

# ANOTHER CUP AT THE NILE'S CROWDED SPIGOT: SOUTH SUDAN AND ITS NILE WATER RIGHTS

CHARLES L. KATZ\*

## ABSTRACT

*This Note will examine and analyze the legal implications of South Sudanese independence on the Nile Basin's legal regime governing use of the Nile's water. South Sudan has three options with respect to usage of the Nile: (1) acceding to the 1959 Nile Waters Agreement; (2) signing and ratifying the Cooperative Framework Agreement; or (3) pursuing an independent, alternative course based on preexisting international water law. This Note will first provide a general overview of South Sudanese independence and of the Nile Basin as a whole. It will argue that South Sudan is not bound by the 1959 Nile Waters Agreement according to several theories of international law relating to state succession with respect to treaties. It will then explore the legal impact of a hypothetical South Sudanese decision to accede to the 1959 Nile Waters Agreement, and discuss what portions of the treaty will need to be renegotiated or altered to reflect a third country becoming party to the treaty. After a discussion of the 1959 Nile Waters Agreement, the Note will then discuss the treaty's relationship with the Cooperative Framework Agreement. It also will elaborate on South Sudanese legal rights under the Cooperative Framework Agreement if South Sudan decides to ratify the CFA. The final subsection of the Note provides an overview of current theories of international water, and proposes a third option for South Sudan to exercise its Nile water rights based off these theories, that of unaffiliated equitable utilization.*

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\* The author is a 2013 graduate of the Georgetown University Law Center. © 2013, Charles L. Katz.

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I. INTRODUCTION

Frequent newspaper headlines tell of the ongoing strife between South Sudan and Sudan concerning border disputes, control over oil producing territory, and the rate for which South Sudan will be charged for shipping oil through Sudanese pipelines to reach Red Sea ports and the global oil market. Rarely discussed, however, is that rights to oil were not the only natural resource rights left unresolved when South Sudan and Sudan split in July 2011. The Comprehensive Peace Agreement (CPA) between Sudan and South Sudan did not include an agreement on South Sudan's rights to the Nile after independence even though both parties rely on the Nile as their principal water source.

South Sudan's independence from Sudan in July 2011 directly impacts the water-scarce Nile Basin's legal framework. Prior to independence, Nile usage by South Sudan, through Sudan, was governed by the 1959 Nile Waters Agreement that split the Nile between Egypt and Sudan, the downstream riparians.<sup>1</sup> The 1959 Agreement is a fixed allocation treaty that relies on the theory of limited territorial sovereignty as its legal doctrinal framework. The 1959 Agreement lacks a state succession provision, and international law governing state succession in respect to treaties is limited to customary international law, which holds that the successor state must accept treaty obligations for them to remain binding. As South Sudan has not accepted the 1959 Agreement, the 1959 Agreement does not bind South Sudan. The Comprehensive Framework Agreement (CFA), an alternative to the

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1. Riparian means "of, relating to, or located on the bank of a river or a stream." BLACK'S LAW DICTIONARY 1441 (9th ed. 2009). A riparian right is "the right of a landowner whose property borders on a body of water or watercourse." *Id.* at 1442.

1959 Agreement, is an equitable utilization agreement that included all Nile Basin riparians in negotiations, but has only been signed (so far) by six upstream riparians. The CFA is not yet in force, but only requires six ratifications to bind members. South Sudan's third legal option is to pursue an independent claim to the Nile founded on one of the traditional international water doctrines.

Despite the river's legendary length, the Nile lacks the water volume possessed by other major rivers.<sup>2</sup> That the Nile River Basin consists of ten riparian users with various levels of dependencies on the river's scarce water offerings makes it an area especially prone to water disputes. The Nile Basin comprises the riparian states of the Nile: Burundi, the Democratic Republic of the Congo (DRC), Egypt, Ethiopia, Kenya, Rwanda, South Sudan, Sudan, Tanzania, and Uganda. Historically, the Nile Basin's split between downstream and upstream riparians mirrored the ethnic, socio-cultural, and religious divide. Islamic and Arab-influenced Egypt and Sudan comprise the downstream Nile riparians, whereas the other seven countries comprising the upstream riparians are Christianized, East African states. South Sudan's emergence as an independent nation and its unique geographical position along the Nile, however, alters this hydropolitical rift. South Sudan is a lower riparian with respect to the East African states along the upper White Nile, but the country lacks the Islamic and Arab influences of Egypt and Sudan. South Sudan can also be considered an upstream nation because several White Nile tributaries originate within its borders. In the case of the Nile Basin, an independent South Sudan represents more than just a new constituent; it represents another cup at the Nile's crowded spigot.

## II. SOUTH SUDANESE INDEPENDENCE ADDS TO THE ALREADY COMPLEX SITUATION FOR NILE WATER RIGHTS

The Comprehensive Peace Agreement (CPA) formally ended the two-decade long Second Sudanese Civil War between the Government of the Republic of the Sudan and the Sudan People's Liberation Movement/Sudan People's Liberation Army. The Second Sudanese Civil War was a long and bitterly fought war that began barely a decade after the conclusion of another fifteen year conflict between many of the same partisan groups that aligned largely along religious and ethnic cleavages that mirrored the geographical and topographical divide between the arid deserts of the North and the swamps and

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2. JOHN WATERBURY, *HYDROPOLITICS OF THE NILE VALLEY* 7 (1979).

savannahs of the South. Provisions for South Sudanese access to the Nile were not included in the Comprehensive Peace Agreement, which provided the roadmap for the eventual breakup of Sudan and was adopted by the Government of the Republic of the Sudan and the Sudan People's Liberation Movement/Sudan People's Liberation Army on January 7, 2005.

The CPA is a compilation of five individual protocols and agreements.<sup>3</sup> The Agreement detailed comprehensive provisions relating to South Sudanese self-determination,<sup>4</sup> governmental rules and regulations in the interim period before the vote of self-determination,<sup>5</sup> usage and ownership of oil and petroleum resources,<sup>6</sup> and the cease-fire between the Sudanese Armed Forces and the Sudan People's Liberation Army (SPLA).<sup>7</sup> The CPA proved to be less than comprehensive, however, in the realm of water rights—which only merited passing inclusion in the Schedules of the Protocol on Power Sharing.<sup>8</sup> During the six-year “Interim Period” between the adoption of the CPA and the 2011 South Sudanese vote for independence,<sup>9</sup> issues concerning the Nile and other rivers crossing the border between the northern and southern regions belonged solely to the Government of the Republic of the Sudan in Khartoum.<sup>10</sup> No provision of the CPA discussed the division of Nile water rights in the event that the people of South Sudan decided to vote in favor of independence,<sup>11</sup> and at the time of writing, South Sudan has neither signed nor entered into any agreement, whether pre- or post-independence, concerning its use of the Nile.

The lack of agreement governing South Sudanese use of the Nile adds another layer of complexity to the uncertainty of the Nile Basin's legal regime. Prior to the creation of South Sudan, there were already nine countries with riparian rights to Nile water. As the Nile is the

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3. The Comprehensive Peace Agreement Between the Government of the Republic of Sudan and the Sudan People's Liberation Movement/the Sudan People's Liberation Army, Chapeau, Sud.-SPLM/SPLA (Jan. 7, 2005), *available at* <http://www.aec-sudan.org/docs/cpa/cpa-en.pdf> [hereinafter Comprehensive Peace Agreement].

4. *Id.* at ch. I.

5. *Id.* at ch. II.

6. *Id.* at ch. III.

7. *Id.* at ch. VI.

8. *Id.* at ch. II.

9. The Interim Period began six months after the signing of the CPA and ended on Jan. 9, 2011, when the South Sudanese independence referendum was held.

10. Comprehensive Peace Agreement, *supra* note 3, at ch. II.

11. *Id.*

largest and most significant river basin in the world without a comprehensive agreement binding all riparian parties,<sup>12</sup> the riparians historically viewed use and rights to the river as a zero-sum game, leading to frequent disputes<sup>13</sup> and a general atmosphere of suspicion and distrust.<sup>14</sup> In 1999, riparians tried to resolve some of the legal uncertainty by forming the Nile Basin Initiative (NBI).<sup>15</sup> In 2009, NBI members attempted to formally bind Nile riparians with the Agreement on the Nile Basin Cooperative Framework, commonly known as the Cooperative Framework Agreement (CFA), but did not achieve unanimity because Egypt and Sudan refused to sign in a dispute over the words used in a provision dealing with water security.<sup>16</sup> Six NBI members, however, have signed the CFA,<sup>17</sup> which is the minimum required for the Agreement to enter into force once all signatories ratify.<sup>18</sup> Sudan and Egypt, though, remain bound by the terms of the controversial 1959 Agreement for the Full Utilization of the Nile Waters (1959 Nile Waters Agreement) dividing the Nile solely between the two parties.<sup>19</sup> Thus, the current state of the Nile's legal regime is that of one treaty binding two major parties which directly conflicts with a signed-but-not-ratified agreement binding other Nile riparians, and a newly independent South Sudan that has yet to declare its own intentions.

On March 28, 2011, the President of South Sudan, Salva Kiir appeared to reveal South Sudan's intentions regarding the Nile when he

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12. E.g., Dereje Zeleke Mekonnen, *The Nile Basin Cooperative Framework Agreement Negotiations and the Adoption of a 'Water Security' Paradigm: Flight into Obscurity or a Logical Cul-De-Sac?*, 21 EUR. J. INT'L L. 421, 440 (2010).

13. TESFAYE TAFESSE, *THE NILE QUESTION: HYDROLOGICALS, LEGAL WRANGLING, MODUS VIVENDI AND PERSPECTIVES* 77 (2001).

14. *See id.* at 105.

