CONFLICT ON THE NILE: INTERNATIONAL WATERCOURSE LAW AND THE ELUSIVE EFFORT TO CREATE A TRANSBOUNDARY WATER REGIME IN THE NILE BASIN

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I. INTRODUCTION

Just days after concluding Egypt's historic peace treaty with Israel in 1979, Egyptian president Anwar Sadat proclaimed"[t]he only matter that could take Egypt to war again is water."[1] Sadat's ominous prognostication was not a thinly-veiled challenge to Israel, but rather a stern admonition to Ethiopia,[2] one of ten Nile River riparian[3] states and the source of nearly 85% of the river system's total annual discharge.[4] Sadat's message was unmistakable: should Ethiopia tamper with the unimpeded flow of the Nile—long considered an Egyptian birthright[5]—such a disruption would be viewed by the most populous Arab country as nothing short of an existential threat.[6]

Three decades later, Sadat's forecast has yet to materialize, but the specter of a "water war" along the banks of the world's most fabled waterway remains firmly within the realm of possibility. Far from being resolved, the myriad challenges that have plagued cooperation among the countries of the

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1. Joyce R. Starr, *Water Wars*, FOREIGN POL'Y, Spring 1991, at 17, 19.

2. *Id.*; *see also* Norman Myers, *Environment and Security*, FOREIGN POL'Y, Spring 1989, at 23, 32 (stating that Egypt may use force if Ethiopia blocks Egypt's access to Nile).

3. The term "riparian" "denotes states that share a common international watercourse system or international river basin." Lisa M. Jacobs, *Sharing the Gifts of the Nile: Establishment of a Legal Regime for Nile Waters Management*, 7 TEMP. INT'L & COMP. L.J. 95, n.5 (1993). The doctrine of riparian rights recognizes that all owners of property adjoining an international watercourse enjoy equal rights to water use, provided that such usage does not interfere with the rights of any co-riparian. SANTOSH KUMAR GARG, INTERNATIONAL AND INTERSTATE RIVER WATER DISPUTES IN INDIA 17 (1999).

4. *See* Daniel Kendie, *Egypt and the Hydro-Politics of the Blue Nile River*, 6 N.E. AFR. STUD.141, 157 (stating that Ethiopia's decision to carry out studies in 1978 exploring the feasibility of diverting the Nile's waters for irrigative purposes served as the impetus for Sadat's remarks).

5. *See generally* Hazem el-Beblawi, *Egypt Must Stand Up for Its Nile Water*, AL-MASRY AL-YOUM(Egypt), Apr. 19, 2010, *available at* http://www.almasryalyoum.com/en/node/36028(arguing that Egypt's established rights to the Nile can be traced back to the emergence of civilization there seven thousand years ago).

6. Myers, *supra* note 2, at 32.

Nile Basin for decades, and which have rendered the region a flashpoint for potential conflict, are today perhaps more pronounced than ever. At its core, the dispute centers on the competing narratives and needs of the river's upstream and downstream riparians, and the struggle to bring management of the river in line with the principle of equitable utilization, a lodestar of international watercourse law.

For Egypt, much of the current impasse revolves around issues of identity and survival. Since antiquity, Egypt has been synonymous with the Nile River.[7] During his visit to Egypt in the fourth century B.C., the Greek historian Herodotus coined the age-old truism that millions of Egyptians know as *Misr Hibat an-Nil*: "Egypt is the gift of the Nile."[8] More than two millennia later, that observation has become something of a platitude, but it remains valid not just because the Nile's floodwaters have enabled civilization to prosper on its banks, but also because now, more than ever, Egypt's fate is inextricably tied to the allocation of its waters. Indeed, without the Nile River winding through its territory, Egypt would be a veritable wilderness, a largely uninhabitable desert on par with the unforgiving landscapes of Libya and Saudi Arabia.[9]

As it is, Egypt's nearly eighty-two million people[10] live on just 5.5% of the country's total land area,[11] a narrow ribbon of cultivatable land located primarily in the Nile Valley and Nile Delta regions. Coupled with this skewed geographic distribution, estimates that Egypt's population could swell to as high as 130 million people by 2050[12] portend an environmental and demographic crisis—one that would exacerbate Egypt's dependence on the Nile, hasten urban encroachment on arable land,[13] and plunge per capita water availability further below the water poverty line.[14] The clouds of this

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7. el-Beblawi, *supra* note 5.

8. THE LANDMARK HERODOTUS: THE HISTORIES 118 (Robert B. Strassler ed., Andrea L. Purvis trans., Pantheon Books 2007) ("[I]t is obvious to anyone with common sense when he sees it for himself: the Egypt to which the Hellenes sail is land that was deposited by the river—it is the gift of the river to the Egyptians . . . .").

9. *See* Magdy Hefny & Salah El-Din Amer, *Egypt and the Nile Basin*, 67 AQUATIC SCI. 42, 42 (2005) (noting that these three countries are positioned on the same latitude and receive negligible amounts of annual precipitation).

10. *The World Factbook: Egypt*, CENT. INTELLIGENCE AGENCY, https://www.cia.gov/library/publications/the-world-factbook/geos/eg.html (last visited Nov. 13, 2011).

11. MONA KHALIFA, JULIE DAVANZO & DAVID M. ADAMSON, RAND CTR. FOR MIDDLE EAST PUB. POL'Y, POPULATION GROWTH IN EGYPT: A CONTINUING POLICY CHALLENGE, ISSUE PAPER NO. 183, at 5 (2000), *available at* http://www.rand.org/pubs/issue_papers/2006/IP183.pdf.

12. POPULATION DIVISION, DEP'T OF ECON. & SOC. AFFAIRS, UNITED NATIONS,WORLD POPULATION PROSPECTS: THE 2008 REVISION: HIGHLIGHTS 37 (2008), *available at* http://www.un.org/esa/population/publications/wpp2008/wpp2008_highlights.pdf.

13. *E.g.*, Metwali Salem, *Minister: Egypt Lost 700,000 Feddans to Illegal Construction*, AL-MASRY AL-YOUM (Dec. 20, 2010), http://www.almasryalyoum.com/en/node/275899 (Egypt) (reporting that Egypt has lost 700,000 feddans of arable land to illicit construction over the past two decades).

14. *See* Yasmine Fathi, *Quench the Thirst*, AL-AHRAM WKLY., Dec. 23-29, 2004 (Egypt), *available at* http://weekly.ahram.org.eg/2004/722/fe1.htm (stating that Egypt's current

perfect storm may gather sooner rather than later: an Egyptian government think tank projects that the country will face a water deficit as soon as 2017, when consumptive needs will outstrip resources by an estimated 15 billion cubic meters.[15]

But even that scenario assumes, of course, that Egypt can continue to use the Nile's waters with impunity. Along with Sudan, Egypt has enjoyed an effective monopoly over the Nile's resources since a 1929 accord[16] concluded under British colonial rule granted it a lion's share of the river,[17] as well as a virtual veto power over upstream projects that would make sure the plans do not "infringe Egypt's natural and historical rights in the water of the Nile."[18] In 1959, the treaty was amended by Egypt and Sudan, but only to provide for a more equitable allocation of rights as between those two newly independent countries; the interests of the Nile Basin's other riparians were still relegated to inferior status.[19]

Today, such a zero-sum arrangement is no longer tenable. With their own populations also set to experience rapid growth,[20] these states—Ethiopia, Uganda, Tanzania, Eritrea, Burundi, Kenya, Rwanda, and the Democratic Republic of the Congo—have begun to chafe under the weight of these lopsided colonial agreements. Faced with an acute set of problems, chronic food insecurity foremost among them, the Nile Basin's upper riparians have agitated for a more equitable allocation of water rights that would allow them to cultivate more arable land and harness the Nile's hydroelectric potential.[21]

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per capita water availability is 860 cubic meters, well below the international minimum standard of 1000 cubic meters).

15. Egyptian Cabinet, Info. & Decision Support Ctr., *Reports*, IDSC MONTHLY NEWSL., Sept. 2009, at 3, 5, *available at*http://www.idsc.gov.eg/upload/NewsLetters/IDSC%20Monthly%20Newsletter%20-%20September%202009.pdf.

16. 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, U.K.-Egypt, May 7, 1929, 93 L.N.T.S. 44, *available at* http://ocid.nacse.org/tfdd/tfdddocs/92ENG.pdf [hereinafter Nile Waters Agreement].

17. The agreement allocated forty-eight billion cubic meters per year to Egypt and four billion cubic meters per year to Sudan. MWANGI S. KIMENYI & JOHN MUKUM MBAKU, AFR. GROWTH INITIATIVE, BROOKINGS INST., TURBULENCE IN THE NILE: TOWARD A CONSENSUAL AND SUSTAINABLE ALLOCATION OF THE NILE RIVER WATERS 4 (2010), *available at* http://www.brookings.edu/~/media/Files/rc/reports/2010/08_nile_river_basin_kimenyi/08_nile_river_basin_kimenyi.pdf.

18. Nile Waters Agreement, *supra* note 16, ¶ 46.

19. Agreement between the Republic of the Sudan and the United Arab Republic (Egypt) for the Full Utilization of the Nile Waters, U.A.R.-Sudan, Nov. 8, 1959, 453 U.N.T.S. 6519 [hereinafter Agreement on the Full Utilization of the Nile].

20. *See* FOOD & AGRIC. ORG. OF THE UNITED NATIONS, POPULATION PROSPECTS IN THE NILE BASIN (2005), *available at* http://www.fao.org/nr/water/faonile/PopulationProspects.pdf (projecting that the Nile Basin countries' populations will rise to 695 million by 2030, from a 2005 estimate of 372 million).

21. *See* Walter Menya, *Kenya Signs Nile Basin Pact*, DAILY NATION, May 19, 2010

Despite efforts over the past decade to engender greater riparian trust and cooperation, the ultimate aim of concluding a just and comprehensive basin-wide treaty regime has remained elusive.[22] In the face of Egyptian and Sudanese opposition, Ethiopia, Kenya, Rwanda, Tanzania, and Uganda signed a framework agreement in May 2010 that threatens to remove the lower riparians' stranglehold on the Nile once and for all.[23] Egypt has dug in its heels, proclaiming the Nile's waters an inviolable "red line."[24]

This Note explores the roots of this seemingly intractable tragedy of the commons, with a particular emphasis on Egypt's continued intransigence to any change in the status quo. Part II considers Egypt's current dependence on the Nile and its indispensability to the country's agricultural sector. Part III examines the historical backdrop to the current impasse, and Part IV evaluates the strength of Egypt's and other riparians' legal arguments within the context of international fluvial law. Part V discusses the Nile Basin Initiative and the stalled attempt to create a regulatory regime in the Nile Basin. Finally, Part VI argues that despite the fact that most Nile riparians have more to gain through cooperation than they do through divergent unilateral measures, efforts to forge an equitable agreement will likely remain stymied by Egypt's "securitization" of its Nile claims.

II. WITHOUT THE NILE, THERE IS NO EGYPT

A. The Genesis of the River Nile

At 4,238 miles (6,820 kilometers), the Nile River is the longest watercourse in the world.[25] The river system is comprised of various sources, with the White and Blue Niles constituting the primary tributaries of the Nile River proper.[26] The White Nile originates in East Africa's Great Lakes region, where the Kagera River, the river's most remote headstream, empties into Lake Victoria, and then proceeds through several marshlands before discharging into Lake Albert, located on the frontier between Uganda and Congo.[27] Here, the river joins with the Semliki River from Congo before entering the labyrinthine Sudd swamps of southern Sudan, where a significant

(Kenya), *available at* http://www.nation.co.ke/News/Kenya+signs+Nile+Basin+pact/-/1056/921332/-/t6xaucz/-/index.html (explaining Ethiopia, Uganda, Tanzania, Rwanda and Kenya seek new agreement for allocation of Nile resources).

22. *See id*. (demonstrating Egypt's and Sudan's rejection of new agreements regarding allocation of Nile resources).

23. *Id*.

24. Samer al-Atrush, *Egypt Won't Give Up One Drop of Nile Water Rights*, AGENCE FRANCE PRESSE, May 12, 2010 (Fr.).

25. ROBERT O. COLLINS, THE NILE 11 (2002) [hereinafter COLLINS, THE NILE].

26. Patrick Rutagwera, *The Nile River*, NILE BASIN INITIATIVE (May 31, 2011), http://www.nilebasin.org/index.php (follow "About NBI" hyperlink; then follow "The Nile River" hyperlink).

27. EGYPTIAN MINISTRY OF WATER RES. & IRRIGATION, THE RIVER NILE 3, *available at* http://www.mwri.gov.eg/En/pdf_files%20english/Nile_Eng.pdf.

amount of the river's volume is lost to evaporation.[28] Once past the massive Sudd, the White Nile is replenished by Ethiopia's Sobat River, after which it flows for nearly 500 miles before converging with the Nile's other principal tributary, the Blue Nile, in the Sudanese capital of Khartoum.[29] The Nile's last significant tributary, the Atbara River in Ethiopia, unites with the White Nile 200 miles downstream in Sudan.[30]

Rising out of a spring in the Ethiopian highlands, the Blue Nile is the source of more than four-fifths of the Nile's downstream water.[31] The tributary begins as a small stream known as the Little Abbai, which, along with numerous other affluents, drains into Lake Tana.[32] From there, the Blue Nile flows approximately 850 miles before its ultimate confluence with its western counterpart in northern Sudan.[33] Beginning in the Egyptian town of Aswan, the river becomes the Nile River proper, flowing through the Egyptian desert before bifurcating north of Cairo into the two distributaries that form the Nile Delta.[34] At the Aswan Dam, the Nile's average annual discharge is estimated at 84 billion cubic meters,[35] with Egypt's fixed water quota, pursuant to its 1959 treaty with Sudan, at 55.5 billion cubic meters.[36]

The river's complex genesis outside of Egypt underscores the country's hypersensitivity to any reduction or diversion of its flow. For Egypt, the Nile is truly a life-sustaining umbilical cord: 96% of the country's renewable freshwater supply comes from the river.[37] Exacerbating this nearly exclusive dependency is Egypt's negligible and sporadic amount of yearly rainfall, particularly in the Nile Valley, where an arid climate prevails.[38] While the country's Mediterranean coastal belt can be the beneficiary of up to 150 mm annually,[39] on average, Egypt as a whole receives just 51 mm of rainfall per

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28. AFRICA SOUTH OF THE SAHARA 2004, at 1060 (Katharine Murison ed., Europa Publications, 33d ed. 2004) (1971).

29. COLLINS, THE NILE, *supra* note 25, at 3.

30. *Id.*

31. *Id.*

32. *Id.*

33. DAVID H. SHINN & THOMAS P. OFCANSKY, HISTORICAL DICTIONARY OF ETHIOPIA 77 (2004).

34. MAMDOUH SHAHIN, HYDROLOGY OF THE NILE BASIN 54 (1985) (the Rosetta and Damietta branches).

35. GEBRETSADIK DEGEFU, THE NILE: HISTORICAL, LEGAL, AND DEVELOPMENTAL PERSPECTIVES 176 (2003).

36. *The Nile Protocols*, EGYPT STATE INFO. SERV., http://www.sis.gov.eg/en/Story.aspx?sid=180 (last visited Oct. 6, 2011).

