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Inheriting International Rivers: State Succession to Territorial Obligations, South Sudan, and the 1959 Nile Waters Agreement

Mohamed S. Helal

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INHERITING INTERNATIONAL RIVERS: STATE SUCCESSION TO TERRITORIAL OBLIGATIONS, SOUTH SUDAN, AND THE 1959 NILE WATERS AGREEMENT[†]

Mohamed S. Helal^{*}

ABSTRACT

South Sudan's independence has increased the number of Nile riparian states to eleven. Unfortunately, the Nile remains without an all-inclusive legal regime to regulate its use and to ensure that this indispensable natural resource is conserved for future generations. What, therefore, are the legal obligations of the newborn Republic of South Sudan regarding the Nile River? Specifically, this Article asks whether the Egyptian-Sudanese Nile Waters Agreement of 1959 has devolved onto South Sudan. This Article looks to the law of state succession to treaties to answer to this question. This is a field of international law that is beset with considerable uncertainty. State practice is inconsistent and scholarly opinion is virtually unanimous that the principal international legal instrument on the matter, the 1978 Convention on State Succession in Respect of Treaties, does not wholly reflect customary international law. To further complicate matters, the process by which South Sudan gained independence makes it difficult to reconcile this case with the structure and logic of the 1978 Convention. Therefore, this Article turns to customary international law to determine the rights and obligations of South Sudan in relation to the Nile River. This Article argues that international law recognizes a special category of treaties that establish territorial obligations. The overwhelming weight of state practice and judicial opinion supports the assertion that these territorial obligations remain unaffected by State

[†] With much gratitude, this Article is dedicated to my academic supervisors at Harvard University: Professor William Alford, Professor Gabriella Blum, and Professor John Gerard Ruggie. The author wishes to thank Jason Robison, Konstantinos Stylianou, and Abdelkhalig Shaib for reading drafts of this Article and providing insightful comments and suggestions. All errors are mine alone.

^{*} S.J.D. Candidate (Harvard Law School); LL.M. '10 (Harvard Law School); *Licence en droit* '09 (Ain Shams Law Faculty, Egypt); M.A. in International Human Rights Law '04 (American University in Cairo); B.A. in Public and International Law '02 (American University in Cairo). The author is a Second Secretary with the Diplomatic Corps of Egypt. He served on the Cabinet of the Foreign Minister of Egypt from 2005-2009 and on the Cabinet of the Secretary-General of the Arab League from 2002-2003. All views expressed herein are solely those of the author, and nothing in this article should be read or interpreted as representing the positions of the Government of the Arab Republic of Egypt.

succession. This Article concludes that, while it is doubtful that South Sudan has succeeded to the 1959 Nile Water Treaty per se, the Nile's newest riparian is bound by the territorial obligations enshrined therein. This, however, is an unsatisfactory state of affairs. The existing treaties relating to the Nile River are inadequate to meet the many environmental, demographic, and developmental challenges facing the drainage basin. The Nile riparians need to overcome their differences and reach agreement on a comprehensive legal regime to govern the utilization of the watercourse.

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INTRODUCTION

On July 9, 2011, South Sudan declared independence from the Republic of the Sudan and became the world's newest state.¹ South Sudan also became the eleventh riparian state to share the world's longest river, the Nile.² Emerging from Africa's longest civil war, South Sudan faces immeasurable challenges as it strives to lay the foundations of a peaceful and prosperous nation.³ In addition to boundary disputes with its northern neighbor, conflicts over the use and exploitation of its abundant natural resources, particularly oil and water, could become a serious source of insecurity for the young republic.⁴ Most scholarly and policy interest has centered on the potential for the outbreak of hostilities between Sudan and South Sudan over oil-related disputes.⁵ Relatively lesser attention has been paid to the impact the birth of South Sudan has had on the Nile Basin legal regime.

The Nile is an ancient river. Since time immemorial, glorious civilizations flourished on its banks and lived off its silt.⁶ "The Nile is one of the great natural wonders of the world. . . . It flows through every natural formation from towering mountains and well-watered highlands to the most barren of deserts."⁷ Today, the Nile continues to provide sustenance to millions of people in its eleven riparian states.⁸ Unfortunately, South Sudan entered international life at a time of uncertainty for the Nile. As discussed in Part II of

¹ See, e.g., *South Sudan's Flag Raised at Independence Ceremony*, BBC NEWS (July 9, 2011), <http://www.bbc.co.uk/news/world-africa-14092375>.

