania, rather than to a question of whether the Treaty is *territorial*, "In this instance, again, there is the complication of the treaty's having been concluded by an administering Power, whose competence to bind a dependent territory in respect of territorial obligations is afterwards disputed on the territory's becoming independent." *Id*.).

[182] OFFICIAL RECORDS OF THE UNITED NATIONS CONFERENCE ON THE SUCCESSION OF STATES IN RESPECT OF TREATIES, Vol. III, doc. A/CONF.80/16/Add.2, p. 43, § 15 (commenting on what became Article 16, which was at the time Article 15).

of Tanganyika, Uganda, mentioned *supra* at __.[183]

In the same volume in which Okidi theorizes why the 1902 and 1929 treaties are void, Samir Ahmed concludes the exact opposite, based on the 1978 Convention. Referring to a set of treaties including the 1902 Treaty between Ethiopia and Britain, the 1906 Agreement between the Congo and Britain, the 1929 Treaty between Egypt and Britain (on behalf of Kenya, Tanzania, and Uganda), and the 1934 agreement between Britain and Belgium (on behalf of Rwanda and Burundi), Ahmed concludes that

> [i]t is an agreed principle of international law that such territorial status agreements constitute an obligation and a limitation on the contracting parties' territory, unaffected by a change of sovereignty. . . . They cannot be amended or abrogated except by the agreement of the signatories or in accordance with the measures stipulate by the Vienna Convention on the Law of Treaties of 1969.[184]

Thus, including the binding 1959 Agreement along with this recapitulation, all eight other Nile riparians are bound by treaty not to interfere with the flow to Egypt of the Nile's waters.[185] The arguments to the contrary simply don't stand up to international law. Other arguments based on other general principles of international law would be more consonant with the rule of law.

C. Principles That Could Support Abrogation of Nile Waters Treaties

While the international law of state succession does not offer the upper riparians a clear legal path to abrogating the colonial-era treaties, the combination of *rebus sic stantibus* and *jus cogens* may do just that. Both principles were codified by the 1969 UN Vienna Convention on

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[183] *Id*.

[184] Samir Ahmed, Principles and Precedents in International Law Governing the Sharing of Nile Waters, in THE NILE: SHARING A SCARCE RESOURCE, P.P. Howell and J.A. Allan, eds., 351, 355-57 (1994).

[185] As noted previously, Rwanda and Burundi may have the best counter-argument insofar as Belgium's agreement only bound them to Tanzania and not to Egypt and thus could void their obligations through agreement with Tanzania, regardless of Egypt's stance on the matter.

the Law of Treaties, which has been in force since 1980.[186] This subpart briefly lays out the doctrine, and Part V substantively applies the doctrine to the Nile Basin.

1. Rebus Sic Stantibus

The principle of changed circumstances is central to the "clean slate" doctrine. In one view, State independence is itself a fundamental change in circumstances annulling the validity of colonial-era treaties.[187] The Vienna Convention on the Law of Treaties defines the doctrine of *rebus sic stantibus* or "changed circumstances" that would allow a party to abrogate a treaty.

> 1. A fundamental change of circumstances which has occurred with regard to those existing at the time of the conclusion of a treaty, and which was not foreseen by the parties, may not be invoked as a ground for terminating or withdrawing from the treaty unless: (a) the existence of those circumstances constituted an essential basis of the consent of the parties to be bound by the treaty; and (b) the effect of the change is radically to transform the extent of obligations still to be performed under the treaty.[188]

As Amdetsion argues, the "fundamental circumstances giving rise to the 1929 Exchange of Notes no longer exist: states whose interests were ostensibly represented by the British are now fully independent and currently governed by governments that would never have willingly consented to the present lopsided allocation of the Nile's waters."[189]

Yet invoking *rebus sic stantibus* with respect to territorial treaties will also face its challenges. The "Vienna Convention on the Law of Treaties of 1969 provides that a fundamental change of circumstances may not be invoked as a ground for terminating or

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[186] UNITED NATIONS TREATY COLLECTION, CHAPTER XXIII LAW OF TREATIES, *available at* http://treaties.un.org/Pages/ViewDetailsIII.aspx?&src=TREATY&mtdsg_no=XXIII~1&chapter=23&Temp=mtdsg3&lang=en (Status at Apr. 11, 2011).

[187] Okoth-Owiro, at 1.

[188] Vienna Convention on the Law of Treaties art. 62, May 23, 1969, 1155 U.N.T.S. 331.

[189] Amdetsion, *supra* note 4 at 26.

withdrawing from a treaty 'if the treaty establishes a boundary.'"[190] The Convention, however, does not explicitly address *territorial* treaties. Whereas the 1978 Convention addressed the two categories of treaties in separate provisions, the 1969 Convention omits any reference to *territorial* agreements. Reading the two Conventions together, the absence of *territory* from the *rebus sic stantibus* provision leaves room for States to argue that changed circumstances render territorial agreements void. Of course, the changed circumstances would need to exceed the fact of state succession, itself, as Article 12 of the 1978 Convention makes clear. Indeed, *rebus sic stantibus* alone is likely insufficient to void the colonial-era treaties relating to the Nile, given that no legal treaty abrogation has ever been decided on the principle alone.[191]

2. Jus Cogens

In the context of extreme water scarcity and resultant famine in various riparian states,[192] the principle of *jus cogens* may play the most important role in abrogating the colonial-era treaties and establishing the outer-bounds of a cooperative agreement. An agreement is said to violate *jus cogens* when it violates a fundamental and inviolable principle shared by the

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[190] P. K. MENON, THE SUCCESSION OF STATE IN RESPECT OF TREATIES, STATE PROPERTY, ARCHIVES, AND DEBT 12 (1991) (quoting Vienna Convention on the Law of Treaties of 1969, art. 62, §2(a)).

[191] *See* CRAVEN 54 n.216 ("*Fisheries Jurisdiction* (UK v. Iceland), Judgment of 2 Feb 1973, ICJ Rep 3, at 18 ('International law admits that a fundamental change in circumstances which determined the parties to accept the treaty, if it has resulted in radical transformation of the extent of obligations imposed by it, may, under certain conditions, afford the party affected a ground for invoking the termination or suspension of the treaty. This principle, and the conditions and exceptions to which it is subject, have been embodied in Article 62 of the Vienna Convention on the Law of Treaties, which may in many respects be considered as a codification of existing customary law on the subject of termination of a treaty relationship on account of chance circumstance.'). . . . The doctrine has been discussed (albeit indirectly) in a number of cases but has never been ground as a justifiable basis for the termination of an agreement. eg *Free Zones in Upper Savoy and the District of Gex*, (1932) PCIJ Series A/B, no 46, p158; *Fisheries Jurisdiction* case ICJ Rep (1973) 3; *Gabçikovo-Nagymaros Project* case ICJ Rep (1997) para 104 (the Court indicated that 'the stability of treaty relations requires that the plea of fundamental change of circumstance be applied only in exceptional circumstances'.). . .").

[192] *See* Part IV *infra, see also, e.g.,* Okoth-Owiro, at 15 (noting more than a decade ago that "Nile basin countries are beginning to experience water scarcity, with four of them (Egypt, Kenya, Rwanda and Burundi) already classified as water-scarce states").

international community, rendering the agreement void *ab initio*. Article 53 of the 1969 Treaty Convention codified the principle:

> *Treaties conflicting with a peremptory norm of general international law ("jus cogens")*
>
> A treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law. For the purposes of the present Convention, a peremptory norm of general international law is a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.

While jurists have disputed the application of *jus cogens* to particularized treaties, there is little argument that the principle exists and would forbid certain classes of agreements, e.g. an agreement to commit genocide or enslave a population. Yet jurists have resisted giving more content to the principle for fear that any description may be under-inclusive.[193]

The principle of *jus cogens* delimits the outer boundary of the otherwise unlimited power of states to conclude international treaties.[194] "The criterion for these rules

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[193] *See* Alfred Verdross, *Jus Dispositivum and Jus Cogens in International Law*, 60 THE AMERICAN JOURNAL OF INTERNATIONAL LAW 55, 57 (1966) (authored by a member of the International Law Commission, European Court of Human Rights, and the Institute of International Law, discussing the evolution of the *jus cogens* principle later adopted in the 1969 Convention:

> The International Law Commission tried to codify th[e] [*jus cogens*] principle in Article 37 of its draft Convention on the Law of Treaties. . . . This article was unanimously adopted by the Commission. It found it, however, difficult to indicate any criterion by which rules of *jus cogens* may be distinguished from other rules of general international law. Some members of the Commission suggested that mention be made, as examples of treaties in violation of a rule of *jus cogens*, of treaties contemplating an unlawful use of force contrary to the principles of the Charter, or the performance of any other act criminal under international law, or treaties contemplating or conniving at the commission of acts, such as slave trade, piracy or genocide, in the suppression of which every state is called upon to co-operate. The Commission decided, however, against including any examples of *jus cogens* for two reasons: first, because it may lead to misunderstanding as to the position of other possible cases; secondly, because a complete list of such cases was impossible without a prolonged study of this matter.).

[194] *See Id.*, at 55.

consists in the fact that they do not exist to satisfy the needs of the individual states but the higher interest of the whole international community. Hence these rules are absolute. The others are relative, because the rights and obligations created by them concern only individual states *inter se*."[195] Among this limited group of rules are those created for a humanitarian purpose. Though it is not immediately clear which humanitarian rights are protected. Certainly the right to be free from slavery or unjustified killing are included, though the right to sufficient food or water may be further afield. "In its judgment in the *Corfu Channel* case, the International Court says that 'elementary considerations of humanity' are 'even more exacting in peace than in war.'"[196] Thus it is quite possible that treaties that effectively denied such basic human subsistence needs such as food and water—elementary considerations of humanity—would violate *jus cogens*, particularly where such effects are predictable and not the result of the exigencies of war or conflict.

D. Conclusion

The Nile dispute should be resolved according to international law, nullifying treaties where they violate established principles of international law—not merely where states dispute their validity. The international law of state succession does not offer the upper riparian states a clear vehicle for abrogating the colonial-era treaties, and Ethiopia has the weakest claim of all riparians. Yet, as demographic pressures mount, the current allocations may prove not just undesirable or unfair, but patently inhumane and untenable. While the ultimate solution to Nile

[195] Verdross, at 58.

[196] Verdross, at 59.

water management will require collaborative planning, management and utilization,[197] the "[a]rguments and counterarguments made by upper and lower riparian states are framed within the context of established tenets of public international law."[198] Even the justifications for war are couched in the language of breached treaties and violations of international law.[199] Thus it is important that both sides get the law right.

In the next Part, we turn first to the facts. We describe the current state of water and food scarcity in the Nile region and relative development of the riparians.

IV. Status of the Nile Basin Today

The Nile Basin was once regarded as the "cradle of civilization" and the heart of the "breadbasket" of the Roman Empire. But today this entire region is characterized as food deficient, underdeveloped, and close to economic and political collapse.[200] At the turn of the 20th century when the colonial-era treaties were signed, Egypt was in the most dire water situation. Egypt's need for potable water to promote health and sanitation paired with her need for cotton production justified her disproportionate share of Nile waters. Unsurprisingly, Egypt's population and life developed around the Nile. About 96% of Egypt's population lives in the

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[197] *See, e.g.*, O. Okidi, *The History of the Nile and Lake Victoria Basins Through Treaties*, in THE NILE: SHARING A SCARCE RESOURCE, P.P. Howell and J.A. Allan, eds., 322 (1994) ("For the African countries it will be clear that the solution to the perennial problems of widespread famine and general development lies in the comprehensive planning, management and utilization of natural resources, principally water.").

[198] Amdetsion, *supra* note 4 at 13.

[199] *See Id.* at 24 ("More recently, following the announcement by the Kenyan government of its intention to withdraw from the 1929 Agreement, Egypt's Minister for Water Resources accused Kenya of breaching international law and warned that it was tantamount to 'an act of war.') (citing Yosef Yacob, *From UNDUGU to the Nile Basin Initiative: An Enduring Exercise in Futility*, ADDIS TRIBUNE, Jan. 30, 2004, *available at* http://www.tigrai.org/News/Articles2004/TheNileByYacob2.html.).

[200] Elhance at 59.

narrow Nile Valley and Nile Delta, an area that accounts for only 4% of the landmass of the country.[201] "No other comparably populous country in the world has such a narrow and concentrated economic geography that is so heavily dependent on the waters of a shared river."[202]

It is unclear whether Egypt is in the same dire situation it faced when the first water treaties were signed at the turn of the 20th century. Furthermore, the needs of other riparian countries are much different today than a century ago. The following Part will discuss the landscape of the Nile basin today. To understand the landscape, this Part will explore the current state of water security, food security, and development in the riparian states.

A. Egypt Today

Due to Egypt's extremely arid climate and sparse rainfall, the country must rely heavily on the Nile River for all its water needs. In fact, 97% of Egypt's surface water comes from the Nile River, [203] making it the riparian country most dependent upon the River.[204] However, even though Egypt depends on the Nile for survival, it seems to have crossed a threshold so that it now withdraws more than is necessary for survival. This is particularly stark when Egypt's economy and development is compared to that of other riparian countries. For example, Egypt is

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[201] *Id.* at 60.

[202] *Id.* at 61.

[203] Yehenew Walilegne, *The Nile Basin: From Confrontation to Cooperation*, 27 Dalhousie L.J. 503, 512 (2004).

[204] Degefu at 17.

able to irrigate 3,266,000 hectares of the potential 4,434,000 hectares.[205] No other country irrigates such a high proportion of their land. *See* Table 5.

Besides withdrawing more water than is needed, studies as late as 2002 show that Egypt does not yet use all of its allocated Nile water. The study estimates a total annual supply of 63.7 km^3 and a total use of 61.7 km^3.[206] Additionally, due to its confidence in its water supply, Egypt did not adopt measures to reduce population growth or to conserve water. Scholars have estimated that better water management would provide Egypt with an additional 6.5 to 10 billion m^3 of water.[207]

Because Egypt has had a surplus of water, it has not yet had to react to deteriorating water quality and salinity of land caused by the Aswan High Dam, completed in 1971. Instead of finding ways to correct these problems, Egypt simply draws more water to make up for poorer water quality. Before construction of the dam, the annual Nile floods would deposit between 50 and 110 million tons of nutrient rich silt on Egypt's fields. After construction of the dam, the silt is no longer deposited in the farmers' fields. Water drainage was not sufficient, which increased the salinity of the soil. Without the enriched soil and increased salinity, yields in these affected areas have dropped by 30%. To compensate for the decreased yields, farmers overwater and clog the poor draining system.[208] In addition, pesticides and other soil "enhancements" further deteriorate the water quality.[209]

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[205] Ashok at 297-98.
[206] Agrawala at 105.

[207] Kliot at 49.

[208] *Id.*

[209] *Id.* at 46-47.

B. Sudan Today

Today, agriculture composes nearly one third of Sudan's economy and supplies 80% of jobs. This agriculture uses irrigation drawn almost entirely from the Nile River. Even with an economy heavily dependent on irrigation, Sudan does not use all of its allocated water. Official sources estimate Sudan's annual use at 12.6 BCM in 1985-86 of the 18.5 BCM it is entitled. Any unused water by Sudan automatically benefits Egypt since Egypt is downstream.[210] Even without using all its allocated water, Sudan is able to irrigate 1,946,000 hectares of its 3,637,000 hectares of potentially irrigable land.[211]

C. Ethiopia Today

A wealth of water resources is located in Ethiopia. This country is home to twelve major river basins, eleven fresh water lakes, nine saline lakes, four crater lakes, and over twelve major swamps or wetlands. Yet Ethiopia cannot make use of its rich resources because there are no dams to store surplus waters in times of drought. Additionally, Ethiopia contributes about 85% of the water to the Nile yet uses less than 1 billion m^3, or about 1% because of treaty allocations.[212] Ethiopia historically was able to use so little of the Nile's water because its annual rainfall, between 1,200 and 1,800 mm, had been able to sustain its water needs. However, Ethiopia has faced severe droughts since the 1970s. The droughts led to the starvation of over 1 million people in the 1980s. The land was so badly scarred after the drought that Ethiopia is still recovering today.[213] Today, food insecurity, mostly attributed to water insecurity, continues to

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[210] Scheumann and Schiffler at 140-41.

[211] Ashok at 297-98.

[212] Kliot at 66.

[213] *Id.*

grip Ethiopia. Ethiopia, as well as Uganda and Tanzania, suffer more severe food insecurity than in Egypt's deserts. Even in years of good rainfall, about five million Ethiopians are in need of food aid. During drought years, the need rises to 14 million, amounting to two million tons of food aid worth $700 million.[214]

Because Ethiopia can hardly use any of the Nile's flow, only 190,000 of the country's potentially irrigable 3,637,000 hectares are irrigated by the Nile.[215] Even with such a small amount of land cultivated, agriculture supplies 85% of the jobs in Ethiopia.[216]

Ethiopia's needs today are not what they were in 1902. The estimated 2010 water requirements are found in Table 4.[217]

Table 4: Water Requirement Estimates of Ethiopia in 2010	
Use	**million cubic meters**
Drinking & Domestic Utilities	3,390
Irrigation	10,700
Industry	960
Hydropower	66,972

Driven by a mixture of hunger, desperation, and politics, Ethiopia has started construction projects on the Nile, in violation of treaties, despite Egypt's threats of war.[218] When the 1929

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[214] Press Release, *World Food Programme, Drought and Lack of Food Aid Threaten Millions of Ethiopians* (Nov. 12, 2002), *available at* http://www.wfp.org/english/?moduleID=137&Key=549.

[215] Swain, 22 SAIS Rev. 293, 297 (2002).

[216] Ethiopia, The World FactBook, Central Intelligence Agency, 2010, *available at* https://www.cia.gov/library/publications/the-world-factbook/geos/et.html.

[217] Degefu at 194.

Treaty was signed, Ethiopia, independent and not under British rule, was not a party to the treaty.[219] Ignoring the 1902 agreement, Ethiopia has alarmed Egypt in the last half century by claiming, such as at the UN Water Conference at Mar de Plata, Argentina in 1977, that it reserves the sovereign right to use the Blue Nile.[220] In 1981, Ethiopia presented a ten-year investment plan including fifty irrigation projects on the Blue Nile basin. Egyptian officials claim these projects would draw away 5.4 billion m³ of water from the Blue Nile. However, other scholars argue that this figure is exaggerated and if the Blue Nile projects are managed properly, they would have no effect on water flow to Sudan and Egypt.[221]

D. Other Riparian Countries Today

The other riparian countries for the purposes of this section include Tanzania, Uganda, Kenya, Rwanda, Burundi, Democratic Republic of Congo and Eritrea.

The economies of all the riparian States remain weak today. Most still rely heavily on agriculture, leaving them exposed to food shortages in times of drought. This agriculture is sustained by rainfall and not the Nile. For example, agriculture composes a quarter of Tanzania's economy and supplies 80% of its jobs. [222] Similarly, agriculture supplies work for 82% of Uganda, 75% of Kenya, 90% of Rwanda, 94% of Burundi, and 80% of Eritrea's workforce. [223]

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[218] EthioBlog, *Ethiopia to Build Hydro-Electricity Dam Over Blue Nile Tributary*, *available at* http://www.nazrest.com/blog/index.php?title=ethiopia_to_build_hydro_ electricity_dam&more=1 (last visited June 20, 2008).

[219] Swain at 686.

[220] Kliot at 67.

[221] *Id.* at 68.

[222] Degefu at 16.

[223] The World FactBook, Central Intelligence Agency, 2010, *available at* https://www.cia.gov/library/publications/the-world-factbook/geos/tz.html.

