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

by Alice Shih and Trevor Stutz

Alice Shih is a 2012 Yale Law School graduate, currently clerking on the U.S. Court of Appeals for the Fifth Circuit. Trevor Stutz is a 2012 Yale Law School graduate, currently clerking on the U.S. Court of Appeals for the Ninth Circuit.

Summary

A shocking 80% of the Nile's water is consumed by one country: Egypt. The upstream riparian countries threaten to encroach on Egypt's share of water as recordbreaking populations, droughts, and famines generate ever-greater need. Indeed, the increasingly dire fight over the Nile stands to be one of the most significant global crises and potential armed conflicts of this century. Egypt maintains the rights to a vast majority of the Nile's waters based on colonial-era treaties. Following state succession, new riparian States have disavowed these treaties, but the inequitable colonial treaties survived the process of decolonization. Nevertheless, current events demonstrate that this inequitable water allocation cannot persist without violating human rights.

Water is the foundation of life. Water 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 kilometers (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 10 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 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

Authors' Note: Special thanks to Prof. Lea Brilmayer, Howard M. Holtzmann Professor of International Law at Yale Law School, for her invaluable insights and guidance without which this Article would not be possible.

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. 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 NBI. Greg Shapland, Rivers of Discord: International Water Disputes in the Middle East 57 (1997).
3. *See* Mike Pflanz, *Egypt, Sudan Lock Horns With Lower Africa Over Control of Nile River*, Christian 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.

   Prof. 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.'").
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) ("Fol-

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]

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 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 more predictable manner."[13]

Part I introduces the Nile and reviews the history of treaties that have governed the Nile Basin for more than 100 years. Part II confronts upstream riparians' arguments that the colonial-era treaties are void after independence.

lowing 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. *Burundi Signs the Nile Cooperative Framework Agreement*, Nile Basin Initiative (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 Great Millennium Dam Move Ethiopia*, Grand Millennium Dam (Apr. 11, 2011), http://grandmillenniumdam.net/great-millennium-dam-moves-ethiopia/.
8. *See, e.g.*, Jutta Brunnée & Stephen J. Toope, *The Changing Nile Basin Regime: Does Law Matter?*, 43 Harv. 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 CFA is another ploy to mandate current water allocations).
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 Envtl. 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).
13. Kal Raustiala & Anne-Marie Slaughter, *International Law, International Relations, and Compliance*, Handbook Int'l Rel. 538, 541 (2002).

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 III applies the doctrines of *rebus sic stantibus* and *jus cogens* to the current food and water scarcity in the region and compares the relative development of the various Nile riparians to conclude that the stark deprivation of vital human needs in the upstream countries sufficiently voids the colonial-era treaties. Part IV 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 V 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.

I. 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 world.[15] The Nile's irregular flow and relatively low volume makes its management and control even more critical for its 10 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 Kenya, Tanzania, and Uganda, 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.

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 cubic meters (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 millimeters (mm) per 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]

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 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.

14. *See infra* Table 6.
15. Jacobs, *supra* note 1, at 95.
16. Greg Shapland, Rivers of Discord: International Water Disputes in the Middle East 57 (1997).
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. Christophe C.S. Morhange, *Reviews: Africa: The Nile*, 28 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 55-57 (1995).
21. Sohair S. Zaghloul et al., *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), http://www.dsi.gov.tr/english/congress2007/chapter_2/63.pdf.
22. Nurit Kliot, Water Resources and Conflict in the Middle East 27 (1994).
23. *Id.* at 27.
24. *Id.* at 22.
25. Waltina Scheumann & Manuel Schiffler, Water in the Middle East: Potential for Conflicts and Prospects for Cooperation 146 (Springer 1998).

3. Riparian Countries

Ten countries border the Nile: Burundi, the Democratic Republic of Congo, Egypt, Eritrea, Ethiopia, Kenya, Rwanda, Sudan, Tanzania, and Uganda.[26] The square kilometers (km^2) 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

Area of Nile (km^2)	Constituent Countries	Share per country, area	
		km^2	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%

Source: Nurit Kliot, Water Resources and Conflict in the Middle East 28 (1994).

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.[27] 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.[28] These constant upheavals damage and impede the development of the riparian countries' economies.

Each of these countries is classified among the "least developing countries," plagued with low life expectancy, high infant mortality, and low literacy rates.[29] 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.[30] This conflict has played out over more than a century.

B. Treaties Governing the Nile Basin

For more than one century, riparian States have negotiated water rights through a series of treaties. Though upper riparian States debate the validity of the colonial-era Nile treaties, decolonization and state succession did not abrogate the treaties. Before analyzing the legal arguments, a historical analysis of the Nile treaties follows. This history informs the past, present, and future dialogue regarding the Nile waters. Of the numerous Nile treaties signed in the last century, "the 1929 and 1959 treaties [are the] most . . . significant and controversial,"[31] and the 1902 treaty is probably the most overlooked. This subpart reviews the colonial-era and post-colonial era agreements of riparian States.

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.[32]

The majority of the colonial-era treaties favor Egypt because of its favored role vis-à-vis Great Britain. Despite the multiple European actors in the region, Great Britain effectively controlled the Nile River due to its control of Egypt, Kenya, Sudan, Tanzania, and Uganda, as well as its military superiority.[33] Of the countries Great Britain controlled, Egypt was the most important to the empire.[34] 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 was especially important after the United States gained independence in 1776 and Great Britain no longer controlled the United States or its cotton production.[35] 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; 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.[36] The early agreements contracted by Great Britain included an agreement with Italy (1891),[37]

26. *Id.*
27. Kliot, *supra* note 22, at 29-30.
28. Arun P. Elhance, Hydropolitics in the Third World: Conflict and Cooperation in International River Basins 62 (1999).
29. Kliot, *supra* note 22, at 74.
30. Paul P. Howell & J. Anthony Allan, The Nile: Sharing a Scarce Resource 10 (1994).
31. Amdetsion, *supra* note 4, at 13. *See, e.g.*, John Kamau, *Can EA Win the Nile War?*, The Nation (Kenya) (Mar. 28, 2002, http://chora.virtualave.net/ea-nile.htm (discussing the controversy surrounding the treaties).
32. With the exception of Ethiopia, all other States in the Nile Basin were under colonial rule from the 1880s until post-World War II. Egypt became independent—after 40 years of British rule and 30 years of monarchy—in 1953. Upstream British colonies of Kenya, Tanzania, and Uganda, gained independence in the early 1960s, around the same time that Burundi, Congo, and Rwanda gained independence from Belgium. *See* Elhance, *supra* note 28, at 62.
33. Elhance, *supra* note 28, at 68.
34. Michael M. Ogbeidi, Egypt and Her Neighbours 96 (Publishers Express 2005).
35. Elhance, *supra* note 28, at 69.
36. Kliot, *supra* note 22, at 37-38.
37. 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).

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

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 that 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
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 without Egypt's consent	Egypt and the Sudan	Egypt sees it as binding, the Equatorial states see it as not binding
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, hydropower	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 Hydrometeorological Survey (with UNDP Agreement)	Egypt, Kenya, Sudan, Tanzania, Uganda	To survey Lakes Kioga, Victoria and Albert; to measure water balance in Lake Victoria catchment	Egypt, Kenya, Sudan, Tanzania, Uganda	Binding

Type of Agreement	State parties to the agreement	Contents of agreement and utilization patterns	Beneficiaries	Status at present
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

Source: Nurit Kliot, Water Resources and Conflict in the Middle East 82-84 (1994).

