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The Nile Waters Agreements: Imposition and Impacts of a Transboundary Legal System

Introduction

In "The Transplant Effect," Daniel Berkowitz, Katharina Pistor and Jean-Francois Richard state that "countries that receive their fundamental legal order from another country have to come to grips with what was often a substantial mismatch between the preexisting and the imported order."[1] Often, the imported system – particularly if imposed on an unwilling third party – tends to suffer from a misalignment between itself and the very situation it was intended to address. Much of the study of African Law is concerned with this question, as the use of transplanted domestic and international legal systems still dominates much of the post-colonial continent.

Within the Nile River Basin, the governance of Nile water resources has come to rely on an increasingly outdated colonially-imposed treaty regime. The core Nile Waters Agreements (signed by Egypt and Britain and Egypt and Sudan in 1929 and 1959, respectively) allocate a vast majority of the Nile's flow to Egypt, and purport to bind all upstream riparian nations[2] to its allotments and obligations. As in many countries operating under a colonially-imposed legal system, "because the populace had little input in designing or approving these [institutions], the resulting documents did not command the loyalty, obedience and confidence of the people."[3] As such, the binding force of the colonial- and post-colonial Nile Waters Agreements is being called increasingly into question. The ten nations (Egypt, Sudan, Ethiopia, Eritrea, Uganda, Rwanda, Burundi, the Democratic Republic of the Congo, Kenya, and Tanzania) that share the Nile River Basin have been forced to reevaluate their varied national and local legal regimes controlling

[1] Daniel Berkowitz, et al., The Transplant Effect, 51 AM. J. COMP. L. 163, 171 (2003).
[2] "Upstream riparian nations" are those nations located along the upstream Nile and Nile tributaries, including the nations bordering Lake Victoria and the other Great Lakes of Central Africa. "Downstream riparians" are those located furthest downstream along the Nile River Basin.
[3] Ruth Gordon, Growing Constitutions, 1 U. PA. J. CONST. L. 528, 542 (1988-1999).

claims to the Nile, and the basis for determining claims to the river and preventing or resolving conflict on an international level has become highly uncertain.

Article 34 of the Vienna Convention on the Law of Treaties ["the Vienna Convention"] states as a general rule that "a treaty does not create either obligations or rights for a third State without its consent."[4] In this paper, I will examine the Nile Waters Agreements as a colonially-imposed legal regime. I make the assumption that these agreements are generally invalid, at least to the extent that they purport to bind post-colonial third-party upstream nations. I discuss their validity only to the extent that it is addressed in regional theories of treaty succession. In addition, the international laws of succession of colonial treaties following the independence of a nation indicate that this type of agreement (one that concerns resource use and allocation) is not a territorial or "localized treaty" that must remain binding following the birth of a newly independent state.[5] As such, I leave many aspects of that discussion, as well as the implications of national withdrawals if the treaties *are* valid, to be explored in a later paper. In addition, my discussion of relevant international law provisions is premised on the grounds that the treaties are at least legally questionable, if not entirely invalid, with respect to the obligations of upper riparian nations.

In order to examine the Nile treaty regime, the body of this paper is organized into four main sections. Part I looks to the history of Nile governance, including the needs of colonial Egypt and the British plans for the river leading to the first Nile Waters Agreement in 1929. Part II examines an updated 1959 Agreement (which operates in conjunction with the 1929 Agreements) and lingering legal claims and obligations arising from these agreements. Regional

[4] Vienna Convention on the Law of Treaties, 1155 U.N.T.S. 331, *adopted on* May 22, 1969, *entered into force on* Jan. 27, 1980 [hereinafter "Vienna Convention"].
[5] Christina Carroll, Past and Future Legal Framework of the Nile River Basin, 12 GEO. INT'L. ENVTL. L. REV. 269, 278 (1999). For a discussion of "territorial, real, dispositive, or localized" treaties as they apply under the "clean slate" doctrine, *see infra* note 61.

theories and objections to treaty succession, as they relate to the Nile Agreements, make up Part III. Part IV explores relevant principles of international water law. Because I conclude that the Nile treaties did not legally succeed to become obligations of the independent nations, I use international legal options as potential gap-fillers in the instance that there are no valid treaties – or at least no treaties that are being treated in practice as valid by important upstream riparian nations. In addition, I find that the relevant international law theories of territorial sovereignty and national rights to water are insufficient to address the breadth and complexity of the Nile River Basin, suggesting that there is still a major gap in the legal basis for governance of the Nile waters.

In my conclusion, I will argue that currently proposed alternatives to the Nile Waters Agreements offer an important starting point for moving toward a comprehensive framework, but do not provide a final solution, as there is still no reliable legal structure from which to operate. Instead, I believe that an ideal plan would "start from scratch," discarding the outdated Agreements and renegotiating a new agreement to which all ten basin nations could be party. Because of the Nile's notoriously unpredictable annual flows and the need for a flexible long-term arrangement that can adjust to the development capacities and specific needs of basin nations, this agreement should operate on the basis of a decentralized cooperative approach rather than on the basis of water allotments. Any new agreement should find localized "African solutions" to Nile governance, offering a "ground-up" approach. Such an approach should address the developmental, clean water and health/sanitation needs of rural communities and small-scale fishing industries that depend most on the river's resources in addition to the large-scale development projects of the nations involved. By doing so, Nile waters can be allocated according to need rather than on the historical power basis that has been used until this point.

Part I: History of Nile Governance

Traditionally, the allocation and use of Nile River waters depended primarily on customary local and international practice. Until the early twentieth century, downstream riparian nations - Egypt in particular - were more concerned with controlling floods along the Nile than with staking legal claim to an increasingly scarce resource.[6] Upstream riparians, including Ethiopia, Uganda and Tanzania, tended either to allocate water according to local availability and custom, [7] or to avoid development along the river due to lack of capacity or control over the resource.[8] Even today, the upstream supply of Nile water exceeds the capability of these nations to use it, but many basin nations are beginning to assert claims to the river in recognition of increasing demand, decreasing water availability throughout the region, and environmental degradation of the accessible water supply.[9] With relatively high population growth across all Nile riparian nations, in addition to the likelihood of increasing development capacity over the next few decades, scarcity and conflicts over Nile water resources are expected to intensify in the near future.[10]

For nearly 5,000 years, Egypt has been the primary beneficiary of the Nile River.[11] In the 1800s, Egypt's perennially irrigated land consisted of approximately three million acres, from which the nation derives an asserted historical right to Nile water.[12] As Egypt significantly expanded its agricultural activities in the early twentieth century, it began to increase the

[6] Donald Hornstein, Environmental Sustainability and Environmental Justice at the International Level: Traces of Tension and Traces of Synergy, 9 DUKE ENVTL. L. & POL'Y F. 291, 294 (1999).
[7] Chibli Mallat, Law and the Nile River: Emerging International Rules and the Shari'a, in THE NILE: SHARING A SCARCE RESOURCE 365, 367 (P. P. Howell & J. A. Allen eds., 1994). ("In defence of the relevance of the 'domestic' tradition in the case of the Nile… it ought to be stressed that watersharing rules are a relatively unsystematic field, where the concern for a norm is high, but where models are insufficient.")
[8] BONAYA ADHI GODANA, AFRICA'S SHARED WATER RESOURCES: LEGAL AND INSTITUTIONAL ASPECTS OF THE NILE, NIGER AND SENEGAL RIVER SYSTEMS 84 (1985).
[9] Carroll, *supra* note 5, at 270.
[10] *Id*. at 270.
[11] Hornstein, *supra* note 6, at 294.
[12] Dante Caponera, Legal Aspects of Transboundary River Basins in the Middle East: The Al Asi (Orontes), the Jordan and the Nile, 33 NAT. RESOURCES J. 629, 652 (1993).