The dependence on agriculture makes these countries particularly vulnerable to droughts. In 2006, a drought year, 3.7 million Tanzanians were in need of food aid.[224] In the same year, 3.5 million Kenyans were in need of food aid.[225]

Without irrigation from the Nile, most of the countries have not been able to develop the majority of irrigable land. [226] Of its 828,000 hectares of irrigable land, Tanzania has only put to use 190,000 hectares. Uganda has only developed 9,000 hectares out of a potential 202,000 hectares of land. Kenya only irrigates 67,000 hectares out of a potential 352,000 hectares. On the other hand, Egypt has been able to develop 74% of its irrigable land due to nearly unlimited access to the Nile. See more in Table 5.

Table 5: Irrigable Land Development

Country	Developed land (hectares)	Irrigable land (hectares)	Percentage of land developed
Egypt	3,266,000	4,434,000	73.7%
Sudan	1,946,000	3,637,000	53.5%
Tanzania	190,000	828,000	22.9%
Kenya	67,000	352,000	19.0%
Ethiopia	190,000	3,637,000	5.2%
Uganda	9,000	202,000	4.5%

[224] *Tanzania: Government in Plea for Food Aid as Drought Bites*, IRIN, Feb. 14, 2006, http://www.irinnews.org/report.aspx?reportid=58136.

[225] Simon Caldwell, *Aid Agencies Say 3.5 Million Kenyans Face Starvation*, Catholic News Service, Mar. 10, 2006, http://www.catholicnews.com/data/stories/cns/0601425.htm.

[226] Swain at 297.

The other riparian countries not only need the Nile for irrigation, but could greatly use the river for hydroelectric production. These countries all rely heavily on hydroelectric power for their own electricity production. For example, 97.7% of Rwanda's electricity production and 98.3% of Uganda's electricity production comes from hydroelectric power.[227] Each equatorial country has capacity for hydropower production. The capacity of Rwanda is 121 MW, 120 MW for Burundi, 4,500 MW for Tanzania and 710 MW for Kenya.[228]

Uganda's hydroelectric production currently is powered by the Nile from the Owens Fall Dam, located across the White Nile near its source, Lake Victoria. Per the 1929 Treaty, any construction on the Nile needed to be approved by Egypt to ensure the dam would not reduce water flow to Egypt, which is downstream of the proposed dam.[229] An agreement between the two countries was reached in 1953. It stated that Egypt was interested in the water of the Nile for irrigation purposes while Uganda was interested in hydroelectricity production.[230] The two governments agreed to joint administration for building and operating the dam and construction was completed in 1954. It has the capacity to produce 100 MW.[231] The Owens Fall Dam produces a surplus of electricity, which Uganda sells to Kenya, Tanzania and Rwanda.[232] Presently, drought and low water levels have reduced the electric output of the Owens Fall Dam.

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[227] Kliot at 71.

[228] Degefu at 178-80.

[229] *Exchange of Notes Constituting an Agreement Between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of Egypt regarding the constitution of the Owen Falls Dam in Uganda*, 85 (International Water Law, Vol. 3 2008).

[230] Kliot at 50.

[231] Degefu at 129

[232] *Id.*

E. Measures of Well-being

1. Population

Population increases in the Nile Basin in the mid-1970s forced water allocation to the forefront of riparian countries' agendas. As populations have reached unprecedented levels, they have strained the limited water supply. The resulting increase in demand for food and hence agricultural development has created water deficits.[233] The population increase that began in the 1970s has not slowed today.

With the Nile Basin region's population growing by 3% a year, experts estimate a population of 859 million in 2025, up from 245 million in 1990. According to the CIA, in the next 40 years, Uganda's population will increase 288% and Ethiopia's population will increase by 216%. Specific population increases by country are found in Table 6. These huge population increases will exacerbate the scarcity of water in the region. In addition to population increase in this region, the worldwide trend in consumption of water has increased by 35-fold in the last 300 years. More than half of this increase has occurred in the past 60 years. This rapid increase in water usage paired with a growing population result in an estimated decline in per capita availability of water by one-third over the next generation.[234] A July 2000 study by the University of New Hampshire revealed that population growth and economic development

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[233] Howell & Allan at 2.

[234] J. Campbell & J.A. Beardmore, *Poverty & Aquatic Biodiversity*, *in* Living Off Biodiversity 191, 209 (Izabella Koziell & Jacqueline Saunders eds., 2001).

account for 80% of water scarcity.[235] This worldwide trend will be particularly severe in the Nile region.[236]

Table 6: Projected Population in Millions[237]				
	2010	**2025**	**2050**	**% Change in 40 years**
Egypt	80	103	138	73%
Sudan	44	63	97	120%
Ethiopia	88	140	278	216%
Tanzania	42	53	67	60%
Uganda	33	57	128	288%
Kenya	40	51	65	63%
Rwanda	11	16	27.5	150%
Burundi	10	15	27	170%
DR Congo	71	110	189	166%
Eritrea	5.7	8	11	93%

2. Water Security

Since the Nile River is Egypt's only source of available water, it is unsurprising that Egypt withdraws[238] one of the highest levels of freshwater among riparian countries. Sudan withdraws the most freshwater per capita at 1030 m³ per year. Egypt withdraws 923

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[235] Degefu at 162.

[236] Ashok Swain, *The Nile River Basin Initiative: Too Many Cooks, Too Little Broth*, 22 SAIS Rev. 293, 297-98 (2002).

[237] The World FactBook, Central Intelligence Agency, 2010, *available at* https://www.cia.gov/library/publications/the-world-factbook/region/region_afr.html.

[238] For the purposes of this section, "withdrawal" refers to water taken from a water source for use. It does not refer to water "consumed" in that use. The domestic sector typically includes household and municipal uses as well as commercial and governmental water use. The industrial sector includes water used for power plant cooling and industrial production. The agricultural sector includes water for irrigation and livestock.

m^3/person/per year compared to Ethiopia's 72 m^3/person/per year. However, withdrawal does not actually reveal the amount of water available to a country since some riparian countries have other sources of water not from the Nile. See Table 7 for a complete list of freshwater withdrawal by country.

Table 7: Freshwater Withdrawal, by Country[239]			
Country	**Year**	**Total Freshwater withdrawal (km^3/yr)**	**Per capita withdrawal (m^3/p/yr)**
Egypt	2000	68.3	923
Ethiopia	2002	5.56	72
Burundi	2000	.29	38
DR Congo	2000	.36	6
Eritrea	2000	.3	68
Kenya	2000	1.58	46
Rwanda	2000	.15	17
Sudan	2000	37.32	1030
Tanzania	2000	5.18	135
Uganda	2002	.3	10

The withdrawal rates correlate with average precipitation in each country. By far, Egypt has the lowest average precipitation at 51 mm/year. Ethiopia enjoys 848 mm/year of average precipitation. The DR Congo withdrew the least amount of freshwater of any riparian country, 6

[239] *Access to Improved Drinking Water, by Country, 1970 to 2004*, The World's Water, Pacific Institute, *available at* http://www.worldwater.org/data.html. Retrieved on April 12, 2011.

m^3/person/year. The low withdrawal rate may be due to the fact that DR Congo has the most precipitation of any riparian country at 1543 mm/year and therefore needn't withdraw water from additional sources.

Table 8: Average precipitation in depth (mm/yr) [240]	
Country	**2007**
Egypt	51
Ethiopia	848
Burundi	1274
DR Congo	1543
Eritrea	384
Kenya	630
Rwanda	1212
Sudan	416
Tanzania	1070
Uganda	1180

To understand the water security of these countries, data beyond withdrawal is required. According to the Maplecroft's Water Security Index, it still seems that Egypt and Sudan are among the least water secure in the Nile Basin. Of the ten countries ranked as "extreme risk" for water security, Sudan ranked number two and Egypt ranked eight for most water insecure. No other Nile riparian country ranked in the bottom ten. [241]

[240] Aquastat, Food and Agriculture Organization of the United Nations, *available at* http://www.fao.org/nr/water/aquastat/main/index.stm. Retrieved on 12 April 2011.

[241] New Maplecroft index rates Pakistan and Egypt among nations facing "extreme" water security risks, Maplecroft, 41 June 2010, *available at* http://www.maplecroft.com/about/news/water-security.html. Retrieved on 12 April 2011.

However, a closer look at different indicators of water security gives a more nuanced view into the water situation of these riparian countries. First, water security is precarious in all the Nile Basin countries. Some scholars estimate that the minimum per capita water needs for an efficient, moderately industrialized nation is 1,000 m^3per year.[242] Water availability from 1990 to 2025 is expected to drop from 1,070 to 620 cubic meters in Egypt, 2360 to 980 cubic meters in Ethiopia, 590 to 190 cubic meters in Kenya, 880 to 350 cubic meters in Rwanda and 2780 to 900 cubic meters in Tanzania just based on population increase and the current rate of water extraction. [243]

While water security is dropping for most Nile Basin countries, Egypt still ranks among the most well off in terms of access to improved drinking water and access to improved sanitation. Access to improved drinking water is defined by the World Health Organization.

> Improved drinking water sources are defined in terms of the types of technology and levels of services that are more likely to provide safe water than unimproved technologies. Improved water sources include household connections, public standpipes, boreholes, protected dug wells, protected springs, and rainwater collections. Unimproved water sources are unprotected wells, unprotected springs, vendor-provided water, bottled water (unless water for other uses is available from an improved source) and tanker truck-provided water.[244]

Access to improved sanitation is defined by the World Health Organization as

> Improved sanitation facilities are defined in terms of the types of technology and levels of services that are more likely to be sanitary than unimproved technologies. Improved sanitation includes connection to a

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[242] Elhance at 59.

[243] Elhance at 59, citing Peter H. Gleick, "Water and Conflict," in *Environmental Change an Acute Conflict* (Washington, D.C.: American Academy of Arts and Sciences, 1992), 17.

[244] Indicator Definitions and Metadata, World Health Organization, *available at* http://www.who.int/whosis/indicators/compendium/2008/2wst/en/. Retrieved on 20 June 2011.

> public sewers, connection to septic systems, pour-flush latrines, simple pit latrines and ventilated improved pit latrines. Not considered as improved sanitation are service or bucket latrines (where excreta is manually removed), public latrines and open latrines.[245]

The fraction of population with access to improved drinking water is quite indicative of Egypt's advantage over other riparian countries, especially Ethiopia. While improved drinking water indicates greater water availability, it also indicates a more complete or advanced infrastructure. Infrastructure may not seem to indicate that Egypt has greater water access. However, a country will only invest in infrastructure if it has assurance that it will have access to the resources, water in this case. Egypt is assured that it has access to the Nile's flow so it has invested in the infrastructure to provide potable water.

Nearly all of Egypt's population (98%) enjoys improved drinking water while a scant 22% of the Ethiopian population has such access. Throughout the past 35 years, Egypt has consistently had high access to improved drinking water while Ethiopia has consistently had very low access. The other riparian countries hover mostly between 60 and 70% access. See Table 9 for the fraction of population with access to improved drinking water from 1970 until 2004.

Table 9: Fraction of Population with Access to Improved Drinking Water[246]

Country	**1970**	**1975**	**1980**	**1985**	**1990**	**1994**	**2000**	**2002**	**2004**
Egypt	93		84		90	64	95	98	98
Ethiopia	6	8		16			24	22	22
Burundi			23	25	45	52		79	79
DR	11	19		32	36	27	45	46	46

[245] *Id.*

[246] *Access to Improved Drinking Water, by Country, 1970 to 2004*, The World's Water, Pacific Institute, *available at* http://www.worldwater.org/data.html. Retrieved on April 12, 2011.

Congo									
Eritrea							46	57	60
Kenya	15	17	26			53	49	62	61
Rwanda	67	68	55	50	68		41	73	74
Sudan	19	50	51			50	75	69	70
Tanzania	13	39		53			54	73	62
Uganda	22	35		20	33	34	50	56	60

The disparity between Egypt and Ethiopia is again evident in the fraction of the population with access to improved sanitation. Egypt has the largest fraction of its population with access to improved sanitation of the riparian countries at 70%. This is especially stark when compared with Ethiopia's 13%. Ethiopia not only has the least access to improved sanitation of all riparian countries, but also has the least access to improved sanitation, with only 9% of the population with access. The other riparian countries hover in the 30-40% access level. Even though Egypt seems much better off than Ethiopia, it should be noted that Egypt's access has decreased drastically from 2000 to 2004, falling from 94% to 70%. On the other hand, Ethiopia has shown little change in access from 1970 (14%) until 2004 (13%). See Table 10 for the fraction of population with access to improved sanitation from 1970 to 2004.

	Table 10: Fraction of Population with Access to Improved Sanitation[247]								
Country	**1970**	**1975**	**1980**	**1985**	**1990**	**1994**	**2000**	**2002**	**2004**
Egypt					50	11	94	68	70
Ethiopia	14	14					15	6	13

[247] *Access to Improved Sanitation, by Country, 1970 to 2004*, The World's Water, Pacific Institute, *available at* http://www.worldwater.org/data.html. Retrieved on April 12, 2011.

Burundi			35	58	18	51		36	36
DR Congo	5	22			21	9	20	29	30
Eritrea							13	9	9
Kenya	50	55	30			77	86	48	43
Rwanda	53	57	51	56	21		8	41	42
Sudan	16	22				22	62	34	34
Tanzania		17	66				90	46	47
Uganda	76	94		30	57	57	75	41	43

3. Food Security

Egypt excels in comparison to other riparian countries not only on the water security front, but also in food security. The Food and Agriculture Organization (FAO) of the United Nations ranks the prevalence of undernourishment in developing countries according to the following scale:

> Very high – undernourishment 35% and above
> High – undernourishment 25-34%
> Moderately high – undernourishment 15-24%
> Moderately low – undernourishment 5-14%
> Very low – undernourishment below 5%

Of the Nile Basin countries, Egypt is the only one designated as "very low" prevalence of undernourishment, or undernourishment below 5%. All other countries are categorized as "moderately high" and above with Ethiopia, Burundi, DR Congo and Eritrea categorized with the most prevalent undernourishment.

Table 11: Prevalence of undernourishment in developing countries (2005-2007)[248]	
Country	**Category**
Egypt	Very Low
Ethiopia	Very high
Burundi	Very high
DR Congo	Very high
Eritrea	Very high
Kenya	High
Rwanda	High
Sudan	Moderately high
Tanzania	High
Uganda	Moderately high

In FAO's *State of Food Insecurity in the World*, Egypt is not mentioned because the report deems the country's undernourishment as "not statistically significant." The report tracks the number of undernourished people and the percentage of the total population undernourished in the other nine riparian countries. Ethiopia and Sudan have seen a decrease in undernourishment. In the past 15 years, Ethiopia has fallen from 69% of the population undernourished to 41%. All other riparian countries have seen an increase in undernourishment in the last 15 years. DR Congo has the highest undernourishment in the region, with 69% of its population undernourished. Burundi and Eritrea also face undernourishment for nearly two-thirds of their populations. See all countries' undernourishment data in Table 12.

Table 12: Undernourishment by country[249]

[248] FAO Hunger Map 2010, www.fao.org, *available at* www.fao.org/fileadmin/templates/es/Hunger.../Hunger_Map_2010b.pdf

	Number of undernourished people in millions				% of the total population undernourished			
Country	**1990-92**	**1995-97**	**2000-02**	**2005-07**	**1990-92**	**1995-97**	**2000-02**	**2005-07**
Egypt	NS*	NS	NS	NS	-	-	-	-
Ethiopia	34.6	36.3	32.4	31.6	69	62	48	41
Burundi	2.5	3.5	3.9	4.7	44	56	59	62
DR Congo	10.0	25.5	36.7	41.9	26	55	70	69
Eritrea	2.1	2.1	2.7	3.0	67	64	70	64
Kenya	8.0	8.6	10.3	11.2	33	31	32	31
Rwanda	3.0	3.0	3.1	3.1	44	53	38	34
Sudan	10.8	9.3	9.9	8.8	39	29	28	22
Tanzania	7.4	12.4	13.6	13.7	28	40	39	34
Uganda	3.5	4.9	4.8	6.1	19	23	19	21

*NS- not statistically significant

4. Human Development Index

The Human Development Index (HDI) as defined by the United Nations Development Programme (UNDP), is the composite index measuring average achievement in three basic dimensions of human development—(1) a long and healthy life, (2) knowledge, and (3) a decent standard of living. These dimensions are intricately tied with access to water. First, potable water and food are necessary to live a long and healthy life. Second, if a society does not have the basics of food and water to sustain life, it cannot engage in higher level thinking or

[249] *The State of Food Insecurity in the World*, Food and Agriculture Organization of the United Nations and World Food Programme, *available at* www.fao.org/docrep/013/i1683e/i1683e.pdf. Retrieved on 12 April 2011.

knowledge building. And third, water is necessary for a very basic standard of living. The HDI is expressed as a value between 0 and 1.

UNDP ranks 169 countries based on the HDI, with 1 indicating the country with the highest HDI. Of the Nile Basin countries, Egypt has the highest HDI rank at 101 while the DR Congo is ranked 168. Egypt's HDI is much higher than the other riparian countries. In 2010, Egypt's HDI was .62. The next closest country was Kenya at .47. Ethiopia had an HDI of .328. DR Congo was the lowest at .282. See Table 13 for more HDI information.

Table 13: Human Development Index (HDI) [250]

HDI Rank out of 169	Country	1980	1990	2000	2005	2006	2007	2008	2009	2010
101	Egypt	0.393	0.484	0.566	0.587	0.594	0.601	0.608	0.614	0.62
157	Ethiopia	..	..	0.25	0.287	0.298	0.309	0.317	0.324	0.328
166	Burundi	0.181	0.236	0.223	0.239	0.254	0.263	0.271	0.276	0.282
168	Congo (Democratic Republic of the)	0.267	0.261	0.201	0.223	0.227	0.235	0.231	0.233	0.239
..	Eritrea	..	..	..	..	..	..	..	..	..
128	Kenya	0.404	0.437	0.424	0.443	0.449	0.456	0.459	0.464	0.47
152	Rwanda	0.249	0.215	0.277	0.334	0.344	0.355	0.373	0.379	0.385
154	Sudan	0.25	0.282	0.336	0.36	0.365	0.369	0.373	0.375	0.379
148	Tanzania (United Republic of)	..	0.329	0.332	0.37	0.375	0.379	0.386	0.392	0.398
143	Uganda	..	0.281	0.35	0.38	0.388	0.398	0.408	0.416	0.422

The landscape of the Nile Basin region has changed significantly since the turn of the 20th century. Due in part to the inequitable allocation of the Nile River, Egypt has been able to excel in many areas where other riparian countries have stayed stagnant or slid backwards. Population is expanding quickly for every riparian country. With increased populations comes increased

[250] International Human Development Indicators, United Nations Development Programme, *available at* http://hdrstats.undp.org/en/indicators/49806.html. Retrieved on 23 April 2011.

uncertainty in water security, food security, sanitation. Alone, these changed circumstances cannot abrogate existing treaties. The next section sets forth a new test in which abrogation of these treaties still upholds the rule of law.

V. Application to the Nile Basin: *Rebus Sic Stantibus* Invoking *Jus Cogens*

If a state could abrogate a treaty whenever it is not in their best interest, the confidence and legitimacy of all international treaties would be greatly undermined. Yet circumstances and times may change so drastically that the status quo would not be sustainable. In the Nile Basin, the circumstances of the region simply cannot continue along its current water trajectory. States are willing to go to war to preserve their livelihood. A dialogue among the States must take place for the livelihood of all riparian States.