15. The members of the Nile Basin Initiative are Burundi, the Democratic Republic of the Congo, Egypt, Eritrea, Ethiopia, Kenya, Rwanda, Sudan, Tanzania, and Uganda. South Sudan has applied for full membership in the NBI. *See South Sudan Seeks Membership of the Nile Basin Initiative*, SUDAN TRIBUNE, Sept. 25, 2011.

16. Mekonnen, *supra* note 12, at 429.

17. The six signatories to the CFA are Burundi, Ethiopia, Kenya, Rwanda, Tanzania, and Uganda. David Malingha Doya, *Burundi Government Signs Accord on Use of Nile River Water*, BLOOMBERG, Feb. 28, 2011, available at <http://www.bloomberg.com/news/2011-02-28/burundi-signs-accord-on-water-usage-from-nile-that-may-strip-egypt-of-veto.html>.

18. Agreement on the Nile River Basin Cooperative Framework, art. 42, *opened for signature* May 14, 2010, available at [http://internationalwaterlaw.org/documents/regionaldocs/Nile\\_River\\_Basin\\_Cooperative\\_Framework\\_2010.pdf](http://internationalwaterlaw.org/documents/regionaldocs/Nile_River_Basin_Cooperative_Framework_2010.pdf).

19. Agreement for the Full Utilization of the Nile Waters, Sudan-Egypt, Nov. 8, 1959, 453 U.N.T.S. 51, available at [http://internationalwaterlaw.org/documents/regionaldocs/uar\\_sudan.html](http://internationalwaterlaw.org/documents/regionaldocs/uar_sudan.html) [hereinafter 1959 Nile Waters Agreement].

declared to Egyptian Prime Minister Essam Sharaf that South Sudan would honor and respect the existing Nile water treaties.<sup>20</sup> In reference to a specific water project, Kiir told Sharaf that the water would come from the existing Sudanese allocation under the 1959 Nile Waters Agreement, respecting the Egyptian allocation.<sup>21</sup> Kiir's statement, however, is insufficient to bind South Sudan to the terms of the treaty, and does not equate to an accession to the Agreement.<sup>22</sup> Furthermore, it may not necessarily be in South Sudan's best interest to accede to the 1959 Nile Waters Agreement in place of signing and ratifying the CFA or pursuing a third, alternative course based on preexisting international water law.

### III. THE 1959 NILE WATERS AGREEMENT

The 1959 Nile Waters Agreement is a polarizing document that benefits the downstream Nile riparians at the expense of upstream riparians. While Egypt and Sudan cling to the fixed water allotments granted to them in the treaty, upstream riparians like Ethiopia, Kenya, Tanzania, and Uganda detest the document and call for its abandonment. The 1959 Nile Waters Agreement itself originated from the renegotiation of a predecessor document, the 1929 Exchange of Notes Regarding the Use of the Nile for irrigation, which remains valid when not replaced by the 1959 treaty. Determining whether South Sudan is party (and thus bound) to the 1959 Nile Waters Agreement requires the examination of three different theories of state succession. Under current international law, South Sudan is not bound by the terms of the 1959 Nile Waters Agreement, though it could accede to the 1959 Treaty. Were South Sudan to pursue accession, several portions of the 1959 Nile Waters Agreement would need to be renegotiated and rewritten.

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20. *South Sudan Tells Egypt it Will Respect Existing Nile Water Treaties*, SUDAN TRIBUNE, Mar. 29, 2011, <http://www.sudantribune.com/South-Sudan-tells-Egypt-it-will,38423>.

21. *Id.*

22. The 1959 Nile Waters Agreement specifies the method of accession to the treaty. Article 7 declares that "this Agreement shall come into force after its sanction by the two contracting parties, provided that either party shall notify the other party of the date of its sanction, through the diplomatic channels." 1959 Nile Waters Agreement, *supra* note 19, art. 7. According to *Black's Law Dictionary*, the English word "sanction" can be synonymous with "ratification," as well as several other terms. BLACK'S LAW DICTIONARY 1376 (9th ed. 2009). That the treaty was signed on November 8, 1959 by authorized representatives of their respective countries but did not come into force until December 12, 1959 indicates that the signatures themselves did not constitute ratification: "the final establishment of consent by the parties to a treaty to be bound by it." *Id.*

## ANOTHER CUP AT THE NILE'S CROWDED SPIGOT

### A. *History and Origins of the 1959 Nile Waters Agreement*

Just as the CFA would later emerge, in part, from the dissatisfaction of third parties to the 1959 Nile Waters Agreement,<sup>23</sup> the 1959 Nile Waters Agreement similarly originated from dissatisfaction with an earlier treaty. In 1929, newly independent Egypt and the United Kingdom, on behalf of its Nile riparian colonies, signed the Exchange of Notes Regarding the Use of the Waters of the Nile for Irrigation (the 1929 Treaty).<sup>24</sup> The 1929 Treaty is remarkably one-sided, demonstrating the British desire to appease Egypt in order to secure the shortest sea-route to British-controlled India via the Suez Canal and Red Sea ports.<sup>25</sup> The main terms of the 1929 treaty are as follows: Anglo-Egyptian Sudan was granted an annual allotment of four km<sup>3</sup>; Egypt was granted a water allotment of forty-eight km<sup>3</sup>, ownership of any remaining water in the Nile when it reached Egypt, and veto rights over any upstream projects on the Nile;<sup>26</sup> and the treaty bound all upper Nile riparians.<sup>27</sup> Although the Democratic Republic of the Congo and Ethiopia were not British colonies, the British obtained agreements by the contemporary representatives of both parties (the Congo Free State and Italy, respectively) that they would not alter the Nile's flow without obtaining consent first from the U.K.<sup>28</sup> In the 1950s, Sudanese governmental officials, resentful of Sudan's limited water allocation, demanded renegotiation of the 1929 Treaty.<sup>29</sup> Renegotiation between

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23. Carol Gachiengo, *Fighting Over the Nile Could Drown Us All*, EAST AFRICAN, Jan. 31, 2011, <http://www.theestafrican.co.ke/magazine/Fighting-over-the-Nile-could-drown-us-all/-/434746/1096752/-/view/printVersion/-/cq78n0/-/index.html>.

24. At the time, Britain's Nile riparian colonies included Anglo-Egyptian Sudan (modern-day Sudan and South Sudan, and parts of Libya and Egypt); the Tanganyika Territory (modern-day Tanzania); and the protectorates of Kenya and Uganda. For a discussion of the wider context of the history of Nile treaties, see C.O. Okidi, *History of the Nile and Lake Victoria Basins Through Treaties*, in THE NILE: SHARING A SCARCE RESOURCE 321 (P.P. Howell & J.A. Allen, eds., 1994).

25. ARUN P. ELHANCE, *HYDROPOLITICS IN THE THIRD WORLD* 68 (1999).

26. Exchange of Notes in Regard of the Use of the Waters of the River Nile for Irrigation Purposes, Egypt-U.K., May 7, 1929, 93 L.N.T.S. 43, available at [http://internationalwaterlaw.org/documents/regionaldocs/Egypt\\_UK\\_Nile\\_Agreement-1929.html](http://internationalwaterlaw.org/documents/regionaldocs/Egypt_UK_Nile_Agreement-1929.html); see also Mekonnen, *supra* note 12, at 432.

27. Valerie Knobelsdorf, Note, *The Nile Waters Agreements: Imposition and Impacts of a Transboundary Legal System*, 44 COLUM. J. TRANSNAT'L L. 622, 628 (2006).

28. 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).

29. Joseph Dellapenna, *The Nile as a Legal and Political Structure*, in THE SCARCITY OF WATER: EMERGING LEGAL AND POLICY RESPONSES 121, 125 (Edward H.P. Brans et al., eds., 1997).

Egypt and newly independent Sudan produced the 1959 Nile Waters Agreement.

The 1959 Agreement is not a per se rejection and replacement of the 1929 Treaty.<sup>30</sup> Though Sudan could have attempted to void the 1929 Treaty through *rebus sic stantibus*,<sup>31</sup> this argument, like the claim that the British colonial officials lacked legal authority to enter into agreements on behalf of Sudan, was not the official reason for renegotiating the 1929 Treaty.<sup>32</sup> Rather, the official reason, as stated in the preamble to the 1959 Nile Waters Agreement itself, was that “the Nile Waters Agreement concluded in 1929 provided only for the partial use of the Nile Waters and did not extend to include a complete control of the River waters.”<sup>33</sup> Though the 1959 Agreement effectually replaced the 1929 Treaty,<sup>34</sup> provisions in the 1929 Treaty that are not replaced, explicitly revoked, or explicitly repudiated remain valid, including the provision binding all Nile riparians.<sup>35</sup> Unlike the 1929 Treaty, where the interests of the British East African colonies were “represented” by their British colonizer (which also possessed prior Congolese and Ethiopian consent), Sudan and Egypt only consulted themselves in respect to the 1959 Agreement.<sup>36</sup> A coalition of East African colonial delegates formally noted their reservation to the 1959 Agreement.<sup>37</sup> Thus, while the 1959 Agreement can be read as a broadening of the 1929 Treaty, other Nile riparians, by virtue of the absence of even a nominal presence or consultation during the Agreement’s negotiation, can argue that the 1959 Agreement should be read more narrowly than the 1929 Treaty.<sup>38</sup>

The 1959 Nile Waters Agreement contains several significant provi-

30. See 1959 Nile Waters Agreement, *supra* note 19; Yimer Fisseha, *State Succession and the Legal Status of International Rivers*, in *THE LEGAL REGIME OF INTERNATIONAL RIVERS AND LAKES* 177, 187 (Ralph Zacklin & Lucius Cafilisch eds., 1981).