protection of its historical and legal claims to the river. In particular, a cotton shortage in the early 1900s put pressure on colonial Egypt to turn from traditional "flood-fed" agriculture to a greatly increased reliance upon perennial irrigation.[13] The United Kingdom, which controlled Egyptian interests until 1922 and had become reliant on the agricultural exports of the region, became interested in Nile water allocations between Egypt, British East Africa and Sudan for the purposes of irrigation. In response to a 1920 British-commissioned water allocation study, Egyptian nationalists, who "saw the plan as a British means of controlling Egypt in the event of Egyptian independence,"[14] began to campaign for an agreement between itself and the United Kingdom that would protect Egyptian interests and also bind British-controlled upstream riparians to respect those interests. Following Egyptian independence, representatives of the new government initiated a bilateral water allocation treaty agreement between the United Kingdom and itself in order to preserve national irrigation resources, also binding upstream riparians. This series of negotiations and understandings became what are known as the 1929 Nile Waters Agreements.[15]

Although one of the stated purposes of the Agreements was to mobilize upstream development, they served primarily to protect Egyptian agricultural interests, reserving a minor claim for British Sudan (generally ignoring any other upstream riparians' rights). The 1929 Agreements granted the vast majority of water allocation to Egypt. Of the Nile's average 84 billion cubic meters (bcm) per year, over half was reserved for Egypt (48 bcm/yr) and 4 bcm/yr was allocated to Sudan, leaving only 32 bcm/yr unallocated for the use of upstream riparians, or

[13] Transboundary Freshwater Dispute Database, Case Study: The Nile Waters Agreement, "Background" section, *available at*: www.transboundarywaters.orst.edt/projects/casestudies/nile-agreement.html.
[14] *Id.*
[15] Exchange of Notes Between His Majesty's Government in the United Kingdom and the Egyptian Government in Regard to the Use of the Waters of the River Nile for Irrigation Purposes, May 7, 1929, No. 1 (hereinafter "1929 Agreements").

possibly for subsequent division between Egypt and Sudan.[16] In addition, the British government assured Egyptian representatives that "the British Government, however solicitous for the prosperity of Sudan, has no intention of trespassing upon the natural and historic rights of Egypt in the waters of the Nile."[17]

Although the entirety of Nile water flow originates outside of Egyptian borders, from the lakes of central Africa and the Blue Nile and the Atbara River from Ethiopia, the 1929 Agreements provided that Sudan's water interests would be subordinated to those of Egypt, also requiring Egyptian oversight and approval of any irrigation, power, or other water diversion project along the Nile.[18] Aware of its vulnerable position as the furthest downstream nation along the river, Egypt has continued to govern its use of Nile waters with the strategy of protecting and enhancing its potential future claims. Since the enactment of the 1929 Agreements, Egypt has adhered to a nationalist theory of territorial water rights, "according to which all important works on the Nile should be constructed in Egyptian territory in order to avoid the danger of any works built outside of the country being used as a political weapon against Egypt."[19]

Part II: The 1959 Agreement and Other Lingering Claims

Although the 1929 Agreements served as the basis for principles of Nile water allocation, modern governance of the Nile River Basin has relied primarily on the legal foundation set forth in a formal 1959 Agreement between Sudan and Egypt[20] and subsequent ad hoc political

[16] Transboundary Freshwater Dispute Database, *supra* note 13. Note that Nile River's flows are notoriously variable by season and year, and are extremely difficult to monitor and quantify. "Average annual bcm" (as measured within Egypt) is the standard measure used in the Nile Waters Agreements, presumably to account for expected seasonal fluctuations. Actual total annual flow in any given year or location, however, may vary widely.
[17] The 1929 Agreements., at No. 3.
[18] *Id*. at No. 1.
[19] Caponera, *supra* note 12, at 653.
[20] Agreement Between the Republic of the Sudan and the United Arab Republic for the Full Utilization of the Nile Waters, Nov. 8, 1959, 453 U.N.T.S. 51 (hereinafter "1959 Agreement").

compromises.[21] While the 1959 Agreement effectively replaced allocations set forth in the 1929 Agreements, the agreements together create a comprehensive regime. Of particular importance is the fact that the 1929 Agreements explicitly bound upstream riparians, while the 1959 Agreement simply polarized their interests with those of Egypt and Sudan, despite the fact that only the two downstream nations were actual signatories to the treaty.[22] Even today, the Nile Waters Agreements remain as the core legal basis for international Nile water allocation and large-scale governance.

Calls for a new agreement had begun during the Sudanese campaign for independence in the 1950s, when emerging leadership expressed its dissatisfaction with Sudan's allocations in the 1929 Agreements.[23] Negotiations between Sudan and Egypt continued sporadically throughout the early 1950s and broke off completely in 1958, two years following Sudanese independence.[24] The conflict then threatened to escalate into military confrontation when Egypt's government moved troops to the border of Sudan in response to a proposed dam project on Sudan's portion of the Blue Nile.[25] When Sudan constructed the Sennar dam without Egyptian oversight or approval, such an act was considered a direct repudiation of the 1929 Agreements.[26] The tension between the two countries eased only when a military regime friendly to Egyptian interests

[21] GREG SHAPLAND, RIVERS OF DISCORD: INTERNATIONAL WATER DISPUTES IN THE MIDDLE EAST 74 (1997). (Shapland states that the 1959 Agreement "has been faithfully applied . . . and both [Egypt and Sudan] have, without exception, received their designated shard.") *See also* NURIT KLIOT, WATER RESOURCES AND CONFLICT IN THE MIDDLE EAST 84-85 (1994).
[22] Carroll, *supra* note 5, at 282.
[23] GODANA, *supra* note 8, at 144. ("Other Sudanese interest groups, including the Nationalists . . . pointed out that their country was not a Party to the [1929] Agreement, which had been concluded directly between London and Cairo or simply between the Governments of Egypt and the British Administration in the Sudan, and that Sudanese interests had in fact been cheaply disposed of because the British Government, eager to please the Egyptian cabinet… had badly defended them.")
[24] Transboundary Freshwater Dispute Database, *supra* note 13, "Attempts at Conflict Management" section.
[25] *Id*.
[26] *Id*.

seized power in a 1958 coup.[27] Negotiations resumed in early 1959, culminating in a new treaty that would update allocations but not entirely replace the obligations under the 1929 Agreements.