No existing theories, including state succession, *rebus sic stantibus*, and *jus cogens*, are sufficient legal vehicles for assessing whether a treaty can be abrogated while upholding the rule of law. Until now, scholars have not applied a doctrinal vehicle that allows an assessment in which the outcome would abrogate an existing treaty while still upholding rule of law. We propose a test which could allow both. The test combines two existing doctrines, *rebus sic stantibus* and *jus cogens*. It requires the petitioning state(s) to meet the high bar of proving that circumstances have so fundamentally changed as to result in the violation of inviolable principles shared by the international community, such as nourishment, water access, and sanitation. If the state(s) is successful in proving that *rebus sic stantibus* has invoked *jus cogens*, then the state can abrogate the treaty.

During the colonial era, specifically when the 1902 agreement and the 1929 treaty were signed, allocating the majority of the Nile's flow to Egypt was consonant with human rights. However, if the upper riparian states can make the case that the water availability, economic

well-being, and health of the Nile Basin have so drastically changed in the past eight decades to fundamentally change the circumstances so that human rights are violated, then abrogation of the colonial-era treaties would be valid and even necessary. In this section, the *Rebus Sic Stantibus* invoking *Jus Cogens* test will be applied to the Nile Basin.

A. Circumstances in 1902 and 1929 Justified the Treaties

The *rebus sic stantibus* prong of the test is important because without it, *jus cogens* posits that a treaty is void *ab initio*. In such a case, a treaty should not have been upheld to begin with. The theory articulated here applies to treaties that were valid at their inception, but because of changed circumstances may have come to violate fundamental human rights. This is a significant difference because the proposed test does not have a foregone conclusion. Application of the test could conclude that abrogation of the treaty is not justified by the rule of law. In such a case, the treaty should continue to be upheld. If the treaty was void *ab initio*, it would not continue to be upheld. Below is a discussion of whether the colonial-era treaties were justified at the time of their signing.

Historically, the riparian States have recognized Egypt as the most water insecure country in the Nile Basin. The majority of Egypt, 86%, is classified as extremely arid and 14% is classified as semi-arid. The mean annual rainfall is less than one inch.[251] This amount of rainfall is not enough to sustain life. Without the Nile, Egypt would not have had access to any sanitary water, drinking water, or water for irrigation. No other country faced such dire circumstances. Therefore, it was customary local practice to allow Egypt unconstrained use of the Nile since the river was its only water source.[252] This is demonstrated in practice as Egypt has been the main

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[251] Degefu at 17.

[252] Bonaya Adhi Godana, Africa's Shared Water Resources: Legal and Institutional Aspects of the Nile, Niger, and Senegal River Systems 169 (1985).

beneficiary of the Nile's flow for 5000 years.[253] Egypt's "natural and historic" rights were also acknowledged in formal commissions and agreements.[254] The British Commission of 1914 recognized and respected Egypt's prior rights.[255] The British Commission of 1919 found that Egypt had a right to the amount of water she was actually using at the time, which comprised all the natural flow of the Blue Nile until January 20.[256] The Nile Commission of 1925 concluded from Nile flow rates of the past 960 years[257] that the river was particularly important to Sudan and Egypt because their sole source of water comes from the Nile.[258] No other country could claim such substantial reliance on the Nile.

Because customary practices recognized Egypt's prior rights to water, no treaty was needed before the 1900's. Egypt only needed as much water as was necessary for survival. However, a global cotton shortage in the early 1900's created an opportunity for Egypt to fill the shortage since it was well-situated to grow cotton.[259] Great Britain was especially in favor of this expansion since its textile mills were hit hard by the cotton shortage and its previous relationship with Egypt made Egypt a good trading partner. Great Britain wanted security that

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[253] Donald Hornstein, Environmental Sustainability and Environmental Justice at the International Level: Traces of Tension and Traces of Synergy, 9 Duke Envtl. L. & Pol'y F. 291, 294 (1999).

[254] *See* Part II *supra*.

[255] Degefu at 121.

[256] *Id.* at 122.

[257] The Report of the Joint Commission of His Majesty's Government of the United Kingdom and Northern Ireland and the Egyptian Government, Para. 32 (1925).

[258] The Report of the Joint Commission of His Majesty's Government of the United Kingdom and Northern Ireland and the Egyptian Government, Para. 71 (1925).

[259] Valerie Knobelsdorf , The Nile Waters Agreements: Imposition and Impacts of a Transboundary Legal System, 44 Colum. J. Transnat'l L. 622, 626

Egypt would have stable irrigation to continually provide its mills with cotton. Therefore, Great Britain helped Egypt secure its "natural and historic" rights to Nile waters in the 1929 Treaty.

The allocation of the 1929 treaty, largely favoring Egypt, was accepted by riparian States because they recognized Egypt's dire water situation, as discussed above.[260] So even though Egypt was now securing its water rights for survival as well as irrigation, upper riparians did not protest because their own irrigation could be sustained by their tropical climates and precipitation. Furthermore, the allocation of the 1929 treaty, and of the 1902 agreement, did not take water away from any other state as the water was unused by those states. Therefore, the circumstances surrounding the colonial-era treaties, namely the 1902 Agreement and the 1929 Treaty, did not violate fundamental rights of any of the riparian countries. At the time, they merely guaranteed the ability of Egypt to meet the fundamental needs of its citizens. These colonial-era treaties were no void *ab initio.*

The finding of validity of the colonial-era treaties is important because if the next prong of the test does not show that circumstances have changed so much that they now violate human rights, riparian States are still bound by the existing treaties.

B. **Do Changed Circumstances Violate Human Rights Today?**

In the past, *jus cogens* had only applied to torture. But now scarce resources have elevated deprivation of water and food to levels of *jus cogens*. If a treaty violates *jus cogens*, it must be abrogated. This next section will explore the changed circumstances in the Nile Basin and whether circumstances have changed so much that abrogation of the 1902 and 1929 treaties are compelled by *jus cogens*.

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[260] John Anthony Allan, *East Africa's Water Requirements: The Equatorial Nile Project and the Nile Waters Agreement of 1929*, *in* The Nile: Sharing a Scarce Resource, 81 (Cambridge University Press 1994).

1. Water Security

Today, water security for the States in the Nile basin is a dire situation. The entire Nile Basin suffers from water insecurity, which affects access to improved drinking water[261] and access to improved sanitation.[262] On both counts, Egypt is an outlier among the rest of the riparian countries. Nearly all of Egypt's population (98%) has access to improved drinking water. Egypt has been able to provide broad access to its population consistently for the past half century. Ethiopia, on the other hand, is in the most precarious position. It has the least access of all riparian countries, providing only 22% of its population with improved drinking water. This is an improvement from 1970, when barely anyone in Ethiopia, 6%, had access to improved drinking water. Though Ethiopia was able to quadruple its access, 22% is still an extremely low proportion. The other countries fare better than Ethiopia, but are still a far cry from Egypt's nearly complete access. Many of them have seen great improvement between 1970 and 2004. DR Congo increased access from 11% of the population in 1970 to 46% in 2004. Kenya increased from 15% to 61%. Sudan jumped from 19% to 70%. Tanzania increased from 13% to 62%. And Uganda tripled its access in the last 35 years from 22% to 60%. These increases have developed even without access to more Nile water. However, this may be the most the countries are able to achieve without tapping into the Nile's water. The percentage of access for all countries has stayed relatively constant for the last five years of data. If the upper riparian countries have hit a ceiling in providing access, the gap between access rates (as great as 76% between Egypt and Ethiopia) cannot be justified with the continued monopolistic use of the Nile by Egypt. See Table 9 for detailed data on fraction of population with access to improved

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[261] *Access to Improved Drinking Water, by Country, 1970 to 2004*, The World's Water, Pacific Institute, *available at* http://www.worldwater.org/data.html. Retrieved on April 12, 2011.

[262] *Id.*

drinking water. With most States unable to provide potable water to their populations, it is questionable whether Egypt should be using so much water for cotton production.

Access to improved sanitation also sheds light onto the problem of water insecurity. Though Egypt still fares the best of all riparian countries, it is not immune to the disturbing trend over the last five years of data that show an extreme decrease in fraction of population with access. In 2000, nearly all of Egypt's population (94%) had access to improved sanitation. This number has since fallen to 70% in 2004. This drastic decrease in access is foreboding for the entire region. After all, Egypt has access to the most water of any riparian country. The other countries are nowhere near Egypt's level of access to improved sanitation. Ethiopia's access to improved sanitation has hovered at about 14% for the past half century, dipping all the way to a mere 6% in 2002. The other riparian countries, including Egypt, struggled to bring improved sanitation to even 30-40% of its population. Egypt was not the only country to experience a significant decrease in access over the last five years. Both Kenya and Tanzania nearly halved their access, falling from about 90% access in 2000 to only about 45% in 2004. In the same period, Sudan fell from 62% to 34% and Uganda fell from 75% to 43%.[263] See Table 10 for detailed data on fraction of population with access to improved sanitation. This downward trend is a reminder that water security is a much more complicated issue than merely scapegoating Egypt for having access to the Nile River. Even Egypt is in a precarious situation. The access problem in the Nile Basin would not be fixed by simply taking all the Nile's allocation away from Egypt. The solution must be more nuanced.

2. Food Security

[263] *Id.*

Ethiopia sits among incredibly rich water resources, most of which feed into the Nile River. Ethiopia has not been able to harness this rich resource because the water treaties do not allow it to build dams and any projects that could affect the flow of the water. This was not a problem in the colonial-era since rainfall was plentiful. Ethiopia enjoyed relatively drought-free years until the Famine of Tigray in 1958. Bahru Zewde, *A History of Modern Ethiopia: 1855-1974*, 196 (1991). Ethiopia has faced severe drought since the 1970s. These droughts have resulted in devastating famines. Today, the food insecurity that grips Ethiopia, as well as Uganda and Tanzania, is worse than in Egypt's deserts. Even in years of good rain fall, about five million Ethiopians are in need of food aid. During drought years, the need rises to 14 million, amounting to two million tons of food aid worth $700 million.[264] Now the need to harness its water resources is no longer a luxury, but a necessity to sustain life. Ethiopia's economy has suffered so much from the drought that it must look to foreign investment. One particularly booming industry in Ethiopia is foreign agribusiness. While this may be good in the short term for Ethiopia's economy, the country is leasing vast tracts of irrigable land to foreign agribusinesses that ship the agriculture abroad as opposed to keeping the food in the country.

Yet again, Egypt is an outlier among the rest of the riparians when it comes to undernourishment.[265] Egypt is the only Nile Basin country with less than 5% of its population undernourished. In fact, the Food and Agriculture Organization of the United Nations does not report Egypt's food security data in *The State of Food Insecurity in the World* report because it

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[264] Press Release, *World Food Programme, Drought and Lack of Food Aid Threaten Millions of Ethiopians* (Nov. 12, 2002), *available at* http://www.wfp.org/english/?moduleID=137&Key=549.

[265] The rankings of undernourishment are as defined by the Food and Agriculture Organization of the United Nations. The corresponding rates of undernourishment are: Very high- undernourishment 35% and above; High- undernourishment 25-34%; Moderately high - undernourishment 15-24%; Moderately low – undernourishment 5-14%; Very low – undernourishment below 5%.

deems the statistics insignificantly small. Sudan is the next best country, classified as moderately high undernourishment with rates between 15-24%.[266] All other riparian countries are classified as having high to very high levels of undernourishment. Ethiopia, Burundi, DR Congo, and Eritrea are among the most undernourished. Forty-one percent of Ethiopia's population is undernourished and over sixty percent of the populations in Burundi, DR Congo, and Eritrea are undernourished.[267] Such high levels of undernourishment are staggering. No country has shown particularly strong improvements in the last 15 years. Ethiopia did decrease its percent of undernourished from 69% to 41%. However, two countries experienced even more significant increases in undernourishment. From 1990 to 2007, the percentage of the population undernourished in DR Congo jumped from 26% to 69%. Burundi increased from 44% to 62% in that same time period. By the United Nations' estimate, nearly 135 million people in this region are undernourished.[268] See Table 11 for classifications on prevalence of undernourishment in developing countries and Table 12 for detailed data on undernourishment by country.

Though Egypt fared better in water security data from upper riparian countries, it is not even discussed with these other countries for food security. Food security is simply not a problem for Egypt due to the development of a majority of its irrigable land. On the other hand, most of the other riparian States, namely Ethiopia, are starving.

3. Development

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[266] FAO Hunger Map 2010, www.fao.org, *available at* www.fao.org/fileadmin/templates/es/Hunger.../Hunger_Map_2010b.pdf

[267] *The State of Food Insecurity in the World*, Food and Agriculture Organization of the United Nations and World Food Programme, *available at* www.fao.org/docrep/013/i1683e/i1683e.pdf. Retrieved on 12 April 2011.

[268] *Id.*

The Nile Basin region is among the least developed area in the world. One such measure to capture human development is the Human Development Index ("HDI") developed by the United Nations Development Programme. This composite index is composed of indicators of life expectancy, educational attainment and income. HDI serves as a frame of reference for both social and economic development. Access to water, a foundation of life, has great affects on these indicators composing the HDI. The HDI below is calculated for the year 2010.

Again, Egypt ranks the highest in HDI of the Nile Basin region. In fact, Egypt places relatively well among all ranked countries. Of the 169 ranked countries, Egypt places 101 with an HDI of .62. The other riparian countries are not only must worse off compared to the Egypt, they are much worse off compared to the rest of the world. DR Congo is the second to worst country for HDI at .239. Ethiopia and Burundi also linger near the bottom of the list at 157 and 166 respectively.[269]

While Egypt greatly increased its HDI in 30 years, from 1980 to 2010, other riparian countries did not fare so well. Egypt nearly doubled its HDI from .393 in 1980 to .62 in 2010. Other countries saw modest increases or even decreases in HDI. Ethiopia increased from .25 in 2000 to .328 in 2010. Burundi barely increased in 30 years from .181 to a meager .282. The DR Congo fell from .267 to just .239 in 30 years. See Table 13 for detailed HDI data.

4. **Water Usage**

Currently, Egypt consumes the majority of the Nile's flow, 80%, followed by Sudan at 18.5%. Ethiopia consumes only 1% of the Nile's flow though it supplies the majority of water. The other seven riparian countries collectively consume half a percent of the Nile's flow. In 1902

[269] International Human Development Indicators, United Nations Development Programme, *available at* http://hdrstats.undp.org/en/indicators/49806.html. Retrieved on 23 April 2011.

and1929, the inequitable allocation was acceptable because upper riparian countries did not need the water. However, the upper riparian countries' exploding populations and developing economies have increased their demand for water.

Though water is scarce in this region, Egypt and Sudan could afford to give up some of their allocation without suffering. Studies as late as 2002 show that Egypt does not yet use all of its allocated Nile water. The study estimates a total annual supply of 63.7 km³ and a total use of 61.7 km³.[270] Official sources estimate Sudan's annual use at 12.6 km³ in 1985-86 of the 18.5 km³ it is entitled. [271]

Egypt still receives the least amount of precipitation, approximately 51 mm/year.[272] Though other countries receive much more precipitation than Egypt, as little as ten times more and as much as thirty times more, it is still not enough to meet the growing demands of the countries. Therefore even taking into account Egypt's precipitation rates, its 80% consumption of Nile water doesn't seem justified when all riparian countries are also struggling for water security.

5. **Environmental Impacts**

Due to dam building and use of agricultural chemicals and pesticides, water quality in the Nile Basin has greatly decreased. In particular, the Aswan High Dam, completed in 1971, has changed the ecological makeup of the region. Before construction of the dam, the annual Nile floods would deposit 50 and 110 million tons of nutrient rich silt to Egypt's fields. This enriched

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[270] Agrawala at 105.

[271] Scheumann and Schiffler at 140-41.

[272] Aquastat, Food and Agriculture Organization of the United Nations, *available at* http://www.fao.org/nr/water/aquastat/main/index.stm. Retrieved on 12 April 2011.

soil is no longer deposited into Egypt's fields, resulting in lower production yield.[273] Estimates approximate that yields in these affected areas have dropped by 30%.[274] The decreased soil fertility and yield leads to the increased use of fertilizers and pesticides by Egypt. These chemicals decrease the water quality.[275] Other States do not share the blame for this poorer water quality since they do not have access to much, if any, of the Nile's water.

Poorer water quality is not the only environmental development in the region. A significant amount of water is lost to evaporation and seepage—approximately 12% to 21% of the annual volume of the Nile.[276] This evaporation is due to poor water management and lack of cooperation among the riparian states. For example, scholars have estimated that better water management would provide Egypt with an additional 6.5 to 10 billion m³ of water.[277] However, Egypt has had little incentive to manage its water better since it has access to nearly all the Nile's flow. Though water is limited in this region, more water could be preserved for use if all states cooperate.

C. Test Outcome

"It is important to renegotiate the colonial treaties. They do not reflect the circumstances that exist today." Philip Kassaija, lecturer at the Makerere University in Kampala, Uganda.[278]

Egypt historically and presently is an extremely water deficient country. As recognized by the colonial-era treaties, Egypt's water deficiency was worse than any other riparian country

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[273] *Id.*

[274] Kliot at 46-47.

[275] *Id.*

[276] *Id.* at 46.

[277] *Id.* at 49.

[278] The Nile: Water Conflicts, Science in Africa (May 2003), *available at* http://www.scienceinafrica.co.za/2003/may/nile.htm. Last accessed on 21 May 2011.

since it had no other source of water. Due to Egypt's dire water situation, the riparian countries accepted that Egypt used the majority of the Nile's flow. However, more than a century has passed since the signing of the 1902 agreement. Circumstances are much different today. Egypt's near-exclusive use of the Nile has allowed her to develop into the most food and water secure country in the Nile Basin. While Egypt has demonstrated incredible improvement over the years in food security, water sanitation, access to drinking water, and human development, most of the other riparian countries have stayed stagnant or slipped backwards. These countries are no longer able to sustain a minimal standard of living for its population with other water sources besides the Nile River. Though Egypt is still an arid region and relies heavily on the Nile for its livelihood, the current day situation of water security, food security, and development cannot justify the continued allocation of the Nile water from the 1929 and 1959 treaties. Riparian countries have not shown improvement in these areas in recent years and do not indicate that they will. The current water allocation is not sustainable. A closer look at three factors staggeringly concludes that continued observance of the colonial-era treaties violates *jus cogens*.

1. Water security: Nearly all of Egypt's population (98%) has had access to improved drinking water for the past half century while riparian countries have as little as 22% of their population with access. Furthermore, the riparian countries have stayed constant for the past five years of access with no signs of improvement without change.
2. Food security: Though Egypt has an arid climate, its near unlimited use of the Nile waters for irrigation has allowed it to develop more land for food production than any other riparian country. Egypt has developed 3,266,000 hectares of irrigable land, nearly three-quarters of its total irrigable land. No country comes close to Egypt's

development. Even Sudan, who rights to more Nile water than upper riparian States has only been able to develop 54% of its irrigable land. Ethiopia has developed a mere 5% of its irrigable land while Uganda has developed only 4.5%.[279] Clearly other sources of water in upper riparian countries are not enough to develop the irrigable land at the same rate as Egypt. Due to its development, Egypt is the only Nile Basin country not counted as undernourished. All other riparian countries are classified by the United Nations as moderately high to very high levels of undernourishment. As much as 60% of the populations in Burundi and DR Congo are undernourished. No riparian country has shown significant improvement in food security in the past 15 years.