31. *Rebus sic stantibus* is Latin for “matters still standing.” This principle of international law holds that all agreements are only binding as long as there are no fundamentally changed circumstances. BLACK’S LAW DICTIONARY 1381 (9th ed. 2009). Sudan’s *rebus sic stantibus* claim is the change in status from colony to independent nation. Fisseha, *supra* note 30, at 186.

32. *Id.* at 187.

33. 1959 Nile Waters Agreement, *supra* note 19.

34. See Okidi, *supra* note 24, at 333.

35. See Christina M. Carroll, *Past and Future Legal Framework of the Nile River Basin*, 12 *Geo. INT’L ENVTL. L. REV.* 269, 280 (1999).

36. Paul Howell, *East Africa’s Water Requirements: The Equatorial Nile Project and the Nile Waters Agreement of 1929*, in *THE NILE: SHARING A SCARCE RESOURCE* 81, 97 (P.P. Howell & J.A. Allen eds., 1994).

37. *Id.* at 100.

38. See Knobelsdorf, *supra* note 27, at 628.



sions that replace provisions found in the 1929 Treaty. The annual base discharge of the Nile, once assumed to be fifty-two km<sup>3</sup>, was actually found to be eighty-four km<sup>3</sup> as measured at the Aswan Dam.<sup>39</sup> Of this twenty-two km<sup>3</sup> of “new” water, the Agreement allocated 7.5 km<sup>3</sup> to Egypt, giving it an annual allotment of 55.5 km<sup>3</sup>, and allocated 14.5 km<sup>3</sup> to Sudan, giving it an annual allotment of 18.5 km<sup>3</sup>.<sup>40</sup> Any future allotment based on the Nile’s increased yield is equally divided between Sudan and Egypt.<sup>41</sup> To preserve the integrity of the Agreement, Egypt and Sudan are to take a unified stance in any negotiation with or claim by another Nile riparian.<sup>42</sup> The 1959 Agreement also calls for the establishment of a Technical Commission for knowledge sharing purposes, and, in the event of a decrease in the Nile’s yield, it is left to this Technical Commission to determine the new water allotments.<sup>43</sup> The 1959 Agreement lacks a severability clause—a clause stating that the breach or the voiding of one part of the agreement does not result in the voiding of the entire agreement, making renegotiation particularly difficult.<sup>44</sup> Most relevant to the case of South Sudan is the complete absence in the 1959 Nile Waters Agreement of any provision relating to state succession, generally referred to as a “devolution provision.”<sup>45</sup>

B. *State Succession Under International Law in Respect to Treaties*

The absence of a devolution provision in the 1959 Nile Waters Agreement is problematic because international law relating to state succession lacks theoretical consensus, consistent state practice, or settled legal rules.<sup>46</sup> Three different approaches to state succession are currently practiced. The Nyerere Doctrine represents a hybrid approach that permits successor states the discretion to decide which agreements they wish to continue to be bound by, and which agreements they wish to forego.<sup>47</sup> Customary international law, as demonstrated by the *Restatement (Third) of Foreign Relations Law of the United States*, currently espouses a modified version of the Nyerere

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39. 1959 Nile Waters Agreement, *supra* note 19, art. 2(3).

40. *Id.* art. 2(4).

41. *Id.* art. 2(4).

42. *Id.* art. 5.

43. *Id.* art. 4(1)e.

44. *See id.*

45. *See id.*

46. *See* TIYANJANA MALUWA, *INTERNATIONAL LAW IN POST-COLONIAL AFRICA* 61 (1995).

47. *See id.* at 73.

Doctrine.<sup>48</sup> The *tabula rasa* approach, popularized in the era of decolonization, holds that successor states are wholly new legal personalities not bound by prior agreements other than those relating to borders.<sup>49</sup> It can be inferred that the Vienna Convention on Treaties uses this approach.<sup>50</sup> One approach to state succession, universal succession, holds that all treaties entered into by the original state are automatically binding on the successor states.<sup>51</sup> The Vienna Convention on State Succession currently adopts this approach.<sup>52</sup>

Of the three approaches, East African state practice after 1950 favors the Nyerere Doctrine.<sup>53</sup> The Nyerere Doctrine originates in Julius Nyerere's rejection of universal succession to treaty obligations.<sup>54</sup> The first president of Tanganyika (later Tanzania), Nyerere rejected the inheritance of treaty obligations from the British on the grounds that the application of universal succession to newly independent former colonies meant continuing the yoke of colonization.<sup>55</sup> Indeed, the decolonization of Africa proved problematic for the traditional theory of universal state succession to treaties because treaties, as they are traditionally understood, represent the consensual desire of states to bind themselves to a particular agreement.<sup>56</sup> In colonial arrangements, however, the colonizers typically ignored the will and desires of the colonized, and acted in the best interest of the colonizer rather than the colony.<sup>57</sup> Nyerere believed that perpetuating the binding effects of colonial era obligations on decolonized states was incompatible with the international norm of state self-determination.<sup>58</sup> Instead, the Nyerere Doctrine provides each newly independent state with a two-year window to evaluate, renegotiate, and potentially withdraw from all holdover treaties.<sup>59</sup> The doctrine, therefore, permits each state to

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48. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES §§ 208, 210, 324 (1987).

49. *E.g.*, MALUWA, *supra* note 46, at 69.

50. *See* Vienna Convention on the Law of Treaties, arts. 11, 12, May 23, 1969, 1155 U.N.T.S. 331 (entered into force Jan. 27, 1980).

51. *E.g.*, MALUWA, *supra* note 46, at 68.

52. *See* Vienna Convention on Succession of States in Respect of Treaties, art. 34, Aug. 23, 1978, 1946 U.N.T.S. 3 (entered into force Nov. 6, 1996).

53. EARLE E. SEATON & SOSTHENES T. MALITI, TANZANIA TREATY PRACTICE 47 (1973).

54. *Id.* at 45.

55. *See id.*

56. *See* Vienna Convention on the Law of Treaties, *supra* note 50.

57. SEATON, *supra* note 53, at 20.

58. *See id.*

59. *See id.*

exercise its sovereign power and repudiate any agreements entered into on the former colony's behalf that are contrary to its interest(s) as an independent state.<sup>60</sup> Tanzania, Kenya, and Uganda utilized the Nyerere Doctrine to declare their formal repudiation of the 1929 Treaty, since all were colonies at the time of signing.<sup>61</sup> As the 1959 Nile Waters Agreement utilizes the 1929 Treaty to bind all upper riparians, in repudiating the 1929 Treaty, Tanzania, Kenya, and Uganda de facto repudiated the 1959 Nile Waters Agreement as well.<sup>62</sup>

The *Restatement (Third) of Foreign Relations Law of the United States*, which is not formally binding on Egypt or Sudan but is considered to be an articulation of customary international law,<sup>63</sup> which does bind all nations, adopts an approach to state succession that resembles a modified version of the Nyerere Doctrine in that treaties are not automatically binding on successor states.<sup>64</sup> As South Sudan falls within the definition of a successor state of the *Restatement*,<sup>65</sup> it would not accede to the 1959 Nile Waters Agreement unless it either expressly or impliedly accepted the agreement, and Sudan and Egypt permitted South Sudanese accession.<sup>66</sup> Given the status quo of no affirmative act of acceptance of the 1959 Agreement by South Sudan, under the *Restatement*, South Sudan is not bound by the 1959 Nile Waters Agreement.<sup>67</sup> If South Sudan is not made party, Egypt could make a *rebus sic stantibus* claim that the 1959 Nile Waters Agreement lacks validity because of provisions in the treaty specifying projects in areas that were

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60. *See id.* at 45.

61. Howell, *supra* note 36, at 85; Robert O. Collins, *History, Hydropolitics, and the Nile, in THE NILE: SHARING A SCARCE RESOURCE* 109, 122 (P.P. Howell and J.A. Allen, eds., 1994).

62. *See* 1959 Nile Waters Agreement, *supra* note 19; Exchange of Notes in Regard to the Use of the River Nile for Irrigation Purposes, *supra* note 26.

63. *Publications Catalogue: Restatement of the Law Third—Foreign Relations Law of the United States*, THE AMERICAN LAW INSTITUTE, [http://www.ali.org/index.cfm?fuseaction=publications.ppage&node\\_id=33](http://www.ali.org/index.cfm?fuseaction=publications.ppage&node_id=33).

64. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 210 (1987).

65. *Id.* § 208.

66. *Id.* § 210.

67. Prior to independence, in 2011, the leader of the Government of South Sudan, Salva Kiir (the current South Sudanese President), told Egyptian Prime Minister Essam Sharaf that South Sudan would honor existing treaties. *South Sudan Tells Egypt it Will Respect Existing Nile Water Treaties*, *supra* note 20. Pledging to honor a treaty, however, is not an affirmative act of acceptance, as demonstrated by the comments made by Egyptian Foreign Minister Mohamed Amr at a press conference during a 2012 visit to Juba: "We realise that our brothers in South Sudan are aware of Egypt's interests and the importance of the Nile water for Egypt." *Egypt's Foreign Minister Visits Juba, Khartoum*, SUDAN TRIBUNE, Jan. 15, 2012.

ceded by Sudan to South Sudan.<sup>68</sup> Under the *Restatement*, South Sudan would not be bound by the water allotments unless they were made party to the 1959 Agreement because of an absence of consent.<sup>69</sup> Thus, under the *Restatement*, South Sudan does not automatically accede to the 1959 Nile Waters Agreement.

