Recent legal and political changes in the Nile Region and their implications for equitable water sharing in the Nile River Basin

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1. Chapter One: Introduction

1.1 Research Question

Relations between Nile riparians have been hostile for a long time due to the unwillingness of downstream states—Egypt and Sudan—to share the Nile waters more equitably with upstream states; their reluctance is based on legal rights embodied in the 1929 and 1959 Nile waters agreements. However, the political situation has changed due to events in the Nile region during the first half of 2011, namely, Southern Sudan’s referendum for independence on 9 January, the start of Egypt’s revolution on 25 January, and the start of the construction of the Grand Millennium Dam (GMD) by Ethiopia at the beginning of April 2011.

The Nile Basin Initiative and the Cooperative Framework Agreement (CFA) are two processes exerting pressure on the downstream riparians to incorporate the principle of reasonable and equitable utilization into the Nile waters legal regime. The unilateral decision of Ethiopia to build the GMD created tension; the secession of South Sudan generated concerns about ‘who gets what’ of the water allocated to the former Republic of Sudan by the 1959 Agreement and about whether South Sudan will join the CFA or, rather, will align with Egypt and (North) Sudan in their opposition to it. At the same time, Egypt has finally had a major change in regime and is showing a more moderate approach to the sharing of the Nile waters.

With reference to the above, this thesis addresses the question: Do the recent events in the region—the secession of South Sudan, the unilateral act by Ethiopia of constructing the GMD—in the context of a regime change in Egypt, create an opportunity to incorporate a more equitable sharing of the waters in the Nile Basin legal regime?

1.2 Justification of Research

There is extensive literature on the Nile Basin. However, this research focuses on the recent and ongoing events in the region and their consequences for the legal regime of the Nile waters. Due, precisely, to the fact that the events covered are so recent, there are only a few academic papers on the topic and, to the knowledge of this author, there are no publications approaching the issue from the perspective of whether these recent events create an opportunity for a more equitable sharing of water in the Nile Basin.
1.3 Research Methodology

The research involved legal analysis of relevant treaties, applicable general international law, jurisprudence and literature.

In addition, the research closely followed news reports on the events mentioned above. However, since there was not much legal literature available on these specific events, and since the media is not always a reliable source in academic writing, this author soon realized that other sources of knowledge and information were needed. Thus, this research included attendance at two conferences on the topic and in-depth interviews with key stakeholders and experts of different disciplines.


1.4 Structure of the Thesis

This section presents the research question, justifies the need for new research in this topic and explains the methodology used.

Section 2 presents the legal framework of the Nile Basin. It revises colonial water agreements, with emphasis in the 1929 Agreement between Egypt and the UK (on behalf of Sudan and its Eastern African colonies), and presents the discussion about their validity. It also discusses post-colonial water agreements, with a focus on the 1959 Agreement between Egypt and Sudan —used as the basis for sharing the waters of the Nile between two states.

Section 3 analyses the changes in the legal and political context of the region during the last decade, with an emphasis on the events starting from January 2011. It describes the Nile Basin Initiative —launched in 1999—, negotiation process that gave birth to the Cooperative Framework Agreement signed in May 2010. It then turns to examine the secession of South Sudan, its effect on succession with respect to the 1959 Agreement, and its implications regarding a more equitable sharing of the Nile waters. Finally, it discusses the unilateral decision of Ethiopia to
build the Grand Millennium Dam and examines whether such decision and the negotiations it initiated open an opportunity to incorporate equitable sharing in the Nile legal regime.

Section 4 presents the most relevant findings and conclusions of this thesis.
2. Chapter Two: Legal Framework

2.1 Colonial Agreements

Several agreements on the Nile waters were signed during the colonial period. Among them, the colonial agreement of 1929 is particularly significant and marks a turning point in the Nile legal framework; the agreements before it paved the way to its conclusion whereas the agreements after it are considered to supplement it and elaborate upon its principles. The colonial agreements consistently restricted the action of upper riparian states with respect to water development projects that would adversely affect the flow of the Nile waters into the territory of the lower riparian states, Egypt and Sudan. After decolonization, all newly independent states involved in these agreements declared that they did not consider themselves bound by them, based, for the most part, on the Nyerere doctrine. However, a brief review of the colonial agreements will provide an understanding of how long the interests of Egypt and Sudan over the Nile waters have been protected.¹

2.1.1 Agreements before 1929

The first colonial agreement was a protocol signed in 1891 between the UK and Italy.² The relevant part required that the Italian government undertake “not to construct on the Atbara, in view of irrigation, any work which might sensibly modify its flow into the Nile”.³ According to scholars, this agreement lost its binding force with the end of the Italian and British colonial rule in the region.⁴

In 1902, the UK and Ethiopia signed an agreement stipulating that the King of Ethiopia engaged himself towards the UK “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 except in agreement with His Britannic Majesty’s Government and the Government of the

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³ Id. art. III. (Atbara is situated in North-East of Sudan.)
⁴ A. Garretson, The Nile Basin, in Garretson, Hayton, Olmstead (Eds.), The Law of International Drainage Basins, 291 (1967); See also Okidi, supra note 1, at 167 & infra note 73, at 323-24; Garretson, infra note 50, at 143.
Sudan.”⁵ Some argue that this agreement was never ratified by Ethiopia and therefore is not binding on it.⁶ As discussed in Chapter 3, section 4, the validity of this agreement is an issue not yet settled.

In 1906, the UK and the Congo signed a treaty to redefine their spheres of influence in Central Africa. It provided that the Congo undertake “not to construct, or to allow to be constructed, any work on or near the Semliki or Isango River, which would diminish the volume of water entering Lake Albert, except in agreement with the Sudanese Government”.⁷

Also in 1906, after Italy had lost control over Ethiopia, the UK, France and Italy signed an agreement reconfirming the terms of the 1891 Protocol and the 1902 Agreement.⁸ It provided that “in the event of the status quo laid down in Art. I being disturbed, France, Great Britain, and Italy shall make every effort to preserve the integrity of Ethiopia. In any case, they shall concert together […] in order to safeguard: (a) the interests of Great Britain and Egypt in the Nile Basin…”⁹

Later, in an Exchange of Notes in 1925 between the UK and Italy, the Italian Government “recognizing the prior hydraulic rights of Egypt and Sudan, will engage not to construct on the headwaters of the Blue or White Niles or their tributaries or effluents [sic] any work which might sensibly modify their flux into the main river”.¹⁰ In addition, this Exchange of Notes recognizes Egypt and Sudan’s “paramount hydraulic interests” in the Nile waters which are “vital to the prosperity and even the existence” of such states.¹¹ Ethiopia sent a letter to the League of Nations protesting that the intention of such exchange of notes was “to exert pressure upon it in order to obtain economic advantages” and therefore “could have no legal force” and “must be deemed to

⁵Treaties between Great Britain and Ethiopia, and between Great Britain, Italy, and Ethiopia, relative to the Frontiers between the Sudan, Ethiopia, and Eritrea, signed at Addis Ababa 15 May 1902. See E. Hertslet, supra note 2, Vol. II 431-2 No. 100, art. III.
⁹Id. art. IV.
¹⁰50 L.N.T.S. 282 (1925). See Letter from the British Ambassador at Rome to the Italian Prime Minister, Rome, December 14th, 1925. In this Exchange of Notes, both parties agree to support each other in order to obtain concessions from Ethiopia to construct a barrage in Lake Tsana and to construct and run a railway in favor of the UK and Italy, respectively.
¹¹Id. See Letter from the Italian Prime Minister to the British Ambassador at Rome, Rome, December 20th, 1925.
be null and void”. A reference to the letter of protest was inserted by the Secretary General of the League of Nations at the end of the exchange of notes. Kasimbazi argues that this agreement is not legally binding because Ethiopia’s protest generated official responses from the governments of the UK and Italy that prevented it from entering into force. In any case, the binding force of this exchange of notes on Ethiopia has also been questioned on the grounds that Ethiopia was not a party to it and its international legal personality was actually implicitly denied in the text of the notes.

Also in 1925, an Assurance by the British High Commissioner for Sudan stated that the British Government had “no intention of trespassing upon the natural and historic rights of Egypt in the waters of the Nile, which they recognize today no less than in the past.”

The Nile waters agreements signed before 1929 have several common features. First, they all restrict the right of the upper riparian states to undertake water development works that might “sensibly” or “adversely” modify the flow of the waters to the lower riparian states, Egypt and Sudan, thereby setting a precedent for the veto rights Egypt was invested with in the 1929 Agreement. Second, beginning in 1906, the colonial agreements started to recognize ‘prior’ or ‘natural and historical’ rights of Egypt to the Nile waters that were later officially acknowledged in the 1929 Agreement. Finally, these agreements are generally considered to have ceased to exist with the end of the colonial era. From 1891 to 1925, these agreements planted the seed of what would become one of the most controversial Nile waters agreements.

12 Supra note 10, see Letter from his Imperial and Royal Highness Ras Tafari Makonnen, Heir to the Throne and Regent of the Empire of Abyssinia, to the Secretary–General of the League of Nations. Under international law, a protest aims at rebutting any presumption of acquiescence in a particular claim or conduct in order to preserve the protesting State’s rights. See, e.g., C. Eick, Protest, in R. Wolfrum (Ed.), The Max Planck Encyclopedia of Public International Law (2008) online edition [www.mpepil.com] (accessed 13 June 2011).
13 Id. See Reply from the Secretary-General to his Imperial and Royal Highness Ras Tafari Makonnen, October 8th, 1926.
17 Okidi infra note 73, at 325.
2.1.2 1929 Agreement

Indeed, the 1929 Agreement has been highly debated. All Nile riparian states question its validity; notwithstanding, Egypt still bases its main claims to the Nile upon it, i.e., ‘natural and historical’ rights to the waters and veto rights over upstream water development works.

After Egypt’s independence, the new government initiated negotiations with the UK in order to secure irrigation and protect its water rights from any conflicting interests that upper riparian states might have.\(^{18}\) These negotiations led to the Nile Waters Agreement of 1929, an Exchange of Notes between the UK -acting on behalf of Sudan and its Eastern African colonies-\(^{19}\) and Egypt on the use of the Nile waters for irrigation.\(^{20}\)

Firstly, the 1929 Agreement officially recognizes the “natural and historical right of Egypt to the waters of the Nile”\(^{21}\) which is equivalent to admitting the primacy of Egypt’s water needs.\(^{22}\) Secondly, it invests Egypt with a right of veto over water development works undertaken by upstream riparian states which could jeopardize its interests.\(^{23}-^{24}\) Thirdly, it provides for water works to be administered “under the direct control of the Egyptian Government”.\(^{25}\) Consequently, the 1929 agreement reaffirms the status of Egypt as the main riparian state.\(^{26}\)


\(^{19}\) Uganda, Kenya and Tanganyika (today’s Tanzania).

\(^{20}\) Exchange of Notes between His Majesty’s Government in the United Kingdom and the Egyptian Government on the Use of Waters of the Nile for Irrigation. Cairo, 7 May, 1929, 93 L.N.T.S. 43, [Hereinafter 1929 Agreement].

\(^{21}\) Id. Note No 1, states that Egypt is willing to increase the quantity of water that Sudan is using until then “in so far as this would not infringe…the natural and historical rights of Egypt”. In addition, Note No 2, para. 4, states that the UK “has already recognized the natural and historical right of Egypt to the waters of the Nile” and that the observance of such rights is a “fundamental principle of the policy of Great Britain” that “will be observed irrespective of the time and circumstances."


\(^{23}\) Supra note 20, Note No 1, para. 4(ii), reads “Except with the prior consent of the Egyptian Government, no irrigation works shall be undertaken nor electric generators installed along the Nile and its branches nor on the lakes from which they flow if these lakes are situated in Sudan or in countries under British administration which could jeopardize the interests of Egypt either by reducing the quantity of water flowing into Egypt or appreciably changing the date of its flow or causing its level to drop.” This veto power is in line with restrictions on the action of upper riparian imposed by colonial agreements prior to 1929.

\(^{24}\) Egypt could commence water works without any authorization whatsoever. The only requirement is that, before starting works, Egypt should reach an agreement with the local authorities “on the measures to be taken in order to safeguard local interests.” See supra note 20, para. 4(iv).

\(^{25}\) Supra note 20, para. 4(iv).

One of the most disputed aspects of this agreement is the recognition of Egypt’s natural and historical rights to the Nile waters.\textsuperscript{27} The debate revolves around the scope (i.e., whether they refer to rights to previously appropriated waters only, or whether they also refer to rights to unappropriated waters) and the content (i.e., how much water Egypt is actually entitled to) of such rights.\textsuperscript{28} Regarding the scope, the travaux préparatoires\textsuperscript{29} as well as subsequent practice\textsuperscript{30} provide strong support to argue that ‘natural and historical’ rights in the 1929 Agreement refer not only to Egypt’s right to the water for land already under cultivation, but also to rights to unused waters.\textsuperscript{31} With respect to the content of such rights, customary international law prescribes that it is important to distinguish between rights to the quantities of water already appropriated and rights to the unappropriated quantities.\textsuperscript{32} Historic rights as legal rights to appropriated quantities of water are recognized by customary international law.\textsuperscript{33} Accordingly, in the 1929 Agreement, the parties agreed to the principle of natural and historical rights with respect to waters appropriated by Egypt, which they recognized as already-established Egyptian rights to such waters.\textsuperscript{34} The unappropriated quantities, however, are not rights acknowledged by customary international law.\textsuperscript{35} In fact, it is argued that the doctrine of prior appropriation does not give the first appropriator a right of preference upon the unappropriated water supply\textsuperscript{36} and that whatever validity historic rights based on long usage have in international law, such validity cannot extend beyond the limits of actual usage. Consequently, even though the travaux préparatoires and the subsequent practice indicate that Egypt’s natural and historical rights

\textsuperscript{27} See, generally, Batstone, infra note 31, at 529-30; Garretson, infra note 50, at 141-3; Caponera, supra note 16, at 660-1; Waterbury, supra note 6, at 281-2; Okidi, supra note 1, at 172 & infra note 73, at 327.


\textsuperscript{29} Mainly based on an exchange of notes between Ziwar Pasha –member of the 1925 Commission, and Lord Allenby –the British High Commissioner in Egypt. See infra note 31, at 528-9.

\textsuperscript{30} Vienna Convention on the Law of Treaties, 115 U.N.T.S. 331, arts. 31(b), 32.

\textsuperscript{31} R. Batstone, The Utilization of the Nile Waters, 8 Int’l & Comp. L. Q. 529 (1959); Godana, supra note 28, at 170.

\textsuperscript{32} Supra note 28, at 172.

\textsuperscript{33} Supra note 28, at 172.

\textsuperscript{34} Supra note 20, Note No 1, para. 2; Note No 2, para. 4. According to the travaux préparatoire, the 1929 agreement was based on the work of two Commissions, 1920 and 1925. The 1920 Commission reported that Egypt had an established claim to receive water to “irrigate an area equal to the largest area which has been irrigated in any single year since the Aswan Dam in its present form was completed, and that Egypt has an established claim to receive this water at the particular seasons when it is required”, see Garretson, supra note 4, at 268. In addition, the 1925 Commission proposed that it would be necessary from time to time to review the proposals set out in the report and considered it to be essential that in any such future review all established irrigation must be respected. See also Garretson, supra note 4, at 270.