3. Development: Egypt is heads and shoulders above the other riparian countries in terms of development. While Egypt ranks at a respectable 101st out of 169 countries for highest Human Development Index, the least developed country in the region, DR Congo, has the second worst HDI. Egypt has greatly increased its HDI in 30 years while DR Congo experienced a drop from .267 to .239. The disparity is staggering, but the trend is even more devastating.

Additionally, the conditions of Egypt's water needs have changed in the last century. At the turn of the 20th century, irrigation was necessary to sustain Egypt's main economy of cotton production. The current economy of Egypt is now much less dependent on agriculture than it once was. A main export for Egypt is still cotton, though agriculture now only composes 13.7%

[279] Swain at 297.

of Egypt's GDP and supplies 32% of jobs.[280] Egypt's economy is no longer completely dependent on cotton agriculture. Furthermore, it is not harder to justify allocating water for Egypt's cotton growth when other States do not have enough water for drinking and growing food. These factors clearly indicate that circumstances have changed so much in the Nile Basin region that the water treaties cannot continue to be upheld. To abrogate them would be to uphold the rule of law.

Notice that this test does not turn on state succession. As stated in a previous section, state succession as the reason for abrogating treaties is not recognized by international law. Though many of these States became independent after the signing of key Nile treaties, that factor is not enough to justify abrogation under the rule of law. Furthermore, though circumstances have changed considerably in the Nile Basin, *rebus sic stantibus* alone is not sufficient to void the colonial-era treaties relating to the Nile, given that no legal treaty abrogation has ever been decided on the principle alone.[281] Instead, the abrogation is proper because changed circumstances have been show to violate human rights. Though no international codification recognizes food and water as a human right within *jus cogens*, "[i]n its judgment in the *Corfu Channel* case, the

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[280] Egypt, The World FactBook, Central Intelligence Agency, 2010, *available at* https://www.cia.gov/library/publications/the-world-factbook/geos/eg.html.

[281] *See* CRAVEN 54 n.216 ("*Fisheries Jurisdiction* (UK v. Iceland), Judgment of 2 Feb 1973, ICJ Rep 3, at 18 ('International law admits that a fundamental change in circumstances which determined the parties to accept the treaty, if it has resulted in radical transformation of the extent of obligations imposed by it, may, under certain conditions, afford the party affected a ground for invoking the termination or suspension of the treaty. This principle, and the conditions and exceptions to which it is subject, have been embodied in Article 62 of the Vienna Convention on the Law of Treaties, which may in many respects be considered as a codification of existing customary law on the subject of termination of a treaty relationship on account of chance circumstance.'). . . . The doctrine has been discussed (albeit indirectly) in a number of cases but has never been ground as a justifiable basis for the termination of an agreement. eg *Free Zones in Upper Savoy and the District of Gex*, (1932) PCIJ Series A/B, no 46, p158; *Fisheries Jurisdiction* case ICJ Rep (1973) 3; *Gabçikovo-Nagymaros Project* case ICJ Rep (1997) para 104 (the Court indicated that 'the stability of treaty relations requires that the plea of fundamental change of circumstance be applied only in exceptional circumstances'.). . .").

International Court says that 'elementary considerations of humanity' are 'even more exacting in peace than in war.'"[282] Thus it is quite possible that treaties that effectively denied such basic human subsistence needs such as food and water—elementary considerations of humanity—would violate *jus cogens*, particularly where such effects are predictable and not the result of the exigencies of war or conflict.

And thus, the application of the *Rebus sic stantibus* invoking *Jus Cogens* test concludes that the colonial-era Nile treaties, namely the 1902 and 1929 agreements were justified at the time of their signing. However, circumstances have changed so that the continual observance of the treaty would violate *jus cogens*. Treaties that were valid at an earlier point in time are no longer valid. These agreements must now be abrogated.

Our discussion does not end here. Once the treaties are abrogated, there is still no binding agreement to allocate the Nile water. The next section will propose international water law as the law that should apply in the absence of binding treaties in the Nile region. It will serve as a guide for adjudicators and states renegotiating.

VI. International Watercourse Law

In the absence of binding treaties, international transboundary watercourse law should guide adjudication of water rights on the Nile and regional negotiations over water management. While some commentators argue that international watercourse law is unsettled, the status of this body of law has evolved over the last half-century to widely applicable and accepted standards. Though these legal principles won't, by themselves, definitively guide state action in the absence

[282] Verdross, at 59.

of international agreement or adjudication, any international adjudication should predictably rely on this defined body of law. Thirty years ago Yimer Fisseha may have been correct in observing that "International river law is one of the most unsettled areas of international law; it is an area where there are few rules of general application or validity."[283] Yet today, in the wake of the 1997 United Nations Convention on the Non-Navigational Uses of International Watercourses ("UN Watercourse Convention"),[284] international court and arbitration decisions,[285] publications by the International Law Association and the International Law Commission,[286] and consistent state practices, there is a strong and reliable body of international watercourse law. An eminent water law scholar recently summed up the state of the law as "significant and well-developed" in "addressing transboundary water problems."[287] Especially where the colonial era treaties of the Nile Basin are invalidated, this body of law should guide new riparian agreements and international adjudication of water rights.

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[283] Yimer Fisseha, *State Succession and the Legal Status of International Rivers*, in THE LEGAL REGIME OF INTERNATIONAL RIVERS AND LAKES 177 (Ralph Zacklin et al. eds., 1981). *See also* Takele Soboka Bulto, *Between Ambivalence and Necessity* at 295 (writing in 2009 that "rules of international water law have always been and remain vague and uncertain" while bracketing the 1997 UN Watercourse Convention and relying on arguments that either predate or are concurrent with the Convention; citing Lucius Caflisch, *Regulation of Uses of International Watercourses*, in INTERNATIONAL WATERCOURSES ENHANCING COOPERATION AND MANAGING CONFLICT, 1998 Proc. of a World Bank Seminar 121 (Salman M. A. Salman & Laurence Boisson de Chazournes, eds.) at 3, 16; *See also* Ellen Hey, *Sustainable Use of Shared Water Resources: The Need for a Paradigmatic Shift in International Watercourses Law*, in THE PEACEFUL MANAGEMENT OF TRANSBOUNDARY RESOURCES, 127-130 (Gerald H. Blake, et al. eds., 1995); Dante A. Caponera, *Shared Waters and International Law*, in THE PEACEFUL MANAGEMENT OF TRANSBOUNDARY Resources, 121-23.).

[284] Convention on the Law of the Non-Navigational Uses of International Watercourses, G.A. Res. 51/229, 51st Sess., Supp. No. 49, U.N. Doc. A/51/49 (May 21, 1997), available at http://untreaty.un.org/ilc/texts/instruments/English/conventions/8_3_1997.pdf (hereinafter "UN Watercourse Convention").

[285] *See* International Court of Justice, *Gabçikovo-Nagymaros Case* (1997); McCaffrey, *supra* note __ at 146; Dellapenna, *supra* note __ at 323.

[286] *See infra* this section.

[287] Joseph W. Dellapenna, *International Water Law in a Climate of Disruption*, 17 MICH. ST. J. INT'L L. 43, 60 (2008) (referring to the Berlin Rules on Water Resources, in Report of the Seventy-First Meeting of the International Law Association 334 (2004) and Joseph W. Dellapenna, *Customary International Law of Transboundary Fresh Waters*, 1 INT'L J. GLOBAL ENVTL. 261 (2001).).

It is important to note at the outset of this Part that the substantive international water law does not mention changing pre-existing treaties that are still in force. The substantive law discussed in this Part serves to illustrate the principles that govern water allocation and management *in the absence of binding treaties*. However, the unique emphasis international water law places on prioritizing "vital human needs" strengthens the argument made in Part V. Thus, while this area of law does not explicitly speak to abrogating pre-existing treaties, this Part analyzes the international water law that has shaped and will continue to shape negotiations among the Nile riparians.

Nineteenth century international watercourse law concerned itself principally with navigational uses, but throughout the twentieth century, the law governing non-navigational uses has progressed. The International Institute of Law ("IIL")[288] updated its 1911 Madrid Declaration[289] in its 1961 Salzburg Resolution,[290] moving beyond a "no harm principle" to one that included equitable utilization.[291] The International Law Association ("ILA") further codified transboundary watercourse law in its 1966 Helsinki Rules,[292] and subsequently the UN General Assembly asked the International Law Commission ("ILC") to codify the law. After more than thirty, years the UN adopted the 1997 UN Watercourse Convention. In 2004 the ILA

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[288] Institut de Droit International

[289] ANNUAIRE DE L'INSTITUT DE DROIT INTERNATIONAL, Madrid Session 1911, (Paris 1911) Vol. 24, pp. 365-365, *available at* http://www.fao.org/DOCREP/005/W9549E/w9549e08.htm#fn139.

[290] Comm'n on the Utilization of Non-Mar. Int'l Waters, Inst. of Int'l Law, Salzburg Resolution (1961) ("Salzburg Resolution"). Text in ANNUAIRE DE L'INSTITUT DE DROIT INTERNATIONAL, Vol. 49, II, Salzburg Session, September 1961, (Basle 1961), pp. 381-384, *available at* http://www.fao.org/DOCREP/005/W9549E/w9549e08.htm#fn139.

[291] SALMAN M. A. SALMAN, THE WORLD BANK POLICY FOR PROJECTS ON INTERNATIONAL WATERWAYS: AN HISTORICAL AND LEGAL ANALYSIS 52-53 (2009).

[292] Int'l Law Ass'n 52nd Conference, Helsinki, Fin., Aug. 1966, The Helsinki Rules (1962) ("Helsinki Rules").

built on the UN Watercourse Convention and articulated its Berlin Rules on Water Resources.[293] A number of notable court decisions have interspersed themselves enshrining international custom into law. While the 1997 UN Watercourse Convention is still not in force,[294] and despite some criticism,[295] it serves as the most authoritative body of law governing transboundary watercourses and its principles have guided most contemporary treaties and judicial decisions. While there are areas of divergences or relative vagueness among publicists, State practices and the UN Watercourse Convention, all have incorporated a few key principles that define international watercourse law.

A. Competing Principles

The principles embodied in the UN Watercourse Convention and other authoritative statements of international law arise from customary international water law and mirror three settled core principles. First, the principle of limited territorial sovereignty has replaced the often asserted, though never implemented, theories of absolute territorial sovereignty and absolute territorial integrity. Limited territorial sovereignty balances the rights of States to waters within their national borders with duties to other riparians. "Today, limited sovereignty is expressed as the principle of equitable utilization, i.e., the need to share international waters according to

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[293] .International Law Association, The Berlin Rules on Water Resources, Berlin Conference: Water Resources Law (2004), *available at* http://www.internationalwaterlaw.org/documents/intldocs/ILA_Berlin_Rules-2004.pdf.

[294] Takele Soboka Bulto, *Between Ambivalence and Necessity: Occlusions on the Path Toward a Basin-Wide Treaty in the Nile Basin*, 20 COLO. J. INT'L ENVTL. L. & POL'Y 291, 293 (2009) (noting that thirty-five states must ratify the Convention for it to come into operation).

[295] The UN Watercourse Convention is subject to criticism because it doesn't sufficiently deal with environmental risk or the idea that water should be viewed as a human right in light of emerging water scarcity. *See, e.g.* JOSEPH W. DELLAPENNA AND JOYEETA GUPTA, EDS., THE EVOLUTION OF THE LAW AND POLITICS OF WATER 6 (2008) (noting the Convention "is conservative in its approach to international water law, it scarcely attempted to address the water challenges of the twenty-first century and was out-of-date even before it was adopted"). It may be the Convention's conservatism that makes it widely applicable and lends it legitimacy for not overreaching. The 2004 Berlin Rules, for which Dellapenna served as Rappateur, expanded the role of environmental concerns, which is perhaps the most significant divergence from the principles of the UN Watercourse Convention.

principles of equity (fairness)."[296] Second, the principle of "no harm" requires that no riparian use the watercourse to impose significant harm on another riparian. The no harm principle, in its absolutist form, is often seen as standing in opposition to equitable utilization because it can imply that any change to the status quo "harms" riparians benefiting from current allocations.[297] Viewed together with equitable utilization, however, the no harm principle is simply one logical—and flexible—factor included among several in determining a fair allocation of waters.[298] Third, riparians have an obligation to negotiate and settle disputes peacefully.[299] The following subsections trace the historical evolution of the principles of equitable utilization and no significant harm; Part VI takes up dispute settlement more fully from an institutional perspective.

1. Absolutes: Territorial Sovereignty vs. Territorial Integrity

In an irreconcilable divide, the downstream Nile riparians, Egypt and Sudan, have argued for absolute territorial integrity (their right to the uninhibited flow of the Nile) while the upstream riparians have argued for absolute territorial sovereignty (their right to use the Nile

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[296] JOSEPH W. DELLAPENNA AND JOYEETA GUPTA, EDS., THE EVOLUTION OF THE LAW AND POLITICS OF WATER 11 (2008) (noting that equitable utilization is enshrined in ILA's 1966 Helsinki Accords, art. IV; the UN Watercourse Convention, art. 5; and the ILA's 2004 Berlin Rules, art. 12).

[297] *See, e.g.* Dereje Zeleke Mekonnen, *The Nile Basin Cooperative Framework Agreement Negotiations and the Adoption of a "Water Security" Paradigm: Flight into Obscurity or a Logical Cul-de-sac?* 21 Eur. J. Int'l L. 421, 428 (2010) (discussing Egypt's insertion into the Nile Basin Cooperative Framework Agreement of the duty "not to significantly affect the water security of any other Nile Basin State" as a point of deadlock between Egypt and the upper riparians because of the implication that any change in water allocations could be seen as harming—or affecting the water security—of Egypt vis-à-vis the status quo).

[298] The UN Watercourse Convention includes both principles in Articles 5 and 7, and includes both existing uses and effects of uses on other riparians as factors to be balanced in Article 6. *See also* MCCAFFREY, THE LAW OF INTERNATIONAL WATERCOURSES 135-36 (noting that where a downstream states invokes "no harm" to give itself a "veto" over development of the watercourse by upstream riparians then the downstream state is in fact "harming" the upstream states).

[299] JOSEPH W. DELLAPENNA AND JOYEETA GUPTA, EDS., THE EVOLUTION OF THE LAW AND POLITICS OF WATER 11 (2008).

irrespective of any other riparian). "Although these doctrines are devoid of legally binding effects, adherence to them by the Nile Basin States has presented an obstacle to the formation of a new Nile Basin treaty."[300]

The theory of absolute territorial sovereignty "suggests that a sovereign nation can do as it pleases with the portion of an international river found within its borders regardless of the impact on the downstream nation[s]."[301] The principle was famously expressed in 1895 by U.S. Attorney General Judson Harmon, and has since become known as the "Harmon Doctrine." Mexico had protested that American diversion of the Rio Grande River waters caused a legal injury to Mexicans living downstream by depriving them of water that they had claimed the right to "prior to that of the inhabitants of Colorado by hundreds of years."[302] In response to Mexico's claims, Attorney General Harmon stated

> The fundamental principle of international law is the absolute sovereignty of every nation, as against all others, within its territory . . . .
>
> "All exceptions . . . to the full and complete power of a nation within its own territories must be traced to the consent of the nation itself. They can flow from no other legitimate source."
>
> . . .
>
> The immediate as well as the possible consequences of the right asserted by Mexico show that its recognition is entirely inconsistent with the sovereignty of the United States over its national domain . . . . The case presented is a novel one. Whether the circumstances make it possible or proper to take any action from considerations of comity is a question which does not pertain to the Department [of Justice]; but that question should be decided

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[300] Bulto, at 302.

[301] Ralph W. Johnson, *The Columbia Basin*, in INTERNATIONAL DRAINAGE BASINS 168 (quoted in MCCAFFREY, THE LAW OF INTERNATIONAL WATERCOURSES 115 n.11 (2001).) *See* BONAYA ADHI GODANA, AFRICA'S SHARED WATER RESOURCES: LEGAL AND INSTITUTIONAL ASPECTS OF THE NILE, NIGER, AND SENEGAL RIVER SYSTEMS 32 (1985); Bulto, at 302-03.

[302] Minister Romero to U.S. Secretary of State Richard Olney, 21 Oct. 1895, US Appendix, p.202 (quoted in MCCAFFREY, THE LAW OF INTERNATIONAL WATERCOURSES 114).

> as one of policy only, because, in my opinion, the rules, principles, and precedents of international law impose no liability or obligation upon the United States.[303]

It is unclear whether Harmon's statement was an objective view of the state of international law at the time, or merely a realpolitik bargaining position. In fact, the U.S. didn't ultimately adopt this position in resolving the Rio Grande dispute nor in subsequent cases.[304] "[T]he doctrine of absolute sovereignty has, in any event, never enjoyed wide support as the basic, governing principle in the field. It is at best an anachronism that has no place in today's interdependent, water-scarce world."[305]

While upstream riparians have championed absolute territorial *sovereignty*, downstream riparians have championed the equally extreme doctrine of absolute territorial *integrity*. This doctrine holds that downstream riparians have an absolute right to an uninterrupted flow of water, free from the intervention of upstream riparians.[306] "Under this approach, any effort at harnessing a river's hydroelectric or irrigation potential is premised upon sanction by lower riparian [S]tates."[307]

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[303] Treaty of Guadalupe Hidalgo-International Law, 21 Op. Att'y Gen. 274, 281-83 (1895) (quoting *The Schooner Exchange v. McFaddon*, 7 Cranch 116, 136 (1812) (Marshall, C.J., writing about sovereign immunity) (quoted in MCCAFFREY, THE LAW OF INTERNATIONAL WATERCOURSES 115 (2001) (explaining the doctrine in greater detail at 76-111)).

[304] In fact the U.S. and Mexico apportioned the water equitably under the 1906 Convention concerning the Equitable Distribution of the Waters of the Rio Grande for Irrigation Purposes, *see* McCaffrey, The Law of International Watercourses 115, and repudiated the doctrine as having "never been followed either by the United States or any other country," *id*. at 127 n.98.

[305] STEPHEN C. MCCAFFREY, THE LAW OF INTERNATIONAL WATERCOURSES: NON-NAVIGATIONAL USES 114 -17 (2001) (referring to Mexico's claim of historic right to the Rio Grande waters and to Pakistan's claim to the Indus based on "Pakistan's right to historic, legal and equitable" rights).

[306] *See* Amdetsion, *supra* note 4 at 30; MCCAFFREY, THE LAW OF INTERNATIONAL WATERCOURSES 128.

[307] Amdetsion, *supra* note 4 at 30.

Quoting the same Supreme Court passage as Harmon quoted in support of the exact opposite proposition, the United States invoked absolute territorial integrity in the *Trail Smelter* arbitration,[308] claiming that Canada violated international law by causing transboundary air pollution. Yet, as with the eventual resolution of the Rio Grande dispute, the absolutist doctrine gave way to an agreement that allowed an equitable result—the continued operation of the Canadian smelter with compensation for those harmed in the U.S.[309]

Egypt has frequently asserted the doctrine of absolute territorial integrity to complement its "historic rights" arguments. In the colonial treaties, Egypt justified the allocation of all of the Nile's waters to Egypt and Sudan under "natural and historical rights."[310] According to Egypt, these then became "acquired rights"[311] given the acquiescence of the other riparians to historical allocations. And as recently as 1981 Egypt offered a full-throated argument in support of absolute territorial integrity, stating at a regional meeting that its right to the status quo derives from the "principle that no country has the right to undertake any positive or negative measure that could have an impact on the river's flow into other countries."[312]

A handful of other States have asserted their downstream rights under this theory, "yet no state has ever accepted a diplomatic settlement on this basis, no arbitral decision has ever been awarded by virtue of this principle, and no prominent jurists have advocated this view."[313] The

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[308] *United States v. Canada*, 1941, 2 UNRIAA 1905 (1949).