In the new agreement, signed on November 8, 1959, Egypt and Sudan renegotiated the allocation of Nile River waters in response to political and agricultural changes since 1929. Under the 1959 Agreement, the Egyptian water allocation was increased to 55 bcm/yr, and Sudan's share jumped to 18 bcm/yr, leaving only 10 bcm/yr of the average flow unallocated.[28] The agreement was entirely exclusive and bilateral, with no mention of the needs or riparian rights of upstream Nile Basin nations. In addition, it indicated specifically that "the Nile Waters Agreement concluded on 1929 provided only for the partial use of the Nile waters and did not extend to complete control of the River waters."[29] Both the stated and the effective purposes of the 1959 Agreement were to claim full control of Nile River waters, to be shared exclusively between Egypt and Sudan. In addition, the stipulated purpose indicates an interest in solidifying future claims to the waters "in order to regulate their benefits and utilize the Nile waters in a manner which secures the present and future requirements of the two countries."[30]

Despite the fact that Egypt and Sudan were in positions to understand firsthand the vulnerability of water rights allocated by an outside sovereign, the 1959 Agreement effectively bound all upstream riparians to the allocations – or lack thereof – granted by the bilateral agreement. Although the treaty did not explicitly address upstream nations as the 1929 Agreements did, the fact that nearly all of the Nile's flow was allocated to powerful downstream nations served to restrict upstream rights in the same way. In addition, the two countries agreed

[27] SHAPLAND, *supra* note 21, at 74. ("Probably more compelling was the eagerness of the military regime which had taken over in Khartoum in November 1958 to improve Sudan's relations with its powerful and by that time rather threatening northern neighbour. Reaching agreement on the Nile was its top priority . . . ") *See also* KLIOT, *supra* note 21, at 87-88.
[28] The 1959 Agreement, art. 1(1) and art. 2(3-4). (Calculated as the codified Historical Rights plus Acquired Rights.)
[29] *Id*. at Introductory Stipulations.
[30] *Id*.

to present a unified view in future negotiations with other upstream riparians, in case any other nations exerted a claim to Nile water.[31] If such negotiations resulted in the construction of any works on the upstream portion of the river, a Joint Technical Commission (representing Egypt and Sudan) would conduct all of the relevant "technical execution details and the working and maintenance agreements."[32] In essence, if an upstream nation wished to develop projects along the river, it would have to obtain not only Egyptian approval, but also mandatory technical oversight and contractual supervision.

Throughout this process, Ethiopia in particular has expressed its dissatisfaction with the Egypt-Sudan water agreements, but has generally lacked the ability to actively reserve any significant portions of Nile water for domestic irrigation purposes.[33] Although Ethiopia is the catchment source of the majority of all Nile waters – between five-sevenths of total flow (according to official Egyptian estimates) and six-sevenths (according to Ethiopian sources)[34] – it was not party to any major Nile Waters Agreement until 1993.[35] Even before the enactment of the 1959 Agreement, Ethiopia was also one of the first upstream nations to express doubts about the binding force of such bilateral treaties on upper riparians.[36] Beginning in 1956, Ethiopian authorities made statements that indicated that the nation no longer considered the previous Nile

[31] *Id*. at art. 5(1).
[32] *Id*. at art. 5(2).
[33] Caponera, *supra* note 12, at 279.
[34] *Id*. at 651.
[35] Framework for General Co-operation between the Arab Republic of Egypt and Ethiopia, July 1, 1993, Survey of World Broadcasts, ME/1731, A/4. This agreement is important because of its focus on integrated and conjunctive management of international waters (the Blue Nile and the Atbara River, originating within Ethiopian boundaries), but it serves primarily as a model for cooperative governance between the two nations rather than as a renegotiation of water allocations set forth in the previous treaties. It is also strictly bilateral, not concerning the issue of upper White Nile riparians in the Great Lakes region of Central Africa.
[36] *See* SHAPLAND, *supra* note 21, at 77-80. ("In 1956 . . . Ethiopia formally declared that it 'reserved its right to utilize the water resources of the Nile for the benefit of its people, whatever might be the measure of utilization of such waters sought by riparian states." *Id*. at 77.) *See also* GODANA, *supra* note 8, at 197. ("Ethiopia simply does not acknowledge any existing treaty or other obligations preventing it from freely disposing of the Nile waters on its territory.")

Waters Agreements as binding on itself or on other independent basin nations.[37] As more of the upper riparians gained independence in the late-1950s and 1960s, increasing doubts were raised about the binding force of these treaties and more nations began to follow Ethiopia's lead.

Part III: Regional Theories of Treaty Succession

The issue of treaty succession has played a central role in debates about modern Nile governance and has served as a basis for the refutation of the Agreements by some upper riparian states. In the cases of Ethiopia, Tanzania and Kenya, national leaders have directly refused to be bound by the 1929 and 1959 Agreements, arguing that these were signed on their nations' behalf and without their consultation.[38] As such, there is some question as to whether treaty obligations legally passed from the colonized to the independent states. These nations, however, have made such statements primarily to reserve a future claim to the water for development, generally lacking the need or capacity to utilize the river for irrigation purposes, which would be the largest potential draw on Nile water.[39] Some of the other upper riparians, including Uganda and Rwanda, have not yet taken a firm stance on the validity of the 1959 Agreement.[40] Resource excess and lack of capacity have generally prevented the need for some countries to take a solid stance on the issue, although growing water scarcity and newly proposed development projects have begun to change this.[41] Kenya, Uganda and Tanzania, for example, have recently expressed

[37] Carroll, *supra* note 5, at 279.
[38] KLIOT, *supra* note 21, at 86. ("[T]he upper riparians have on various occasions made it clear that they reserve their rights to Nile water. Ethiopia declared this in 1956, 1977, and 1980 . . . Kenya, Uganda and Tanzania adopted a similar policy which was spelled out in the Nyerere Doctrine.") *See also* the Vienna Convention's principles on treaties purporting to bind non-signatory third parties, *supra* note 4.
[39] Caponera, *supra* note 12, at 655.
[40] Under the Nyerere Doctrine, Uganda refuted the binding force of the 1929 Agreements upon national independence in 1962. *See supra* note 38. Uganda has yet, however, to state an official stance on the 1959 Agreement, possibly because of its relationship with Egypt in the construction and management of the Owen Falls Dam. *See* O. Okidi, History of the Nile and Lake Victoria Basins Through Treaties, in THE NILE: SHARING A SCARCE RESOURCE 321, 330-33 (P. P. Howell & J. A. Allen eds., 1994).
[41] GODANA, *supra* note 8, at 84. *See also* SHAPLAND, *supra* note 21, at 75-77, 78. Shapland also attributes the lack of upstream development to "prolonged periods of unrest and sometimes civil wars that have compelled regimes to concentrate on day-to-day survival, rather than on planning the development of their countries' water resources." *Id*.

interest in developing small- and medium-scale irrigation projects around Lake Victoria, and some international disagreements have arisen about the rights of local fishermen in the lake.[42]

Section A: The Nyerere Doctrine and Treaty Repudiation

The "Nyerere Doctrine of Treaty Succession" has been highly influential in the Nile debate, originally asserted by the first President of Tanganyika [Tanzania], Julius Nyerere, in 1961.[43] According to this approach, Tanzania refused to be bound by colonial-era agreements "unless required by international law."[44] In a note to the Egyptian Government in 1962, the government of Tanzania explained that, following from the Nyerere Doctrine, "an agreement purporting to bind [upstream riparians] in perpetuity to secure Egyptian consent before undertaking its own development programs based on its own resources was considered to be incompatible with Tanganyika's status as a sovereign state."[45] The justification for this approach was that the Agreements could not bind an independent state because "the new states never took part in the negotiations creating the obligations under the treaties."[46] While the Nyerere Doctrine has been in place for nearly half a century, it again caused controversy in February 2004, when the government of Tanzania launched a $27.6m project to draw Lake Victoria water for domestic use in the Shinyanga region.[47] As this Note will argue later in the section on international law

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at 75. As these countries - particularly Uganda, Rwanda and Kenya - become increasingly stable, a likely inflow of foreign capital will also increase the rate at which water allocation and resource development issues become of central concern.