The Vienna Convention on Treaties (which entered into force in 1980) lacks any provisions relating to the succession of states in respect to treaties.<sup>70</sup> Rather, the Convention on Treaties considers South Sudan a third state in relation to the 1959 Nile Waters Agreement,<sup>71</sup> and a third state must consent to a treaty in order to be bound by rights from it and consent, in writing, to be bound by obligations provided for within the treaty.<sup>72</sup> Additionally, Egypt and Sudan must intend South Sudan to possess those rights.<sup>73</sup> The 1959 Nile Waters Agreement does not bind South Sudan under the Convention on Treaties because South Sudan has never consented.<sup>74</sup> Though Sudan ratified the Convention and Egypt acceded to it,<sup>75</sup> a potential conflict between the Convention on Treaties and the Convention on State Succession on this matter is averted by Article 4 of the Convention on Treaties, limiting the scope of the Convention on Treaties to treaties enacted after the Convention came into force in 1980.<sup>76</sup> The Convention on Treaties, therefore, does not apply to South Sudan and the 1959 Nile Waters Agreement because of the Article 4 non-retroactivity clause.

The Vienna Convention on State Succession (entered into force in 1996) adopts the approach of universal succession to treaties. The succession of South Sudan from Sudan is within the scope of the Convention on State Succession according to Articles 6 and 7.<sup>77</sup> The process of South Sudan's succession to Sudan conformed to the principles of international law enshrined in the United Nations, and occurred

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68. For political reasons, this is a highly unlikely scenario. 1959 Nile Waters Agreement, *supra* note 19; RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 210 (1987).

69. *See id.* § 324.

70. *See* Vienna Convention on the Law of Treaties, *supra* note 50, arts. 34-38.

71. *See id.*

72. *See id.* arts. 34, 45.

73. *See id.* art. 36.

74. *See id.* arts. 11, 12.

75. For signatory information, see the present list of parties with dates of signature available through the United Nations' online database. United Nations Treaty Collection, *Chapter XXIII: Law of Treaties—Vienna Convention on the Law of Treaties*, [http://treaties.un.org/Pages/ViewDetailsIII.aspx?&src=TREATY&mtdsg\\_no=XXIII1&chapter=23&Temp=mtdsg3&lang=en](http://treaties.un.org/Pages/ViewDetailsIII.aspx?&src=TREATY&mtdsg_no=XXIII1&chapter=23&Temp=mtdsg3&lang=en).

76. *See* Vienna Convention on the Law of Treaties, *supra* note 50, art. 4.

77. *See* Vienna Convention on Succession of States in respect of Treaties, *supra* note 52.

after the date that the Convention on State Succession entered into force.<sup>78</sup> Article 34 explicitly covers state separation in respect to treaties, and states that treaties in force at the date of succession that govern the entire territory of the prior state continue to bind each successor state formed.<sup>79</sup> As South Sudan consists solely of territory previously under Sudanese sovereignty, and the 1959 Nile Waters Agreement applied to pre-independent South Sudan, the 1959 Agreement continues to bind South Sudan under the Convention.<sup>80</sup> The Convention on State Succession complements the Vienna Convention on Treaties, and does not replace it.<sup>81</sup> While Egypt is party to the Convention on State Succession, Sudan has yet to ratify it, however, meaning that this convention currently lacks the power to bind both parties.<sup>82</sup> So, under the Convention on State Succession, South Sudan would have automatically acceded to the 1959 Nile Waters Agreement if both Sudan and Egypt were parties to the Convention. However, because Sudan was never a party to it, South Sudan is not bound by the 1959 Nile Waters Agreement under the Convention on State Succession.<sup>83</sup>

Thus, after examining several possible bases of existing international law, the status of South Sudan in regards to the 1959 Nile Waters Agreement is clear—South Sudan is not bound or party to the treaty. South Sudan is still within its two-year window permitted under the Nyerere Doctrine to reevaluate and renegotiate all holdover treaties. Customary international law, as exemplified by the *Restatement*, holds that South Sudan is not party to the Agreement because treaty succession by split states is not automatic.<sup>84</sup> The claim that the 1959 Agreement binds South Sudan because of the provisions in the 1929 Treaty that purport to apply to all Nile riparians is invalid because the argument assumes the contrary—that state succession to treaties is automatic.<sup>85</sup> The Convention on State Succession would hold South Sudan bound to the 1959 Nile Waters Agreement because of universal succession if both Sudan and Egypt were parties.<sup>86</sup> Sudan's lack of

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78. *See id.* arts. 6, 7.

79. *Id.* art. 34.

80. *See id.* art. 34.

81. *See id.* pmbl.

82. Vienna Convention on Succession of States in Respect of Treaties, *supra* note 52.

83. *See* RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES §§ 301, 324 (1987).

84. *See id.* § 210.

85. *See id.*; Knobelsdorf, *supra* note 27, at 628.

86. *See* Vienna Convention on Succession of States in Respect of Treaties, *supra* note 52.

accession to the Convention, though, invalidates its binding effect.<sup>87</sup> Customary law, however, does not prohibit South Sudan from acceding to the treaty by formally consenting to the Agreement, expressing a desire to accede, and Sudan and Egypt unanimously agreeing to permit accession.<sup>88</sup>

C. *The Legal Impact of Acceding to the 1959 Nile Waters Agreement*

While South Sudan has not overtly discussed the possibility, it could choose to accede to the 1959 Nile Waters Agreement. South Sudan's hypothetical accession to the 1959 Nile Waters Agreement presents its own set of challenges because of the necessary modification of the actual terms, both textually and substantively. Language reflecting the bilateral nature of the original treaty peppers the 1959 Agreement.<sup>89</sup> Phrases like "the two Republics," "the two parties," and "the two Governments" will need to be changed when referring to the parties of the treaty.<sup>90</sup> Less clear is whether those phrases should be changed in reference to a decision-making process—i.e., whether the intent of having decisions made by "two parties" was based on a desire to achieve a majority or a unanimity, which will depend on context. For example, it is apparent that the phrase: "the two Republics have agreed that they shall jointly consider and reach one unified view regarding the said claims,"<sup>91</sup> intends unanimity. Textual intent, however, is less apparent when the treaty uses language like: "the Commission shall, subject to the approval of the two Governments."<sup>92</sup> Such language could be interpreted as either desiring unanimity among the parties or as desiring the approval of only two individual governments, a fact which is relevant in case a state like South Sudan acceded to the 1959 Agreement.

Incorporating South Sudan into Article 2(4) intermingles textual and substantive issues, both of which would have to be addressed to make the text functional. Article 2(4) is a provision declaring that the net benefit of any Nile average yield increase at Aswan will be evenly

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87. See RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES §§ 301, 324 (1987).

88. See Vienna Convention on Succession of States in respect of Treaties, *supra* note 52; RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 334 (1987).

89. 1959 Nile Waters Agreement, *supra* note 50.

90. *Id.*

91. *Id.* art. 5(2).

92. *Id.* art. 4(3).

split between the two parties to the agreement.<sup>93</sup> With the addition of South Sudan increasing the number of parties to three, this text requires amending. One possible option is an even split between the three parties. Another option preserves Egypt's right to half of any increase, and evenly divides Sudan's half between Sudan and South Sudan, so that each receive a quarter of the net benefit. Of course, in an arid, water scarce environment like the lower Nile Basin, where fixed water allotments are fought for and clung to,<sup>94</sup> a straightforward division of water may not occur for reasons related to the Nile's hydrological characteristics.

Several Nilotic characteristics make it particularly difficult to determine a proper water "divide" between South Sudan and Sudan. The Nile only becomes the Nile proper at Khartoum—before Khartoum, the Nile exists as two separate flows, the White Nile and the Blue Nile, each with its own distinct hydrology. After Khartoum, one more tributary, the Atbara, adds water to the Nile, but the Nile actually loses water after the Atbara merger because of evaporation and a lack of rainfall for the Nile's last 3,000 km.<sup>95</sup> Whereas the White Nile, originating in the Great Lakes region of Africa, flows through both South Sudan and Sudan, the Blue Nile, originating in the Ethiopian Highlands, flows only through Sudan and never enters South Sudan.<sup>96</sup> Owing to evaporation over the White Nile's considerably longer course, the Blue Nile and Atbara systems' estimated contribution to the yield at Aswan may be as high as 85%, but South Sudan is riparian to neither system.<sup>97</sup> This extreme is further emphasized in flood season, when the Blue Nile accounts for an estimated 95% of the Nile's flow at Aswan.<sup>98</sup> The prevailing international norm that only riparians possess the right to riverine water excludes South Sudan from possessing a right to the Blue Nile and the Atbara.<sup>99</sup> Given these characteristics, a straight-

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93. *Id.* art. 2(4).

94. See WATERBURY, *supra* note 2, at 78; 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, 9-10 (2008).

95. Dellapenna, *supra* note 29, at 124.

96. This could change if the state of Blue Nile—currently on the border between Sudan and South Sudan, and riparian to the Blue Nile—votes in an oft-delayed referendum to join South Sudan. Khalid Abdelaziz & Hereward Holland, *Clashes Erupt in Flashpoint Sudan Border State*, REUTERS, Sept. 2, 2011, <http://www.reuters.com/article/2011/09/02/us-sudan-clash-idUSTRE7811UN20110902>.

97. ELHANCE, *supra* note 25, at 56.

98. *E.g.*, WATERBURY, *supra* note 2, at 78.

99. Dellapenna, *supra* note 28, at 35.

forward even split of the 18.5 km<sup>3</sup> would be contrary to existing general principles of international water law.