[309] MCCAFFREY, THE LAW OF INTERNATIONAL WATERCOURSES 129-30.

[310] Exchange of Notes, 1929.

[311] *See* MCCAFFREY, THE LAW OF INTERNATIONAL WATERCOURSES 130.

[312] *Country Report, Egypt*, paper presented at the Interregional Meeting of International River Organizations held at Dakar, 5-14 May 1981, ¶3, as quoted in GODANA 39.

[313] Amdetsion, *supra* note 4 at 30. *See also* MCCAFFREY, THE LAW OF INTERNATIONAL WATERCOURSES 128-37.

doctrine has at times been strained to encompass the principle of doing "no harm" discussed in the third subsection, yet beyond "a certain facial similarity, the likeness does not extend further than that for the simple reason that the [no harm] principle is not an absolute one."[314] While arguing in extremes may serve short-term diplomatic and rhetorical interests, ultimately from an international law perspective, the extreme doctrines of absolute territorial sovereignty and absolute territorial integrity are dead letters.

2. Equitable Utilization and Limited Territorial Sovereignty

The dominant theory today is limited territorial sovereignty—that there are legal restrictions on a State's use of international watercourses.[315] Rather than apportion the absolute right to any State simply based on its geographic or historical position, waters are allocated according to the principle of "equitable utilization." Each State's sovereign right to water flowing through its territory acts reciprocally to restrict the right of other riparians.[316] This principle is the "pillar of interstate interactions over the uses of international waters" and holds that each State has an equal right to use the waters of an international river in accordance with its needs.[317]

Equity does not translate to an equal volumetric division of water to each riparian. It would, for instance, strain the principle to allocate equal shares of water to two otherwise

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[314] MCCAFFREY, THE LAW OF INTERNATIONAL WATERCOURSES 136-37.

[315] MCCAFFREY, THE LAW OF INTERNATIONAL WATERCOURSES 149.

[316] A 1958 State Department Memorandum summarized what "an international tribunal would deduce" as "the applicable principles of international law" including "1. A riparian has the sovereign right to make maximum use of the part of a system of international waters within its jurisdiction, consistent with the corresponding right of each coriparian." "2. (a) Riparians are entitled to share in the use and benefits of a system of international waters on a just and reasonable basis."(quoted in MCCAFFREY, THE LAW OF INTERNATIONAL WATERCOURSES 143).

[317] Bulto, at 308.

equally-situated riparians with massively disparate populations. Rather, need is assessed through historic patterns of use, population, area, arable land, and a range of other objective factors.[318] One mid-twentieth century formulation defined three criteria for an equitable apportionment of waters:

> (1) examination of the economic and social needs of the co-riparian [S]tates by an objective consideration of various factors and conflicting elements . . . relevant to their use of the water; (2) distribution of the waters among the co-riparians in such a manner as to satisfy their needs to the greatest extent possible; and (3) accomplishment of the distribution of the waters by achieving the maximum benefit for each co-riparian consistent with the minimum of detriment to each.[319]

The UN Watercourse Convention provides its own incomplete list of factors to be weighed together, with each factor weighed "by its importance in comparison with that of other relevant factors."[320]

> (a) Geographic, hydrographic, hydrological, climatic, ecological and other factors of a natural character;
>
> (b) The social and economic needs of the watercourse States concerned;
>
> (c) The population dependent on the watercourse in each watercourse [S]tate;
>
> (d) The effects of the use or uses of the watercourses in one watercourse State on other watercourse States;
>
> (e) Existing and potential uses of the watercourse;
>
> (f) Conservation, protection, development and economy of use of the water resources of the watercourse and the costs of measures taken to that effect;
>
> (g) Availability of alternatives, of comparable value, to a particular planned or

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[318] Joseph W. Dellapenna, *The Customary International Law of Transboundary Fresh Waters*, 1 INT'L J. GLOBAL ENVIRONMENTAL ISSUES, 264, 270 (2001).

[319] Jerome Lipper, *Equitable Utilization*, in THE LAW OF INTERNATIONAL DRAINAGE BASINS 45 (A. H. Garretson, R. D. Hayton, & C. J. Olmstead eds., 1967) (quoted in Bulto, at 308-09).

[320] UN Watercourse Convention art. 6.

existing use.[321]

The 1966 Helsinki Rules includes another list of comparable factors,[322] and the 2004 Berlin Rules contains a list with an additional environmental focus.[323]

Regardless of the factors weighed, equitable utilization is principally a quantitative measure, rather than a qualitative one.[324] It might therefore be more accurately labeled "equitable allocation" or "equitable apportionment" as it has been termed by the U.S. Supreme Court in its elaboration of the doctrine since the early 20th century in disputes between the states.[325] In somewhat of a break with international custom and practice, the 2004 Berlin Rules takes steps to habilitate the notion that equitable utilization should include environmental and quality concerns.[326] This may be an important step in redefining the factors to be weighed, but for the time being represents a divergence from customary law and State practice that was subject to publicized internal critique.[327] In any case, drafting a complete list of factors to

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[321] *Id.*

[322] Helsinki Rules art. V.

[323] Berlin Rules art. 13.

[324] MCCAFFREY, THE LAW OF INTERNATIONAL WATERCOURSES 325-26.

[325] *See* Kansas v. Colorado, 206 U.S. 46 (1907); Wyoming v. Colorado, 259 US 419, *modified*, 260 U.S. 1 (1922), *amended*, 252 U.S. 953 (1957); Connecticut v. Massachusetts, 282 U.S. 660 (1931); New Jersey v. New York, 283 U.S. 336 (1931); Washington v. Oregon, 297 U.S. 517 (1936); Colorado v. Kansas, 320 U.S. 383 (1943); Nebraska v. Wyoming, 325 U.S. 589 (1945), *modified*, 345 U.S. 981 (1953); Colorado v. New Mexico, 459 U.S. 176 (1982); Texas v. New Mexico, 462 U.S. 554 (1983); Colorado v. New Mexico, 467 U.S. 310 (1984); and Kansas v. Colorado, 475 U.S. 1079 (1986). These cases are cited in MCCAFFREY, THE LAW OF INTERNATIONAL WATERCOURSES 324 n.2.

[326] *See* ILA Berlin Conference 2004 - Water Resource Committee Dissenting Opinion *available at* http://www.internationalwaterlaw.org/documents/intldocs/ila_berlin_rules_dissent.html (expressing concern that the proposed Rules cede the principle of equitable utilization too much in the direction of environmental concerns).

[327] *Id.* Despite the internal dissent, the ILA nonetheless approved the Rules. Joseph W. Dellapenna, who served as the Rapporteur for the ILA in its drafting of the 2004 Berlin Rules has argued in several places that the UN Watercourse Convention is outdated because of its failure to adequately address environmental and other concerns. In a 2001 article calling for an ILA update of the Helsinki Rules, Dellapenna wrote, "The new body of international environmental law is not incompatible with the rule of equitable utilisation. Yet equitable utilisation is sufficiently

consider is a hopeless task and one that would do little to clarify the application of the law.[328]

> Conceptually, equitable utilization can also be viewed through two different lenses.
>
> > The "shared uses" variant refers to the classical apportionment method. This variant is usually achieved through a treaty among the basin states that allocates the dependable flow of wet water of a river among the riparian states, where a right to "water qua water" is created. Each state enjoys complete freedom of action with respect to the choice and manner of utilization of its quota, presumably, with the major caveat that no state can have the right to cause a significant harm to its neighbors through its usage of the common waters.
> >
> > The second variant of equitable utilization, called the "shared benefits" principle, springs from welfare economics. The gist of this variant is that water is a scarce resource that can be put to alternative uses. In water sharing processes among the riparian users of a given water resource, states must ensure that water is put to a use that is most valuable as compared to the other uses. The implication of this principle in many cases would lead to a situation where "some nations forgo the actual use of wet water but are entitled to monetary compensation for allowing other states to put the water to its most efficient use."[329]

While the "shared benefits" variant may be new to State practices, it may ultimately align with possible global trends towards accepting legal principles that favor market approaches to equity approaches.[330]

In general, no use of water is to be given priority over another. However, serving "vital human needs" stands apart from all other factors, as the single *favored* use of water under both

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uncertain in application that some critics have argued the principle focuses too strongly on the procedures for resolving disputes over water and presupposes that water is to be consumed even in consumption is not sustainable." Dellapenna, *The Customary International Law of Transboundary Fresh Waters*, at 288.

[328] Dellapenna, *The Customary International Law of Transboundary Fresh Waters*, at 287 (arguing that customary international law falls short on this point and therefore states in the Jordan Valley will have to turn to negotiations or a third party adjudication). Dellapenna doesn't explain how a failure of the doctrine to enumerate totalizing factors results in a failure of customary international law. This paper argues that in such disputed cases customary international law *requires* states to turn to adjudication and then a competent court should apply the appropriate body of law. The need for adjudication certainly can't represent an *ipso facto* failure of law.

[329] Bulto, at 312 (quoting passim A. Dan Tarlock & Patricia Wouters, *Are Shared Benefits of International Waters an Equitable Apportionment?*, 18 COLO. J. OF INT'L ENVTL. L. & POL'Y 523 (2007)).

[330] Gupta and Dellapenna, *The Challenges for the Twenty-First Century*, at 404.

the UN Watercourse Convention and the Berlin Rules.[331] Thus, while States must weigh all other competing interests based on their relative importance in a given context, satisfying vital human needs will always take precedence. It is worth quoting the commentary to the Berlin Rules at length to encapsulate the acceptance of this principle and demarcate the boundary of what is considered a "vital human need."

> Generally, categories or kinds of use have no inherent preference over each other in international water law, with one important exception. Legal institutions have long recognized a preference in municipal law for "domestic uses" of water, or as the *UN [Watercourse] Convention* describes it, "vital human needs." Comparable preferences are found in particular treaties. . . . ["Vital human needs"] does not extend to water needed to support general economic activity even though some have argued that such activity is included in "vital human needs." Unquestionably, the provision of jobs as well as the other benefits from enhanced economic activity are important concerns, but those concerns need to be balanced under Articles 12 [the principle of equitable utilization] and 13 [the incomplete list of factors to be weighed in determining equity] against the like needs in other basin States and against the obligations of ecological integrity and sustainable development.

The presumption is that vital needs include drinking and sanitation.[332]

Historically, the principle of equitable utilization has focused on riparians' *need* for water with a concomitant concern that use should not impinge on the reciprocal rights of other riparians. Innumerable treaties have applied the principle using various formulations of this language.[333] A treaty between the Dominican Republic and Haiti provides each with the right to

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[331] UN Watercourse Convention, art. 10 "1. In the absence of agreement or custom to the contrary, no use of an international watercourse enjoys inherent priority over other uses. 2. In the event of a conflict between uses of an international watercourse, it shall be resolved with reference to articles 5 [equitable utilization] to 7 [no harm], with special regard being given to the requirements of vital human needs." Berlin Rules, art. 14. "1. In determining an equitable and reasonable use, States shall first allocate waters to satisfy vital human needs. 2. No other use or category of uses shall have an inherent preference over any other use or category of uses."

[332] Bulto, at 310.

[333] *See* Joseph W. Dellapenna, *The Customary International Law of Transboundary Fresh Waters*, Int. 1 J. Global Environmental Issues, Vol. 1, 264, 270-71 (2001) (citing that many of the treaties are collected in UN Doc. A/CN.4/283, (1974) *Y.B. Int. L. Comm'n*, Vol. 2, pp.33-264.).

make "just and equitable use" of their shared waters.[334] An agreement for using the Mekong River system committed the signatories to "utilize the waters of the Mekong River system in a reasonable and equitable manner."[335] Several treaties comingle language of equitable use with explicit restrictions on harming other riparians. Argentina and Brazil's 1971 Declaration of Asunción on the Use of International Rivers, provides that "each State may use the waters in accordance with its needs provided that it causes no appreciable damage to any other State of the [La Plata] Basin."[336] Throughout the last century of State practice, the principle has remained a constant feature.

Indeed, the principle of equitable utilization has been more present in the Nile Basin context than one might imagine given all of the absolutist talk. Sometimes the principle was comingled with language asserting prior use and historic rights. Leading up to the 1929 Treaty, the United Kingdom Foreign Minister instructed his representative:

> The principle is accepted that the waters of the Nile . . . must be considered as a single unit, designed for the use of the peoples inhabiting their banks according to their needs and their capacity to benefit therefrom; and, in conformity with this principle, it is recognized that Egypt has a prior right to the maintenance of her present supplies of water for the areas now under cultivation, and to an equitable proportion of any additional supplies.[337]

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[334] Signed Feb. 20, 1929, art. 10, LNTS Vol. 105, p.225. See also Agreement concerning the waterpower of the Pasvik River, signed Dec. 18, 1957, Norway-USSR, UNTS Vol. 312, p.274.

[335] Agreement on the cooperation for the sustainable development of the Mekong River basin, signed April 5, 1995, Cambodia-Laos-Thailand-Vietnam, art. 5, reprinted in *Int. Legal Materials*, Vol. 34, pp.864–880 ('Mekong River basin agreement'). See also Agreement on regulation of boundary waters, signed November 20, 1866, Spain-Portugal, Annex 1 (the whole agreement in turn is an annex to the Convention on boundaries, signed on 29 September, 1864, Spain-Portugal, *Legislative Texts*, ref. 58, p.241); Treaty concerning the regulation of water management of frontier waters, signed Dec. 7, 1967, Austria-Czechoslovakia, art. 19(4) UNTS Vol. 728, p.313.

[336] Reproduced in 1974 Y.B. Int'l L. Comm'n, vol. 2, pt. 2, p. 322, para. 326 (quoted in MCCAFFREY, THE LAW OF INTERNATIONAL WATERCOURSES 141).

[337] PAPERS REGARDING NEGOTIATIONS FOR A TREATY OF ALLIANCE WITH EGYPT-EGYPT no. 1, Cmd. 3050, p. 31 (London, HM Printing Office, 1928) (quoted in MCCAFFREY, THE LAW OF INTERNATIONAL WATERCOURSES 139).

Thus the prior rights aligned with need and "capacity to benefit," while the statement acknowledges that waters beyond those needs should be equitably apportioned. The 1959 Treaty between Egypt and the Sudan reflected a similar application of the equitable utilization principle—it simply applied the principle to Sudan and Egypt to the exclusion of all other riparians. In negotiating the treaty, Sudan stated: "It is not disputed that Egypt has established a right to the volumes of water which she actually uses for irrigation. The Sudan has a similar right."[338] The text of the 1959 Treaty divides the waters according to acquired (historic) rights and a formula for dividing waters beyond that amount, and also provides that were the annual yield to increase, the benefits would be divided in equal shares.[339] Another provisions of the 1959 Treaty allowed Egypt to start construction to increase the Nile's yield without Sudan's assistance if Egypt's "progress and planned agricultural expansion" required it, and for Sudan to pay her share and derive her share of benefits when development enabled it.[340] Like other agreements throughout the twentieth century, the Nile Basin agreements recognized that multiple riparians shared legal rights to the Basin's waters—they simply acted to abridge those rights through the explicit terms of the agreement.

Equitable utilization has a long and persistent history in State practice and international codifications. The principle applied in the Holy Roman Empire and continued through to the 1911 Madrid Resolution, the 1961 Salzburg Resolution, the 1966 Helsinki Rules, the 1997 UN

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[338] Quoted in MCCAFFREY, THE LAW OF INTERNATIONAL WATERCOURSES 140.

[339] Agreement Between the Republic of the Sudan and the United Arab Republic for the Full Utilization of the Nile Waters, 8 November 1959, §§ First-Second.

[340] Agreement Between the Republic of the Sudan and the United Arab Republic for the Full Utilization of the Nile Waters, 8 November 1959, § Third.

Watercourse Convention and the 2004 Berlin Rules.[341] Importantly, one of the principle's most important aspects "is that it takes into account both the current and future water needs of the riparian States and is elastic enough to accommodate a changing set of circumstances."[342] While there is no universally applicable way to decide how the principle of equitable utilization translates into the resolution of a given dispute,[343] it is clear that "no known international decision supports a contrary rule" and that there is "no doubt" that equitable utilization is "the governing principle in the field of international watercourses."[344]

3. The No-Harm Principle

The "no-harm" principle is tightly interwoven into the equitable utilization principle, though it is often considered as analytically distinct. Despite their conjunctive functionality, the two principles appear as distinct "General Principles" in the UN Watercourse Convention.[345] Parallel to the discarded doctrine of absolute territorial integrity, the obligation of a riparian to cause no harm has been argued as an absolute prohibition against interfering with downstream riparians' claims. In that sense, the no-harm principle has been advanced to maintain the "prior appropriations," "historic rights," or any other formulation of the status quo. However, "the no-harm principle is not, and has never been, conceived as absolutely prohibiting the causing of significant harm in all circumstances."[346] Rather, "no harm" is a compatible component of the

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[341] *See* MCCAFFREY, THE LAW OF INTERNATIONAL WATERCOURSES 149; UN Watercourse Convention art. 5; Berlin Rules art. 12). *See also* Amdetsion, *supra* note 4 at 30; Bulto, at 308-13.

[342] Bulto, at 311.

[343] MCCAFFREY, THE LAW OF INTERNATIONAL WATERCOURSES 138.

[344] *Id.*, at 145-46 (referring to the impact of the *Gabçikovo-Nagymaros* case discussed in section B.).

[345] UN Watercourse Convention art. 5 (defining the General Principle of "Equitable and reasonable utilization and participation"), art. 7 (defining the General Principle of the "Obligation not to cause significant harm").

[346] MCCAFFREY, THE LAW OF INTERNATIONAL WATERCOURSES 347.

equitable utilization doctrine. "It neither embodies an absolute standard nor supersedes the principle of equitable utilization where the two appear to conflict with each other."[347] Essentially, the two doctrines "are, in reality, two sides of the same coin."[348] In the Nile Basin context, Egypt has asserted that the "no harm" principle stands for the proposition that her existing water allocation cannot be diminished. Discussed in greater depth *infra*, this is an overbroad reading of the "no harm" principle.

While the no harm principle is often cited as deriving from the Roman principle *sic utere tuo ut alienum non laedas* (so use your property as not to harm that of another), the law as applied to watercourses even in Rome reflected the principle that "the law may permit the causing of factual harm if that is equitable under the circumstances—i.e. if it is within the actor's right of equitable utilization."[349] This is true of the principle as currently formulated. One U.S. court wrote *sic utere tuo* "is not an ironclad rule, without limitations. If applied literally in every case it would largely defeat the very purpose of its existence, for in many instances it would deprive individuals of the legitimate use of their property."[350] If viewed reciprocally and absolutely, the no-harm principle would deprive any riparian from using any water whatsoever, as if both absolute territorial sovereignty and integrity applied simultaneously. Thus it is unsurprising that the doctrine has never been applied in that way.

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[347] *Id.*, at 348.

[348] *Id.*, at 371.

[349] *Id.*, at 350.

[350] Fleming v. Lockwood, 92 Pac. 962 (Mont. 1908) (highlighting the inherent limitation of the "no harm" principle) (excerpted in MCCAFFREY, THE LAW OF INTERNATIONAL WATERCOURSES 350-51).

