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# INTERNATIONAL WATER RIGHTS ON THE WHITE NILE OF THE NEW STATE OF SOUTH SUDAN

ANDREAS K. WENDL \*

**Abstract:** The birth of South Sudan falls directly in the demarcation zone of the rivalry between downstream and upstream riparian states on the waters of the Nile River. The downstream states—Egypt and Sudan—stress their “natural and historic” rights to the entire flow of the Nile based on the 1959 Nile Agreement and older colonial treaties, while the upstream African states refuse to be bound by colonial treaties and claim their equitable share of the Nile River by promoting South Sudan’s accession to the Cooperative Framework Agreement (CFA). The Nile River Basin lacks an international binding water agreement that includes and satisfies all the riparian states. This Article analyzes the status quo of South Sudan’s water rights to the Nile River by addressing the following questions: Is the new state bound by any rights and obligations established by the 1959 Nile Agreement? Is it advantageous for South Sudan to accede to the CFA, which provides for modern principles of international water law? The Article applies the customary international law of state succession to South Sudan’s secession from Sudan to determine if the 1959 Nile Agreement is binding between the two states. It concludes that South Sudan succeeded Sudan with regard to territorial rights and obligations established by the 1959 Nile Agreement, as customary international law recognizes that legal obligations of a territorial nature remain unaffected by state succession. South Sudan should enter into negotiations on a binding water agreement to allocate the 18.5 billion cubic meters of water granted to it under the 1959 Nile Agreement. The Article concludes that South Sudan should accede to the CFA within its allotted portion of the Nile waters under the 1959 Nile Agreement.

## INTRODUCTION

The Nile River Basin expands from the rainforest of Lake Victoria over the wet highlands of Ethiopia to the deserts of Sudan and Egypt until it

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empties its waters into the Mediterranean Sea.<sup>1</sup> The roughly 300 million inhabitants of the riparian states—the states situated on the banks of the Nile River—claim the Nile waters as their own.<sup>2</sup> Since the 19th century, these inhabitants have disputed the allotment of the ancient Nile River.<sup>3</sup> In fact, the river still lacks an international binding water agreement that includes and satisfies all the riparian states.<sup>4</sup> Consequently, every riparian state has undertaken the unilateral effort to use as much water as possible.<sup>5</sup> South Sudan is the eleventh riparian state to the Nile River claiming its share of the river's flow.<sup>6</sup>

Hydro-politics within the Nile Basin can be characterized by a strong rivalry between downstream—predominantly Arab countries—and upper riparian states—the East-African and equatorial lake states. Despite Egypt's and Sudan's disadvantageous location as downstream states of the Nile River, they have benefitted from an established colonial treaty setup, namely the 1929 Nile Agreement between Britain, on behalf of its colonies, and Egypt and the 1959 Nile Agreement between Sudan and Egypt, which incorporated the main provisions of the 1929 Nile Agreement.<sup>7</sup> The treaties essentially grant most of the Nile's water to Egypt and a much smaller share to Sudan.<sup>8</sup> Accordingly, Egypt has often stated that its right to control the Nile is based on “international law.”<sup>9</sup> Most of the upstream riparian states, however, find it extremely difficult to identify international law validating Egypt's claim. Upon their independence, several East African states persistently refused to be bound by these treaties, which they had been forced into under colonial rule.<sup>10</sup> Moreover, they were and are still not party to the 1959 Nile Agreement.<sup>11</sup> Egypt, however, continues to insist on the validity of the

<sup>1</sup> Salman M.A. Salman, *The Nile Basin Cooperative Framework Agreement: A Peacefully Unfolding African Spring?*, 38 WATER INT'L 17, 17 (2013) [hereinafter Salman, *A Peacefully Unfolding African Spring?*].

<sup>2</sup> *Id.*

<sup>3</sup> *Id.* at 18.

<sup>4</sup> See STEPHEN C. MCCAFFREY, *THE LAW OF INTERNATIONAL WATERCOURSES* 262 (2nd ed. 2007).

<sup>5</sup> Wossenu Abteu & Assefa M. Melesse, *Transboundary Rivers and the Nile*, in NILE RIVER BASIN: ECOHYDROLOGICAL CHALLENGES, CLIMATE CHANGE AND HYDROPOLITICS 565, 576 (Assefa M. Melesse et al. eds., 2014).

<sup>6</sup> See *id.* at 566.

<sup>7</sup> See OWEN MCINTYRE, *ENVIRONMENTAL PROTECTION OF INTERNATIONAL WATERCOURSES UNDER INTERNATIONAL LAW* 181 (2007).

<sup>8</sup> *Id.*

<sup>9</sup> SEIFULAZIZ MILAS, *SHARING THE NILE: EGYPT, ETHIOPIA AND THE GEO-POLITICS OF WATER* 61 (2013).

<sup>10</sup> See Emmanuel B. Kasimbazi, *Developing a Cooperative Framework Agreement for a Transboundary River: Lessons from a Comparative Analysis of the Mekong and Nile Rivers Basins*, 8 US-CHINA L. REV. 724, 753 (2011).

<sup>11</sup> See *id.* at 753–54.

colonial treaties and threatens—sometimes implicitly and sometimes explicitly—to use force against water projects of riparian states.<sup>12</sup>

On July 9, 2011, the new state of South Sudan was born after an internationally recognized referendum was held, in which almost 99% of South Sudanese voted for secession from Sudan.<sup>13</sup> South Sudan falls geographically and politically directly in the demarcation zone of the rivalry between the downstream and upstream states. South Sudanese feel a strong link to their African neighbors from the equatorial lakes, but are historically bound to Sudan and Egypt.<sup>14</sup>

In 1999, the Nile Basin Initiative (NBI) was launched by all riparian states to create a forum to foster cooperation and to frame an agreement for the equitable use and development of the Nile's resources.<sup>15</sup> In 2010, the NBI presented its Cooperative Framework Agreement (CFA), which has been signed by six upstream states: Ethiopia, Rwanda, Tanzania, Uganda, Kenya, and Burundi.<sup>16</sup> The CFA's forty-five articles incorporate the principles of equitable water use by all riparian states and no-harm rules to other riparian states.<sup>17</sup> The CFA aims to finally supplement the unbalanced colonial treaties of the 20th century with modern principles of international water law.<sup>18</sup> Nevertheless, the CFA has not entered into force because it lacks sufficient ratifications.<sup>19</sup> The CFA treaty offers a chance to manage the Nile coherently for the future.

The Nile River Basin faces many challenges that call for a common approach. Demographic projections forecast that the population living at the Nile will double to 600 million people within the next twenty-five years.<sup>20</sup> A higher per-capita use may lead to water shortages as water demand could

<sup>12</sup> See Jutta Brunnée & Stephen J. Toope, *The Changing Nile Basin Regime: Does Law Matter?*, 43 HARV. INT'L L.J. 105, 106–07 (2002).

<sup>13</sup> Kevin L. Cope, *The Intermestic Constitution: Lessons from the World's Newest Nation*, 53 VA. J. INT'L L. 667, 685 (2013).

<sup>14</sup> See Salman, *A Peacefully Unfolding African Spring?*, *supra* note 1, at 23.

<sup>15</sup> See Matthias Morbach et al., *Supporting the Development of Efficient and Effective River Basin Organizations in Africa: What Steps Can Be Taken to Improve Transboundary Water Cooperation Between the Riparian States of the Nile?*, in NILE RIVER BASIN: ECOHYDROLOGICAL CHALLENGES, CLIMATE CHANGE AND HYDROPOLITICS, *supra* note 5, at 608–09.

<sup>16</sup> See *id.* at 598, 617.

<sup>17</sup> See Scott O. McKenzie, Note, *Egypt's Choice: From the Nile Basin Treaty to the Cooperative Framework Agreement, an International Legal Analysis*, 21 TRANSNAT'L L. & CONTEMP. PROBS. 571, 596 (2012).

<sup>18</sup> See *id.* at 596–97.

<sup>19</sup> Morbach et al., *supra* note 15, at 617.

<sup>20</sup> Musa Mohammed Abseno, *Nile River Basin*, in THE UN WATERCOURSES CONVENTION IN FORCE: STRENGTHENING INTERNATIONAL LAW FOR TRANSBOUNDARY WATER MANAGEMENT 139, 142 (Flavia Rocha Loures & Alistair Rieu-Clarke eds., 2013).

exceed supply, especially in dry seasons.<sup>21</sup> Moreover, the effects of climate change in the Nile Basin could lead to less rainfall and more extreme weather phenomena overall.<sup>22</sup>

Given this situation, South Sudan's decision regarding whether to accede to the CFA is of particular significance for the entire Nile Basin. It could trigger new dynamics in the ratification process of the CFA and be a wake-up call for negotiations for a comprehensive agreement to overcome the colonial treaty regime in order to include all Nile riparian states. Egypt and Sudan, however, oppose the CFA, consider South Sudan to be bound by the 1959 Nile Agreement, and have tried to persuade South Sudan not to accede to the CFA.<sup>23</sup>

Although there have been several signals by South Sudanese officials that they are willing to accede to the CFA, South Sudan has so far been hesitant to sign the treaty.<sup>24</sup> International water issues are currently not on South Sudan's political agenda, as it is engaged in a brutal and destructive civil war.<sup>25</sup> Sooner or later, however, the government of South Sudan will have to decide if it wants to accede to the CFA.

This Article analyzes the status of South Sudan's water rights to the Nile River and addresses the following questions: Is it bound by the 1959 Nile Agreement? Is it advantageous for South Sudan to accede to the CFA? Is the 1959 Nile Agreement a factual obstacle to South Sudan's accession? In the next three sections, this Article frames the situation by describing the law of state succession, which evaluates the current status of South Sudan's water rights. The Article first presents an overview on the hydrology of South Sudan and the Nile River Basin. Then it briefly introduces the Comprehensive Peace Agreement (CPA), which eventually led to South Sudan's independence from Sudan without addressing future water allocations between the two states in any form. The Article then gives a short historical outline on colonial water treaties governing the Nile prior to the 1959 Nile Agreement and introduces the relevant rights and obligations of the Agreement for South Sudan.

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<sup>21</sup> See Stephen McCaffrey, *Water Scarcity: Institutional and Legal Responses*, in *THE SCARCITY OF WATER: EMERGING LEGAL AND POLICY RESPONSES* 43, 44–46 (Edward H.P. Brans et al. eds., 1997).

<sup>22</sup> See Abteu & Melesse, *supra* note 5, at 574–75.

<sup>23</sup> Morbach et al., *supra* note 15, at 621.

<sup>24</sup> See Salman M.A. Salman, *Water Resources in the Sudan North-South Peace Process and the Ramifications of the Secession of South Sudan*, in *WATER AND POST-CONFLICT PEACEBUILDING* 327, 351–52 (Erika Weinthal et al. eds., 2014) [hereinafter Salman, *Water Resources in the Sudan North-South Peace Process*].

<sup>25</sup> See Alex de Waal, *When Kleptocracy Becomes Insolvent: Brute Causes of the Civil War in South Sudan*, 113 *AFR. AFF.* 347, 349–50, 361 (2014).

The remaining sections provide an outlook on how South Sudan could execute its inherited rights and strategies going forward. The Article applies the customary international law of state succession to South Sudan's secession from Sudan to determine if the 1959 Nile Agreement is binding between the two states. This section first identifies the two governing provisions of state succession in the applicable case of secession—the principle of automatic state succession (Article 34 of the 1978 Vienna Convention) and the automatic succession to territorial rights and obligations established by treaties (Article 12 of the 1978 Vienna Convention). It then thoroughly scrutinizes their status as customary law. This section then argues that South Sudan succeeded Sudan with regard to territorial rights and obligations established by the 1959 Nile Agreement because customary international law recognizes that legal obligations of a territorial nature remain unaffected by state succession. South Sudan did not automatically become party to the entire 1959 Nile Agreement, as Article 34 is not part of customary international law, even though the provisions of the water allocation between Sudan and Egypt are binding upon South Sudan.

The Article next deals with the procedural implications for South Sudan and elaborates upon what steps South Sudan must undertake to exercise its rights and obligations in the future. South Sudan has the right to use a certain share of the waters allocated to Sudan under the 1959 Nile Agreement. The Article then lays out the principles of customary international water law for fruitful negotiations between the two Sudans for a binding water agreement with respect to the rights and obligations of the 1959 Nile Agreement. Finally, the Article presents an overview of contingent issues of the negotiation process of the CFA between the riparian states and suggests that South Sudan should accede to the CFA within its allotted portion of the Nile waters.

## I. SOUTH SUDAN AND THE HYDROLOGY OF THE NILE BASIN

The Nile is the longest river in the world, flowing 6650 kilometers from East Africa to the Mediterranean Sea.<sup>26</sup> The watershed bypasses eleven riparian states.<sup>27</sup> In Khartoum, Sudan, the Nile's two main tributaries merge—the White Nile constantly traveling from the Equatorial Lakes and the Blue Nile from Ethiopia's and Eritrea's rainy highlands.<sup>28</sup> In Barbar, north of Khartoum, the last tributary, the Atbarah River, flows into the Nile.<sup>29</sup>

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<sup>26</sup> Abteu & Melesse, *supra* note 5, at 566.

<sup>27</sup> *Id.*

<sup>28</sup> *Id.* at 572–74.

<sup>29</sup> Morbach et al., *supra* note 15, at 600.

About 20% of the Nile Basin belongs to South Sudan and over 90% of the territory of South Sudan is part of the Nile Basin.<sup>30</sup> The White Nile enters South Sudan at the city of Nimule and runs through its capital city, Juba, to spread out in the vast swamp area of Al-Sudd.<sup>31</sup> The name Al-Sudd originates from the Arab word for “barrier” and constitutes one of the largest wetland biospheres in the world.<sup>32</sup> Its size varies between 30,000 and 40,000 square kilometers and it expands to double that size during the wet season.<sup>33</sup> At this point, the White Nile branches into several smaller rivers and is fed later by numerous rivers flowing from the west (mainly the Al-Arab and Jur Rivers).<sup>34</sup> At the city of Malakal, the White Nile is joined by its last major tributary, the Sobat River, which originates in Ethiopia.<sup>35</sup> Traveling further north, the White Nile enters Sudan to merge with the Blue Nile into the Nile River.<sup>36</sup> In other words, “South Sudan is where the White Nile loses and later consolidates itself.”<sup>37</sup>

The average water flow of the Nile can be expressed in numbers. At the Aswan Dam, the total flow of the Nile is 84.1 billion cubic meters (bcm).<sup>38</sup> The Blue Nile and the Atbarah River (11 bcm) together contribute about 61 bcm, or 72%, of the total flow.<sup>39</sup> The White Nile and the Sobat River each add about 11.5 bcm of water flow and thus provide the remaining 28% of the total flow measured at the Aswan Dam.<sup>40</sup> The contribution from the Equatorial Lakes is only 11.5 bcm or 14% of the total flow, but it remains steady throughout the year and thus provides for a continuous supply for the Nile Basin.<sup>41</sup> This constant flow is very important because the waters of the Blue Nile are highly dependent upon the seasonal rains in Ethiopia’s highlands, which feed the Nile with 86% of its waters.<sup>42</sup> The two water systems complement each other and provide for the water needs of Egypt and Sudan during the low-flow period of the Blue Nile.<sup>43</sup>

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<sup>30</sup> Salman M.A. Salman, *The New State of South Sudan and the Hydro-Politics of the Nile Basin*, 36 WATER INT’L 154, 157 (2011) [hereinafter Salman, *The New State of South Sudan*].

<sup>31</sup> See MCCAFFREY, *supra* note 4, at 259–60.

<sup>32</sup> See *id.* at 259.

<sup>33</sup> Salman, *Water Resources in the Sudan North-South Peace Process*, *supra* note 24, at 340–41.

<sup>34</sup> *Id.* at 334.

<sup>35</sup> *Id.* at 335.

<sup>36</sup> *Id.*

<sup>37</sup> *Id.*

<sup>38</sup> James Kinyangi et al., *The Nile Basin, People, Poverty and Vulnerability*, in *THE NILE RIVER BASIN: WATER, AGRICULTURE, GOVERNANCE AND LIVELIHOODS* 30, 31 (Seleshi Bekele Awulachew et al. eds., 2012).

<sup>39</sup> MCCAFFREY, *supra* note 4, at 268.

<sup>40</sup> Salman, *Water Resources in the Sudan North-South Peace Process*, *supra* note 24, at 335.

<sup>41</sup> *Id.* at 336.

<sup>42</sup> *Id.*

<sup>43</sup> *Id.* at 335–36.