Based on the 1959 Nile Waters Agreement, a hypothetical split of Sudan's 18.5 km<sup>3</sup> can be envisioned were South Sudan to accede to the Agreement. Because South Sudan is not riparian to the Blue Nile, it would be improper to include the Blue Nile's contribution in determining the split.<sup>100</sup> In order to determine the annual contribution of the White Nile to the Blue Nile's flow, the average annual flow of the White Nile needs to be determined. The annual flow of the White Nile has been continuously measured since 1905 at Malakal, a flow that includes the contribution of the Sobat River, averaging out to 29.6 km<sup>3</sup>.<sup>101</sup> Using the eighty-four km<sup>3</sup> figure in Article 2 of the 1959 Nile Waters Agreement as the average annual yield of the Nile, it can be determined that the White Nile on average contributes 35% of the Nile's flow as measured at Aswan. An important caveat is that Malakal is some 400 miles south of the Blue Nile and White Nile confluence at Khartoum, and evaporation is not taken into account into this determination.<sup>102</sup> Assuming that the White Nile's flow was evenly distributed between Egypt and Sudan, then the volume of water at issue is 35% of 18.5 km<sup>3</sup> or 6.5 km<sup>3</sup> as measured at Aswan. Sudan's benefit as a riparian to the Blue Nile, therefore, is worth around twelve km<sup>3</sup> annually.

In order to provide for a more accurate measurement of the White Nile's contribution to the post-Khartoum Nile, either party could request that the flow be measured at the Jebel Aulia Dam, located just forty km from the confluence of the Blue and White Niles. The actual percentage split of the 6.52 km<sup>3</sup> would be left to South Sudan and Sudan to agree upon. In spite of its Blue Nile allotment, Sudan could argue that it is entitled to a greater share of the 6.52 km<sup>3</sup> because of South Sudan's use of water in the Sudd that would otherwise be lost to evaporation. As a point of reference, 6.52 km<sup>3</sup> represents an amount equivalent to just over one quarter of pre-South Sudanese secession Sudan's demand for Nile water in 2000.<sup>103</sup> In the event that an even split is agreed to, each party would get 3.26 km<sup>3</sup>, a volume of water less than Sudan's entire original allotment in the 1929 Nile Treaty.<sup>104</sup>

Another substantive issue is financial responsibility for water projects

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100. *Id.* at 35.

101. *E.g.*, NURIT KLIOT, WATER RESOURCES AND CONFLICT IN THE MIDDLE EAST 29 (1994).

102. *E.g.*, *id.*

103. *Id.* at 72.

104. Exchange of Notes in Regard to the Use of the Waters of the River Nile for Irrigation Purposes, *supra* note 26.



in the Sudd and other swamplands in the White Nile Basin designed to increase the Nile's yield, and allotments from the resulting increased yield. The Sudd is the vast swamp of the upper White Nile wholly contained within the boundaries of South Sudan. The White Nile system annually loses a mean of seventeen km<sup>3</sup> of water through evaporation in the Sudd, or nearly one-fifth of the Nile's mean flow at Aswan.<sup>105</sup> A distinct feature of the Sudd is that a proportional increase in the White Nile's inflow to the Sudd does not necessarily result in a proportional increase of the White Nile's outflow of the Sudd.<sup>106</sup> Volume of water in the White Nile is determined not by evaporation rates, but rather by the surface area flooded in the Sudd.<sup>107</sup> Considering the incredible flatness of the Sudd,<sup>108</sup> "the rise of flood waters by a few centimeters can inundate hundreds of square kilometers, exposing them to evaporation at a proportionally greater loss not offset by the rainfall."<sup>109</sup>

Other proposed sites for anti-evaporation projects in the 1959 Nile Waters Agreement include the Bahr al-Ghazal, a White Nile tributary itself a combination of several streams originating in southwestern South Sudan, near the border with the Central African Republic, and the Machar Marshes, a swamp that stifles the flow of another White Nile tributary, the Sobat.<sup>110</sup> Both the Sobat and the Bahr al-Ghazal merge with the White Nile in the Sudd. One source estimates the possible net gain from anti-evaporation projects in the White Nile Basin, including the long-awaited/long-desired Jonglei Canal, a project originally proposed in the 1900s, to be as high as thirteen km<sup>3</sup> at Aswan.<sup>111</sup> The original terms of the 1959 Agreement call for Egypt and Sudan to split both the cost and net yield of the projects.<sup>112</sup> While the projects are in South Sudan, Sudan and Egypt are both riparian to the proposed projects' net yield because of their downstream location, and Sudan could certainly argue entitlement to a share based on past financial contributions to the Jonglei Canal, which was started in the late 1970s,

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105. Collins, *supra* note 61, at 112; GREG SHAPLAND, RIVERS OF DISCORD: INTERNATIONAL WATER DISPUTES IN THE MIDDLE EAST 59 (1997).

106. ROBERT O. COLLINS, THE WATERS OF THE NILE 98 (1990).

107. *Id.*

108. *Id.*; THE JONGLEI CANAL 8 (Paul Howell et. al., eds., 1988).

109. COLLINS, *supra* note 106, at 98.

110. 1959 Nile Waters Agreement, *supra* note 19.

111. KLIOT, *supra* note 101, at 57.

112. 1959 Nile Waters Agreement, *supra* note 19, art. 3(1).

but abandoned when civil war broke out.<sup>113</sup> Therefore, South Sudan could be forced to split the benefits of any White Nile Basin project with Sudan, although Egypt is considering overlooking the 1959 Agreement's provision and splitting the net yield evenly with South Sudan.<sup>114</sup>

Another substantive issue related to a South Sudanese accession to the 1959 Agreement concerns renegotiation of water allotments. South Sudan's hypothetical accession likely poses a greater threat to Sudan's water allotment than Egypt's water allotment because the geographical area now contained within South Sudanese borders was once covered by the water allotment granted to Sudan in the 1959 Agreement.<sup>115</sup> Egypt will fiercely contest any attempt to subtract from its water allotment, making Egypt's 55.5 km<sup>3</sup> effectively non-negotiable.<sup>116</sup> A plausible scenario, given Egypt's interest in preserving the Nile's flow through both Sudan and South Sudan,<sup>117</sup> is Egypt serving as the middleman in negotiations between the two countries concerning the division of 18.5 km<sup>3</sup> of Nile water.<sup>118</sup>

Acceding to the 1959 Nile Waters Agreement would not preclude South Sudan from participating in other regional bodies or other legal agreements concerning the Nile. Egypt and Sudan are already members of the NBI and participated in the negotiation for the CFA, but refused to sign.<sup>119</sup> Using Article 5(2), South Sudanese accession means that the three countries would effectively participate as a unified bloc in any Nile-related negotiations with outside parties.<sup>120</sup> This article could prove to be problematic if the three parties were to disagree, and, as a result of the disagreement, one party wishes to withdraw. The 1959 Agreement lacks a withdrawal provision, and is not governed by the Vienna Convention on Treaties, so parties do not have the legal right of withdrawal.<sup>121</sup> According to the *Restatement*, South Sudan would lack

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113. Christopher L. Kukk and David A. Deese, *At the Water's Edge: Regional Conflict and Cooperation Over Fresh Water*, 1 UCLA J. INT'L L. & FOREIGN AFF. 21, 45 (1996).

114. *Egypt Vows to Open a 'New Page' with Sudan*, SUDAN TRIBUNE, Mar. 28, 2011.

115. See 1959 Nile Waters Agreement, *supra* note 19.

116. *Egypt's Nile Quota Too Low: Minister*, AL AHRAM WEEKLY, Jan. 15, 2013; *Sudan's Bashir Visits Egypt, Confirms 'Identical Position' on the Nile Water Dispute*, SUDAN TRIBUNE, Sept. 17, 2012; see also, WATERBURY, *supra* note 2, at 78.

117. See SHAPLAND, *supra* note 105, at 74.

118. *Egypt Offers to Mediate Between Khartoum and Juba*, SUDAN TRIBUNE, Jan. 10, 2012.

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

120. See 1959 Nile Waters Agreement, *supra* note 19, art. 5(2).

121. See *id.*

the right to withdraw because the 1959 Agreement lacked a provision permitting withdrawal.<sup>122</sup> Under customary law, therefore, South Sudan's only methods of withdrawal would either be through the use of *rebus sic stantibus*,<sup>123</sup> or unilateral action that could precipitate a war with Sudan, Egypt, or both.<sup>124</sup> Thus, South Sudanese accession to the 1959 Agreement would practically result in yielding a certain measure of domestic and international sovereignty to Egypt and Sudan.

#### IV. THE COOPERATIVE FRAMEWORK AGREEMENT

The CFA serves as the only formalized alternative to the 1959 Nile Waters Agreement. The CFA does not specifically repudiate the 1959 Nile Waters Agreement, but the two agreements contain provisions that are in direct conflict with one another. Thus, unless the 1959 Nile Waters Agreement is modified, the CFA effectively replaces the Treaty in the eyes of its signatories. While South Sudan is eligible to accede to the CFA, acceding to the CFA means exchanging the fixed water allotment under the 1959 Nile Waters Agreement for a varying allotment dependent upon the equitable and reasonable utilization of upstream signatories.

##### A. *History and Origins of the Cooperative Framework Agreement*

An alternative to the 1959 Nile Waters Agreement is the CFA. A product of the Nile Basin Initiative, the CFA's terms reflect the spirit of the NBI.<sup>125</sup> The NBI itself arose out of recognition that the Nile Basin, an area traditionally characterized by suspicion and mistrust among riparians,<sup>126</sup> should be a region of cooperation, not conflict, in regard to shared water resources.<sup>127</sup> The 1999 founding of the NBI formally demonstrated this changed geopolitical atmosphere, as all existing

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122. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 332 (1987).