The harm contemplated by the principle must be "significant" *legal* harm.[351] *Factual* harm, however significant, will not alone constitute the prohibited harm proscribed by the doctrine. The factual harm caused must be recognized as unreasonable and inequitable when weighed against other countervailing interests. McCaffrey indicates there is no bright line test, but rather a flexible test "which may aptly be described as use of one's property or territory that is *reasonable* in the circumstances vis-à-vis one's neighbor or co-riparian. This is another way of saying that it is *legal* injury, rather than *factual* harm *per se*, that is proscribed."[352] Under U.S. jurisprudence, a state complaining of a new harm must make a prima facie showing that another state's actions would cause harm in order to shift the burden to the other state to "establish that the new use should nevertheless be permitted under the principle of equitable utilization."[353] Under the UN Watercourse Convention, threshold harm may be a factual inquiry, but legal injury would only be sustained where the "conduct resulting in harm was unreasonable (inequitable) in respect of the affected [S]tate."[354]

While there is a potentially heightened standard for preventing new pollution, the standard for reasonableness in doing "no harm" is generally one of due diligence. Article 7 of the UN Watercourse Convention states "all appropriate measures" are to be taken to prevent harming co-riparians, which is an explicit due diligence standard. While one could question the

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[351] The UN Watercourse Convention speaks of "significant harm" which its drafters explained as "real impairment of use, i.e. a detrimental impact of some consequence upon, for example, public health, industry, property, agriculture, or the environment. . . ." The term "significant" replaced "appreciable" and "substantial" used in other codifications of international watercourse law. *See* Y.B. Int'l L. Comm'n, vol. 2, pt. 2, p. 36 (1988) (explaining the ILC's definition of "appreciable" which was later changed in the 1994 Draft and adopted by the General Assembly in the 1997 UN Watercourse Convention) (quoted in MCCAFFREY, THE LAW OF INTERNATIONAL WATERCOURSES 348).

[352] MCCAFFREY, THE LAW OF INTERNATIONAL WATERCOURSES 365.

[353] *Id.*, at 366 (citing in particular Colorado v. New Mexico, 459 U.S. 176, 187 n.13 (1982)).

[354] MCCAFFREY, THE LAW OF INTERNATIONAL WATERCOURSES 369.

meaning of these words, "they are generally regarded as reflecting due diligence obligations, as the ILC's commentary confirms."[355] On the other hand, "when it comes to pollution harm, neither the ILC's final draft nor the Convention contains any qualifying language whatsoever on the issue of the required standard of conduct."[356] Though ILC commentary seems to imply a due diligence standard even for preventing pollution.[357] Even the 2004 Berlin Rules, which places far more emphasis on environmental concerns, limits the obligations of State to cause "no harm" or promote sustainability to one of due diligence.[358]

The no-harm principle also imposes a duty on States to give notice, cooperate, or negotiate about potential harms. The *Lake Lanoux* arbitration between Spain and France is one famous example. Spain contested France's elaborate plans to utilize the Carol River, yet the tribunal ultimately ruled in France's favor, holding that because France had given consistent notice of its plans it could proceed even without Spain's consent.[359] "[T]he tribunal, over Spain's vehement objections, gave its blessing to a radical alteration of the natural conditions of

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[355] *Id.*, at 372 (citing para. 6 of the commentary to art. 7 as adopted on second reading, ILC 1994 Report pp. 238-39).

[356] MCCAFFREY, THE LAW OF INTERNATIONAL WATERCOURSES 377.

[357] *Id.* 377-78.

[358] *See* Berlin Rules, Commentary to art. 7 "*Sustainability"* stating, "In a sense, this entire body of Rules is a structure for fostering sustainability. That is not the same as requiring that States use waters equitably and reasonably. The rule of equitable utilization, the heart of the original *Helsinki Rules,* still expresses the primary rule of international law (whether customary or conventional) regarding the allocation of waters among basin States. *See* Article 12. The emerging international environmental law is compatible with the rule of equitable utilization, yet there is nothing to require that States when using water—even equitably and reasonably—must conform themselves to the mandates of international environmental law. Sustainability then is a separate and compelling obligation that, as indicated in the *UN Convention,* art. 5, conditions the rule of equitable and reasonable use without displacing it. Yet sustainability is not an absolute obligation. The varied circumstances of human need and water availability are too complex to allow one to declare an absolute obligation of sustainability. Moreover, in too many situations whether a particular use is sustainable will be highly debatable. Rather than attempt to lay down a theoretically absolute obligation that often will be breached in practice, this Rule identifies an obligation of to take appropriate measures to assure sustainability—a due diligence obligation to which States can be expected to conform. "

[359] *See* Lilian del Castillo-Laborde, *Case Law on International Watercourses*, in THE EVOLUTION OF THE LAW AND POLITICS OF WATER, DELLAPENNA AND GUPTA, EDS. 325 (2008).

the Carol River. . . . This suggests the tribunal was of the view that at least when one riparian [S]tate holds extensive consultations with another" the State will be given wide latitude to cause harm where it can be justified as equitable.

This wide latitude, however, does not extend to violating a pre-existing treaty. In *Lake Lanoux*, the tribunal found that while there were pre-existing treaties between France and Spain, the treaties did not themselves bar France's proposed construction.[360] In contrast, the existing colonial-era treaties governing the Nile Basin explicitly forbid affecting the Nile without Egypt's consent. So long as these treaties remain in force, there is no obligation for Egypt to negotiate a new agreement. Egypt's most persuasive argument, therefore, rests on the force of the colonial-era treaties and not on the no-harm principle.

Where pre-existing treaties do not govern, several international statements of law reinforce the principle that States are required to consult or cooperate with respect to international watercourses as part of the no-harm—and indeed the equitable utilization—principle, whether in consideration of environmental or other harms. Article 3 of the Charter of Economic Rights and Duties of States (CERDS), which is "closely related to international watercourses,"[361] provides: "In the exploitation of natural resources shared by two or more countries, each State must co-operate on the basis of a system of information and prior consultations in order to achieve optimum use of such resources without causing damage to the legitimate interests of others."[362] Principle 1 of a 1978 UN Environmental Program Governing

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[360] John G. Laylin & Rinaldo L. Bianchi, *The Role of Adjudication in International River Disputes*, 53 AMER. J. OF INT'L L. 30, 35 (1959).

[361] MCCAFFREY, THE LAW OF INTERNATIONAL WATERCOURSES 360.

[362] UN GA Res. 3281 (XXIX) of 12 Dec. 1974, art. 3.

Council Decision states "[I]t is necessary that consistent with the concept of equitable utilization of shared natural resources, States co-operate with a view to controlling, preventing, reducing or eliminating adverse environmental effects which may result from the utilization of such resources."[363] Under Article 7 of the UN Watercourse Convention, a State causing harm must consult with the State alleging harm and resolve the conflict "in the context of the overall regime of equitable and reasonable utilization."[364]

So how do States resolve unreasonable factual harms—harm that violates a legally protected right and is inequitable? In the *Trail Smelter* case mentioned previously, rather than enjoin the smelter from operating, the tribunal resolved the dispute by requiring Canada to compensate the U.S. for the harm caused by the smelter's pollution.[365] In essence, the tribunal recognized the right of the U.S. to be free from transboundary harm as governed by a liability rule—where an entitlement can be taken without consent and compensated—as opposed to a property rule—where entitlements are more strongly protected and mere compensation cannot justify the taking.[366] Indeed, "modern instruments tend to regulate pollution rather than prohibiting it outright, since it is a concomitant of modern civilization. In any event. . . these provisions are generally regarded as reflecting a due diligence standard rather than an absolute prohibition."[367] Thus, the *Trail Smelter* tribunal "arrives at a result that is much closer to an

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[363] UNEP Governing Council Decision on Principles of Conduct in the Field of the Environment for the Guidance of States in the Conservation and Harmonious Utilization of Natural Resources Shared by Two or More States, Adopted at Nairobi on 19 May 1978, UNEP ELGP no. 2, 17 ILM 1097, Principle 1 (1978).

[364] MCCAFFREY, THE LAW OF INTERNATIONAL WATERCOURSES 368.

[365] *Id.*, at 354.

[366] *See generally* Guido Calabresi and Bernard Melamed, *One View of the Cathedral*, 85 HARV. L. REV. 1089 (1972).

[367] MCCAFFREY, THE LAW OF INTERNATIONAL WATERCOURSES 362-63.

equitable allocation of the uses of the air shed involved than to a flat proscription of transboundary harm."[368] The UN Watercourse Convention incorporated a similar standard. "Where significant harm nevertheless is caused to another watercourse State, the States whose use causes such harm shall, in the absence of agreement to such use, take all appropriate measures, . . . in consultation with the affected State, to eliminate or mitigate such harm and, where appropriate, to *discuss the question of compensation*."[369]

In terms of the Nile Basin, Egypt has frequently proffered the no-harm doctrine in defense of maintaining the status quo. Given Egypt's reliance on the Nile, Cairo's view of "harm" is expansive.[370] The argument is a more robust version of the "prior appropriation" or "historic rights" arguments, and one that stands on firmer legal ground.[371] Throughout the ongoing negotiations among Nile riparians, Egypt has consistently inserted the no-harm principle into the draft Cooperative Framework Agreement ("CFA"), recently under the guise of "water security." In 2007, the Nile Council of Ministers ("Nile-COM")[372] held extensive and inconclusive discussions over the water security provision, which read:

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[368] *Id.*, at 354-55.

[369] UN Watercourse Convention, art. 7(2).

[370] *See* Amdetsion, *supra* note 4 at 30.

[371] The "prior appropriation" doctrine has limited acceptance in international law. Prior use is among the factors to be measured to determine equitable utilization in the UN Watercourse Convention and to a lesser degree in the Berlin Rules, but has no favored status in either. *See* Christina M. Carroll, *Note, Past and Future Legal Framework of the Nile River Basin*, 12 GEO. INT'L ENVTL. L. REV. 260, 283-86 (1999) (discussing the UN Watercourse Convention). This hasn't prevented Egypt from pronouncing the doctrine as determinative. The Chief Justice of the Supreme Constitutional Court of Egypt has argued that the Nile waters are allocated according to "acquired rights which were established by use over an immemorial period of time, with the tacit or otherwise acquiescence of other riparians [which] cannot be denied." A. El Morr, *Water Resources in the Middle East: Some Guiding Principles*, in WATER IN THE MIDDLE EAST: LEGAL, POLITICAL, AND COMMERCIAL IMPLICATIONS, J. A. ALLAN & C. MALLAT, EDS. 297 (1995).

[372] Nile-COM is the highest decision-making body of the Nile Basin Initiative. *See* Nile Basin Initiative: Operational Structure http://www.nilebasin.org/index.php?option=com_content&task=view&id=30&Itemid=77.

> . . . The States also recognize that cooperative management and development of the waters of the Nile River System will facilitate achievement of water security and other benefits. Nile Basin [S]tates therefore agree, in a spirit of cooperation:
>
> (a) to work together to ensure that all States achieve and sustain water security
>
> (b) not to significantly affect the water security of any other Nile Basin State.[373]

Egypt and Sudan proposed an amendment, which would instead obligate riparians "not to adversely affect the water security *and current uses and rights* of any other Nile Basin State,"[374] and Nile-COM was unable to reach consensus.[375] Thereafter, the 2008 Nile-COM meeting also fell short of resolving the issue leaving it to be resolved by the institution slated to implement the CFA once ratified, Nile River Basin Commission.[376] "[I]mportantly, the assumption underpinning the decision that the Nile River Basin Commission would succeed in what almost 10 years of negotiations have been unable to attain is Utopian, to say the least."[377] Even if Egypt and Sudan were to sign the CFA—which through June 2011 they had not—a "CFA with 'water security' as its element would only mark either a logical cul-de-sac in the decade-long negotiations or the beginning of yet another round of endless negotiations under the auspices of the Nile River Basin Commission."[378] Thus, Egypt and Sudan's use of water security as a cloak for the obligation "not to adversely affect" the "current uses and rights of any [] Nile Basin State" is one more attempt to maintain the status quo under a perverted reading of the no-harm

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[373] Excerpted in Mohammed, 'The Nile River Cooperative Framework Agreement: Contentious Legal Issues and Future Strategies for Ethiopia', Paper Presented at the National Consultative Workshop on Nile Cooperation, 12-13 Feb. 2009, Addis Ababa, Ethiopia, at 11. (quoted in Mekonnen, at 428).

[374] *Id*. (emphasis added).

[375] *See* Mekonnen, at 428-30 for a full discussion of the negotiations. *See also* Bulto, at 301 (citing Joseph Ngome, Clause Holds Key to New Nile Treaty, Daily Nation (Nairobi), Mar. 28, 2008, available at http://allafrica.com/stories/printable/200803280008.html.).

[376] Mekonnen, at 429.

[377] *Id.*, at 429.

[378] *Id.*, at 428-29.

principle.

The no-harm principle is well defined in international watercourse law and new Nile water allocations that diminish Egypt's share would not *per se* violate the principle. Ultimately, "for the 'no-harm' obligation to be breached, three conditions must be satisfied: significant harm must result in one [S]tate from activities in another [S]tate; the latter must not only have failed to prevent the harm by its conduct but must also have been capable of preventing it by different conduct; and the conduct or use resulting in the harm must be unreasonable (inequitable) in the circumstances."[379] Upstream Nile riparians use of water to satisfy vital human needs would not be unreasonable (or inequitable) use. Thus, while the principles that govern international rivers do not, on their own, invalidate pre-existing treaties; these principles support a reassessment of water needs in the Nile region and allocations based on equitable utilization.

B. Codifying the Doctrine: A Brief Institutional Overview

1. International Court Case Law

While many water disputes have been settled through technical commissions and other forms of arbitration, some disputes have also involved international adjudication, which has advanced the body of international watercourse law. "Because the [International] Court [of Justice] relies on its precedents and is consistent in its holdings, the few disputes on water issues have created controlling case law."[380] The jurisprudence of the ICJ, and of the Permanent Court of International Justice before it, has evolved in conjunction with international custom and conventions. "The systematization of the case law of international tribunals allows one to

[379] *Id.*, at 379.

[380] Lilian del Castillo-Laborde, *Case Law on International Watercourses*, in THE EVOLUTION OF THE LAW AND POLITICS OF WATER, DELLAPENNA AND GUPTA, EDS. 320 (2008).

deduce from an apparent dispersion, a general norm that provides for the application of equitable principles under the common denomination of equitable utilization of water resources."[381]

The Permanent Court of International Justice, established in 1920 by the League of Nations, first addressed transboundary watercourses in its 1929 *River Oder Case*. The Court foreshadowed the equitable utilization doctrine by concluding that there is "'a community of interests of riparian States' that, in a navigable river 'becomes the basis of a common legal right.'"[382] While the *Oder* case adjudicated navigational uses of the river, the Court expanded its jurisprudence to non-navigational uses in the 1937 *Diversion of the Meuse River Case*. In *Meuse*, Belgium and the Netherlands disputed the legality of Belgium's diversion of the Meuse's waters by expanding its canal system in alleged violation of an 1863 treaty. The Court held that the treaty "did not prevent the Parties from modifying, enlarging, or transforming the canals in their own territories if they did not affect the discharge of waters from the Meuse intake. . . ."[383] The language sounds closer to an invocation of the no-harm principle, though as commentators have written, the decision recognized both the no-harm principle and the equitable utilization principle.[384]

The leading ICJ case on watercourse law is the 1997 *Gabçikovo-Nagymaros Project Case*, decided in September, just four months after the UN General Assembly adopted the

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[381] *Id*., at 334.

[382] *Id*., at 320.

[383] *Id*., at 323.

[384] *Id*., at 321.

Watercourse Convention.[385] The case arose out of a dispute over the obligations of Slovakia and Hungary under a 1977 treaty signed between Czechoslovakia and Hungary to implement a joint project for the utilization of the Danube waters. In 1989 Hungary suspended construction of the project and Slovakia implemented an alternative in the absence of Hungarian cooperation. "In 1993, the two States submitted their differences to the ICJ, asking it to decide whether Hungary was entitled to suspend and then abandon the works on the Nagymaros Project and whether Slovakia was entitled to proceed with its 'provisional solution' and to determine the legal consequences of these decisions."[386]

After four years, the ICJ rendered a decision, finding that both States had violated international law. The Court found that the 1977 Treaty was still in force despite state succession and changed circumstances.[387] In a 14-1 vote, the Court found that "Hungary was not entitled to suspend and subsequently abandon, in 1989, the works on the [projects contemplated in the treaty]."[388] In a 10-5 vote, the Court found that Slovakia was not entitled to implement its "provisional solution."[389] In finding as it did, the Court relied on its own precedent as well as the UN Watercourse Convention.

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[385] Though decided in 1997, the case is still pending before the ICJ because of Hungary's unwillingness to implement the Court's decision. *See Id.* at 326. It is important to note the different effects of the decision in this case compared to the potential impact of an ICJ in the Nile basin context. In order to vindicate the judgment of the Court in the Hungary-Slovakia case, Hungary must take significant active steps. In the Nile basin context, the upstream riparians needn't compel Egypt or Sudan to act, but rather are likely to act unilaterally to vindicate an equitable judgment, while the relative power of Egypt should deter the upstream riparians from brazenly over-exploiting the Nile waters beyond the judgment rendered.

[386] Lilian del Castillo-Laborde, at 325.

[387] *Gabçikovo-Nagymaros Project (*Hungary/Slovakia*)*, Judgment, I. C. J. Reports 1997 ¶¶155.(1).D, (2).

[388] *Id.* ¶155.(1).A.

[389] *Id.* ¶155.(1).C.

In concluding that Slovakia had gone too far in affecting Hungary's waters by implementing its "provisional solution," the Court cited its *River Oder* precedent.

> [The] community of interest in a navigable river becomes the basis of a common legal right, the essential features of which are the perfect equality of al1 riparian States in the user of the whole course of the river and the exclusion of any preferential privilege of any one riparian State in relation to the others.[390]

Slovakia's operation of its provisional solution had appropriated between 80 and 90 percent of the Danube's waters before returning them to the river.[391] The Court noted that while Slovakia argued their solution was necessitated by Hungary's breach of the treaty, the breach didn't override the doctrine of equitable utilization. Hungary violated its legal obligations under the treaty, "but that cannot mean that Hungary forfeited its basic right to an equitable and reasonable sharing of the resources of an international watercourse."[392]

The Court also explicitly cited the UN Watercourse Convention, passed just four months earlier, as support for the equitable use premise.

> Modern development of international law has strengthened this principle for non-navigational uses of international watercourses as well, as evidenced by the adoption of the Convention of 21 May 1997 on the Law of the Non-Navigational Uses of International Watercourses by the United Nations General Assembly.
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> The Court considers that Czechoslovakia, by unilaterally assuming control of a shared resource, and thereby depriving Hungary of its right to an equitable and reasonable share of the natural resources of the Danube . . . failed to respect the proportionality which is required by international law.[393]

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[390] *Territorial Jurisdiction of the International Commission of the River Oder,* Judgment No. 16, 1929, P. C. I. J., Series A, No. 23, p. 27 (cited in *Gabçikovo-Nagymaros Project* ¶85).

[391] *Gabçikovo-Nagymaros Project* ¶78.

[392] *Id.* ¶78.

[393] *Id.* ¶85. The Court also made direct reference to the UN Watercourse Convention in ¶147, stating:

> Re-establishment of the joint regime will also reflect in an optimal way the concept of common utilization of shared water resources for the achievement of the several objectives mentioned in the Treaty, in

Proportionality in this context captures the principles of both "limited harm" and "equitable utilization." Especially where there is a scarce resource, these doctrines act to balance competing claims to water. "The Court thus recognized that the equitable principle of proportionality is also embedded in the legal principle of equitable utilization."[394] While at the same time, "[t]he rule of 'no harm to other riparians' becomes part of the rule of equitable utilization and of the 'community of interest' of international rivers recognized by the courts."[395] ICJ jurisprudence therefore tracks closely to the international customary law codified in the UN Watercourse Convention and that expressed by other authoritative international bodies.