\textsuperscript{35} Supra note 28, at 172.

\textsuperscript{36} Supra note 31, at 529-30.
include both already appropriated and unappropriated water, customary international law does not seem to support Egypt’s claim with respect to the latter. Notwithstanding, Egypt could still claim rights to water in excess to the already appropriated quantities based not on natural and historical rights, but on the basis of other needs, e.g., population dependent on the watercourse or economic needs.\

From the perspective of customary international water law, historical rights to appropriated waters are legitimate as long as they are in conformity with the customary law principle of equitable and reasonable utilization. Therefore, it is not necessary to fully abandon historical uses; rather, international water law provides a framework to enable riparian states to harmonize the exercise of natural and historical rights with the equitable and reasonable utilization of transboundary watercourses. The burden of proof would then rest on Egypt to establish that the enjoyment of its natural and historical rights to the Nile waters is equitable and reasonable.

With respect to the veto power conferred to Egypt by the 1929 Agreement, international law provides that a treaty creates neither obligations nor rights for a third state without its consent. Consequently, if the 1929 Agreement is still binding, as Egypt alleges, the right to veto upstream water works would only be enforceable upon Sudan, Kenya, Uganda and Tanzania, and only if the treaty had not been effectively repudiated by such states after decolonization. Indeed, Sudan declared that it did not consider itself bound by a treaty entered into on its behalf by the British colonial administration, objecting particularly to Egypt’s veto rights. Ethiopia, in turn,

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37 Supra note 31, at 530. In 1959, Batstone referred to factors that today are considered relevant in order to determine the whether certain use of the waters is equitable and reasonable. See also infra note 262, art. 6.
38 Helsinki Rules, infra note 264 art. VIII (1): “An existing reasonable use may continue in operation unless the factors justifying its continuance are outweighed by other factors leading to the conclusion that it be modified or terminated so as to accommodate a competing incompatible use”; see also infra note 262, art. 6: “Utilization of an international watercourse in an equitable and reasonable manner requires taking into account all relevant factors and circumstances, including: (e) Existing and potential uses of the watercourse”. Generally, the International Court of Justice has recognized the concept of historic title in cases where there is appropriate evidence of it. See, e.g., I. Brownlie, Principles of Public International Law 142 (2008).
41 Supra note 30, art. 34.
42 All riparian states disputed the validity of the 1929 Agreement primarily based on the Neyerere Doctrine.
has not considered itself bound to obtain Egypt’s prior consent since at least 1956.\(^{45}\) Kenya, Uganda and Tanzania adhered to the Nyerere doctrine in order to declare they were not bound by this treaty. In sum, strong disagreement regarding Egypt’s veto power made negotiations among riparians so difficult that it was only in 1999 that the parties were able to make a common effort to negotiate a comprehensive legal framework for the Nile.\(^{46}\)

Finally, another important aspect of this agreement is that for the first time Egypt acknowledges Sudan’s rights over the Nile waters. In fact, it recognizes Sudanese right to develop and to use the Nile waters to achieve its development goals.\(^{47}\) Nonetheless, Sudan’s water allocation was subordinated to Egypt’s water needs since the latter would agree to an increase in the amount of water used by the former only “in so far as this would not infringe […] its agricultural development needs.”\(^{48}\)

In conclusion, all of Egypt’s claims to natural and historical rights to the Nile have been based on the 1929 agreement. It has used the same agreement to veto water development works by upstream states that would prejudice its interests. Egypt has tried to impose this agreement not only upon the parties to it -Sudan and the UK Eastern African colonies- but also upon all the remaining Nile riparian states, with an emphasis on Ethiopia, the source of 85% of the Nile waters that flow into Egypt.

### 2.1.3 Agreements after 1929

Several agreements followed and were based on the 1929 Agreement. First, a supplementary to the 1929 Agreement was signed between the UK and Egypt in 1932 providing, inter alia, that Egypt would pay compensation for injury to Sudanese interests affected by the Jebel Awliya Dam (located in the north-central part of Sudan and included in the 1929 Agreement).\(^{49}\) Then, Belgium and the UK signed an agreement in 1934\(^{50}\) providing that if a signatory diverts water from a part of the Nile entirely within its territory it shall return such water to the river before it

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\(^{47}\) *Supra* note 20, Note No 1, para. 2; Okidi, *supra* note 1, at 172, and *infra* note 73, at 327.

\(^{48}\) *Supra* note 20, Note No 1, para 2; Dellapenna, *supra* note 45, at 241; Batstone, *supra* note 31, at 529 & 533; Knobelsdorf, *supra* note 18, at 627.

\(^{49}\) *Supra* note 4, at 285.

leaves its territory.\textsuperscript{51} In 1949, the UK (on behalf of Uganda) and Egypt signed an agreement regarding the construction of the Owen Falls Dam (located in Uganda).\textsuperscript{52} It provided that the Uganda Electricity Board (UEB, organ administering the dam) could take any action regarding the construction of the dam as long as it “does not entail any prejudice to the interests of Egypt in accordance with the Nile Waters Agreement of 1929.” \textsuperscript{53} In addition, it stated that the interests of Egypt will be represented at the site by an Egyptian resident engineer and that the discharges to be passed through the dam will be regulated on his instructions.\textsuperscript{54} The parties agreed to the financial arrangements for the construction of the Owen Falls Dam in 1952 providing that Egypt pay compensation to Uganda for injuries caused by the construction of the dam.\textsuperscript{55}

\section*{2.1.4 Validity of the Colonial Agreements}

The validity of colonial agreements beyond decolonization has been widely discussed.\textsuperscript{56} Two main doctrines developed to address this issue: ‘clean slate’ and universal succession except for certain types of treaties. The clean slate doctrine denies succession completely;\textsuperscript{57} that is, the successor state does not inherit any of the treaties concluded by its predecessor state.\textsuperscript{58} The universal succession doctrine, on the other hand, provides that a state would continue to be bound by all treaties save those which might lapse because of ‘frustration’ as at the date of independence.\textsuperscript{59} In practice, however, newly independent states adopted neither doctrine, but instead followed a more pragmatic approach allowing themselves some time to examine the respective treaties and decide whether to would continue to be bound by it.\textsuperscript{60} One example of this approach was the Nyerere doctrine; it takes the clean slate doctrine as a starting point but is less

\begin{thebibliography}{9}
\bibitem{51} Kasimbazi, \textit{supra} note 14, at 723; Garretson, \textit{supra} note 4, at 277.
\bibitem{53} \textit{Id.} Note No 1, para 5.
\bibitem{54} \textit{Id.} Note No 1, para 4.
\bibitem{56} \textit{See, e.g.,} D.P. O’Connell, State Succession in Municipal Law and International Law, Ch.8 (1967).
\bibitem{58} This doctrine was adopted by the 1978 Vienna Convention on Succession of States in Respect of Treaties, 1946 U.N.T.S. 3., art. 16, which has been widely criticized because it does not reflect state practice.
\bibitem{59} \textit{Supra} note 15, at 115.
\bibitem{60} \textit{Id.} at 113-9.
\end{thebibliography}
Prime Minister Nyerere of Tanganyika (today’s Tanzania) decided that his country would continue to apply British treaties for two years. During such period, the treaties would be examined and the relevant parties would be notified of the treaties Tanganyika wished to continue. Treaties that were not confirmed were considered to have lapsed save those succeeded to because of customary international law.

Regarding the validity of the 1929 Agreement specifically, the Nyerere doctrine was followed by all East African states after independence. Uganda considered the 1929 Agreement to have expired by the end of 1963 and Tanganyika declared that it did not consider itself bound by the agreement, not on the grounds of state succession, but because it was obsolescent. Sudan, in turn, declared that it did not consider itself bound by this agreement. In response to these declarations, Egypt argues that all Nile water agreements are to be considered territorial in nature and therefore binding beyond decolonization. Under international law, territorial agreements create rights and obligations considered as ‘attaching’ to the territories in question. Such agreements are unaffected by the rules of state succession and therefore devolve to the successor state automatically. Consequently, if Egypt’s argument is accepted, the declarations made by Sudan and the former East African colonies did not have the desired effect and the 1929 Agreement continues to bind them as any other territorial treaty.

A counter-argument has been elaborated on the basis of the temporary nature of the 1929 Agreement due to the fact that, at the time of the negotiations of the 1929 Agreement, Sudan was an Egyptian-British condominium, i.e., both states jointly exercised governmental authority over Sudanese territory. The political situation of Sudan was the reason why the parties expressly stated that the agreement was not regulating the status of Sudan (which would be dealt with later).

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62 O’Connell, supra note 56, at 116.
63 O’Connell, supra note 56, at 116.
64 Supra note 22, at 275.
65 Supra note 4, at 284.
66 Supra note 56, at 247.
67 Supra note 4, at 287
68 The position of Kenya with regard to the 1929 Agreement in particular is less known.
69 Supra note 58, art. 12.
70 Id. art. 11.
but only the use of water for irrigation. These provisions have been interpreted as proof of the fact that Egypt considered the 1929 Agreement as a temporary rather than a permanent measure, conditional on future political developments. The 1929 agreement was then not intended to be a ‘real’ or ‘dispositive’ or ‘territorial’ agreement and is thus affected by state succession and does not devolve automatically to the successor state. The declarations by Sudan and the former Eastern African colonies would have the desired effect and the 1929 Agreement would therefore no longer be binding upon them.

In light of these two arguments, it seems that the 1929 Agreement cannot be deemed a territorial treaty. If the critical requirement is that such a treaty creates rights and obligations ‘attaching to’ the parts of the river to which it relates, the fact that the 1929 Agreement is actually open to amendment whenever there is a change in the political circumstances of Sudan seem to prevents it from becoming territorial treaty. Consequently, it appears that the newly independent state concerned would only be bound by the 1929 Agreement if it notified its accession within a certain period of time.

Additionally, it has been argued that the 1929 Agreement was superseded by the 1959 Agreement and therefore it would no longer be a binding treaty. The relevant part of the 1959 Agreement reads “[A]nd as the Nile waters Agreement concluded in 1929 provided only for the partial use of the Nile waters and did not extend to include a complete control of the River waters, the two Republics have agreed on the following”. At first glimpse, it appears that this interpretation is consistent with the rule of customary international law providing for the termination of a treaty implied by the conclusion of a later treaty. In fact, first, it shows that the parties intended the matter to be governed by the 1959 Agreement instead of the 1929

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72 Supra note 20, Note No 1, paras. 1, 5; Note No 2, para. 3. The agreement could in no way be considered as “affecting the control of the River –this being a problem which will cover free discussions between the two Governments within the framework of negotiations on the Sudan.”
76 Garretson, supra note 4 at 287; Collins, supra note 22, at 156; Waterbury, supra note 6, at 284.
77 Infra note 87, Preamble.
78 Supra note 30, art. 59.
Second, the provisions of the 1959 Agreement are so incompatible with those of the 1929 Agreement that the two treaties are not capable of being applied at the same time. Nevertheless, a fundamental legal question arises from this interpretation which is whether the parties to both agreements are the same, and therefore, the requirement that all the parties to the previous agreement have to conclude the later agreement is fulfilled. The 1929 Agreement was concluded by the UK – on behalf of Sudan, Kenya, Uganda and Tanzania, and Egypt. The 1959 Agreement, on the other hand, was concluded by Egypt and (independent) Sudan. None of the scholars reviewed for this thesis referred to this issue. The basic question is then whether Kenya, Uganda and Tanzania must also to agree to the 1959 Agreement in order to consider that it has effectively superseded the 1929 Agreement. Or, in other words, whether the declaration by such states affirming not to be bound by the 1929 Agreement effectively excludes them from this agreement and therefore their participation in the 1959 Agreement is not required.

Should the theory of the replacement of the 1929 Agreement by the 1959 Agreement not prove successful, the analysis of the validity of the former would bring us back to theories of succession of colonial treaties and the debate of whether the 1929 Agreement is a territorial treaty or not. Notwithstanding, and if the 1929 agreement is eventually considered invalid, it can still be considered an indication of Egypt’s natural and historical rights. According to article 6 of the UN Watercourses Convention, ‘existing uses’ is a relevant factor to be considered in order to determine Egypt’s equitable and reasonable share of the Nile waters. Consequently, should Egypt need to prove that its use of the Nile waters is reasonable and equitable, it could support its claim, among other relevant factors, on natural and historical rights recognized not only by the 1959 Agreement but also by the 1929 Agreement and other colonial agreements dating back to 1906.

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79 Supra note 30, art. 59(1).
80 Id. art. 59(2).
81 Id. art. 59.
82 Infra note 168.
2.2 Post-Colonial Agreements

2.2.1 1959 Agreement

Immediately after its independence in 1956, Sudan declared that it did not consider itself bound by a treaty entered into on its behalf by the British colonial administration,\(^83\) objecting to Egypt’s veto rights and arguing that the agreement was too restrictive of Sudanese development.\(^84\) Consequently, Egypt and Sudan started negotiations towards a water sharing agreement which brought the parties to the verge of war in 1958 when Egypt moved troops to the border of Sudan reacting to a proposed dam project on Sudan’s portion of the Blue Nile.\(^85\) Only when a military regime friendly to Egypt assumed power, were peaceful relations between the two countries reestablished and negotiations restarted.\(^86\) Finally, in 1959 both states signed the Agreement for the Full Utilization of the Nile Waters which until today is the main instrument regulating their relations regarding the Nile waters.\(^87\)

In conformity with the 1929 Agreement, Sudan recognizes Egypt’s historic rights to the Nile waters and its status as main riparian. Indeed, Article 1 of the 1959 Agreement provides that Egypt’s “acquired right is 48 Milliards of cubic meters per year” and Sudan’s “acquired right is 4 Milliards of cubic meters per year”, both as measured at Aswan.\(^88\) Such was the amount of water used by each party until the 1959 Agreement was signed. Additionally, the parties agreed that once the water works regulated in the agreement began operating, the net benefit would be divided and added to their acquired rights. After such addition, each state’s share was fixed at 55.5 Milliards cubic meters (MCM) for Egypt and 18.5 MCM for Sudan.\(^89\) Any amount in excess of this share would be divided equally between the parties.\(^90\)

Furthermore, the agreement regulates cost sharing of projects for the utilization of lost waters in the Nile Basin.\(^91\) Most of these projects were to be developed in Sudan because the swamps of

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\(^{84}\) Supra note 44.

\(^{85}\) Supra note 18, at 629.

\(^{86}\) Id.

\(^{87}\) Agreement between the Republic of the Sudan and the United Arab Republic for the Full Utilization of the Nile Waters, Cairo 8 November 1959. 453 U.N.T.S. 6519 [Hereinafter 1959 Agreement].