Ethiopia (1902),[38] the Independent State of Congo (1906),[39] Italy and France (1906),[40] and Italy again (1925). Great Britain signed each of these treaties in order to protect and further Egyptian interests. The following subsections discuss these treaties.

a. 1891 Protocol

At the end of the 19th century, Great Britain had colonial power over Egypt and Sudan. In 1890, Italy was introduced to the hydropolitics 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."[41]

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 the Battle of Adwa in 1896.[42] 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 of Africa.[43] For example, France, which had colonial aspirations "to gain . . . a foothold on the Nile,"[44] vied for Emperor Menelik of Ethiopia's support.[45] 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.[46]

b. Treaty Between Great Britain and Ethiopia in 1902

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."[47]

Since the 1902 agreement binds Ethiopia to such unfavorable terms, she has subsequently argued vigorously that the treaty is not in force, despite having signed the treaty as an independent country. After 1902, no agreements were entered into by Ethiopia regarding the Nile until 1993.

c. Treaty Between Great Britain and King Leopold II 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."[48] This language is similar to the two previous agreements signed by Great Britain (the 1891 Protocol and the 1902 Treaty with Ethiopia) and the later 1929 Agreement. Therefore, the expectation not

38. Edward Hertslet, The Map of Africa by Treaty, Vol. II, No. 100, 432-42 (3d ed. 1967) [hereinafter Hertslet].
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, 99 (1963).
40. Hertslet, *supra* note 38, at 584-85.
41. 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.
42. Paulos Milkias & Getachew Metaferia, The Battle of Adowa: Reflections on Ethiopia's Historic Victory Against European Colonialism 23, 27-28 (2005).
43. *Id.* at 32.
44. Terje Tvedt, The River Nile in the Age of the British: Political Ecology and the Quest for Economic Power 48 (2008).
45. 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.).
46. Amdetsion, *supra* note 4, at 18.
47. 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 Ababa, 15 May 1902.
48. G.B. Treaty Series, No. 4 (1906), Cmd. 2920; British and Foreign State Papers, Vol. 99, 173; Hertslet, Africa, No. 165, 584-86; H.A. Smith, The Economic Uses of International Waterways, 166 (London, 1931).

to diminish the water volume was well-known to the riparian countries.

d. Treaty Between Great Britain, France, and Italy in 1906

The Tripartite Agreement was signed later that year, on December 13, 1906. The purpose of this agreement was to reconfirm the terms of the 1891 Protocol and the 1902 Treaty[49] at a time when Great Britain, France, and Italy were scrambling for influence in the Nile Basin. 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 textile factories. France was interested in more economic power in Ethiopia, namely through its railroads. Italy still hoped to absorb northern Ethiopia into her empire.[50] 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.[51] As a result, Article I of the agreement discussed the maintenance of the status quo in Ethiopia as defined by previously signed agreements, which included 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 one of its primary sources, 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: "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."[52] 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.[53] 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 referenced the 1902 Agreement as if it were still in force. Therefore, more than two decades later, Ethiopia still understood the 1902 agreement to be in force.

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.[54] 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 Treaty.

f. 1929 Water Agreement

Because Great Britain's 1925 negotiations to control Lake Tana were unsuccessful, Great Britain 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.[55] In 1929, Britain's colonial empire controlled Kenya, Sudan, Tanzania, and Uganda. 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

49. Degefu, *supra* note 45, at 102.
50. *Id.* at 103.
51. *Id.*
52. C. Odidi Okidi, *The History of the Nile and Lake Victoria Basins Through Treaties*, *in* The Nile: Sharing a Scarce Resource 325-26 (Paul P. Howell & J. Anthony Allan, eds., 1994).
53. Kefyalew Mekonnen, *The Defects and Effects of Past Treaties and Agreements on the Nile River Waters: Whose Faults Were They?*, Ethiopians.com, http://www.ethiopians.com/abay/engin.html.
54. Kliot, *supra* note 22, at 82-84.
55. 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.

> 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.[56]

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 to veto any Nile-related projects, Egypt also had the right to develop Nile projects in upper riparian States.[57]

The disproportionate allocation was stark. Downstream Egypt was allocated 75% of the Nile's waters, though it contributed almost nothing to the Nile's water balance. Ethiopia, from which 85% of the Nile flows, was allocated virtually none of the Nile water.[58] 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

Country	Consumption
Egypt	80%
Sudan	18.5%
Ethiopia	1%
All other riparian States	0.5%

Source: Nurit Kliot, Water Resources and Conflict in the Middle East 72 (1994).

In 1929, this disproportionate allocation may have been acceptable because Egypt's dry climate made the Nile essential for survival.[59] 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 Nile commissions dating as far back as 1894 exhibited an acceptance of Egypt's prior rights, though they were predominantly conducted by the British, whose interest lay in justifying the existing allocation. The British Commission of 1914 recognized and respected Egypt's prior rights as well as proposed introduction of cotton cultivation in Sudan.[60] The British Commission of 1919 found that Egypt had a right to the amount of water Egypt was actually using at the time, which amounted to all the natural flow of the Blue Nile until January 20.[61] 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 (U.K.) 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."[62] The Commission assessed the flow rates of the Nile for the past 960 years.[63] From these years of data, the Commission found that flow of the Nile to Sudan and Egypt was particularly important because their sole source of water comes from the Nile.[64] 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, since Egypt would not be able to survive otherwise.[65] These Commissions became the basis for the 1929 Agreement.

The provision of the 1929 Agreement 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 the agreement.

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 Agreement prevented them from affecting any of the flow to Egypt.[66] As Egypt gained, upper riparian countries suffered.[67]

Despite its consistency with prior agreements and commissions, the 1929 Agreement is controversial. Egypt insists the 1929 Agreement is binding on Kenya, Sudan, Tanzania, and Uganda, which were under British rule when the agreement was signed.[68] Among Egypt's arguments for why the agreement continues to bind these States is a letter from Britain that was part of the 1929 Agreement. The letter states that "detailed provisions of this

56. *Id.* at Section 4(b).
57. 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 July 23, 2013).
58. 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 (1996-1997).
59. 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 Univ. Press 1994).
60. Degefu, *supra* note 45, at 121.
61. *Id.* at 122.
62. 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*, app. A (2004).
63. The Report of the Joint Commission of His Majesty's Government of the United Kingdom and Northern Ireland and the Egyptian Government, ¶ 32 (1925).
64. *Id.* ¶ 71.
65. The Report of the Joint Commission of His Majesty's Government of the United Kingdom and Northern Ireland and the Egyptian Government, ¶ 88 (1925).
66. Howell & Allan, *supra* note 30, at 81.
67. Kliot, *supra* note 22, at 50-51.
68. Gebre Tsadik Degefu, *The Nile Waters: Moving Beyond Gridlock*, Addis Trib., June 11, 2004, http://allafrica.com/stories/200406110550.html.

grant will be observed at all times and under any conditions which may rise,"[69] 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.[70] 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."[71]

Rwanda and Burundi argue that this agreement does not give Egypt the right to veto any projects upstream, as was provided in the 1929 Agreement. 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 Agreement 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

Access to the Nile was not enough to ensure water security in Egypt, since the Nile was Egypt's only source of water and it does not have a consistent flow year round. The Nile's dry season stretches from January until July and can be exacerbated in years with little rainfall. 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."[72] 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.[73] 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,[74] when a minimum of 25 liters per day is required to sustain life.[75] 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.[76]

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 Agreement in stating 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."[77]

The exchange of notes leading to the final Owens Fall Agreement occurred in three sections. First, the countries entered an agreement regarding the logistics of constructing the dam.[78] Second, they entered an agreement regarding the granting of a contract for construction of the dam.[79] Finally, the third section dealt with the financial arrangement for construction and maintenance of the dam.[80]

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

2. Post-Colonial Treaties

a. The Nile Waters Agreement of 1959

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 waters. 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, leav-

69. Letter from Mohamed Mahmoud Pasha, to Lord Lloyd (May 7, 1929).
70. Agreement Between the United Kingdom and Belgium Regarding Water Rights on the Boundary Between Tanganyika and Ruanda-Urundi-London, 22 November 1934.
71. *Id.* ¶ 3.
72. *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 Utilization 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.
73. *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 Utilization 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 October 1946.
74. *Id.*
75. Kristin Stranc, *Managing Scarce Water in the Face of Global Climate Change: Preventing Conflict in the Horn of Africa*, Hofstra L. Rev. 245 (2010).
76. Elhance, *supra* note 28, at 70.
77. *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.
78. 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).
79. *Id.* at 110-11.
80. *Id.* at 114-15.

ing no allocation of water to other riparian countries. The countries were clear to emphasize that the 1959 Agreement did not replace the 1929 Agreement. Instead, this new agreement was an adaptation and extension of the 1929 Agreement. The preamble of the 1959 Agreement stated that the 1929 Agreement only provided for partial use of the Nile's water, so the Nile's water was not fully allocated. The 1959 Agreement would provide for full utilization of the Nile waters. By signing, Sudan renounced any reasonable claim that the 1929 Agreement was invalid.

The 1959 Agreement was based on the following data[81]:

> Average Nile flow in Aswan is 84 billion m^3
> Evaporation losses from Lake Nasser is 10 billion m^3
> Available water is 74 billion m^3

The 1959 Agreement also gave Egypt the right to construct the Aswan High Dam.[82] In §5 of the treaty, Egypt and Sudan reiterate the power to approve or veto any projects on the Nile as set forth in the 1929 Agreement.[83] The 1959 Agreement is still binding on Egypt and Sudan.