37. Hefny & Amer, *supra* note 9, at 42.

38. M.A. ZAHRAN & A.J. WILLIS, THE VEGETATION OF EGYPT 255 (2d ed. 2009).

39. UNITED NATIONS CONVENTION TO COMBAT DESERTIFICATION, EGYPTIAN NATIONAL ACTION PROGRAM TO COMBAT DESERTIFICATION 6 (2005), *available at* http://www.unccd.int/actionprogrammes/africa/national/2005/egypt-eng.pdf [hereinafter NATIONAL ACTION PROGRAM]. "Egypt ratified the [UN] Convention to Combat Desertification [in 1995]." *Id.* at 1. The Convention's objectives include the prevention of land degradation, rehabilitation of partially-degraded lands, and reclamation of desertified

year, making it the driest country on the African continent.[40] In the southern part of the country, known as Upper Egypt, rainfall is practically non-existent; ten mm may fall only once a decade.

Egypt has sought to highlight this dearth of precipitation in defending its utilization of the Nile. It has attempted to distinguish between the Nile River and Nile Basin and claims the Nile Basin receives 1,660 billion cubic meters[41] of recorded rainfall annually, 85% of which falls in the Ethiopian highlands, with the balance falling in other upstream riparians.[42] Rather than fixate on its water quota, Egypt contends that upstream countries would be better off focusing their own energies on exploitation of this untapped water supply, much of which is currently lost to seepage and evaporation.[43]

The Nile's waters notwithstanding, Egypt's only other noteworthy source of abundant freshwater is derived from its deep groundwater reservoirs.[44] The country has two aquifers, one in the Nile Basin[45] and another in the Western Desert, the latter being the only source of freshwater in an otherwise arid expanse of land that covers sixty-eight percent of Egypt's total land area.[46] However, the fossil water of the Western Desert aquifer is not renewable, and to date, only a fraction of its resources have been tapped due to the cost-prohibitive nature of extraction.[47]

B. Sustenance and Sustainability

Like its fellow Nile Basin riparians, Egypt is an agriculturally-dependent country. The country's agricultural sector not only constitutes an important component of gross domestic product, but also is a major contributor to food security and domestic employment.[48] Not surprisingly, Egypt's farming sector

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land. *Id.*

40. *General Summary of Africa*, AQUASTAT, FOOD & AGRIC. ORG. OF THE UNITED NATIONS (2005),http://www.fao.org/nr/water/aquastat/regions/africa/index.stm.

41. By contrast, the Nile River carries approximately ninety to a hundred billion cubic meters of water downstream per year prior to evaporation. *Accord or Discord on the Nile? – Part I*, INT'L WATER LAW PROJECT BLOG (July 26, 2010, 15:54 EST), http://www.internationalwaterlaw.org/blog/2010/07/26/accord-or-discord-on-the-nile-%E2%80%93-part-i/.

42. *Id.*

43. *Id.*

44. *See* NATIONAL ACTION PROGRAM, *supra* note 39, at 9 (stating Egypt has two underwater aquifers in addition to the Nile River).

45. *Id.* As of 2005, the annual rate of groundwater withdrawal from this aquifer was around 6.1 billion cubic meters. *Id.*

46. *African Water Project Gets Million Dollar Backing*, INT'L ATOMIC ENERGY AGENCY (June 28, 2005), http://www.iaea.org/NewsCenter/News/2005/nubian_aquifer.html.

47. *Great Lakes Beneath Their Feet: Probing North Africa's Oldest Water Treasures*, INT'L ATOMIC ENERGY AGENCY, http://www.iaea.org/Publications/Booklets/Ssp/great_lakes.html (last visited Oct. 9, 2010).

48. *Agriculture and Irrigation*, EGYPT STATE INFO. SERV., http://www.sis.gov.eg/en/Story.aspx?sid=2335 (last visited Oct. 9, 2010); *see also* INT'L FUND FOR AGRIC. DEV., NEAR EAST AND NORTH AFRICA DIVISION, EGYPT: SMALLHOLDER CONTRACT

depends mightily on the Nile for irrigation, consuming around fifty-four billion cubic meters[49] of the country's annual freshwater withdrawal of nearly sixty-eight billion cubic meters.[50] Yet, despite this intense utilization,[51] Egypt is still forced to import some 40% of its food requirements,[52] such as cereals, sugar, and oil, an amount that, if grown locally,[53] would necessitate an additional twenty billion cubic meters of irrigation water.[54] As a result, Egypt is one of the largest food importers in the world.[55] Indeed, in 2007, Egypt imported $6.6 billion in foodstuffs,[56] and in 2009, cereals alone accounted for nearly half of its imported commodities.[57] Cereals that are produced domestically are wholly reliant on Nile flood irrigation.[58]

Even where Egypt's agricultural sector has a comparative advantage, problems of water use abound. While the lands of the Nile Valley and Delta enjoy some of the highest crop yields in the world,[59] the cultivation of rice and sugarcane, two of Egypt's staple export crops,[60]require more consumption of

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FARMING FOR HIGH-VALUE AND ORGANIC AGRICULTURAL EXPORTS 12-13 (2006) [hereinafter IFAD REPORT] (stating that the agricultural sector directly employs approximately one-third of Egypt's labor force, while providing jobs for 55% of the population overall).

49. *See* Hefny & Amer, *supra* note 9, at 43 (notingthe water amount required for agriculture not supplied solely by the Nile River and stating that "[t]he total amount of water diverted for agricultural use include[s] the amount of water required for evapotranspiration, conveyance, and application losses in both the irrigation network and at the farm level").

50. *See Annual Freshwater Withdrawals, Domestic (% of Total Freshwater Withdrawal)*, THE WORLD BANK, http://data.worldbank.org/indicator/ER.H2O.FWDM.ZS/countries/1w-AL-DZ?display=default (last visited Oct. 9, 2010) (providing a 2000 estimate).

51. Irrigation water is completely subsidized by the Egyptian government, providing an incentive for wasteful and inefficient farming practices. Thanassis Cambanis, *Egypt and Thirsty Neighbors Are at Odds Over Nile*, N.Y. TIMES, Sept. 26, 2010, at A4.

52. *Minister: Egypt Imports 40% of Its Food*, AL-MASRY AL-YOUM (Aug. 6, 2010), http://www.almasryalyoum.com/en/node/47715 (Egypt).

53. *Water Challenges in Egypt*, EGYPTIAN MINISTRY OF WATER RES. & IRRIGATION 1 (2010), http://www.mwri.gov.eg/En/index.htm (follow "more" hyperlink; then follow "Water Challenges in Egypt" hyperlink).

54. Paul Weber & John Harris, *Egypt and Food Security*, AL-AHRAM WKLY, Oct. 23-29, 2008 (Egypt).

55. *Water Challenges in Egypt*, *supra* note 53, at 1.

56. U.S. DEP'T OF AGRIC., FOREIGN AGRIC. SERVICE, AGRICULTURAL ECONOMY & POLICY REPORT – EGYPT 3 (2009), *available at* http://www.fas.usda.gov/country/Egypt/Egypt%20Agricultural%20Economy%20and%20Policy%20Report.pdf. [hereinafter USDA REPORT].

57. *Water Challenges in Egypt*, *supra* note 53, at 1.

58. 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, 8 (2009).

59. *See* IFAD REPORT, *supra* note 48, at 13 (stating that Egypt's old lands produce some of the highest cereal crops in the world).

60. USDA REPORT, *supra* note 56, at 3.

water than any other agricultural product.[61] In a partial bid to reallocate resources away from water-intensive crops and cushion price fluctuations in the domestic rice market, Egypt instituted an export "ban" in 2008 that imposed a hefty export tariff on rice and required farmers to give a portion of their yields to the government.[62] Given rice's low-cost and high-profit nature, such protectionism has proven only partially effective, as illicit cultivation continues to remain attractive to subsistence farmers.[63]

With Egypt's import capabilities increasingly taxed, and an expected increase in water use from the country's municipal and industrial sectors,[64] the Nile waters will assume a greater importance for the agricultural sector in the near future. Simply put, it will have to do more with less. While this development would seem to create a fertile opportunity for cooperation between Egypt and upper Nile riparians, who possess more arable land and who can farm more efficiently with the Nile waters,[65] Egypt appears to favor the pursuit of greater agricultural self-sufficiency.[66] Indeed, it has announced its intent to achieve 75% wheat sufficiency by 2020,[67] an objective the government admits is only viable if the agricultural sector's antiquated irrigation techniques are overhauled.[68] This consideration has not dissuaded Egypt from embarking on ambitious desert reclamation projects of questionable utility.[69] Whether Egypt can succeed in "making the desert bloom" by reclaiming millions of acres remains to be seen, but such a risky venture will undoubtedly deepen its dependence on the Nile's precious waters.

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61. EGYPT IN THE TWENTY-FIRST CENTURY: CHALLENGES FOR DEVELOPMENT 155 (Mohamad Riad El Ghonemy ed., 2003).

62. JULIO MALDONADO & SHERIF IBRAHIM, USDA, EGYPT: RICE UPDATE: REPORT NO. EG9018, at 2 (2009), *available at* http://gain.fas.usda.gov/Recent%20GAIN%20Publications/Rice%20Update_Cairo_Egypt_10-7-2009.pdf.

63. *See* SAMEH GHARIB, MODELING THE IRRIGATION SYSTEM IN EGYPT 4 (2004) ("[T]he fields of rice sometimes are out of control and there are observed violations of the quotas determined by the government.").

64. *Water Challenges in Egypt*, *supra* note 53, at 2.

65. *See* Anjana Das, *Egypt Transforms Its Farming Sector*, GERMAN-ARAB TRADE MAG., Sept.-Oct. 2009, *available at* http://aegypten.ahk.de/index.php?id=802&L=15 (stating that Egypt has in fact begun operating farmlands in neighboring countries, concluding agreements with Sudan and Ethiopia to grow wheat and with Tanzania to produce vegetables).

66. Weber & Harris, *supra* note 54.

67. Heba Saleh, *Egypt's Food Inflation Feeds Social Unease*, FIN. TIMES, Aug. 30, 2010.

68. *See* Das, *supra* note 65 (stating that Egypt's irrigation system is comprised of open canals and waterways that lose half of their water to evaporation); *see also* Cambanis, *supra* note 51 (stating that irrigation channels are often unpaved, allowing water to seep into the ground and weeds to obstruct water flow).

69. *See* Weber & Harris, *supra* note 54 ("Desert soil has neither the storage capacity for water nor for plant nutrients to make it even remotely comparable in productivity to the deep alluvial clay soils in the Nile Valley and the Delta.").

III. COMPETING HISTORICAL NARRATIVES

A. A Brief History

To understand the current dynamics, politics, and fears surrounding the Nile Basin dispute is to study the checkered history of the river itself. The Nile has been the source of international intrigue and political machinations for thousands of years.[70] The contours of the present controversy began to crystallize more recently during the nineteenth century, when Egypt's Muhammad Ali invaded Sudan in 1820 out of a "desire to secure control over the entire Nile system."[71] To be sure, Ali's subjugation of Sudan had as much to do with Ethiopia, whose strategic perch at the headwaters of the Blue Nile—from which most of Egypt's water emanates—was viewed as a constant sword of Damocles hanging over Egypt's head.[72] By the mid-to-late eighteenth century, this perceived vulnerability—and the infatuation of Ali's grandson, the Khedive Ismail, with the notion of bringing the entire Nile Basin under Egyptian control—prompted Egypt to launch military expeditions in Ethiopia in 1875-76.[73]

Ismail's attempt at manifest destiny was ultimately thwarted, and in 1882, Egypt succumbed to British occupation. Although Egypt would not attain independence until seven decades later in 1952, the advent of British colonialism brought with it Egypt's hegemony over the Nile.[74] Keen to preserve its grip on the Suez Canal, Great Britain, much like Egypt, believed that control over the Nile River was indispensable to the achievement of greater strategic depth in the region.[75] In 1891, British authorities began to implement their designs on the Nile Basin, concluding a treaty with Italy to keep out of the Nile Valley in exchange for British recognition of Italy's sphere of influence within Ethiopia, thus also serving the purpose of frustrating French geopolitical interests in that country.[76] Though the protocol was a

70. *See* Amdetsion, *supra* note 58, at 13-14 ("[E]xploitation of the river acquired a political dimension at a very early stage.").

71. Kendie, *supra* note 4, at 145.

72. *See* Amdetsion, *supra* note 58, at 14 (arguing that Ethiopia's perceived ability to divert the Nile River at will remains one of the defining characteristics of Egyptian-Ethiopian relations); *see also* 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, 423 (2010) (stating that Ethiopia was cognizant of Egyptian concerns, and sought to use the Nile as a diplomatic cudgel in bilateral affairs).

73. Czeslaw Jesman, *Egyptian Invasion of Ethiopia*, 58 AFR. AFF. 75, 77-78 (1959).

74. Paul Williams, *Nile Co-operation Through Hydro-Realpolitik?*, 23 THIRD WORLD Q. 1189, 1192 (2002).

75. *Id.*

76. *See* HAROLD G. MARCUS, A HISTORY OF ETHIOPIA 95 (1994) (discussing the Anglo-Italian protocol which placed the Ethiopian city of Harer in the Italian sphere of influence, thus frustrating French access to the Nile valley).

useful counterpoise against the French, Great Britain's main rival in Egypt, it was less effective as an instrument for exerting dominion over the Nile's waters. Concluded before the discovery of the Blue Nile as the Nile River's principal tributary, the protocol only reserved for the British control over the Atbara River.[77]

The Anglo-Ethiopian Treaty of 1902 was more effective. This was primarily designed to demarcate the border between Ethiopia and Sudan,[78] which was previously ruled under a condominium agreement with Egypt.[79] The treaty also furthered British interests in the Nile. Article III of the treaty provided that Ethiopia would agree "not to 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" without the consent of the British and Sudanese governments.[80] A 1906 agreement negotiated with Congo, then under Belgian control, achieved a similar purpose, securing a pledge not to impede the flow of the Semliki and Isango Rivers, both of which issue into Lake Albert.[81]

In a 1925 exchange of notes between Britain and Italy, Britain, unable to extract a concession from Ethiopian leaders to erect a dam at Lake Tana that would give it direct control over the Blue Nile's main source, instead reaffirmed its quid pro quo with Italy regarding Ethiopia.[82] Britain conditioned its recognition of Italian economic influence in western Ethiopia in exchange for both Italy's acknowledgment of Egypt's and Sudan's "prior hydraulic rights" and promise to refrain from construction that would "sensibly modify" the flow of the Nile River proper.[83] Not surprisingly, the Ethiopian government objected to the agreement and voiced its displeasure with the League of Nations.[84]

B. Legal Instruments of Current Import

The Nile Waters Agreement of 1929 was the capstone to Britain's effort to bring the Nile under Egypt's sway and safeguard the unimpeded flow of its waters. Though a product of the colonial era, its impact has endured to the present-day; the 1929 accord remains a vigorously contested feature of the

77. Jacobs, *supra* note 3, at 106.

78. Edward Ullendorff, *The Anglo-Ethiopian Treaty of 1902*, 30 BULL. SCH. ORIENTAL & AFR. STUD. 641, 641 (1967).

79. ROBERT O. COLLINS, A HISTORY OF MODERN SUDAN 33 (2008). Under an 1899 agreement, Egypt and Great Britain exercised joint sovereignty over Sudan. *Id.*

80. Ullendorff, *supra* note 78, at 643.

81. Christina M. Carroll, *Past and Future Legal Framework of the Nile River Basin*, 12 GEO. INT'L ENVTL. L. REV. 269, 277 (1999).