The *Gabçikovo-Nagymaros Project* case, moreover, sets a strong precedent for the Nile Basin context on some of the relevant legal issues. The water allocation treaty at issue in that case was upheld on state succession grounds, as Part III *infra* predicted the colonial-era treaties would be. Moreover, the court found that where one State breaches a river treaty, she does not forfeit her claims to equitable utilization of the waters. For the Nile, this doesn't mean that equitable utilization principles overcome binding treaties—they don't. The decision also does not implicate *jus cogens*. Rather, the decision means that were the Nile treaties held to violate *jus cogens*—or were Egypt and the other riparians to mutually abrogate the colonial-era treaties and enter adjudication—the ICJ would determine equitable utilization without penalizing

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concordance with Article 5, paragraph 2, of the Convention on the Law of Non-Navigational Uses of International Watercourses, according to which:

> Watercourse States shall participate in the use, development and protection of an international watercourse in an equitable and reasonable manner. Such participation includes both the right to utilize the watercourse and the duty to cooperate in the protection and development thereof, as provided in the present Convention (General Assembly doc. A/51/869 of 11 April 1997.).

[394] Lilian del Castillo-Laborde, at 321.

[395] *Id.*

Ethiopia or the other riparians for their violations of the treaties currently in force.

2. The International Law Institute & the International Law Association: Madrid to Salzburg & Helsinki to Berlin

The International Law Institute and the International Law Association have each addressed international watercourse law in the last century. The governing rules they have articulated largely conform to and confirm the principles of equitable utilization and no harm discussed *supra*. The IIL passed two significant resolutions in the first part of the twentieth century, the 1911 Madrid Resolution and the 1961 Salzburg Resolution, and the ILA then adopted two significant sets of rules, the 1966 Helsinki Rules and the 2004 Berlin Rules. Each codification has considered the twin principles of equitable utilization and no harm. The IIL moved from a focus on no harm towards a broader inclusion of equitable utilization. The ILA focused on equitable utilization in 1966, but significantly expanded the no-harm principle with respect to environmental harms in 2004.

The IIL offered the Madrid Resolution as an afterthought to international law principles that already applied to navigational uses of watercourses.[396] Acknowledging that riparian interdependence "precludes the idea of the complete autonomy of each State in the section of the natural watercourse under its sovereignty,"[397] the IIL emphasized the no-harm principle. In its brief statement of regulations, the ILL wrote, "neither State may, on its own territory, utilize or allow the utilization of the water in such a way as to seriously interfere with its utilization by the other State."[398] As well as, "All alterations injurious to the water, the emptying therein of

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[396] Madrid Resolution ("International law has dealt with the right of navigation with respect to international rivers but the use of water for the purposes of industry, agriculture, etc. was not foreseen by international law.").
[397] *Id*. *See also* trans. from 1974 Y.B. Int'l L. Comm'n. vol. 2, pt. 2, p. 200. (discussed in MCCAFFREY, THE LAW OF INTERNATIONAL WATERCOURSES 363).

[398] Madrid Resolution. para. I.

injurious matter (from factories, etc.) [are] forbidden."[399] This absolute language was typical of the time.[400]

When the IIL revisited the issue in its 1961 Salzburg Resolution, it emphasized equitable utilization over the no-harm principle.

> [W]hile its preamble refers to "the obligation not to cause unlawful harm to others". . . the rules formulated in its operative paragraphs do not refer to a no-harm or similar rule. Rather, they emphasize the equal rights of states to utilize a shared watercourse and declare that any disagreement concerning the extent of their respective rights of use "shall be settle on the basis of equity."[401]

Thus, the ILL evolved its view to be consonant with the governing principle of equitable utilization.

Shortly thereafter, in 1966 the International Law Association adopted the Helsinki Rules on the Uses of International Rivers. "These non-binding rules presented the state-of-the-art of globally recognized legal principles in the 1960s and not only reflected [S]tate practice but also shaped practice."[402] The Helsinki Rules focused almost exclusively on equitable utilization, nearly ignoring the no-harm principle, or subsuming it completely under the equitable utilization chapter, except as it applied to pollution.[403]

In 2004, the ILA adopted the Berlin Rules to replace the Helsinki Rules and brought back the principle of no-harm more forcefully, again with a focus on pollution, the environment, and

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[399] *Id.* para. II(2).

[400] MCCAFFREY, THE LAW OF INTERNATIONAL WATERCOURSES 363.

[401] *Id.*

[402] Joseph W. Dellapenna and Joyeeta Gupta, *The Evolution of Global Water Law*, in THE EVOLUTION OF THE LAW AND POLITICS OF WATER, DELLAPENNA AND GUPTA, EDS. 12 (2008).

[403] Helsinki Rules. Chapters 2, 3.

sustainability. According to Joseph W. Dellapenna, Rapporteur for the ILA in 2004, the Rules "integrates the latest insights from environmental, humanitarian, human rights, and resource law. . . . The rules include the principles of public participation, the obligation to use best efforts to achieve both conjunctive and integrated management of waters, and the duties to achieve sustainability and the minimization of environmental harm. . . . The Berlin Rules are grounded in existing law but also reflect the direction in which global water law is heading."[404]

Several member of the ILA hotly contested the move towards a greater focus on environmental concerns. Four members, including the form chair of the Water Resources Committee signed a public dissent to the proposed rules.

> [T]he chief concern of the majority of the [Water Resources Committee] was the development of international law to protect the environment; the law on international fresh water was regarded as being incidental to an all-embracing international environmental law. Evidence of this is especially strong in the provisions making the principle of equitable utilization subordinate to the "no harm" rule (see Article 12 and 16). The WRC is not shy in admitting that its aim was the progressive development of customary international environmental law relating to fresh water generally. . . .
>
> The rules in the articles proposed by the WRC in its report, then, strike at the fundamental basis of the Helsinki Rules and subsequent resolutions of the ILA; their adoption would abrogate the customary law on equitable utilization as viewed by the ILA since 1966. The rules set out in the WRC Report are also contrary to those affirmed by the ILC in its final report on the Non-Navigational Uses of International Watercourses, and to those in the 1997 UN [Watercourse] Convention, and in the judgment of the International Court of Justice in the *Gabcikovo-Nagymoros Case*."[405]

The actual rules as adopted and the commentary thereto are less extreme than the dissent's characterization, yet they surely represent a shift towards prioritizing environmental protection.

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[404] Joseph W. Dellapenna and Joyeeta Gupta, *The Evolution of Global Water Law*, at 13.

[405] ILA Berlin Conference 2004 - Water Resource Committee Dissenting Opinion *available at* http://www.internationalwaterlaw.org/documents/intldocs/ila_berlin_rules_dissent.html.

The commentary to the Articles 12 and 16, clarify that the principle of equitable utilization is *not subordinate* to the no-harm rule, yet seems to place the no-harm principle, particularly with respect to environmental harm, on par with the principle of equitable utilization.[406] While this is an evolution, the Rules still recognize that the no-harm doctrine is not absolute—even in the environmental context—and an equitable balancing is required in each specific case. According to Robbie Sabel, who was also a member of the ILA when it adopted its 2004 Berlin Rules, "the 'no harm' and the 'equitable utilisation' rules have equal status. How to combine these rules must be negotiated."[407]

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[406] The commentary makes several explicit comparisons to the 1997 UN Watercourse Convention statements and raises the status of the no-harm principle without fundamentally undermining the equitable utilization principle. Berlin Rules Commentary to art. 12 *"Equitable Utilization*":

> The language introduces another change from the *UN Convention* in order to resolve the most debated issue in the drafting of the *UN Convention:* the relationship of the principle of equitable utilization to the obligation not to harm another basin State (Article 16). The phrasing adopted here emphasizes that the right to an equitable and reasonable share of the waters of an international drainage basin carries with it certain duties in the use of those waters. The change of phrase from the original *Helsinki Rules* is not a turning away from the right to share in the benefits of the transboundary resource. Rather, it recognizes that with the right to share come obligations that can only be fulfilled by acting in an equitable and reasonable manner, having due regard to the obligation no to cause significant harm to another basin State. The interrelation of these obligations must be worked out in each case individually, in particular through the balancing process expressed in Articles 13 and 14.
>
> Paragraph 2 tracks the language of the second sentence of the *UN Convention,* art. 5(1), with vocabulary changes to reflect usage in these Rules. As with the corresponding sentence in the *UN Convention,* paragraph 2 sets forth the principle that the right to an equitable utilization does not trump the obligations to assure the optimal and, most centrally, sustainable use of the waters, and the obligation to assure adequate protection to the waters (Article 7). The last point refers back to the obligation to minimize environ-mental harm (Article 8).

Berlin Rules Commentary to art. 16 *"Avoidance of Transboundary Harm*":

> This Article follows the approach of the *UN Convention,* art. 7. Despite the considerable controversy over the application of the "no harm" rule and its relation to the rule of equitable use found in art. 5 of the *UN Convention,* there actually is little controversy over whether the principle expressed in art. 7 is part of customary international law. While not the same, this rule is intimately related to the principle of equitable utilization (Article 12), the principle of sustainability (Article 7), and the principle on minimization of environmental harm (Article 8). Together these provisions express the complex of obligations that arise depending on the nature of the harm that results from an activity relating to water.

[407] Robbie Sabel, *The Jordan Basin: Evolution of the Rules*, in THE EVOLUTION OF THE LAW AND POLITICS OF WATER, DELLAPENNA AND GUPTA, EDS. 274 (2008).

3. The International Law Commission and the United Nations 1997 UN Watercourse Convention

The United Nations has also addressed international rivers and articulated substantially the same governing principles. After the ILA had established the Helsinki Rules, the UN General Assembly instructed the ILC to "prepare a set of 'draft articles' on the 'non-navigational uses of international watercourses.'"[408] In 1991, twenty-three years later, the ILC produced its first draft[409] and then a final draft in 1994.[410] "At that point, the General Assembly instructed the Sixth Committee to prepare a draft convention for the Assembly to consider. This produced a revised text that was approved by the General Assembly on 21 May 1997, by a vote of 104-3."[411] As of January 2011, there are twenty-one parties to the Convention and an additional five countries that have signed but not yet ratified the Convention as a treaty.[412] While this falls short of the thirty-five ratifications needed for the Convention to enter into force,[413] it is still "seen as an authoritative, if conservative,— [according to Dellapenna]—reflection of existing customary

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[408] Dellapenna, *The Customary International Law of Transboundary Fresh Water*, at 277-78 (citing Progressive development and codification of the rules of international law relating to international watercourses, GA Res. 2669 (XXV) Dec. 8, 1970, UN Doc. A/8028.).

[409] Int. L. Comm'n, *Draft Articles on the Law of Non-Navigational Use of International Watercourses*, UN Doc. A/CN.4/L.463/Add/4 (1991) reprinted in *Colo. J. Int. Envtl. L.*, Vol. 3, pp.1–11 (1992)

[410] Int. L. Comm'n, Draft articles on the law of non-navigational uses of international watercourses, *Report of the 46th Meeting of the International Law Commission*, 2 May – 22 July, 1994, A/49/10 (1994).

[411] Dellapenna, *The Customary International Law of Transboundary Fresh Water*, at 278.

[412] Status of the Watercourse Convention, *available at* http://www.internationalwaterlaw.org/documents/intldocs/watercourse_status.html.

[413] Article 36(1) of the Convention provides that "The present Convention shall enter into force on the ninetieth day following the date of deposit of the thirty-fifth instrument of ratification, acceptance, approval or accession with the Secretary-General of the United Nations."

water law."[414]

The Convention is guided by six "General Principles" articulated in Articles 5-10. Articles 5, 6, and 7 do most of the heavy lifting of the Convention. Article 5 states the central principle of the Convention, that of "Equitable and reasonable utilization and participation," while Article 7 states the "Obligation not to cause significant harm." These two competing principles—discussed at length in the previous subsection—are played off against one another in the Convention, with the no-harm principle incorporated into a weighing of factors relevant to the equity determination stated as a non-exhaustive list in Article 6. Articles 8 and 9 require cooperation and the exchange of information. Article 10 gives special status to "vital human needs" as the lone priority for water use in the balancing of factors as determined by the principles of equitable utilization and no significant harm.[415] In determining what counts as vital, "special attention is to be paid to providing sufficient water to sustain human life, including both drinking water and water required for production of food in order to prevent starvation."[416]

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[414] Joseph W. Dellapenna and Joyeeta Gupta, *The Evolution of Global Water Law*, at 11 (2008) (noting that while the Convention fails to consider "legal developments in the environmental, human rights, and investment arenas, [it has nevertheless] influenced regional law in Southern Africa, South Asia, and Europe"). Later in the same volume, Dellapenna and Gupta write, "The fact that the 1997 UN Watercourses Convention has not entered into force may be testimony to the unwillingness of governments to accept these equity principles in a global treaty. . . ." Joyeeta Gupta and Joseph Dellapenna, *The Challenges for the Twenty-First Century: A Critical Approach*, in THE EVOLUTION OF THE LAW AND POLITICS OF WATER, DELLAPENNA AND GUPTA, EDS. 404 (2008). Though Dellapenna had written in more general terms in an early piece on water law that UN codifications tended to arise only where there was general international convergence on principles. "Successful areas of customary law have tended to be codified under United Nations auspices. In fact, customary rules become open to codification precisely because the rules are so seldom questioned and so generally followed. The principal organ through which the United Nations initiates this codification is the International Law Commission, a body created by the General Assembly in 1947 to help codify and 'progressively develop' customary international law." Dellapenna, *The Customary International Law of Transboundary Fresh Waters*, at 268.

[415] *See* Bulto, at 309-10.

[416] Report on the Sixth Committee convening as the Working Group of the Whole, 11 Apr. 1997, UN Doc. A/51/869, p.5 (quoted in MCCAFFREY, THE LAW OF INTERNATIONAL WATERCOURSES 311).

While the formulation of the no-harm provision was "the most controversial provision" in the Convention, Article 7 continues to dictate a non-absolute due diligence standard for the prevention of harm.[417] "It is difficult to answer the crucial question of which of the two rules—equitable utilization or prevention of significant harm—takes precedence" where they conflict.[418] Yet, the no-harm principle would not override equitable utilization.[419] Rather, the duty to eliminate—or even mitigate—the harm would be "required only in so far as the harming [S]tate's use was not equitable."[420]

On a separate note, it is important to note that the Convention itself does not "prevent[] [S]tates from concluding specific watercourse agreements that depart from the Convention's terms."[421] Rather, the Convention provides a framework for States to negotiate basin-specific agreements rooted in these principles. Article 6 also provides for flexible allocations that may shift over time "when the need arises."[422]

From the Nile Basin perspective, the riparian States were actively engaged in debating the provisions of the Convention. At the signing, fully a quarter of the States that offered comments (4 of 16) were Nile riparians. Those four countries—Egypt, Ethiopia, Rwanda, and Tanzania—then all abstained from voting (along with 23 other countries). Burundi was one of

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[417] MCCAFFREY, THE LAW OF INTERNATIONAL WATERCOURSES 306-07.

[418] *Id.* at 308.

[419] *Id.*

[420] *Id.*, at 309.

[421] *Id.* at 303. The passage continues, "After all, the Convention does not purport to contain provisions rising to the level of *jus cogens*. This point was emphasized several times during the negotiations." *Id.* It is important to note for this paper's argument, that while an agreement in opposition to the equitable terms of the UN Watercourse Convention does not *per se* implicate *jus cogens*, that fact is wholly different from the idea that where there is a severe derivation from equitable allocation, such a deprivation *could* violate the principle of *jus cogens.*

[422] *See* MCCAFFREY, THE LAW OF INTERNATIONAL WATERCOURSES 306.

three countries voting against (in addition to China and Turkey). Of the 103 votes in favor, Sudan and Kenya were the only Nile riparians, and neither has yet ratified the Convention.[423]

Ethiopia explained its abstention on the grounds that "the Convention was not balanced, particularly with respect to safeguarding the interests of upper riparian States. Article 7 and Part III of the Convention were of particular concern. Part III [dealing with requirements of notice for planned utilizations of river waters] put an onerous burden on upper riparian States."[424] On the other hand, Egypt's comments indicated its desire to maintain the status quo—noting that the regulations don't modify customary international law, that the "framework should not affect bilateral or regional agreements or established laws," and that "[i]ts application should be subject to the full agreement and consent of all parties sharing those watercourses. The special nature of each application, as well as existing agreements and customary uses, should be taken into account."[425] Also of note, at an earlier stage of codification, Egypt had unsuccessfully argued that the availability of other water resources should be an enumerated factor in Article 6.[426]

While the Convention is not in force and subject to these objections from Nile riparians, other African countries, including two Nile riparians—Tanzania and the Democratic Republic of Congo—have essentially ratified the principles (and even the text) of the Convention through the Southern African Development Community ("SADC"). Through SADC's revised Protocol on Shared Watercourse Systems, the SADC States put into force large swaths of the Convention's

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[423] United Nations General Assembly Press Release GA/9248 *available at* http://www.internationalwaterlaw.org/documents/intldocs/convention_press.html. Eritrea, Uganda, Zaire (now the Democratic Republic of Congo) were absent during the vote and have not subsequently acted.

[424] *Id*.

[425] *Id*.

[426] MCCAFFREY, THE LAW OF INTERNATIONAL WATERCOURSES 306.

text.[427] The Convention text is identical for the principle of equitable utilization,[428] the factors to be taken into account to determine what is equitable and reasonable,[429] and the obligation not to cause significant harm.[430] "The Southern African Development Community is unique as the only region in the world where the UN Watercourses Convention is in force—through the revised Protocol."[431] The Protocol refers disputes to the SADC Tribunal for adjudication, though Botswana and Namibia submitted their 1996 dispute over the Chobe River to the ICJ.[432]

C. Conclusion

The principles and laws governing international watercourses are well defined and substantially codified through international agreements and conventions, case law, and State practices. In addition to the principle of equitable utilization and the obligation to do no significant harm, international law has imposed duties to resolve water disputes peacefully through negotiation. When negotiated agreements prove impossible, the law imposes a duty to adjudicate disputes through various arbitral and judicial mechanisms. This dimension of the law will be addressed in the next Part.

While the core principles of international watercourse law are in tension with one another, they are certainly reconcilable. "Applying the basic principles of international water

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[427] *See* Pieter van der Zaag, *Southern Africa: Evolving Regional Water Law and Politics*, in THE EVOLUTION OF THE LAW AND POLITICS OF WATER (DELLAPENNA AND GUPTA, EDS.) 252-54 (2008) (noting that the agreement first entered into force in 1995 and then was revised in 2000 to reflect the 1997 UN Watercourse Convention, entering into force in 2003).

[428] Protocol: art. 3(7a), (7b); UN Watercourse Convention: art. 5.

[429] Protocol: art. 3(8a); UN Watercourse Convention: art. 6.

[430] Protocol: art. 3(10a), (10b); UN Watercourse Convention: art. 7.

[431] Pieter van der Zaag, *Southern Africa: Evolving Regional Water Law and Politics*, in THE EVOLUTION OF THE LAW AND POLITICS OF WATER (DELLAPENNA AND GUPTA, EDS.) 253 (2008)

[432] *Id*. at 254.

law . . . and translating the same into specific basin-wide agreements to ensure equitable and reasonable utilization is, without doubt, a Herculean task. The huge difficulty involved though is no justification for an unwarranted characterization of international water law as one hallmarked with ambiguity."[433] A court or tribunal of competent jurisdiction could resolve the dispute based on readily accepted principles of international law. Yet the challenges are of course manifold. Primary among them is the political viability of the process of adjudication, sufficient technical fact finding to render a just decision, and adequate enforcement mechanisms to ensure compliance with a decision.