Egypt and Sudan rely almost completely on Nile waters for irrigation purposes.<sup>44</sup> On the contrary, most parts of South Sudan have a rainy season from June to October and therefore have an additional source for irrigation.<sup>45</sup> Egypt and Sudan have a common interest to increase the water supplies arriving from the White Nile in order to be less dependent upon seasonal water flow variations from the Blue Nile.<sup>46</sup> Egypt is currently pushing for the realization of water conservation projects in the Al-Sudd swamp area.<sup>47</sup> Between 1899 and 1903, the British engineer Sir William Garstin made three journeys to the Upper Nile, where he perceptively observed that nearly 60% of the water entering the Al-Sudd was lost by evaporation and transpiration.<sup>48</sup> His report fostered the idea for the construction of the Jonglei canal through the wetlands to conserve up to 20 bcm for the White Nile, which would almost double the White Nile's flow.<sup>49</sup> The project was finally undertaken in a joint effort between Egypt and Sudan in the 1970s, but faced major opposition by Southern Sudanese fearing the destruction of the wetland ecosystem, which serves as the region's fishery, drinking water, and pasture supply.<sup>50</sup> Between 1983 and 1984, with more than two-thirds of the 360 kilometers of canal already completed, rebels of the Sudan People's Liberation Movement (SPLM) attacked the construction site several times, which brought the project to its end.<sup>51</sup> South Sudan has great potential to develop water conservation projects in the Al-Sudd, but it should be mindful to preserve the unique ecosystem of the wetland, which is protected under the Ramsar Convention on Wetlands and is of great value for the livelihood of the local population.<sup>52</sup>

## II. SOUTH SUDAN'S STRUGGLE FOR INDEPENDENCE—NO ROOM FOR A BINDING WATER AGREEMENT WITH SUDAN

Surprisingly, Sudan and South Sudan did not incorporate into the CPA a treaty on the allocation of the Nile waters, despite both states' significant

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<sup>44</sup> See Morbach et al., *supra* note 15, at 602.

<sup>45</sup> Salman, *Water Resources in the Sudan North-South Peace Process*, *supra* note 24, at 339.

<sup>46</sup> See Morbach et al., *supra* note 15, at 602.

<sup>47</sup> See Rebecca Yang, Note, *The American Southeast and South Sudan: The Emergence of Environmental Factors in Transboundary Water Law*, 38 N.C. INT'L L. & COM. REG. 233, 251 (2012).

<sup>48</sup> Robert O. Collins, *The Jonglei Canal: Illusion or Reality?*, 13 WATER INT'L, 144, 144 (1988).

<sup>49</sup> See *id.*

<sup>50</sup> *Id.* at 147.

<sup>51</sup> Salman, *Water Resources in the Sudan North-South Peace Process*, *supra* note 24, at 342–44.

<sup>52</sup> See LAURENCE BOISSON DE CHAZOURNES, FRESH WATER IN INTERNATIONAL LAW 133–35 (2013).



dependence upon the Nile as a prime water resource.<sup>53</sup> One has to consider the circumstances of South Sudan's independence to comprehend this astonishing fact.

South Sudan has come a long and violent way to its independence from Sudan on July 9, 2011.<sup>54</sup> From 1955 until 2005, over two million Southern Sudanese were killed in armed conflicts, and approximately four million Southern Sudanese fled the South to Sudan or neighboring countries during the civil wars.<sup>55</sup> Similarly, hundreds of thousands of northern Sudanese died on the other side during the longest-running conflict in Africa in recorded history.<sup>56</sup> One of the central sources of conflict was the dispute over water in the civil war from 1983 until 2005—the conflict over the Jonglei project and the Abyei region.<sup>57</sup> The Abyei conflict relates to a border demarcation dispute along the Al-Arab River and to water and cattle grazing rights in the region.<sup>58</sup>

On January 9, 2005, the SPLM and the central government of Sudan signed the CPA, ending the civil war and installing an interim constitution for Sudan.<sup>59</sup> The CPA consisted of six different agreements, signed by the conflict parties in Kenya, and a chapeau, which describes the long and complicated negotiations and emphasizes the need for a long-lasting peace.<sup>60</sup> The Machakos Protocol of 2002 was part of the CPA and provided for South Sudan's right to self-determination for the first time.<sup>61</sup> Accordingly, South Sudan was allowed to hold a referendum on its independence from Sudan six years after the CPA was signed.<sup>62</sup> On January 9, 2011, 98.8% of the people of South Sudan voted in an internationally recognized referendum for independence from Sudan.<sup>63</sup> Six months later, on July 9, 2011, the 54th African state was officially born.<sup>64</sup>

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<sup>53</sup> See Salman, *The New State of South Sudan*, *supra* note 30, at 160.

<sup>54</sup> *See id.* at 154.

<sup>55</sup> Salman, *Water Resources in the Sudan North-South Peace Process*, *supra* note 24, at 333.

<sup>56</sup> *See id.* at 328–29.

<sup>57</sup> *See id.* at 333, 340.

<sup>58</sup> *See* Jure Vidmar, *South Sudan and the International Legal Framework Governing the Emergence and Delimitation of New States*, 47 TEX. INT'L L.J. 541, 554–58 (2012); Samson S. Wassara, *Interests of Border Communities in Water and Pastures: Will They Influence Nile Water Policies of the Two Sudans?* 93, 104–05 (UNISCI Discussion Paper No. 33, 2013).

<sup>59</sup> Salman M.A. Salman, *South Sudan Road to Independence: Broken Promises and Lost Opportunities*, 26 PAC. MCGEORGE GLOB. BUS. & DEV. L.J. 343, 393, 399 (2013).

<sup>60</sup> *Id.* at 394–95.

<sup>61</sup> *See* Jure Vidmar, *Territorial Integrity and the Law of Statehood*, 44 GEO. WASH. INT'L L. REV. 697, 712–13 (2012) [hereinafter Vidmar, *Territorial Integrity*].

<sup>62</sup> Cope, *supra* note 13, at 691.

<sup>63</sup> *Id.* at 685.

<sup>64</sup> *See* Vidmar, *Territorial Integrity*, *supra* note 61, at 714; Jeffrey Gettleman, *After Years of Struggle, South Sudan Becomes a New Nation*, N.Y. TIMES (July 9, 2011), [http://www.nytimes.com/2011/07/10/world/africa/10sudan.html?\\_r=0](http://www.nytimes.com/2011/07/10/world/africa/10sudan.html?_r=0) [perma.cc/UAR6-GNXP].

Despite the centrality of the Nile waters, the agreements did not refer to the allocation of water between Sudan and South Sudan or to any colonial Nile treaties with Egypt. The CPA did not incorporate any provisions on the allocation of the Nile waters in the Agreement on Wealth Sharing, which allocated more than 50% of Sudan's oil reserves to South Sudan, or in the Power Sharing Agreement.<sup>65</sup> The latter agreement granted the central government of Sudan the exclusive responsibility for administering the use of the Nile resources in the interim phase.<sup>66</sup> This right terminated upon South Sudan's independence. As a matter of course, the parties knew about the importance of the issue, but preferred to leave it aside for the negotiations of the CPA.<sup>67</sup> The SPLM was hesitant to demand a share of the Nile waters under the 1959 Nile Agreement.<sup>68</sup> Such a claim would have injected the SPLM in the middle of the Nile controversies between upstream and downstream states. The SPLM knew that it needed the support of its neighboring states upon South Sudan's independence.<sup>69</sup> Therefore, the SPLM postponed its claims on water shares for the era after independence and agreed to mandate the waters of the Nile by the central government of Sudan.<sup>70</sup> The parties thought to come to a solution during the interim phase, before South Sudan became independent from Sudan, but these negotiations have not yet taken place.

### III. THE 1959 NILE AGREEMENT

The 1959 Nile Agreement was established as a bilateral treaty between Egypt and Sudan and continues to govern water allocation between the two states.<sup>71</sup> On the one hand, it grants water rights to Sudan, which might also be applicable to South Sudan.<sup>72</sup> On the other hand, the treaty solidified the dissatisfaction of the other upper riparian states, which strongly reject the agreement as a continuation of colonial treaty policy.<sup>73</sup>

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<sup>65</sup> See Salman M.A. Salman, *Water Resources in the Sudan North-South Peace Process: Past Experience and Future Trends*, 16 AFR. Y.B. INT'L L. 299, 303–04 (2008) [hereinafter Salman, *Past Experience and Future Trends*].

<sup>66</sup> See *id.* at 306.

<sup>67</sup> See Mohamed S. Helal, *Inheriting International Rivers: State Succession to Territorial Obligations, South Sudan, and the 1959 Nile Waters Agreement*, 27 EMORY INT'L L. REV. 907, 913–14 (2013).

<sup>68</sup> See Salman, *Past Experience and Future Trends*, *supra* note 65, at 313.

<sup>69</sup> See *id.*

<sup>70</sup> See *id.*

<sup>71</sup> Ryan Stoa, *International Water Law Principles and Frameworks: Perspectives from the Nile River Basin*, in NILE RIVER BASIN: ECOHYDROLOGICAL CHALLENGES, CLIMATE CHANGE AND HYDROPOLITICS, *supra* note 5, at 587 [hereinafter Stoa, *International Water Law Principles and Frameworks*].

<sup>72</sup> See MCCAFFREY, *supra* note 4, at 268.

<sup>73</sup> See *id.* at 270.

### A. History of the 1959 Nile Agreement

Many treaties have been concluded to regulate the utilization of the waters of the Nile River over the last two centuries.<sup>74</sup> Most of the early colonial treaties were of a bilateral nature, dividing the waters of the Nile between Britain and other European states according to their interests.<sup>75</sup> At the beginning of the 20th century, Egypt was included in the British Nile Agreements.<sup>76</sup> Nevertheless, these agreements caused bitter conflicts between the riparian states.<sup>77</sup> The Nile Agreements from 1929<sup>78</sup> and 1959<sup>79</sup> have continued the tradition of inequitable allocation. The 1929 Nile Agreement is a great reflection of the predominant power relations of that time and became “the dominating feature of legal relationships concerning the distribution and utilization of the Nile waters,”<sup>80</sup> which Egypt claims are still in effect today.

The British framers of the Nile Agreements gave special attention to secure free passage through the Suez Canal, the shortest sea route between Europe and British-ruled India.<sup>81</sup> Thus, they drafted remarkably favorable treaty provisions to please Egypt.<sup>82</sup> British colonial power then expanded outside Ethiopia and the Democratic Republic of Congo<sup>83</sup> to the major riparian states of the Nile (Sudan, Kenya, Uganda, and Tanzania), and Britain willingly ratified the 1929 Nile Agreement on their behalf.<sup>84</sup> The 1929 Nile Agreement provided Sudan with only four bcm of water allotment, but did

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<sup>74</sup> See Abseno, *supra* note 20, at 144–45.

<sup>75</sup> See McKenzie, *supra* note 17, at 577.

<sup>76</sup> Salman, *A Peacefully Unfolding African Spring?*, *supra* note 1, at 18.

<sup>77</sup> *Id.*

<sup>78</sup> Exchange of Notes Between His Majesty’s Government in the United Kingdom and the Egyptian Government in Regard to the Use of Waters of the River Nile for Irrigation Purposes, U.K.–Egypt, May 7, 1929, 93 L.N.T.S. 44 [hereinafter 1929 Nile Agreement].

<sup>79</sup> Agreement Between the Republic of the Sudan and the United Arab Republic for the Full Utilization of the Nile Waters, Sudan–United Arab Republic, Nov. 8, 1959, 453 U.N.T.S. 51 [hereinafter 1959 Nile Agreement].

<sup>80</sup> R.K. Batstone, *The Utilisation of the Nile Waters*, 8 INT’L & COMP. L.Q. 523, 526–27 (1959).

<sup>81</sup> See BONAYA ADHI GODANA, AFRICA’S SHARED WATER RESOURCES: LEGAL AND INSTITUTIONAL ASPECTS OF THE NILE, NIGER AND SENEGAL RIVER SYSTEMS 107 (1985).

<sup>82</sup> See Fasil Amdetsion, *Scrutinizing the Scorpion Problematique: Arguments in Favor of the Continued Relevance of International Law and a Multidisciplinary Approach to Resolving the Nile Dispute*, 44 TEX. INT’L L.J. 1, 18 (2008).

<sup>83</sup> The independent state of Ethiopia was bound by a 1902 agreement with Britain not to construct any works arresting the flow of Blue Nile or any waters therein unless agreed upon with Britain and Sudan. Similarly, Britain obtained an agreement with the Democratic Republic of the Congo that the Democratic Republic of the Congo would refrain from altering the Nile’s flow without Britain’s prior consent. See Joseph W. Dellapenna, *Treaties as Instruments for Managing Internationally-Shared Water Resources: Restricted Sovereignty v. Community of Property*, 26 CASE. W. RES. J. INT’L L. 27, 48 (1994).

<sup>84</sup> See MCCAFFREY, *supra* note 4, at 266.

not take any irrigation or developmental needs of the remaining upper riparian states into account.<sup>85</sup> On the contrary, Egypt was granted the remaining share of 48 bcm of water, according to scientific assessment, for its own purposes.<sup>86</sup> Egypt received ownership of any remaining water as it reached Egypt and was granted a veto right binding upon all riparian states to obstruct any upstream water projects that would reduce the quantity of water arriving in Egypt, modify the timing of the water's arrival, or lower its level.<sup>87</sup> The 1929 Nile Agreement also expressed Britain's view of the "natural and historic rights of Egypt in the waters of the Nile"—without any explanation of the origin and content of these rights.<sup>88</sup>

In Sudan, resentment against the 1929 Nile Agreement arose soon after its conclusion, even before Sudan's independence. British administrators in Sudan identified the 1929 Nile Agreement as a major obstacle to economic and social development within the state, and Sudanese interest groups rejected the agreement, which had been directly concluded between London and Cairo, and stressed that they were not party to it.<sup>89</sup> Thus, after attaining independence in 1956, Sudan further underlined the invalidity of the 1929 Nile Agreement.<sup>90</sup> Egypt felt compelled to renegotiate a new treaty with Sudan, which resulted in the 1959 Nile Agreement.<sup>91</sup> Officially, the reason for undertaking negotiations between the two states was the extension of the only partial utilization of the Nile waters of 1929 to the full utilization, which provided Egypt with full control of the Nile waters.<sup>92</sup> Unlike the 1929 Nile Agreement, in which Britain effectively bound its East-African riparian colonies, the 1959 Nile Agreement was merely a bilateral treaty, with the consequence that all provisions of the 1929 Nile Agreement that were not explicitly revoked or repudiated remained in effect.<sup>93</sup> The 1959 agreement maintains the principle of respecting established rights by prior Nile Agreements, including the 1929 Nile Agreement.<sup>94</sup> Thus, the 1959 Nile

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<sup>85</sup> See *id.* at 267.

<sup>86</sup> See *id.*

<sup>87</sup> See Salman, *A Peacefully Unfolding African Spring?*, *supra* note 1, at 18.

<sup>88</sup> IBRAHIM KAYA, *EQUITABLE UTILIZATION: THE LAW OF THE NON-NAVIGATIONAL USES OF INTERNATIONAL WATERCOURSES* 61 (2003) (citations omitted); see Arthur Okoth-Owiro, *The Nile Treaty: State Succession and International Treaty Commitments: A Case Study of the Nile Water Treaties* 8 (Konrad Adenauer Stiftung & Law and Pol'y Res. Found. Occasional Paper No. 9, 2004).

<sup>89</sup> See GODANA, *supra* note 81, at 144.

<sup>90</sup> See MCCAFFREY, *supra* note 4, at 266.

<sup>91</sup> Okoth-Owiro, *supra* note 88, at 13.

<sup>92</sup> MCCAFFREY, *supra* note 4, at 266–67.

<sup>93</sup> See *id.* at 266–68.

<sup>94</sup> See *id.* at 267–68.