[42] *Id*. at 622; Mutiithi Muriuki, *Lake Victoria Treaty Flawed, Says State*, DAILY NATION (Kenya), Dec. 11, 2003, *available at*: www.nationaudio.com/News/DailyNation/11122003/News/News1112200356.html.

[43] P. Kenneth Kiplagat, Legal Status of Integration Treaties and the Enforcement of Treaty Obligations: A Look at the COMESA Process, 23 DENV. J. INT'L L. & POL'Y 259, 263 (1995).

[44] Gebre Tsadik Degefu, *The Nile Waters: Moving Beyond Gridlock*, ADDIS TRIBUNE, June 11, 2004, *available at*: allafrica.com/stories/printable/200406180805.html. *Excerpted from* GEBRE TSADIK DEGEFU, THE NILE: HISTORICAL, LEGAL AND DEVELOPMENTAL PERSPECTIVES (2003).

[45] Juakali Kambale, *Lake Victoria Basin States Want Nile Treaty Revised*, DAILY NATION, Nov. 11, 2002, *available at*: www.nationaudio.com/News/EastAfrican/09022004/Regional/Regional0902200442.html.

[46] Carroll, *supra* note 5, at 278-279.

[47] Faustini Rwambali, *Tanzania Ignores Nile Treaty, Starts Victoria Water Project*, THE EAST AFRICAN, Feb. 9, 2004, *available at*: www.nationaudio.com/News/EastAfrican/09022004/Regional/Regional0902200442.html.

and the development of regional custom,[48] the fact that Tanzania renounced the treaties immediately following independence provides significantly more legal support for this type of project than would a later renunciation.

By 2002, legislators in other upper riparian nations had raised similar objections to the Nile Waters Agreements.[49] On December 11, 2003, one of these proposals came to fruition, when Kenya's Parliament determined that the nation's government would no longer honor the 1929 Agreements.[50] In the resolution, Parliament stated that the Agreement would not be considered binding because Kenya had not been party to – or consulted before – the treaty's enactment.[51] Some prominent members of Parliament argued that this action was long overdue: "Dr. Oburu said Kenya should have followed Tanzania's example, which rejected the treaty immediately after independence."[52] Although many legal justifications were cited, the tensions regarding local fishing rights also contributed to Kenya's recent repudiation of the Nile treaty regime. Parliament's formal renunciation came a few months after a number of Kenyan fishermen in Lake Victoria were arrested by Ugandan authorities in May 2003.[53] One of the reasons to reject the treaty, according to Kenyan leaders, was to protect the "socio-economic interests of the people living around the lake… 'This is a human rights issue.'"[54]

Although Uganda has been active in Nile discussions, and some legislators have argued that the country should follow suit after Kenya's December 2003 resolution, it has not officially contested the binding force of the agreements.[55] However, in addition to natural rights claims,[56]

[48] *See infra* Part IV.C, at 21.
[49] Kambale, *supra* note 45.
[50] Muriuki, *supra* note 42.
[51] *Id.*
[52] *Id.*
[53] *Id.*
[54] *Id.* (quoting Kenyan Member of Parliament Dr. Oburu Odinga)
[55] Degefu, *supra* note 44.
[56] *See infra* Part IV.B, at 18 for discussion on natural rights claims in principles of international law.

the government of Uganda may also be able to argue that the independent state had "neither renegotiated nor repudiated" the treaties, and that the Nile Waters Agreements were therefore "considered by [Uganda] as having lapsed automatically on [its] accession to independence."[57] As in the cases of Kenya and Tanzania, the issue will probably come to the forefront in Uganda as domestic needs for water and hydroelectric power begin to exceed the desire to cooperate politically with powerful downstream riparians.

Section B: The "Clean Slate" Doctrine and Egypt's Response

Similar to the Nyerere Doctrine, a theory that has come into play in the Nile agreements debate is the "clean slate doctrine."[58] This theory of treaty succession established that newly independent states do not inherit the agreements of their colonial predecessors, so long as the treaty does not demarcate territorial or other lines.[59] Because this approach "presupposed the total destruction of the previous State identity and the creation of a new international legal person,"[60] it attributes to the new state a basic right to legal self-determination. The only exception, however, is the obligation for states to inherit the pre-existing territorial boundaries by respecting treaties that are "territorial, real, dispositive, or localized."[61] The clean slate doctrine

[57] Degefu, *supra* note 44.
[58] Tiyanjana Maluwa, INTERNATIONAL LAW IN POST-COLONIAL AFRICA 68-70 (1999). The "clean slate doctrine" emerged as a result of decolonialization and as a reaction to French colonial practice, which presumed that all French treaties were binding upon their colonial territories. It is, therefore, of particular importance to the question of Nile treaty succession because these are precisely the types of obligations that the clean slate doctrine sought to address. ("The non-devolution theory – also known as the 'clean slate' doctrine of State succession – is essentially a product of the late nineteenth century. This theory holds that a successor State acquires its territory with a 'clean slate', or *tabula rasa*, and is thus under no obligation to succeed to pre-independence treaties. . . . The phenomenon of independence presupposes the total destruction of the previous State identity and the creation of a new international legal person. The argument here is that the successor State does not derive its sovereignty from the predecessor State, but from international law and from its own statehood. In other words, there is not a transfer of one sovereignty, but a substitution of sovereignties by the extinction of one and the creation of another. . . . In essence, therefore, the occurrence of independence means that the new State does not as such acquire its territory from the predecessor State as a 'gift' but actually recaptures territory that had, in effect, been forcibly or unlawfully been acquired from the pre-colonial indigenous polity." *Id*. at 69-70.)
[59] Carroll, *supra* note 5, at 278.
[60] Maluwa, *supra* note 58, at 70-71.
[61] Carroll, *supra* note 5, at 278.

provides strong support for the Kenyan and Tanzanian approaches to the problem, but leaves open the question as to whether transboundary water treaties are considered to be the types of agreements that fall within the territorial exception, or whether they can be understood as international political agreements that can be abandoned upon independence.

Like Tanzania, Ethiopia has challenged the validity of the 1929 and 1959 Agreements for a number of decades. As discussed above, Ethiopia – which was never controlled by a long-term colonial administrative power[62] - argues that treaties are not binding on it as an independent country and has also moved to reserve a future claim to the Nile waters once the development capacity is reached.[63] Like Tanzania and Kenya, Ethiopia seems to generally support the clean slate doctrine of succession.[64] Ethiopian leaders have taken a slightly different approach from clean slate, however, arguing also that Ethiopia can refute the binding force of the agreements "based on the Egyptian and Sudanese practice of denouncing treaties signed by Britain on their behalf if they no longer reflect their development needs."[65] This "developmental approach" to treaty succession reflects a primary concern with the practical effects of an outdated agreement. It also indicates the need for an international framework that can reflect not only the legal concerns of all parties involved, but also concern (at least in the post-colonial context) for shifting realities in the process of an agreement's implementation.