82. *Id.*

83. DEGEFU, *supra* note 35, at 240. Interestingly, Britain stated that such a pledge would not "preclude a reasonable use of the waters in question by the inhabitants of the region, even to the extent of constructing dams for hydro-electric power or small reservoirs in minor affluents to store water for domestic purposes." *Id.*

84. Kendie, *supra* note 4, at 147.

Nile Basin's current administration. Negotiated between Egypt and Britain, which also nominally represented Sudan, Kenya, Uganda, and Tanganyika (now Tanzania), the agreement adopted the findings of the 1925 Nile Commission, whose official mandate was to examine and propose "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."[85]

Though the Commission's report formally recognized Sudan's right to withdraw water from the Nile for irrigative purposes, its findings tilted decidedly in Egypt's favor. Indeed, the report stated "consideration of [water] levels could not be carried to the point of precluding development in the Sudan, *but only to the point of setting a limit to the extent and rate of this development*."[86] Thus, under the 1929 agreement, Egypt consented to an increased allocation of water for Sudan provided such quantity did "not infringe Egypt's natural and historical rights in the waters of the Nile and its requirements of agricultural extension . . . ."[87] To be sure, the concession was relative: while Sudan's recognized right to the Nile increased from 1.5 to four billion cubic meters, Egypt's allotment rose to forty-eight billion cubic meters, up from forty billion cubic meters in 1920.[88] No other Nile Basin riparian received a share of the river's waters.[89] Furthermore, the agreement stipulated the following:

> Save with the previous agreement of the Egyptian Government, no irrigation or power works or measures are to be constructed or taken on the River Nile and its branches, or on the lakes from which it flows, so far as all these are in the Sudan or in countries under British administration, which would, in such a manner as to entail any prejudice to the interests of Egypt, either reduce the quantity of water arriving in Egypt, or modify the date of its arrival, or lower its level.[90]

In so doing, it not only required Egypt's imprimatur for the construction of all future upstream Nile-related projects, effectively creating a veto power, but it also imposed no such corresponding restrictions on Egypt. Egypt was free to do as it pleased in Sudan, where it only needed to secure agreement from local communities before undertaking any power works. Still, the deal represented a breakthrough of sorts for Sudan in terms of meeting its immediate irrigation demands. Despite its paltry increase in recognized rights

85. Nile Waters Agreement, *supra* note 16, ¶1.

86. *Id.* ¶ 38 (emphasis added).

87. *Id.* ¶ 2.

88. ROBERT O. COLLINS, THE WATERS OF THE NILE: HYDROPOLITICS AND THE JONGLEI CANAL, 1900-1988, at 157 (1990) [hereinafter COLLINS, THE WATERS OF THE NILE].

89. TERJE TVEDT, THE RIVER NILE IN THE AGE OF THE BRITISH: POLITICAL ECOLOGY & THE QUEST FOR ECONOMIC POWER 145 (2004). The agreement also provided that the entirety of the Nile's flow be "reserved for the benefit of Egypt" during the country's dry season (January to June). *Id.*

90. Nile Waters Agreement, *supra* note 16, ¶ 4(b).

and the agreement's utter disparity in entitlements, Khartoum nonetheless saw the new understanding as an improvement over the status quo ante, particularly with respect to Egypt's approach to management of the Nile's resources.[91]

However, the arrangement would prove only to be a temporary fix. By 1951, Sudan was consuming nearly its entire quota under the 1929 agreement.[92] In 1952, Egypt's military, led by Gamal Abdul Nasser's Free Officers' Movement, succeeded in throwing off the yoke of British rule and declared its intent to construct the high dam at Aswan, the culmination of an Egyptian Nile development plan that sought to generate an added fifteen billion cubic meters of water per year but with little benefit to Sudan.[93] Four years later, in 1956, pressure to reach a new modus vivendi with Egypt before it began construction on the dam—the wisdom and mutual benefits of which were bitterly debated by both countries[94]—assumed an added urgency when Sudan gained independence.[95] The independent government in Khartoum bristled at the notion of being bound by the 1929 agreement to which it was not a signatory—a contention that would become familiar as other Nile riparians emerged from colonial rule in the 1950s and 1960s.[96]

In 1959, the parties struck an accord known as the Agreement on the Full Utilization of the Nile Waters. The agreement provided that of the Nile's average annual discharge of eighty-four billion cubic meters of water, Egypt's yearly allotment would be fifty-five billion cubic meters, compared to eighteen billion for Sudan.[97] Unlike the 1929 agreement, the 1959 treaty also provided that, should the Nile yield more than eighty-four billion cubic meters in any given year, the excess waters would be split equally between the two states.[98] However, like its predecessor, the 1959 Nile Waters Agreement left the other Nile Basin countries completely out in the cold, although it did offer a glimmer of hope by providing that should other riparian states claim a share of the Nile's waters, Egypt and Sudan would "jointly consider" allotting a portion of

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91. TVEDT, *supra* note 89, at 145.

92. I.H. Abdalla, *The 1959 Nile Waters Agreement in Sudanese-Egyptian Relations*, 7 MIDDLE E. STUD. 329, 331 (1971).

93. COLLINS, THE WATERS OF THE NILE, *supra* note 88, at 250. Under the plan, Sudan would only receive one billion cubic meters of water. *Id.* While the high dam itself would be constructed solely in Egyptian territory, the resultant flooding from its reservoir would submerge the northern Sudanese town of Wadi Halfa, the principal junction between Egypt and Sudan, thus necessitating an agreement with Sudan over compensation. *Id.*

94. *See, e.g.*, Abdalla, *supra* note 92, at 329 (stating that the high dam project ran counter to Sudan's vision for the Nile's development, which favored the erection of many smaller dams to minimize inundation and evaporation).

95. COLLINS, THE WATERS OF THE NILE, *supra* note 88, at 254.

96. *Id.*

97. Abdalla, *supra* note 92, at 336 (stating that this allocation assumed that ten billion cubic meters of water would be lost due to evaporation from Lake Nasser, the vast reservoir created by the Aswan dam, and the seepage of water under the dam itself).

98. *Id.* at 336-37.

the river after reaching a "unified view" regarding the matter.[99] Moreover, that agreed upon allocation would be deducted from Egypt's and Sudan's shares in equal parts.[100] Nevertheless, such provisions made it clear that the claims of other Nile riparians would remain subordinate to the "present acquired rights" of Egypt and Sudan.

A half-century later, Egypt continues to rely on the 1929 and 1959 agreements in laying claim to around 65% of the Nile's bounties. Indeed, beyond providing for mere regulation of the river's waters, the agreements have constituted an integral pillar of Egypt's legal assertions regarding utilization. By invoking the notion of "natural and historical rights," the 1929 accord not only gave Egypt a "hydrological victory,"[101] but a legal and political one as well. With the stroke of a pen, Egypt buttressed its claims to the Nile by affording legal cover to the idea that acknowledgment of its prior rights equated to recognition of the paramountcy of its future needs.[102]

Yet, Egypt's invocation of its "natural and historical rights" has remained contentious, particularly because determining the precise contents of those rights under international law has proved troublesome. Some scholars have taken issue with the agreement's reference to "natural" rights, alluding to the fact that the quantity of water allocated to Egypt under the 1929 treaty did not reflect some inherently magical figure, but rather was an estimate that derived from the five million feddans[103] of land Egypt needed to irrigate in 1916-17, an amount clearly subject to change with time.[104] The term "natural and historical rights" also left unresolved the question of whether Egypt's claim embodied rights only to those resources it had customarily appropriated, or whether Egypt was also entitled to whatever amount its future needs dictated.[105] While Egypt and Britain clearly contemplated an arrangement that extended beyond recognition of established and pre-existing rights—after all, the 1929 treaty reserved for Egypt an amount of water that would safeguard its "natural and historical rights in the waters of

99. Agreement on the Full Utilization of the Nile, *supra* note 19, § 5.

100. *Id.*

101. COLLINS, THE WATERS OF THE NILE, *supra* note 88, at 156.

102. *Id.* at 157; *see also* ARTHUR OKOTH-OWIRO, STATE SUCCESSION AND INTERNATIONAL TREATY COMMITMENTS: A CASE STUDY OF THE NILE WATER TREATIES8 (2004), *available at* http://www.kas.de/wf/doc/kas_6306-544-1-30.pdf ("To some Egyptian writers, [the treaty] has merely recorded Egypt's established rights over the Nile since antiquity.").

103. A feddan, a unit of surface area used in Egypt, is equivalent to 1.04 acres. WILLIAM L. CLEVELAND & MARTIN P. BUNTON, A HISTORY OF THE MODERN MIDDLE EAST 109 (4th ed. 2009).

104. C.O. Okidi, *History of the Nile and Lake Victoria Basins Through Treaties*, *in* THE NILE: SHARING A SCARCE RESOURCE: AN HISTORICAL AND TECHNICAL REVIEW OF WATER MANAGEMENT AND OF ECONOMICAL AND LEGAL ISSUES 327 (J.A. Allen &P.P. Howell eds., 1994).

105. *See, e.g.*, CESAR A. GUVELE, THE NILE BASIN INITIATIVE AND ITS IMPLICATIONS IN POST CONFLICT SOUTH SUDAN 6 (2003), *available at* http://cafnr.missouri.edu/iap/sudan/doc/nile-basin.pdf (suggesting that this construction cannot be considered an articulation of the accepted principle of prior appropriation).

the Nile" as well as satisfy "its requirements of agricultural extension"[106]—such a claim did not comport with international customary law as it then existed. The principle of prior appropriation (i.e. first in time, first in right) vested the "first appropriator" with recognized rights, but failed to give it "a right of pre-emption upon the 'unappropriated' water supply."[107] In other words, the "first appropriator" could not lay claim to water that had not yet been reduced to possession.

It is worth noting that the 1925 Nile Commission concluded that precedents in water allocation were scarce, confessing that it was "aware of no generally adopted code or standard practice upon which the settlement of a question of inter-communal water allocation might be based."[108] Given this admission, and the fact that the Commission's findings served as the basis for much of the 1929 agreement, it is unlikely that Egypt's interpretation of "natural and historical rights" drew support or legitimacy from then-established principles of customary law.

The agreement's dismissal as a colonial artifact and political instrument[109] has not dissuaded Egypt from continuing to assert its validity under international law. Much hinges on the accuracy of those assertions. Egypt adamantly maintains that the treaty's provisions remain binding not only on those riparian countries on whose behalf Britain ostensibly concluded the agreement—Kenya, Sudan, Tanzania, and Uganda—but on Ethiopia as well (even though it was a sovereign state in 1929),[110] thus lending legitimacy to the colonial era's legal order.[111] That position, based on the theory of universal succession[112] which posits that when a state is extinguished, the succeeding state inherits the predecessor's legal personality, including all rights, obligations, and property interests,[113] has failed to garner widespread

106. Nile Waters Agreement, *supra* note 16, ¶ 2.

107. *See, e.g.*,Pierre Crabitès, *Egypt, the Sudan and the Nile*, 3 FOREIGN AFF. 320, 328 (1924) (stating that the law of prior appropriation "does not exclude the hypothesis that all the arable lands unwatered but irrigable belonging to different proprietors, including the 'original appropriator,' enjoy an equitable right to an adequate share of the unappropriated water of a stream"); *see also* Okidi, *supra* note 104, at 327 (stating that the term "historical rights" should not be read as being synonymous with the doctrine of prior appropriation).

108. Nile Waters Agreement, *supra* note 16, ¶ 21.

109. This perception is derived, in part, from Lord Lloyd's statement in the 1929 Exchange of Notes between Egypt and the United Kingdom that Britain regarded "the safeguarding of those rights [i.e. Egypt's natural and historical rights] as a fundamental principle of British policy." *Id.* ¶ 4. Lloyd likewise assured Egypt that the "detailed provisions of this agreement will be observed at all times and under any conditions that may arise." *Id.*

110. KIMENYI & MBAKU, *supra* note 17, at 5-6.

111. Amdetsion, *supra* note 58, at 23.

112. Mekonnen, *supra* note 72, at 432.

113. *See, e.g.*, MALCOLM NATHAN SHAW, INTERNATIONAL LAW 862 (5th ed. 2003) (stating that considerations of state sovereignty, equality of states, and non-interference militate against the adoption of the universal succession principle in international law governing state succession).

acceptance in international fora.[114] In particular, many legal scholars have criticized reliance on the theory as a legal ploy intended to mitigate the deleterious effects of decolonization on imperial powers and their beneficiaries.[115]

In 1961, a year after it won independence and announced its refusal to be legally bound by British treaties concluded on her behalf, Tanzania espoused the opposing theory, known as the "clean slate" principle or Nyerere Doctrine (in honor of Tanzania's first president, Julius Nyerere).[116] In essence, the doctrine holds that successor states are not bound by the treaty obligations of their predecessors, with a controversial carve-out exception for "territorial, real, dispositive, or localized treaties."[117] The transmissibility of a predecessor state's legal rights and obligations to a successor state may also be permissible where the agreements at issue evidence customary international law.[118] Article 35 of the 1969 Vienna Convention on the Law of Treaties stipulates that "[a]n obligation arises for a third State[119] from a provision of a treaty if the parties to the treaty intend the provision to be the means of establishing the obligation and the third State expressly accepts that obligation in writing."[120] Yet, this article is modified by Article 38, which holds that a treaty provision can indeed become binding upon a third State—even in the absence of its explicit consent—where such provision is recognized as a customary rule of international law.[121] Presumably, third party states can avoid the binding effect of such rules by registering timely objections to their application.

In a 1961 declaration to the Secretary-General of the United Nations, the Tanzanian government brought many of these complicated issues to the fore.

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114. *See, e.g.*, DEGEFU, *supra* note 35, at 329 ("[The doctrine] has been heavily criticized and has not found support in state practice.").

115. Mekonnen, *supra* note 72, at 433.

116. OKOTH-OWIRO, *supra* note 102, at 14; *see also* SHAW, *supra* note 113, at 862 (stating that, under the clean slate principle, new states acquire sovereignty "free from encumbrances created by the predecessor sovereign").