\(^{88}\) Supra note 87, art. 1(1) & (2). A Milliard is a water measurement term equal to 1 billion cubic meters or 1 cubic kilometer. “Billion cubic meters” (BCM) is the more common usage today.

\(^{89}\) Supra note 87, art. 2(4).

\(^{90}\) Id.

\(^{91}\) Id. art. 3.
central Sudan were the main cause of water diversion.\textsuperscript{92} The parties would share the costs of them, with the exception that if Egypt needed water from a planned project at a time when Sudan did not need such project, Egypt could start execution at its own expense and Sudan would then contribute proportionally if it needed water from the project as well.\textsuperscript{93}

Finally, the parties agreed on forming a Permanent Joint Technical Commission (PJTC) to supervise the implementation of the 1959 Agreement. According to Abbas, Egypt and Sudan have both been actively engaged in the implementation of the 1959 Agreement. Up to the present time, the PJTC meets twice a year (once in Egypt, once in Sudan) and there are Egyptian engineers in Sudan and Sudanese engineers in Egypt monitoring the execution of the Agreement.\textsuperscript{94} Consequently, and despite the legal debate on the validity of the 1929 Agreement and on whether or not it was superseded by the 1959 Agreement, Abbas emphasized that, in practice, Egypt and Sudan consider only the 1959 Agreement valid to regulate the utilization of the Nile waters.\textsuperscript{95}

\subsection*{2.2.2 Validity of the 1959 Agreement}

One of the most disputed aspects of the 1959 Agreement is the water allocations it stipulates. Indeed, all the remaining Nile riparian states strongly contest the fact that the waters were divided between Egypt and the Sudan only, leaving them out of the allocation of water shares.\textsuperscript{96} For instance, Ethiopia issued a press release stating that it reserved its rights to the Nile waters in its territory for its own economic development\textsuperscript{97} and has persistently declared that it has all the rights to exploit its natural resources.\textsuperscript{98} According to international law, the 1959 Agreement is binding only upon Egypt and Sudan and creates neither obligations nor rights for the remaining

\textsuperscript{92} Supra note 26, art 112.
\textsuperscript{93} Supra note 87, art. 3(2).
\textsuperscript{94} Interview with Y. Abbas, IWMI Nile Basin and Eastern Africa Sub Region, UNESCO-IHE, Delft (22 June 2011).
\textsuperscript{95} It is generally understood that the 1959 Agreement updates water allocations under the 1929 Agreement. However, there is no consensus on whether the former has replaced the latter or, rather, both agreements form a comprehensive regime. Supra note 18, at 629. There are, however, some authors that affirm that the 1929 Agreement was indeed replaced by the 1959 Agreement. See also D. Zeleke Mekonnen, The Nile Basin Cooperative Framework Agreement Negotiations and the Adoption of a ‘Water Scarcity’ Paradigm: Flight into Obscurity or a Logical Cul-de-Sac? 21 Eur. J. Int’l L. 435 (2010); Okidi, supra note 1, at 182 (1959 Agreement was different in spirit from the 1929 Agreement, Egypt and Sudan were beginning nearly with tabula rasa); Peichert, infra note117, at 117; Carroll, infra note 96, at 280.
\textsuperscript{97} Supra note 18, at 635.
\textsuperscript{98} Supra note 1, at 193.
eight riparian states without their consent.\textsuperscript{99} Therefore, their rights and obligations in the Nile River remain unaffected by the treaty.

It is true that Egypt and Sudan ignored the rights of upper riparian states in the 1959 Agreement;\textsuperscript{100} however, both states are conscious of the existence of such rights.\textsuperscript{101} Judging from article 5(2) Egypt and the Sudan did not intend to bind the other riparian states to the terms of such agreement\textsuperscript{102} and were aware that they could, at some point, raise claims regarding their rights to the waters. In relevant part, article 5(2) reads: “As the riparian states, other than the two Republics, claim a share in the Nile waters, the two Republics have agreed that they shall jointly consider and reach one unified view regarding the such claims”\textsuperscript{103} This provision not only acknowledges the rights of the remaining Nile riparian states but also leaves open the possibility that they actually claim such rights. Teclaff argued in 1967 that when upstream riparians start using Nile waters appreciably, the treaty would need to be rewritten to include the whole basin\textsuperscript{104}.

Lastly, water allocations in the 1959 Agreement do not follow the principle of equitable and reasonable utilization. Since such principle has become customary international law, the question is whether this agreement should be revised and adjusted accordingly in order to provide for a more equitable use of the Nile waters. In the Gabcikovo-Nagymaros case, the ICJ ruled that the incorporation of new rules of customary international law into a treaty is not automatic.\textsuperscript{105} Egypt and Sudan would then need to agree on adjusting the 1959 Agreement to the customary international water law of equitable use. Egypt strongly opposes any amendment of this agreement out of fear that its share would be reduced. Sudan, in turn, due to its internal political circumstances, does not see the amendment of the agreement as a priority.\textsuperscript{106} So an amendment to the 1959 Agreement seems very unlikely, even more if based on the principle of equitable use.

Without prejudice to the above, recent political changes in the region bring winds of change to the Nile basin regime and may open an opportunity for a more equitable water sharing. In fact,

\textsuperscript{99} Supra note 30, art. 34.
\textsuperscript{100} Caponera, supra note 16, at 660; Knobelsdorf, supra note 18, at 627.
\textsuperscript{101} Supra note 50, at 142.
\textsuperscript{102} Id. at 141. In any case, this would have not been possible because of the rule that treaties are only binding to the parties to it.
\textsuperscript{103} Supra note 87, art. 5(2) which adds “And if the said consideration results in the acceptance of allotting an amount of the Nile water to one of the other of the said states, the accepted amount shall be deducted from the shares of the two Republics in equal parts, as calculated at Aswan.”
\textsuperscript{104} L. Teclaff, The River Basin in History and Law 163 (1967).
\textsuperscript{105} Supra note 74, paras. 89-115.
\textsuperscript{106} Interview with S. Salman, Former Lead Counsel and Water Law Adviser, Legal Vice Presidency, World Bank, in Geneva (8 July 2011).
the new prominence of Ethiopia in the region as a result of the regime change in Egypt and the construction of the Grand Millennium Dam (which will allow it to trade hydro-electrical power with neighboring countries) might put Ethiopia in a position to push harder to obtain the ratification of the Cooperative Framework Agreement which incorporates equitable use. Additionally, it is still unknown whether the new state of South Sudan will claim any rights to the Nile waters and, if so, what the exact content of such claims will be. Should Sudan and South Sudan need more water than the share allocated in the 1959 Agreement, they might try to exert pressure in order to revise it. Furthermore, Egypt’s current population of 80 million is expected to double by 2050. Consequently, Nile riparian states might eventually contemplate the possibility of a more equitable sharing of the waters.

Should Egypt consider the possibility of incorporating reasonable and equitable utilization into the Nile waters regime that would not necessarily diminish its allocated share and might actually increase it. First, several relevant factors need to be considered in order to ascertain whether the use of a watercourse state is reasonable and equitable. As discussed below, the UN Watercourses Convention and the Helsinki Rules provide guidance in this respect, but is in no way an exhaustive list of relevant factors. Then, Egypt could argue on the basis of any other factors it considers relevant. Second, existing uses are recognized as one of such relevant factors and so are other factors such as the population dependent on the resource, existence of alternative sources of water and the impact of climate change.107

In sum, the 1959 Agreement establishes a regime that is only binding on the parties to it, that is, Egypt and Sudan. The remaining eight riparian states, even though not legally bound by such treaty, strongly dispute that the total amount of waters was divided between only two states. Notwithstanding the fact the Egypt and Sudan seemed to be aware of future claims by other riparians, no recognition of such claims has been made so far based on article 5(2) of the agreement. Recent changes in the politics of the region might change this scenario providing, for the first time, an opportunity to incorporate a more equitable allocation of the waters.

2.2.3 Other Post-Colonial Agreements

Nile riparian states signed several agreements after 1959. In 1967, Egypt, Sudan, Kenya, Tanzania, and Uganda signed an agreement which was the basis for the Hydromet Project re-

107 UNWCC, infra note 262, art. 6.
launched in the early 1980s with support from the UN Development Program and the World Meteorological Organization\textsuperscript{108}. In 1977, Burundi, Rwanda, Tanzania and Uganda created a basin-wide management regime for the Kagera River.\textsuperscript{109} In 1992, an agreement established TECCONILE (1992-95), a transitional follow-up arrangement to the Hydromet Project,\textsuperscript{110} which created a Nile River Basin Action Plan this time involving all riparian states (Ethiopia and Kenya had consistently rejected to participate in the previous attempts to have a comprehensive cooperative framework).\textsuperscript{111} In practice, this Action Plan achieved very little implementation and was superseded by the Nile River Basin Strategic Action Program in 1999. In the same year, the Nile Basin Initiative replaced TECCONILE.


\textsuperscript{110} \textit{Supra} note 46, at, 132.

\textsuperscript{111} \textit{Id.} at 134.

3.1 Nile Basin Initiative

Formally launched in February 1999, the Nile Basin Initiative (NBI) is a partnership of 9 of the 10 riparian states.\(^{112}\) Eritrea remains an observer and not a full member, possibly because of its limited interests and stakes in the Nile.\(^{113}\) The NBI is based on member states’ shared vision “to achieve sustainable socio-economic development through the equitable utilization of, and benefit from, the common Nile Basin water resources.”\(^{114}\) It provides an institutional mechanism, a shared vision and a set of agreed policy guidelines to provide a “basin-wide framework for cooperative action.”\(^{115}\) The NBI aims to develop the Nile River in a cooperative manner, share socio-economic benefits, and promote regional peace and security.\(^{116}\) The NBI has been the most serious effort thus far to prevent conflict through dialogue and partnership in the Nile River.\(^{117}\)

The NBI was invested with international legal personality on a transitional basis in 2002.\(^{118}\) It is governed by the Nile Council of Ministers (NILECOM), the Technical Advisory Committee (NILETAC) and the NBI Secretariat (NILE SEC).\(^{119}\) The NILECOM is the highest decision-making body, is composed of Ministers of water affairs of the riparian states and its chairpersonship is on a rotational one-year basis.\(^{120}\) The NILETAC is composed of technical representatives from the riparian states and offers technical support and advice to the NILECOM on matters related to the management and development of the Nile waters.\(^{121}\) Finally, the NILE

\(^{112}\) The NBI is comprised of Burundi, Democratic Republic of Congo, Egypt, Ethiopia, Kenya, Rwanda, Sudan, Tanzania and Uganda.

\(^{113}\) S. Salman, *The new state of South Sudan and the hydro-politics of the Nile Basin*, 36 Water International 2 (2011), at 160. It is also argued that other factors would be that its relations with Ethiopia after the Eritrea-Ethiopian war 1998-2000 are still sensitive (in fact, Ethiopia continues to occupy Badme, a territory the UN Eritrea-Ethiopia Boundary Commission established belonged to Eritrea in 2002) and Eritrea’s interest in maintaining good relations with Egypt and avoiding to place itself in any position that would make it take sides against Egypt or Sudan, e.g., negotiations in the context of the NBI. Interview with A. Mehari Haile, Spate Irrigation Design and Management Expert, UNESCO-IHE, in Delft (26 May 2011).

\(^{114}\) See S. Burchi & M. Spreij, *Institutions for International Water Management*, Report, FAO Legal Office 10 (2003), stating that Eritrea has expressed its interest in joining the NBI as a full member.

\(^{115}\) Id.

\(^{116}\) Id.


\(^{119}\) Supra note 114.

\(^{120}\) Currently, the chairperson is H.E. Alemayehu Tegenu of Ethiopia.

\(^{121}\) Supra note 114.
SEC is the executive body of the NBI supporting the activities of the NILECOM and the NILETAC regarding financial management, logistical support and administration.\(^{122}\)

Two programs form part of the NBI: Strategic Action Program, the Shared Vision Program (SVP) and the Subsidiary Action Program (SAP). The SVP focuses on projects at a basin level, while the SAP on projects at a sub-basin level.\(^{123}\) The Nile Equatorial Lakes SAP (NELSAP) and the Eastern Nile SAP (ENSAP) are current examples of the latter. The NELSAP includes Burundi, Democratic Republic of Congo, Kenya, Rwanda, Tanzania and Uganda, as well as Egypt and Sudan.\(^ {124}\) It aims to contribute to the eradication of poverty, promote economic growth, and reverse environmental degradation.\(^{125}\) The ENSAP, on the other hand, is an investment program by the governments of Egypt, Ethiopia and Sudan that shares the same objectives as NELSAP but has a more sophisticated institutional structure.\(^ {126}\) It is led by the Eastern Nile Council of Ministers (ENCOM)\(^ {127}\) which established the Eastern Nile Technical Regional Office (ENTRO) headquartered in Ethiopia.\(^ {128}\) ENTRO is a regional international organization headquartered in Addis Ababa\(^ {129}\) that manages ENSAP projects and provides capacity building in social development, input in project design, formulation of guidelines and the initiation of pilot and background studies and analysis.\(^ {130}\) ENTRO aims at realizing a cooperative sustainable development of the Eastern Nile in which the three states involved can benefit from the river. It is considered a good example of an effort to build confidence in order to foster cooperation.\(^ {131}\) According to Abbas, despite its good performance, ENTRO stopped working because of the signature of the CFA in May 2010.\(^ {132}\) Now, Egypt, Sudan and Ethiopia have formed a Committee inspired in ENTRO away from the politics of the NBI.\(^ {133}\)

\(^{122}\) NILESEC offices are located in Entebbe, Uganda.
\(^{123}\) Supra note 114.
\(^ {124}\) Id.
\(^ {125}\) Currently, studies for a development project in Gucha Migori River Basin in Kenya promoted by the NELSAP are taking place funded by the World Bank Nile Basin Trust Fund. See, e.g., http://www.waterpowermagazine.com/story.asp?sectioncode=257&storyCode=2059577
\(^ {127}\) Comprised of water ministers of Egypt, Sudan and Ethiopia and an ENSAP Team formed of three technical country teams.
\(^ {128}\) Supra note 126.
\(^ {129}\) Id. ENTRO enjoys international legal personality and thus is entitled to, e.g., receive and administer grants funding its activities and to enter into legally binding agreements.
\(^ {130}\) Supra note 126.
\(^ {132}\) Supra note 94.
\(^ {133}\) Id.
The NBI is funded by contributions made by the riparian states as well as donor partners.\textsuperscript{134} In partnership with the UNDP and the Canadian International Development Agency (CIDA) the International Consortium for Cooperation on the Nile (ICCON) was established; donors committed about US $130 million to the NBI in 2001.\textsuperscript{135} The Nile Basin Trust Fund (NBTF) was established in 2003, administered by the World Bank (WB)\textsuperscript{136} and overseen by a committee comprised of donors, the NBI and the WB.\textsuperscript{137} The NBTF transfers funds to the NBI to implement SVP as well as sub-basin programs in the ENSAP and the NELSAP. Local costs of SVP projects are borne by the host state.\textsuperscript{138} Once a permanent institutional framework for the Nile Basin is established, the NBTF will be transferred to an institution in such framework.\textsuperscript{139}