123. *See id.* § 336.

124. WATERBURY, *supra* note 2, at 78. *See also* ELHANCE, *supra* note 25, at 54 (noting that South Sudan's withdrawal would threaten Egypt's water supply, and that "hydropolitics in the Nile Basin can be understood only if it is recognized outright that without the Nile's water, Egypt would cease to exist as a viable state."); David Knott & Rodney Hewett, *Water Resources Planning in the Sudan*, in *THE NILE: SHARING A SCARCE RESOURCE* 205 (P.P. Howell and J.A. Allen, eds., 1994) (pointing out that Sudan also principally relies on the Nile for its water); Sandra Postel, *The Politics of Water*, 6 *WORLD WATCH* 4 (1993).

125. Jutta Brunnée & Stephen J. Toope, *The Changing Nile Basin Regime: Does Law Matter?*, 43 *HARV. INT'L L. J.* 105, 138 (2002).

126. TAFESSE, *supra* note 13, at 105.

127. Brunnée & Toope, *supra* note 125, at 107.

Nile Basin nations joined the NBI at its founding.<sup>128</sup> The NBI's Shared Vision summarizes the organization's philosophy: to "achieve sustainable socio-economic development through the equitable utilization of and benefit from the common Nile Basin water resources."<sup>129</sup> The NBI was always intended as a temporary organization, a stepping-stone to a regional governmental body with the power to bind its members.<sup>130</sup> The CFA formalizes and codifies the Shared Vision's intent.<sup>131</sup> NBI members were able to agree to over 90% of the CFA's provisions, and six members signed, but the signatories do not include Sudan and Egypt.<sup>132</sup>

The CFA attempts to integrate the diverse aims, desires, and concerns of ten different nations with radically different riparian positions on the Nile.<sup>133</sup> It incorporates and reconciles aspects of various contradictory international water law principles into a framework built around equitable and reasonable utilization of the Nile.<sup>134</sup> Sudan and Egypt refused to sign because of the wording of Provision 14b, the "water security" provision.<sup>135</sup> Sudan and Egypt believe that the existing wording does not recognize the historical rights granted by the 1959 Nile Waters Agreement.<sup>136</sup> In spite of the CFA's efforts to integrate the water policies of the Nile Basin countries, Sudan and Egypt's refusal to sign the CFA demonstrates three things: (1) the failure of the Agreement to account for Sudan and Egypt's national security concerns; (2) the failure of the NBI to fully eliminate the legacy of a century-long Nile riparian strategy focused on an upstream/downstream divide; and (3) that the Nile Basin's population of Nile-dependent persons will

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128. *Id.* at 108.

129. *About Us: About the Nile Basin Initiative*, NILE BASIN INITIATIVE, [http://www.nilebasin.org/newsite/index.php?option=com\\_content&view=section&layout=blog&id=5&Itemid=68&lang=en](http://www.nilebasin.org/newsite/index.php?option=com_content&view=section&layout=blog&id=5&Itemid=68&lang=en).

130. Brunnée & Toope, *supra* note 125, at 108.

131. Mekonnen, *supra* note 12, at 427.

132. The Democratic Republic of the Congo is the other non-signatory. Ashenafi Abedje, *Nile River Countries Consider Cooperative Framework Agreement*, VOICE OF AMERICA (Mar. 18, 2011), <http://www.voanews.com/english/news/africa/east/Nile-Series-Overview-11Mar.11-118252974.html>.

133. See Shreevani Suvarna, *Development Aid in an Environmental Context: Using Microfinance to Promote Equitable and Sustainable Water Use in the Nile Basin*, 33 B.C. ENVTL. AFF. L. REV. 449, 457-58 (2006).

134. See Brunnée & Toope, *supra* note 125, at 152.

135. Mekonnen, *supra* note 12, at 429.

136. *Id.* at 439.

eventually exceed the Nile's provisional capacity.<sup>137</sup>

B. *The 1959 Nile Waters Agreement and the CFA*

Implied by Sudan and Egypt's refusal to sign the CFA is that the CFA rejects or supersedes the 1959 Nile Waters Agreement and all prior agreements between CFA members relating to use of the Nile River. This is not the case.<sup>138</sup> The CFA does not include a merger and integration clause designed to overrule and invalidate any prior agreements between CFA members,<sup>139</sup> rather, it respects and honors prior agreements.<sup>140</sup> Using relatively conciliatory and unaggressive language, Article 31 of the CFA only requires its members to "undertake to ensure" that any prior agreements "are consistent with those of the Nile River Basin Commission, and with the principles and rules set out in, or adopted under, the framework."<sup>141</sup> In theory, therefore, the 1959 Nile Waters Agreement and the CFA do not necessarily conflict with each other.

In practice, the CFA effectively repudiates and supersedes the 1959 Nile Waters Agreement unless both Sudan and Egypt amend or modify the Agreement. The main provision of the 1959 Nile Waters Agreement causing an incompatibility with the CFA is Article 2(4) allotting use of the entire Nile to only Egypt and Sudan.<sup>142</sup> Any use of the Nile water, even a single drop, by other Nile riparians violates the terms of the 1959 Nile Waters Agreement.<sup>143</sup> The CFA, in contrast, enshrines the doctrine of equitable and reasonable utilization, granting every member the right to use water from the Nile.<sup>144</sup>

Were Sudan and Egypt to join the CFA, Article 2(4) needs amending to incorporate the right of other Nile riparians to equitable and reasonable utilization of the Nile.<sup>145</sup> First, the language in Article 2(4) dividing any surplus water evenly between Sudan and Egypt if the Nile's

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137. See DANIEL HILLEL, RIVERS OF EDEN: THE STRUGGLE FOR WATER AND THE QUEST FOR PEACE IN THE MIDDLE EAST 284 (1994); Ashok Swain, *Mission Not Yet Accomplished: Managing Water Resources in the Nile River Basin*, 61 INT'L AFF. 201, 201 (2008) (providing information regarding population and the providing capacity of the Nile).

138. See Agreement on the Nile River Basin Cooperative Framework, *supra* note 18, art. 31(2).

139. See *id.*

140. See *id.*

141. *Id.*

142. 1959 Nile Waters Agreement, *supra* note 19, art. 2(4).

143. See *id.*

144. Agreement on the Nile River Basin Cooperative Framework, *supra* note 18, art. 4.

145. See *id.* art. 31(2).

yield exceeds eighty-four km<sup>3</sup> would need rewriting. Then, in addition, the fixed allotments of 54.5 km<sup>3</sup> and 18.5 km<sup>3</sup> also would require amending in case the Nile yielded less than eighty-four km<sup>3</sup> at Aswan for the 1959 Nile Waters Agreement to be consistent with the CFA.<sup>146</sup>

The inability of the 1959 Agreement to fit comfortably within the CFA without modification demonstrates that fixed water allotments, whether on a percentage or volume basis, are fundamentally incompatible with the doctrine of equitable and reasonable utilization.<sup>147</sup> In order to comply with the CFA, therefore, the water allotments would need to be removed from the 1959 Nile Waters Agreement altogether.<sup>148</sup> The aforementioned reluctance of Egypt to part with its fixed allotment in the 1959 Agreement for national security purposes is what ultimately led them to reject the CFA when the parties were unable to get the allotments enshrined in CFA's water security provision.<sup>149</sup>

### C. *South Sudan's Legal Rights Under the CFA*

Unlike the 1959 Nile Waters Agreement, state succession does not play a role in the analysis of South Sudan's right to accede to the CFA. Sudan is a member of the NBI, but South Sudan is currently not, though it is seeking membership.<sup>150</sup> The CFA is not an agreement exclusively meant for NBI members—Nile hydrology, not political affiliation or national identity, acts as the determinant for party eligibility. Under Article 41 of the CFA, and based on the definition of "Nile River Basin" in Article 2(a),<sup>151</sup> South Sudan can ratify and accede to the CFA because of the White Nile's flow through its sovereign territory.<sup>152</sup> Though the CFA has not entered into force, South Sudan's ratification or accession is eligible to count as one of the required six state ratifications or accessions necessary for the CFA to enter into

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146. *See id.*

147. *See* Takele Soboka Bulto, *Between Ambivalence and Necessity: Occlusions on the Path Toward a Basin-Wide Treaty in the Nile Basin*, 20 COLO. J. INT'L ENVTL. L. & POL'Y 291, 308 (2009).

148. *See* 1959 Nile Waters Agreement, *supra* note 19, art. 2(4); *see also* Agreement on the Nile River Basin Cooperative Framework, *supra* note 18, art. 4.

149. *See* Mekonnen, *supra* note 12, at 439.

150. *E.g.*, *South Sudan Seeks Membership of the Nile Basin Initiative*, SUDAN TRIB. (Sept. 24, 2011), <http://www.sudantribune.com/South-Sudan-seeks-membership-of,40240>.