Agreement did not replace its predecessor entirely, and British riparian colonies continued to be bound by the 1929 Nile Agreement.<sup>95</sup>

### *B. Relevant Rights and Obligations Under the 1959 Nile Agreement*

The 1959 Nile Agreement created a set of rights and obligations between Sudan and Egypt related to the construction of the Aswan Dam and other water projects located in Sudan and in today's South Sudan.<sup>96</sup> The agreement does not contain any provisions on water quality, but focuses mainly on water allocation.<sup>97</sup> For this Article, there are three main provisions of interest, each of which is binding upon Sudan and might be applicable to South Sudan.<sup>98</sup>

First, the entire waters of the Nile flow were shared between Egypt and Sudan.<sup>99</sup> Since the 1929 Nile Agreement, the average flow of the river at the Aswan Dam was considered to be 84 bcm.<sup>100</sup> Seepage and evaporation are estimated to account for 10 bcm, leaving 74 bcm to be divided.<sup>101</sup> Of this total, the acquired rights of Egypt and Sudan were given precedence and amounted to 52 bcm.<sup>102</sup> The remaining benefits of approximately 22 bcm were divided by a ratio of 7.5 bcm for Egypt and 14.5 bcm for Sudan.<sup>103</sup> Egypt was allotted the flow of 55.5 bcm of water and Sudan received 18.5 bcm for its use.<sup>104</sup>

Second, the agreement contains a provision that the Sudanese government, in cooperation with Egypt, will undertake projects to increase the Nile waters by preventing water waste in the great swamp region of the White Nile, located in the territory of today's South Sudan.<sup>105</sup> Net revenues from those projects shall accrue in equal shares to both states, which will also equally share the costs.<sup>106</sup> With the other's cooperation, Sudan and Egypt were granted the right to construct water conservation projects in their respective territories.<sup>107</sup>

<sup>95</sup> 1959 Nile Agreement, *supra* note 79, pmb., art. 1.

<sup>96</sup> See MCCAFFREY, *supra* note 4, at 268.

<sup>97</sup> See MCINTYRE, *supra* note 7, at 181.

<sup>98</sup> See HOREYA T. MEGAHED, THE DEVELOPMENT OF THE NILE BASIN 19–20 (1973); Aaron T. Wolf & Joshua T. Newton, *Case Study of Transboundary Dispute Resolution: The Nile Waters Agreement 1*, 5–6 (Oregon State University), [http://www.transboundarywaters.orst.edu/research/case\\_studies/Documents/nile.pdf](http://www.transboundarywaters.orst.edu/research/case_studies/Documents/nile.pdf) [perma.cc/88F7-RYTP].

<sup>99</sup> See MCCAFFREY, *supra* note 4, at 268.

<sup>100</sup> See *id.*; Wolf & Newton, *supra* note 98, at 1.

<sup>101</sup> Wolf & Newton, *supra* note 98, at 5.

<sup>102</sup> *Id.*

<sup>103</sup> *Id.*

<sup>104</sup> *Id.*

<sup>105</sup> See 1959 Nile Agreement, *supra* note 79, art. 3; MCCAFFREY, *supra* note 4, at 268.

<sup>106</sup> See 1959 Nile Agreement, *supra* note 79, art. 3.

<sup>107</sup> *Id.*

Lastly, a Joint Technical Commission was established to enhance knowledge sharing and to determine new water allocations between Egypt and Sudan in the event of water shortages.<sup>108</sup> Both states were aware that, in the future, the upper riparian states might increase their use of the Nile for their development.<sup>109</sup> In case such negotiations on water apportionment with third states were required, Egypt and Sudan agreed beforehand to take a “unified view.”<sup>110</sup> This commission was also required to determine whether water projects on the Nile beyond the borders of Egypt and Sudan were permissible or negatively affected the flow of the Nile.<sup>111</sup>

#### IV. THE INTERNATIONAL LAW OF STATE SUCCESSION

The international law of state succession needs to be consulted to understand which treaties currently bind South Sudan because the CPA and the 1959 Nile Agreement remain silent on how water should be allocated between Sudan and South Sudan. As mentioned above, the 1959 Nile Agreement is only a bilateral treaty between Egypt and Sudan, and the CPA between Sudan and South Sudan does not provide for a devolution treaty,<sup>112</sup> which would outline the rights and obligations between the two Sudans with regard to the 1959 Nile Agreement.

This section first identifies the governing provisions of customary international law of state succession and evaluates each provision's status as a customary norm. Then, the international law of state succession is applied to determine the rights and obligations between Sudan and South Sudan. Finally, this section addresses the question of whether the rights and obligations of the 1959 Nile Agreement are binding upon South Sudan.

##### *A. Identification of Governing Provisions of International Law on State Succession in the Case of South Sudan*

This section provides a short introduction to the international law of state succession according to customary law and the 1978 Vienna Convention on Succession of States in Respect of Treaties (1978 Vienna Convention).<sup>113</sup> As of today, the law of state succession has not entirely been set-

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<sup>108</sup> *Id.* art. 4; see MCCAFFREY, *supra* note 4, at 270.

<sup>109</sup> See MCCAFFREY, *supra* note 4, at 270.

<sup>110</sup> 1959 Nile Agreement, *supra* note 79, art. 5.

<sup>111</sup> *Id.*

<sup>112</sup> See MATTHEW CRAVEN, *THE DECOLONIZATION OF INTERNATIONAL LAW: STATE SUCCESSION AND THE LAW OF TREATIES* 122–27 (2007).

<sup>113</sup> See generally Vienna Convention on Succession of States in Respect of Treaties, Aug. 23, 1978, 1946 U.N.T.S. 3 [hereinafter 1978 Vienna Convention].

tled.<sup>114</sup> International treaties bind the concluding states regardless of whether another government has replaced the signing government.<sup>115</sup> These international treaties, when entered into force, limit to varying degrees the power of consenting states with respect to the object of the treaty.<sup>116</sup> States, therefore, limit their own sovereignty to achieve a common goal.<sup>117</sup>

Which rules are applicable when a new state is born? Are all treaties of the predecessor state binding upon the new state *ab initio*? The answers given by international law and state practice are still in many regards “confused and uncertain,” even though many state successions have occurred globally.<sup>118</sup> As a result of the often very political and emotional circumstances of state succession, state practice is highly variable and strongly based on national policy considerations, rather than on general normative principles of international law.<sup>119</sup>

Today’s rules of state succession derive mainly from customary international law and the codification of the 1978 Vienna Convention. Article 2(b) of the 1978 Vienna Convention defines succession as “the replacement of one State by another in the responsibility for the international relations of the territory.”<sup>120</sup> The term signifies “a change of sovereignty” over a certain territory, in which the “new sovereign [succeeds] to the legal rights and obligations of the old sovereign.”<sup>121</sup> Certainly, South Sudan succeeded Sudan in its responsibility for international relations for its territory upon its independence in 2011.

These definitions are broadly accepted as they guarantee a smooth and clear transition. The new state shall inherit all the rights and obligations of the international treaties of its predecessor.<sup>122</sup> Those rules provide stability and continuity in established treaty relations for the global community.<sup>123</sup> The clear disadvantage of that principle of “universal continuity” is the inherent limitation of the new state’s sovereignty.<sup>124</sup> From the beginning, eve-

<sup>114</sup> See McKenzie, *supra* note 17, at 587; D.P. O’Connell, *Independence and Succession to Treaties*, 38 BRIT. Y.B. INT’L L. 84, 84 (1962).

<sup>115</sup> See DANIEL P. O’CONNELL, *THE LAW OF STATE SUCCESSION* 5, 15 (H.C. Gutteridge et al. eds., 1956); PATRICK DUMBERRY, *STATE SUCCESSION TO INTERNATIONAL RESPONSIBILITY* 14 (2007).

<sup>116</sup> See O’CONNELL, *supra* note 115, at 64.

<sup>117</sup> *Id.*

<sup>118</sup> See RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 208, rep. n.1 (AM. LAW INST. 1987).

<sup>119</sup> See DUMBERRY, *supra* note 115, at 3–4.

<sup>120</sup> 1978 Vienna Convention, *supra* note 113, art. 2(b).

<sup>121</sup> See GODANA, *supra* note 81, at 133–34; O’CONNELL, *supra* note 115, at 5.

<sup>122</sup> See 1978 Vienna Convention, *supra* note 113, arts. 1, 2.

<sup>123</sup> See O’CONNELL, *supra* note 115, at 6–8.

<sup>124</sup> Christina Leb & Mara Tignino, *State Succession to Water Treaties: Uncertain Streams*, in INTERNATIONAL LAW AND FRESHWATER: THE MULTIPLE CHALLENGES 421, 424 (Laurence Boisson de Chazournes et al. eds., 2013).

ry new state's government would suffer from a limitation of discretionary powers concerning its foreign relations, without taking the circumstances of its emergence and the type of agreement into consideration.<sup>125</sup> Therefore, international law and state practices vary according to different settings of emergence and draw different legal conclusions as to whether rights and obligations are inherited *ab initio* or not. Moreover, differing types and contents of treaties have different effects on the transition of rights and obligations.<sup>126</sup>

The 1978 Vienna Convention is a practicable starting point for the assessment of applicable provisions in the case of state secession or separation.<sup>127</sup> The governing provisions of state succession in the case of South Sudan are Article 34 and Article 12 of the 1978 Vienna Convention. On the one hand, Article 34 foresees that the successor state will inherit all treaties automatically from its predecessor upon independence if the territory consists only of parts of the predecessor state's former territory.<sup>128</sup> Therefore, the concept of Article 34 seems *prima facie* applicable in South Sudan's case of state secession. On the other hand, according to the theory of automatic territorial treaties as provided in Article 12 of the 1978 Vienna Convention, South Sudan could be automatically bound with regard to the territorial rights and obligations established by the 1959 Nile Agreement.<sup>129</sup>

The 1978 Vienna Convention, however, is not applicable between Sudan and South Sudan. Sudan only signed but never ratified the 1978 Vienna Convention.<sup>130</sup> Egypt signed and ratified the Convention.<sup>131</sup> South Sudan neither signed nor ratified it.<sup>132</sup> According to the Vienna Convention on the Law of Treaties of 1969, every signatory is obliged not to defeat the object of the treaty prior to its entry into force.<sup>133</sup> In the context of state succession, this concept is hardly applicable because Sudan lost its sovereignty over South Sudan, and it is virtually impossible to enforce that obligation on South Sudan. Therefore, in the case of South Sudan, the rules of state succession established by international agreements are not applicable.

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<sup>125</sup> *See id.*

<sup>126</sup> *See id.*

<sup>127</sup> TAI-HENG CHENG, STATE SUCCESSION AND COMMERCIAL OBLIGATIONS 80 (2006).

<sup>128</sup> *See* 1978 Vienna Convention, *supra* note 113, art. 34.

<sup>129</sup> *See id.* art. 12.

<sup>130</sup> *See Vienna Convention on Succession of States in Respect of Treaties*, UNITED NATIONS TREATY COLLECTION, [https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=XXIII-2&chapter=23&lang=en](https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XXIII-2&chapter=23&lang=en) (last updated Jan. 3, 2016) [perma.cc/K8BT-GR9K] [hereinafter *Vienna Convention*, UN Treaty Collection].

<sup>131</sup> *Id.*

<sup>132</sup> *See id.*

<sup>133</sup> *See* Vienna Convention on the Law of Treaties, art. 18, May 23, 1969, 1155 U.N.T.S. 331 [hereinafter 1969 Vienna Convention].



### B. Article 34 of the 1978 Vienna Convention in the Case of State Secession

Article 34 of the 1978 Vienna Convention governs the law of state succession when a state separates into two or more states.<sup>134</sup> First, this part examines if Article 34 of the 1978 Vienna Convention is applicable to the case of South Sudan. Then, it turns to the question of whether Article 34 is regarded as customary international law or if there is a different governing principle accepted as custom in cases of state secession.

#### 1. Scope of Article 34 of the 1978 Vienna Convention

The 1978 Vienna Convention basically foresees two different scenarios for state succession: the “clean slate” state applies for “newly independent states,” and “universal continuity” applies for most other types of new state emergences, including cases in which one state separates from another state or two or more states unify into one state, unless states agree otherwise.<sup>135</sup>

According to Article 2(f) of the 1978 Vienna Convention, a “newly independent state” is born when its territory was immediately dependent on a different state before the date of succession.<sup>136</sup> The Convention adopted the “clean slate” state or *tabula rasa* based on the recent experiences of decolonization, mainly in Africa and South America.<sup>137</sup> It was conceived to be just that those successor states should be perceived as wholly new legal personalities with a clean slate.<sup>138</sup> These states should not be bound *ab initio* by any treaties from their colonial era, except for treaties that determine borders to prevent future disputes with neighboring countries as provided by Article 11 of the 1978 Vienna Convention.<sup>139</sup>

On the other hand, Article 34(1) of the 1978 Vienna Convention governs the case of state separation and its effect on treaties.<sup>140</sup> It declares that any treaty that was in force at the date of the succession of states with respect to the entire territory of the predecessor state continues to be in force with each successor state so formed.<sup>141</sup> The entire territory of South Sudan is identical to former parts of the territory of Sudan. Consequently, this would lead to universal continuity of treaty obligations and, in particular,

<sup>134</sup> 1978 Vienna Convention, *supra* note 113, art. 34.

<sup>135</sup> *See id.* arts. 33, 34; Leb & Tignino, *supra* note 124, at 424–25. Part II of the 1978 Vienna Convention foresees a different regime in the case of transfer of parts of a territory from one existing state to another existing state. *See* 1978 Vienna Convention, *supra* note 113, art. 15.

<sup>136</sup> 1978 Vienna Convention, *supra* note 113, art. 2(f).

<sup>137</sup> *See* CRAVEN, *supra* note 112, at 233; Leb & Tignino, *supra* note 124, at 424–25.

<sup>138</sup> *See* 1978 Vienna Convention, *supra* note 113, Part III; Leb & Tignino, *supra* note 124, at 424–25.

<sup>139</sup> *See* Amdetsion, *supra* note 82, at 25.

<sup>140</sup> *See* 1978 Vienna Convention, *supra* note 113, art. 34(l).

<sup>141</sup> *Id.* art. 34(a).

would indicate that the 1959 Nile Agreement, which bound Sudan at the time of state succession, was transferred to South Sudan.<sup>142</sup>

The 1978 Vienna Convention creates a certain contradiction by separating the world into mainly two categories: states with colonial heritage and states without colonial heritage.<sup>143</sup> Whereas the latter category fully succeeds to the rights and obligations of the treaties established by the predecessor, unless the states negotiate otherwise, “newly independent states” enjoy full discretion regarding their international obligations as they apply the “clean slate” state doctrine.<sup>144</sup>

Could the relationship between Sudan and South Sudan possibly be described as a “dependency” similar to colonial rule in Africa?<sup>145</sup> Although the independence of South Sudan was shaped by a struggle for self-determination, its focus rests on secession from Sudan, as South Sudan consists exclusively of former territory under the sovereignty of Sudan.<sup>146</sup> Sudan, however, cannot be viewed as a former colonial power suppressing South Sudan, as stipulated for newly independent states, nor was Sudan under colonial rule when it signed the 1959 Nile Agreement, which supplemented the colonial 1929 Nile Agreement.<sup>147</sup> South Sudan merely exercised its constitutional right for secession from Sudan, which was created under the interim Constitution as part of the CPA.<sup>148</sup> Consequently, South Sudan cannot be treated as a newly independent state to which the “clean slate” state doctrine applies. Instead, Article 34 is the applicable norm for the termination of state succession.<sup>149</sup>

## 2. Article 34 of the 1978 Vienna Convention: Part of Customary International Law?

Whether South Sudan became a successor to the 1959 Nile Agreement upon its independence depends upon whether Article 34 of the 1978 Vienna Convention, which stipulates automatic succession in cases of state separation, can be regarded as customary international law or if custom provides for a different approach.

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<sup>142</sup> See Qerim Qerimi & Suzana Krasniqi, *Theories and Practice of State Succession to Bilateral Treaties: The Recent Experience in Kosovo*, 14 GER. L.J. 1639, 1649–51 (2013); Helal, *supra* note 67, at 953.

<sup>143</sup> See Leb & Tignino, *supra* note 124, at 424–26.

<sup>144</sup> See CHENG, *supra* note 127, at 16; Leb & Tignino, *supra* note 124, at 425.

<sup>145</sup> See Helal, *supra* note 67, at 944–45.

<sup>146</sup> See *id.* at 948–49.

<sup>147</sup> See DUMBERRY, *supra* note 115, at 19–20.

<sup>148</sup> See Vidmar, *Territorial Integrity*, *supra* note 61, at 713.

<sup>149</sup> See 1978 Vienna Convention, *supra* note 113, art. 34.