Until 1999, and despite several attempts to bring the parties together\textsuperscript{140}, the riparian states strongly disagreed on the veto power conferred to Egypt and Sudan by both the 1929 and 1959 Agreements and, generally, on the legal status of such agreements\textsuperscript{141}. For this reason, it is remarkable that, for the first time in the history of the Nile, all ten riparian states took part in the NBI in a common effort to regulate the Nile waters\textsuperscript{142} that reflects a new spirit of cooperation\textsuperscript{143}. The NBI was meant to be a transitional institution towards a new, comprehensive and permanent water management agreement that would replace the 1959 Agreement.\textsuperscript{144} However, Egypt was opposed to this idea from the very beginning.\textsuperscript{145} A forum was set up (the Co-operative Framework) to undergo negotiations towards a legal and institutional framework acceptable to all riparians.\textsuperscript{146} An independent study team was given the task of preparing a draft for a
Cooperative Framework Agreement (CFA) and was asked to consider as many relevant provisions of international water laws on transboundary rivers as possible.\textsuperscript{147}

A draft CFA was presented to a panel of experts in 1999; the panel delivered a revised version to the riparian states which, in turn, made several reservations to it.\textsuperscript{148} For instance, Ethiopia made reservations to provisions regarding prior notification for planned projects and providing that upstream water utilization should not cause significant harm to downstream users.\textsuperscript{149} Egypt and Sudan made reservations to provisions affecting existing projects such as those regarding environmental audits.\textsuperscript{150} Due to the many reservations, the draft agreement was not signed and the NBI announced in 2000 that ‘substantive issues in the cooperative framework remain unresolved’.\textsuperscript{151} In the same year, a new committee was formed to work on a new draft; however, no consensus was reached among the parties because they felt that their national interests were threatened.\textsuperscript{152}

It was only in 2007 that agreement on most provisions was achieved.\textsuperscript{153} However, article 14(b) of the draft CFA remained highly disputed because upper riparian states did not accept the Egyptian-Sudanese amendment regarding their historical rights recognized in the 1959 Agreement. In addition, there was strong disagreement on the concept of water security.\textsuperscript{154} The draft was discussed again at the NILECOM meeting in Kinshasa, in May 2009, and, since no agreement was reached on the full text, the NILECOM adopted the agreed sections of it, leaving article 14(b) to be resolved by the Nile River Basin Commission (provided for in the CFA) once established.\textsuperscript{155} The NILECOM set a time-limit of six months for riparian states to conclude a CFA, expressing the hope that this would be the last step in the negotiation process.\textsuperscript{156} However, as of the time of writing, this hope is yet to be realized. In May 2010, five riparian states

\begin{footnotesize}
\textsuperscript{147} Supra note 144, at 110.
\textsuperscript{148} Id. at 111.
\textsuperscript{149} Id.
\textsuperscript{150} Id.
\textsuperscript{151} Id. at 112.
\textsuperscript{152} Id.
\textsuperscript{153} A draft CFA was submitted to the NILECOM in Entebbe, Uganda, in June 2007.
\textsuperscript{154} Zeleke Mekonnen, supra note 95, at 428.
\textsuperscript{156} Zeleke Mekonnen, supra note 95, at 429.
\end{footnotesize}
(Ethiopia, Kenya, Rwanda, Tanzania and Uganda) signed the CFA\footnote{157}{Supra note 114.}, despite the opposition of Egypt and Sudan, exacerbating the tensions in the region\footnote{158}{Infra note 195, at 161.}. By the end of 2010, the existence of mutual distrust was revealed by accusations and threats reported in the media,\footnote{159}{Id.} including reference to a potential water war based on declarations made by political leaders.\footnote{160}{See, e.g., Ethiopia PM warns of Nile war, Aljazeera, 24 November 2010, available at http://english.aljazeera.net/news/middleeast/2010/11/20101124152728280839.html (accessed May 24, 2011); K. Diab, The curse of the Nile, Guardian, 5 December 2010, available at http://www.guardian.co.uk/commentisfree/2010/dec/05/nile-egypt-water-war-ethiopia (accessed May 24, 2011).}

### 3.2 Cooperative Framework Agreement


The Preamble of the CFA expresses the desire to strengthen cooperation among riparians in order to achieve sustainable development in the Nile Basin. In addition, it acknowledges the need for a framework agreement to promote integrated management, harmonious utilization of the
water and conservation and protection for the benefit of present and future generations. In Part I, it enumerates the general principles according to which the waters shall be protected, used, conserved and developed; among them are equitable and reasonable utilization, prevention of the causing of significant harm, information concerning planned measures, cooperation and peaceful resolution of disputes.

Part II of the CFA contains the rights and obligations of the states party to the agreement including the obligation to utilize the Nile waters in an equitable and reasonable manner, to take all appropriate measures to prevent the causing of significant harm to other riparian states and to exchange information on planned measures. Naturally, all these obligations entail the correlative right of each riparian states to demand their fulfillment.

The Nile River Basin Commission (the Commission) is at the top of the institutional structure set forth by the CFA and is comprised of the Conference of Heads of State and Government (the Conference), the Council of Ministers (the Council), the Technical Advisory Committee (the TAC), Sectoral Advisory Committees (SACs), and the Secretariat. The mandate of the Commission is to promote and facilitate the implementation of the principles, rights and obligations provided for in the CFA; to serve as an institutional framework for cooperation among the riparian states; and, in an attempt to institutionalize a more comprehensive approach, to facilitate closer cooperation among the States and peoples of the Nile River Basin in the social, economic and cultural fields. It enjoys international legal personality, privileges and immunities as necessary to perform its functions and will be headquartered in Entebbe, Uganda.

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167 Supra note 164, Preamble.
168 Id. art. 3. Some of these principles are established customary international water law codified in the UN Convention on the Law of the Non-navigational Uses of International Watercourses, GA Res. 51/229, Annex (May 21, 1997), e.g., equitable and reasonable utilization (art.5); obligation not to cause harm (art.6) and prior notification in respect of planned measures (art.12). Other principles are innovative such as the subsidiarity principle elaborated in art. 10(a) which promotes participation and democratizes management of the Nile. See infra note 182.
169 Supra note 164, art. 4.
170 Id. art. 5.
171 Id. art. 8.
172 Id. art. 14.
173 Id. Part III, Institutional Structure.
174 Id. art. 16.
175 Id. arts. 18-19.
The Conference is the supreme policy-making organ of the Commission. The Council is its governing body and is composed of the Minister of Water Affairs of each Nile Basin State. The TAC is composed of two members from each Nile Basin State and provides technical support to the Council. The SACs may be established by the Council to deal with specific sectoral matters and shall be composed of one member from each State party. Finally, the Secretariat, headquartered in Entebbe, Uganda, will be headed by an Executive Secretary appointed for a 3-year term, accountable to the Council through the TAC.

There is consensus on the need for the Commission. Its establishment is considered to be the most significant aspect of the CFA because it creates a mechanism for facilitating cooperation, preventing disputes and, most importantly, for discussing sensitive issues outside the political arena. The Commission will succeed to all rights, obligations and assets of the NBI upon the entry into force of the CFA.

Article 14(b) on water security and current uses and rights is still in dispute since Egypt and Sudan, the downstream countries, are not willing to give up their current shares of the Nile waters established by the 1959 Agreement. After the end of the negotiations, no consensus was reached on Article 14 (b) which incorporates the concept of water security and reads “Nile Basin States therefore agree, in a spirit of cooperation: (b) not to significantly affect the water security of any other Nile Basin State”. All countries agreed to this proposal except Egypt and Sudan. Egypt proposed that art. 14 (b) should be replaced by the following wording “not to adversely affect the water security and current uses and rights of any other Nile Basin State” (emphasis added). This discussion took the riparian states to a deadlock and, in the current state of affairs, it seems unlikely that the negotiations will progress. For instance, Ethiopia does

\[\text{\footnotesize 176 Supra note 164, art. 21.}\]
\[\text{\footnotesize 177 Id. art. 22, 24.}\]
\[\text{\footnotesize 178 Id. art. 25-26.}\]
\[\text{\footnotesize 179 Id. art. 27.}\]
\[\text{\footnotesize 180 Id. art. 29.}\]
\[\text{\footnotesize 181 Interview with L. Boisson de Chazournes, Professor, Faculty of Law, University of Geneva, in Geneva (18 May 2011).}\]
\[\text{\footnotesize 183 Supra note 164, art. 30.}\]
\[\text{\footnotesize 184 Zeleke Mekonnen, supra note 95, at 428.}\]
\[\text{\footnotesize 185 Supra note 164, footnote No. 6.}\]
\[\text{\footnotesize 186 Id.}\]
not and will never accept the 1959 Agreement\textsuperscript{187} and Egypt cannot risk a reduction of its ‘current uses and rights’. In April this year, the Egyptian Water Resources Minister said that the CFA did not provide for a redistribution of water quotas, which means it would not deprive Egypt of its rights to the water.\textsuperscript{188} However, more needs to be done in order for Egypt to change its attitude.

Finally, it remains to be seen whether the new state of South Sudan will accede to the CFA or align itself with Egypt and Sudan.

### 3.3 Secessions of South Sudan

A formal declaration of independence of South Sudan was made on 9 July 2011,\textsuperscript{189} making it the 11\textsuperscript{th} Nile riparian state. North Sudan (hereinafter Sudan) will continue the international legal personality of the Republic of Sudan while South Sudan will start its existence as a new sovereign state. This section discusses the legal effects of the secession of South Sudan on international treaties, specifically the 1959 Agreement, and whether such secession constitutes a fundamental change of circumstances -in terms of article 62 of the Vienna Convention on the Law of Treaties (VCLT), allowing for its revision. In order to assess these legal consequences accurately, it is necessary to examine the provisions on water resources contained in the Comprehensive Peace Agreement and the Interim Constitution which ruled the Republic of Sudan during the 6-year interim period from 2005 to 2011.

The Republic of Sudan suffered from protracted civil wars. The first civil war lasted from 1951 to 1972 and the second from 1983 to 1989 following a coup d’etat led by current president Omar al-Bashir.\textsuperscript{190} Peace negotiations led to the Comprehensive Peace Agreement (CPA) signed between the government of Sudan and the Sudan People’s Liberation Movement/Sudan People’s Liberation Army (SPLM/A) in January 9, 2005.\textsuperscript{191} The CPA put in place radical political

\textsuperscript{187} Interview with H.E. A. Tegenu, Minister of Water and Energy of Ethiopia, in London (14 June 2011).
structures for the division of power and wealth between North and South Sudan\textsuperscript{192} and, more importantly, it recognized the right of the people of South Sudan to self-determination.\textsuperscript{193} In fact, it stipulated that, after a 6-year interim period, the people of South Sudan would determine their future status through a referendum in order “to confirm the unity of the Sudan by voting to adopt the system of government established under the CPA, or to vote for secession”.\textsuperscript{194} In January 2011, the South Sudanese people voted in a referendum to secede from Sudan.\textsuperscript{195}

The CPA and the Interim Constitution set forth a clear distribution of responsibilities over water resources between the National Government and the Government of South Sudan. Indeed, provisions on water resources in the Power Sharing Agreement of the CPA --reiterated in the Interim Constitution-- stipulate that the National Government has exclusive competency with respect to the “Nile Water Commission, the management of the Nile Waters, transboundary waters and disputes arising from the management of interstate waters between Northern states and any dispute between Northern and Southern states”.\textsuperscript{196} In contrast, it provides that the exclusive powers of South Sudan include the coordination of Southern Sudanese services or the establishment of minimum standards or uniform norms in, inter alia, the provision of water and waste management services.\textsuperscript{197} Additionally, South Sudan has jurisdiction only over disputes arising from the management of interstate waters \textit{strictly within} its territory (emphasis added).\textsuperscript{198} Exclusive jurisdiction of the National Government with respect to the Nile waters was established despite the fact that a large part of the Nile falls within Southern Sudan\textsuperscript{199} and that

\textsuperscript{192} The CPA consists of a Chapeau, six separate protocols and agreements (Machakos Protocol, Security Arrangements, Wealth Sharing Agreement, Power Sharing Agreement, the Agreement on the Resolution of the Conflict in the Two States of Southern Kordofan and Blue Nile and the agreement on the Resolution of the Abyei Conflict), and two annexes. The main undertakings under the different protocols and agreements are reflected in the Interim National Constitution of the Republic of the Sudan, adopted on July 6, 2005, six months after the conclusion of the CPA. \textit{Infra} note 193.
\textsuperscript{194} \textit{Supra} note 191, Machakos Protocol, para 2.5.
\textsuperscript{196} Power Sharing Agreement, Schedule A (33) reiterated in the Interim Constitution, Schedule A (33).
\textsuperscript{197} Power Sharing Agreement, Schedule B, para 9, reiterated as paragraph 9 of Schedule B of the Interim Constitution.
\textsuperscript{198} Id. para. 19.
\textsuperscript{199} \textit{Supra} note 193, at 306-308. Actually, the Sudd swamp is located in South Sudan. It is one of the world’s largest wetlands covering an area of 500 km south to north and 200 km east to west.
the projects for augmenting the waters of the Nile are also mostly in the South.200 These stipulations contributed to the minimal role played by South Sudan concerning the Nile waters.

In fact, during the interim period, the SPLM/A did not have any explicit or active role in the sharing and management of the Nile waters and did not demand representation in the Nile Permanent Technical Joint Committee established by the 1959 Agreement. Salman argues that there are two reasons for this decision. First, some of the Nile riparian states were concerned about the complications an eleventh riparian would bring to the table and the SPLM/A did not want to jeopardize the exercise of their right to self-determination by becoming entangled in Nile politics.201 Second, South Sudan had no need for a share of the water during the interim period and no projects affecting the swamp areas in its territory were discussed or planned by the Technical Committee.202 Both the exclusive jurisdiction of the National Government regarding the Nile waters and the passive role adopted by the SPLM/A are an indication that North Sudan, rather than the South, was actually exercising rights and performing obligations under the 1959 Agreement.

There is no generally accepted codification of the law of state secession and its effects on treaty succession. In addition, state practice lacks uniformity and is to a large extent influenced by political considerations.203 Shaw states that, as a general rule, when one state secedes from another and creates a new state, the former continues with its international rights and obligations intact, albeit territorially reduced.204 The newly created state, in turn, would commence international life free from the treaty rights and obligations of its former sovereign.205 According to this interpretation, Sudan would continue the legal personality of the former Republic of Sudan whereas South Sudan would commence international life with a clean slate. Unfortunately, it is not as simple in practice. When examining succession of water agreements—such as the 1959 Agreement— one fundamental issue that needs to be considered is whether water agreements are territorial agreements.