117. Carroll, *supra* note 81, at 278; *see, e.g.*, Territorial Dispute (Libyan Arab Jamahiriya v. Chad), 1994 I.C.J. 6 (Feb. 3). In litigation between Chad and Libya over the contested Aouzou Strip, Chad supported its claim to the territory by arguing that the strip's border had been demarcated by a 1955 treaty between France and Libya. *Id.* ¶ 5. Chad asserted that the treaty still bound Libya despite the fact that the country was then under British and Italian rule. *Id.* ¶ 23. The International Court of Justice agreed, writing that establishment of a boundary by treaty "achieves a permanence which the treaty itself does not necessarily enjoy." *Id.* ¶ 73.To hold otherwise, the court said, would "vitiate the fundamental principle of the stability of boundaries." *Id.* ¶ 72.

118. OKOTH-OWIRO, *supra* note 102, at 11.

119. The Convention defines a "third State" as one that is not a party to the treaty in question. Vienna Convention on the Law of Treaties art. 2(h), May 23, 1969, 1155 U.N.T.S. 331 [hereinafter Convention on the Law of Treaties].

120. *Id.* art. 35.

121. *Id.* art. 38.

The pronouncement stated that it would regard as null and void those "treaties which could not by the application of rules of customary international law be regarded as otherwise surviving . . . ."[122] The following year, Tanzania expressly repudiated the binding nature of the 1929 Nile Waters Agreement in a note sent to Egypt's government, declaring that "an agreement purporting to bind [upstream riparians] in perpetuity to secure Egyptian consent before undertaking its own development programs . . . was considered to be incompatible with [Tanzania's] status as a sovereign state."[123] Uganda adopted a similar tack when it gained independence in 1962;[124] Burundi, Kenya, and Rwanda have since followed suit.[125]

Undoubtedly, such an approach has gained a more favorable reception in international legal circles, a function of the fact that the "clean slate" principle traces its origins to the nineteenth century *tabula rasa* doctrine.[126] More recently, the custom has been codified into international treaty law. The 1978 Vienna Convention on Succession of States in Respect of Treaties, which applies to normal cases of state succession, incorporates the "clean slate" principle into its provisions.[127] Specifically, Article 16 the Convention stipulates:

> [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.[128]

A more nuanced reading of the language, however, suggests that its drafters did not intend to adopt a pure and unadulterated form of the doctrine; that is, by rejecting the inheritance of a predecessor's treaties solely on the basis of state succession, the Convention leaves the door ajar for enforcement on other grounds. In fact, Article 11 provides that state succession does not affect "a boundary established by a treaty" or the "obligations and rights established by a treaty and relating to the regime of a boundary."[129] Perhaps of greater significance to the Nile Basin dispute is Article 12, which governs "other territorial regimes." That article, in relevant part, provides that state succession does not affect "rights established by a

122. OKOTH-OWIRO, *supra* note 102, at 14.

123. Valerie Knobelsdorf, *The Nile Waters Agreements: Imposition and Impacts of a Transboundary Legal System*, 44 COLUM. J. TRANSNAT'L L. 622, 632 (2006).

124. Carroll, *supra* note 81, at 279. The timing of such repudiation may bear on its effectiveness. Though it upheld the validity of the 1955 treaty at issue in the Chad-Libya dispute because of its territorial nature, the International Court of Justice suggested that Libya's subsequent failure to object to the treaty's terms evinced a lack of serious disagreement. Territorial Dispute (Libyan Arab Jamahiriya v. Chad), 1994 I.C.J. 6, ¶ 45 (Feb. 3).

125. OKOTH-OWIRO, *supra* note 102, at 14.

126. Amdetsion, *supra* note 58, at 23-24.

127. Vienna Convention on Succession of States in Respect of Treaties, Aug. 23, 1978, 1946 U.N.T.S. 3.

128. *Id.* art. 16.

129. *Id.* art. 11.

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."[130]

The question of whether the 1929 Nile Waters Agreement falls within the ambit of Article 12, an exception to the "clean slate" doctrine, would seem to provide more fertile ground for disagreement. While the application of Article 11 to the 1929 agreement would require a strained interpretation of that article's contents—the terms of the treaty dealt not with the demarcation of frontiers, but with the allocation of the Nile's waters—a colorable argument could be made that the treaty is covered by Article 12's territorial, non-boundary exception. In its 1997 judgment regarding the dispute between Hungary and Slovakia over the Danube River's Gabčíkovo-Nagymaros Project, the International Court of Justice opined on the scope of Article 12.[131] In observing that Article 12 reflects a rule of customary international law, the court cited to the International Law Commission's commentary on the draft articles of the 1978 Vienna Convention.[132] There, the Commission noted that "treaties concerning water rights or navigation on rivers are commonly regarded as candidates for inclusion in the category of territorial treaties."[133] Still, despite the Commission's interpretation, there remains no clear consensus as to whether a transboundary water agreement dealing with consumptive rights would in fact survive state succession.[134]

Indeed, there is little unanimity with respect to the international law of state succession writ large. The 1978 Vienna Convention notwithstanding, state succession remains a largely gray and unsettled area of the law. State practice is inconsistent, a fact that may deprive the upstream Nile riparians' invocation of the "clean slate" principle of some of its teeth.[135] For example, when Tanzania articulated the doctrine in 1961, it did not immediately abrogate its bilateral treaties with the United Kingdom.[136] Instead, for reasons of reciprocity, it offered to continue applying the terms of such treaties (unless terminated or modified consensually) for a period of two years, at which point it would consider them, to the extent of their invalidity under customary international law, null and void.[137] In stark contrast, Kenya did not officially reject the Nile Waters Agreement's terms until 2003, when the

130. *Id.* art. 12.

131. Gabčíkovo-Nagymaros Project (Hung. v. Slovk.), 1997 I.C.J. 7, 71-72 (Sept. 25).

132. *Id.*

133. *Id.*

134. Knobelsdorf, *supra* note 123, at 633.

135. It should be noted, however, that both Egypt and Sudan have also historically engaged in the practice of denouncing unequal colonial-era treaties concluded by Britain on their behalf that were later seen as antithetical to their interests, a fact that also undermines their reliance on the customary international law of state succession. Carroll, *supra* note 81, at 279.

136. OKOTH-OWIRO, *supra* note 102, at 14.

137. *Id.*

country's parliament declared that it would no longer recognize the legality of the agreement.[138]

Interestingly, the Kenyan government advanced the same rationale[139] as its Tanzanian counterpart: since Kenya had neither signed the agreement nor been consulted prior to its implementation, it would not be bound by the treaty's provisions.[140] Temporal considerations aside, other states attaining independence since World War II have elected to adopt a more a la carte approach to the question of treaty succession, picking and choosing those agreements to which they would remain bound.[141] Nevertheless, despite the clean slate principle's uneven history, a relatively strong argument can be made for the doctrine's applicability to the Nile Waters Agreement.

Alternatively, attempts to categorize the 1929 accord under the rubric of a "territorial" or "dispositive" treaty, which would automatically devolve on a state successor, might also be countered by recourse to the international legal principle of *rebus sic stantibus*, enshrined in Article 62 of the 1969 Vienna Convention on the Law of Treaties.[142] The doctrine, a well-known, if limited, exception to the legal maxim *pacta sunt servanda*—which holds that "[e]very treaty in force is binding upon the parties to it and must be performed by them in good faith"[143]—will vitiate a state's treaty obligations provided the circumstances upon which the treaty was concluded, and upon which the parties consented, have undergone a fundamental and unforeseen change since the treaty's conclusion and have radically transformed the nature of a state's obligations under the agreement.[144]

Due to the doctrine's obvious appeal as an escape hatch through which states can unilaterally declare a treaty obsolescent, international legal scholars have sought to circumscribe its applicability so as to prevent its self-serving invocation. Therefore, only those circumstantial changes that go to "the essence of the parties' consent to be bound" can properly serve as the basis for the theory's application.[145] Yet, despite the doctrine's strong presumption toward the continued enforceability of treaties, there is considerable agreement that the decolonization of Nile Basin riparians in the 1950s and 1960s precipitated just such a change, in that the states which emerged from British imperialism would have never freely assented to the terms of the 1929 agreement had they been truly independent during its negotiation.[146]

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138. Knobelsdorf, *supra* note 123, at 633.

139. *Id.*

140. *Id.*

141. ANTHONY AUST, HANDBOOK OF INTERNATIONAL LAW 366 (2d ed. 2010).

142. Convention on the Law of Treaties, *supra* note 119, art. 62.

143. *Id.* art. 26.

144. DEGEFU, *supra* note 35, at 331.

145. Mark Bennett & Nicole Roughan, *Rebus Sic Stantibus and the Treaty of Waitangi*, 37 VICTORIA U. WELLINGTON L. REV. 505, 516 (2006).

146. *See, e.g.*, DEGEFU, *supra* note 35, at 332 (arguing that the doctrine of *rebus sic*

IV. INTERNATIONAL FLUVIAL LAW: A HELP OR HINDRANCE?

The divergent legal positions between the Nile's upper and lower riparians are not, of course, confined to merely abstract issues regarding state succession. Principles of international watercourse law, and the non-navigational uses of transboundary water basins, also shape much of the legal debate, but such norms are far less developed than the principles underpinning the customary international law of treaties. Indeed, international fluvial law is still of relatively recent vintage: though some of its more recognizable doctrines began to emerge in the late nineteenth century, it was only in 1966 that the International Law Association (ILA), a non-governmental organization, issued the non-binding Helsinki Rules on the Uses of the Waters of International Rivers,[147] the first comprehensive attempt at codifying the modern customary rules governing international watercourses.[148]

Alas, the law has not crystallized much since. The Helsinki Rules—which did not rise to the level of customary international law because of insufficient state practice and *opinio juris*[149]—were superseded as the most authoritative statement on international watercourse law when the United Nations General Assembly adopted the Convention on the Law of Non-navigational Uses of International Watercourses ("Watercourse Convention") in 1997, but that instrument has failed to become operational fourteen years after it was first opened for signature. As a result, there is a glaring lacuna in the law; at present, there is still no universal treaty regulating the use and protection of the world's approximately 261 international watercourses.[150]

A. The Watercourse Convention and Leading Principles of International Law

While some legal scholars believe that the Watercourse Convention's significance turns not on its having binding legal effect but on its contribution to the formalization of customary law,[151] other experts have criticized the

stantibus can successfully be applied to the Nile Waters Agreement, since Sudan, Kenya, Tanzania, and Uganda "can no longer be regarded as territories whose claim to development could be taken up only once the interests of Egypt, present and potential, have been assured").

147. INT'L LAW ASS'N, THE HELSINKI RULES ON THE USES OF THE WATERS OF INTERNATIONAL RIVERS (1966), *available at* http://webworld.unesco.org/water/wwap/pccp/cd/pdf/educational_tools/course_modules/reference_documents/internationalregionconventions/helsinkirules.pdf.

148. Salman M.A. Salman, *The Helsinki Rules, the UN Watercourses Convention and the Berlin Rules: Perspectives on International Water Law*, 23 WATER RESOURCES DEV. 625, 630 (2007).

149. Jacobs, *supra* note 3, at 101.

150. Amdetsion, *supra* note 58, at 3.

151. *See, e.g.*, Stephen McCaffrey, *The Contribution of the UN Convention on the Law of the Non-Navigational Uses of International Watercourses*, 1 INT'L J. GLOBAL ENVTL. ISSUES 250,

"normative ambiguity" of its language—a deliberate feature of the instrument—in questioning its ultimate relevance.[152] For the latter group, the problem is not so much about enforcement as it is about the law being too vague and inchoate.[153] Far from being an effective tool of conflict resolution, affording parties the necessary space to reach a political compromise, such incoherence, they argue, is simply an invitation for states to assume contradictory positions and stonewall during negotiations.[154] To the extent that the Watercourse Convention's provisions have helped inform the substantive rules of transboundary water agreements, these detractors also suggest that the lack of a sufficient regulatory framework has only served to frustrate implementation and encourage non-compliance.[155]

There is some merit to these claims. The Watercourse Convention is the best articulation of customary international law today, but it is far from irreproachable. That the law remains in something of a state of fog is perhaps not all that remarkable when one considers that the Convention's "travaux préparatoires" span a period of twenty-three years.[156] The reason for the protracted deliberations stemmed from a fundamental debate over the weight to be given to the leading watercourse law principles of equitable utilization and "no significant harm."[157] While the Convention's drafters believed that they had reached a satisfactory compromise between the two contending theories, several Nile riparians, including Egypt and Ethiopia, thought otherwise. In abstaining from the UN General Assembly's vote on the Convention in 1997, Ethiopia justified its abstention on the "lack of clear-cut distinction and balance" between the two principles.[158]

At its core, the doctrine of equitable utilization stipulates that "a state must use an international watercourse in a manner that is equitable and

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261 (2001) (stating that the Convention's influence is more likely to derive from the fact that it has served as "a starting point for the negotiation of agreements relating to specific watercourses").

152. INTERNATIONAL WATERCOURSES LAW FOR THE 21ST CENTURY: THE CASE OF THE RIVER GANGES BASIN 94 (Surya P. Subedi ed., Ashgate Publishing Co. 2005).

153. *See, e.g.*, Itay Fischhendler, *When Ambiguity in Treaty Design Becomes Destructive: A Study of Transboundary Water*, 8 GLOBAL ENVTL. POL. 111, 112 (2008) ("[T]he the 1997 UN Convention on the Law of the Non-Navigational Uses of International Watercourses has been called into question due to its widespread use of vague and sometimes contradictory language.").

154. *See* Sergei Vinogradov et al., *Transforming Potential Conflict into Cooperation Potential: The Role of International Water Law* 67 (UNESCO, PC à CP Series No. 2, 2003), *available at* http://unesdoc.unesco.org/images/0013/001332/133258e.pdf (arguing that the adversarial nature of treaty resolution is not conducive to maintaining long term cooperation).

155. *Id.*

156. Salman, *supra* note 148, at 625.

157. Albert E. Utton, *Which Rule Should Prevail in International Water Disputes: That of Reasonableness or that of No Harm?*, 36 NAT. RESOURCES J. 635, 635 (1996).