Customary international law is binding upon all nations; explicit consent of the states to the rules is not required.<sup>150</sup> But customary law on state succession is particularly vague, and it is often very difficult to distinguish a rule from its exception.<sup>151</sup> In its judgments of *Gabčíkovo-Nagymaros Project* in 1997<sup>152</sup> and *Bosnia-Herzegovina v. Yugoslavia* in 1996,<sup>153</sup> the International Court of Justice (ICJ) did not clarify whether it considers Article 34 of the 1978 Vienna Convention (the principle of universal succession) to be part of customary international law.<sup>154</sup>

There is broad agreement that the 1978 Vienna Convention did not entirely reflect customary law, but rather codified norms for the progressive development of international law.<sup>155</sup> The International Law Commission (ILC), in its “Commentary to the Draft Articles on Succession of States in Respect of Treaties,” referred to inconsistent state practices regarding Article 34, sometimes suggesting automatic succession and sometimes suggesting other consequences.<sup>156</sup> The ILC’s legislative effort was to bring those practices to a common denominator for the 1978 Vienna Convention because practices varied widely due to the circumstances of state succession:

More specifically, the Vienna Convention reflects the customary trend to continue treaty rights and obligations, but it does not accurately reflect the divergent practices regarding the question of whether treaties automatically continue or whether the successor states must consent to their continuation.<sup>157</sup>

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<sup>150</sup> Statute of the International Court of Justice art. 38(1)(b), June 26, 1945, 59 Stat. 1031, T.S. No. 993.

<sup>151</sup> Jan Klabbbers, *Case Analysis: Cat on a Hot Tin Roof: The World Court, State Succession, and the Gabčíkovo-Nagymaros Case*, 11 LEIDEN J. INT’L L. 345, 347 (1998).

<sup>152</sup> See generally *Gabčíkovo-Nagymaros Project* (Hung./Slovk.), Judgment, 1997 I.C.J. Rep. 7 (Sept. 25).

<sup>153</sup> See generally *Application of Convention on Prevention and Punishment of Crime of Genocide* (Bosn. & Herz. v. Yugoslavia), Preliminary Objections, Judgment, 1996 I.C.J. Rep. 595 (July 11).

<sup>154</sup> See *Gabčíkovo-Nagymaros Project*, 1997 I.C.J. Rep. 7, para. 123; *Application of Convention on Prevention and Punishment of Crime of Genocide*, 1996 I.C.J. Rep. 595, para. 23.

<sup>155</sup> See RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 208, rep. n.4; Klabbbers, *supra* note 151, at 348–49; Rein Mullerson, *New Developments in the Former USSR and Yugoslavia*, 33 VA. J. INT’L L. 299, 299–300 (1992); D.P. O’Connell, *Reflections on the State Succession Convention*, 39 ZEITSCHRIFT FÜR AUSLÄNDISCHES ÖFFENTLICHES RECHT UND VÖLKERRECHT 725, 734 (1979); Qerimi & Krasniqi, *Theories and Practice of State Succession to Bilateral Treaties: The Recent Experience in Kosovo*, *supra* note 142, at 1648–49.

<sup>156</sup> *Draft Articles on Succession of States in Respect of Treaties with Commentaries*, [1974] 2 Y.B. INT’L L. COMM’N 174, 263–64 n.12–18, U.N. Doc. A/CN.4/SER.A/1974/Add.1 (Part 1) [hereinafter ILC Draft Articles].

<sup>157</sup> Paul R. Williams, *Treaty Obligations of the Successor States of the Former Soviet Union, Yugoslavia, and Czechoslovakia: Do They Continue in Force?*, 23 DENV. J. INT’L L. & POL’Y 1, 8 (1994).

The 1978 Vienna Convention fails to take into consideration the divergent policies as underlying causes for the respective state practices.<sup>158</sup>

Although the 1978 Vienna Convention did not reflect state practice, it could have influenced the behavior of various states and therefore evolved into customary international law with regard to automatic succession. Some multilateral treaties, like the Universal Declaration of Human Rights or the Helsinki Protocol, have established customary international law even though they did not have binding effect on the parties.<sup>159</sup> The sheer number of parties made these treaties globally accepted and shaped state behavior and *opinio juris* after coming into force.<sup>160</sup> The 1978 Vienna Convention, however, remains far from representing global consent, particularly because emerging law and policy give preference to policy-oriented approaches over the positivistic approach of the Convention.<sup>161</sup> It took the 1978 Vienna Convention over seventeen years to enter into force in 1996, after its opening for signatures in 1979.<sup>162</sup> So far, the 1978 Vienna Convention has only twenty-two parties and nineteen signatories; neither the United States nor any influential Western state has become a party or signatory.<sup>163</sup>

Not only states' reluctance to accede to the 1978 Vienna Convention, but also state practices after 1978 signal that automatic succession did not become part of international law.<sup>164</sup> After the fall of the Iron Curtain, numerous cases of state succession occurred in the territory of the former Soviet Union and Yugoslavia.<sup>165</sup> Every case was treated differently by the states involved with respect to their succession to existing treaties, without giving effect to the clear dichotomy of clean slate states for former colonies and that of automatic succession for other forms of state succession.<sup>166</sup> In 2008, the International Law Association (ILA) promulgated its report on recent international state practice on state succession:

Recent State practice shows different approaches of the successor States with regard to treaties in cases of secession and dissolution. Although in their vast majority, successor States considered themselves as successor to the multilateral treaties, some of them adopted the clean slate rule, rendering that succession merely op-

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<sup>158</sup> See CRAVEN, *supra* note 112, at 202–03.

<sup>159</sup> See INETA ZIEMELE, *STATE CONTINUITY AND NATIONALITY: THE BALTIC STATES AND RUSSIA: PAST, PRESENT AND FUTURE AS DEFINED BY INTERNATIONAL LAW* 280 (2005).

<sup>160</sup> Hurst Hannum, *The Status of the Universal Declaration of Human Rights in National and International Law*, 25 GA. J. INT'L & COMP. L. 287, 289–90 (1995).

<sup>161</sup> CHENG, *supra* note 127, at 116.

<sup>162</sup> *Vienna Convention*, UN Treaty Collection, *supra* note 130.

<sup>163</sup> See *id.*

<sup>164</sup> See CRAVEN, *supra* note 112, at 236–40.

<sup>165</sup> See Leb & Tignino, *supra* note 124, at 426.

<sup>166</sup> See, e.g., Williams, *supra* note 157, at 3–7.

tional. Yet other States decided to accede to some multilateral treaties to which the predecessor State was a party. In principle, Article 34 of the 1978 Vienna Convention was referred to by most of the successor States, whereas for some others that Article does not reflect customary law.<sup>167</sup>

Article 34 of the Convention appears “too rigid” to resemble customary international law because it does not even require notification, as state practice of general succession shows.<sup>168</sup> The practice of state continuity to the legal personality of the predecessor shows that states provide declarations of continuity.<sup>169</sup> Although these unilateral statements do not bind third states or states party to the treaties in question,<sup>170</sup> “[t]his practice reflects the need of legal certainty by affirming the existence of a situation of continuity on the one hand, and by the clarification of the consequences thereof.”<sup>171</sup>

The successor state has to make a clear statement as to whether it wishes to be bound by the treaties of its predecessor.<sup>172</sup> In cases of state succession, pragmatism is, and was, the prevailing doctrine in customary international law.<sup>173</sup> State practice illustrates that it did not follow the approach of the 1978 Vienna Convention.<sup>174</sup> Since South Sudan’s independence, officials have been reluctant to give clear statements on state succession with respect to international treaties and to the 1959 Nile Agreement.<sup>175</sup>

The Third Restatement of Foreign Relations Law of the United States (Restatement)—although it does not generally reflect customary international law, but certainly serves as a strong indicator for existing state practice and *opinio juris*—supports this finding and further modifies the provision of state succession in cases like that of South Sudan:

When part of a state becomes a new state, the new state does not succeed to the international agreements to which the predecessor state was a party, unless, expressly or by implication, it accepts

<sup>167</sup> INT’L LAW ASSOC., ASPECTS OF THE LAW ON STATE SUCCESSION, Res. No. 3/2008, n.5 (2008) [hereinafter ASPECTS OF THE LAW].

<sup>168</sup> See Mullerson, *supra* note 155, at 315–16.

<sup>169</sup> See *id.* at 303, 315.

<sup>170</sup> LORI F. DAMROSCH ET AL., INTERNATIONAL LAW: CASES AND MATERIALS 1525 (5th ed. 2009).

<sup>171</sup> ASPECTS OF THE LAW, *supra* note 167, at n.4.

<sup>172</sup> See CRAVEN, *supra* note 112, at 239.

<sup>173</sup> See Leb & Tignino, *supra* note 124, at 426.

<sup>174</sup> See CHENG, *supra* note 127, at 116.

<sup>175</sup> See Salman, *Water Resources in the Sudan North-South Peace Process*, *supra* note 24, at 351–52.

such agreements and the other party or parties agree thereto or acquiesce.<sup>176</sup>

In cases like that of South Sudan, customary international law does not adopt the clean slate rule because the new state would not be entitled to become a party to the treaties of the predecessor nor succeed *ipso jure* to existing treaties, independent of any affirmative action on its part.<sup>177</sup> Customary international law claims that the treaties of the predecessor state bind none of the successor states, regardless of the particular circumstances surrounding the break-up of that state (colonial or non-colonial past).<sup>178</sup> It therefore diverges substantively from Article 34 and clearly rejects the concept of automatic succession in cases of state separation. Customary international law requires statements by the successor states to clearly determine their willingness to be bound by certain treaties of the predecessor, to which the parties to the treaties have finally agreed upon.<sup>179</sup> In particular, the Restatement omits the contentious dichotomy of states with colonial and non-colonial backgrounds.<sup>180</sup>

Without a declaration of its willingness to be bound, South Sudan will not become party to the 1959 Nile Agreement. Upon its independence, South Sudan “start[ed] afresh, with neither rights nor obligations under the agreements of its predecessor state.”<sup>181</sup> South Sudan maintains a clean slate unless it unilaterally declares its desire to adopt the 1959 Nile Agreement.<sup>182</sup> The Restatement also gives Egypt and Sudan some leverage in the situation, as they would have to consent to the accession of South Sudan.<sup>183</sup> Moreover, since South Sudan has come into existence, Egypt could theoretically cease its obligations according to the principle of *rebus sic stantibus* because major projects of the 1959 Nile Agreement now lie within South Sudan's territory.<sup>184</sup> From a legal and strategic point of view, however, it is highly doubtful that Egypt could consider invoking this principle. The ICJ enshrined a very high threshold to meet the *rebus sic stantibus* requirements, as seen in in the *Gabčíkovo-Nagymaros Project* decision.<sup>185</sup>

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<sup>176</sup> RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 210 (AM. LAW INST. 1987).

<sup>177</sup> See CRAVEN, *supra* note 112, at 238–39.

<sup>178</sup> See Leb & Tignino, *supra* note 124, at 426–27.

<sup>179</sup> See *id.* at 426.

<sup>180</sup> See RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 210.

<sup>181</sup> See *id.* § 210 cmt. f.

<sup>182</sup> See *id.*

<sup>183</sup> See *id.* § 210.

<sup>184</sup> See *id.* § 210 cmt. b.

<sup>185</sup> See 1997 I.C.J. Rep. 7, para. 104.

South Sudan did not succeed automatically to the 1959 Nile Agreement.<sup>186</sup> Nevertheless, South Sudan may accede to the 1959 Nile Agreement, but it needs to state its willingness to do so to the parties of the treaty and is dependent upon their acceptance of the treaty. Furthermore, the bilateral nature of the 1959 Nile Agreement requires negotiations between the parties and South Sudan for the adoption of the treaty.<sup>187</sup>

### *C. Territorial Treaties According to Article 12 of the 1978 Vienna Convention*

Article 12 of the 1978 Vienna Convention presents a different approach to the law of state succession than Article 34, which applies in cases of state separation.<sup>188</sup> In contrast, Article 12 applies to treaties that have a direct effect on the territory of another state.<sup>189</sup> The 1959 Nile Agreement could fall into this category and be binding on South Sudan from its date of independence.<sup>190</sup> The following part first examines whether Article 12 is customary international law. Then it discusses the scope of succession with regard to the rights and obligations of the 1959 Nile Agreement. Finally, this part evaluates whether South Sudan could apply the Nyerere doctrine to render the territorial rights and obligations insignificant. The finding above that South Sudan is not yet bound by the 1959 Nile Agreement will be re-futed if the agreement falls into the category of treaties that create a territorial regime, therefore leading to automatic succession to that treaty or, at a minimum, to the rights and obligations established by that treaty.

#### 1. Article 12 of the 1978 Vienna Convention: Part of Customary International Law?

Article 12 of the 1978 Vienna Convention enjoys common recognition as customary international law and provides that the rights and obligations attached to a specific territory and established by a treaty remain unaffected by state succession.<sup>191</sup> The ICJ ruled in *Gabčíkovo-Nagymaros Project* that “Article 12 reflects a rule of customary international law.”<sup>192</sup>

Article 11 foresees that state succession does not affect boundaries established by a treaty or rights and obligations established by a treaty that relate to a boundary regime.<sup>193</sup> It is generally accepted that boundaries re-

<sup>186</sup> See *supra* text accompanying notes 164–180.

<sup>187</sup> See *infra*, notes 271–354.

<sup>188</sup> ILC Draft Articles, *supra* note 156, at 260 art. 34, n.1.

<sup>189</sup> See 1978 Vienna Convention, *supra* note 113, art. 12.

<sup>190</sup> See *id.*

<sup>191</sup> ASPECTS OF THE LAW, *supra* note 167, at n.9; see Leeb & Tignino, *supra* note 124, at 427.

<sup>192</sup> 1997 I.C.J. Rep. 7, para. 123.

<sup>193</sup> 1978 Vienna Convention, *supra* note 113, art. 11.

main unaffected by state succession to serve the common purpose of conflict prevention.<sup>194</sup> Similarly, the rationale of Article 12 is to protect most territorial obligations, especially those for the benefit of other states, irrespective of the new state's past.<sup>195</sup> Its scope is much broader than Article 11 and ensures the continuity of those rights and obligations attached to the territory.<sup>196</sup> These rights and duties must result from territorial treaties, which are often referred to as dispositive treaties.<sup>197</sup>

Dispositive agreements are directly related to a certain territory and are therefore unaffected by a fundamental change in sovereignty.<sup>198</sup> On the contrary, political or personal agreements only concern the states' governments as such.<sup>199</sup> For example, dispositive treaties establish riparian states' right of passage by way of river navigation.<sup>200</sup> Literally, Article 12 can be compared to some kind of "international servitudes," which remain in place when the sovereign of the territory changes—just like those rights that remain in private law in the case of a transfer of property.<sup>201</sup> These servitudes are opposable *erga omnes*.<sup>202</sup> Article 12(1) speaks of territory "for the benefit of any territory of a foreign State" and Article 12(2) refers to a territory "for the benefit of a group of States;" in both cases, the rights and obligations must be attached to the territories in question.<sup>203</sup>

The 1959 Nile Agreement provides for such territorial rights and obligations.<sup>204</sup> According to the ILC's comments, such territorial rights and obligations established by a water treaty are comprised of water rights like fishing, the right of navigation, irrigation, and supply of water.<sup>205</sup> The 1959 Nile Agreement consists of various parts governing rights and obligations between Egypt and Sudan.<sup>206</sup> The centerpiece of the agreement is the provi-

<sup>194</sup> See 1969 Vienna Convention, *supra* note 133, art. 62(2)(a) (excluding boundary treaties from the invocation of the "fundamental change of circumstances" principle to prevent friction); CRAVEN, *supra* note 112, at 175.

<sup>195</sup> See 1978 Vienna Convention, *supra* note 113, art. 12.

<sup>196</sup> See *id.* arts. 11, 12; Leb & Tignino, *supra* note 124, at 427–29.

<sup>197</sup> O'CONNELL, *supra* note 115, at 49–50.

<sup>198</sup> See ILC Draft Articles, *supra* note 156, at 263 art. 34, n.12; O'CONNELL, *supra* note 115, at 49.

<sup>199</sup> M. DE VATTEL, *THE LAW OF NATIONS; OR, PRINCIPLES OF THE LAW OF NATURE: APPLIED TO THE CONDUCT AND AFFAIRS OF NATIONS AND SOVEREIGNS*, at xiii (Whieldon & Butterworth eds., 1793); see D.P. O'Connell, *State Succession and the Effect upon Treaties of Entry into a Composite Relationship*, 39 BRIT. Y.B. INT'L L. 54, 108 (1963).

<sup>200</sup> See CRAVEN, *supra* note 112, at 188–89; O'CONNELL, *supra* note 115, at 49.

<sup>201</sup> Leb & Tignino, *supra* note 124, at 429; see 1978 Vienna Convention, *supra* note 113, art. 12.