200 Supra note 193, at 311.
201 Id. at 312-3.
202 Id. at 313.
205 Id. at 974.
Article 12 of the Vienna Convention on Succession to Treaties (VCST) provides that treaties of a territorial character, i.e., treaties that create rights and obligations ‘attaching to’ the territories to which they relate, are unaffected by state succession. It is widely stated that the VCST does not reflect customary international law. In the Gabcikovo-Nagymaros case, however, the International Court of Justice (ICJ) considers that Article 12 does reflect a rule of customary international law. In this case, Hungary argued that the 1977 Treaty between Hungary and Czechoslovakia ceased to be in force as a result of the disappearance of one of the parties (Czechoslovakia) and that “there is no rule of international law which provides for automatic succession to bilateral treaties on the disappearance of a party”. Slovakia, on the other hand, argued that there is a “general rule of continuity which applies in the case of dissolution”. According to the judgment, the major elements of the 1977 Treaty were “the proposed construction and joint operation of a large, integrated and indivisible complex of structures and installations on specific parts of the territories” of the contracting states along the Danube. The treaty also established the navigational regime for “the relocation of the main international shipping lane to the bypass canal” creating “a situation in which the interests of other users of the Danube were affected.” In its reasoning, the Court also refers to the ILC Commentary on the Draft Articles on Succession of States in Respect to Treaties which indicates that “treaties concerning water rights or navigation on rivers are commonly regarded as candidates for inclusion in the category of territorial treaties.” The Court ruled that “the content of the 1977 Treaty indicates that it must be regarded as establishing a territorial regime within the meaning of Article 12” of the VCST “creating rights and obligations ‘attaching to’ the parts of the Danube to which it relates”. Thus, the 1977 Treaty cannot be affected by succession of states.

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206 Vienna Convention on Succession of States in Respect of Treaties, 1946 U.N.T.S. 3, art. 34 [Hereinafter VCST].
207 See, e.g., Shaw, supra note 204, at 976; Zimmermann, supra note 203.
208 Supra note 74, para. 123.
209 Id. para. 118.
210 Id. para. 120.
211 Id. para. 123.
212 Id..
213 Id.
214 Id.
The legal question in the context of state succession to treaties in Sudan is whether the 1959 Agreement is a territorial treaty within the meaning of Article 12 and, thus, creates rights and obligations ‘attaching to’ the parts of the Nile to which it relates.

First of all, the 1959 Agreement does not contain any boundary provisions; therefore, it is not a boundary treaty per se. Secondly, it does not regulate navigational rights, which are widely considered to be territorial rights due to similarity to a right of passage.\(^{215}\) That said, an aspect that resembles the 1977 Treaty is that one of the major elements of the 1959 Agreement was to regulate the construction of water projects on specific parts of the territories of Egypt and Sudan along the Nile;\(^{216}\) this is similar in nature to the system of locks on the Danube regulated in the 1977 Treaty. Since the Court considered that such a system of locks created rights and obligations ‘attaching to’ the river, it could be argued that equivalent infrastructures on the Nile also create territorial rights and obligations and, thus, the 1959 Agreement is not affected by state succession due to the secession of South Sudan.

As mentioned before, there is no uniform state practice regarding succession to international treaties. In addition, continuation of treaties depends not only on the will of the states involved in the succession, but also on the consent of the other contracting parties to the respective treaties. For instance, in the case of Czechoslovakia the former state disappeared and two new states were created: Slovakia and the Czech Republic. These two states agreed to continue all the treaties to which Czechoslovakia was a party. However, third states party to the treaties reacted in different ways regarding the acceptance of such continuation. For instance, Sweden and Norway accepted such continuity; Switzerland, on the other hand, accepted continuity only with respect to some of them.\(^{217}\) Thus, even if the states concerned decide to continue the treaties, the actual continuity of the treaty depends on the consent of the other states party to it, particularly if it is a bilateral treaty. Generally, Sudan and South Sudan could choose among (a) universal continuity by issuing a unilateral declaration of succession; (b) reviewing each treaty and notify contracting parties of the treaties they wish to continue; or (c) allowing South Sudan, which does not continue the legal personality of the Republic of Sudan, to start its existence with a clean slate as long as it follows the rules of general international law. Additionally, Egypt, as the other


\(^{217}\) *Supra* note 215.
contracting party to the 1959 Agreement, would still have the opportunity to oppose to the terms of the succession. For instance, if Sudan and South Sudan decide that only Sudan continues the 1959 Agreement, Egypt could condition its consent to the continuation of the treaty to the succession of South Sudan.

Finally, the negotiations can consider state practice in this matter which, although inconsistent, tends to support the clean slate doctrine regarding the seceding state, South Sudan. Precedents to examine include secession of Belgium from the Netherlands, Cuba from Spain, Panama from Colombia, Finland from Russia, Singapore from Malaysia, and Pakistan from India. All these cases show a tendency to regard the separated state as starting with a clean slate thereby supporting the argument that the VCST does not actually reflect customary international law.

In conclusion, it appears then that one needs to be cautious when considering the principles applicable to state succession in respect to treaties and to bear in mind that such a process is highly influenced by politics of the moment. Sudan and South Sudan are still negotiating all relevant aspects of secession including succession to international treaties. The terms of the succession to the 1959 Agreement would then depend on the ongoing negotiations among these two states and also on the reaction of Egypt to the terms of the succession.

In practice, both Sudan and South Sudan have expressed that the implementation of the 1959 Agreement will continue. As of the time of writing, North and South Sudanese officials are engaged in talks in Addis Ababa aimed at reaching an agreement on a number of issues between the two sides unresolved prior to the partition, including water resources. Negotiations to divide the share allocated to Sudan in the 1959 Agreement between the North and the South are

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219 O'Connell, supra note 56, at 88-100.
220 Supra note 94. Until now, Egypt and Sudan have both been actively engaged in the implementation of the 1959 Agreement. The Permanent Joint Technical Commission meets twice a year (once in Egypt, once in Sudan) and there are Egyptian engineers in Sudan and Sudanese engineers in Egypt monitoring the implementation of the Agreement. See, e.g., O. El-Tom Hamad & A. El-Battahani, Sudan and the Nile Basin, 67 Aquat. Sci. 28-41 (2005).
221 Southern Sudan Referendum Act, para. 67(3), a copy is available at http://saycsd.org/doc/SouthernSudanReferendumActFeb10EnglishVersion.pdf (accessed 9 July 2011). Para. 67(3) enumerates ten substantive issues to be negotiated and agreed upon after the referendum, including nationality, currency, public service, international agreements and conventions, assets and debts, oil and water.
influenced by the competing demands of two states which both foresee an increase in their respective water needs.\footnote{Supra note 106.}

In fact, Sudan argues that since it will lose 50% of the oil revenue due to the secession of South Sudan, it will need to refocus its development strategy on agriculture and therefore will need more water.\footnote{Supra note 195, at 162. In addition, agricultural projects undertaken by Gulf states in Sudanese territory will contribute to increase water needs. See, e.g., Verhoeven, supra note 190. Another good example is the 1.7 acres of land acquired by South Korea in order to grow wheat in Sudan. See L.R. Brown, \textit{When the Nile Runs Dry}, New York Times, 1 June 2011, available at \url{http://www.nytimes.com/2011/06/02/opinion/02Brown.html} (accessed 27 June 2011). Brown argues that such land acquisitions by foreign governments and agribusiness firms should be banned in order to mitigate water scarcity in the Nile region.} South Sudan, on the other hand, claims a share in the Nile waters alleging that it will undertake all sorts of development projects after independence\footnote{The implementation of development plans necessarily involves water resources, e.g., water for generation of hydropower, irrigation, as well as for domestic, livestock and industrial uses.} in addition to providing for the growing needs of the returning South Sudanese.\footnote{Supra note 195, at 162.} These competing claims may not be easy to meet with Sudan’s current allocation of 18.5 BCM.\footnote{Id.}

The secession of South Sudan may then provide an opportunity to incorporate the principle of equitable and reasonable utilization into the treaty law of the region. In fact, and in consistence with the customary law status of the principle of equitable utilization, Sudan and South Sudan have an international obligation to utilize the Nile waters in an equitable and reasonable manner.\footnote{UNWCC, supra note 168, arts. 5-6.} Negotiations on the division of Sudan’s share must, then, be guided by this principle and consider all factors and circumstances relevant to this particular situation.\footnote{The parties could use art. 6 of the 1997 UN Water Convention and art. V of the Helsinki Rules as guidance.} Consequently, if the negotiations in Addis Ababa lead to the signature of a bilateral treaty on the division of Sudan’s share, an opportunity to incorporate the principle of equitable use would arise.

The secession of South Sudan may also provide an opportunity for revising the 1959 Agreement. Indeed, even if Sudan uses its full share,\footnote{Sudan is currently using only about 14 BMC because it does not have enough physical infrastructures to store the water.} 18.5 BCM may become insufficient due to the expected increase in the water needs of both Sudan and South Sudan. In this context, Sudan could allege that a fundamental change in circumstances (\textit{rebus sic stantibus} principle) has occurred and demand a revision of the 1959 Agreement. However, Salman holds the opinion...
that the parties will address the division of Sudan’s share without involving Egypt in the negotiations; that is, Sudan and South Sudan do not plan to revise the 1959 Agreement, at least for the time being.\textsuperscript{230} This is due to political considerations related to the sensitivity of the Nile waters in the geopolitics of the region and the fact that South Sudan does not wish this issue to affect its path to consolidating independence.\textsuperscript{231}

Without prejudice to the above, the legal question here is whether Sudan could invoke the secession of South Sudan as grounds for revising the 1959 Agreement according to the \textit{rebus sic stantibus} principle. According to Article 62 of the VCLT, Sudan may invoke a fundamental change of circumstances –secession of South Sudan– as grounds for terminating or withdrawing from the 1959 Agreement if it proves (a) that the secession was not foreseen by the parties in 1959; (b) that the participation of Sudan as it was before the secession (i.e., including the territory of South Sudan) constituted an essential basis of the consent of the parties; and (c) that the secession radically transforms the extent of obligations still to be performed under the treaty (e.g., the need for more water resources precludes Sudan from fulfilling its obligation to use no more than 18.5 BCM). Sudan could also advance arguments on grounds of equitable use of water resources in order to highlight the equity and justice of a revision of the 1959 Agreement. Additionally, Article 5(b) of the 1959 Agreement may be an indication that this agreement is not static, but rather open to adapt should there be a change of circumstances (such as a claim of a share in the Nile waters by any of the remaining riparians). As discussed below, however, article 62 has been interpreted in a very restrictive way.

Salman states that Egypt has no interest in revising the 1959 Agreement. If this is the case, in order to avoid a revision of the 1959 Agreement and protect its natural and historic rights recognized therein, Egypt could make several counterarguments, such as the exceptional and limited character of the application of the \textit{rebus sic stantibus} principle declared not only by the ICJ\textsuperscript{232} but also emphasized during the travaux preparatoires of the VCLT\textsuperscript{233} in order to defend the primacy of the principle of \textit{pacta sunt servanda} and protect the security of treaties. Moreover, a fundamental change of circumstances may not be invoked as grounds to terminate territorial

\textsuperscript{230} Supra note 106.
\textsuperscript{231} Id.
\textsuperscript{232} Supra note 74, paras. 89-115.
treaties. Finally, shifting to an economy based on agriculture is a change of policy rather than a fundamental change of circumstances in the restrictive sense of article 62 and therefore cannot justly be invoked as grounds to revise the 1959 Agreement.

The strength of the arguments in favor of Egyptian claims, together with precedents that severely restrict the scope of the *rebus sic stantibus* principle, makes it difficult for Sudan to successfully argue a fundamental change of circumstances in the legal arena. Political negotiations that encompass elements beyond water may be a brighter path to follow to obtain a revision of the 1959 Agreement.

Finally, a few words about recognition of the new state of South Sudan are required. This is not the place to discuss the declaratory and constitutive theories of recognition of states in extenso. Suffice it to say that, in practice, unless a new state “is accorded recognition by a sufficiently large number of states, it cannot realistically be a state with all the corresponding rights and obligations.” Sudan was the first state to recognize South Sudan; Egypt was the second and the United States, the third. Salman affirms that more than one hundred states have expressed their intention to recognize South Sudan. Consequently, and if declarations recognizing the new state continue to be made as expected, the issue of recognition should not interfere in South Sudan’s path to true independence.

In conclusion, since there is no widely accepted codification of the law of state secession and its effects on succession to international treaties, whether the new state of South Sudan will succeed or not to the 1959 Agreement will actually depend on the negotiations currently taking place in Addis Ababa. The division of powers between the North and the South during the

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234 *Supra* note 30, art. 62(2.a).
235 *Supra* note 233, para. 10.
236 Experts interviewed for this work agree that the negotiations between watercourse states in general and the Nile riparians in particular, should integrate issues other than water in order to move forward. Otherwise, negotiations become stuck in dealing with unresolved conflicting claims to the waters for which there is no clear legal answer, let alone a world judicial authority with enforcement capacity. Thus, negotiations between Sudan and South Sudan should integrate water with other issues such as oil and border delimitation.
237 A. Aust, Handbook of International Law 16 (2010).
241 *Supra* note 106.
interim period and state practice permit the anticipation that South Sudan will not succeed to the 1959 Agreement but will, rather, negotiate the division of the 18.5 BCM share of the Nile waters allocated to the former Republic of Sudan with Sudan only, not Egypt. In addition, due to the restrictive interpretation of the *rebus sic stantibus* principle, a legal claim for revision of the 1959 Agreement -based on article 62 of the VCLT- has little chance of success. Therefore, it might be more effective to pursue revision in the context of political negotiations. Finally, based on the information available at the time of writing, it is unlikely that the issue of recognition will raise questions with regard to the international legal personality of South Sudan.