Upper riparian States argue that they are not bound by the 1959 Agreement to which they were not a party.[84] 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.

b. 1967 Nile Hydrometeorological Survey

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 hydrometeorological survey of Lakes Victoria, Kyoga, and Albert.[85] Its purpose was to measure the water level of Lake Victoria and its flow to the Nile.[86]

This agreement, like the 1949 Owens Fall Dam Agreement, indicates the willingness of 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 cooperation continues to the present day.

c. Kagera Basin Agreement of 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.[87] 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 that the "agreement is open to accession by Uganda," which formally joined the agreement 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. Though this list seems to give the three countries authority to initiate many types of projects, its blatant disregard of the 1929 Agreement undermines its validity. Through the lens of the 1929 Agreement, only after Egypt approves the projects, as provided in the 1929 and 1959 agreements, can the Kagera Basin Agreement fully take effect. In that sense, this agreement builds upon the 1929 and 1959 agreements, but does not abrogate them.

d. 1993 Framework for General Cooperation Between Ethiopia and 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."[88] 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 and fail to set concrete terms for utilizing the Nile River.

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 Agree-

81. Kliot, *supra* note 22, at 43.
82. Amdetsion, *supra* note 4, at 20.
83. [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.
84. 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.
85. 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).
86. 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).
87. 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.
88. 1993 Framework for General Cooperation Between Ethiopia and the Arab Republic of Egypt, 1 July 1993.

ment language that no works can be undertaken that 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."[89] 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 Treaty, Ethiopia commits to causing no harm to Egypt in the 1993 Agreement, a proposition that Egypt has argued is tantamount to preserving the status quo. Furthermore, the 1993 Agreement is still binding.

Part II addresses the arguments made by Ethiopia and other upstream riparians that seek to invalidate the colonial-era treaties. Part II concludes that despite state succession, the colonial-era treaties are still binding.

II. 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 Agreement, which resulted in a new agreement between Egypt and Sudan in 1959. Tanzania announced its eventual withdrawal from the 1929 Agreement 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 waters, despite the 1902 Treaty it signed as an independent State. Burundi, the Democratic Republic of Congo, and Rwanda have also renounced their colonial-era obligations.

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 U.N. adopted the Vienna Convention on State Succession in Respect of Treaties in 1978 (1978 Convention), which entered into force in 1996.[90] 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.[91] Yet, there are several factors that complicate the picture. For one, Article 7 of the 1978 Convention limits its application to future State successions. 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.[92]

Thus, even in the straightforward attempt of the former British colonies—Kenya, Tanzania, Uganda—to abrogate the 1929 Agreement, state succession law does not succeed in voiding the treaty. The same principle would apply to claims made by Burundi, Democratic Republic of Congo and Rwanda. 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,[93] 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 successfully abrogated a treaty,[94] 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

89. 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.

90. 1978 Vienna Convention on State Succession in Respect of Treaties, 17 ILM 1488 (1978) [Aug. 23, 1978, 1946 U.N.T.S. 3] [hereinafter 1978 Convention].

91. 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.

92. *Gabçikovo-Nagymaros Project (*Hungary/Slovakia*)*, Judgment, ICJ Reports 1997 ¶ 123.
> 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.

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

94. *See* Matthew Craven, The Decolonization of International Law: State Succession and the Law of Treaties 54 n.216 (2007) (noting that *rebus sic stantibus* "has never been ground as a justifiable basis for the termination of an agreement").

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*.

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. Fasil Amdetsion writes: "By contrast to the cooperation seen in Egyptian-Sudanese relations, Ethiopia has not entered into any binding treaties with either Egypt or Sudan concerning the allocation of the Nile's waters."[95] The Eritrean representative to the Nile Basin Initiative (NBI) noted that the 1902 Treaty has never been brought up at NBI meetings, while the 1929 and 1959 treaties are consistently mentioned.[96] Yet, on May 15, 1902, in Addis Ababa, Ethiopia and the U.K. (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[97]:

> His Majesty the Emperor Menelik II, King 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.[98]

The other treaties concluded among France, Italy, and the U.K. would not have bound Ethiopia, because Ethiopia remained an independent sovereign during the time period that such agreements were signed.[99] 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 toward independence:

1. The agreements . . . between Ethiopia and the U.K. 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 U.K. (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 nonviability of these agreements.
4. The U.K. in 1935 recognized the annexation of the Ethiopian Empire by Italy . . . U.K.'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.[100]

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 is not constrained solely by "customary rights" or "behavior," 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 did not 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 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 III 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

95. Amdetsion, *supra* note 4, at 12.
96. Authors' Interview with Mebrahtu Iyassu, Director General, Water Resources Department, The State of Eritrea, March 11, 2011 in Asmara, Eritrea. Iyassu is an NBI TAC member and attended the Nile-COM Meetings on behalf of Eritrea, though Eritrea is only an "observer" to the NBI.
97. *See* Okoth-Owiro, *supra* note 62, at 6-7; Okidi, *supra* note 52, at 324.
98. 1902 Treaty, *supra* note 47.
99. For instance, the 1906 Agreement among Italy, France, and the U.K., *supra* notes 4-51 and accompanying text; and the 1925 exchange of Notes between the U.K. and Italy.
100. Okidi, *supra* note 52, at 324 (quoting Dante 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)).

already agreed in 1901 to manage water relations with Great Britain,[101] 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, France, Great Britain, and Italy 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."[102]

(3) While it is clear that Great Britain likely had the upper hand in negotiating the treaty, it is 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.[103] Rather, this type of political consideration, unmentioned in the text of a treaty, is often—if not always—at work in international negotiations.

The third argument again relies inappropriately on the notion that Ethiopia gained nothing from the treaty. Even discounting this part of the argument, it does not 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 did not 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 Agreement and signed the 1959 Agreement. There, the main point of contention is whether the 1959 Agreement abrogated the 1929 Agreement, but in no way is the 1902 Treaty 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 U.K. officially recognized this annexation—that Ethiopia's prior international agreements were wiped clean.[104] This is essentially a modified "clean slate" state succession claim. As Subpart B details, the "clean slate" doctrine does not 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,[105] though Britain, Japan, and other European nations did. It would be a cruel trick if international 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.[106] 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, C. Odidi Okidi reiterated them in 1994 to explain Ethiopia's contemporary contention that the 1902 Treaty is not in force.[107] 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.[108] Rather, through a murky amalgamation of these weak arguments, he seeks inappropriately to sum them into a basket of reasons that outweighs the rule of law, while acknowledging that each argument is itself not necessarily persuasive.[109]

---

101. *See id.* at 325 (referring to the Protocol of April 1901 between Italy and Great Britain regulating use of water on the River Gash).
102. Hertslet, The Map of Africa by Treaty. Vol. II, No. 100, at 436, 442 (3d ed., 1967) (quoted in Okidi, *supra* note 52, at 325).
103. Degefu, *supra* note 45, at 97.
104. Degefu, *supra* note 45, at 111 (Great Britain recognized the Italian occupation of Ethiopia from 1935 until 1941 in the Italian Peace Treaty of 1947).
105. 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, http://www.mtholyoke.edu/acad/intrel/WorldWar2/italy.htm.
106. Permanent Court of Arbitration, Eritrea-Ethiopia Boundary Commission, *Decision on Delimitation of the Border Between Eritrea and Ethiopia*, Apr. 13, 2002, at 57-59, 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.* ¶ 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.* ¶ 5.7).
107. *See* Okidi, *supra* note 52, at 324.
108. *See* Okidi, *supra* note 52, 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).
109. Okidi, *supra* note 52, 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 Agreement is invalid under the "clean slate" doctrine of state succession. Yet, his argument seems to be mostly that the 1929 Agreement 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

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.[110] Naturally, Ethiopia opposed the 1959 Agreement 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."[111] In the context of the cold war, the United States supported Ethiopia as a Western ally against the Soviet-backed Egypt.[112] 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."[113] However, U.S. policy toward the Nile did not extend beyond rhetoric.[114] 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.[115] Yet, Ethiopia's relations with the West remained strong until the communist Dergue took power in the mid-1970s[116] and the World Bank's policy was in fact consonant with international law enforcing the 1902 Treaty. Thus, while U.S. geopolitical positioning might have nodded toward Ethiopian water rights, such political arguments have no bearing on the binding nature of the 1902 Treaty. The United States 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 has not made a compelling legal argument to abrogate its obligations under the 1902 Treaty.

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

When Tanganyika[117] 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.[118] 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"[119]—with slight modifications. The "Nyerere Doctrine" was imitated by multiple newly independent African States[120] and was proclaimed as

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 Agreement. 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 Agreement seems to be the party who benefits.