<sup>202</sup> See CRAVEN, *supra* note 112, at 175; O'CONNELL, *supra* note 115, at 49.

<sup>203</sup> 1978 Vienna Convention, *supra* note 113, art. 12; Klabbbers, *supra* note 151, at 353, n.34.

<sup>204</sup> See 1959 Nile Agreement, *supra* note 79, arts. 1, 2; ILC Draft Articles, *supra* note 156, at 203 art. 12, n.26.

<sup>205</sup> See ILC Draft Articles, *supra* note 156, at 203–04 art. 12, n.26–28.

<sup>206</sup> See generally 1959 Nile Agreement, *supra* note 79.



sion allocating the waters of the Nile between the two parties, which qualifies as a territorial obligation.<sup>207</sup> The 1959 Nile Agreement incorporates the 1929 Nile Agreement, which the ILC refers to as a major precedent for a dispositive treaty.<sup>208</sup> Since then, the entire territory of Sudan, including the territory of South Sudan, was charged with the servitude for Egypt's water supply and the right to use as much water as allocated by the treaty.<sup>209</sup>

## 2. Legal Consequence of Article 12: Succession to the Entire Treaty or Merely to Territorial Rights and Obligations?

Although it is broadly accepted that Article 12 is part of customary international law, the legal consequence of the provision is disputed. Some argue that South Sudan automatically succeeded to the entire 1959 Nile Agreement,<sup>210</sup> whereas others stress it succeeded merely to those rights and obligations related to its territory, as the wording of Article 12 suggests.<sup>211</sup>

The ICJ came to the conclusion in *Gabčíkovo-Nagymaros Project* that the entire treaty of the project in question would remain unaffected by state succession.<sup>212</sup> The primary concern of the case involved the use of an international river for a joint hydropower project that came to halt.<sup>213</sup> Hungary maintained that the agreement (1977 Treaty) was solely an investment agreement, which is not subject to automatic succession because it does not create rights attached to a territory.<sup>214</sup> The ICJ, however, concluded that the construction and operation of a system of locks, sited in the territory of both states, established territorial obligations on the parties.<sup>215</sup> The contentious treaty between Hungary and Slovakia also contained a clause to ensure "uninterrupted and safe navigation on the international fairway" of the Danube River.<sup>216</sup>

The critiques of the ICJ's decision are twofold. First, criticism derives from the ICJ's vague definition that led to confusion about which water

<sup>207</sup> See 1959 Nile Agreement, *supra* note 79, arts. 1–3; O'CONNELL, *supra* note 115, at 51–52.

<sup>208</sup> 1959 Nile Agreement, *supra* note 79, pmbl.; ILC Draft Articles, *supra* note 156, at 203–04 art. 12, n.27.

<sup>209</sup> See 1959 Nile Agreement, *supra* note 79, arts. 1–3; KAYA, *supra* note 88, at 98; O'CONNELL, *supra* note 115, at 51–52.

<sup>210</sup> See *Gabčíkovo-Nagymaros Project*, 1997 I.C.J. Rep. 7, para. 123; KAYA, *supra* note 88, at 97–99.

<sup>211</sup> See 1978 Vienna Convention, *supra* note 113, art. 12; Leb & Tignino, *supra* note 124, at 427; Klabbers, *supra* note 151, at 352.

<sup>212</sup> *Gabčíkovo-Nagymaros Project*, 1997 I.C.J. Rep. 7, para. 123.

<sup>213</sup> *Id.* at paras. 15, 22–23.

<sup>214</sup> *Id.* at para. 119.

<sup>215</sup> *Id.* at para. 123.

<sup>216</sup> Treaty Concerning the Construction and Operation of the *Gabčíkovo-Nagymaros System of Locks* art. 18, Czech.-Hung., Sept. 16, 1977, 1109 U.N.T.S. 211; see KAYA, *supra* note 88, at 99.

treaties create territorial rights and obligations.<sup>217</sup> The finding that Article 12 should be applicable was flawed because it relies on the ILC's imprecise definition: "Treaties concerning water rights or navigation on rivers are commonly regarded as candidates for inclusion in the category of territorial treaties."<sup>218</sup> Those findings are directly premised on the comments of the ILC to Article 12.<sup>219</sup> The ICJ's recourse to the ILC commentary does not resolve the scope of Article 12 and leaves room for alternative interpretation.<sup>220</sup> Hence, one can conclude that the ICJ did not rule that every water treaty establishes rights and obligations attached to a territory.

Second, despite the unambiguous textual premises of Article 12, the ICJ concluded that the entire treaty in question remains binding upon the successor state to ensure continuity of the treaty regime.<sup>221</sup>

The Court observes that Article 12, in providing only, without reference to the treaty itself, that rights and obligations of a territorial character established by a treaty are unaffected by a succession of States, appears to lend support to the position of Hungary rather than of Slovakia. However the Court concludes that this formulation was devised rather to take account of the fact that, in many cases, treaties which had established boundaries or territorial régimes were no longer in force. . . . Those that remained in force would nonetheless bind a successor state.

Taking all these factors into account, the Court finds that the content of the 1977 Treaty indicates that it must be regarded as establishing a territorial régime within the meaning of Article 12 of the 1978 Vienna Convention. It created rights and obligations "attaching to" the parts of the Danube to which it relates; thus the Treaty itself cannot be affected by a succession of States.<sup>222</sup>

The ICJ stretched the wording of Article 12 and concluded—as indicated by the word "thus"—that, because the treaty in question established territorial rights and obligations, the entire treaty itself consequently cannot be affected by a state succession.<sup>223</sup> But Article 12 clearly differentiates between

<sup>217</sup> See *Leb & Tignino*, *supra* note 124, at 430–31.

<sup>218</sup> ILC Draft Articles, *supra* note 156, at 203 art. 12, n.26.

<sup>219</sup> *Gabčíkovo-Nagymaros Project*, 1997 I.C.J. Rep. 7, para. 123; see *Leb & Tignino*, *supra* note 124, at 430–31.

<sup>220</sup> See *Gabčíkovo-Nagymaros Project*, 1997 I.C.J. Rep. 7, para. 123; *Leb & Tignino*, *supra* note 124, at 430–31.

<sup>221</sup> *Gabčíkovo-Nagymaros Project*, 1997 I.C.J. Rep. 7, para. 123; *KAYA*, *supra* note 88, at 99; see 1978 Vienna Convention, *supra* note 113, art. 12.

<sup>222</sup> *Gabčíkovo-Nagymaros Project*, 1997 I.C.J. Rep. 7, para. 123 (citation omitted).

<sup>223</sup> *Klabbers*, *supra* note 151, at 354; see *Gabčíkovo-Nagymaros Project*, 1997 I.C.J. Rep. 7, para. 123.

established rights and obligations and the treaty itself.<sup>224</sup> The latter is not meant to be immune from state succession.<sup>225</sup> The ICJ's decision therefore leaves some doubt that every provision of a treaty that established certain rights and obligations attached to a territory entirely survives state succession. In the given case, it was argued that the ICJ did not find it necessary to differentiate between the 1977 Treaty and the territorial regime it established because virtually all provisions had a territorial attachment, which made that distinction artificial.<sup>226</sup> Hence, the findings of the ICJ are not transferable to treaties that include many provisions with a non-territorial character. In this regard, the ICJ failed to establish a clear distinction between those two groups of treaties.<sup>227</sup>

Therefore, the territorial obligation has to be proven on a case-by-case basis.<sup>228</sup> All territorial rights and obligations established by the 1959 Nile Agreement, such as the water allocation, have survived South Sudan's secession from Sudan.<sup>229</sup> South Sudan, however, did not automatically become a party to the 1959 Nile Agreement, as it also contains provisions of a non-territorial nature.<sup>230</sup>

South Sudan needs to enter into negotiations with Egypt and Sudan if it wants to change or withdraw from the rights and obligations established by the 1959 Nile Agreement.<sup>231</sup> The purpose of Article 12 is to prevent states from unilaterally invalidating territorial servitudes, like boundary agreements, to avoid future disputes.<sup>232</sup> Changing or withdrawing from territorial rights and obligations is thus solely permissible with the consent of the parties involved or, as is sometimes argued, due to a colonial past.<sup>233</sup>

### 3. The Nyerere Doctrine

The Nyerere doctrine has developed in Tanzania as a modification of the clean slate theory.<sup>234</sup> It is sometimes advocated that South Sudan could

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<sup>224</sup> See 1978 Vienna Convention, *supra* note 113, art. 12; Klabbers, *supra* note 151, at 354.

<sup>225</sup> See Klabbers, *supra* note 151, at 354. It is also argued that a territorial regime cannot be established by an executory treaty like the contentious treaty in *Gabčíkovo-Nagymaros Project*, which had not been executed at the time. See Malcom D. Evans & Phoebe N. Okowa, *Recent Cases: Case Concerning the Gabčíkovo-Nagymaros Project (Hungary/Slovakia)*, 47 INT'L & COMP. L.Q. 688, 696 (1998).

<sup>226</sup> Helal, *supra* note 67, at 979–80.

<sup>227</sup> See *id.*

<sup>228</sup> See *id.* at 980.

<sup>229</sup> *Id.*

<sup>230</sup> *Id.* at 981.

<sup>231</sup> *Id.* at 983.

<sup>232</sup> See 1978 Vienna Convention, *supra* note 113, art. 12.

<sup>233</sup> See O'CONNELL, *supra* note 115, at 51–53; ZIEMELE, *supra* note 159, at 135–36.

<sup>234</sup> See Charles L. Katz, *Another Cup at the Nile's Crowded Spigot: South Sudan and Its Nile Water Rights*, 44 GEO. J. INT'L L. 1249, 1258 (2013).

invoke the Nyerere doctrine to refute the territorial rights and obligations under the 1959 Nile Agreement.<sup>235</sup>

The Nyerere doctrine is named after the first President of Tanzania.<sup>236</sup> For newly independent states, it departs from a “categorical discontinuity of treaties” upon their sovereignty and develops an optional doctrine to “selectively consent” to treaties over a period of two years.<sup>237</sup> During that grace period, all colonial treaties remain in effect, unless revoked or adapted through renegotiations with the parties.<sup>238</sup> By the time the grace period expires, all treaties to which the parties did not expressly consent lapse.<sup>239</sup>

Noteworthy in this regard is the rejection of the 1929 Nile Agreement by Tanzania, Uganda, and Kenya, which applied the Nyerere doctrine to the established territorial regime.<sup>240</sup> These precedents do not suggest that the 1929 Nile Agreement did not establish territorial obligations, but raised the question of whether those territorial obligations are refutable if they were established by a colonial power.<sup>241</sup> Therefore, the Nyerere doctrine allegedly established an exemption from the application of Article 12, although Egypt persistently objected to the doctrine and claimed automatic succession because of the territorial nature of the 1929 Nile Agreement.<sup>242</sup>

The Nyerere doctrine, however, is not applicable to the case of South Sudan because South Sudan lacks the colonial past with regard to the 1959 Nile Agreement. Sudan cannot be viewed as a former colonial power suppressing South Sudan, as stipulated for newly independent states, and Sudan was not under colonial rule when it signed the 1959 Nile Agreement supplementing the colonial 1929 Nile Agreement.<sup>243</sup> Moreover, the two-year grace period for statements and negotiations regarding treaties of the prede-

<sup>235</sup> See *id.* at 1259, 1261; Dereje Zeleke Mekonnen, *From Tenuous Legal Arguments to Securitization and Benefit Sharing: Hegemonic Obstinacy—The Stumbling Block Against Resolution of the Nile Waters Question*, 4 MIZAN L. REV. 232, 240–41 (2010).

<sup>236</sup> Jeffrey D. Azarva, *Conflict on the Nile: International Watercourse Law and the Elusive Effort to Create a Transboundary Water Regime in the Nile Basin*, 25 TEMP. INT'L & COMP. L.J. 457, 471 (2011).

<sup>237</sup> Andrew M. Beato, Note and Comment, *Newly Independent and Separating States' Succession to Treaties: Considerations on the Hybrid Dependency of the Republics of the Former Soviet Union*, 9 AM. U. J. INT'L L. & POL'Y 525, 542 (1994); see Katz, *supra* note 234, at 1258.

<sup>238</sup> See Katz, *supra* note 234, at 1258–59; Salman, *The New State of South Sudan*, *supra* note 30, at 159.

<sup>239</sup> Salman, *The New State of South Sudan*, *supra* note 30, at 159.

<sup>240</sup> See ILC Draft Articles, *supra* note 156, at 203–04 art. 12, n.27; Katz, *supra* note 234, at 1259.

<sup>241</sup> See Azarva, *supra* note 236, at 472–73; Katz, *supra* note 234, at 1258–59.

<sup>242</sup> See Azarva, *supra* note 236, at 472–73; Wuhibegezer Ferede & Sheferawu Abebe, *The Efficacy of Water Treaties in the Eastern Nile Basin*, 49 AFR. SPECTRUM 55, 57 (2014).

<sup>243</sup> See Katz, *supra* note 234, at 1258–59.

cessor expired in 2013, consequently resulting in a loss of South Sudan's rights for accession to the 1959 Nile Agreement.<sup>244</sup>

#### 4. Scope of the Inherited Territorial Rights and Obligations of the 1959 Nile Agreement

The 1959 Nile Agreement establishes three different territorial rights and obligations for South Sudan.<sup>245</sup> The scope of inheritance for each right has to be evaluated separately on a case-by-case basis.

First, the provisions of the water allocations of the 1959 Nile Agreement remain binding upon Egypt, Sudan, and South Sudan.<sup>246</sup> The water allocation provision is a typical example of a territorial right and obligation.<sup>247</sup> Sudan and South Sudan will have to enter into negotiations in good faith to allocate their share of 18.5 bcm of water.<sup>248</sup>

Second, Article 3 of the 1959 Nile Agreement provided for the construction of water projects, like the Jonglei project, to increase the flow of the Nile situated in South Sudan's territory.<sup>249</sup> Thus, the agreement established a territorial right for South Sudan, Sudan, and Egypt to undertake water conservation projects.<sup>250</sup> If Egypt or Sudan wants to proceed with a water conservation project on South Sudanese soil, it must reach an agreement with South Sudan.<sup>251</sup> The sovereign government of South Sudan has full discretion over whether these projects will be realized.<sup>252</sup> To this effect, Egypt and Sudan may enter into good faith negotiations with South Sudan. South Sudan, however, has objected several times to the continuation of the Jonglei project—the most prominent project initiated by Egypt under Article 3 of the 1959 Nile Agreement—but similar projects could be feasible.<sup>253</sup>

Lastly, should South Sudan apply to become a full party to the Joint Technical Commission, Sudan and Egypt will very likely grant such a request.<sup>254</sup> So far, South Sudan automatically became party to the Joint Technical Commission as far as the allocation of water is concerned.<sup>255</sup> Like other international river basin commissions, the Joint Technical Commis-

<sup>244</sup> See *id.* at 1250, 1259.

<sup>245</sup> See 1959 Nile Agreement, *supra* note 79.

<sup>246</sup> See *id.* arts. 1–3; Helal, *supra* note 67, at 980.

<sup>247</sup> ILC Draft Articles, *supra* note 156, at 203 art. 12, n.26.

<sup>248</sup> See 1959 Nile Agreement, *supra* note 79, art. 2(2); Helal, *supra* note 67, at 983; Katz, *supra* note 234, at 1264.

<sup>249</sup> 1959 Nile Agreement, *supra* note 79, art. 3; see Katz, *supra* note 234, at 1265.

<sup>250</sup> See 1959 Nile Agreement, *supra* note 79, art. 3; Helal, *supra* note 67, at 980.

<sup>251</sup> See Helal, *supra* note 67, at 983.

<sup>252</sup> See *id.*

<sup>253</sup> See Collins, *supra* note 48, at 147–48.

<sup>254</sup> See Helal, *supra* note 67, at 983.

<sup>255</sup> See *id.* at 980.

sion has tasks with both territorial and non-territorial character.<sup>256</sup> As set out in Article 12 of the 1978 Convention, a state automatically becomes party to such a commission only with regard to rights or obligations of a territorial character.<sup>257</sup> In all other cases, the new states have to request to become party to multilateral commissions.<sup>258</sup> The Joint Technical Commission provides for planning of water projects for maintenance and enhances the exchange of technical know-how between Sudan and Egypt.<sup>259</sup> It further determines water projects initiated by all other riparian states outside their territory.<sup>260</sup> These regulations are not attached to uses of a specific territory but rather regulate decision-making processes and rights.<sup>261</sup> Nevertheless, separating the rights of the Joint Technical Commission seems impractical for all states and should be overcome by negotiations in good faith for full party status of South Sudan to the Commission.<sup>262</sup>

#### V. PROCEDURAL IMPLICATIONS FOR SOUTH SUDAN

This section clarifies the relationship between Article 12 of the 1978 Vienna Convention and customary international law with regard to state separation, which lead to somewhat contradictory results, and suggests a procedural way for South Sudan to execute its rights and obligations under international law. If there is indeed a choice for South Sudan in how it executes its rights, which procedural path should it choose?