As would be expected in the case of the Nile agreements, Egypt generally holds that colonial treaties are binding on successor states (with the possible "developmental approach" exception mentioned above), and has historically adhered to theories of legal positivism, recognizing only written agreements regarding transboundary rights and denying any natural

[62] Ethiopia was briefly occupied by Italian forces during World War II, but it is effectively the only African state that has historically remained free from colonial imposition.
[63] Carroll, *supra* note 5, at 278.
[64] *See* GODANA, *supra* note 8, at 140-41, 155-56.
[65] Carroll, *supra* note 4, at 278.

claims to land or resources.[66] Such a rigid positivistic approach, however, is clearly prejudicial to Egypt in this instance, especially since the written colonial Nile agreements are of questionable legal validity.[67] In addition, Egypt does not recognize regional customary practice or absolute territorial sovereignty in international law.[68] Although Egypt has shown some interest in cooperative renegotiation and development within the entire Nile Basin, it generally recognizes the colonial agreements as the only valid and controlling international legal instruments for the governance of the Nile.[69]

Section C: The "Minimal Impact" Approach

An alternate approach to Nile governance has often been adopted by upstream riparians on a case-by-case basis. This approach – I will call it the "minimal impact" approach – avoids the question of whether the Nile Agreements are valid and instead argues that a proposed project would not violate the treaties *at all* if it will cause only a "minimal impact" on the flow of downstream waters.[70] For example, when Tanzania proposed the Shinyanga region water project in February 2004, Dr. Tom Okurut, the officer in charge, maintained that "the proposed water

[66] *See* GODANA, *supra* note 8, at 143. ("To Egypt, the clear beneficiary, this was the only possible interpretation… a treaty expressly recognizing these rights could only have been intended by both parties to be binding forever.")
[67] Caponera, *supra* note 12, at 660.
[68] Kristen Wiebe, The Nile River: Potential for Conflict and Cooperation in the Face of Water Degradation, 41 NAT. RESOURCES J. 731, 747 (2001). Despite the fact that Egypt does not generally recognize international customary as binding, there is some support for binding third-party obligations under a treaty if those obligations have been reinforced by international customary practice. Article 38 of the Vienna Convention states that "nothing in articles 34 to 37 [those addressing third-party obligations] precludes a rule set forth in a treaty from becoming binding upon a third State as a customary rule of international law, recognized as such." (Vienna Convention, Art. 38). However, this argument would only apply to states that had not registered timely objections to the "custom," and would probably not sufficiently bind states such as Tanzania and Ethiopia, as discussed in this paper.
[69] Carroll, *supra* note 5, at 279.
[70] Although I have not seen this principle referred to as the "minimal impact approach," I borrowed the term from Tanzania's statements regarding the Shinyanga project. A "minimal impact approach," as I refer to it, seemingly aims to minimize, rather than justify in international law, the effects of a proposed water project along the Nile. This approach seeks a diplomatic avoidance of the uncertain legal obligations among basin states while striving to leave some room in the restrictive treaty regime for small-scale upstream development. However, this approach also closely resembles the "principles of equitable utilization" embodied in the Helsinki Rules (*infra* note 85) and other rules of international law. For example, the Lake Lanoux Arbitration before the ICJ recognized a "duty not to injure the interests of a neighbouring state," Lake Lanoux (Fr. v. Spain), 12 R.I.A.A. 281, *translated in* 24 ILR 101, at 111-112 (1957) (hereinafter "Lake Lanoux Arbitration"). This statement could also be read as allowing a "minimal impact" but not "serious injury" to downstream state interests.

supply in Shinyanga is mainly for domestic use and the amount to be drawn from [Lake Victoria] 'is minimum.'"[71] The minimal impact approach allows governments to operate on a developmental basis, implementing projects with the assurances that Egyptian interests would not be negatively affected. This tactic, however, will only work until the need and capacity for major upstream water diversion projects exceeds the ability to argue that such projects would only have a "minimal" effect on the river's flow. In addition, an inquiry into the legality of a "minimal impact" project would require a difficult factual inquiry into the flow variations of an already highly variable and unpredictable river. Due to the volume of Nile water originating within its boundaries, Ethiopia has avoided the use of this approach, preferring instead to reserve its natural and territorial claims to the river for potential large-scale development in the future.[72] However, when Ethiopia proposed its "comprehensive and integrated water resources management policy" [73] in 2000, Egypt's response was tempered by assurances that Ethiopian irrigation and hydroelectric projects would not significantly impact downstream flow.[74]

Part IV: Relevant Principles in International Water Law

In addition to regional theories of treaty succession, there are a number of generally relevant provisions of international water law that may shape or form a basis for future Nile Basin negotiations. Although these provisions typically serve a "gap-filling" function, applying only when there is no other relevant treaty, agreement, or binding regional custom, they may prove helpful in the interpretation of existing agreements, and are usually relevant if the existing

[71] Sukdev Chhatbar, *Nile: Kahama Project 'Won't Affect Victoria,'* THE EAST AFRICAN, Feb. 16, 2004, *available at*: www.nationaudio.com/News/EastAfrican/09022004/Regiounal/Regional0902200442.html.
[72] SHAPLAND, *supra* note 21, at 78-79. ("Perhaps because of their lack of progress in staking a claim to the waters of the Nile by building dams, the Ethiopians continued to make verbal assertions of their rights.") Because Ethiopia's catchment supply far exceeds their current and historical ability to undertake large-scale water development projects, it has been in their national interest to reserve as much right to access as possible, rather than minimize the potential effects of any such project. More recently, however, the Ethiopian position has moderated, with national policy shifting toward international cooperation and "agreement on the use of shared rivers." *Id.*
[73] Ethiopian Water Resources Management Proclamation No. 197/2000 (2000).
[74] Wiebe, *supra* note 68, at 744.

agreements are deemed invalid or nonbinding.[75] However, like the doctrines of treaty succession, acceptance of these approaches varies between countries depending on national laws, policies, and political interests.

Section A: Theories of Territorial Sovereignty

The question of territorial sovereignty is central to transboundary claims to international freshwater bodies. In the governance of land, the issue of territorial sovereignty can be very simple: a sovereign nation generally has the right to exert exclusive and unrestricted jurisdiction over land territory within its boundaries.[76] With ambient resources such as water, and especially with the emergence of modern environmental law, this absolute approach to territorial sovereignty becomes more complicated. As in common law property ownership, the law's consideration of ambient resources does not fit easily into broadly established frameworks.[77]

Under the theory of absolute territorial sovereignty, the waters flowing through the boundaries of a nation are within the complete domain of that nation, which can use them in any manner with no regard for downstream beneficiaries.[78] The former Iraqi government, for example, operated under this approach, justifying its use of the Euphrates River based on its

[75] The Vienna Convention, *supra* note 4. Art. 31(3)(c) states that "there shall be taken into account, together with the context… any relevant rules of international law applicable in the relations of the parties [with respect to the interpretation of a treaty or subsequent practice." Art 32 states that "recourse may be had to supplementary means of interpretation … in order to confirm the meaning resulting from the application of article 31 or to determine the meaning when the interpretation according to article 3: (a) leaves the meaning ambiguous or obscure, or (b) leads to a result which is manifestly absurd or unreasonable." Because the Nile Waters Agreements are arguably invalid according to the rules of treaty succession and contrary to basic rights of state sovereignty and human rights (at least as they apply to upper riparian states), the application of international law principles in this case should be considered preferable as "gap-filling" provisions in place of the allocations, territorial water rights and state obligations assigned by the 1929 and 1959 Agreements.