151. Agreement on the Nile River Basin Cooperative Framework, *supra* note 18, art. 2(a).

152. *Id.* art. 41.

force.<sup>153</sup> Unlike the 1959 Nile Waters Agreement, post-accession/ratification withdrawal is permissible because the withdrawal provision in Article 39 clearly details the procedures necessary.<sup>154</sup>

The CFA is considerably more flexible than the 1959 Agreement, as evidenced by the withdrawal provision. For example, the CFA does not provide for any fixed water allotments.<sup>155</sup> Instead, Nile water rights are based on “equitable and reasonable utilization.”<sup>156</sup> Equitable and reasonable utilization is not defined per se in the CFA, but the CFA provides a non-inclusive list of factors to guide the evaluation of whether use is equitable and reasonable, which includes the social and economic needs, dependent population, and existing and potential uses.<sup>157</sup> Evaluating whether a party is engaging in equitable and reasonable utilization is a totality of the circumstances test based on the aforementioned factors.<sup>158</sup> Unlike the 1959 Nile Waters Agreement, where the fixed Nile allotments serve as de facto limits on South Sudan’s population and economic development, the CFA permits South Sudan to withdraw an amount of water necessary to meet the needs of a growing population and a developing country.<sup>159</sup> The main limitation to equitable and reasonable use of the Nile under the CFA is an obligation not to cause significant harm to other Nile Basin members.<sup>160</sup> “Significant harm” is left undefined by the CFA, which creates uncertainty in determining how significant a harm must be, and in what manner it must be harmful, to limit equitable and reasonable utilization of the Nile.<sup>161</sup>

One of the CFA’s greatest strengths, flexibility, is also its greatest weakness. The terms “reasonable” and “significant” lack a fixed definition, and parties’ own definitions of the terms vary.<sup>162</sup> In order to compensate for this lack of definitiveness within the text of the CFA, the CFA establishes a Council of Ministers to serve, in part, as a dispute settlement body concerning issues related to the interpretation or

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153. *Id.* art. 42.

154. *Id.* art. 39.

155. *See id.*

156. *Id.* art. 4.

157. *Id.* arts. 4(2)b-c, 4(2)e.

158. *Id.* art. 4(4).

159. *See id.* arts. 4(2), 4(4).

160. *Id.* art. 5.

161. *See id.* art. 5.

162. *See* Imeru Tamrat, *Constraints and Opportunities for Basin-Wide Cooperation in the Nile: A Legal Perspective, in Water in the Middle East: Legal, Political, and Commercial Implications* 177, 186 (J.A. Allen & Chibli Mallat, eds., 1995).

application of CFA provisions.<sup>163</sup> The Council's composition is minimally defined, as the only representatives that the CFA mandates are each state's Minister for Water Affairs, with any additional members to be determined by the Nile River Basin Commission (which will replace the NBI).<sup>164</sup> That the council decisions are binding on all Nile states<sup>165</sup> indicates that the definitions to some of these ill-defined terms will likely be clarified through Council rulings, as deciding upon fixed definitions during the negotiation process could have resulted in no agreement at all. The decisions, though, are to be made by consensus rather than majority,<sup>166</sup> so the possibility exists that clarification may never occur if consensus is blocked. Even if the Council reaches a consensus, the CFA lacks an enforcement mechanism to enforce the Council's rulings.<sup>167</sup> Thus, in an effort to be as flexible as possible to account for the diverse opinions, diverse future needs, and diverse present needs of its member states, the CFA may have rendered itself functionally ineffective.

Perhaps the most noticeable difference, other than flexibility, between the CFA and the 1959 Nile Waters Agreement, is the CFA's emphasis on environmental protection. The 1959 Agreement adopts a very utilitarian approach, prioritizing the maximum possible use of the Nile's waters.<sup>168</sup> In practical terms, this means compelling South Sudan, in the case of accession, to drain the South Sudanese swamps, divert the Nile around them, or both to prevent loss of water volume through evaporation.<sup>169</sup> In contrast, the CFA explicitly calls for the preservation and conservation of Nile Basin wetlands.<sup>170</sup> Among other environmental regulations, the CFA also demands environmental impact assessments and audits on not just the impact of a party's action on its own territory, but of the action's impact/effect on other Nile basin members' territories.<sup>171</sup> Under the CFA, therefore, South Sudan is able to maintain greater domestic sovereignty than under the 1959 Nile Waters Agreement.

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163. Agreement on the Nile River Basin Cooperative Framework, *supra* note 18, art. 24(12).

164. *Id.* art. 22.

165. *Id.* art. 23(6).

166. *Id.* art. 23(5).

167. *See id.*

168. *See* 1959 Nile Waters Agreement, *supra* note 19, art. 3.

169. Yeheyese Wuhib, *Nile Debate Emphasizes Conservation, Water Sharing*, VOICE OF AMERICA, Mar. 30, 2011.

170. Agreement on the Nile River Basin Cooperative Framework, *supra* note 18, art. 6(1)d.

171. *Id.* arts. 9-9(1).



## V. ALTERNATIVE OPTIONS

A. *International Water Law Doctrine*

Alternative options to the CFA and 1959 Nile Waters Agreement are available to South Sudan. South Sudan, an independent nation-state not necessarily bound to any international agreement,<sup>172</sup> occupies a rare position along the Nile in that it is both an upstream and downstream riparian. While downstream from the White Nile's headwaters, South Sudan is also upstream in that several White Nile tributaries originate within its borders. It thus does not neatly fit into the upstream riparian/downstream riparian divide generally demonstrated by the signatories and non-signatories of the CFA.<sup>173</sup> As an unaffiliated Nile riparian with its own domestic and foreign policy objectives and interests that were not integrated into either the CFA or the 1959 Agreement,<sup>174</sup> South Sudan possesses the opportunity for the first time to exercise its right of self-determination on an international level.

Traditionally, independent, non-treaty participants stake their claim to a transboundary water resource using one of four doctrines. The prevailing international norm requires that before staking a claim to a transboundary water resource, the state must be riparian to that body of water.<sup>175</sup> Absolute territorial sovereignty, or the Harmon Doctrine, is the principle that riparian states do not owe any duty to downstream riparians, and possess full rights to the water flows through its territory.<sup>176</sup> With absolute territorial integrity, upstream states owe a duty to downstream states to ensure that their use of an international watercourse does not impede on the downstream state's right to the continuation of the watercourse's natural flow.<sup>177</sup> Limited territorial sovereignty ensures that downstream users' historical rights are not infringed upon and respected, and resembles the doctrine of prior appropriation

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172. See *supra* Part IIA, "State Succession Under International Law in Relation to Treaties," for a discussion of why this statement needs to be qualified.

173. In addition to Egypt and Sudan, the other non-signatory is the Democratic Republic of the Congo.

174. See ELHANCE, *supra* note 25, at 73 (noting that the many concerns of people in southern Sudan during the Jonglei Canal Project in the 1980s were ignored by the Sudanese government).

175. E.g. 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, 35 (1994).

176. Jerome Lipper, *Equitable Utilization*, in THE LAW OF INTERNATIONAL DRAINAGE BASINS 18 (A.H. Garretson et. al., eds., 1967).

177. *Id.*

in that priority is given to first use of the watercourse.<sup>178</sup> Equitable utilization promotes a social utility calculation, both domestically and internationally, as each riparian state's right to water is based on the social and economic needs of both the riparian state and the other basin riparian states.<sup>179</sup>

Each doctrine's application will impact the Nile Basin, and the relations among riparians, differently. Absolute territorial sovereignty strongly favors upstream riparians at the expense of downstream riparians, and the theory's unilateral nature promotes a geopolitical atmosphere of hostility and fear toward the upper riparian. The doctrine's undermining effect on relations between states in water scarce or water limited regions resulted in its virtual elimination as a valid principle of international law.<sup>180</sup> South Sudan's application of absolute territorial sovereignty, with the potential to deny water to both Sudan and Egypt, could result in a declaration of war by one or both parties.<sup>181</sup> Absolute territorial integrity is a more cooperative approach that attempts to harmonize upstream and downstream water rights, and South Sudan's implementation of a policy of absolute territorial integrity is arguably the least damaging to Egypt and Sudan's needs and prior uses while ensuring South Sudan's reasonable use.<sup>182</sup> Egypt and Sudan's argument for respect of their rights enshrined in the 1959 Nile Waters Agreement uses limited territorial sovereignty as its doctrinal foundation,<sup>183</sup> but the doctrine does not favor rights of new users, like South Sudan, without a history of past use. International legal norms favor the use of equitable utilization of shared water resources to promote the socially optimal use of the watercourse.<sup>184</sup> Under international law, the safest route for South Sudan is pursuing a policy of equitable utilization because of the theory's elasticity in permitting a change in a nation's water use based on social and economic circumstances.

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178. *Id.*; Niveen Tadros, *Shrinking Water Resources: The National Security Issue of this Century*, 17 Nw. J. INT'L L. & BUS. 1091, 1103 (1996-1997).

179. Lipper, *supra* note 176, at 63.

180. Samir Ahmed, *Principles and Precedents in International Law Governing the Sharing of Nile Waters*, in *THE NILE: SHARING A SCARCE RESOURCE* 351, 351 (P.P. Howell & J.A. Allen, eds., 1994).

181. *E.g.* WATERBURY, *supra* note 2, at 78; Amdetsion, *supra* note 94, at 10.

182. *See* Lipper, *supra* note 176, at 18.

183. *See* Mekonnen, *supra* note 12, at 439.

184. DANTE CAPONERA, *PRINCIPLES OF WATER LAW AND ADMINISTRATION: NATIONAL AND INTERNATIONAL* 193 (2nd ed. 2007).

B. *Unaffiliated Equitable and Reasonable Utilization*

An alternative course for South Sudan to pursue would be unaffiliated equitable and reasonable utilization. This alternative course represents a legal strategy built around equitable and reasonable utilization, but influenced by the current geopolitical realities of the Nile Basin.<sup>185</sup> A policy of unaffiliated equitable and reasonable utilization is founded upon South Sudan's inherent water rights as an independent nation-state and utilizes as its legal framework the 1997 U.N. Convention on the Law of the Non-navigational Uses of International Watercourses (Watercourses Convention), much of which is already codified in the CFA.<sup>186</sup> Unaffiliated equitable and reasonable utilization essentially molds the inherent rights of an independent nation-state to Nile Basin geopolitics. The aim of such a policy is to enable South Sudan to maximize the achievement of its legal objectives and its economic, social, development, and foreign policy goals.