Currently, South Sudanese officials are still very hesitant to give any statements with regard to water allocation issues and to international water treaties on the Nile, like the 1959 Nile Agreement and the CFA.<sup>263</sup> That hesitation could stem from the lack of certainty about South Sudan's current water rights to the Nile. On the one hand, this Article shows that, according to Article 12 of the 1978 Vienna Convention, South Sudan already has territorial rights and obligations vis-à-vis the 1959 Nile Agreement between Sudan and Egypt regarding a share of Sudan's total water allocation of 18.5 bcm of water per year, engagement in water conservation projects in its territory, and becoming party with certain rights to the Joint Technical Com-

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<sup>256</sup> See Leb & Tignino, *supra* note 124, at 439.

<sup>257</sup> 1978 Vienna Convention, *supra* note 113, art. 12; Helal, *supra* note 67, at 980.

<sup>258</sup> See 1978 Vienna Convention, *supra* note 113, art. 12; Leb & Tignino, *supra* note 124, at 439.

<sup>259</sup> See MCCAFFREY, *supra* note 4, at 268–69.

<sup>260</sup> See MEGAHED, *supra* note 98, at 25–26.

<sup>261</sup> See Leb & Tignino, *supra* note 124, at 442.

<sup>262</sup> See Helal, *supra* note 67, at 983. The duty to cooperate is one of the leading principles in international water law. CHRISTINA LEB, COOPERATION IN THE LAW OF TRANSBOUNDARY WATER RESOURCES 79–81 (2nd ed. 2013).

<sup>263</sup> See Salman, *Water Resources in the Sudan North-South Peace Process*, *supra* note 24, at 351–52.

mission.<sup>264</sup> On the other hand, according to customary international law, South Sudan is, as in cases of state secession, not yet bound by the 1959 Nile Agreement—it is dependent upon a unilateral statement by South Sudan assuring its willingness to become party to the treaty and acceptance by Egypt and Sudan.<sup>265</sup>

Article 12 and customary international law in cases of state secession overlap in many ways in both scope and legal consequences. The procedural road is, nevertheless, signposted by the ICJ and pragmatic expectations.<sup>266</sup> In *Gabčíkovo-Nagymaros Project*, the ICJ gave precedence to the customary provision of Article 12 of the 1978 Vienna Convention, with respect to territorial rights and obligations, over Article 34, which was not applied because the ICJ was reluctant to resolve whether Article 34 resembled custom.<sup>267</sup> According to the findings of this Article, however, Article 34 is not part of customary international law because it lacks clear state practice; Article 34 is modified in a way that state succession to certain treaties of the predecessor is applicable if the parties concerned express their willingness to be bound by existing treaties of the predecessor.<sup>268</sup> State practice shows that all states have a claim for succession, but they need to expressly assert their will to be bound to execute the rights and obligations under the treaty.<sup>269</sup> Moreover, the other treaty parties need to consent to the statement of the successor state.<sup>270</sup>

From a pragmatic perspective, however, South Sudan has a choice between two procedural pathways. On the one hand, if South Sudan wants to enjoy all the rights and obligations of the 1959 Nile Agreement, South Sudan should declare its willingness to be fully bound by the 1959 Nile Agreement to Sudan and Egypt. This declaration will consequently lead to negotiations and adaptations of the 1959 Nile Agreement because it is a bilateral treaty that needs to be revised so that a third party can fully accede to it. These negotiations could also lead to a new agreement that is less ruthless with regard to the water rights of the upstream riparian states. Prior to this declaration, South Sudan should undertake negotiations in good faith

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<sup>264</sup> See 1978 Vienna Convention, *supra* note 113, art. 12; Helal, *supra* note 67, at 980.

<sup>265</sup> See ASPECTS OF THE LAW, *supra* note 167, at n.6.

<sup>266</sup> See *Gabčíkovo-Nagymaros Project* (Hung./Slovk.), Judgment, 1997 I.C.J. Rep. 7, para. 123 (Sept. 25).

<sup>267</sup> See 1978 Vienna Convention, *supra* note 113, arts. 12, 34; *Gabčíkovo-Nagymaros Project*, 1997 I.C.J. Rep. 7, para. 123; see also *Application of Convention on Prevention and Punishment of Crime of Genocide* (Bosn. & Herz. v. Yugoslavia), Preliminary Objections, Judgment, 1996 I.C.J. Rep. 595, para. 23 (July 11).

<sup>268</sup> See 1978 Vienna Convention, *supra* note 113, art. 34; ASPECTS OF THE LAW, *supra* note 167, at n.6.

<sup>269</sup> See RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 210(3) (AM. LAW INST. 1987).

<sup>270</sup> *Id.*

on water allocations between Sudan and South Sudan under the rights established by the 1959 Nile Agreement.<sup>271</sup>

On the other hand, if South Sudan does not wish to further engage with the downstream countries, Egypt and Sudan, it should not express its willingness to be bound by the entire 1959 Nile Agreement. But it has to enter into negotiations with Sudan to apportion its water rights under the 1959 Nile Agreement.<sup>272</sup>

Although it is uncertain which procedural approach for South Sudan is more favorable, South Sudan should enter into good faith negotiations with Sudan on water allocation under the 1959 Nile Agreement.<sup>273</sup> After all, South Sudan can confidently claim its share under the agreement.<sup>274</sup>

## VI. WATER REALLOCATION BETWEEN SUDAN AND SOUTH SUDAN ACCORDING TO INTERNATIONAL WATER LAW PRINCIPLES

This section gives an outlook on water allocation between Sudan and South Sudan under the principles of customary international fresh water law.<sup>275</sup> Customary international water law does not endeavor to forecast the outcome of such negotiations,<sup>276</sup> but plays an important role in framing the relevant procedural and legal considerations for such negotiations.<sup>277</sup> This section further focuses on actual apportionment between the two Sudans for the last few years, Sudan's actual water use, and South Sudan's water conservation potential.

### *A. Principles of Customary International Water Law and the Gabčíkovo-Nagymaros Project*

Sudan and South Sudan have to enter into negotiations on the allocation of their common share of 18.5 bcm vis-à-vis Egypt, as established by the 1959 Nile Agreement.<sup>278</sup> The two Sudans were reluctant to agree on binding allocations in the CPA because this topic had the potential to undo the entire peace agreement.<sup>279</sup> The negotiations for a binding agreement could help to overcome further unresolved disputes and foster understand-

<sup>271</sup> See Helal, *supra* note 67, at 983.

<sup>272</sup> See *id.*

<sup>273</sup> See LEB, *supra* note 262, at 146; Helal, *supra* note 67, at 983. As Leeb states, "when States are in obvious disagreement with one another or there is a risk thereof, they are under obligation to negotiate to avoid disputes." LEB, *supra* note 262, at 146.

<sup>274</sup> See Helal, *supra* note 67, at 983.

<sup>275</sup> See DE CHAZOURNES, *supra* note 52, at 7–8; Kasimbazi, *supra* note 10, at 756.

<sup>276</sup> See SHLOMI DINAR, INTERNATIONAL WATER TREATIES: NEGOTIATION AND COOPERATION ALONG TRANSBOUNDARY RIVERS 37 (2008).

<sup>277</sup> See Kasimbazi, *supra* note 10, at 756.

<sup>278</sup> See Helal, *supra* note 67, at 983.

<sup>279</sup> See Salman, *The New State of South Sudan*, *supra* note 30, at 160.



ing. This section outlines customary international water law and discusses the doctrines of equitable use and no significant harm, the decision of the ICJ in *Gabčíkovo-Nagymaros Project*,<sup>280</sup> and the thoughts of scholars<sup>281</sup> of international fresh water law.

Neither state is party to the two predominant international agreements on transboundary watercourses: the United Nations (UN) Economic Commission for Europe's (UNECE) Convention on the Protection and Use of Transboundary Watercourses and International Lakes of 1992 (UNECE Water Convention),<sup>282</sup> which entered into force in 1996 and turned into a universally available legal framework for transboundary water cooperation following the entry into force of amendments in February 2013 that opened the agreement to all UN member states,<sup>283</sup> and the UN Convention on the Law of the Non-Navigational Uses of International Watercourses of 1997 (UN Water Convention),<sup>284</sup> which entered into force in August 2014. Because neither state is a party to these agreements, the governing principles for an agreement between the two Sudans ought to derive from customary international law.

The UN Water Convention and UNECE Water Convention both have enshrined the main principles of customary international water law to "provide a framework for negotiating regional or site-specific agreements."<sup>285</sup> Customary international law developed, like any customary rule, through a sequence of claims and counterclaims between two states or a group of

<sup>280</sup> See *Gabčíkovo-Nagymaros Project* (Hung./Slovk.), Judgment, 1997 I.C.J. Rep. 7, paras. 133–135 (Sept. 25); EDITH BROWN WEISS, *INTERNATIONAL LAW FOR A WATER-SCARCE WORLD* 28, 132 (2013); Alexandre Kiss, *Legal Procedures Applicable to Interstate Conflicts on Water Scarcity: The Gabčíkovo Case*, in *THE SCARCITY OF WATER: EMERGING LEGAL AND POLICY RESPONSES* 59, 70–71 (Edward H.P. Brans et al. eds., 1997); Joseph W. Dellapenna, *International Water Law in a Climate of Disruption*, 17 MICH. ST. J. INT'L L. 43, 75 (2008).

<sup>281</sup> See, e.g., MCCAFFREY, *supra* note 4, at 405; WEISS, *supra* note 280, at 28; Dellapenna, *supra* note 280, at 75.

<sup>282</sup> Convention on the Protection and Use of Transboundary Watercourses and International Lakes, Mar. 17, 1992, 1936 U.N.T.S. 269 [hereinafter UNECE Water Convention].

<sup>283</sup> *Id.*; see Amendments to Articles 25 and 26 of the Convention on the Protection and Use of Transboundary Watercourses and International Lakes, Nov. 28, 2003, U.N. Doc. ECE/MP.WAT/14 (2004), <http://www.unece.org/fileadmin/DAM/env/documents/2004/wat/ece.mp.wat.14.e.pdf> [<http://perma.cc/5YVL-X2M9>]. "It is expected that countries outside the ECE region will be able to join the Convention as of late 2015." *Water Convention*, UN ECON. COMM'N FOR EUR., <http://www.unece.org/env/water/> (last visited Jan. 3, 2016) [[perma.cc/ZWG4-YHJZ](http://perma.cc/ZWG4-YHJZ)].

<sup>284</sup> Convention on the Law of the Non-Navigational Uses of International Watercourses, May 21, 1997, 36 I.L.M. 700 [hereinafter UN Water Convention].

<sup>285</sup> Ryan B. Stoa, *The United Nations Watercourses Convention on the Dawn of Entry into Force*, 47 VAND. J. TRANSNAT'L L. 1321, 1331 (2014) [hereinafter Stoa, *United Nations Watercourses Convention*]; see LEB, *supra* note 262, at 63–64; Irina Zodrow, *International Aspects of Water Law Reforms*, in *WATER LAW FOR THE TWENTY-FIRST CENTURY: NATIONAL AND INTERNATIONAL ASPECTS OF WATER LAW REFORM IN INDIA* 36, 38–39 (Philippe Cullet et al. eds., 2010).

states until an agreement was reached.<sup>286</sup> Three main principles have developed over time, represented in varying degrees in the UN and UNECE Water Conventions.<sup>287</sup>

First, the principle of equitable and reasonable use, also referred to as the principle of limited territorial sovereignty over national waters, limits the rights of riparian states and obliges consideration of the needs of their neighbors.<sup>288</sup> “Equity” in its common law sense means “fairness considering the water needs of the several riparians and their ability to use the water efficiently.”<sup>289</sup> The principle developed from the dialectic process of states claiming absolute control over national waters (absolute territorial sovereignty) and the counterclaim of requiring that waters flowing over a border cannot be altered with regard to quantity or quality other than what would naturally occur (absolute territorial integrity).<sup>290</sup>

The second principle is the prohibition of significant transboundary harm, which is an inherent part of international environmental law. The principle derives from a Roman law principle prohibiting the use of property in a manner that injures someone else’s property.<sup>291</sup> The most prominent case supporting the no significant harm principle is the *Trail Smelter* arbitration.<sup>292</sup> The case between the United States and Canada involved transboundary air pollution and can be applied to international watercourses.<sup>293</sup> The arbitration found:

[U]nder the principles of international law, as well as of the law of the United States, no State has the right to use or permit the use of its territory in such a manner as to cause injury by fumes in or to the territory of another or the properties or persons therein, when the case is of serious consequence and the injury is established by clear and convincing evidence.<sup>294</sup>

The ICJ stated in the *Corfu Channel Case* that it is a principle of customary international law that it is “every State’s obligation not to allow knowingly its territory to be used for acts contrary to the rights of other

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<sup>286</sup> See Joseph W. Dellapenna & Joyeeta Gupta, *The Evolution of Global Water Law*, in THE EVOLUTION OF THE LAW AND POLITICS OF WATER 3, 11 (Joseph W. Dellapenna & Joyeeta Gupta eds., 2009).

<sup>287</sup> See WEISS, *supra* note 280, at 11.

<sup>288</sup> See MCCAFFREY, *supra* note 4, at 135.

<sup>289</sup> Dellapenna, *supra* note 280, at 74.

<sup>290</sup> See *id.* at 68–69; Dellapenna & Gupta, *supra* note 286, at 11.

<sup>291</sup> WEISS, *supra* note 280, at 21.

<sup>292</sup> MCCAFFREY, *supra* note 4, at 419; see NAHID ISLAM, THE LAW OF NON-NAVIGATIONAL USES OF INTERNATIONAL WATERCOURSES: OPTIONS FOR REGIONAL REGIME-BUILDING IN ASIA 106 (2010).

<sup>293</sup> See *Trail Smelter Case* (U.S./Can.), 3 R.I.A.A. 1905, 1965 (1941).

<sup>294</sup> *Id.*

States.<sup>295</sup> The last rule of customary international water law is the principle of notification and information exchange,<sup>296</sup> which includes the obligation to settle disputes peacefully.<sup>297</sup>

Sudan and South Sudan must take those principles, which are accepted as customary international law,<sup>298</sup> into account for the negotiation of their agreement. The application of these principles, however, remains particularly vague and does not contribute greatly to the resolution of specific negotiations.<sup>299</sup> The UN Water Convention incorporates the principle of equitable and reasonable use in Article 5, the principle of no significant harm in Article 7, and the principle to notify in Articles 12 and 13.<sup>300</sup> Upstream South Sudan would invoke the principle of equitable and reasonable use of the Nile waters, whereas Sudan would emphasize the opposing principle of no significant harm.<sup>301</sup> Two basic questions remain: How much water could South Sudan use according to the equitable and reasonable use principle, and when would South Sudan's water consumption qualify as a "significant harm" to Sudan?<sup>302</sup>

The dichotomy of the principles of equitable and reasonable use and no significant harm need to be brought into accord. It is still difficult to determine with certainty how international law has harmonized the inherent tensions between downstream and upstream riparian states.<sup>303</sup> The UN Water Convention does not pronounce a preference between the principles and treats them as complementary.<sup>304</sup> Given the purpose of the UN Water Convention as a framework agreement for international watercourse agreements, the explanation for that ambiguity could be the effort to strike a balance between equitable use and no significant harm on a case-by-case basis, as every international river is different.<sup>305</sup> On the other hand, this remaining

<sup>295</sup> Corfu Channel Case (U.K. v. Alb.), Judgment, 1949 I.C.J. Rep. 4, 22 (Apr. 9).

<sup>296</sup> See DANTE A. CAPONERA, PRINCIPLES OF WATER LAW AND ADMINISTRATION 219–21 (Marcella Nanni ed., 2nd ed. 2007).

<sup>297</sup> Dellapenna & Gupta, *supra* note 286, at 11.

<sup>298</sup> *Id.*

<sup>299</sup> MILAS, *supra* note 9, at 61.