110. *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.

111. Tesfaye Tafesse, The Nile Question: Hydropolitics, Legal Wrangling, Modus Vivendi and Perspectives 95 (2001) (quoted in Amdetsion, *supra* note 4, at 27-28).
112. *See* Amdetsion, *supra* note 4, at 20-21.
113. 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.
114. Amdetsion, *supra* note 4, at 21.
115. *Id.*
116. *See* Robert G. Patman, The Soviet Union in the Horn of Africa: The Diplomacy of Intervention and Disengagement 150-75 (1990).
117. In 1964, Tanganyika joined with Zanzibar to become modern-day Tanzania.
118. *See* Prakash 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).
119. *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 . . . .").
120. Menon, *supra* note 118, at 8 (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 the 1929 exchange of notes remained applicable "pending further agreement."

Okoth-Owiro, *supra* note 62, at 14 (noting that Tanganyika's approach was followed by Burundi, Kenya, Rwanda, and Uganda).

a progressive development toward empowering these new, free States.[121]

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.[122] 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 U.N., 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."[123]

The government also sent a Note to Egypt, Great Britain, 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 and 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.[124]

On its face, Nyerere's position is entirely reasonable. In fact, contemporary international water law urges basinwide 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."[125]

"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 Simma) with State practice historically being extraordinarily inconsistent."[126] The 1978 Convention differentiated among different pathways toward state succession, largely crediting the tabula rasa formulation in the newly independent state context,[127] while largely rejecting it in the context of uniting or separating states.[128] In arguing that the 1929 Agreement 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."[129] He then cites the various exceptions to the doctrine, while ignoring the most relevant exception that defeats his point with respect to the 1929 Agreement—*territorial* treaties.[130]

The Nyerere Doctrine gained popularity and praise throughout Africa. Kenya and Uganda both made similar declarations upon independence.[131] The doctrine's under-

121. 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).

122. 1978 Convention, *supra* note 90, art. 12. See Subpart B, for a full discussion.

123. 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).

124. Okoth-Owiro, *supra* note 62, 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).

125. 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).

126. Amdetsion, *supra* note 4, at 24.

127. 1978 Convention, *supra* note 90, Part III. Newly Independent States, esp. art. 16.

128. 1978 Convention, *supra* note 90, Part IV. Uniting and Separation of States, esp. art. 31.

129. Amdetsion, *supra* note 4, at 24.

130. *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).

131. *See* The Effect of Independence on Treaties: A Handbook, The International Law Association 117-18 (1965) (reprinting the letter Uganda

lying 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 clean slate doctrines their most generous reading, the legal history is clear that the 1929 Nile Waters Agreement is still binding on Kenya, Tanzania, and Uganda 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 section addresses another legal argument offered by various states and scholars: that the 1929 Agreement was invalidated by the 1959 Agreement between Egypt and Sudan and their state practices.

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

After Sudan gained independence on January 1, 1956,[132] the new government "rejected the 1929 'treaty,' demanding an increase in the share of water to which Sudan was entitled."[133] Egypt sought to maintain cooperative relations with Sudan to ensure the completion of the Aswan High Dam.[134] On November 8, the two parties signed the Agreement for the Full Utilization of the Nile Waters, increasing Sudan's share of the Nile's waters while continuing to allocate the large majority to Egypt.[135] This renegotiation raises the question of whether the 1959 Agreement in effect voided the validity of the 1929 Agreement. Okidi claims that "Egypt considered the 1929 Agreement temporary pending determination of the political future of the Sudan" and thus the 1929 Agreement should not "have longer life for Kenya, Tanzania, or Uganda" than it did for Sudan.[136] 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. . . ."[137]

Yet, far from unambiguously invalidating the 1929 Agreement, 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. . . ."[138] The preamble of the 1959 Agreement implied that this new agreement was an adaptation and extension of the 1929 Agreement, expanding the parameters of water use—not invalidating them.[139] 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.[140] The "full utilization" was not an abrogation of the previous agreement, but rather a recognition that the Nile produced, or could produce with technical improvements, more water than the 1929 Agreement specifically allocated.[141]

Commentators also offer a straw-man argument—that Egypt and Sudan seek to bind other riparians as third parties to the 1959 Agreement.[142] Without a doubt, two States

sent to the U.N. Secretary General on Feb. 12, 1963 reiterating the same proposed course of action as Nyerere's declaration); Okidi, *supra* note 52, 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.

132. *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).
133. 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, *supra* note 62, 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. . . .").
134. *See* Amdetsion, *supra* note 4, at 19-20; 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).
135. Agreement Between the Republic of the Sudan and the United Arab Republic for the Full Utilization of the Nile Waters, 8 November 1959. *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").
136. Okidi, *supra* note 52, at 329.
137. *Id.* at 333.
138. The Effect of Independence on Treaties: A Handbook, The International Law Association 353 (1965).
139. 1959 Agreement, *supra* note 135 ("And as the Nile waters Agreement concluded in 1929 provided only for the partial use of the Nile waters and did not extend to include a complete control of the River waters. . . .").
140. 1959 Agreement, *supra* note 135

> *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.

141. *But see* Okoth-Owiro, *supra* note 62, at 13 (citing a statement made by the U.K. 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 U.K. 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.

142. *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

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 Agreement, 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 agreement] Egypt made it clear, as a matter of principle, that the 1929 agreement was to be temporary, and its terms viewed as conditional on future political developments.[143]

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."[144] 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 Egypt and Sudan renegotiated in 1959. Without entering the subjective intentions of the two parties to the 1929 Agreement, 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 Agreement, 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."[145] This reasoning is familiar to 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; its broad and indiscriminate application to "development needs" does not, however, fit with the law. The 1929 Agreement 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."[146] 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.[147] Throughout the 1950s and 1960s, most successor states were former colonial possessions of European predecessors, whereas the 1980s and 1990s saw the breakup of the Soviet Union and the emergence of successor states through various secessions and combinations of predecessor states.[148] 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.[149] "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.'"[150]

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 interna-

---

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.

143. Okidi, *supra* note 52.

144. 1929 Agreement, Note from Pasha to Lord Lloyd.

145. 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); C. Odidi 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).

146. Okoth-Owiro, *supra* note 62, at 10.

147. *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).

148. *See* Craven, *supra* note, at 94 (discussing the variance in state practice and in the codification of the law based on the pathways to state succession).

149. While this Article 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.

150. Menon, *supra* note 118, at viii (quoting The Effect of Independence on Treaties: A Handbook, The International Law Association xiii (1965)).

tional 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."[151] 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 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 (ILC) also took up the topic in 1963 and codified the law in the Convention passed by the U.N. in 1978.[152]

Territorial treaties belong to a broader class of agreements known as "dispositive," "localized," or "real" that many have argued devolve automatically upon successor states.[153] "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."[154] In other words, dispositive treaties create rights and obligations in rem that cannot be extinguished by succession. As the International Law Association (ILA) said in 1965: "Boundary provisions in treaties are the clearest examples of such continuing delimitation. Aside from boundary provisions, however, the characterization of treaty clauses as dispositive must in each instance be controversial."[155] 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 clearcut.

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."[156] The "Cairo Declaration" continues to be widely accepted by African States today.[157]

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,"[158] 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 the boundary between Tanganyika and Nyasaland.[159] 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 that 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. . . ."[160] 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.[161] Ethiopia has also recognized that certain dispositive treaties survived state succession,[162]

151. *Id.* at vii.
152. *See id.* at viii.
153. *See* Okoth-Owiro, *supra* note 62, at 11 (noting this terminology and citing scholars from the 1930s-1950s).
154. The Effect of Independence on Treaties: A Handbook, The International Law Association 352 (1965); *but see* Okoth-Owiro, *supra* note 62, 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 to Brownlie (1990)).
155. 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.").
156. 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), http://www.africa-union.org/official_documents/Heads%20of%20State%20Summits/hog/bHoGAssembly1964.pdf.
157. *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").
158. Nyerere Doctrine declaration (emphasis added).
159. The Effect of Independence on Treaties: A Handbook, The International Law Association 362-63 (1965).
160. 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.
161. *See, e.g.*, *id.* at 32-33, §§23-24 (commenting on Article 12). Great Britain (on behalf of Tanzania) and Belgium (on behalf of Burundi, Rwanda, and Zaire) had signed two agreements concerning the administration of the seaport 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.
162. *See, e.g., id.* at 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 colo-

including the boundary provisions of the 1902 Agreement with Britain.