² The Nile riparian States are: Burundi, the Democratic Republic of the Congo, Egypt, Eritrea, Ethiopia, Kenya, South Sudan, Sudan, Rwanda, Tanzania, and Uganda.. See Christina Carroll, *Past and Future Legal Framework of the Nile River Basin*, 12 GEO. INT'L ENVTL. L. REV. 269, 270, 273 (1999).

³ See Crisis Group Africa, Int'l Crisis Group, *Politics and Transition in the New South Sudan*, at 1–2, Africa Report No.172 (Apr. 4, 2011).

⁴ See Crisis Group Africa, Int'l Crisis Group, *Sudan: Defining the North-South Border*, at 1–2, 8, Policy Briefing No.75 (Sept. 2, 2010).

⁵ Luke Patey, *Crude Days Ahead? Oil and the Resource Curse in Sudan*, 109 AFR. AFF., 617, 617 (2010); TED DAGNE, CONG. RESEARCH SERV., THE REPUBLIC OF SOUTH SUDAN AND CHALLENGES FOR AFRICA'S NEWEST NATION 18 (2011), available at http://relooney.fatcow.com/SI_FAO-Africa-2012/Sudan_1.pdf; Josh Kron, *In 2 Sudans, Familiarity with Path to War*, N.Y. TIMES, May 11, 2012, at A4. It should be noted, however, that scholars have pointed to the potential for the outbreak of war over water between Nile riparian States. See, e.g., Joyce Starr, *Water Wars*, FOREIGN POLICY (Spring 1991) at 17.

⁶ R.O. Collins, *History, Hydropolitics, and the Nile: Nile Control: Myth or Reality*, in THE NILE: SHARING A SCARCE RESOURCE 109, 110 (P.P. Howell & J.A. Allan eds., 1994)

⁷ *Id.*

⁸ In 2005, the UN Food and Agricultural Organization (FAO) estimated that the total population of the Nile Basin to be 201 million and projected that this figure will increase to 336 million by 2030. See U.N. FOOD & AGRIC. ORG., POPULATION PROSPECTS IN THE NILE BASIN (2005), available at http://www.fao.org/nr/water/faonile/products/Docs/Poster_Maps/POPULATIONBIG.pdf.

this Article, the Nile riparian States have failed to agree on a comprehensive legal framework for the utilization and conservation of the river's resources. This has left the Nile with a fragmented legal regime comprised of antiquated treaties contracted during the colonial era and a series of post-colonial agreements, none of which include all riparian states.

Prior to the independence of South Sudan, the use of the Nile waters by Sudan was regulated by a number of international treaties and basin-wide cooperative arrangements.⁹ The most prominent of these is the Nile Waters Agreement concluded between Egypt and Sudan in 1959.¹⁰ The birth of South Sudan and the absence of an overarching legal regime regulating the use of the Nile waters raises questions about the scope and content of the legal rights and obligations of this new state in relation to the Nile River. Specifically, this Article examines whether South Sudan has inherited the legal obligations of its parent state, Sudan, enshrined in the 1959 Nile Waters Agreement.

Examining the status of the 1959 Agreement is a question that intersects multiple areas of international law and environmental policy that are mired by varying degrees of uncertainty, indeterminacy, and complexity. These areas principally include the law of state succession, which suffers doctrinal uncertainty and confusion;¹¹ international fluvial law, which lacks a coherent set of customary rules to govern the utilization of international watercourses;¹²

⁹ See generally P. Howell, *East Africa's Water Requirements: The Equatorial Nile Project and the Nile Waters Agreement of 1929. A Brief Historical Review*, in *The Nile*, *supra* note 6, at 81.

¹⁰ *Id.* at 97.