A policy of unaffiliated equitable and reasonable utilization uses the Watercourses Convention as its principal legal framework. Rather than holding South Sudan to a specific allotment, South Sudan would be permitted equitable and reasonable utilization of the waters of the Nile Basin as defined and used in Articles 5 and 6 of the Watercourse Convention and would agree not to cause significant harm as defined in Article 7.<sup>187</sup> South Sudan could reserve the right to plan and build structures along the Nile as befits its development, provided that all measures would comply with the principles articulated in Articles 5, 6, and 7, as well as Articles 11-19 of the Watercourses Convention relating to planned measures.<sup>188</sup>

Though a policy of equitable and reasonable utilization of the Nile is promoted by the CFA, South Sudan would not sign onto the CFA for political purposes. As the CFA and the 1959 Nile Waters Agreement are incompatible with each other in practice,<sup>189</sup> signing on to the CFA would risk alienating a strong potential ally in Egypt. South Sudan could then enter into an agreement with Egypt and Sudan to examine, in good faith, the viability of evaporation prevention projects in the Nile Basin within its sovereign territory, without committing to con-

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185. Egypt is especially sensitive to possible threats to its share of the Nile. See ELHANCE, *supra* note 25, at 54.

186. Brunnée & Toope, *supra* note 125, at 152.

187. Convention on the Law of the Non-Navigational Uses of International Watercourses, arts. 5-7, G.A. Res. 51/229, 51st Sess., Supp. No. 49, U.N. Doc. A/51/49 (May 21, 1997).

188. *Id.* arts. 5-7, 11-19.

189. See Bulto, *supra* note 147, at 308.

struction if it is deemed that the liabilities/detriments of the project(s) in question would prove to outweigh the benefits to South Sudan. This would permit South Sudan to take into account the potential environmental and social effects of the project(s) and their effect on the traditional lifestyle of the Nilotic tribes, a relevant concern given that South Sudan still struggles with domestic instability and internecine rivalries.<sup>190</sup> If South Sudan decided to permit the project, then the beneficiaries would agree to split the net yield of the project in a formulation based on equitable and reasonable use, and agree to split the cost based on the proportion of net yield gained. An agreement of this nature would be in line with Egypt and Sudan's obligations under Article 5 of the 1959 Nile Waters Agreement to take a unified position toward outside Nile riparian claimants.<sup>191</sup>

In adopting a policy of unaffiliated equitable and reasonable utilization, South Sudan would attempt to balance the potentially conflicting needs of East African upstream partners with those of North African downstream partners along with incorporating South Sudan's own interests. A policy of equitable and reasonable utilization would provide South Sudan with the necessary flexibility in terms of a water supply. The conflicting nature of the 1959 Nile Waters Agreement and the CFA means that it would be politically improbable for South Sudan to both join the CFA and cultivate a strong relationship with Egypt and not further damage the frayed relationship with Sudan. In adopting equitable and reasonable utilization, South Sudan would demonstrate a water policy in line with those of its upstream, CFA-signing neighbors. In pursuing a relationship with Egypt, South Sudan would pursue a partnership necessary for facilitating the country's national development.

While a policy of unaffiliated equitable and reasonable utilization is supported by international water law, the demographic and political window for pursuing such a policy is narrowing. In contrast to the hostile attitude espoused by his predecessor toward upstream Nile riparians, Egyptian President Mohamed Morsi has tried to cultivate stronger ties and expand Egypt's influence within the Nile Basin.<sup>192</sup>

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190. E.g. Beny Gideon Mabor, *Lack of National Identity Is a Cry of the Owl for South Sudan*, SUDAN TRIB., Mar. 27, 2013.

191. See 1959 Nile Waters Agreement, *supra* note 19, art.5.

192. Bradley Hope, *Morsi Visits Ethiopia to Seek Unity in Nile Nations Over Water*, THE (U.A.E.) NATIONAL, July 16, 2012; Jeffrey Fleishman, *Neighbors Eye Egypt's Lifeline*, L.A. TIMES, Nov. 11, 2012.

Influence usually comes in the form of sponsoring and financing development projects.<sup>193</sup> Egypt's growing population is placing increased pressure on its already strained freshwater resources—the country's annual water consumption already exceeds its 1959 Nile Waters Agreement allotment.<sup>194</sup> Even if Egypt forces its citizens to use water more efficiently, projected population increases in Egypt and increased demand from other Nile Basin countries may lead to a revival of the hostile approach adopted by Mubarak.<sup>195</sup>

South Sudan's need for Egyptian assistance and support may also be waning, as this need is directly related to the vulnerability of South Sudanese oil exports to Sudanese disruption. South Sudan's principle source of revenue comes from oil production, which accounts for 71% of the nation's GDP, and 98% of its official government income.<sup>196</sup> Because of pre-independence infrastructure built by the Sudanese, South Sudan's oil exports are wholly dependent on a working Sudanese-South Sudanese relationship and are vulnerable to Sudanese disruption.<sup>197</sup> Getting the oil to the global market means relying on pipelines to the sea that run exclusively north through Sudan to Port Sudan on the Red Sea.<sup>198</sup> South Sudan, however, is also a partner in the plan to develop the Lamu Port and Lamu-Southern Sudan-Ethiopia Transport Corridor (LAPSSET). As part of a wider project designed to facilitate trade and link the economies of Ethiopia and Kenya with other East African brethren, LAPSSET will result in the building of an oil pipeline linking the South Sudanese oil fields to the markets of Ethiopia and Djibouti, as well as the Kenyan port of Lamu on the Indian Ocean.<sup>199</sup> The South Sudanese and Kenyans are already negotiating a legal framework for the pipeline, and there is hope that construction of the 2,000 km long pipeline will be complete by 2014.<sup>200</sup>

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193. E.g., *Egypt to Carry Out Projects Worth LE84.6 Million in South Sudan*, AL AHAM WEEKLY, Mar. 18, 2013.

194. Such a development is facilitated by the use of recycled water. *Id.*

195. See *It's Beginning to Look Like Egypt Could Run Out of Water by 2025*, THE BUSINESS INSIDER, Apr. 9, 2012; Fleishman, *supra* note 192.

196. *Sudan and South Sudan: The Mother of All Divorces*, ECONOMIST, Feb. 11, 2012.

197. See Andrew S. Natsios & Michael Abramowitz, *Sudan's Secession Crisis: Can the South Part From the North Without War?*, 90 FOREIGN AFF., Jan. 1, 2011.

198. *Id.*

199. E.g., *Country Report: South Sudan Costs Lamu Pipeline at US \$3 Billion*, ECONOMIST, Aug. 13, 2012.

200. E.g., *id.*

VI. CONCLUSION

While the global community usually celebrates a nation's independence, the existence of a new state also means an additional competitor for common resources of differing scarcities. Of all common resources, water is the most valuable, not only for the sustenance of human life, but for economic development as well. Water is essential for economic development because "it is through the combination of water with one or more natural resources that other 'secondary' resources are made available."<sup>201</sup> In water-scarce regions like the Nile River Basin, South Sudan's emergence means additional demands on either static or dwindling water resources, making it somewhat surprising that South Sudan and Sudan did not come to an agreement on use of the Nile prior to South Sudanese independence.

Regardless of the option pursued, the more permanent effects of South Sudanese independence will likely be felt in the alteration of the legal regime governing the Nile. The Nile Basin was already on the verge of a necessary legal transformation once Burundi became the sixth nation to sign the CFA, and the future looked to be dim for the 1959 Nile Waters Agreement for demographic reasons. If South Sudan instead pursues accession to the 1959 Agreement, legal alteration will still occur because the Agreement requires modification because it is bilateral, not trilateral in its current form. The 1959 Agreement and its fixed allocations comprising the long-standing Nile Basin legal status quo, however, are simply inadequate to serve a water-scarce region containing multiple countries with demographic expansions mirroring national developmental efforts. While a hypothetical South Sudanese accession might temporarily revive the 1959 Agreement, ultimately the emergence of another national population dependent on the already water-stressed Nile will serve as the tipping point that hastens the departure of the 1959 Agreement.

South Sudan's choice between the 1959 Nile Waters Agreement, the CFA, or an alternative strategy exemplified by a hypothetical policy of unaffiliated equitable and reasonable utilization demonstrates the political and economic aspects of international water rights. Since "the availability of water is both a prerequisite of and the limiting factor to the economic development of a country,"<sup>202</sup> South Sudan's use of a particular legal strategy to acquire water rights should not be guided by international norms as much as it is guided by the nation's economic

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201. CAPONERA, *supra* note 184, at 1.

202. *Id.*

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and political goals. Each option conveys its own set of tradeoffs. The 1959 Nile Waters Agreement guarantees a fixed annual allotment and potential for a strong ally and working relationship with Egypt. In exchange, South Sudan would relinquish domestic sovereignty and become bound by fixed allotments, regardless of its future needs, as well as the risk of probable environmental degradation that could affect the internal stability of the new country. The CFA provides South Sudan with greater flexibility for its current and future water needs, stronger ties with socio-cultural regional peers, and greater domestic sovereignty. The cost of the CFA would be the lack of a guaranteed allotment and the potential alienation of Egypt, which could provide immediate assistance to alleviate some of South Sudan's most immediate and pressing difficulties relating to national development. A policy of unaffiliated equitable and reasonable utilization represents an idealized short-term solution for South Sudan in that it attempts to minimize any negative trade-offs while maximizing the positive benefits.