<sup>300</sup> UN Water Convention, *supra* note 284, arts. 5, 7, 12, 13; see also Stephen C. McCaffrey, *The Progressive Development of International Water Law*, in THE UN WATERCOURSES CONVENTION IN FORCE, *supra* note 20, at 10, 17–18 (providing overview of the UN Water Convention).

<sup>301</sup> See JEROME DELLI PRISCOLI & AARON T. WOLF, MANAGING AND TRANSFORMING WATER CONFLICTS 60 (2009).

<sup>302</sup> See Salman M.A. Salman, *Misconceptions Regarding the Interpretation of the UN Watercourses Convention*, in THE UN WATERCOURSES CONVENTION IN FORCE, *supra* note 20, at 28–30.

<sup>303</sup> See Meredith A. Giordano & Aaron T. Wolf, *Sharing Waters: Post-Rio International Water Management*, 27 NAT. RES. F. 163, 167–68 (2003).

<sup>304</sup> See DELLI PRISCOLI & WOLF, *supra* note 301, at 60.

<sup>305</sup> See Joseph W. Dellapenna, Alistair Rieu-Clark & Flavia Rocha Loures, *Possible Reasons Slowing Down the Ratification Process*, in THE UN WATERCOURSES CONVENTION IN FORCE, *supra* note 20, at 26.

uncertainty could be one reason for states' hesitance to ratify the UN Water Convention, which explains why it took the Convention seventeen years to enter into force.<sup>306</sup>

In some cases, however, these contrary positions cannot be reconciled due to disputes over water allocations.<sup>307</sup> The ICJ concluded in such cases that the principle of equitable use has primacy over the no significant harm principle.<sup>308</sup> In *Gabčíkovo-Nagymaros Project*, the ICJ emphasized the "general obligation to 'respect the environment of other States,'" but it did not refer to the no-harm rule, as argued by Hungary, in the context of the allocation of the shared water resources of the Danube River.<sup>309</sup> Instead, the ICJ stressed the importance of the equitable utilization principle and made it the governing principle.<sup>310</sup> Accordingly, it referred to a decision of the Permanent Court of International Justice that reinforced that:

[The] community of interest in a navigable river becomes the basis of a common legal right, the essential features of which are the perfect equality of all riparian States in the use[] of the whole course of the river and the exclusion of any preferential privilege of any one riparian State in relation to the others.<sup>311</sup>

The ICJ referred to the UN Water Convention, which has strengthened this equitable utilization principle for non-navigational use.<sup>312</sup> The theory of the community of interest,<sup>313</sup> which the ICJ cited, emphasizes "the shared nature of interests in an international watercourse" and the need to cooperate with the riparian states in its use and development.<sup>314</sup> No riparian state may "unilaterally assum[e] control of a shared resource, and thereby deprive [other riparian states of their] right to an equitable and reasonable share of the natural resources."<sup>315</sup>

Similarly, with respect to state practice, Professor Stephen McCaffrey concludes that cases of strictly opposing positions of equitable use run

<sup>306</sup> See DINAR, *supra* note 276, at 42.

<sup>307</sup> See Stoa, *United Nations Watercourses Convention*, *supra* note 285, at 1351.

<sup>308</sup> See Stoa, *International Water Law Principles and Frameworks*, *supra* note 71, at 585.

<sup>309</sup> MCCAFFREY, *supra* note 4, at 422 (quoting *Gabčíkovo-Nagymaros Project*, 1997 I.C.J. Rep. 7, para. 53).

<sup>310</sup> *Id.* at 422; see *Gabčíkovo-Nagymaros Project*, 1997 I.C.J. Rep. 7, paras. 53, 78, 85, 147, 150.

<sup>311</sup> *Gabčíkovo-Nagymaros Project*, 1997 I.C.J. Rep. 7, para. 85 (quoting *Territorial Jurisdiction of International Commission of River Order*, Judgment, 1929 P.C.I.J. (ser. A) No. 23, at 27 (Sept. 10)).

<sup>312</sup> See *id.*; LEB, *supra* note 262, at 52.

<sup>313</sup> See LEB, *supra* note 262, at 52–56.

<sup>314</sup> MCCAFFREY, *supra* note 4, at 217; see *Gabčíkovo-Nagymaros Project*, 1997 I.C.J. Rep. 7, para. 85.

<sup>315</sup> *Gabčíkovo-Nagymaros Project*, 1997 I.C.J. Rep. 7, para. 85.

counter to the no-harm principle.<sup>316</sup> Therefore, it depends on the circumstances if significant harm occurs to the downstream state and if the severity of harm might change over time.<sup>317</sup> It is not that causing significant harm per se is prohibited, but that the *unreasonable* causing of such harm is prohibited.<sup>318</sup> This means that conduct of a state has to be tolerated, even if significant harm occurs, as long as the circumstances for its use are reasonable.<sup>319</sup> As McCaffrey explains, “[S]ignificant harm may have to be tolerated in order to achieve an overall regime of equitable and reasonable utilization. . . . There is therefore no need to ‘reconcile’ the no-harm and equitable utilization principles. They are, in reality, two sides of the same coin.”<sup>320</sup>

The upstream state must therefore perform due diligence to control for reasonable use. Nevertheless, the standard depends upon the circumstances of “what could reasonably be expected of the state” and which “applicable standards [] have been generally accepted” between the states, in the region, or globally.<sup>321</sup> The determination of the threshold of significant harm is two-fold. First, the complaining state has to declare “whether and to what extent harm has occurred.”<sup>322</sup> Then, it has to be determined whether the upstream state “exercised due diligence to prevent the harm.”<sup>323</sup>

Customary international water law is indeed very flawed when it comes to the interplay of no harm and equitable and reasonable use as guiding principles for a water agreement, especially because every basin and its riparian states are unique.<sup>324</sup> Still, an agreement between the two states needs to take these principles into consideration.<sup>325</sup> The key to an equitable agreement offers the principle of peaceful conflict resolution and notification about water projects, which could have the effect of significant harm.<sup>326</sup> A future agreement, however, needs to take into account bilateral state practice between the two Sudans.<sup>327</sup>

<sup>316</sup> MCCAFFREY, *supra* note 4, at 436.

<sup>317</sup> *See id.* at 404–05.

<sup>318</sup> *Id.* at 436.

<sup>319</sup> *Id.*

<sup>320</sup> *Id.*

<sup>321</sup> *Id.* at 445.

<sup>322</sup> *Id.*

<sup>323</sup> *Id.*

<sup>324</sup> *See* DELLI PRISCOLI & WOLF, *supra* note 301, at 58.

<sup>325</sup> *See* WEISS, *supra* note 280, at 28–29.

<sup>326</sup> *See* LEB, *supra* note 262, at 144–45; MCCAFFREY, *supra* note 4, at 476–77.

<sup>327</sup> *See* CAPONERA, *supra* note 296, at 54–55.

*B. Reallocation According to Existing Regional Practice and Regional Developments*

An agreement on water allocation based on the principle of equitable use needs to consider regional practice and other circumstances between Sudan and South Sudan.<sup>328</sup> More specifically, the negotiations need to include aspects of existing and expected future water uses of the two states within the 18.5 bcm of allocated water.<sup>329</sup>

The most important practice between the two states is Sudan's inability to capture enough flow to use its entire share of the 18.5 bcm of water.<sup>330</sup> Even before the separation of the two states, the annual amount of Sudan's "unused" water was 6 bcm—almost one-third of its total water allocation.<sup>331</sup> Sudan's unused share of water could be fully allocated to South Sudan. As a result, the two states would still remain within the amount of the total allocation under the 1959 Nile Agreement.

But there are further constraints that need to be taken into consideration to provide for equitable water allocation.<sup>332</sup> Sudan has lost more than 50% of its oil sources to South Sudan, and, therefore, it wants to compensate its losses by using more of its irrigable lands for agriculture; it was once called the breadbasket of the Arab world.<sup>333</sup> This economic development requires a higher share of its unused water. Moreover, South Sudan is blessed with seasonal rainfall, which makes it less dependent upon the Nile River, whereas the Nile River is the only reliable water source for Sudan.<sup>334</sup>

In addition, Sudan, Egypt, and Ethiopia have come to an agreement on the Grand Ethiopian Renaissance Dam (GERD), which will be constructed

<sup>328</sup> See KAYA, *supra* note 88, at 96.

<sup>329</sup> See 1959 Nile Agreement, *supra* note 79, art. 2; KAYA, *supra* note 88, at 113–14.

<sup>330</sup> See Fred Pearce, *On the River Nile, a Move to Avert a Conflict Over Water*, YALE ENVI. 360 (Mar. 12, 2015), [http://e360.yale.edu/feature/on\\_the\\_river\\_nile\\_a\\_move\\_to\\_avert\\_a\\_conflict\\_over\\_water/2855/](http://e360.yale.edu/feature/on_the_river_nile_a_move_to_avert_a_conflict_over_water/2855/) [perma.cc/3QUT-5SRU].

<sup>331</sup> See Salman, *A Peacefully Unfolding African Spring?*, *supra* note 1, at 27, n.1.

<sup>332</sup> See LEB, *supra* note 262, at 87. The author explains that some criteria for equitable and reasonable use include:

geographic, hydrographic, hydrological, climatic[,] and ecological factors; social and economic needs of riparian States; populations dependent on shared water resources; effects of uses on different riparian States; existing and potential uses; conservation, protection[,] and economic efficiency of use of the shared resources; and potential alternative uses that are comparable to a planned or existing use.

*Id.*

<sup>333</sup> Salman, *Water Resources in the Sudan North-South Peace Process*, *supra* note 24, at 349; see Pierre Crabitès, *Egypt, the Sudan and the Nile*, 3 FOREIGN AFF. 320, 327 (1924).

<sup>334</sup> See Ufulle Ga-Aro Festus Kenyi, *Water Security and Hydropolitics of the Nile River: South Sudan's National Security in the 21st Century* 46–47 (Dec. 16, 2011) (M.M.A.S. thesis, U.S. Army Command and General Staff College).

on the Blue Nile, directly on the Ethiopian side of the border with Sudan.<sup>335</sup> The dam, which is currently under construction, will create a huge water reservoir and generate electricity.<sup>336</sup> The reservoir will change the flow pattern of the Blue Nile, which contributes more than 80% of the Nile waters for Sudan and Egypt, from a highly seasonal resource to a constant resource in the long term.<sup>337</sup> Moreover, it would provide Sudan with a much-needed water-capture facility for its water use.<sup>338</sup> GERD could make Sudan less dependent upon the waters of the White Nile flowing from South Sudan.

Equally important is South Sudan's enormous potential for water conservation, which could minimize drastic evaporation losses. Water conservation projects in the Al-Sudd, like the Jonglei Canal, would increase the flow of the White Nile by 100%.<sup>339</sup> South Sudan could revive water conservation projects in an environmentally sound manner to protect the unique swamp ecosystem.<sup>340</sup> The advantage of such an approach would be that South Sudan could invoke the provision of the 1959 Nile Agreement to share the costs and the water surplus generated from the project with Sudan and Egypt because of South Sudan's inherited territorial right.<sup>341</sup> Such a project would add a lot of value to the negotiations, as Sudan and Egypt were eager to construct such a project even before the 1959 Nile Agreement.<sup>342</sup>

To conclude, the current usage of Sudan, the GERD project, and South Sudan's potential for a water conservation project are the most important factors in determining reasonable and equitable utilization between the two Sudans. The GERD will provide for a constant flow of water from the Blue Nile to satisfy Sudan's agricultural needs, and prospective water projects in South Sudan could increase the constant flow of the White Nile.<sup>343</sup> Thus, this would raise the overall water allocations under 1959 Nile Agreement

<sup>335</sup> See Pearce, *supra* note 330; Salman M.A. Salman, *How and Why Has the Ethiopian Strategy on the Renaissance Dam Succeeded?*, SUDAN VISION (Mar. 30, 2015), <http://news.sudanvisiondaily.com/details.html?rsnpid=248051> [perma.cc/CS4X-7PZM] [hereinafter Salman, *Ethiopian Strategy*].

<sup>336</sup> See Pearce, *supra* note 330.

<sup>337</sup> See *id.*; Salman, *Water Resources in the Sudan North-South Peace Process*, *supra* note 24, at 336.

<sup>338</sup> See S. Satti et al., *The Question of Sudan: A Hydro-Economic Optimization Model for the Sudanese Blue Nile*, 19 HYDROLOGY & EARTH SYS. SCI. 2275, 2289 (2015). It is expected that until the filling of the GERD reservoir is complete, the flow of the Blue Nile in Sudan will be reduced. See Pearce, *supra* note 330.

<sup>339</sup> Yang, *supra* note 47, at 236.

<sup>340</sup> See *id.* at 257.

<sup>341</sup> See 1959 Nile Agreement, *supra* note 79, art. 3; Collins, *supra* note 48, at 145; Helal, *supra* note 67, at 980.

<sup>342</sup> See Collins, *supra* note 48, at 145.

<sup>343</sup> See Pearce, *supra* note 330.

for all three states.<sup>344</sup> Under these conditions, the two Sudans could agree on 12.5 bcm of water for Sudan (corresponding to its full current factual usage) and 6 bcm for South Sudan, without causing significant harm to Sudan. The requirements set out by the ICJ for a sustainable agreement on equitable utilization of a shared resource would be met if the two states could agree on constant consultation and adaptation measures to prevent future constraints and to ensure that no riparian state takes unilateral control that deprives the other state of its rights.<sup>345</sup> Moreover, South Sudan needs to perform regular due diligence according to consented standards between the two states to control for a reasonable use of its waters and to prevent significant harm to Sudan.<sup>346</sup>

## VII. THE WAY FORWARD: SOUTH SUDAN AND THE COOPERATIVE FRAMEWORK AGREEMENT

This final section presents an overview of the CFA and reflects on the contentious treaty negotiations between upstream and downstream riparian states.<sup>347</sup> Finally, it evaluates the potential benefits for South Sudan and the Nile riparian states of the ratification of the agreement.

The CFA is still not in force—it needs six ratifications or accessions.<sup>348</sup> So far, out of the six signatories (Ethiopia, Rwanda, Tanzania, Uganda, Kenya, and Burundi), only Ethiopia, Rwanda, and Tanzania have ratified the agreement.<sup>349</sup> The CFA is widely recognized as a successful assertion of the water rights of the upstream riparian states and represents a rejection of the status quo of Egypt and Sudan claiming all waters of the Nile from the sources of the Nile as their own.<sup>350</sup> The CFA was born out of the Nile Basin Initiative (NBI), which was founded in 1999 by all Nile riparian states.<sup>351</sup> The NBI's objectives are to reduce tensions, provide a framework for an agreement on equitable sharing and cooperative development of the Nile

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<sup>344</sup> See 1959 Nile Agreement, *supra* note 79, art. 2; Pearce, *supra* note 330.

<sup>345</sup> See Gabčíkovo-Nagymaros Project, 1997 I.C.J. Rep. 7, para. 147; LEB, *supra* note 262, at 139–42.

<sup>346</sup> See MCCAFFREY, *supra* note 4, at 445.

<sup>347</sup> See Stoa, *International Water Law Principles and Frameworks*, *supra* note 71, at 589.

<sup>348</sup> Agreement on the Nile River Basin Cooperative Framework arts. 42, 43, NILE BASIN INITIATIVE, *opened for signature* May 14, 2010, <http://www.nilebasin.org/images/docs/CFA - English - FrenchVersion.pdf> [perma.cc/MG7S-BL4R] [hereinafter CFA]. Note the enumeration of the articles in the CFA might vary in other publications; all citations herein refer to this version of the CFA.

<sup>349</sup> *The Cooperative Framework Agreement for the River Nile Basin: An Overview*, NILE BASIN INITIATIVE, <http://www.nilebasin.org/index.php/about-us/the-nb-cooperative-framework> (last visited Jan. 3, 2016) [perma.cc/MV5R-VHWY].

<sup>350</sup> See MILAS, *supra* note 9, at 146.

<sup>351</sup> See Salman, *A Peacefully Unfolding African Spring?*, *supra* note 1, at 20; Stoa, *International Water Law Principles and Frameworks*, *supra* note 71, at 588.