### 3.4 The Unilateral Dam Building Decision of Ethiopia

In April 2011, Ethiopian Prime Minister Meles Zenawi laid the foundation stone of the Grand Millennium Dam (GMD) currently under construction by Italian group Salini Costruttori with funding from Chinese banks.\textsuperscript{242} The GMD is part of Ethiopia’s Growth and Transformation Plan (GTP) which makes water and energy the cornerstones of Ethiopia’s development.\textsuperscript{243} High population growth rates,\textsuperscript{244} development of the industrial sector\textsuperscript{245} and rainfall variability aggravated by the impact of climate change have increased the demand for energy.\textsuperscript{246} According to Alemayehu Tegenu, Ethiopian Minister of Water and Energy, the GMD is expected not only to help meet such growing demand but also to strengthen hydropower trade with neighboring states.\textsuperscript{247}

The purpose of the GMD is to generate hydropower; in hydrology this is known as a ‘non-consumptive dam’ (as opposed to dams used for irrigation which are ‘consumptive dams’). Non-consumptive water use means that the water is withdrawn for use but is not consumed. However, typically non-consumptive water projects are not 100 percent non-consumptive. For instance, there are evaporation losses associated with maintaining a reservoir at a specified elevation and

\textsuperscript{242} Supra note 190, at 20.
\textsuperscript{243} Growth and Transformation Planning for the Next Five Years (2011-2015), Ministry of Finance and Economic Development of Ethiopia, July (2010). The GTP sets as an objective “[T]o utilize and develop the water resources of the country for the economic development in a fairly and sustainable manner.”
\textsuperscript{245} Supra note 244. Ethiopia has achieved an overall economic growth rate of 11% per annum.
\textsuperscript{247} Id. In ensuing interview with this writer, Minister Tegenu mentioned that in June 2011 Ethiopia started exporting power to Djibouti and that trade was expected to start with Sudan in July 2011. Ethiopia also signed a power trade with Kenya.
conveyance losses associated with maintaining a minimum stream flow in a river. Ethiopia publically declared that it will not use the GMD for irrigation but only for hydropower generation.\footnote{See, e.g., \textit{Ethiopia Commits not to Use Renaissance [sic] for Irrigation}, Addis Fortune, 3 July 2011. NB: The media also calls the GMD ‘Renaissance Dam’. Available at http://addisfortune.com/Ethiopia%20Commits%20not%20to%20Use%20Renaissance%20Dam%20for%20Irrigation.htm (accessed 6 July 2011).}

Ethiopia’s national access to electricity is 47%; the per capita energy supply is 100kwh/year\footnote{Supra note 190, at 8.} with only 15-20% of the population having access to the national power grid.\footnote{Supra note 190, at 8.} In order to solve its chronic power shortage, and since it does not have any oil and gas energy resources to fuel its development, Ethiopia is determined to use its hydropower potential\footnote{Supra note 246.} which is estimated to be about 40,000-45,000 MW.\footnote{Supra note 246.} The GTP expects to increase hydropower generation from the current 2060 MW to 10,000 MW by 2015 and the GMD, with a potential capacity of 5,250 MW, will play a key role in achieving this goal. However, increasing the population’s access to electricity is not the only goal Ethiopians plan to achieve. According to Minister Tegenu, hydropower development provides “a platform for inter-riparian cooperation to engage in the generation and distribution of energy and power trade” and promotes “regional security and eventually economic integration among nations – conferring benefits and win-win outcomes for all”.\footnote{Supra note 246.}

Put this way, the GMD appears to be a perfect strategy to lift the Ethiopian people out of extreme poverty. However, there is a very important fact to consider: Ethiopia is building this large dam on an international watercourse shared by nine other riparian states (ten, including the new state of South Sudan). Thus, should any of these states consider that the GMD significantly affects its interests in the Nile River, it might have a legitimate claim against its construction. For instance, after learning about the GMD from the media, Egypt -always afraid that upstream states may use the Nile waters in a way that diminishes the flow downstream- claimed that “no Nile country may embark on any projects without the consent of all Nile Basin countries.”\footnote{Ethiopia Hydropower Nile Project Alarms Egypt, 14 May 2011, available at http://ht.ly/1c1PEF (last visited 30 June 2011)} In other words, Ethiopia should not only have notified all riparians of its plan to build the GMD, but also
obtained their prior consent to its construction, at least from Egypt. Egypt’s claim is based on a right to veto upstream water works given to it by the 1929 Agreement, a colonial treaty whose validity, as discussed above, is still in dispute. Should this claim be settled in favor of Egypt, Ethiopia’s hydropower development plan would be frustrated. Should Ethiopia, however, be entitled under international law to build the GMD, it could legitimately implement the perfect plan to literally give power to its people.

This section addresses the issue of whether the construction of the GMD creates an opportunity for a more equitable sharing of the Nile waters. The first legal question is whether Ethiopia has, in fact, an obligation under international law to use the water (construction of the dam) in an equitable manner. The second question is whether Ethiopia had an obligation to obtain the consent of the other riparian states—as alleged by Egypt—before starting the construction of the GMD. These questions are addressed by examining principles of customary international water law, relevant Nile waters agreements, and principles in the UN Charter and the African Charter. Such analysis will illuminate the legal framework applicable to the GMD and lead to an answer as to whether its construction opens a possibility for a more equitable utilization of the waters of the Nile.

As a general rule, Ethiopia has the right to use water from the Nile River and the obligation to manage its uses so as not to interfere with like uses in other riparian states. However, there is no widely accepted codification of rules determining the content and scope of such right and obligation and state practice still shows a tendency to resort to either of two incompatible doctrines: absolute territorial sovereignty and absolute territorial integrity. The former is used by the uppermost riparian state to claim the right to do whatever it chooses with that water regardless of its effect on other riparian states. The latter is invoked by downstream states to claim that upper riparian states can do nothing that affects the quantity or quality of the water that flows down the river. The incompatibility of such claims makes it very difficult for either to prevail over the other and usually brings negotiations to a deadlock.

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255 Supra note 45.
256 S. McCaffrey, The Law of International Watercourses: Non-navigational Uses, Chapter 5 (2001). According to this author, this is the prevailing theory of international watercourse rights and obligations today. This rule is also known as the doctrine of ‘limited territorial sovereignty’, i.e., the sovereignty of a state over its territory is ‘limited’ by the obligation not to use that territory in such a way as to cause significant harm to other states.
257 Interview with C. Brolmann, Associate Professor, Universiteit van Amsterdam, in Amsterdam (1 June 2011).
258 Supra note 106.
In fact, Ethiopia argues that it has the right to exploit its water resources to fuel its development needs and that “Egypt will not be able to stop Ethiopia from building dams on the Nile”.\textsuperscript{259} Egypt, on the other hand, affirms that “any threat against the Nile waters will result in the reduction of Egypt’s share” and that “if someone [sic] is going to stop the water […] we will fight […] with all means available”.\textsuperscript{260} These statements show that, despite the more cooperative attitude shown by these two states in the months after the regime change in Egypt, especially due to a new approach towards Africa promoted by a more moderate transitional government, claims based on absolute rights and absolute territorial integrity of the river may still be stubbornly held.

Literature reviewed and experts interviewed highlight the need to apply principles that combine the competing demands of watercourse states.\textsuperscript{261} Nonetheless, the issue of which principles constitute customary international water law has not yet been established. The most comprehensive attempt to codify principles of customary international water law thus far is the UN Convention on the Law of the Non-navigational Uses of International Watercourses (UNWCC) adopted by the General Assembly in 1997.\textsuperscript{262} However, it is not yet in force -and it may never be-\textsuperscript{263} because only 24 of the 35 states required to ratify it have done so in the 14 years it has been open for signature.\textsuperscript{264} Based on draft articles prepared by the International Law Commission,\textsuperscript{265} the UNWCC is regarded as codifying customary international law with respect to two core principles: equitable and reasonable utilization and the obligation to cause no


\textsuperscript{260} Interview by Aljazeera with Hussam Swailam, former Egyptian military general, supra note 259.

\textsuperscript{261} The expression ‘watercourse state’ is used in the meaning of UNWCC art. 2, i.e., “a state in whose territory part of an international watercourse is situated”. The term ‘riparian state’ is used as a synonym.

\textsuperscript{262} Convention on the Law of the Non-navigational Uses of International Watercourses, GA Res. 51/229, Annex (May 21, 1997). Not yet in force. None of the Nile riparian states has signed it. [Hereinafter UNWCC]

\textsuperscript{263} Supra note 257.

\textsuperscript{264} Scholars also refer to the first draft codification of the law of both navigational and non-navigational uses known as the Helsinki Rules and adopted by the International Law Association. These rules referred for the first time to the doctrine of equitable utilization as the governing principle applicable to international watercourses. The Helsinki Rules have no formal standing or legally binding effect per se, however, until the adoption of the UNWCC they remained the single most authoritative and widely quoted set of rules for regulating the use and protection of international watercourses. \textit{See} Helsinki Rules on the Uses of the Waters of International Rivers, Report of the Fifty-Second Conference (1966), International Law Association 484 (1967). \textit{See also} S. Salman, \textit{The Helsinki Rules, the UN Watercourses Convention and the Berlin Rules: Perspectives on International Water Law}, 23(4) Water Resources Development 629 (2007).

\textsuperscript{265} Draft Articles on the Law of the Non-navigational Uses of International Watercourses and Commentaries Thereto and Resolution on Transboundary Confined Groundwater, Yearbook of the International Law Commission, II(2) (1994).
significant harm.\textsuperscript{266} Supporters of this interpretation argue that only four months after its adoption, the UNWCC was referred to several times in the Gabcikovo-Nagymaros case\textsuperscript{267} and that its influence is evident in a number of treaties regulating international watercourses.\textsuperscript{268} The strength of this position is, however, undermined by the fact that the UNWCC is not yet in force. This is a reflection of how divisive watercourse problems and disputes are and of the steadfast nature of the contrast between upstream and downstream states regarding the legal status of these principles.\textsuperscript{269}

Notwithstanding, there is overwhelming support in the literature for the argument stating that the principle of equitable and reasonable utilization has the status of customary international law.\textsuperscript{270} In addition, the ICJ invoked this principle in the Gabcikovo-Nagymaros case when referring to a state’s “basic right to an equitable and reasonable sharing of the resources of an international watercourse”\textsuperscript{271} reinforcing the customary law status of this principle.\textsuperscript{272} The right to equitable and reasonable use of the Nile River entails the correlative obligation to not deprive other Nile riparian states of their right to an equitable and reasonable use. Determining whether the GMD is an equitable and reasonable use by Ethiopia of the Nile waters is not straightforward and requires an accounting of all relevant factors and circumstances that play a role in this particular case. Article 6 of the UNWCC provides an list of relevant factors and circumstances that watercourse states may use as guidelines.\textsuperscript{273} The official position of the government of

\begin{itemize}
  \item \textsuperscript{266} Supra note 256. See also UNWCC arts. 5-7.
  \item \textsuperscript{268} E.g., the 1995 Agreement on the Cooperation for the Sustainable Development of the Mekong River Basin; the 1995 Protocol on Sharing Watercourses; and the 2000 Revised Protocol on Shared Watercourses - in the Southern African Development Community.
  \item \textsuperscript{269} L. Caflisch, Address at the conference on Freshwater and International Law: The Multiple Challenges, in Geneva (9 July 2011).
  \item \textsuperscript{270} See, e.g. ILC draft articles, Special report by McCaffrey, Lilian Castillo-Laborte etc. citing state practice, treaties, case law. According to the ILC “There is overwhelming support for the doctrine of equitable utilization as a general rule of law for the determination of the rights and obligations of States in this field.” Supra note 265, para. 10. The ILC also stated that “[A] review of the manner in which States have resolved actual controversies pertaining to the non-navigational uses of international watercourses reveals a general acceptance of the entitlement of every watercourse State to utilize and benefit from an international watercourse in a reasonable and equitable manner.” Supra note 265, para. 13.
  \item \textsuperscript{271} Supra note 74, para. 78. The ICJ thus reinforces the customary law status of the principle of equitable utilization, and, in particular, a state’s ‘basic right’ to an equitable and reasonable share of the resources of an international watercourse.
  \item \textsuperscript{272} See McCaffrey, \textit{supra} note 256, 192.
  \item \textsuperscript{273} The list includes (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
\end{itemize}
Ethiopia is that, even though it has not signed the UNWCC yet, it adheres to the principle of reasonable and equitable utilization incorporated therein. According to the Ethiopian Minister of Water and Energy, equitable use and no harm are principles that shall be harmonized and that shall inspire the relations among Nile riparian states.\(^{274}\)

Regarding the obligation to cause no significant harm,\(^ {275}\) this research found that there is consensus regarding its customary law status in combination with the principle of equitable use. Caflisch states that the UNWCC attempts to strike a balance between the interests of upper and lower riparians and, therefore, between the principles of equitable utilization (traditionally invoked by upstream states like Ethiopia) and no harm (traditionally invoked by downstream states such as Egypt).\(^ {276}\) According to Caflisch, the phrase “having due regard for the provisions of articles 5 and 6” in Article 7 of the UNWCC – which contains the no harm rule – restricts its application to a co-basin State on other watercourse States; (e) Existing and potential uses of the watercourse; (f) Conservation, protection, development and economy of use of the water resources of the watercourse and the costs of measures taken to that effect; (g) The availability of alternatives, of comparable value, to a particular planned or existing use. Another indicative list of such factors is given in the Helsinki Rules (see supra note 264), including (1) The geography of the basin, including in particular the extent of the drainage area in the territory of each basin State; (2) The hydrology of the basin, including in particular the contribution of water by each basin State; (3) The climate affecting the basin; (4) The past utilization of the waters of the basin, including in particular existing utilization; (5) The economic and social needs of each basin State; (6) The population dependent on the waters of the basin in each basin State; (7) The comparative costs of alternative means of satisfying the economic and social needs of each basin State; (8) The availability of other resources; (9) The avoidance of unnecessary waste in the utilization of waters of the basin; (10) The practicability of compensation to one or more of the co-basin States as a means of adjusting conflicts among uses; and (11) The degree to which the needs of a basin State may be satisfied, without causing substantial injury to a co-basin State. Again, these lists are neither exhaustive nor even necessarily fully relevant because everything depends upon the unique characteristics of the case at hand. See supra note 256, at 341. See also supra note 265, art. 6(3) “No priority or weight is assigned to factors and circumstances listed [in art. 6] since some of them may be more important in certain cases while others may deserve to be accorded greater weight in other cases.”

\(^ {274}\) Supra note 187. Minister Tegenu highlights that Ethiopia’s focus is on a win-win approach based on the principles of equitable utilization and no harm, in a context of cooperation and friendship that includes water management and an adequate institutional framework.

\(^ {275}\) UNWCC art. 7 (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. (emphasis added).

\(^ {276}\) The interrelationship between the obligations of equitable utilization and prevention of significant harm is complex. One of the main issues discussed during the negotiations of the UNWCC was whether in case of conflict the equitable use or the no harm rule should prevail. Upstream states - which are often mountainous and develop their water resources later than their flatter downstream neighbors - favored according primacy to equitable utilization over prevention of harm, while downstream states preferred the opposite. Applied to the Nile Basin, this would mean that, since its waters are almost fully used by Egypt and Sudan (1959 Agreement), a conflict arises when other riparians (e.g., Ethiopia), which have so far not taken part in its utilization, now wish to do so. Under the no harm rule, such new utilization would lead to damage to the old users; under the rule of equitable utilization, such new claims can be justified as long as it is reasonable and equitable.
scope by subordinating it to the principle of equitable use. McCaffrey, special rapporteur for the ILC’s draft articles that formed the basis of the UNWCC, affirms that Articles 5 to 7 seek “to avoid harm in a way that is consistent with equitable and reasonable utilization.” Dellapenna emphasizes the importance of balancing the needs of upper and lower watercourse states in order to achieve fairness. According to Judge Awn Shawkat Al-Khasawaneh, even though the ICJ has not referred to the no harm rule in the context of allocation of shared waters, it came close to endorsing such rule in the Gabcikovo-Nagymaros case by citing the Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons, which in relevant part reads “[T]he existence of the general obligation of States to ensure that activities within their jurisdiction and control respect the environment of other states […] is now part of the corpus of international law related to the environment.” Finally, the obligation to cause no significant harm is an obligation of due diligence, i.e., if harm is caused despite Ethiopia’s efforts to prevent it, Ethiopia, guided by the overall objective of equitable utilization and in consultation with the affected state, is to seek to eliminate or mitigate the harm and, where appropriate, is to discuss with the affected state the question of compensation. This rule seeks to avoid harm in a way that is consistent with equitable utilization. In sum, there seems to be consensus on the need for a combined application of the two core principles of equitable use and no harm, with the latter subordinate to the former. Also, there seems to be strong support for the argument that both are principles of customary international law.