If conditions in the upper riparians States or Sudan, for that matter, are of crisis proportion, then the explicit provisions of both the UN Watercourse Convention and the Berlin Rules will operate to prioritize the vital human needs of those regions. Regardless of whether or not the UN Watercourse Convention is in force, the principles it embodies are enshrined in the theory and practice of a half-century of international watercourse law. With the answer to what legal principle should govern the allocation of Nile Basin waters, the question left to address is what international adjudicatory body would have jurisdiction to decide their allocation. As Part VII addresses in detail, the upper riparian countries could seek International Court of Justice jurisdiction. States could seek a binding decision on a portion of the riparians that would have declaratory value for the region even without the binding force of the UN Watercourse Convention or the voluntary submission to ICJ jurisdiction of other riparians. The ICJ should then apply the principles of the UN Watercourse Convention as it has previously.

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[433] Mekonnen, at 437.

VII. Institutional Analysis: ICJ Adjudication in place of Cooperative Impasse

The current water management system in the Nile Basin is untenable given the demographic and climatic changes in the region. Yet, the Nile riparians have been at a political impasse for decades over how to move forward. Egypt and Sudan have been unwilling to cede any of their water allocation, and Egypt has threatened violent reprisals if any upstream State interrupts the flow of the river. In 1999 the ten Nile States formed the Nile Basin Initiative to negotiate how to manage the Basin[434]—the latest in a series of cooperative organizations.[435] After more than a decade of joint demonstration projects and high-level political negotiations, the fundamental dispute between the upstream and downstream States over water allocation and Egypt's veto power remains unresolved.

The time has come for judicial intervention. Despite a half-century of contestation over the validity of the colonial-era Nile Basin treaties, no State has ever brought the matter before a judicial body. While political cooperation is ultimately a necessary component for Basin management, the region needs judicial intervention to break the logjam of interminable negotiations. Importantly, these negotiations have always been grounded in legal terms—in the first place as a treaty dispute and secondly as an application of international water law in the absence of binding treaties. A court of competent jurisdiction should evaluate the *jus cogens* and *rebus sic stantibus* claims to resolve the treaty issue and apply the principles of international water law to address management and allocation. The court could set the terms of a new

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[434] The nine states referred to throughout the paper as riparians: Burundi, Democratic Republic of Congo, Egypt, Ethiopia, Kenya, Sudan, Rwanda, Tanzania, Uganda as well as Eritrea, who participated as a partial member and an observer in certain regards.

[435] *See* Amdetsion, *supra* note 4 at 37-41 (discussing the predecessor organizations to the Nile Basin Commission).

agreement or at the very least resolve the validity of the colonial-era treaties. A decision would provide clarity for international institutions like the World Bank (and foreign investors like China and Italy) for Nile project development. Moreover, a court decision would strengthen the rule of law, legitimize new water allocations and stabilize regional expectations.

Every major restatement of international law discussed in this paper supports the proposition that the Nile Basin dispute can be settled through judicial intervention of some kind.[436] Often such intervention bears fruit. In McCaffrey's authoritative review of international water disputes, he notes that several of the world's major water "controversies were brought before the United Nations, usually with good effect."[437] Indeed other eminent publicists note that "[w]ater adjudication is a rich and old area" of law.[438]

A court could also delve into the tangle of balancing various water uses. Under the UN Watercourses Convention, priority is given only to uses that serve "vital human needs."[439] Yet it would be perverse to reward poor water management with an increased allocation, even to meet these vital needs. Lack of food and potable water are likely to correlate with poor water management as well as with a lack of access to water. Indeed even some highly developed uses of water may themselves be inefficient. Egyptian cotton production or emerging foreign agribusiness may generate profits in the region at the expense of drinking water, local food and

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[436] In the treaty context *see* the 1978 Vienna Convention on Succession of States in Respect of Treaties, art. 43; United Nations Charter, art. 33 *et. seq.*, art. 92 *et. seq*. In the water context, *see* the 1997 Watercourse Convention, art. 33; PATRICIA WOUTERS ED., INTERNATIONAL WATER LAW: SELECTED WRITINGS OF PROFESSOR CHARLES B. BOURNE 206 (1997) (noting the 1966 Helsinki Rules and predecessor international statements of law call for adjudication where compromise can't be reached).

[437] MCCAFFREY, THE LAW OF INTERNATIONAL WATERCOURSES 296 (2001).

[438] JOSEPH W. DELLAPENNA AND JOYEETA GUPTA, EDS., THE EVOLUTION OF THE LAW AND POLITICS OF WATER 12 (2008).

[439] Discussed *supra* in Part VI.

sanitation. A court could wade into these thorny issues, though it is important to acknowledge that any ultimate solution will require riparian collaboration and ongoing incentives to maximize efficiency.

The International Court of Justice ("ICJ") would be an appropriate venue for the dispute. As a starting point, all ten riparians are members of the United Nations. Article 33 of the U.N. Charter encourages all members to "seek a solution [to disputes] by . . . mediation, conciliation, arbitration, judicial settlement, . . . or other peaceful means of their own choice."[440] And the ICJ is the principle judicial organ of the United Nations.[441] While the ICJ can only hear cases where States have consented to its jurisdiction,[442] any member State can voluntarily submit to jurisdiction, and the DRC, Kenya, Sudan and Uganda have all declared compulsory ICJ jurisdiction.[443] Though the case can only successfully adjudicate Nile management and allocations if all ten riparians agree to submit the Basin dispute to ICJ jurisdiction.

It is in the States' collective interest to adjudicate the matter. While Egypt may seem unlikely to submit to jurisdiction insofar as she hasn't otherwise agreed to compromise, the imminent unilateral action of the upstream States may finally compel her to act. Ethiopia may fear a negative judicial outcome and opt to continue with unilateral action. However, several

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[440] U.N. Charter, art. 33. (quoted in PATRICIA WOUTERS ED., INTERNATIONAL WATER LAW: SELECTED WRITINGS OF PROFESSOR CHARLES B. BOURNE 197 (1997)).

[441] U.N. Charter, art. 92.

[442] *See* INTERNATIONAL COURT OF JUSTICE: JURISDICTION, *available at* http://www.icj-cij.org/jurisdiction/index.php?p1=5&p2=1 ("The Court can only deal with a dispute when the States concerned have recognized its jurisdiction. No State can therefore be a party to proceedings before the Court unless it has in some manner or other consented thereto.").

[443] See INTERNATIONAL COURT OF JUSTICE: DECLARATIONS RECOGNIZING THE JURISDICTION OF THE COURT AS COMPULSORY *available at*: http://www.icj-cij.org/jurisdiction/index.php?p1=5&p2=1&p3=3. Egypt has also declared compulsory ICJ jurisdiction, but only for the very limited purpose of interpreting a single provision of a 1957 agreement related to the Suez Canal.

factors militate towards submitting to adjudication: fear of Egyptian military action, possible World Bank sanctions for infringing on Egypt's claimed water rights, and tension with Western countries traditionally allied with Egypt. A judicial forum would resolve the underlying legal issues that have stalled political negotiations.[444] All riparians would benefit from a clear articulation of the law, and international actors will be encouraged to invest more substantially in the region once legal entitlements have been more concretely decided.

A. Cooperative Impasse

Undoubtedly the long-term success of Nile management requires cooperation among riparians. However, cooperative attempts have failed to overcome the fundamental impasses between the upper and lower riparians—Egypt's allotment of water and right to veto upstream projects. Even the hailed Nile Basin Initiative ("NBI") has turned out to be merely "yet another fit of bureaucratic reorganization."[445] The NBI had a lofty mission of achieving "sustainable socioeconomic development through equitable utilization of and benefit from the common Nile Basin water resources."[446] The World Bank played an active role in funding several cooperative, capacity-building programs, while encouraging the States to agree to a single Basin-wide management framework.[447] From the outset, however, the "project [was] greeted with caution . . . since previous [B]asin-wide initiatives ha[d] failed to produce a lasting framework for sharing

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[444] *See*(Keith Hayward, Supplying Basin-Wide Reforms with an Independent Assessment Applying International Water Law: Case Study of the Dnieper River, 18 Colo. J. Int'l Evntl. L. & Pol'y 633, 633 (2007) ("a clear view of the requirements of international law can provide States with a reference point from which to assimilate the diverse influences that shape their actions and interactions with their riparian neighbors") (quoted in Bulto, at 293).

[445] Amdetsion, *supra* note 4 at 22.

[446] Ashok Swain, The Nile River Basin Initiative: Too Many Cooks, Too Little Broth, 22 SAIS Rev. 293, 302 (2002).

[447] *See* Ashok Swain, The Nile River Basin Initiative: Too Many Cooks, Too Little Broth, 22 SAIS Rev. 293, 294 (2002);

and allocating the Nile's water flows."[448] In fact, after more than a decade of negotiations, Egypt and Sudan have rejected the framework established by the upstream riparians. And the NBI, while in some senses a milestone, is "likely to be consigned to the annals of history as 'a remarkable and fragile' cooperative initiative which degenerated into just another strategic bargaining process."[449]

In 2003, moving beyond the capacity-building projects,[450] the NBI established a committee "to recommend a comprehensive legal agreement for reallocation of the Nile's waters."[451] It took until 2006 to produce a draft of the legal framework.[452] Still, Egypt and Sudan made "audacious" proposals to amend the framework and sent "an unambiguously clear message that should dissipate any lingering false hope for a reallocation of the Nile waters" through the cooperative framework agreement process.[453] In essence, Egypt and Sudan sought to perpetuate the "no harm" principle under the guise of "water security," preventing any upstream riparian from interfering with the Nile's flow without Egyptian and Sudanese consent.[454] This would be tantamount to maintaining the status quo. More than a decade after the NBI began, the good intensions of the riparians failed to move beyond "the phase of rhetorical commitment."[455]

Despite the strident objections of Egypt and Sudan, six of the Nile riparians have signed a

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[448] *Id.*

[449] Mekonnen, Nile Basin Cooperative Framework, at 427.

[450] The NBI has termed these "shared vision projects" or SVPs.

[451] Amdetsion, *supra* note 4 at 23.

[452] Mekonnen, Nile Basin Cooperative Framework, at 428.

[453] Mekonnen, Nile Basin Cooperative Framework, at 439.

[454] *See* Mekonnen, Nile Basin Cooperative Framework, 427-31.

[455] Mekonnen, Nile Basin Cooperative Framework, at 440.

new Cooperative Framework Agreement ("CFA"),[456] ignoring colonial-era treaties and leaving the "water security" issue unresolved.[457] The CFA scraps Egypt's veto power, eliminates Egypt and Sudan's control of over 98% of the Nile's waters, and allocates decision-making authority to a new Nile Basin Commission.[458] Ethiopia, Rwanda, Tanzania and Uganda signed the CFA in May 2010, with Kenya following suit soon thereafter, and Burundi signing in February 2011.[459] If the six member States' legislatures ratify the CFA, it will come into force and the new Nile Basin Commission will be tasked with resolving the century-old impasses now captured under the "water security" provision—supposedly in its first six months of operation.[460]

Since Egypt and Sudan have rejected the CFA, it is impossible that its ratification and implementation by the upper riparians will bring any finality to the ongoing dispute. Instead, Egypt is likely to threaten war, and the stability of the region will remain compromised. Egypt has already expressed fury over Ethiopia's planned hydro-electric dams on the Blue Nile.[461]

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[456] The full text of the Cooperative Framework Agreement is available here: http://internationalwaterlaw.org/documents/regionaldocs/Nile_River_Basin_Cooperative_Framework_2010.pdf It is unclear if this is the finalized version, but it is presumed to be very close to the final version (minus some formatting errors) and is the only copy the authors found available.

[457] *See* Mekonnen, Nile Basin Cooperative Framework, at 430 (discussing before the CFA was signed a critique that remains valid, "the establishment of a permanent Nile River Basin Commission is by no means a matter of certainty as the CFA has yet to be . . . ratified. But, even more importantly, the assumption underpinning the decision that the Nile River Basin Commission would succeed in what almost 10 years of negotiations have been unable to attain is Utopian, to say the least").

[458] Ben Simon, *Nile treaty set for ratification*, ASSOCIATED FOREIGN PRESS, Mar. 1, 2011, *available at* http://en.news.maktoob.com/20090000605504/Nile_treaty_set_for_ratification/Article.htm

[459] David Malingha Doya, *Burundi Government Signs Accord on Use of Nile River Water***,** Bloomberg, Feb. 28, 2011. *See also* Nile Basin Initiative, *Burundi Signs the Nile Cooperative Framework Agreement*, Feb. 28, 2011, *available at:* http://www.nilebasin.org/newsite/index.php?option=com_content&view=article&id=70%3Aburundi-signs-the-nile-cooperative-framework-agreement-pdf&catid=40%3Alatest-news&Itemid=84&lang=en.

[460] *Id. See* CFA, art. 14.

[461] *See* Agraw Ashine, *Egypt Furious Over Secret Ethiopian Nile Dams*, Africa Review, Mar. 17, 2011, *available at:* http://www.africareview.com/News/Ethiopia+angers+Egypt+over+secret+Nile+dams/-/979180/1128160/-/6d9xq8z/-/.

Despite Egypt's outcries, Ethiopia has moved forward with construction, launching its massive Millennium Dam on April 2, 2011.[462] Indeed, several upstream countries have announced plans to begin construction projects on the Nile.[463] These unilateral actions fail to resolve the underlying legal questions, erode the rule-of-law, perpetuate regional instability by provoking Egyptian retaliation, and leave international actors in an uncertain position—unsure if they should support development projects.

B. The ICJ Way Forward

Court intervention is the clear alternative to this cooperative impasse. International water law and treaty law support the recourse to judicial resolution of the Nile dispute. While the ICJ is by no means the only possible mode of judicial intervention, it is a viable option and one well positioned to resolve the questions of state succession and water law.[464] Article 43 of the 1978 Vienna Convention on Succession of States in Respect of Treaties instructs parties to attempt judicial settlement and arbitration when consultation, negotiations and conciliation have failed.

> Any State . . . may, by notification to the depositary, declare that, where a dispute has not been resolved by [negotiations, etc.], that dispute may be submitted for a decision to the International Court of Justice by a written application of any party

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[462] *See* Andualem Sisay, *Ethiopia Not Afraid of Egyptians – Meles*, NEW BUS. ETHIOPIA, Apr. 5, 2011, http://newbusinessethiopia.com/index.php?option=com_content&view=article&id=468:we-are-not-afraid-of-egyptians-meles&catid=11:parliament&Itemid=4.

[463] *See* Amdetsion, *supra* note 4 at 23 (citing articles throughout 2009 referring to projects, "Uganda, Kenya, and Tanzania have all declared that they are about to embark on projects. Ethiopia has also taken the same route. Prime Minister Meles Zenawi justified the move, saying that 'while Egypt is taking the Nile water to transform the Sahara into something green, we in Ethiopia are denied the possibility of using it to feed ourselves. And we are being forced to beg for food every year.' Thus, Ethiopia has begun making use of the tributaries of the Nile. It is worth noting that many of these projects are not as controversial as they would seem since they do not threaten the flow of the Nile.").

[464] In 1997, the ICJ resolved the dispute between Hungary and Slovakia over the viability of a treaty allocating rights on the Danube river. The *Gabcikovo-Nagyamros Project* case involved questions of state succession with respect to treaties and navigation and non-navigational uses of water. The ICJ has heard several more recent cases related to international watercourse law. *See* INTERNATIONAL WATER LAW PROJECT: INTERNATIONAL COURT OF JUSTICE – INTERNATIONAL WATER LAW CASES, *available at*: http://www.internationalwaterlaw.org/cases/icj.html.

> to the dispute, or in the alternative to arbitration, provided that the other party to the dispute has made a like declaration.[465]

The 1997 Watercourses Convention contains similar language.[466]

The DRC, Kenya, Sudan and Uganda have already agreed to compulsory ICJ jurisdiction.[467] Theoretically, any one of them could bring this dispute before the ICJ limiting the matter to only the water rights of these four States. Even in this limited instance, an adjudication binding on four States and advisory for the others would have declaratory value. At the very least, the ICJ would have to decide the validity of the 1929 Treaty as it relates to the water rights among Kenya, Sudan and Uganda. Of course, a more meaningful adjudication would include all ten Nile riparians. Burundi, Egypt, Eritrea, Ethiopia, Rwanda and Tanzania would have to consent to jurisdiction in order for the ICJ or any other arbitral panel to fully hear the Nile dispute. While there is cause for skepticism as to whether these States would submit to jurisdiction, there has been a "progressive erosion of the traditional reluctance on the part of States to commit themselves, in advance, to judicial and quasi-judicial dispute settlement mechanisms."[468] Ethiopia and an emergent Egyptian government may find judicial intervention a palatable third party mechanism to depoliticize a fractious issue during tumultuous times.

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[465] 1978 Convention. Note again that Egypt, Ethiopia, Sudan, and the DRC are all parties to the Convention, which has been in force since 1996.

[466] 1997 Watercourses Convention, art. 33(2) ("If the parties concerned cannot reach agreement by negotiation requested by one of them, they may jointly seek the good offices of, or request mediation or conciliation by, a third party, or make use, as appropriate, of any joint watercourse institutions that may have been established by them or agree to submit the dispute to arbitration or to the International Court of Justice.").

[467] INTERNATIONAL COURT OF JUSTICE, JURISDICTION: DECLARATIONS RECOGNIZING THE JURISDICTION OF THE COURT AS COMPULSORY, *available at*: http://www.icj-cij.org/jurisdiction/index.php?p1=5&p2=1&p3=3&code=SD (quoting Sudan's January 2, 1958 statement submitting to compulsory ICJ jurisdiction for "any question of International Law").

[468] Laurence Boisson de Chazournes, *Water and Economics: Trends in Dispute Settlement Procedure and Practice*, in FRESH WATER AND INTERNATIONAL ECONOMIC LAW, EDITH BROWN WEISS, LAURENCE BOISSON DE CHAZOURNES, NATHALIE BERNASCONI-OSTERWALTER, EDS., 334 (2005).

VIII. Conclusion

To stabilize the region, prevent war, enable foreign investment, and uphold the rule of law, the Nile Basin countries must arrive at a new Nile waters management agreement. The first step in this process is to break the legal logjam that has underpinned Egypt's intransigence. A legal solution would benefit all the Nile riparians. In order for adjudication or negotiation to move forward, colonial-era treaties must be dispensed with. Independence has not voided the treaties under the international law of state succession and the territorial exception to the "clean slate" doctrine. As Egypt and Sudan appear unwilling to voluntarily nullify the treaties, a court should decide if the treaties violate the principles of *rebus sic stantibus* and *jus cogens*. The degree of water and food scarcity in the upstream countries today is so dire and so fundamentally different than during the colonial era, that under these dual doctrines the treaties may be void.

In the absence of binding treaties, international transboundary watercourse law applies. An adjudicatory body or negotiating parties should frame water management and allocation under the principles enshrined in the UN Watercourses Convention. These principles acknowledge a favored status for "vital human needs" such as drinking water and sanitation. The current Cooperative Framework Agreement signed by six of the Nile riparians hews closely to the Convention, though Egypt and Sudan have rejected the Agreement. After decades of negotiations, judicial intervention is necessary and the ICJ would be an apt body for adjudicating the current political impasse. Ultimately the region will have to build consensus and improve its overall water use efficiency. Together the Nile countries will sink or swim.