Basin countries, and promote international discourse on Nile water issues.<sup>352</sup> In May 2010, after a long phase of negotiations, four upstream states signed the CFA in Entebbe, Uganda.<sup>353</sup> The CFA intends to establish a framework to “promote integrated management, sustainable development, and harmonious utilization of the water resources of the Basin, as well as their conservation and protection for the benefit of present and future generations,” rather than explicitly quantify equitable rights or water use allocations for all riparian states.<sup>354</sup>

The treaty reflects the modern principles of international water law<sup>355</sup> and incorporates the principle of equitable and reasonable utilization in Article 4—exactly the same provision as in the UN Water Convention.<sup>356</sup> Article 5 incorporates the principle of no significant harm and provides for compensation if any provision is violated.<sup>357</sup> Article 14 of the CFA introduces a unique concept of “water security,” intending to harmonize Article 4 and Article 5 and foster cooperation between the states to reach the goal of basin-wide water security.<sup>358</sup> This term is defined in Article 2(f) as “the right of all Nile Basin States to reliable access to and use of the Nile River system for health, agriculture, livelihoods, production[,] and environment.”<sup>359</sup> The creation of a third legal principle of water security, however, might not resolve the issue between upstream and downstream states, which unsuccessfully pushed for Article 14(b) “not to significantly affect the water security of any other Nile Basin State.”<sup>360</sup> The concept of water security is rendered useless as this principle turns out to be a more or less redundant reiteration of the equitable use principle and the prevention of causing significant harm.<sup>361</sup> The principle of equitable use, thus, outweighs the principle of no significant harm, as supported by the ICJ’s decision in *Gabčíkovo-Nagymaros Project*.<sup>362</sup> The treaty is therefore favorable for the African up-

<sup>352</sup> See CFA, *supra* note 348, art. 3.

<sup>353</sup> See *Cooperative Framework Agreement for the River Nile Basin: An Overview*, *supra* note 349.

<sup>354</sup> See CFA, *supra* note 348, pmbll.

<sup>355</sup> See WEISS, *supra* note 280, at 102; McKenzie, *supra* note 17, at 596–97.

<sup>356</sup> See CFA, *supra* note 348, art. 4; UN Water Convention, *supra* note 284, arts. 5, 6.

<sup>357</sup> CFA, *supra* note 348, art. 5.

<sup>358</sup> *Id.* art. 14; see WEISS, *supra* note 280, at 157–58; Stoa, *International Water Law Principles and Frameworks*, *supra* note 71, at 589.

<sup>359</sup> CFA, *supra* note 348, art. 2(f).

<sup>360</sup> Abseno, *supra* note 20, at 149; see Stoa, *International Water Law Principles and Frameworks*, *supra* note 71, at 589.

<sup>361</sup> See Dereje Zeleke Mekonnen, *Between the Scylla of Water Security and Charybdis of Benefit Sharing: The Nile Basin Cooperative Framework Agreement—Failed or Just Teetering on the Brink?*, 3 GOETTINGEN J. INT’L L. 345, 362 (2011).

<sup>362</sup> See *Gabčíkovo-Nagymaros Project* (Hung./Slovk.), Judgment, 1997 I.C.J. Rep. 7, para. 85 (Sept. 25); Salman, *A Peacefully Unfolding African Spring?*, *supra* note 1, at 21.

stream states, which claim an equitable and reasonable share of the Nile waters flowing through their territories for economic development.<sup>363</sup>

The negotiation history regarding the principle of water security is only one example of the different expectations and objectives held by Egypt and Sudan as opposed to the other upper riparian states.<sup>364</sup> In the negotiations for the CFA, Sudan and especially Egypt pushed for three major concerns.<sup>365</sup> First, Egypt and Sudan insisted throughout the process of negotiations on the incorporation of a clause to safeguard their existing rights and water allocations—a claim tantamount to a demand for recognition of Egypt's colonial treaties and the 1959 Nile Agreement—that would essentially reassure Egypt's unilateral veto power on all water projects on the Nile.<sup>366</sup> This position was vehemently opposed and rejected by the other riparian states.<sup>367</sup> Second, the two states demanded that the no significant harm principle be the guiding principle in order to reinforce their claim on the entire flow of the Nile.<sup>368</sup> Such an approach undermined the common goal of the NBI for socio-economic development through equitable utilization of the Nile Basin water, to which Sudan and Egypt committed themselves.<sup>369</sup> Finally, Egypt opposed the majority voting regime for amendments to the CFA and the lack of notification rules.<sup>370</sup> The upstream states have asserted their position that amendments to the CFA are permissible by two-thirds majority vote to avoid deceleration of the process by vetoes of single states.<sup>371</sup> Moreover, Ethiopia was concerned that notification requirements for any water projects could be construed as recognition of colonial-era treaties.<sup>372</sup> As a result, Egypt and Sudan continue to oppose the CFA as a wrongful attack on their inherited rights, whereas the upstream states prefer that the CFA enter into force to stress their rights for socio-economic development and equitable use of the Nile waters.<sup>373</sup>

The upstream states expect South Sudan to accede to the CFA based on ethnic, historical, geographic, and cultural interests and the positive signals

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<sup>363</sup> See Salman M.A. Salman, *Downstream Riparians Can Also Harm Upstream Riparians: The Concept of Foreclosure of Future Uses*, 35 WATER INT'L 350, 351 (2010).

<sup>364</sup> See Salman, *A Peacefully Unfolding African Spring?*, *supra* note 1, at 20–23; Stoa, *International Water Law Principles and Frameworks*, *supra* note 71, at 589.

<sup>365</sup> See Salman, *A Peacefully Unfolding African Spring?*, *supra* note 1, at 21–23.

<sup>366</sup> See Abseno, *supra* note 20, at 151; Kasimbazi, *supra* note 10, at 751; Stoa, *International Water Law Principles and Frameworks*, *supra* note 71, at 589.

<sup>367</sup> See Kasimbazi, *supra* note 10, at 753.

<sup>368</sup> See Salman, *A Peacefully Unfolding African Spring?*, *supra* note 1, at 21–22.

<sup>369</sup> See *id.* at 22.

<sup>370</sup> *Id.* at 22–23.

<sup>371</sup> See CFA, *supra* note 348, art. 36; Salman, *A Peacefully Unfolding African Spring?*, *supra* note 1, at 23.

<sup>372</sup> Salman, *A Peacefully Unfolding African Spring?*, *supra* note 1, at 22.

<sup>373</sup> See *id.* at 22–23.

that South Sudan has made over the last few years.<sup>374</sup> South Sudan's Minister of Irrigation and Water Resources, Paul Mayom Akec, stated that South Sudan's ratification of the CFA is "inevitable."<sup>375</sup> He added in June 2013 that "the process of joining the agreement has started at all levels of the state apparatus in South Sudan."<sup>376</sup> The accession process to the CFA, however, came to a halt because of a lack of political will and power due to the eruption of a brutal civil war and a split in the South Sudanese government.<sup>377</sup>

When South Sudan's water rights are back on its political agenda, it has to consider its future role in the region. According to the status quo, it is legally permissible for South Sudan to accede to the CFA. South Sudan is bound by the fixed water allocations and by the realization of water conservation projects in the Al-Sudd swamps established by the 1959 Nile Agreement, but it is free to accede to the CFA within its share, which it has to negotiate with Sudan under the 1959 Nile Agreement.<sup>378</sup> So long as South Sudan remains within its share of the 1959 Nile Agreement, it remains compliant with its inherited rights and obligations. In addition, the main requirement of the CFA for equitable use could be maintained simultaneously. If South Sudan wants to accede to the CFA, however, it needs to be clear and unambiguous about its objectives towards Sudan and Egypt, which means that South Sudan should not officially request to be bound by the entire 1959 Nile Agreement<sup>379</sup> because the stipulated full water claims are hardly compatible with the CFA's approach, as constituted in the preamble of the CFA.<sup>380</sup>

The accession of South Sudan could further motivate states to ratify or accede to the CFA so that it finally receives the number of ratifications needed to enter into force. Ideally, the accession could ease tensions between the upstream and downstream states, as South Sudan would serve as a kind of binding link. After all, South Sudan is obligated by the territorial rights and obligations that favor downstream Sudan and Egypt, but is viewed favorably by the upper riparian states due to its willingness to ac-

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<sup>374</sup> See *id.* at 23.

<sup>375</sup> *South Sudan Set to Sign New Nile Agreement*, AL JAZEERA (Jun. 20, 2013 9:44 AM), <http://www.aljazeera.com/news/africa/2013/06/201362075235645727.html> [perma.cc/YKR4-VR2W].

<sup>376</sup> *Id.*

<sup>377</sup> See de Waal, *supra* note 25, at 361–62; Clemence Pinaud, *South Sudan: Civil War, Predation and the Making of a Military Aristocracy*, 113 AFR. AFF. 192, 192–93 (2014).

<sup>378</sup> See 1959 Nile Agreement, *supra* note 79, arts. 1–4; Gabčíkovo-Nagymaros Project, 1997 I.C.J. Rep. 7, para. 123; Helal, *supra* note 67, at 983.

<sup>379</sup> See ASPECTS OF THE LAW, *supra* note 167, at n.6.

<sup>380</sup> See CFA, *supra* note 348, pmb1.; Abseno, *supra* note 20, at 147.

cede to the CFA.<sup>381</sup> South Sudan could therefore stipulate an approach of the two very different conceptions on the rights to the Nile waters.

There are also positive signals for such an approach, as Egypt and Sudan have recently shown they are able to change their position on their inherited rights on all Nile waters when under pressure.<sup>382</sup> On March 23, 2015, Egypt, Sudan, and Ethiopia entered into an agreement on the GERD project in Ethiopia that significantly impacts the amount of water arriving at the Aswan Dam.<sup>383</sup> It is the first time that Egypt and Sudan agreed on a large-scale water project on the Nile.<sup>384</sup> Given the major disputes between Egypt and Ethiopia, which peaked when Egypt explicitly threatened to bomb the dam,<sup>385</sup> this agreement is very astonishing and could mark a turnaround in the downstream position. It remains to be seen, however, if Egypt and Sudan will adopt a more inclusive approach towards the water rights of the upper riparian states.

The CFA would be advantageous for South Sudan. It supports the struggle of the upstream states for equal rights and establishes mechanisms that protect South Sudan's share of the Nile. Most of the states are currently only constructing small water projects that have hardly any effect on the water flow for South Sudan.<sup>386</sup> Moreover, the Al-Sudd swamp serves as a natural water regulator guaranteeing a constant flow of the White Nile from South Sudan to Sudan and Egypt.<sup>387</sup> In addition, the CFA provides many legal mechanisms for cooperation between the parties to the CFA to control for South Sudan's sufficient water supplies.<sup>388</sup> Although the 1959 Nile Agreement enforces Egypt's and Sudan's claimed rights on the Nile River's entire flow by threatening to resort to military force against the riparian states, as opposed to the 1959 Nile Agreement, the CFA provides legally binding, safe, and peaceful conflict resolution mechanisms.<sup>389</sup>

Finally, the CFA would establish the first international environmental protection standards for the entire Nile River Basin.<sup>390</sup> Article 6 of the CFA is dedicated to the protection of the Nile River's ecosystems and foresees

<sup>381</sup> See CFA, *supra* note 348, pmb1.; 1959 Nile Agreement, *supra* note 79, arts. 1–3; Gabčíkovo-Nagymaros Project, 1997 I.C.J. Rep. 7, para. 123.

<sup>382</sup> See WEISS, *supra* note 280, at 16, n.17; Satti et al., *supra* note 338, at 2275–76.

<sup>383</sup> See Salman, *Ethiopian Strategy*, *supra* note 335; Pearce, *supra* note 330.

<sup>384</sup> See Salman, *Ethiopian Strategy*, *supra* note 335.

<sup>385</sup> See Daniel Abebe, *Egypt, Ethiopia, and the Nile: The Economics of International Water Law*, 15 CHI. J. INT'L L. 27, 33 (2014).

<sup>386</sup> See Morbach et al., *supra* note 15, at 603–04.

<sup>387</sup> See Kenyi, *supra* note 334, at 52–53.

<sup>388</sup> See CFA, *supra* note 348, arts. 8, 22–25, 27–28, 34.

<sup>389</sup> See *id.* arts. 8, 9, 34; 1959 Nile Agreement, *supra* note 79, art. 4; see Abebe, *supra* note 385, at 33; McKenzie, *supra* note 17, at 595–96; Stoa, *International Water Law Principles and Frameworks*, *supra* note 71, at 589.

<sup>390</sup> See CFA, *supra* note 348, arts. 6, 9; McKenzie, *supra* note 17, at 596–97.

special protection for wetland areas.<sup>391</sup> Article 9 introduces comprehensive environmental impact assessment standards for water projects.<sup>392</sup> These environmental protection standards could be very useful for South Sudan, which might sooner or later construct a water conservation project to limit evaporation and enhance the overall flow in the Al-Sudd swamps. By adopting these standards, South Sudan can be assured that a project like the Jonglei Canal will not be constructed without taking environmental and socio-economic impacts of the local population into consideration. South Sudan could hold these binding rules of the CFA against Sudan and Egypt, which might demand water conservation projects in the Al-Sudd area according to the territorial rights and obligations established by the 1959 Nile Agreement.

### CONCLUSION

The newly independent South Sudan falls directly in the demarcation zone of the rivalry between downstream and upstream riparian states along the Nile River. This tension stems from Egypt and Sudan stressing their rights to the entire flow of the Nile. The upstream African states, however, refuse to be bound by colonial treaties and claim their equitable share of the Nile River. South Sudan will play an important role in the future of the Nile River Basin region, whichever way it chooses to proceed. South Sudan may choose to cooperate more closely with Sudan and Egypt under the 1959 Nile Agreement, or it may decide to accede to the CFA treaty to support the upstream riparian states in their struggle for acknowledgement of their water rights.

The analysis of the law of state succession evaluated the legal status quo of South Sudan's water rights. The concept of automatic state succession, according to Article 34 of the 1978 Vienna Convention, is not applicable to South Sudan because this provision has not become part of customary international law. South Sudan, therefore, did not become party to the entire 1959 Nile Agreement. In fact, in the case of state separation, customary international law provides for pragmatic solutions for all states and grants South Sudan the sole right to notify Sudan and Egypt of its willingness to become party to the agreement and then for the two states to finally decide on South Sudan's accession.

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<sup>391</sup> CFA, *supra* note 348, art. 6, art. 6(1)(a).

<sup>392</sup> *See id.* art. 9. Egypt and Sudan did not undertake an environmental impact assessment before the start of construction of the Jonglei Canal in the 1970s. Yang, *supra* note 47, at 260–61, n.188, (citing Adil Mustafa Ahmad, *Post-Jonglei Planning in Southern Sudan: Combining Environment with Development*, 20 ENV'T & URB. 575, 581 (2008)).

However, the application of Article 12 of the 1978 Vienna Convention, which resembles customary international law, points to a different result. This Article concludes that South Sudan, since its independence, was automatically bound by the territorial rights and obligations established by the 1959 Nile Agreement. In particular, South Sudan enjoys the right to an equitable share of the 18.5 bcm of water allocated to Sudan. Moreover, it may undertake water conservation projects in the Al-Sudd swamps to raise the overall water apportionments of South Sudan, Sudan, and Egypt. Finally, it may become party to the Joint Technical Commission with regard to the execution of territorial rights.

With respect to the finding above, South Sudan should enter into negotiations with Sudan for an apportionment of its share of 18.5 bcm of water according to international water law because the 1959 Nile Agreement remains silent in this regard. Such a bilateral agreement between the two Sudans is a prerequisite for whichever route South Sudan chooses. If South Sudan wishes to become a full party to the 1959 Nile Agreement, it needs a clear definition of its existing rights and obligations; if it considers acceding to the CFA, it needs to be sure to comply with its territorial rights and obligations under the 1959 Nile Agreement towards Sudan and Egypt. Such an agreement should take into consideration the annual water usage of Sudan, which amounted to only 12.5 bcm of water even before the secession, and its socio-economic development. Overall, Sudan's unused 6 bcm of water could be assigned to South Sudan without leading to significant harm to Sudan. Moreover, South Sudan has great water conservation potential in the Al-Sudd swamps, which would allow for an increased flow of the White Nile to Sudan and Egypt.

Given the legal status quo, this Article finally argues that South Sudan should accede to the CFA. South Sudan may accede to the CFA without violating its territorial rights and obligations under the 1959 Nile Agreement, as long as it does not exceed its water allotment with Sudan, which it must negotiate prior to accession. South Sudan most likely would agree to an international water treaty that corresponds with international water law and guarantees an equitable use for all riparian states in the long term. The accession of South Sudan to the CFA could also provide several advantages for the entire Nile River Basin: it could foster further ratifications and lead to the CFA's entry into force; it might also help overcome the decade-long dispute between Egypt and Sudan and the remaining eight East African upstream states.

Rest assured, whichever road South Sudan chooses for its future, it will have a major impact on the highly complicated hydro-politics of the Nile River Basin.