As for the 1929 Nile Waters Agreement, Egypt has asserted that the treaty remains in force under the laws of state succession.[163] Despite the above, Nyerere later explicitly announced that the 1929 Agreement did not bind Tanganyika upon independence.[164] 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.'"[165] In the same publication, the ILA lists "British Treaties which could give rise to considerations of dispositive character."[166] The list includes the 1929 Agreement,[167] a 1938 Agreement between Belgium and the U.K. regarding water rights between Tanganyika and Ruanda-Urundi,[168] and the 1953 Owen Falls Dam exchange of notes,[169] among other agreements relating to international rivers and boundaries. The ILA did not seek to 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.[170] 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.[171] 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.

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,[172] 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.
>
> 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.

nial 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).

163. Okoth-Owiro, *supra* note 62, at 16.

164. *See* Statement of Nyerere, *supra* note 158, 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)).

165. 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. at 353-54. Of course, after withholding specific comment, Nyerere later clarified that Tanganyika would not be bound by the 1929 Agreement, *see supra* note 158.

166. The Effect of Independence on Treaties: A Handbook, The International Law Association 355-60 (1965).

167. *Id.* at 356.

168. *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.

169. *Id.* at 359.

170. *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).

171. Menon, *supra* note 118, at 8-9, noting:

> 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*.

172. "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; . . ."

The ILC'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."[173] In its review of state practice, the ILC noted again: "Treaties concerning water rights or navigation on rivers are commonly regarded as candidates for inclusion in the category of territorial treaties."[174] The ILC also cites the 1929 Nile Waters Agreement, though concludes only that the parties continue to dispute the validity of the treaty.[175]

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."[176] The ILC, in fact, supports this notion by reference to the declarations of Tanganyika and Uganda.[177]

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 Agreement between Egypt and Britain (on behalf of Kenya, Tanzania, and Uganda), and the 1934 Agreement between Britain and Belgium (on behalf of Burundi and Rwanda), 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 stipulated by the Vienna Convention on the Law of Treaties of 1969.[178]

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.[179] The arguments to the contrary simply do not 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 U.N. Vienna Convention on the Law of Treaties, which has been in force since 1980.[180]

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.[181] 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

173. 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.)

174. 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).

175. 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.*).

176. 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).

177. *Id.*

178. Samir Ahmed, *Principles and Precedents in International Law Governing the Sharing of Nile Waters*, *in* The Nile: Sharing a Scarce Resource, 351, 355-57 (Paul P. Howell & J. Antonio Allan, eds., 1994).

179. As noted previously, Burundi and Rwanda may have the best counterargument, 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.

180. 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).

181. Okoth-Owiro, *supra* note 62, at 1.

> 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.[182]

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."[183]

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 withdrawing from a treaty 'if the treaty establishes a boundary.'"[184] 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.[185]

2. *Jus Cogens*

In the context of extreme water scarcity and resultant famine in various riparian States,[186] 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 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 underinclusive.[187]

The principle of *jus cogens* delimits the outer boundary of the otherwise unlimited power of states to conclude international treaties.[188]

> The criterion for these rules 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*.[189]

182. Vienna Convention on the Law of Treaties art. 62, May 23, 1969, 1155 U.N.T.S. 331.
183. Amdetsion, *supra* note 4, at 26.
184. Menon, *supra* note 118, at 12 (quoting Vienna Convention on the Law of Treaties of 1969, art. 62, §2(a)).
185. *See* Craven, *supra* note 94, at 54 n.216.
> *Fisheries Jurisdiction* (U.K. 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) ¶ 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'.). . . .
186. *See* Part IV *infra*, *see also, e.g.*, Okoth-Owiro, *supra* note 62, at 15 (noting more than one 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").
187. *See* Alfred Verdross, Jus Dispositivum *and* Jus Cogens *in International Law*, 60 Am. J. Int'l L. 55, 57 (1966) (authored by a member of the ILC, 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.).
188. *See id.* at 55.
189. *Id.* at 58.

Among this limited group of rules are those created for a humanitarian purpose. However, 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.'"[190] 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 water management will require collaborative planning, management, and utilization,[191] the "[a]rguments and counterarguments made by upper and lower riparian states are framed within the context of established tenets of public international law."[192] Even the justifications for war are couched in the language of breached treaties and violations of international law.[193] Thus, it is important that both sides get the law right.

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

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.[194] 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, may have 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 narrow Nile Valley and Nile Delta, an area that accounts for only 4% of the landmass of the country.[195] "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."[196]

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, though she remains incredibly dependent on the Nile for water. It is clear, however, that 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.

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 is no longer sustainable. In the Nile Basin, the region simply cannot continue along its current water trajectory. States are willing to go to war to preserve or enhance their access to water. 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 would allow the Nile riparians to recognize the post-colonial validity of the treaties while nonetheless abrogating them on other grounds. We propose a theory that could allow both. The theory 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 a state can successfully prove that changed circumstances (*rebus sic stantibus*) have led to a situation that violates international norms (*jus cogens*), then the state can abrogate the treaty.

During the colonial era, specifically when the 1902 Treaty and the 1929 Agreement 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 such that human rights are violated, then abrogation of the colonial-era treaties would be valid and even necessary.

190. *Id.* at 59.
191. *See, e.g.*, Okidi, *supra* note 52, at 322 ("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.").
192. Amdetsion, *supra* note 4, at 13.
193. *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 Trib., Jan. 30, 2004, http://www.tigrai.org/News/Articles2004/TheNileByYacob2.html.).
194. Elhance, *supra* note 28, at 59.
195. *Id.* at 60.
196. *Id.* at 61.

A. *Circumstances in 1902 and 1929 Justified the Treaties*

The *rebus sic stantibus* prong of the test is critical 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.[197] 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.[198] This is demonstrated in practice as Egypt has been the main beneficiary of the Nile's flow for 5,000 years.[199] Egypt's "natural and historic" rights were also acknowledged in formal commissions and agreements.[200] The British Commission of 1914 recognized and respected Egypt's prior rights.[201] 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.[202] The Nile Commission of 1925 concluded from Nile flow rates of the past 960 years[203] that the river was particularly important to Egypt and Sudan because their sole source of water comes from the Nile.[204] 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 1900s. Egypt only needed as much water as was necessary for survival. However, a global cotton shortage in the early 1900s created an opportunity for Egypt to fill the shortage, since it was well-situated to grow cotton.[205] 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. Thus, Great Britain sought to secure adequate irrigation for Egypt to enable a steady supply of cotton for British mills. Therefore, Great Britain helped Egypt secure its "natural and historic" rights to Nile waters in the 1929 Agreement.

The allocation of the 1929 Agreement, largely favoring Egypt, was accepted by riparian States because they recognized Egypt's dire water situation, as discussed above.[206] 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 Agreement, and of the 1902 Treaty, did not actually impact the level of water used by upper riparian States at the time. Therefore, the circumstances surrounding the colonial-era treaties, namely the 1902 Treaty and the 1929 Agreement, did not violate fundamental rights of any of the riparian countries. At the time, they guaranteed the ability of Egypt to meet the fundamental needs of its citizens, and helped to expand Egypt's economy. These colonial-era treaties were not void ab initio. Thus, to the extent that circumstances have not sufficiently changed, the colonial-era treaties remain binding.

B. *Circumstances Have Sufficiently Changed Such That the Treaties Violate Human Rights*

> *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.[207]

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, 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

197. Degefu, *supra* note 45, at 17.
198. Bonaya Adhi Godana, Africa's Shared Water Resources: Legal and Institutional Aspects of the Nile, Niger, and Senegal River Systems 169 (1985).
199. 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).
200. *See supra* Part II.
201. Degefu, *supra* note 45, at 121.
202. *Id.* at 122.
203. The Report of the Joint Commission of His Majesty's Government of the United Kingdom and Northern Ireland and the Egyptian Government, ¶ 32 (1925).
204. *Id.* ¶ 71.
205. Valerie Knobelsdorf, *The Nile Waters Agreements: Imposition and Impacts of a Transboundary Legal System*, 44 Colum. J. Transnat'l L. 622, 626.
206. 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 Univ. Press 1994).
207. The Nile: Water Conflicts, Science in Africa (May 2003), http://www.scienceinafrica.co.za/2003/may/nile.htm (last visited July 23, 2013).

or slipped backwards. These countries are no longer able to sustain a minimal standard of living for their populations without additional sources of water. Though Egypt is still an arid region and relies heavily on the Nile for its livelihood, the current 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 forcefully supports the conclusion 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 other riparian countries provide access for as little as 22% of their population. Furthermore, this trend has persisted over several decades with no signs of improvement. The same is mostly true of access to sanitation, which is largely dependent upon access to water.