158. DEGEFU, *supra* note 35, at 73.

reasonable vis-à-vis other states sharing the watercourse."[159] Recognized as the controlling principle of international watercourse law by the Helsinki Rules, the equitable utilization doctrine enjoys considerable endorsement by international and environmental law experts who believe it best ensures the optimal utilization, development, conservation, management, and protection of international watercourses for both present and future generations.[160] Upstream riparians have traditionally championed the rule since it provides for greater use of a watercourse despite a resultant impact on downstream parties.[161]

The Watercourse Convention enunciates this classical doctrine in Articles 5 and 6. Article 5, which concerns equitable and reasonable utilization and participation, provides:

> 1. Watercourse States shall in their respective territories utilize an international watercourse in an equitable and reasonable manner. In particular, an international watercourse shall be used and developed by watercourse States with a view to attaining optimal and sustainable utilization thereof and benefits therefrom, taking into account the interests of the watercourse States concerned, consistent with adequate protection of the watercourse.
>
> 2. Watercourse States shall participate in the use, development and protection of an international watercourse in an equitable and reasonable manner. Such participation includes both the right to utilize the watercourse and the duty to cooperate in the protection and development thereof, as provided in the present Convention.[162]

Article 6 adds interpretative gloss to Article 5, prescribing a list of seven non-exhaustive factors and circumstances that shall be taken into account when determining whether utilization of an international watercourse accords with the principle of equitable and reasonable use. Under Article 6(1), these include: (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 State; (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; and (g) the availability of alternatives, of comparable value, to a particular planned or existing use.[163] If the juggling act this list required was not difficult enough, Article 6(3) adds

159. McCaffrey, *supra* note 151, at 252.

160. Salman, *supra* note 148, at 632.

161. *Id.* at 633.

162. Convention on the Law of the Non-Navigational Uses of International Watercourses art. 5, annexed to G.A. Res. 51/229, U.N. Doc. A/51/49 (May 21, 1997) [hereinafter Watercourses Convention].

163. *Id.* art. 6(1).

that "[t]he weight to be given to each factor is to be determined by its importance in comparison with that of other relevant factors."[164]

Still, legal scholars have applauded the language in Articles 5 and 6, arguing that no other principle of watercourse law is as fair or holistic.[165] That may very well be true, but as a practical matter, it presupposes the ability of an international watercourse's riparians to cooperate and work closely together; after all, it is not easy for an upstream riparian to determine what constitutes equitable or reasonable use with respect to a downstream riparian absent a joint relationship. This is made clear by the Convention's insertion in Article 5 of the novel concept of "equitable *participation*", an implicit rejection of the idea that unilateral measures alone can lead to a transboundary regime based on equitable use. This point is further driven home by Article 8's imposition of a general obligation to cooperate and recommendation that states consider the establishment of joint mechanisms or commissions to facilitate such cooperation.[166] However, in a transboundary water basin such as the Nile, where there are ten riparians with widely divergent views and needs, the application of the equitable utilization paradigm may be wishful thinking.

The Watercourse Convention also incorporates the rule of "no significant harm", perhaps the instrument's most contentious provision.[167] At first glance, this self-explanatory rule, which obligates riparians to prevent causing substantial harm to other watercourse states, would seem consistent with the equitable utilization doctrine's focus on optimal use and protection. Upon closer inspection, however, the application of both principles may not always produce similar outcomes. To illustrate, Stephen McCaffrey, one of the world's foremost scholars on international water law, provides the common example where a historically underdeveloped upstream riparian seeks to develop its water resources for both hydroelectric and agricultural purposes, but may, by virtue of the "no significant harm" rule, be barred from doing so by downstream states with established uses dating back centuries or millennia.[168] Predictably, downstream riparians have been quick to embrace this rule.[169] But just how such a principle can be squared with the doctrine of equitable utilization is unclear.

Indeed, much ink has been spilled over the Watercourse Convention's treatment of the two principles' relationship. The Convention seeks to accommodate both norms in Article 7, which sets forth an obligation not to

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164. *Id.* art. 6(3).

165. *See, e.g.*, McCaffrey, *supra* note 151, at 253 ("[N]o other general principle . . . can take into account adequately the wide spectrum of factors that may come into play with regard to international watercourse [sic] throughout the world.").

166. Watercourses Convention, *supra* note 162, art. 8.

167. *See* McCaffrey, *supra* note 151, at 253 (stating that article 7 of the Convention, which sets forth the obligation not to cause harm, is the most controversial provision of the Convention).

168. *Id.* at 254.

169. Salman, *supra* note 148, at 633.

cause significant harm. The article states:

> 1. Watercourse States shall, in utilizing an international watercourse in their territories, take all appropriate measures to prevent the causing of significant harm to other watercourse States.
>
> 2. 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, having due regard for the provisions of articles 5 and 6, in consultation with the affected State, to eliminate or mitigate such harm and, where appropriate, to discuss the question of compensation.[170]

Without an equivalent provision like Article 6 to aid in its interpretation, Article 7 has understandably caused confusion among upper and lower riparians. Is the obligation to prevent significant harm commensurate with or subordinate to the equitable utilization command in Article 5? Some have argued that the formula adopted in Article 7 necessarily gives precedence to equitable utilization for several reasons. First, they contend that the mere existence of Article 7(2) implicitly suggests the primacy of equitable utilization, since it does not impose a blanket prohibition on causing significant harm; to the contrary, it permits significant harm in certain circumstances.[171] Second, the text in Article 7(2) requiring states, should they cause significant harm, to have "due regard for the provisions of Article 5 and 6" further indicates that the "no significant harm" rule is to be interpreted through the lens of equitable utilization.[172] Finally, the fact that one of the criteria used to determine equitable utilization under Article 6 is the "effects of the use or uses of the watercourses in one watercourse State on other watercourse States" is additional proof, it is urged, that the "no significant harm" rule is subsumed within the doctrine of equitable utilization.[173]

This careful reading of the Convention's language is persuasive, but even its proponents acknowledge that the document's treatment of the two rules resembles "a *pot-pourri* containing something for everyone."[174] The inclusion of the "no significant harm" rule as a discrete article in the Convention certainly lends some support to those who believe the Convention admits of two interpretations. Downstream riparians such as Egypt have construed the instrument as favoring upstream riparians, while upstream riparians like Burundi see the inclusion of the "no significant harm" rule as being partial to downstream riparians.[175] As a pragmatic matter, some international law

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170. Watercourses Convention, *supra* note 162, art. 7.

171. INTERNATIONAL WATERCOURSES: ENHANCING COOPERATION AND MANAGING CONFLICT 20 (Salman M.A. Salman & Laurence Boisson De Chazournes eds., 1998).

172. *Id.*

173. Salman, *supra* note 148, at 633.

174. McCaffrey, *supra* note 151, at 255.

175. Salman M.A. Salman, *The United Nations Watercourses Convention Ten Years Later: Why Has its Entry into Force Proven Difficult?*, 32 WATER INT'L 1, 8-9 (2007)

scholars question whether the equitable use principle is too quixotic to serve as the ultimate touchstone of watercourse law. "It is a fact that it is more feasible to ascertain harm than to promote equity. Damage can be measured, but fairness is in the eye of the beholder," John Waterbury has observed.[176] These contradictory readings and views may not reflect the universal view of publicists or upstream and downstream riparians, but they are undoubtedly a reason why the Convention still remains in a legal limbo.[177]

B. Doctrinal Tug of War

Not surprisingly, many of the problems that have plagued the development of international watercourse law have manifested themselves in the Nile Basin dispute. Traditionally, the Nile Basin's upstream and downstream riparians have espoused variations of two conflicting—and largely discredited—doctrines of international fluvial law. Despite the shift toward more equitable principles over the last half-century, the law's inherent ambiguities have enabled some of the more powerful riparians to continue clinging to politically expedient and mutually exclusive theories of consumption.

The case of Ethiopia is instructive. Historically, Addis Ababa has adhered[178] to the principle of absolute territorial sovereignty, which provides that a riparian state may engage in the untrammeled use of that part of an international watercourse within its territory, even to the detriment of downstream parties.[179] The doctrine's origins date to 1895, when U.S. Attorney General Judson Harmon issued a legal opinion in which he asserted absolute sovereignty over that portion of the Rio Grande River flowing through U.S. territory.[180] Harmon's eponymous doctrine grew out of the Supreme Court's holding in *Schooner Exchange v. McFaddon*,[181] an 1812 case that dealt with issues of sovereign immunity, not resource allocation in transboundary watercourses. Despite the existence of contrary views,[182] of which he claimed to be unaware, Harmon quoted Chief Justice John Marshall's

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[hereinafter Salman, *The UN Watercourses Convention*]

176. JOHN WATERBURY, THE NILE BASIN: NATIONAL DETERMINANTS OF COLLECTIVE ACTION 32 (2002).

177. Salman, *The UN Watercourses Convention*, *supra* note 175, at 9.

178. OKOTH-OWIRO, *supra* note 102, at 22.

179. Stephen C. McCaffrey, *The Harmon Doctrine One Hundred Years Later: Buried, Not Praised*, 36 NAT. RESOURCES J. 965, 967 (1996) [hereinafter McCaffrey, *The Harmon Doctrine*]. The doctrine, however, does not extend to utilization that alters the physical course of the river in downstream riparians. *Id.*

180. *Id.* at 965.

181. 11 U.S. 116 (1812).

182. Friedrich de Martens, a Russian jurist and luminary in the field of international law, wrote in 1883 that "[i]n the domain of international relations, territorial sovereignty is limited by the fact of coexistence and the society of states. The very nature of their neighborhood relations does not permit them to dispose of their territory without any restriction." McCaffrey, *The Harmon Doctrine*, *supra* note 179, at n.81.

opinion for the proposition that the "jurisdiction of the nation within its own territory is necessarily exclusive and absolute."[183]

By the time the United States and Mexico concluded a treaty for utilization of the Rio Grande's waters in 1944, however, U.S. officials seemed to give the Harmon Doctrine an unceremonious burial.[184] Not only did the final agreement shun the absolutist theory, but then Assistant Secretary of State Dean Acheson remarked that the principal was "hardly the kind of legal doctrine that can be seriously urged in these times."[185] Yet, such sentiment was not universal, especially among upper riparians. In a 1957 aide-memoire sent to its diplomatic mission in Cairo, Ethiopia declared that it had the "right and obligation to exploit the water resources of the Empire and . . . the responsibility of providing the fullest and most scientific measures for the development and utilisation of the same, for the benefit of present and future generations of its citizens . . . ."[186]

That same year, the arbitral tribunal in the Lake Lanoux Arbitration between France and Spain upheld the doctrine in finding that upstream riparians did not, as a matter of international custom, need to secure consent from lower riparians before utilizing the hydrological power of an international watercourse, even where such use resulted in harm to downstream territory.[187] Two decades later, Ethiopia reiterated its stance at the 1977 UN Water Conference in Mar del Plata in Argentina when it declared that it was "the sovereign right of any riparian state, in the absence of an international agreement, to proceed unilaterally with the development of water resources within its territory."[188]

Since the Harmon Doctrine's introduction in 1895, other upstream riparian states have also invoked the principle in transboundary water disputes, including Canada, India, Lebanon, Jordan, Syria, and Israel.[189] In the aftermath of the 1991 Persian Gulf War, Turkey rhetorically embraced the doctrine with respect to the Tigris River; then Turkish premier Suleyman Demirel proclaimed that "[w]ater resources are Turkey's and oil is theirs [Syria and Iraq]. Since we do not tell them, 'Look, we have a right to half of your oil,' they cannot lay claim to what is ours."[190] More recently, during talks

183. *Schooner Exchange*, 11 U.S. at 136.

184. McCaffrey, *The Harmon Doctrine*, *supra* note 179, at 1000-01.

185. *Id.* at 1001.

186. EYAL BENVENISTI, SHARING TRANSBOUNDARY RESOURCES: INTERNATIONAL LAW AND OPTIMAL RESOURCE USE 117 (2002). Ethiopia's current leaders have been described as "disciples in all but name of Judson Harmon." WATERBURY, *supra* note 176, at 30.

187. Lake Lanoux (Fr. v. Spain), 12 R. Int'l Arb. Awards 281, *translated in* 24 I.L.R. 101, 111-12 (1957).

188. 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, 304 (2009).

189. DEGEFU, *supra* note 35, at 75.

190. Murat Metin Hakki, *Turkey, Water and the Middle East: Some Issues Lying Ahead*, 5

preceding the adoption of the Watercourses Convention, both Chinese and Rwandan representatives articulated positions consonant with the Harmon Doctrine.[191]

Several publicists have defended the doctrine as a positivist approach to international law.[192] In accordance with the *Lotus* principle[193]—which provides that if binding international law emanates from the free will of states, restrictions upon a state's freedom of action cannot be presumed where there is no rule of international law governing such action[194]—these scholars have contended that "there are no principles of law binding upon sovereign states . . . that limit their right to do as they choose with international waters while within their boundaries."[195] Yet, many in academe do not subscribe to this view.[196] Indeed, the Harmon Doctrine has now largely been jettisoned in both theory and practice.[197] In particular, publicists have repudiated the doctrine as a dogmatic principle at war with itself—that is, taken to its logical extreme, an upstream riparian's right to the unrestricted use of an international watercourse traversing its territory would necessarily render impossible a downstream riparian's enjoyment of that very same right.[198] Internal contradictions aside, the doctrine has also been rejected on the grounds that it would produce considerable social and economic inequities for downstream riparians.[199]

At the other end of the watercourse law spectrum sit Egypt and Sudan. In general, the two downstream riparians have advanced arguments associated with the maxim of *sic utere tuo ut alienum non laedas* (use your property and perform your activities without damage to others), better known as the "no significant harm" rule.[200] Under this fundamental tenet of international watercourse law, the precise meaning of which has been subject to some scholarly debate,[201] a riparian state has the right to utilize the resources of an international watercourse in its territory, provided such use does not cause

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CHINESE J. INT'L L. 441, 447 (2006).

191. IBRAHIM KAYA, EQUITABLE UTILIZATION: THE LAW OF THE NON-NAVIGATIONAL USES OF INTERNATIONAL WATERCOURSES 45-46 (2003).

192. *See, e.g.*, *id.* at 55-56 (writing that there are only a handful of experts who have adopted this stance).

193. S.S. Lotus (Fr. v. Turk.), 1927 P.C.I.J. (ser. A) No. 10 (Sept. 7).

194. *Id.* at 44.

195. KAYA, *supra* note 191, at 56.

196. *See, e.g.*, *id.* at 56-57 (noting that the doctrine has been labeled "intolerable," "unsound," and "egoistic"); *see also* Hakki, *supra* note 190, at 448 (noting that riparians that once espoused the Harmon Doctrine have since adopted more equitable approaches to dispute resolution).

197. KAYA, *supra* note 191, at 56.

198. *See* J.G. LAMMERS, POLLUTION OF INTERNATIONAL WATERCOURSES 557 (1984) (repudiating self-contradictory character of principle of absolute territorial sovereignty).

199. *Id.*

200. *Id.* at 570.

201. *Id.*

significant harm to other riparians.[202]

For the Nile's lower riparians, reliance on the "no significant harm" rule, codified in Article 7 of the 1997 Convention, is attractive for multiple reasons. First, unlike the factors enumerated in Article 6 that must be considered when determining whether utilization of an international watercourse is equitable and reasonable, Article 7 offers no such interpretative guidance; in fact, it does not even define what constitutes "significant harm." Therefore, any conception of what rises to the level of significant harm would appear more tethered to a riparian state's subjective determination than objective criteria. Second, while Article 7(2) commands any riparian state causing significant harm to consult the affected state(s) to eliminate or mitigate such harm and discuss potential compensation, it only obliges the former to do so "in the absence of agreement to such use."[203] Even assuming its use of the Nile's resources constituted significant harm to other riparians, Egypt could simply fall back on its position that the 1929 and 1959 treaties legitimize such utilization.