¹¹ Robert Jennings commented that:

[T]he law of State succession . . . is a subject which presents such a rich diversity of practice as to give some plausibility to a surprisingly varied range of theoretical analysis and doctrine: so much so that some of the most helpful writers have preferred to abandon general theory and have employed instead an attempt to lay down rules for particular kinds of cases, thus distinguishing, for example, between succession in matters of treaties, matters of contract, matters of tort, and so on, as well as between different occasions: but even so the rules are not above doubt and controversy, for practice is frequently ambiguous.

R.Y. Jennings, *General Course on International Law*, 121 RECUEIL DES COURS 437, 437 (1967) (citations omitted).

¹² Charles Bourne, *The Primacy of the Principle of Equitable Utilization in the 1997 Watercourses Convention*, 1997 CAN. Y.B. INT'L L. 215, 215–16 (commenting that it is “impossible to assert with assurance that there was any customary international law governing international water resources . . .”). For an overview of the historical development of international fluvial law, see generally Ludwik A. Teclaff, *Fiat or Custom: The Checkered Development of International Water Law*, 31 NAT. RESOURCES J. 45 (1991).

and the field of sustainable water resource management, the complexity of which continues to bedevil experts.¹³

In this Article, I argue that South Sudan has inherited the territorial obligations enshrined in the 1959 Nile Waters Agreement. This conclusion is based on the claim that legal obligations of a territorial nature, such as those relating to the use of international watercourses, are recognized by customary international law as being unaffected by the succession of states. This, however, is no cause for comfort. The Nile River remains without a holistic all-inclusive legal framework to regulate its use, exploitation, and conservation. This situation is untenable. The Nile riparians need to overcome their differences and agree on a legal and institutional regime that enables them to collectively overcome the many environmental, economic, and developmental challenges facing the Nile drainage basin.

There is more to this Article, however, than the specific case study of South Sudan's succession to the 1959 Nile Waters Agreement. The birth of new nations is a matter of great political import and entails immense legal ramifications. As discussed in Part III, once admitted to the family of nations, the law of state succession determines the rights and obligations of new states. Having wrested their independence either from colonial masters or oppressive regimes, many new nations have claimed a right to be freed from obligations contracted on their behalf. Maintaining a degree of stability in global affairs, however, requires preserving confidence in international legal transactions and predictability in the relations among nations.

State succession is the field of law that attempts to strike politically sensible and jurisprudentially sound compromises between these clashing interests. Despite its importance, however, state succession is an unfortunate field of international law. For years, monographs on state succession would languish on law library shelves as a testament to a bygone era. Then, suddenly, the tumults of global politics would thrust state succession to the center of policy debates and to the top of the academic agenda. The independence of South Sudan is the latest, but certainly not the last, case of state creation that raises questions of state succession. There are many more candidates for

¹³ See SHAFIQL ISLAM & LAWRENCE SUSSKIND, *WATER DIPLOMACY: A NEGOTIATED APPROACH TO MANAGING COMPLEX WATER NETWORKS* 7–8 (2012).

statehood.¹⁴ This makes the law of state succession an always-opportune topic for academic consideration.

This Article is divided into four parts. Part I briefly describes the process leading to the secession of South Sudan. Part II surveys the legal regime and institutional frameworks governing the utilization of the Nile River. This begins with an examination of the treaties concluded during the colonial era, followed by a description of the political background and content of the 1959 Nile Waters Agreement, and a brief exposé of the treaties and cooperative frameworks that have since been established to regulate the use of the Nile River.

Part III focuses on the law of state succession. First, this part defines State succession, and then briefly discusses and critically examines the main doctrines of State succession developed by jurists. Second, this part examines the 1978 Vienna Convention on State Succession in Respect of Treaties, which is the principal international instrument that purports to codify the applicable law in situations of the creation of new States. Particular emphasis will be placed on discerning where South Sudan falls in the general scheme of this convention. Part IV surveys the doctrine underlying the claim that treaties creating territorial obligations are immunized against the effects of State succession, and then reviews the *travaux préparatoires* of the 1978 Convention and subsequent practice to determine whether customary international law has recognized territorial obligations as surviving State succession. Finally, Part IV identifies the rights and obligations inherited by South Sudan in relation to the Nile River.