[76] Eric W. Sievers, Transboundary Jurisdiction and Watercourse Law: China, Kazakhstan, and the Irtysh, 37 TEX. INT'L. L. J. 1, 15 (2002).

[77] Joseph Dellapenna, The Importance of Getting Names Right: The Myth of Markets for Water, 25 WM. & MARY ENVTL. L. & POL'Y REV. 317, 336-37 (2000).

[78] Harmon Doctrine, 21 Op. Att'y Gen. 274 (1895). The Harmon Doctrine is an early United States' Attorney General's written embodiment of the broader international practice of absolute territorial sovereignty.

absolute right to do with the water as it pleases.[79] Although this theory is usually moderated by international diplomatic concerns or developmental capacity limitations, it is often adopted in times of extreme need, such as widespread drought or war, or in developing countries seeking to utilize all available resources.[80] Among the Nile's basin nations, Rwanda and Ethiopia have most often supported this type of approach, stating that sovereign states have the unconditional right to waters originating or flowing within their borders.[81] This assertion is made stronger by the fact that Ethiopia also serves as the primary catchment area for a majority of the Blue Nile waters,[82] increasing the territorial attachment to the river's flow within the nation.

Although international adherence to the doctrine of absolute territorial sovereignty is waning, especially in the allocation of ambient resources, it has been historically upheld in a number of instances. The famous Lake Lanoux Arbitration between France and Spain before the International Court of Justice (ICJ), for example, notes that limitations on territorial integrity are unusual, with judicial decisions recognizing treaty restrictions only where there is "clear and convincing evidence… especially when they impair the territorial sovereignty of a State."[83] Under this rule, if the doctrine of absolute territorial sovereignty is adopted in the Nile Basin, it could be limited only by a valid, binding and explicit agreement between sovereign nations.

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[79] Scott Cunningham, Do Brothers Divide Shares Forever? Obstacles to the Effective Use of International Law in Euphrates River Basin Water Issues, 21 U. PA. J. INT'L ECON. L. 131, 156-57 (2000).

[80] The Harmon Doctrine – the theory of absolute territorial sovereignty – was developed in the context of early United States growth and expansion. States such as China and Rwanda have more recently asserted a right to territorial sovereignty in the context of national development. *See* IBRAHIM KAYA, EQUITABLE UTILIZATION: THE LAW OF THE NON-NAVIGATIONAL USES OF INTERNATIONAL WATERCOURSES 45-46 (2003). The converse of this principle is the "absolute territorial integrity theory," which provides that "an upstream riparian cannot undertake *any* means affect the waters or the course of an international watercourse, unless downstream riparians give their consent [emphasis added]." *Id.* at 60.

[81] Wiebe, *supra* note 52, at 747. *See also* Harmon Doctrine, *supra* note 60.

[82] Caponera, *supra* note 10, at 655.

[83] Lake Lanoux Arbitration, *supra* note 70.

Section B: Natural and Historical Rights Claims

A similar approach is that of "natural rights," where a nation could lay claim to international waters on the grounds of hydrology and water catchment contribution, economic and social needs, and principles of "beneficial use" or "reasonable and equitable" distribution.[84] This approach to transboundary water law, embodied primarily in the International Law Association's Helsinki Rules of 1967, would allow for claims by upstream nations on the basis of flow contribution or need, providing potential support for greatly increased claims by upper Nile riparians.[85] In addition, international customary practices may establish a similarly increased right by upper basin nations to the Nile waters. Egypt, however, has historically denied such principles of international customary law or natural law claims, arguing instead strictly on the basis of positivist or historical and "prior use" principles.[86]

Historical rights and the "prior use doctrine" have been central to the formation of the Nile Waters Agreements as well as to subsequent discussion, particularly as the Agreements relate to Egypt's use of the river. According to the prior use doctrine, a nation enjoys the right to waters that have been currently or historically used by that nation.[87] Egypt continues to insist upon this approach, declaring that upstream riparians are barred from using Nile waters in a way that limits any established or historical use of the river within Egypt.[88] The 1959 Agreement codifies this approach, explicitly stating that "the amount of the Nile waters used by the United

[84] Mark Sinclair, The Environmental Cooperation Agreement Between Mexico and the United States: A Response to the Pollution Problems of the Borderlands, 19 CORNELL INT'L L. J. 87, FN 120 (1996); Report of the Fifty-Second Conference of the International Law Association, Helsinki Rules on the Uses of the Waters of International Rivers, 52 I.L.A. 477, art. V (1967) (hereinafter "Helsinki Rules").
[85] *See* Helsinki Rules.
[86] Caponera, *supra* note 12, 660.
[87] *Id*. at 661.
[88] Wiebe, *supra* note 68, at747.

Arab Republic [Egypt] until this Agreement is signed shall be her acquired right before obtaining the benefits of the [post-1959] Nile Control Projects."[89]

The problem with the prior use doctrine in Nile River governance is that there is a significant disparity in developmental capacity between the upper riparian states and Egypt. In addition to Egypt's historical control of the majority of Nile basin resources, that access to the river's flow has compounded the capacity gap: as Egypt gained access to water, it was able to use the resource to increase capacity, which increased access even further. Even the modern example of Egypt's recent desert reclamation projects will likely impact future negotiations because they will expand Egypt's "prior use" of the water.[90] In addition, the current trend in international watercourse law supports currently established "prior uses" but denies any historical right to waters not presently in use.[91] The Helsinki Rules of 1967 and the 1997 United Nations Watercourse Convention, both nonbinding codifications of international watercourse law, adhere to the doctrine of "equitable and reasonable" uses, supporting established "prior uses" of the water, but only as long as such uses are reasonable as balanced against the interests of other basin states.[92]

The Helsinki Rules state that "an existing reasonable use may continue in operation unless the factors justifying its existence are outweighed by other factors leading to a conclusion that it can be modified or terminated so as to accommodate a competing incompatible use."[93] As such, the prior use doctrine in the Nile River Basin would be tempered by considerations of historical inequity and the potential for more reasonable future distribution among basin states.

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[89] 1959 Agreement, art. 1(1-2).
[90] Caponera, *supra* note 12, at 661-663.
[91] Helsinki Rules, art. VII.
[92] *See generally* Helsinki Rules; *see also* Convention on the Law of the Non-Navigational Uses of International Watercourses, U.N.G.A. Res. 51/229, May 21, 1997 (1997).
[93] Helsinki Rules, art. VII.