Egypt's reliance on the "no significant harm" principle, however, may be misplaced. Although its status as an organizing principle of international watercourse law is unquestioned and Article 7 makes no such differentiation, the rule's origins are rooted more in concerns of transboundary environmental protection than resource consumption. Given that the Nile Basin dispute, at its core, centers on questions of water allocation and quantity, some legal experts have suggested that the applicability of the "no significant harm" principle to the conflict is inapposite, and that any Nile Basin agreement should instead be predicated on the doctrine of equitable utilization.[204] This is particularly so since there is a concern that, should the "no significant harm" principle be given primacy in future Nile Basin negotiations, it would create more negative externalities by providing a legal endorsement of Egypt's claimed veto power over upstream uses and diversions.[205] Rather, by making the doctrine of equitable and reasonable utilization the bedrock principle underlying a basin-wide regulatory regime, these scholars believe that the focus of the basin's administration would more appropriately be the optimal utilization of its resources.[206]

In conjunction with its espousal of the "no significant harm" theory, Egypt has also contended, partially in response to Ethiopian claims, that the Nile's present state of affairs is justified by the doctrine of "absolute territorial integrity," or "riverine integrity." This theory, the antithesis of the "absolute

202. Utton, *supra* note 157, at 636.

203. Watercourses Convention, *supra* note 162, art. 7(2).

204. *See, e.g.*, Utton, *supra* note 157, at 639 (arguing that the utilization doctrine would reduce confusion among other approaches).

205. *Id.*

206. *See* Vinogradov et al., *supra* note 154, at 17 (attaining optimal utilization for all watercourse states).

territorial sovereignty" argument adopted by Ethiopia and other upper riparians, provides that "an upstream riparian cannot undertake development which would by *any* means affect the waters or course of an international watercourse, unless downstream riparians give their consent."[207] As such, it has far-reaching limitations for upstream riparians' sovereignty. Though the principle places a concomitant duty on downstream riparians to refrain from impeding the natural flow of an international watercourse to other lower riparians,[208] given Egypt's geographic position as the Nile's most downstream country, here, such a doctrine would conveniently impose no such corresponding obligation. Much like the practical effect that would result from making the "no significant harm" rule the legal backbone of any basin administration, efforts to assert the paramountcy of the "absolute territorial integrity" doctrine would likewise subject the vast majority of upstream uses to Egyptian scrutiny and sanction.[209]

It should be noted that resort to the absolute territorial integrity principle, now largely discarded as a relic of nineteenth century international fluvial law,[210] often goes hand-in-hand with claims designed to safeguard a riparian's existing use of a watercourse, also known as prior appropriation.[211] Under the old English common law, the prior appropriation doctrine, first referenced in Part III, conferred on landowners the "right to capture" groundwater beneath their tracts, vesting them with absolute ownership if they were able to reduce such water to their possession.[212] The rule subsequently took root in the western United States (where it remains good law today) due to the region's arid climate and paucity of surface waters.[213] In short, the current doctrine provides that the riparian which "first appropriates (captures) water and puts it to reasonable and beneficial use has a right superior to later appropriators."[214]

As applied to Egypt, the prior appropriation model has obvious appeal given the similar environmental conditions that prevail in the country, not to mention the feared consequences that a more flexible rule would have for the status quo and Egypt's precarious position at the Nile's mouth. For Egypt, this paradigm for the allocation of water rights is considered preferable, in part, to the riparian rights system that emerged in the eastern United States, and

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207. Knobelsdorf, *supra* note 123, at n.80.

208. Salman, *supra* note 148, at 627.

209. *See id* (stating that the principal, at most, tolerates minimal uses from upstream states).

210. Also known as the "natural flow theory," the doctrine of "absolute territorial integrity" has failed to gain traction in international law and practice, having only been invoked by three countries, all of which are downstream: Egypt, Pakistan, and Bangladesh. *See* DANTE A. CAPONERA, PRINCIPLES OF WATER LAW AND ADMINISTRATION: NATIONAL AND INTERNATIONAL 213 (1992) (enacting new statute).

211. *Id.*

212. JESSE DUKEMINIER ET AL., PROPERTY 34 (6th ed. 2006).

213. *Id.* at 35.

214. *Id.* at 34-35.

which is based on reasonable use, because the former allows for the diversion of surface waters to land farther from its source.[215]

Riparian rights regimes, by contrast, proscribe the transportation of water from the land on which it is withdrawn if such withdrawal would result in injury to other riparians;[216] the effect of such a system, however, is often the "development of uneconomical 'bowling-alley' parcels of land perpendicular to the banks" of a watercourse.[217] For a country that already suffers from a crushing population density problem—as previously noted, the overwhelming majority of Egypt's eighty-two million people is concentrated in urban areas near the Nile, an area roughly the size of Switzerland[218]—there is concern that a basin-wide treaty governed by riparian rights would lock-in and exacerbate the effects of an already unsustainable situation.

Yet, the movement in international watercourse law in recent decades toward a more happy medium on the "sovereignty-integrity" continuum would seem to militate against staking the legitimacy of the status quo to the prior appropriation doctrine. No matter how ambiguous or unsettled the current customary law may be, it is undeniable that the law has increasingly eschewed rigid and absolute claims of right in favor of more flexible principles. Although the Watercourse Convention does not dispense with the principle of prior appropriation all together, Article 6 subordinates the doctrine to the larger notion of equitable utilization; existing uses, and the availability of alternatives to such existing uses, are just two of the seven illustrative factors that the article requires consideration of when assessing equitable and reasonable utilization.[219] Thus, for Egypt, the prior appropriation doctrine would appear to be a tenuous reed upon which to rest its Nile claims.

V. MOVING TOWARD A NILE BASIN REGIME?

It should be clear from the preceding discussion that if the countries of the Nile Basin are to overcome their history of suspicion, discord, and mutual recrimination in forging a new and sustainable order along the banks of the Nile, they will have to plug the legal void left by international watercourse law themselves. This is somewhat of a self-evident truth. After all, few interstate conflicts, much less transboundary watercourse disputes, lend themselves to resolution by simply superimposing general rules of international law on local sources of friction. Such norms may serve as a point of departure for negotiations, but they cannot adequately account for the peculiarities of a

215. FOOD AND AGRIC. ORG. OF THE UNITED NATIONS, ISSUES IN WATER LAW REFORM 163 (1999).

216. *Id.* at 164.

217. DUKEMINIER ET AL., *supra* note 212, at 35.

218. Will Rasmussen, *Egypt Fights to Stem Rapid Population Growth*, N.Y. TIMES, July 2, 2008.

219. Watercourses Convention, *supra* note 162, art. 6.

given conflict in steering the parties toward a solution. Ultimately, the parties themselves must fill in the gaps in tailoring a solution to local conditions and needs.

But where such rules do not enjoy universal application or the binding force of customary international law, as is the case in the Nile River Basin and larger arena of transboundary water consumption, the job of adversarial parties in crafting a legal solution is made infinitely harder. That is precisely why many onlookers greeted the creation of the Nile Basin Initiative (NBI) in 1999 with sanguinity.[220] Hailed as a breakthrough to the persistent deadlock that had beset the Nile Basin for decades, the NBI—which was formally launched by Nile-COM, the Council of Ministers of Water Affairs from each Nile Basin state[221]—seemed primed to usher in a new era of cooperation and rapprochement on the Nile. Whereas Nile riparians had confined their past cooperation to non-contentious matters that were technical and sub-basin in scope,[222] the NBI pledged "to achieve sustainable socio-economic development through the equitable utilization of, and benefit from, the common Nile Basin water resources."[223]

As a rhetorical matter, the articulation of the NBI's shared vision was not insignificant. For countries such as Egypt and Sudan, the declaration not only ran counter to their traditional contentions regarding the continued validity of the 1929 and 1959 agreements, but it seemingly marked an acknowledgment of the need to step back from the precipice.[224] For the first time in their collective histories, the Nile Basin riparians vowed to work together to achieve a common objective.[225]

Although an achievement in its own right, consensus on the NBI's joint vision did not guarantee concrete action on the ground. From its outset, the NBI has sought to implement its ambitious agenda with a two-pronged Strategic Action Program that aims to promote confidence and stakeholder investment at the basin-level, while simultaneously initiating "win-win" development projects at a subsidiary level.[226] For example, the Eastern Nile

220. *See* Mekonnen, *supra* note 72, at 425.

221. *About Us*, NILE BASIN INITIATIVE (Oct. 28, 2010), http://www.nilebasin.org/newsite/index.php?option=com_content&view=section&layout=blog&id=5&Itemid=68&lang=en. Also known as Nile-COM, the Council of Ministers is the NBI's principal decision-making organ. *Id.* A Technical Advisory Committee (Nile-TAC) and a Secretariat (Nile-SEC), based in Entebbe, Uganda, augment Nile-COM's activities. *Id.*

222. *See, e.g.*, Mekonnen, *supra* note 72, at 424-25 (stating that such cooperation, which included the collection and exchange of meteorological and hydrological data, did not translate into greater basin-wide collaboration).

223. NILE BASIN INITIATIVE, http://www.nilebasin.org/ (last visited Oct. 26, 2010).

224. *But cf.* Ashok Swain, *The Nile River Basin Initiative: Too Many Cooks, Too Little Broth*, 22 SAIS REV. INT'L AFF. 293, 302 (2002) (arguing that a steady reduction in World Bank assistance, and the personal interest of then World Bank president James Wolfensohn in the NBI's success, accounted for Egypt's rhetorical shift).

225. *Id.* at 303.

226. *See* Hefny & Amer, *supra* note 9, at 45.

Subsidiary Action Program, an NBI subgroup comprised of Egypt, Sudan, and Ethiopia, has identified and developed mutually beneficial projects at the bilateral level in the areas of flood preparedness, irrigation and drainage, watershed management, desertification control, and energy transmission (e.g. the interconnection of power grids).[227] A similar action program exists for the Nile's "equatorial lakes" riparians.[228]

Yet, while a necessary component of the NBI, such development was not considered sufficient to accomplish the NBI's desired goal. If the NBI was to be an effective sheriff, its stakeholders realized that its ultimate success would rise or fall not only on the outcome of sub-basin development projects, but also on the creation of a comprehensive legal regime that would establish an institutional mechanism for the equitable apportionment of the Nile's waters, attract foreign direct investment, and stabilize a basin long prone to volatility.[229] To this end, the NBI co-opted Project D3, a forum established by the United Nations Development Program in 1995 to advance the political and legal discourse surrounding the Nile Basin dispute and develop a cooperative framework for the basin's governance.[230] Upon the conclusion of a framework agreement, a permanent Nile River Basin Commission would supplant the NBI, originally conceived of as a transitional body, to administer the agreement's provisions and oversee dam building and irrigation development.[231]

In 2007, following a decade of protracted negotiations, a draft agreement, known as the Cooperative Framework Agreement (CFA), was submitted to Nile-COM, the group of NBI water ministers, for review.[232] The drawn-out discussions proved a harbinger of things to come. Draft Article 14, a provision concerning "water security," quickly became the major bone of contention between upstream riparians and Egypt and Sudan.[233] The article stipulated:

> Having due regard for the provision [sic] of Articles 4 and 5 [pertaining to equitable utilization and no significant harm], Nile Basin states recognize the vital importance of water security to each of them. 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 states therefore agree, in a spirit of cooperation:

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227. *See IDEN Projects*, NILE BASIN INITIATIVE, http://ensap.nilebasin.org/index.php?option=com_frontpage&Itemid=30 (last visited Oct. 6, 2011).

228. Adams Oloo, *The Quest for Cooperation in the Nile Water Conflicts: The Case of Eritrea*, 11 AFR. SOC. REV. 95, 100 (2007).

229. Knobelsdorf, *supra* note 123, at 645.

230. *See* Oloo, *supra* note 228, at 98-99 (describing D3 project).

231. Walter Menya, *Nile River Basin Talks to Be Held in Kinshasha*, DAILY NATION, May 6, 2009 (Kenya).

232. Mekonnen, *supra* note 72, at 428.

233. *Id.*

> 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.[234]

Both Egypt and Sudan lodged objections to sub-article (b), perceiving it as too great an encroachment on the status quo; absent a reference to the 1929 or 1959 agreements, the CFA's non-recognition of historical rights was a pill both countries were simply not prepared to swallow.[235] In its stead, and in a bold and naked attempt to reframe the notion of water security[236] in terms of prior appropriation, the two riparians proposed an amendment that would only require Nile riparians "not to adversely affect the water security and current uses and rights of any other Nile Basin State."[237] As might be expected, the Egyptian and Sudanese revision, which would render the CFA an exercise in futility if adopted, failed to produce compromise.

Yet, rather than risk throwing the baby out with the bathwater and losing Egyptian and Sudanese support for the rest of the CFA,[238] the NBI's water ministers elected to adopt the original text of Article 14 along with the proposed amendment, leaving resolution of the Article 14(b) question for another day.[239] In May 2009, in an effort to placate all parties and move the ball forward, Nile-COM kicked the can down the road again, announcing that the Nile Basin River Commission, and not the NBI, would decide the article's fate upon its establishment.[240] By side-stepping the issue, the move ostensibly removed the last impediment to the framework's adoption and ultimate ratification.[241]

However, Nile-COM's decision to sweep this contentious issue under the rug, rather than confront it head-on, has not brought the CFA and the Nile Basin River Commission any closer to fruition. For their part, both Egyptian and Sudanese officials have viewed it as an attempt to put the cart before the

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234. *Id.*

235. *See generally* Abdel Monem Said Aly, *Crisis on the Nile: An Egyptian View*, THE DAILY NEWS EGYPT, Jul. 11, 2010 (Egypt) (describing sub-article's negative effects on Egypt and Sudan's vital national interests).

236. The CFA, ratified by five of the NBI's upper riparians in 2010, defines "water security" as the "right of all Nile Basin States to reliable access to and use of the Nile River system for health, agriculture, livelihoods, production and environment." AGREEMENT ON THE NILE RIVER BASIN COOPERATIVE FRAMEWORK, *available at* http://internationalwaterlaw.org/documents/regionaldocs/Nile_River_Basin_Cooperative_Framework_2010.pdf.

237. Mekonnen, *supra* note 72, at 428.

238. *See* Diaa El-Din El-Quosy, *One Initiative or Two Commissions*, AL-AHRAM WKLY., May 20-26, 2010 (Egypt) (suggesting that about 90% of the CFA's provisions met with Egyptian approval).