I. THE BIRTH OF SOUTH SUDAN

On July 20, 2002, the Government of Sudan signed the Machakos Protocol with the Sudan People's Liberation Movement (SPLM).¹⁵ This was the first of a series of agreements that were ultimately combined into a Comprehensive

¹⁴ One scholar has identified the following territories vying for independence: Nagorno-Karabakh (Azerbaijan), Flanders (Belgium), Republika Srpska (Bosnia and Herzegovina), Quebec (Canada), Tibet (China), Xinjiang (China), Abkhazia (Georgia), South Ossetia (Georgia), Ache (Indonesia), Kurdistan (Iraq), Transdnistria (Moldova/Russia), Palestinian Territories, Moro Region (Philippines), Chechnya (Russia), Somaliland (Somalia), Basque (Spain), Tamil Region (Sri Lanka), and Taiwan. Brian Beary, *Separatist Movements: Should Nations Have the Right to Self-Determination?* 2 CQ GLOBAL RESEARCHER 87, 89–90 (2007). See Graeme Wood, *Limbo World: They Start Acting like Real Countries, Then Hope to Become Them*, FOREIGN POLICY, (Jan./Feb. 2010) at 48, for a more “lighthearted” account of life in similar territories.

¹⁵ The Machakos Protocol, 2003–2004 Y.B. ISLAMIC & MIDDLE E. L. 303.

Peace Agreement (CPA), which was signed on January 9, 2005.¹⁶ In a momentous achievement for the SPLM, the government of Sudan acknowledged the right of the people of South Sudan to self-determination to be exercised through a referendum in which they would choose between remaining in a united Sudan or seceding to create an independent state.¹⁷ On February 7, 2011, the South Sudan Referendum Commission announced that almost ninety-nine percent of Southern Sudanese voted for secession.¹⁸ Five months later, in a festive ceremony, South Sudan declared independence.¹⁹

Interestingly, despite including a Protocol on Wealth-Sharing, the CPA disregarded the question of water management and the exploitation of the Nile River resources.²⁰ This protocol focused primarily on sharing the oil revenues, in addition to provisions relating to land use, monetary and fiscal policy, and tax revenues.²¹ The omission was not the result of a drafting error or a negotiator's oversight. The use and apportionment of the Nile waters has been a source of controversy between the river's riparians for many decades.²² The political leadership of the SPLM sought to protect the hard-won acknowledgment of their people's right to self-determination against intervention by other riparian states.²³ "The birth of a new riparian would be seen by some riparians as another complicating factor to the already complex situation within the Nile Basin, and thus may not be welcomed by some of the

¹⁶ See Luka Biong Deng, *The Sudan Comprehensive Peace Agreement: Will It Be Sustained?*, in 7 CIVIL WARS 244, 244 (2005), for an overview of the CPA and its major provisions. See DOUGLAS JOHNSON, *THE ROOT CAUSES OF SUDAN'S CIVIL WARS* (2003); ANN LESCH, *THE SUDAN: CONTESTED NATIONAL IDENTITIES* (1998), for a historical background on the civil war in the Sudan.

¹⁷ Article 1.3 of the Section titled "The Right to Self-Determination for the People of South Sudan" of the Machakos Protocol states: "That the people of South Sudan have the right to self-determination, *inter alia*, through referendum to determine their future status." The Machakos Protocol, *supra* note 15, at 305. Article 2.5 of the same section then prescribes that:

At the end of the six (6) year Interim Period there shall be an internationally monitored referendum, organized jointly by the GOS and the SPLM/A, for the people of South Sudan to: confirm the unity of the Sudan by voting to adopt the system of government established under the Peace Agreement; or to vote for secession.

Id. at 306.

¹⁸ *South Sudan Backs Independence—Results*, BBC NEWS (Feb. 7, 2011), <http://www.bbc.co.uk/news/world-africa-12379431>.

¹⁹ *South Sudan's Flag Raised at Independence Ceremony*, *supra* note 1.

²⁰ *See* Agreement on Wealth-Sharing, 2003–2004 Y.B. ISLAMIC & MIDDLE E. LAW 333.

²¹ *Id.* at 333–34, 341–42.