According to many sources, "Egypt's insistence upon the legal validity of the principle of acquired and historical rights… is not supportable under the current international law of rivers."[94] It must be recalled, however, that these agreements – the Helsinki Rules and the Watercourse Convention, among others – are generally nonbinding and have been ratified by few nations.[95] Egypt's insistence upon positivist approaches to international law will impact future discussions of these frameworks, and the validity of the nation's historical claims to the river remains in question.

Section C: The Potential Formation of Regional Custom

Another interesting possibility is that of regional custom as it relates to the prior use doctrine: a use can become binding custom in international law if that practice is accepted by neighboring states beyond the time of its early practice.[96] According to generally accepted international law, "unless a country 'unambiguously and persistently' registers its object to a custom while that custom is in its development stage, that country will be said to have accepted that regional custom and therefore be bound by it."[97] Although this principle has rarely been applied in international watercourse law, it was upheld by the ICJ in the Haya de la Torre Case (Colombia v. Peru) in a binding judgment issued in 1951.[98] While ICJ judgments are generally binding only to the case at hand,[99] principles established in ICJ decisions tend to impact future

[94] Degefu, *supra* note 44.
[95] Helsinki Rules, art. I. ("The general rules of international law as set forth in these chapters are applicable . . . except as may be provided by convention, agreement or binding custom among the basin States.") However, it is also argued that these rules may have become generally accepted customary international law. *See* SALMAN M. A. SALMAN AND KISHOR UPRETY, CONFLICT AND COOPERATION ON SOUTH ASIA'S INTERNATIONAL RIVERS: A LEGAL PERSPECTIVE 21 (2002). *See also* Charles Bourne, The International Law Association's Contribution to International Water Law, 36 NAT. RESOURCES J. 155 (1996). There is also some support for the binding force of the Helsinki Rules over the Watercourses Convention. *See* SLAVKO BOGDANOVIC, INTERNATIONAL LAW OF WATER RESOURCES: CONTRIBUTION OF THE INTERNATIONAL LAW ASSOCIATION xiii (2001).
[96] *See* HENKIN, ET AL, INTERNATIONAL LAW: CASES AND MATERIALS 56-60 (2nd ed. 1987).
[97] Cunningham, *supra* note 79, at 157.
[98] Haya de la Torre (Colom. v. Peru), 1951 I.C. J. 82 (June 13).
[99] "The decision of the Court has no binding force except between the parties and in respect of that particular case." Statute of the International Court of Justice, 1945 I.C.J. Acts & Docs. art. 59 (1945).

dispute resolution within the court, as well as the decisions of other international dispute resolution bodies.

If upstream riparians have "acquiesced" to Egypt's historical use of the Nile waters, therefore, there is a significant risk that such use could constitute a binding regional custom working in Egypt's favor. However, the early objections of Ethiopia and Tanzania could prove especially important here,[100] raising the question of whether these post-colonial objections equate to "unambiguous and persistent" objections to the custom (at least with regard to Ethiopia and Tanzania), and whether Egypt's water use in the 1950s was still in the "development stage" of that custom. Egypt, however, refuses to accept natural and customary claims to the river, an approach that would actually work against the nation in the potential assertion that Egypt's historical use constitutes a binding regional custom. In addition, international law tends to take into account broad *jus cogens* and fairness considerations that may work against the customary colonial-era allotment of resources to a single nation.[101]

Section D: "Reasonable Use" and "Good Faith"

A final consideration in relevant international watercourse law is that of the incorporation of outside interests and "good faith." In the Lake Lanoux Arbitration,[102] the arbitral tribunal indicated an obligation of a basin nation to operate in good faith, taking into account "the various interests involved, to seek to give them every satisfaction compatible with the pursuit of its own interests, and to show that in this regard it is genuinely concerned to reconcile the interests of the other riparian State with its own."[103] This approach is similar to the theories of natural water rights, where each riparian nation has the right to use water within its boundaries only as long as

[100] *See infra* Part III, at 12.
[101] *See* STEPHEN C. MCCAFFREY, THE LAW OF INTERNATIONAL WATERCOURSES: NON-NAVIGATIONAL USES 324-35. ("The Obligation to Utilize an International Watercourse in an Equitable and Reasonable Manner")
[102] *See infra* Part IV, at 18.
[103] Lake Lanoux Arbitration, *supra* note 70, at § 22.

the downstream water flow remains "undiminished in quality and unchanged in quantity except insofar as upstream uses exploited the water source for strictly domestic uses."[104] The domestic use requirement has been replaced by the modern "reasonable use" theory,[105] which combines territorial integrity with the Lake Lanoux "good faith" approach to produce something along the lines of the "minimal impact" arguments mentioned above. Although requirements such as good faith and reasonable use are legally very difficult to interpret, this approach does provide an alternative to the harsh doctrines of absolute territorial sovereignty and historical/prior use, offering a potential starting point for future negotiations.

Part V: Some Legal and Political Alternatives

While the theories of treaty succession and basic doctrines of international watercourse law form the backbone of current Nile governance debates, there are a few proposed alternatives to the *status quo*. Although the first two options – the creation of a water market for allocation, and environmentally efficient allocation – are not likely to gain the necessary transboundary support for broad implementation along the Nile, the 1999 creation of the Nile Basin Initiative ("NBI") has dramatically changed the international atmosphere for the renegotiation of the Nile Waters Agreements.[106] However, the NBI has thus far served as a primarily political and developmental body, with few solid legal underpinnings. As such, it provides a promising starting point for the reconsideration of cooperative Nile Basin governance, but is not yet the solution necessary to guarantee stability in the future.

[104] Dellapenna, *supra* note 77, at 345-46.
[105] *Id*.
[106] *See generally* Henrike Peichert, The Nile Basin Initiative: A Catalyst for Cooperation, in SECURITY AND ENVIRONMENT IN THE MEDITERRANEAN (Brauch et al. eds., 2003).

A water market option for allocation has become increasingly popular in the international pursuit of the efficient allocation of transboundary water resources.[107] Under this system, for example, quantifiable rights or permits would be distributed between basin nations, and then upper riparians could sell "shares" of the river's flow to downstream riparians like Egypt and Sudan, where the demand for water is greater.[108] Another option would be to create shares of both water and hydroelectric energy, allowing upstream riparians to trade water rights for much-needed electricity produced by downstream hydroelectric power projects. This approach, however, assumes a stable agreement between all basin states and other interested market participants, and also depends upon a solid legal arrangement to form the basis of market apportionments.[109] While it provides the advantage of open-market efficiency and the incentive to establish effective water management institutions, the creation of a water market would depend on a regional stability and developmental capacity that does not yet exist. In addition, market structures tend to shift away from socioeconomic priorities such as small-scale localized development, domestic clean water access for health and sanitation, and the use of natural resources for poverty alleviation. As such, the creation of a market for Nile River water provides an interesting option for allocations, but is not a solution to the lack of a comprehensive legal framework for the multi-level and transboundary governance of the Nile.