Consequently, and as declared by Ethiopia itself, Ethiopia has the obligation to observe both principles in the construction of the GMD. If Ethiopia complies with these obligations –as it assures it does now and will continue to do-- then it is creating an opportunity for the introduction of the principle of equitable utilization in the Nile Basin regime. If Ethiopia achieves its declared purpose of conducting negotiations on the GMD in light of the principles of equitable use and no harm, in a spirit of friendship and cooperation towards a win-win solution, then it may be generating historic conditions for a radical change in the approach Nile riparians have to the use of the waters. Considering that: the Cooperative Framework Agreement (CFA)

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277 Caflisch, Supra note 269.
278 McCaffrey, Supra note 267.
279 Interview with J. Dellapenna, Professor of Law, Villanova University, in Rome (6 July 2011).
280 Supra note 74, para. 53.
incorporates both principles and that six riparian states have already signed it; since the fall of Mubarak, Egypt has demonstrated a willingness to be more open to negotiations with upstream riparians instead of persisting in its traditional view of protecting its natural and historical rights at all costs; and it is not yet clear whether the new state of South Sudan will sign the CFA or align with Egypt and Sudan in their opposition to it (thus allowing for another possible signature), the construction of the GMD and the ongoing negotiations about it may certainly create an opportunity for a more equitable share of the waters.

After Egypt learned via the media about the start of the construction of the GMD, it alleged that Ethiopia had breached its obligation to obtain the consent of all Nile riparians prior to beginning works basing its claim on natural and historical rights acknowledged in the 1929 and the 1959 Agreements. Ethiopia, in turn, counterargued that it has no obligation whatsoever to obtain such consent and that Egypt will not deter it from building dams on the Nile. The issue of whether or not Ethiopia has an obligation of prior notification of water projects and its implications for the inclusion of the principle of equitable use in the Nile Basin regime are discussed below.

It is argued that there is an obligation of customary international law to notify planned measures that may have a significant adverse effect on other watercourse states. McIntyre affirms that assuming that applicable customary rules require that significant harm to other riparian states should be avoided and that the use of the waters must be equitable and reasonable, “it follows that a state will need to know the current or proposed uses of a neighboring state.” In the Pulp Mills case, the ICJ found that Uruguay breached its procedural obligation under the 1975 Statute to inform, notify and negotiate with Argentina regarding the authorization and

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282 B. Malone, Ethiopia Keeping Egypt in Dark on Nile Dam, Reuters, 18 April 2011, available at http://af.reuters.com/article/commoditiesNews/idAFLE73H1WZ20110418 (accessed 28 June 2011). When asked whether Ethiopia had officially informed Egypt it was building the GMD, Alemayehu Tegenu, Ethiopian Minister of Water and Energy said “No. They found out from the media.”
283 Supra note 259.
284 There are special requirements for prior notification of projects to be financed by the World Bank. See supra note 281, at 128. However, the Ethiopian government has insisted on funding the construction of the GMD using its own financial resources. Thus, this prior notification requirement is not applicable in this particular case.
285 UNWCC art. 12. The term ‘planned measures’ is used in a broad sense, that is, “as including new projects or programmes of a major or minor nature, as well as changes in existing or an international watercourse.” See supra note 265.
construction of the pulp mills.\textsuperscript{287} This case has been invoked in support of the customary law status of the obligation to notify planned measures; one needs to be cautious, however since this decision refers only to the obligation to “inform, notify, and negotiate” under a bilateral agreement between Argentina and Uruguay, the 1975 Statute, and not under general international law.

McIntyre suggests that, in addition to a notification procedure, “other legal machinery is required by which watercourse states may consult and negotiate in respect of proposed works or utilization of shared waters.”\textsuperscript{288} Such legal machinery includes, for instance, transboundary environmental impact assessments (EIAs)\textsuperscript{289} recognized by the International Court in the Pulp Mills case.\textsuperscript{290} In fact, the Court stated that “it may now be considered a requirement under general international law to undertake an environmental impact assessment where there is a risk that the proposed industrial activity may have a significant adverse impact in a transboundary context, in particular, on a shared resource.”\textsuperscript{291} It added that since the scope and content of an EIA is not specified in general international law, “it is for each state to determine […] the specific content” of it and that the EIA “must be conducted prior to the implementation of a project.”\textsuperscript{292} According to McIntyre, Article 12 of the UNWCC acknowledges the link between effective notification and transboundary EIA by expressly requiring that the results of any EIA accompany the notification.\textsuperscript{293} According to this reasoning, since there is a customary law obligation to undertake an EIA where there is a risk to cause significant adverse impact on a transboundary shared resource, there is also an obligation under general international law to notify planned measures in a transboundary watercourse that may have a significant adverse effect on other riparian states.

The customary law status of the obligation to notify planned measures is also supported by the general duty to cooperate which would require that Ethiopia enter into consultations and negotiations in good faith concerning the construction of the GMD.\textsuperscript{294} The ILC stated that “the

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\item Pulp Mills on the River Uruguay (Argentina v. Uruguay), Judgment, ICJ Reports (2010), para. 158.
\item McIntyre, \textit{Supra} note 286.
\item \textit{Id.}
\item O. McIntyre, Presentation, Conference on Freshwater and International Law: The Multiple Challenges, University of Geneva (7 July 2011).
\item \textit{Supra} note 287, para. 204.
\item \textit{Id.} para. 205.
\item McIntyre, \textit{Supra} note 286, at 185.
\item \textit{Supra} note 281, at 24.
\end{enumerate}
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attainment of optimal utilization and benefits entails cooperation between watercourse states through their participation in the protection and development of the watercourse” and that “watercourse states have a right to the cooperation of other watercourse states” which is not dependent on a specific agreement for its implementation.\textsuperscript{295} Thus, the UNWCC provides that a watercourse state “shall cooperate on the basis of sovereign equality, territorial integrity, mutual benefit and good faith in order to attain optimal utilization and adequate protection of an international watercourse.”\textsuperscript{296} Similarly, Wouters affirms that customary international water law includes the duty to cooperate and that failure to comply with it “could constitute an international wrongful act entailing state’s responsibility.”\textsuperscript{297} Furthermore, in the 1993 Agreement, Egypt and Ethiopia “recognize the importance of their cooperation as an essential means to promote their economic and political interests as well as stability in the region”, agree to “create appropriate mechanisms for periodic consultations on […] the Nile waters” and commit to “endeavor towards a framework for effective cooperation among countries of the Nile Basin.” Additionally, the duty to cooperate in the context of transboundary watercourses also finds support in Principle 19 of the Rio Declaration on Environment and Development,\textsuperscript{298} Article 9(2)(h) of the UNECE Water Convention,\textsuperscript{299} and the Gabcikovo-Nagymaros and Pulp Mills cases.

In sum, in the context of the Nile Basin, Ethiopia has a duty to cooperate with all riparian states with the purpose of utilizing the waters in a way that causes no harm and is consistent with equitable utilization. Indeed, Ethiopia declares that it acknowledges this duty yet it rejects any obligation to obtain prior consent from any other riparian state to develop water projects.\textsuperscript{300} It is not clear whether Ethiopia recognizes Article 12 of the UNWCC as general international law. The author takes the view that Ethiopia will refrain from making any public declaration on this respect because it may be confused with an acceptance of an obligation to obtain prior consent.

In any case, Ethiopia has made public its commitment to resolve any disagreement over the Nile waters through friendly cooperation. In fact, in May 2011, one month after the start of the

\textsuperscript{295}\textit{Supra} note 265, at 97.
\textsuperscript{296} UNWCC art. 8(1).
\textsuperscript{297} \textit{Supra} note 281, at 24.
\textsuperscript{298} States shall provide prior and timely notification and relevant information to potentially affected States on activities that may have a significant adverse transboundary environmental effect and shall consult with those States at an early stage and in good faith.
\textsuperscript{299} To serve as a forum for the exchange of information on existing and planned uses of water and related installations that are likely to cause transboundary impact;
\textsuperscript{300} Interview with H.E. Minelik Alemu Getahun, Ambassador, Permanent Representative of Ethiopia to the United Nations Office at Geneva, 9 July 2011, Geneva.
construction of the GMD, Egypt, Sudan and Ethiopia established a technical committee to study its impact.\textsuperscript{301} This committee is similar to ENTRO,\textsuperscript{302} but separate from the NBI structure because the parties wished to avoid political wrangling between Nile riparians, especially after the signature of the CFA in May 2010.\textsuperscript{303} According to this research, Egypt and Ethiopia have met a few times this year in order to discuss cooperation regarding their interests in the Nile.\textsuperscript{304} Due to the regime change in Egypt, there is, perhaps, no better time for dialogue between the two parties.\textsuperscript{305} It remains to be seen whether this is a transient approach or will persist after a new government assumes power in Egypt. Thus, considering the current state of politics in the region, the argument that Ethiopia is complying with its international duty to cooperate may be successfully advanced. However, time will tell if the upcoming Egyptian government will be as moderate and open to cooperation as the transitional government has been.

Taking into account the above, the construction of the GMD may provide an opportunity for the parties involved to join forces in order to tackle the issue of any significant harm that may be caused to other Nile riparians and, thus, for negotiations to revolve around a more equitable use for the first time in history.

Now the analysis turns to whether Ethiopia bears international responsibility for breaching a treaty obligation by constructing the GMD. Based on colonial agreements, Egypt argues that Ethiopia has the obligation to obtain its prior authorization before undertaking any water development projects.

The only Nile waters agreement that includes Ethiopia as a party - even though 86% of the Nile flow measured at Aswan, Egypt, originates in Ethiopia’s territory\textsuperscript{306} - is a colonial treaty signed in 1902 between the UK and Ethiopia stipulating in Article III that the King of Ethiopia “engages himself towards the government of His Britannic Majesty 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 except in agreement with His Britannic Majesty’s Government for the first time in history.

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\textsuperscript{302} See supra note 126.
\textsuperscript{303} Supra note 94.
\textsuperscript{304} Id.; supra note 187.
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and the Government of the Sudan®. Some commentators argue that this agreement was never ratified by Ethiopia and therefore is not binding on it. The literature reviewed and the interviews conducted for this thesis show that this issue is not yet settled and that Ethiopia itself has never argued that the agreement was not ratified. Indeed, the official position of the government of Ethiopia is that the 1902 Agreement is valid and binding because it is a boundary treaty delimitating the frontier between Sudan and Ethiopia. Moreover, the 1902 Agreement was confirmed by an Exchange of Notes between Sudan and Ethiopia in 1972. Regarding Article III, the government of Ethiopia maintains that it is actually complying with its obligation ‘not to arrest’ the flow of the waters into the Nile. Notwithstanding, Ethiopia recognizes no obligation to limit use of the Blue Nile because of Egypt’s claim of a right to veto.

Without prejudice to the above, several renowned scholars have argued against the validity of the 1902 Agreement. These arguments include: first, that Ethiopia’s ‘natural rights’ to the Nile waters are not recognized; second, that Ethiopia did not obtain any benefit from the agreement; third, that the UK’s recognition of Italy’s annexation of the Ethiopian Empire invalidated all previous agreements between the two governments; and fourth, that Ethiopia renounced this agreement in 1956 invoking the Egyptian and Sudanese practice of denouncing ‘unequal’ colonial-era treaties when they are not in their interest. Based on this last argument, it is argued that, at least since 1956, Ethiopia has made it clear that it does not consider itself bound to request the prior consent of Egypt to undertake water development works and that it has the “right and obligation to exploit its water resources for the benefit of present and future generations of citizens.”

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307 Treaties between Great Britain and Ethiopia, and between Great Britain, Italy, and Ethiopia, relative to the Frontiers between the Sudan, Ethiopia, and Eritrea, signed at Addis Ababa 15 May 1902. See E. Hertslet, supra note 2, Vol. II No. 100, art. III, at 431.
309 Supra note 300.
310 Id.
311 Id.
312 Id..
313 Waterbury, supra note 308, at 282; Okidi, supra note 73, at 324.
314 Supra note 255, at 243.
Regarding the first two arguments, neither would effectively annul the treaty because there is no rule in international law providing for the invalidation of a treaty that benefits only one of the parties or an agreement that fails to acknowledge the rights of any of the parties thereto.\textsuperscript{317} The only exception would be that such allocation of benefits or omission of rights conflicts with a norm of jus cogens.\textsuperscript{318} With respect to the third argument, Okidi indicates that the legal consequences of the UK’s recognition of Italy’s annexation of Ethiopia are not entirely clear regarding the validity of the 1902 Agreement.\textsuperscript{319} Nonetheless, this third argument for the invalidity of the treaty could be supported by the precedent set when the Ethiopian Government informed the United States that a Franco-Ethiopian treaty of 1908 had “become void by the disappearance of one of the parties thereto, namely Ethiopia, and not to have been revived automatically by the liberation and reconstruction of the country”.\textsuperscript{320} Finally, should the issue of Ethiopia’s renunciation in 1956 be brought to an impartial third party for settlement, Ethiopia would need to prove compliance with article 56 of the VCLT and the issue of whether an unequal treaty allows for renunciation will surely need to be addressed. On the latter, the VCLT does not contain any provision that renders an unequal treaty invalid, unless it breaches a norm of jus cogens which, according to Brolmann, it is not the case in the Nile.\textsuperscript{321} Unequal treaties can be terminated only on the grounds provided for in IL.\textsuperscript{322}

In sum, according to these arguments, if Egypt proves that the 1902 Agreement imposes an obligation on Ethiopia to seek prior authorization to construct any development works on the Nile, Ethiopia could challenge the validity of the agreement by building an argument on its own practice (e.g., 1908 Franco-Ethiopian treaty) and supporting such an argument not on denunciation of an ‘unequal’ treaty, but on theories of the validity of colonial treaties. If it is decided that Ethiopia is not bound by such an obligation, the start of the construction of the GMD without notifying Egypt would be lawful. Nonetheless, since the official position of

\textsuperscript{317} Supra note 257. See also Vienna Convention on the Law of Treaties, 1155 UNTS 331, arts. 46-52 [Hereinafter VCLT]. These agreements were signed before the entering into force of the VCLT in 1980, however, it is widely accepted that it codified principles of existing customary international law. For the customary law character of the different parts of the VCLT. See, e.g., K. Zemanek, Vienna Convention on the Law of Treaties, United Nations Audiovisual Library of International Law, 2009, available at http://untreaty.un.org/codavl/ha/vcltvcltvclt.html (accessed June 19, 2011). See also Gabčíkovo-Nagymaros Project (Hungary/Slovakia), Judgment, ICJ Reports 1997, p. 7, para. 46.

\textsuperscript{318} VCLT, art. 53.

\textsuperscript{319} Supra note 73, at 324.

\textsuperscript{320} See, e.g, D.P. O’Connell, State Succession in Municipal Law and International Law 38 (1967).

\textsuperscript{321} Supra note 257.