Table 4: Fraction of Population With Access to Improved Drinking Water

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 Congo	11	19		32	36	27	45	46	46
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

Source: *Access to Improved Drinking Water, by Country, 1970 to 2004*, The World's Water, Pacific Institute, http://www.worldwater.org/data.html.

Table 5: Fraction of Population With Access to Improved Sanitation

Country	1970	1975	1980	1985	1990	1994	2000	2002	2004
Egypt					50	11	94	68	70
Ethiopia	14	14					15	6	13
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

Source: *Access to Improved Drinking Water, by Country, 1970 to 2004*, The World's Water, Pacific Institute, http://www.worldwater.org/data.html.

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 other riparian country comes close to Egypt's development. Even Sudan, with 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%.[208] 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 U.N. as having 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.

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

Table 6: Undernourishment by Country

	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

Source: Food and Agriculture Organization of the United Nations and World Food Programme, The State of Food Insecurity in the World (2010), *available at* http://www.fao.org/docrep/013/i1683e/i1683e.pdf.

3. *Development*: Egypt is head 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 (HDI), the least-developed country in the region, the Democratic Republic of Congo, has the second worst HDI ranking. Egypt has greatly increased its HDI in 30 years, while Congo has experienced a drop from an HDI of .267 to .239. The disparity is staggering, but the trend is even more devastating.

Table 7: Human Development Index (HDI)

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

Source: United Nations Development Programme, International Human Development Indicators, http://hdrstats.undp.org/en/indicators/49806.html (last visited July 12, 2013).

Additionally, the conditions of Egypt's water needs have changed over 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 composes only 13.7% of Egypt's gross domestic product and supplies 32% of jobs.[209] Egypt's economy is no longer completely dependent on cotton agriculture. Furthermore, it is 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.

This argument does not rely on theories of state succession. Rather, as stated in a previous section, applying the law of state succession leads to the conclusion that the colonial-era treaties remain in force. Though many of these States became independent after the signing of key Nile treaties, that factor is not enough to justify abrogation. Furthermore, though circumstances have changed considerably in the Nile Basin, *rebus sic stantibus* alone is unlikely to provide a sufficient theory to justify voiding the colonial-era treaties relating to the Nile. No legal treaty abrogation has ever

209. Egypt, The World FactBook, Central Intelligence Agency, 2010, https://www.cia.gov/library/publications/the-world-factbook/geos/eg.html.

been decided on the principle alone.[210] Instead, by linking *jus cogens* with changed circumstances, states may offer a more forceful justification for abrogating the colonial-era treaties. 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 International Court says that 'elementary considerations of humanity' are 'even more exacting in peace than in war.'"[211] 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.

Thus, although the 1902 and 1929 Agreements were justified at the time of their signing, circumstances have changed such that the continual observance of these treaties would violate *jus cogens*. 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. Part IV will propose international water law as the law that should apply in the absence of binding treaties in the Nile region. These background principles will inevitably serve as a guide for adjudicators or states renegotiating.

IV. 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 will not, by themselves, definitively guide state action in the absence 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."[212] Yet today, in the wake of the 1997 U.N. Convention on the Non-Navigational Uses of International Watercourses (U.N. Watercourse Convention),[213] international court and arbitration decisions,[214] publications by the ILA and the ILC,[215] 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."[216] 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.

International water law has had a rich and evolving trajectory. Throughout the 20th century, the law expanded to govern non-navigational uses. In the process, the law has shifted from sovereign absolutism toward equitable utilization. Each major international legal body has participated in this process: the International Institute of Law (IIL)[217] promulgated the 1911 Madrid Declaration,[218] focusing on the absolutist notion of doing "no harm," but later moved toward equitable utilization[219] in its 1961 Salzburg Resolution.[220] The International Law Association (ILA) further codified transboundary watercourse law in its 1966 Hel-

210. *See* Craven, *supra* note 94, at 54 n.216.
Fisheries Jurisdiction (U.K. 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".). . . .).

211. Verdross, *supra* note 187, at 59.

212. 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: Occlusions on the Path Toward a Basin-Wide Treaty in the Nile Basin*, 20 Colo. J. Int'l Envtl. L. & Pol'y 291, 295 (2009) (writing in 2009 that "rules of international water law have always been and remain vague and uncertain" while bracketing the 1997 U.N. 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, 127-30 (Gerald H. Blake et al. eds., 1995); Dante A. Caponera, *Shared Waters and International Law*, *in* The Peaceful Management of Transboundary Resources, 121-23.).

213. 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), http://untreaty.un.org/ilc/texts/instruments/English/conventions/8_3_1997.pdf (hereinafter U.N. Watercourse Convention).

214. *See* International Court of Justice, *Gabçikovo-Nagymaros Case* (1997); Stephen McCaffrey, The Law of International Watercourses 146 (2001).

215. *See infra* this section.

216. 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 Ass'n 334 (2004), and Joseph W. Dellapenna, *Customary International Law of Transboundary Fresh Waters*, 1 Int'l J. Global Envtl. L. 261 (2001)).

217. Institut de Droit International.

218. Annuaire de l'Institut de Droit International, Madrid Session 1911 (Paris 1911) Vol. 24, pp. 365-366, http://www.fao.org/DOCREP/005/W9549E/w9549e08.htm#fn139.

219. Salman M.A. Salman, The World Bank Policy for Projects on International Waterways: An Historical and Legal Analysis 52-53 (2009).

220. 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. 381-84, http://www.fao.org/DOCREP/005/W9549E/w9549e08.htm#fn139.

sinki Rules,[221] and subsequently the U.N. General Assembly asked the ILC to codify the law. After more than 30 years, the U.N. adopted the 1997 U.N. Watercourse Convention. In 2004, the ILA built on the U.N. Watercourse Convention and articulated its Berlin Rules on Water Resources.[222] A number of notable court decisions have interspersed themselves enshrining international custom into law. While the 1997 U.N. Watercourse Convention is still not in force,[223] and despite some criticism,[224] 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 U.N. Watercourse Convention, all have incorporated a few key principles that define international watercourse law.

A. Competing Principles

The principles embodied in the U.N. 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 principles of equity (fairness)."[225] 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.[226] Viewed together with equitable utilization, however, the no-harm principle of today is simply one logical—and flexible—factor included among several in determining a fair allocation of waters.[227] Third, riparians have an obligation to negotiate and settle disputes peacefully.[228]

1. Absolutes: Territorial Sovereignty Versus 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 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."[229]

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]."[230] 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."[231] 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."
>
> . . .

221. Int'l Law Ass'n 52nd Conference, Helsinki, Fin., Aug. 1966, The Helsinki Rules (1962) (Helsinki Rules).
222. International Law Association, The Berlin Rules on Water Resources, Berlin Conference: Water Resources Law (2004), http://www.internationalwaterlaw.org/documents/intldocs/ILA_Berlin_Rules-2004.pdf.
223. Bulto, *supra* note 212, at 293(noting that 35 states must ratify the Convention for it to come into operation).
224. The U.N. Watercourse Convention is subject to criticism because it does not 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 & 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 Joseph Dellapenna served as Rappateur, expanded the role of environmental concerns, which is perhaps the most significant divergence from the principles of the U.N. Watercourse Convention.
225. Joseph W. Dellapenna & 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 U.N. Watercourse Convention, art. 5; and the ILA's 2004 Berlin Rules, art. 12).
226. *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 CFA 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).
227. The U.N. 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, *supra* note 214, at 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).
228. Dellapenna & Gupta, *supra* note 225.
229. Bulto, *supra* note 212, at 302.
230. Ralph W. Johnson, *The Columbia Basin*, *in* International Drainage Basins 168 (quoted in McCaffrey, *supra* note 214, at 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, *supra* note 212 at 302-03.
231. Minister Romero to U.S. Secretary of State Richard Olney, 21 Oct. 1895, U.S. Appendix, p. 202 (quoted in McCaffrey, *supra* note 214, at 114).

> 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 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.[232]

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 United States did not ultimately adopt this position in resolving the Rio Grande dispute nor in subsequent cases.[233] "[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."[234]

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.[235] "Under this approach, any effort at harnessing a river's hydroelectric or irrigation potential is premised upon sanction by lower riparian [S]tates."[236]

Quoting the same U.S. 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,[237] 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 United States.[238]

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."[239] According to Egypt, these then became "acquired rights"[240] 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."[241]

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."[242] The 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."[243] 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.[244] 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.[245] 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.[246]

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 equally situated riparians with massively disparate

232. 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, *supra* note 214, at 115 (2001) (explaining the doctrine in greater detail at 76-111)).