²² Salman M.A. Salman, *Water Resources in the Sudan North-South Peace Process: Past Experience and Future Trends*, 2010 AFRICAN Y.B. INT'L LAW 299, 312 (2010).

²³ *Id.* at 313.

Nile riparians.”²⁴ The 2005 Interim Constitution of South Sudan was promulgated to incorporate the agreements reached in the CPA.²⁵ In a further indication of the SPLM’s desire to avoid engaging with questions relating to the Nile River, this Interim Constitution entrusted the National Government in Khartoum, as opposed to the provincial Government of Southern Sudan, with the responsibility of administering the use of the Nile River resources.²⁶

In short, the Government of Sudan and its partners in the SPLM shirked the hard question of the apportionment and use of the Nile River. South Sudan will not, however, be able to avoid this matter for long.²⁷ As the fledgling new nation looks to the Nile as an indispensable natural resource in its quest to achieve sustainable development, it will inevitably need to consult with its copariparians, especially Sudan and Egypt, on waterworks that it plans to construct on the watercourse.²⁸

II. THE LEGAL REGULATION OF THE UTILIZATION OF THE NILE RIVER WATERS

A full understanding of the content and significance of the 1959 Agreement requires placing it within its historical context and viewing it as part of a complex web of legal instruments regulating the use of the Nile waters. While many of the instruments predating the 1959 Agreement were concluded when

²⁴ *Id.*

²⁵ *See id.* at 300.

²⁶ *See id.* at 306.

²⁷ A former U.S. envoy to the Sudan identified the use of the Nile waters as a potential cause for conflict between the Sudan and South Sudan. *See* Andrew Natsios & Michael Abramowitz, *Sudan’s Secession Crisis Can the South Part From the North Without War?*, 90 FOREIGN AFF. 19, 20–21 (2011).

²⁸ As of this writing, the Government of South Sudan has not announced its intention to undertake major waterworks. Also, it is unclear what the position of the Government of South Sudan is regarding the existing legal framework of the Nile River. According to one source:

Regarding the role of Egypt, downstream to Sudan, GoSS [Government of South Sudan] officials have assured their Egyptian counterparts that if the South [water use] becomes independent, they would first review existing water usage with the North and operate within Sudan’s current allocation of 25 per cent of the flow, thus not affecting the Egypt’s allocated flow. GoSS officials have stated their commitment to preventing excessive loss of water but want Egypt to recognize the development needs of Southern Sudan. Some Egyptian officials have expressed concern that an independent Southern Sudan could join the East African states and then object to the standing water sharing agreements.

most of the Nile riparians were under some form of colonial or foreign domination, later agreements and cooperative mechanisms were established after these countries gained independence from their metropolitan powers.²⁹ This Part will first identify the pre-1959 legal instruments that relate to the use of the Nile waters. Particular attention will be paid to the 1929 Nile Waters Agreement since it represents the prelude to the 1959 Agreement. Next, this Part will briefly recount the story of the political circumstances leading to the conclusion of the 1959 Agreement, followed by a description of its contents. Finally, an overview of the post-1959 agreements and regional cooperative mechanisms will be presented, including attempts to reach a comprehensive agreement between the Nile riparians on the use of the watercourse.

A. *Pre-1959 Agreements on the Utilization of the Nile Waters*

In the absence of a general legal instrument to which all Nile riparians are party, we are left with a patchwork of treaties and understandings dating back to the late 19th century. Unlike agreements concluded to regulate the use of European watercourses, these treaties largely neglected the question of navigation and focused almost solely on the non-navigational uses of the river's resources.³⁰ As shown below, even a synoptic overview of these instruments reveals that "[f]rom 1898 until the late 1940s attention on the waters of the Nile focused almost entirely on the irrigation needs of Egypt and the Sudan."³¹ The reason for this was, and remains, simple. As two advisors of the Egyptian Ministry of Water Resources and Irrigation explained, "Egypt depends on the Nile for its water, but its source lies outside of Egypt's borders. The Egyptian concerns with regard to the Nile are, therefore, both a matter of national security and a life or death issue."³² It is, therefore, unsurprising that

²⁹ Lisa Jacobs, Comment, *Sharing the Gifts of the Nile: Establishment of a Legal Regime for Nile Waters*, 7 TEMP. INT'L & COMP. L. J. 95, 105 (1993).