\textsuperscript{322} Id. See VCLT arts. 54-64.
Ethiopia is that the 1902 Agreement is valid and binding, it is very unlikely that this issue will be brought before an international tribunal for settlement, at least for as long as the current state of affairs of the politics in the region stands.

Additionally, Egypt argues that Ethiopia has the obligation to obtain its prior consent to build the GMD based on the veto rights over upstream development projects conferred to it by the 1929 Agreement. However, and as discussed above, this argument has little chance of success because, first, a treaty is only binding upon the parties to it (Ethiopia is not a party to the 1929 Agreement) and, second, because Ethiopia has always made it clear that it does not consider itself bound by such an obligation. Thus, the 1929 Agreement would not be a viable alternative to argue that Ethiopia has the obligation to obtain the prior consent of Egypt in order to build the GMD.

Former President Mubarak and Prime Minister Zenawi signed a framework agreement for general cooperation between Egypt and Ethiopia in 1993. This agreement is criticized as ambiguous and of little use to resolve future disagreements between the parties, in particular regarding the application of the principles of equitable use, no harm and prior notification. Indeed, firstly, Egypt and Ethiopia recognize that the Nile River is a “center of mutual interest” and agree to “refrain from engaging in any activity related to the Nile waters that may cause appreciable harm to the interest of the other party.” It follows that both parties consider the obligation to not cause significant harm one of the guiding principles of their relations with respect to the Nile waters. The incorporation of the no harm principle can be interpreted as a triumph of the Egyptian government since it is in direct protection of its interests. Actually, the no harm principle applies both ways –downstream and upstream- but until environmental considerations gained strength it was considered that only upstream states could cause harm by obstructing or diverting flow of the waters downstream through the construction of water projects. Today, it is understood that the principle of no harm must be compatible with the

323 VCLT, supra note30, art. 34.
324 Supra note 45, at. 244.
325 Framework for General Co-operation Between the Arab Republic of Egypt and Ethiopia, Cairo, 1 July 1993.
326 Supra note 44, at 133.
327 Supra note 325, Preamble.
328 Id. art. 5.
329 Supra note 44, at 133. Here, Dellapenna comments that after signing the 1993 Agreement, Egypt did not object to a loan application by the Ethiopians for a small-scale irrigation project on the Blue Nile, which might well have been the pay-off for Ethiopia agreement to incorporate the no harm principle.
principle of equitable use, therefore, if the use of Egypt is not equitable then it may cause harm to upstream states. In addition, Dellapenna argues that by accepting the inclusion of the principle of no harm in the 1993 Agreement, Ethiopia is implicitly agreeing to an Egyptian right to veto Ethiopian water works upstream. Second, no mention is made of the principle of equitable and reasonable utilization which can also be considered a victory for Egypt because such principle favors Ethiopia. Dellapenna maintains, however, that if the agreement is interpreted as meaning that consultation and cooperation on the basis of the principles of international law must be taken seriously, Ethiopia has gained Egyptian consent to the rule of equitable allocation.

In brief, the 1993 Agreement gives rise to different and conflicting interpretations. Ethiopia’s implied agreement to Egypt’s veto power is debatable because the application of the no harm principle depends on the facts of the particular case and does not necessarily entail the obligation of applying for prior approval from other watercourse states before undertaking development works upstream. Besides, it is true that the 1993 Agreement refers to “principles of international law”, however, it mentions “principles of good neighborliness, peaceful settlement of disputes, and non-interference with the internal affairs of states.” From the text of the agreement, it may be a bold assertion to state that what the parties referred to were principles of international water law such as equitable use or no harm.

Last but not least, the analysis turns to the obligation under general international law to settle disputes by peaceful means. Watercourse states in their relations towards each other shall observe the principle of peaceful settlement of disputes set forth in the UN Charter and reaffirmed in the Organization of African Unity Charter (OAU Charter). If Egypt and Ethiopia are not able to agree on whether Egypt has a right to veto upstream works or on whether the impact of the GMD on the flow of the Nile River causes significant harm to Egypt, then the parties have the obligation to solve their dispute by peaceful means. The UN Charter, the OAU Charter and the ICJ Statute all provide for such an obligation. Ethiopia does not accept the compulsory jurisdiction of the ICJ. Egypt, declared that it accepted it only with respect to one

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330 Supra note 279.
331 Supra note 44, at 133.
332 Id.
333 Supra note 325, Preamble, arts. 1 & 4.
334 Charter of the United Nations, 1 UNTS XVI, art. 1.
335 Organization of African Unity (OAU) Charter, art. II.
336 UN Charter, arts. 1(1); 2(3); Chapters VI & XIV; OAU Charter arts. III(4) & XIX; ICJ Statute art. 36.
specific agreement.\textsuperscript{337} Sudan, the other potential state party to a dispute (due to the 1959 Agreement) has accepted it but with certain exclusions.\textsuperscript{338} The 1959 Agreement provides that if any riparian state other than Egypt and Sudan claims a share in the Nile waters, both states shall agree on a unified view which shall be the basis of any negotiations by the Joint Technical Commission with the claiming states. Egypt and Ethiopia reaffirmed their commitment to the principle of peaceful settlement of disputes in the 1993 Agreement, but they specify neither the tribunal nor the procedure to be followed in case of an actual conflict.\textsuperscript{339} Customary international water law emphasizes dispute-avoidance mechanisms, mainly through provisions requiring consultation, cooperation and negotiation.\textsuperscript{340} The CFA, in turn, provides for negotiation, good offices, mediation or conciliation by the Nile River Basin Commission, arbitration, and settlement by the ICJ.\textsuperscript{341} Since Egypt and Sudan have not signed this agreement and the six signatory states have yet to ratify it, it is unlikely that a dispute settlement mechanism will be chosen based on this provision. In sum, the obligation to settle the dispute regarding the construction of the GMD by peaceful means is virtually unchallenged; therefore, if the parties infringe on such an obligation they may incur international responsibility.

In conclusion, watercourse states have the duty to solve disputes by peaceful means. Based on general international law, customary international water and treaty law, Egypt, Ethiopia and Sudan, the main actors in this saga, have an obligation to cooperate in order for the Grand Millennium Dam to cause no significant harm to any Nile riparian state and to operate in a way consistent with the equitable use of the waters. If the parties are unable to successfully cooperate, their dispute must be settled by peaceful means. The infringement of either of these two obligations may entail the international responsibility of the state concerned.

\textsuperscript{337} With respect to art. 9(b) of the declaration on “the Suez Canal and the arrangement for its operation”.
\textsuperscript{339} \textit{Supra} note 325, art. 1.
\textsuperscript{340} UNWCC, \textit{supra} note 168, art. 33.
\textsuperscript{341} \textit{Supra} note 164, art. 33.
4. Chapter Four: Relevant Findings and Conclusions

The most relevant findings and conclusions of this research are the following:

1. After a thorough review of the literature on the validity of the 1902 Agreement, which included extensive arguments supporting supposed claims of Ethiopia against its binding force upon it, this author could not find any evidence indicating, first, that Ethiopia itself had ever argued that such agreement was never ratified by it and, second, that Ethiopia had in any way disputed its validity. In an interview with H.E. Minelik Alemu Getahun, Ethiopian Ambassador to the United Nations Office at Geneva, it came to the knowledge of this author that, in fact, Ethiopia has never questioned the validity of the 1902 Agreement. The official position of Ethiopia is that such agreement is valid and binding because it is a boundary treaty delimitating the frontier between Sudan and Ethiopia, which was confirmed as such by an Exchange of Notes between Sudan and Ethiopia in 1972. Additionally, the Ethiopian government states that it is indeed complying with its obligations under the Agreement which, as H.E. Alemu Getahun emphasized, does not include any obligation whatsoever to obtain prior authorization in order to start the construction of water development works in the portion of the Nile within Ethiopia’s territory.

2. The validity of the colonial agreements, particularly the 1929 Agreement, is and will continue to be questioned by upper riparian states. The arguments for and against the binding force of such agreement bring the parties involved to a deadlock which suggests that insisting on resolving this issue is not the way forward. No adjudicatory decision has been requested thus far and, according to experts interviewed, it is very unlikely that it will ever happen. Moreover, state practice of Egypt and Sudan shows that both parties consider their sharing of the waters regulated by the 1959 agreement, not the 1929 Agreement. Thus, setting aside discussion on the validity of the 1929 Agreement may bring Nile riparians more fruitful results.

3. In the Nile Basin, tension and cooperation coexist. Tensions are discussed in the political arena while cooperation takes place in a more technical context, due mainly to the work of the Nile Basin Initiative (NBI) and its water development programs. Thus, two processes take place simultaneously: political negotiations in order to ensure a share of the waters while avoiding conflict and implementation of water projects (irrigation, hydropower, etc.) in the context of the NBI. This research found that, due to this coexistence of tension and cooperation, there is disagreement among key stakeholders regarding the very existence of a conflict or dispute on the
Nile waters. In fact, this author was present during discussions among representatives from Egypt, Sudan and Ethiopia in which they could not agree on the actual existence of a dispute due, precisely, to the dichotomy between on the ground cooperation and ‘on the politics’ tension. This work takes the view that there is, in fact, a legal dispute concerning existing agreements questioned by upstream states, Egypt’s natural and historical rights to the Nile waters, operation of the principle of equitable utilization and its balance with the principle of causing no significant harm and the obligation of prior notification of planned measures.

4. The secession of South Sudan creates a new dynamic insofar as it opens the question of succession to the 1959 Agreement and division of the share of the former Republic of Sudan allocated in such agreement. As of the time of writing, North Sudan has not yet publicly informed about its approach to international treaties, which is one of the issues currently under negotiation between the North and the South. This research shows, however, that it all indicates that North Sudan will continue the legal personality of Sudan and, thus, succeed to the 1959 Agreement. Experts interviewed agree with this statement and expressed that South Sudan will negotiate with North Sudan only (not with Egypt) in order to determine the division of Sudan’s total share of 18.5 BCM. It is not yet clear whether these negotiations would provide an opportunity for an equitable sharing of Sudan’s allocation. It may depend on how the parties integrate negotiations about oil and border delimitation with the division of the water. Finally, a claim to revise the 1959 Agreement based on a fundamental change of circumstances (secession of South Sudan) seems to have little chance of success particularly because of the restrictive interpretation of the rebus sic stantibus principle.

5. The construction of the Grand Millennium Dam (GMD) together with the new approach to the Nile issue promoted by a (more) moderate transitional government in Egypt have started a series of negotiations regarding the potential harm that such dam may cause to other riparian states, particularly Egypt and Sudan. These negotiations are taking place despite allegations of Egypt that Ethiopia breached its international obligations not only to inform but also to obtain the consent of other riparians before any construction works began. Sudan, as downstream state, joined Egypt and Ethiopia in forming an ad hoc committee to examine whether the GMD may have any significant adverse effects on other riparian states. Considering that Ethiopia as been the main promoter of the CFA and the principle of reasonable and equitable utilization, hopefully, these negotiations regarding the no harm rule also include equitable use.
6. Finally, the 1959 Agreement is a binding bilateral treaty between Egypt and Sudan that provides for an inequitable sharing of the Nile waters since it allocates the waters to Egypt and Sudan only, leaving the remaining 10 riparian states with no share therein. The most recent changes in the region (fall of Mubarak, secession of South Sudan and construction of the Grand Millennium Dam) bring winds of change and may open an opportunity to revise this agreement in order to provide for a more equitable water sharing. If Ethiopia takes good advantage of its new prominence in the region it may be able to push harder in order for the Cooperative Framework Agreement (CFA) to enter into force and, thus, incorporate principles of equitable use to the Nile legal regime. Should nine of the eleven riparians sign and ratify the CFA, Egypt and Sudan may eventually yield to such political pressure and start meaningful negotiations in order to achieve equitable use in the region. Experts interviewed are, however, skeptical. They generally believe that Egypt, being completely dependent on the Nile for its water supply, would never accept any arrangement that would threat to decrease its share in the Nile waters.

This author, at risk of sounding too optimistic, takes that view that equitable sharing will not necessarily decrease Egypt’s share. It is true that determining what ‘reasonable and equitable use’ is can prove to be a very difficult task, however, factors and circumstances that are relevant to riparians in a specific basin are to be taken into consideration. Such factors and circumstances may change from one basin to the other. Egypt may take advantage of the fact that there is not a straightforward answer to what reasonable and equitable use means in the Nile Basin and that it depends, in the end, of what each riparian state brings to the negotiation table. Egypt could base its claim to an equitable share in the Nile waters on grounds of existing uses (used the Nile waters from time immemorial; natural and historical rights recognized in several treaties); amount of population depending on the water (population to double by 2050); existence of alternative sources of water (only country in the world that depends only on one water resource); impact of climate change, among others.

Again, this author is aware that this opinion may be too optimistic, even naïve, however, strongly believes that Nile riparian states must take advantage of the unique opportunity created by events in the first part of 2011, in order to change their approach to water sharing. Nile riparians must stop looking backwards --to agreements from the colonial era-- in order to secure a share in the waters; rather, the focus should be on looking forward and finding new ways to ensure that every state gets an equitable (not equal) share of the Nile. Law, politics and science
must converge in a joint effort to ensure that riparian states, and more importantly, people living in and of the Nile Basin enjoy the benefits of this shared resource.
Annexes

1. Map of the Nile Basin

2. Map of Southern Sudan

3. Map showing location of the Grand Millennium Dam
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Recent legal and political changes in the Nile Region and their implications for equitable water sharing in the Nile River Basin

Relations between Nile riparians have been hostile for a long time due to the unwillingness of the downstream states -Egypt and Sudan- to share the Nile waters more equitably with the upstream states -Burundi, Democratic Republic of Congo, Eritrea, Ethiopia, Kenya, Rwanda, Tanzania, Uganda-; their reluctance is based on legal rights embodied in the 1929 and 1959 Nile waters agreements. However, the political situation has changed due to events in the Nile region during the first half of 2011, namely, Southern Sudan’s referendum for independence on 9 January, the start of Egypt’s revolution on 25 January, and the start of the construction of the Grand Millennium Dam (GMD) by Ethiopia at the beginning of April 2011.

Two regional processes exert pressure on the downstream riparians to incorporate the principle of reasonable and equitable utilization into the Nile waters legal regime: the Nile Basin Initiative (NBI) and the Cooperative Framework Agreement (CFA). In this context, the unilateral decision of Ethiopia to build the GMD created additional tension; and the secession of South Sudan generated concerns about ‘who gets what’ of the water allocated to the former Republic of Sudan by the 1959 Agreement and about whether the newly independent South Sudan will join the CFA or, rather, will align with Egypt and (North) Sudan in their opposition to it. At the same time, Egypt has finally had a major change in regime and is showing a more moderate approach to the sharing of the Nile waters.

With reference to the above, this thesis addresses the question: Do the recent events in the region –the secession of South Sudan, the unilateral act by Ethiopia of constructing the GMD-- in the context of a regime change in Egypt, create an opportunity to incorporate more equitable sharing of the waters in the Nile Basin legal regime?

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