233. In fact, the United States 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, *supra* note 214, at 115, and repudiated the doctrine as having "never been followed either by the United States or any other country," *id.* at 127 n.98.

234. McCaffrey, *supra* note 214, at 114-17 (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).

235. *See* Amdetsion, *supra* note 4, at 30; McCaffrey, *supra* note 214, at 128.

236. Amdetsion, *supra* note 4, at 30.

237. United States v. Canada, 1941, 2 UNRIAA 1905 (1949).

238. McCaffrey, *supra* note 214, at 129-30.

239. Exchange of Notes, 1929.

240. *See* McCaffrey, *supra* note 214, at 130.

241. *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.

242. Amdetsion, *supra* note 4, at 30. *See also* McCaffrey, *supra* note 214, at 128-37.

243. McCaffrey, *supra* note 214, at 136-37.

244. *Id.* at 149.

245. 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, *supra* note 214, at 143).

246. Bulto, *supra* note 212, at 308.

populations. Rather, need is assessed through historic patterns of use, population, area, arable land, and a range of other objective factors.[247] One mid-20th 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.[248]

The U.N. 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."[249]

> (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 existing use.[250]

The 1966 Helsinki Rules includes another list of comparable factors,[251] and the 2004 Berlin Rules contains a list with an additional environmental focus.[252]

Regardless of the factors weighed, equitable utilization is principally a quantitative measure, rather than a qualitative one.[253] It might therefore be more accurately labeled "equitable allocation" or "equitable apportionment" as it has been termed by the Supreme Court in its elaboration of the doctrine since the early 20th century in disputes between the states.[254] In somewhat of a break with international custom and practice, the 2004 Berlin Rules take steps to habilitate the notion that equitable utilization should include environmental and quality concerns.[255] 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.[256] In any case, drafting a complete list of factors to consider is a hopeless task and one that would do little to clarify the application of the law.[257]

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

247. Joseph W. Dellapenna, *The Customary International Law of Transboundary Fresh Waters*, 1 Int'l J. Global Envtl. Issues 264, 270 (2001).

248. Jerome Lipper, *Equitable Utilization*, *in* The Law of International Drainage Basins 45 (A.H. Garretson et al. eds., 1967) (quoted in Bulto, *supra* note 212 at 308-09).

249. U.N. Watercourse Convention art. 6.

250. *Id.*

251. Helsinki Rules art. V.

252. Berlin Rules art. 13.

253. McCaffrey, *supra* note 214, at 325-26.

254. *See* Kansas v. Colorado, 206 U.S. 46 (1907); Wyoming v. Colorado, 259 U.S. 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, *supra* note 214, at 324 n.2.

255. *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).

256. *Id.* Despite the internal dissent, the ILA nonetheless approved the Rules. Dellapenna, who served as the Rapporteur for the ILA in its drafting of the 2004 Berlin Rules has argued in several places that the U.N. 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 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.

257. 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 does not explain how a failure of the doctrine to enumerate totalizing factors results in a failure of customary international law. This Article 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 cannot represent an ipso facto failure of law.

> are entitled to monetary compensation for allowing other states to put the water to its most efficient use."[258]

While the "shared benefits" variant may be new to State practices, it may ultimately align with possible global trends toward accepting legal principles that favor market approaches to equity approaches.[259]

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 the U.N. Watercourse Convention and the Berlin Rules.[260] 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 *U.N. [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.[261]

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.[262] A treaty between the Dominican Republic and Haiti provides each with the right to make "just and equitable use" of their shared waters.[263] 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."[264] Several treaties commingle 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."[265] 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 commingled with language asserting prior use and historic rights. Leading up to the 1929 Agreement, the U.K. 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.[266]

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 Agreement between Egypt and the Sudan reflected a similar application of the equitable utilization principle—it simply applied the principle to Egypt and Sudan 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."[267] The text of the 1959 Agreement divides the waters according to acquired (historic) rights and a formula for dividing waters beyond

258. Bulto, *supra* note 212, at 312 (quoting passim A. Dan Tarlock & Patricia Wouters, *Are Shared Benefits of International Waters an Equitable Apportionment?*, 18 Colo. J. Int'l Envtl. L. & Pol'y 523 (2007)).

259. Gupta & Dellapenna, *The Challenges for the Twenty-First Century*, at 404.

260. U.N. 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."

261. Bulto, *supra* note 212, at 310.

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

263. 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, U.N.T.S. Vol. 312, p. 274.

264. 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. 864-80 (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) U.N.T.S. Vol. 728, p. 313.

265. Reproduced in 1974 Y.B. Int'l L. Comm'n, Vol. 2, pt. 2, p. 322, ¶ 326 (quoted in McCaffrey, *supra* note 214, at 141).

266. 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, *supra* note 214, at 139).

267. Quoted in McCaffrey, *supra* note 214, at 140.

that amount, and also provides that were the annual yield to increase, the benefits would be divided in equal shares.[268] Another provisions of the 1959 Agreement 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.[269] Like other agreements throughout the 20th 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 U.N. Watercourse Convention, and the 2004 Berlin Rules.[270] 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."[271] While there is no universally applicable way to decide how the principle of equitable utilization translates into the resolution of a given dispute,[272] 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."[273]

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 U.N. Watercourse Convention.[274] 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."[275] Rather, "no harm" is a compatible component of the 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."[276] Essentially, the two doctrines "are, in reality, two sides of the same coin."[277] 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.

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."[278] 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."[279] 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.

The harm contemplated by the principle must be "significant" *legal* harm.[280] *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. Stephen 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."[281] 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

268. 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.
269. Agreement Between the Republic of the Sudan and the United Arab Republic for the Full Utilization of the Nile Waters, 8 November 1959, §Third.
270. *See* McCaffrey, *supra* note 214, at 149; U.N. Watercourse Convention art. 5; Berlin Rules art. 12. *See also* Amdetsion, *supra* note 4, at 30; Bulto, *supra* note 212, at 308-13.
271. Bulto, *supra* note 212, at 311.
272. McCaffrey, *supra* note 214, at 138.
273. *Id.* at 145-46 (referring to the impact of the *Gabçikovo-Nagymaros* case discussed in Section B.).
274. U.N. 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").
275. McCaffrey, *supra* note 214, at 347.
276. *Id.* at 348.
277. *Id.* at 371.
278. *Id.* at 350.
279. Fleming v. Lockwood, 92 Pac. 962 (Mont. 1908) (highlighting the inherent limitation of the no-harm principle) (excerpted in McCaffrey, *supra* note 214, at 350-51).
280. The U.N. 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 U.N. Watercourse Convention) (quoted in McCaffrey, *supra* note 214, at 348).
281. McCaffrey, *supra* note 214, at 365.

of equitable utilization."[282] Under the U.N. 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."[283]

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 U.N. 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 meaning of these words, "they are generally regarded as reflecting due diligence obligations, as the ILC's commentary confirms."[284] 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."[285] Though ILC commentary seems to imply a due diligence standard even for preventing pollution.[286] Even the 2004 Berlin Rules, which place far more emphasis on environmental concerns, limit the obligations of a State to cause "no harm" or promote sustainability to one of due diligence.[287]

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.[288] "[T]he tribunal, over Spain's vehement objections, gave its blessing to a radical alteration of the natural conditions of 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 preexisting treaty. In *Lake Lanoux*, the tribunal found that while there were preexisting treaties between France and Spain, the treaties did not themselves bar France's proposed construction.[289] 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 preexisting 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,"[290] 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."[291] Principle 1 of a 1978 U.N. Environmental Program Governing 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."[292] Under Article 7 of the U.N. 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."[293]

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 United States for the harm caused by the smelter's pollution.[294] In essence, the tribunal recognized the right of the United States to be free from transboundary harm as

282. *Id.* at 366 (citing in particular Colorado v. New Mexico, 459 U.S. 176, 187 n.13 (1982)).
283. McCaffrey, *supra* note 214, at 369.
284. *Id.* at 372 (citing ¶ 6 of the commentary to art. 7 as adopted on second reading, ILC 1994 Report pp. 238-39).
285. McCaffrey, *supra* note 214, at 377.
286. *Id.* 377-78.
287. *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 *U.N. 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.