Another alternative to consider in the renegotiation of the Nile Waters Agreements is the assertion – primarily from environmentalists and indigenous communities within the Basin – that ecosystem conservation and environmentally sustainable considerations should be given priority

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[107] In addition to water market allocation initiatives in Ghana (*see* Interim Poverty Reduction Strategy Paper for Ghana, endorsed by the World Bank in August 2000) and other developing nations, the Colorado State General Assembly recently proposed a water priorities market option for the allocation of Arkansas River Basin water resources. *See* 10 COLO. REV. STAT. § 37-80.5-101 to 37-80.5-107 (2001).
[108] *See* D. Whittington, J. Waterbury & E. McClelland, Toward a New Nile Waters Agreement, in WATER QUANTITY/QUALITY MANAGEMENT AND CONFLICT RESOLUTION (A. Dinar & E. Loehman eds., 1995).
[109] Caponera, *supra* note 12, at 630.

over legal maneuvering and "natural boundary concerns."[110] This approach reflects the integrated and conjunctive management considerations of modern transboundary watercourse treatises, such as the 2003 Revised Helsinki Rules,[111] but is unlikely to produce a political consensus that will unite all ten Nile Basin nations. Of particular concern is the viability of conservation plans over essential domestic water delivery and hydroelectric projects, and the need to attract foreign investment to the region. Although sustainable progress is central to Nile Basin development, it is unlikely to form the primary basis for a viable new Nile Waters Agreement.

A final alternative to an entirely renegotiated Nile treaty regime is the Nile Basin Initiative (NBI), which was established in 1999. Since that time, the NBI has provided the most promising framework for organization, development, and cooperation across riparian states, and was formed by agreement between ministers of all ten Nile basin nations. According to a recent Joint Statement of the Nile Basin Council of Ministers (the organization's chief operating body):

> "Since 1999, [the Nile Basin Initiative has] built a temporary Nile institution, with its Secretariat in Entebbe, Uganda; we have engaged in detailed discussions on a permanent cooperative institutional and legal framework; we have designed a program of eight Shared Vision Projects, which bring all Nile countries together, building trust and capacity; and we have begun the preparation of major joint development projects, which involve two or more countries, bringing direct benefits to our people."[112]

[110] Wiebe, *supra* note 68, at 747.
[111] The [Revised] International Law Association Rules on the Equitable and Sustainable Use of Waters, Ninth Draft Revision, Oct. 2003, *available at*: www.ila-hq.org/pdf/Water%20Resources/Draft%20Rules 9November2003.pdf. (Referred to as the "Revised Helsinki Rules," although this version reflects a dramatic departure from the 1967 Helsinki Rules, which is reflected in the ILA's abandonment of the reference in the new title.) This version is likely to be updated as it progresses from draft revision to final copy, but the principles – especially of environmental and social sustainability and integrated and conjunctive management – form the core of this new document and are likely to remain essentially unchanged. Like the 1967 Helsinki Rules, the Revised Rules are an attempt at codification of broad international customary practice and are not considered binding.
[112] Nile Basin Initiative, Joint Statement of the Nile Basin Council of Ministers, NBI 12th Ordinary Annual Meeting, March 18, 2004, *available at*: www.nilebasin.org/joint_statement_of_the_nile_basin_ministers.htm.

The NBI operates on a broad, "basin-wide" scale, serving as a central coordinating body, attracting investment and implementing large-scale multilateral development projects.[113] It also aims to establish contact with nation-specific and localized needs and concerns, maintaining a technical coordinating body (the NBI Technical Advisory Committee) composed of experts delegated by each basin state.[114]

Although the primary projects of the NBI – the eight Shared Vision Projects – function on a large-scale multinational basis, the organization attempts to decentralize the process as much as possible, providing training and implementation opportunities for basin communities.[115] While the NBI provides a significant new basis for coordinating development and attracting investment, however, cooperation, political dialogue, and facilitation can only go so far. In order to truly provide a stable environment for regional and foreign investors and provide a foundation for resource preservation, dispute avoidance and conflict resolution, there must be a permanent legal framework in place in the Nile River Basin. While the Nile Basin Initiative provides a model for centralized international governance and decentralized implementation, as well as a sound basis for future negotiation, it is not an end in itself. The NBI must be used as a starting point for a permanent renegotiated Nile Waters Agreement – one that incorporates all basin nations, as the NBI has done, and binds all interested parties (not just bilateral signatories, as the previous Agreements did) to a reliable international agreement. The distinct advantage of the NBI over an open market for water or environmental proposals, however, is that it has already

[113] Wiebe, *supra* note 52, at 751.
[114] Nile Basin Initiative, *supra* note 112.
[115] Nile Basin Initiative, Policy Guidelines for the Nile River Basin Strategic Action Program, *available at:* www.nilebasin.org/Documents/TACPolicy.html. ("While the Shared Vision is being developed and promoted at the basin-wide level, building commitment and clear goals, it needs to filter down to the country and local level. However, the Shared Vision cannot stand alone; it has to be nourished and fed by actions on the ground - actions which meet the needs of the people and build trust and confidence amongst the riparian countries. Action on the ground will take place at local, national and sub basin levels, and will integrate upwards within a basin-wide framework.")

organized broad political support and cooperation from all of the Nile Basin nations – an accomplishment that has never before been achieved.[116]

Conclusions and Moving Forward

As a growing number of upper riparian nations refute the binding force of the existing Nile Waters Agreements, it seems increasingly unlikely that these Agreements will maintain any major role in the legal context of transboundary Nile governance. Despite the fact that there is arguably some strict positivist support for the treaties' validity, theories of treaty succession and modern principles of international watercourse law seem to weigh against the Agreements' post-colonial force, particularly to the extent that the treaties purport to bind third-party upper riparians. In addition, it seems highly unlikely that unilateral political pressure – or even military threats – would be able to compel adherence to the Agreements' obligations.

During a time when Nile basin nations are reevaluating their relationship to this colonially-imposed legal framework, there exists a unique opportunity to restructure the framework to address current and future priorities of all basin nations. Instead of insisting on adherence to an oversimplified positivist, market-based or environmental approach, the Nile basin nations should use this opportunity to develop uniquely tailored solutions. Building on the political and economic cooperation begun by the NBI, leaders should develop a comprehensive framework legal agreement to which all basin nations could be bound. Such a framework would provide a basic agreement into which all ten basin nations could enter, incorporating minimum standards for management of the Nile's water and, more importantly, an information-pooling and dispute resolution mechanism between the basin nations. Rural- and village-level development would serve as the primary basis for water rights allocation, conservation, and project implementation. Unlike the current international framework, customary practice and local

[116] *See* Wiebe, *supra* note 68, at 751-53.

understandings would serve as the foundation from which large-scale solutions are formulated. Because such a framework would provide the legal stability necessary to concentrate on investment and development, the basin states could work from that point to implement the new agreement in a localized fashion, focusing on the region's needs from the "ground up." In a time when water resources are becoming increasingly scarce, environmental concerns, poverty alleviation, and health and sanitation should serve as the new priorities of Nile River governance, replacing outdated allocations and historical rights claims.

A successful Nile Waters Agreement will likely respond to the lessons learned under the colonially-imposed Agreements. The complexity of interests in the Nile region calls for autochthonous solutions that build on localized expertise and community concerns. Although some elements of existing and proposed regimes might prove to be helpful elements in a future agreement, only a specifically tailored approach to Nile governance will be able to address regional priorities while avoiding the "substantial mismatch" of a colonial legal transplant into a unique and complex situation.