239. Mekonnen, *supra* note 72, at 428.

240. Walter Menya, *Sudan Walks Out of Nile River Talks*, DAILY NATION, May 24, 2009 (Kenya).

241. *See id.* (stating Nile water ministers believed this would pave the way for the speedy formation of the permanent Nile River Basin Commission).

horse by launching the Commission despite the lack of a true consensus on the CFA's text.[242] Indeed, such a maneuver would contravene the rules of procedure adopted by the CFA's negotiating committee in 2004, which require NBI members to unanimously agree on the treaty's provisions before opening it up for ratification.[243] But upstream riparians have received Egyptian and Sudanese counter-proposals for a "presidential initiative,"[244] in which the basin's heads of state would launch a "high commission" to regulate the Nile's administration, with an equally jaundiced eye. Egypt and Sudan maintained that negotiations for a comprehensive agreement would continue after such a commission's creation, but upstream riparians rejected the proposal out of the belief that it would create a fait accompli before the implementation of any legal framework.[245]

The NBI has been on a downward spiral ever since. With Nile riparians increasingly unable to find common ground, the spirit of cooperation that initially characterized the CFA discussions has dissipated, as conciliatory attitudes have given way to entrenched negotiating positions. In July 2009, Mohamed Nasr El-Deen Allam, Egypt's Minister of Water Resources and Irrigation, asserted that Egypt would not budge on the question of Article 14(b): "The main hurdle is water security and the historic rights of Egypt and Sudan . . . It [does not] matter if they [upstream riparians] are convinced [of the validity of the 1929 and 1959 agreements]. It matters that we are convinced."[246]

After an April 2010 Nile-COM meeting revealed a seemingly irreconcilable divide between upper and lower riparians—not only did a resolution of the thorny Article 14(b) issue remain elusive, but Egyptian calls for a consensus voting system on, and an early notification mechanism for, all upstream projects also went unheeded[247]—upper riparians declared their intent to open the CFA for signature.[248] In May 2010, frustrated by a decade of failed negotiations, Ethiopia, Uganda, Tanzania, Rwanda, and Kenya followed through on their promise in the face of significant Egyptian opposition,

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242. *Agreement on the Nile River Basin Cooperative Framework Opened for Signature by Upstream Countries*, NILE BASIN INITIATIVE, http://www.nilebasin.org/index.php?option=com_content&task=view&id=165&Itemid=1 (last visited Jan. 26, 2011).

243. *Id.*

244. Mohamed El-Sayed, *Power Play*, AL-AHRAM WKLY., May 20-26, 2010 (Egypt).

245. *See* Mohamed Hafez, *Testing the Waters*, AL-AHRAM WKLY., May 6-12, 2010 (Egypt) (stating that no progress had been made on this matter as of April 2010).

246. Maha El Dahan, *Egypt Says Historic Nile River Rights Not Negotiable*, REUTERS, July 27, 2009, *available at* http://www.reuters.com/article/2009/07/27/us-egypt-nile-framework-idUSTRE56Q3LZ20090727.

247. Lindsey Parietti, *Cause for Celebration?*, BUSINESS TODAY EGYPT, Dec. 3, 2009, *available at* http://www.zawya.com/Story.cfm/sidZAWYA20091203114532/Cause%20for%20Celebration%3F/.

248. El-Quosy, *supra* note 238.

signing the CFA in Uganda. [249] Burundi signed the CFA in February 2011,[250] giving the treaty binding effect.[251]

Predictably, the rush to sign the CFA caused consternation in Egypt. Egypt's foreign ministry dismissed the CFA as non-binding, stating that it does not "exempt the signatories from their commitments 'under the rules of international and customary laws, and the current practices, as well as the existing agreements, which enjoy sanctity as being border agreements that cannot be disregarded.'"[252] Following the inauguration of the controversial $520 million TanaBeles hydroelectric dam in Ethiopia in the wake of the CFA's ratification,[253] Egypt reportedly handed the Nile Basin "file" to its intelligence and security chief, stripping the water and foreign affairs ministers of this responsibility and signaling a heightened securitization of the dispute.[254]

That decision has coincided with a public relations offensive to prevent Chinese, Arab, and European[255] investment in lucrative electricity and agricultural projects in upstream riparians, including Ethiopia and Uganda.[256] The move to target funding would not be unprecedented: in 1990, Egypt blocked a loan to Ethiopia from the African Development Bank[257] that was

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249. Solomon, *Egypt Asserts Right to Block Upstream Nile Dams*, ETHIOPIAN J. (May 18, 2010), http://www.ethjournal.com/index.php?option=com_content&view=article&id=2524:egypt-asserts-right-to-block-upstream-nile-dams&catid=18:current-issues-and-events&Itemid=50.

250. David Malingha Doya, *Burundi Government Signs Accord on Use of Nile River Water*, BLOOMBERG (Feb. 28, 2011), http://www.bloomberg.com/news/2011-02-28/burundi-signs-accord-on-water-usage-from-nile-that-may-strip-egypt-of-veto.html.

251. David Malingha Doya, *Burundi Government Signs Accord on Use of Nile River Water*, BUSINESSWEEK, Feb. 28, 2011. The CFA must be ratified by a minimum of six NBI members. *Id.*

252. Abdel-Rahman Hussein, *Egypt to Begin PR Offensive Against Nile Water Treaty*, DAILY NEWS EGYPT,May 17, 2010, *available at* http://www.thedailynewsegypt.com/egypt/egypt-to-begin-pr-offensive-against-nile-water-treaty.html. As previously suggested in Part III, *supra*, that claim rests on a thin reed, as few would agree that the 1929 and 1959 agreements concerned the delineation of borders between Nile Basin states.

253. Jeffrey Fleishman & Kate Linthicum, *On Nile, Egypt Cuts Water Use as Ethiopia Dams for Power*, THE JERUSALEM POST, Jan. 25, 2010, *available at*http://www.jpost.com/Features/InThespotlight/Article.aspx?id=189224.

254. Jack Shenker, *Egypt's Nile: Nation Puts Great River at Heart of Its Security*, THE GUARDIAN, June 25, 2010, *available at* http://www.guardian.co.uk/world/2010/jun/25/egypt-nile-security-cut-water-supply.

255. John Vidal, *How Food and Water Are Driving a 21st-Century African Land Grab*, THE OBSERVER, Mar. 6, 2010, *available at* http://www.guardian.co.uk/environment/2010/mar/07/food-water-africa-land-grab.

256. Cambanis, *supra* note 51 (stating that upstream agricultural projects pose a greater threat to Egyptian interests than do hydropower projects, which are less likely to affect current water quotas); *see also* Adel Elbahnsawy, *Egypt Feels Threatened by China's Growing Presence in Ethiopia*, AL-MASRY AL-YOUM, July 6, 2010 (Egypt), *available at* http://www.ethiopianreview.com/content/28315.

257. Alan Cowell, *Cairo Journal; Now, a Little Steam. Later, Maybe, a Water War*, N.Y.

slated for hydraulic development.[258] Nor would it represent the only strategy Egypt has employed in its determination to perpetuate the status quo: by some accounts, Egypt sunk over a billion dollars worth of investments into Ethiopia in 2010[259] and has continued to woo Uganda with similar carrots,[260] offering record aid packages to that country's underdeveloped sectors[261]with the aim, some say, of using its largesse as a lever to thwart future Nile development.[262] For a country like Egypt that is itself largely reliant on foreign aid and remittances,[263] this explanation is certainly plausible. At the very least, critics have portrayed Egypt's exercise of soft power, which has extended to collaboration on small-scale hydroelectric projects, as a backhanded attempt to marginalize the NBI and assert de facto control over upstream activity.[264]

None of these developments, of course, bodes well for the NBI's resuscitation. With the Nile Basin Trust Fund,[265] the primary financing mechanism through which international donors have funded basin-wide projects, set to expire in 2012,[266] Nile riparians will be hard pressed to salvage the increasingly moribund initiative. While Egypt and Sudan have made a convenient scapegoat for the NBI's unraveling, several commentators believe that responsibility lies more fundamentally with international watercourse law and the terms of the ratified CFA.[267] That is, they believe that the NBI's

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TIMES, Feb. 7, 1990, *available at* http://www.nytimes.com/1990/02/07/world/cairo-journal-now-a-little-steam-later-maybe-a-water-war.html.

258. *See* Solomon, *supra* note 249 ("[Egypt was] widely credited with having blocked a loan from the African Development Bank for a dam project in Ethiopia in 1990.").

259. Egypt State Info. Serv., *Allam: Nile-Basin Cooperation 'Strategic Goal'*, EGYPT ONLINE (Oct. 11, 2010), http://www.sis.gov.eg/en/Story.aspx?sid=51229.

260. Mohammed Mujahid, *Egypt Woos Nile Basin Countries with Communications Investment*, AL-MASRY AL-YOUM, Apr. 9, 2010, *available at* http://www.almasryalyoum.com/en/node/76330.

261. Arab Republic of Egypt, Ministry of Commc'ns and Info. Tech., *Ugandan President Receives Dr. Kamel and His Delegation in Jinja Town*, PRESS RELEASES (Dec. 16, 2010), http://www.mcit.gov.eg/MediaPressSer_Details.aspx?ID=1794&TypeID=1.

262. Nadeen Shaker, *Egyptian Government Used Diplomacy, Aid to Influence Nile Basin Countries*, CARAVAN (May 15, 2011), http://academic.aucegypt.edu/caravan/story/egyptian-government-uses-diplomacy-aid-influence-nile-basin-countries.

263. Tore Kjeilen, *Egypt*, LOOKLEX ENCYCLOPAEDIA, http://i-cias.com/e.o/egypt.economy.htm (last visited Sept. 30, 2011).

264. *See, e.g.*, Amdetsion, *supra* note 58, at 38-39 (stating that some Ethiopians interpreted their government's recent decision to invite Egyptian engineers and hydrologists for consultative talks prior to the construction of several dams as a tacit endorsement of the 1959 agreements).

265. Patrick Rutagwera, *Funding Mechanisms*, NILE BASIN INITIATIVE (Oct. 28, 2010), http://www.nilebasin.org/newsite/index.php?option=com_content&view=section&layout=blog&id=5&Itemid=68&lang=en.

266. *Nile River Basin Cooperative Framework (Taken Question)*, U.S. DEP'T OF STATE (Aug. 6, 2010), http://www.state.gov/r/pa/prs/ps/2010/08/145780.htm.

267. *See, e.g.*, Mekonnen, *supra* note 72, at 430 (dismissing the notion that the

ineffectualness is not the function of any one riparian's actions, but instead is a reflection of the law's deficiencies.[268]

Specifically, they point to the NBI's ill-fated decision in 2002 to introduce the concept of "water security" into Article 14 of the draft CFA as a critical reason why the framework remains stillborn.[269] To be sure, the CFA drafters' decision to insert "water security" was curious, as there is not a single mention of the term in either the 1966 Helsinki Rules or 1997 Watercourse Convention.[270] But paradoxically, it was these documents—and the constructive ambiguity inherent in each of them—that undoubtedly inspired the term's use. Indeed, for the CFA's framers, the virtue of a phrase like "water security" was its elasticity,[271] as they believed it could provide the requisite leeway to harmonize the opposing positions of the basin's upper and lower riparians.[272] Since water security can be defined in the eyes of the beholder, each riparian, in theory, could make difficult concessions at the negotiating table while still spinning an agreement to their domestic constituencies in a favorable light.[273] In highly charged negotiations like the CFA, such flexibility, the thinking went, would also help to defuse tensions, enabling the parties to table knotty issues while preventing otherwise fruitful talks from veering off course.[274]

As sound as such contentions may seem in theory, in the Nile Basin context, they are questionable propositions at best, particularly in light of the CFA experience. The interpolation of water security into the CFA, and the subsequent decision to punt on the Article 14(b) question until after the Nile River Basin Commission's launch, did not reconcile the parties' differences; it papered over them, creating an artificial sense of progress. Fundamental disagreements still lingered just beneath the surface, waiting to rear their head at the first opportunity.

Herein lies the larger problem with ambiguity in legal formulae: it is a

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incorporation of constructive ambiguity into the CFA has brought Nile riparians closer to a compromise).

268. *Id.*

269. *Id.* at 429-30.

270. *Id.* at 438.

271. *See supra* text accompanying note 236.

272. *See* Mekonnen, *supra* note 72, at 422.

273. *See* Itay Fischhendler, *Ambiguity in Transboundary Environmental Dispute Resolution: The Israeli-Jordanian Water Agreement*, 45 J. PEACE RES. 91, 92-93 (2008) [hereinafter Fischhendler, *Ambiguity in Transboundary Environmental Dispute Resolution*] (stating that ambiguities in treaties allow each party to present it differently to their own citizens in order to appease them).

274. *See id.* at 93 (noting that ambiguity might also "provide leeway to adjust the resource allocation during a future crisis without the need to renegotiate the treaty"); *see also* Ibrahim Erdogan, *Fancy Words but No Significant Step Over the Nile River Negotiations*, J. T. WKLY., Aug. 21, 2009, *available at* http://www.turkishweekly.net/columnist/3181/fancy-words-but-no-significant-step-over-the-nile-river-negotiations.html (writing that ambiguity's main objective may be to encourage "parties to speedily move forward in negotiations prior to they [sic] entrench [sic] themselves in fix [sic] positions").

double-edged sword. The same ambiguity that can help grease the wheels of negotiation can also serve to reinforce parties' divergent bargaining positions, increasing the chance of conflict when one side's performance fails to comport with the other party's understanding of that side's legal obligations. Moreover, it may facilitate the problem of "institutional freeloading," in which parties "leave it to others to take costly actions . . . on the pretense of a different interpretation."[275] These may be the major pitfalls of the Watercourse Convention and those transboundary water agreements based upon it. As one scholar notes, the Convention's ambiguity has a "'basket of Halloween'" candy quality to it in that "it provides something for everyone, enabling all sides to claim partial victory . . . while not providing any tools for resolving competing claims."[276] Unfortunately, this has been precisely the case in the Nile Basin dispute, where the insertion of the amorphous concept of water security has not brought the riparians any closer to a resolution.

VI. SECURITIZATION OF THE NILE DISPUTE: A BARRIER TO TRANSBOUNDARY GOVERNANCE

If the limitations and inadequacies of international watercourse law help to explain some of the NBI's failures, they do not explicate all of them. While the NBI's incorporation of water security into the CFA may have been a self-inflicted wound, needlessly throwing a wrench into negotiations, some blame must also be apportioned elsewhere. As reflected in its opposition to, and proposed amendment of, Article 14(b), Egypt's inability to see the Nile dispute in anything but zero-sum terms represents a formidable stumbling block on the road toward a transboundary water agreement. If Nile riparians are to succeed in implementing a comprehensive regulatory regime, they must find a way to contend with Egypt's historical Nile "security complex."