288. *See* Lilian del Castillo-Laborde, *Case Law on International Watercourses*, *in* The Evolution of the Law and Politics of Water 325 (Dellapenna & Gupta eds., 2008).
289. John G. Laylin & Rinaldo L. Bianchi, *The Role of Adjudication in International River Disputes*, 53 Amer. J. Int'l L. 30, 35 (1959).
290. McCaffrey, *supra* note 214, at 360.
291. U.N. GA Res. 3281 (XXIX) of 12 Dec. 1974, art. 3.
292. 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, princ. 1 (1978).
293. McCaffrey, *supra* note 214, at 368.
294. *Id.* at 354.

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.[295] 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."[296] Thus, the *Trail Smelter* tribunal "arrives at a result that is much closer to an equitable allocation of the uses of the air shed involved than to a flat proscription of transboundary harm."[297] The U.N. 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*.[298]

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.[299] The argument is a more robust version of the "prior appropriation" or "historic rights" arguments, and one that stands on firmer legal ground.[300] Throughout the ongoing negotiations among Nile riparians, Egypt has consistently inserted the no-harm principle into the draft CFA, recently under the guise of "water security." In 2007, the Nile Council of Ministers (Nile-COM)[301] held extensive and inconclusive discussions over the water security provision, which read:

> . . . 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.[302]

Egypt and Sudan proposed an amendment that would instead obligate riparians "not to adversely affect the water security *and current uses and rights* of any other Nile Basin State,"[303] and Nile-COM was unable to reach consensus.[304] 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, the Nile River Basin Commission.[305] "[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."[306] 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."[307] 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 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.[308]

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 preexisting treaties; these principles support a reassessment of water needs in the Nile region and allocations based on equitable utilization.

---

295. *See generally* Guido Calabresi & Bernard Melamed, *One View of the Cathedral*, 85 Harv. L. Rev. 1089 (1972).
296. McCaffrey, *supra* note 214, at 362-63.
297. *Id.* at 354-55.
298. U.N. Watercourse Convention, art. 7(2).
299. *See* Amdetsion, *supra* note 4, at 30.
300. 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 U.N. 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 U.N. Watercourse Convention). This has not 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 297 (J.A. Allan & C. Mallat eds., 1995).
301. Nile-COM is the highest decisionmaking body of the NBI. *See* Nile Basin Initiative: Operational Structure, http://www.nilebasin.org/index.php?option=com_content&task=view&id=30&Itemid=77.
302. 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).
303. *Id.* (emphasis added).
304. See Mekonnen, at 428-30, for a full discussion of the negotiations. *See also* Bulto, *supra* note 212, at 301 (citing Joseph Ngome, *Clause Holds Key to New Nile Treaty*, Daily Nation (Nairobi), Mar. 28, 2008, http://allafrica.com/stories/printable/200803280008.html).
305. Mekonnen, at 429.
306. *Id.* at 429.
307. *Id.* at 428-29.
308. *Id.* at 379.

B. 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.

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 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."[309] 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 riparian States or Sudan, for that matter, are of crisis proportion, then the explicit provisions of both the U.N. Watercourse Convention and the Berlin Rules will operate to prioritize the vital human needs of those regions. Regardless of whether or not the U.N. 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. The upper riparian countries could seek ICJ 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 U.N. Watercourse Convention or the voluntary submission to ICJ jurisdiction of other riparians. The ICJ should then apply the principles of the U.N. Watercourse Convention as it has previously.

V. 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 10 Nile States formed the NBI to negotiate how to manage the Basin[310]—the latest in a series of cooperative organizations.[311] After more than one 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 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 Article supports the proposition that the Nile Basin dispute can be settled through judicial intervention of some kind.[312] 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 U.N., usually with good effect."[313] Indeed other eminent publicists note that "[w]ater adjudication is a rich and old area" of law.[314]

A court could also delve into the tangle of balancing various water uses. Under the U.N. Watercourses Convention, priority is given only to uses that serve "vital human needs."[315] Yet, it would be perverse to reward poor water

309. Mekonnen, at 437.

310. The nine states referred to throughout the Article 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.

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

312. In the treaty context, see the 1978 Vienna Convention on Succession of States in Respect of Treaties, art. 43; United Nations Charter, arts. 33 et seq., arts. 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 cannot be reached).

313. McCaffrey, *supra* note 214, at 296.

314. Joseph W. Dellapenna & Joyeeta Gupta, eds., The Evolution of the Law and Politics of Water 12 (2008).

315. Discussed *supra* in Part IV.

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 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 ICJ would be an appropriate venue for the dispute. As a starting point, all 10 riparians are members of the U.N. 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."[316] And the ICJ is the principle judicial organ of the U.N.[317] While the ICJ can only hear cases where States have consented to its jurisdiction,[318] any member State can voluntarily submit to jurisdiction, and the DRC, Kenya, Sudan, and Uganda have all declared compulsory ICJ jurisdiction.[319] Though the case can only successfully adjudicate Nile management and allocations if all 10 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 has not 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 factors militate toward 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.[320] 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.

316. U.N. Charter, art. 33. (quoted in Patricia Wouters ed., International Water Law: Selected Writings of Professor Charles B. Bourne 197 (1997)).
317. U.N. Charter, art. 92.
318. *See* International Court of Justice: Jurisdiction, 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.").
319. *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.
320. *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 Envtl. 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, *supra* note 212, at 293).

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 NBI has turned out to be merely "yet another fit of bureaucratic reorganization."[321] The NBI had a lofty mission of achieving "sustainable socioeconomic development through equitable utilization of and benefit from the common Nile Basin water resources."[322] 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.[323] 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 and allocating the Nile's water flows."[324] 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."[325]

In 2003, moving beyond the capacity-building projects,[326] the NBI established a committee "to recommend a comprehensive legal agreement for reallocation of the Nile's waters."[327] It took until 2006 to produce a draft of the legal framework.[328] 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 CFA process.[329] 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.[330] 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."[331]

Despite the strident objections of Egypt and Sudan, six of the Nile riparians have signed a new CFA,[332] ignoring colonial-era treaties and leaving the "water security"

321. Amdetsion, *supra* note 4, at 22.
322. Swain, *supra* note 208, at 302.
323. *See id.* at 294.
324. *Id.*
325. Mekonnen, Nile Basin Cooperative Framework, at 427.
326. The NBI has termed these "shared vision projects" or SVPs.
327. Amdetsion, *supra* note 4, at 23.
328. Mekonnen, Nile Basin Cooperative Framework, at 428.
329. Mekonnen, Nile Basin Cooperative Framework, at 439.
330. *See* Mekonnen, Nile Basin Cooperative Framework, 427-31.
331. Mekonnen, Nile Basin Cooperative Framework, at 440.
332. The full text of the CFA 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.

issue unresolved.[333] The CFA scraps Egypt's veto power, eliminates Egypt and Sudan's control of over 98% of the Nile's waters, and allocates decisionmaking authority to a new Nile Basin Commission.[334] Ethiopia, Rwanda, Tanzania, and Uganda signed the CFA in May 2010, with Kenya following suit soon thereafter, and Burundi signing in February 2011.[335] 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.[336]

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 hydroelectric dams on the Blue Nile.[337] Despite Egypt's outcries, Ethiopia has moved forward with construction, launching its massive Millennium Dam on April 2, 2011.[338] Indeed, several upstream countries have announced plans to begin construction projects on the Nile.[339] 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.[340] 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 to the dispute, or in the alternative to arbitration, provided that the other party to the dispute has made a like declaration.[341]

The 1997 Watercourses Convention contains similar language.[342]

The DRC, Kenya, Sudan, and Uganda have already agreed to compulsory ICJ jurisdiction.[343] 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 Agreement as it relates to the water rights among Kenya, Sudan, and Uganda. Of course, a more meaningful adjudication would include all 10 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 judi-

333. *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.

334. 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.

335. 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.

336. *Id. See* CFA, art. 14.

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

338. *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.

339. *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.

340. 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, http://www.internationalwaterlaw.org/cases/icj.html.

341. 1978 Convention. Note again that Egypt, Ethiopia, Sudan, and the DRC are all parties to the Convention, which has been in force since 1996.

342. 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.

343. 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").

cial and quasi-judicial dispute settlement mechanisms."[344] Ethiopia and an emergent Egyptian government may find judicial intervention a palatable third-party mechanism to depoliticize a fractious issue during tumultuous times.

VI. 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 U.N. Watercourses Convention. These principles acknowledge a favored status for "vital human needs" such as drinking water and sanitation. The current CFA 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.

344. Laurence Boisson de Chazournes, *Water and Economics: Trends in Dispute Settlement Procedure and Practice*, *in* Fresh Water and International Economic Law 334 (Edith Brown Weiss et al. eds., 2005).