Egypt has long looked at the Nile Basin through the prism of national security, a legacy, in part, of British colonialism, but also a byproduct of the country's heavy dependence on the river's waters. Since obtaining its independence in 1952, Egypt has clung to the mindset of its erstwhile colonial masters, who believed that "[n]o one can hold Egypt securely unless he holds also the whole valley of the Nile. The sources of the river in hostile, or even in indifferent, lands must always be a grave cause of danger, or, at the best, anxiety."[277] In recent decades, this conception of water security, compounded by anxieties over water scarcity, desertification, and demographic challenges, has manifested itself in rhetoric and policies that have refused to brook any challenge, real or perceived, to Egyptian hegemony over the Nile. It is not hyperbolic to suggest that Egypt sees its domination of the Nile as a matter of national survival; as one Egyptian columnist recently opined, any violation of

275. Fischhendler, *supra* note 153, at 113.

276. Fischhendler, *Ambiguity in Transboundary Environmental Dispute Resolution*, *supra* note 273, at 92.

277. SIDNEY CORNWALLIS PEEL, THE BINDING OF THE NILE AND THE NEW SOUDAN 112 (1904).

Egypt's Nile quota would constitute a "genocidal war against 80 million people."[278] Moving forward, it will therefore be difficult, if not impossible, to disentangle these deeply ingrained beliefs from the notion that equitable water allocation is but a euphemism for greater Egyptian insecurity.

But is Egypt truly prepared to resort to war to safeguard what it considers its sacrosanct prerogative? Many believe it is not.[279] Despite former President Anwar Sadat's famous proclamation in 1979 that "[t]he only matter that could take Egypt to war again is water" and former Minister of Foreign Affairs Boutros Boutros-Ghali's declaration a decade later that the "next war in our region will be over the waters of the Nile, not politics,"[280] skeptics dismiss such talk of a water war as mere saber-rattling.[281] This attitude extends to upstream Nile riparians, who perceive the bellicose rhetoric as little more than political bluster, even though a significant power asymmetry exists between Egypt and upper riparians.[282] However, as David Schenker notes, this may be the result of Egypt's diminished stature on the continent: "The fact that Cairo can neither persuade—nor intimidate—NBI member states . . . to continue the present arrangement speaks volumes as to Egypt's standing in Africa."[283] As a result, upstream riparians appear more willing to call Egypt's bluff. After his country ratified the CFA in May 2010, one Uganda state minister remarked: "What it [sic] is Egypt going to do—bomb us all?"[284]

Probably not, but to write off the specter of a water war in the Nile Basin as a social construct created by Egypt to justify its current policies would be a

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278. el-Beblawi, *supra* note 5; *see also* Amdetsion, *supra* note 58, at 40 (quoting Egyptian ambassador to Ethiopia Marwan Badr's statement that the Nile is "not just a national security issue, but rather a national survival obsession").

279. *See, e.g.*, Amdetsion, *supra* note 58, at 32-34 (quoting several critiques of the water war paradigm in the Nile Basin).

280. Tristan McConnell, *War Clouds Gather as Nations Demand a Piece of the Nile*, THE TIMES, June 4, 2010, *available at* http://www.timesonline.co.uk/tol/news/world/africa/article7143786.ece.

281. *See, e.g.*, *id.* ("Water wars are not inevitable . . . . I'm optimistic that the Nile Basin countries are still negotiating, despite the rhetoric.").

282. *See* Mike Thomson, *Nile Restrictions Anger Ethiopia*, BBC NEWS (Feb. 3, 2005), http://news.bbc.co.uk/2/hi/africa/4232107.stm (quoting Ethiopian Prime Minister Meles Zenawi as saying that while he cannot completely dismiss Egypt's inflammatory rhetoric, he does not think military action is a feasible option).

283. David Schenker, *Sick Man on the Nile*, THE WEEKLY STANDARD (Sept. 2, 2010, 3:30 PM), http://www.weeklystandard.com/blogs/sick-man-nile?page=2. Nabil Abdel Fattah, a research director at Egypt's Al-Ahram Center for Political and Strategic Studies, attributes Egypt's waning influence in Africa to political neglect: "President Nasser cultivated a sense of post-colonial solidarity with upstream states based around the non-aligned movement, yet under the regimes of his successors Africa has been neglected . . . . We have seen a marginalisation of the African affairs institutes at universities, a marginalisation of African news on our TV screens. The problem here is . . . the perception we have of Egyptian identity. Our politicians see Africa as a backwater, its countries as underdeveloped." Shenker, *supra* note 254.

284. Xan Rice, *Battle for the Nile as rivals lay claim to Africa's great river*, GUARDIAN (U.K.), June 25, 2010; *see also* Thomson, *supra* note 282 (quoting Ethiopian Prime Minister Meles Zenawi).

dangerous assumption.[285] Egypt's securitization of the Nile issue is not simply an attempt to move negotiations over the river from the realm of diplomacy and political compromise to the domain of security, thereby vindicating the need for extreme measures. A cursory glance at Egypt's geopolitical strategy since the mid-twentieth century reveals an inclination to use force to maintain the Nile Basin's current configuration. This has been particularly true with respect to Ethiopia,[286] the source of the Blue Nile, the tributary upon which so much of Egypt's water needs critically depend.[287] Indeed, it has been asserted that "Egypt must be in a position either to dominate Ethiopia, or to neutralize whatever unfriendly regime might emerge there."[288]

This was no doubt the prevailing attitude in the 1870s,[289] as it also was in the 1950s, when the Egyptian government undertook a proxy campaign to destabilize Ethiopia, backing Eritrean liberation movements there in a conflict that deteriorated into a devastating thirty year civil war.[290] Partially fueled by Cold War exigencies, Egypt's intervention was equally, if not more, motivated by the perceived necessity to sap Addis Ababa of the resources that could otherwise be allocated for substantial Nile development.[291]

Cairo's preoccupation with undercutting Ethiopia and diverting its attention from the Nile Basin has extended as far afield as Somalia, where, in the 1960s and 1970s, Egypt furnished the country with millions in aid and materials during its sporadic conflict with Ethiopia.[292] For a time, Egypt even contemplated the deployment of its own troops to Somalia.[293] While that development never materialized, critics have accused Egypt of continuing to meddle in the Horn of Africa with the aim of sowing ongoing turmoil in Ethiopia. During the 1998-2000 border war between arch rivals Ethiopia and Eritrea,[294] Ethiopian news reports complained of Egyptian involvement,

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285. *See* Hamdy A. Hassan & Ahmad Al-Rasheedy, *The Nile River and Egyptian Foreign Policy Interests*, 11 AFR. SOC. REV. 25, 36 (2007) ("The adoption of cooperationve [sic] diplomacy towards other states of the Nile basin does not mean that Egypt is not prepared to use other means at its disposal to protect its interests in the region.").

286. *See* Kendie, *supra* note 4, at 141 (citing President Sadat's statement: "Any action that would endanger the waters of the Blue Nile will be faced with a firm reaction on the part of Egypt, even if that action should lead to war").

287. *See id.* ("86% of the water that Egypt consumes annually originates from the Blue Nile River.").

288. *Id.*

289. *See supra* text accompanying notes 73-74.

290. Kendie, *supra* note 4, at 154-56.

291. *Id.* at 156.

292. Ambassador David H. Shinn, Address at George Washington University's Elliott School of International Affairs: Nile Basin Relations: Egypt, Sudan and Ethiopia (July 2006) (transcript available at http://elliott.gwu.edu/news/speeches/shinn0706_nilebasin.cfm).

293. Kendie, *supra* note 4, at 160.

294. *Timeline: Eritrea*, BBC NEWS, May 7, 2011, *available at* http://news.bbc.co.uk/2/hi/africa/1070861.stm.

alleging that Cairo was providing weapons and tactical expertise to Eritrea.[295] Predictably, Egypt's foreign policy establishment downplayed these accusations. In 1998, Marwan Badr, Egypt's ambassador to Ethiopia, declared Egypt's readiness "to cooperate with Ethiopia in exploiting its huge hydro-electric power potentials" and affirmed that his government would "not object to the construction of small scale water dams."[296]

That pledge might have seemed disingenuous in light of former Egyptian President Hosni Mubarak's threat to "bomb Ethiopia" due to the construction of a Blue Nile dam the following year,[297] but Egypt and Ethiopia have, in fact, charted a more conciliatory course over the past decade.[298] When viewed in the context of Badr's caveat about small-scale construction, Egypt's lack of a hostile response to Ethiopia's inauguration of a controversial mega-dam at Tana Beles in May 2010 would appear encouraging. Yet, rather than signal an attitudinal shift, Egypt's tempered reaction may have resulted more from its recognition that upstream agricultural projects, not hydroelectric dams, pose a greater danger to its water quota.[299]

Despite its shared status as a lower riparian, not even Sudan has remained immune from Egypt's threatening voices. Much like with Ethiopia, Egypt's geopolitical interests in Sudan are largely predicated on the desire for a pliant and non-hostile political leadership.[300] Sensitivity to Sudanese domestic affairs is particularly acute; Sudan is home to the longest stretch of the Nile River of any riparian,[301] and considerable amounts of the river's waters are lost to evaporation in the country's southern swamplands.[302] In the 1970s, the two countries agreed to address the latter issue by digging the Jonglei Canal, which would increase the Nile's flow into Egypt, but civil war derailed the project. Today, Egyptian perceptions of vulnerability have only heightened with southern Sudan's recent secession.[303]

Indeed, given Sudan's strategic importance to Egypt, and the two countries' vulnerable positions as downstream riparians, it is accepted wisdom among Egyptian policymakers that Sudan must remain in league with Egypt, and abide by its wishes, at any price.[304] Thus, perhaps more so with

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295. *Id.* at 161-62; *see also* Shinn, *supra* note 292 (stating that, at the very least, Egypt expressed sympathy for Eritrea following the outbreak of violence).

296. Kendie, *supra* note 4, at 162.

297. Biong Kuol Deng, *Cooperation Between Egypt and Sudan Over the Nile River Waters: The Challenges of Duality*, 11 AFR. SOC. REV. 38, 48 (2007).

298. Shinn, *supra* note 292.

299. Cambanis, *supra* note 51.

300. Hassan & Al-Rasheedy, *supra* note 285, at 36.

301. **UNITED NATIONS JOINT LOGISTICS CTR., RIVER CARGO TRANSPORTATION ASSESSMENT: WHITE NILE RIVER: SUDAN4 (2009),** ***available at*** http://reliefweb.int/sites/reliefweb.int/files/resources/52E10E59387FE8CB8525755A0063379F-Full_Report.pdf.

302. Deng, *supra* note 297, at 52.

303. *Id.* at 47, 52.

304. *Id.* at 48; *see also* M. El-Fadel et al., *The Nile River Basin: A Case Study in Surface*

Sudan than with any other Nile riparian, Egyptian leaders have made their willingness to revert to military force abundantly clear.[305] In response to Sudanese protestations over Egypt's alleged diversion of Nile water to Israel in the 1990s, former President Mubarak warned: "I do not want to hurt the Sudanese if they are helpless, but I say, and the world hears me, that if they continue with this stance and take other measures, then I have many measures of my own."[306] What exactly Mubarak had in mind is not clear, but it likely encompassed the air raid that Egyptian forces almost launched against a dam in Khartoum in August 1994.[307]

While it would be alarmist to suggest that today, with the apparent breakdown of the NBI process, Egypt is on the warpath, moving toward a confrontation with Nile riparians tomorrow or the day after, one cannot dismiss the fact that the country is prepared for such a scenario. The Egyptian military's high command has reportedly established a "standing Nile force" and developed contingency plans for armed intervention in every basin country in the event of a direct threat to the Nile's flow.[308] Ethiopia's prime minister has gone so far as to allege that, in preparation for conflict in upstream riparian states, Egypt has trained troops in the art of jungle warfare.[309] Whether or not that claim is true is immaterial. What is important is the deleterious effect that Egypt's securitization of the Nile dispute will continue to have on present and future negotiations. Absent Egyptian authorities' ability to move beyond their emotional attachment to the Nile and overcome the psychological barriers that have long defined Egypt's basin policy—a tall order at best—the establishment of a transboundary water regime on the Nile will continue to remain dead in the water.

VII. CONCLUSION

Today, the Nile Basin finds itself on a precarious path toward instability. Against a backdrop of exploding population growth, looming water deficits, environmental degradation, and concerns over chronic food insecurity, the resources of the world's most storied river basin have come under increasing strain from the 360 million people who call this region home.[310] Yet the Nile

Water Conflict Resolution, 32 J. NAT. RESOURCES LIFE SCI. EDUC. 107, 111 (2003) ("Egypt is particularly interested in promoting Sudanese stability as internal conflicts in Sudan represent the main threat to the Nile basin water utilization patterns.").

305. Yehudit Ronen, *Sudan and Egypt: The Swing of the Pendulum (1989-2001)*, 39 MIDDLE E. STUD. 81, 89 (2003) (stating that any attempt by Sudan to interfere with Egypt's water quota, though improbable, "would undoubtedly have met an immediate Egyptian military response").

306. Deng, *supra* note 297, at 47-48.

307. El-Fadel et al., *supra* note 304, at 115.

308. Deng, *supra* note 297, at 46-47 (stating that some of the contingency plans date back to Muhammad Ali's rule in the 1800s).

309. Thomson, *supra* note 282.

310. OKBAZGHI YOHANNES, WATER RESOURCES AND INTER-RIPARIAN RELATIONSHIPS IN THE

River's current administration, predicated on defunct colonial-era agreements, remains woefully unequipped to tackle these daunting challenges. As the only major international basin without an overarching regulatory regime governing its utilization and management, the Nile Basin faces an uncertain future, including a potential descent into water-induced conflict.

However, if there is a loose consensus among Nile riparians that they face a serious collective action problem, there is far less unanimity over what a resolution should look like. This is a function, in part, of the underdeveloped state of international watercourse law which, despite a general embrace of equitable use principles, remains in a state of flux and is arguably too vague and contradictory to serve as the basis for a meaningful transboundary Nile Basin framework. Although Nile riparians have occasionally extolled the virtues of cooperation, the law's failure to coalesce around a set of firm and universally applicable rules has provided the basin's more prominent riparians, such as Egypt and Ethiopia, with a convenient excuse to invoke a host of archaic and conflicting theories of customary law whenever it suits their interests.

In a more fundamental sense, the failure of a transboundary water regime to emerge in the Nile Basin can be attributed to the fact that lower riparians still believe they have more to lose than gain from a reworking of the status quo. The converse, of course, is a sine qua non for any riparian's entry into an international watercourse agreement based on voluntary compliance. As John Waterbury has remarked, "[s]upranational regimes, no matter how needed, [do] not fall like rain from the heavens"[311]; in this case, they must be preceded by a recognition among all riparians that the costs of adhering to the prevailing order outweigh the benefits.

For Egypt, this moment has not yet come to pass, nor is it likely to anytime soon, no matter how poorly received its legal claims may be in the court of world opinion. Although conventional wisdom suggests that a basin-wide regime would inure to the benefit of all Nile riparians by providing credible guarantees regarding future water supply and quality, it ignores the fact that from Egypt's vantage point, consenting to such an arrangement would be considered tantamount to signing its own death sentence.

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311. WATERBURY, *supra* note 176, at 53. Waterbury contends that, under collection action theory, a use regime will only emerge when the "value of the public good created through equitable use will outweigh the sum of the private losses incurred by any riparian through participation in the regime." *Id.* at 30.