³⁰ P.W. Tottenham, the Under-Secretary of State for Public Works in Egypt, was quoted as noting that, "[t]he chief duty of the Nile and the first object of the canal system being the supply of water for agriculture, the interests of navigation have to take second place, though every effort must be made to accommodate them." R.K. Batstone, *The Utilisation of the Nile Waters*, 8 INT'L & COMP. L. Q. 523, 546 n.4 (1959). It is noteworthy, however, that the first international legal instrument dealing with the utilization of the Nile seemed to have been for the purpose of regulating navigation along the river. On October 12, 1841, the Viceroy of Egypt issued a notification allowing for the construction of ships by foreigners for navigation along the Nile and the Mahmoudie Canal. See Notification, on the Part of the Viceroy of Egypt, Relative to the Building of Ships by Foreigners for the Navigation of the Nile and Mahmoudie Canal. Egypt, Oct. 12, 1841, 10 H.C.T. 602.

³¹ Howell, *supra* note 9, at 81.

³² Magdi Hefny & Salah El-din Amer, *Egypt and the Nile Basin*, 67 AQUAT.SCI. 42, 44 (2005).

Egypt has always sought to either directly control or, at least, secure the unrestricted flow of the Nile waters from the river's headwaters in the Abyssinian Highlands and the African Great Lakes region.³³ This Egyptian interest in guaranteeing unbridled access to the Nile waters was adopted by Great Britain following its occupation of Egypt in 1882.³⁴ In London's imperial eyes, Egypt's Suez Canal was an indispensable thoroughfare to Britain's possessions in Asia, which necessitated maintaining stability in Egypt and ensuring that no other European power was in a position to threaten Britain's presence in Egypt.³⁵ Therefore, "[a]fter securing the headwaters of the Nile in Kenya and Uganda and colonizing much of the Nile Valley, Great Britain sought to negotiate treaties with other powers in the region in order to ensure that other states would not change the flow of the Nile from points not in its empire."³⁶

The first of these agreements was concluded between Great Britain and Italy on April 15, 1891.³⁷ The main purpose of the agreement was to demarcate

³³ In an overview of relations between the Blue Nile riparians, and especially Egypt and Ethiopia, Daniel Kendie noted that:

Egypt's foreign policy has, to a significant degree, been shaped by the hydro-politics of the Nile in general and the Blue Nile in particular. It is predicated upon the premise that Egypt should be strong enough either to dominate Ethiopia, or to create the conditions to prevent the latter from building dams on the Blue Nile.

Daniel Kendie, *Egypt and the Hydro-Politics of the Blue Nile*, 6 NORTHEAST AFR. STUD. NO. 1–2, 141, 151 (1999)

³⁴ See Terje Tvedt, *About the Importance of Studying the Modern History of the Countries of the Nile Basin in a Nile Perspective*, in *THE RIVER NILE IN THE POST-COLONIAL AGE* 1, 3 (Terje Tvedt ed. 2010). Despite being under British occupation, Egypt remained legally a province of the Ottoman Empire until Britain declared a protectorate over Egypt at the outbreak of World War I. See Nathan Brown, *Law and Imperialism: Egypt in Comparative Perspective*, 29 LAW & SOC'Y REV. 103, 103, 107 (1995).

³⁵ While ostensibly responding to the threat of the breakdown of order in Egypt due to a revolt by a group of Egyptian army officers, one of Britain's primary aims in invading and occupying Egypt in 1882 was the Suez Canal:

While the revolt of Arabi Pasha supplied the occasion for the British occupation, it was the Suez Canal which furnished the motive. This was indicated when, in 1882, British forces in the name of the Khedive seized the canal, landed troops, collected tolls and regulated canal traffic, with fine disregard of protests of the officials of the canal company.

Halford Hoskins, *The Suez Canal in Time of War*, 14 FOREIGN AFF. 93, 96 (1935).

³⁶ Carroll, *supra* note 2, at 276.

³⁷ See Protocol Between the Governments of Great Britain and Italy for the Demarcation of their Respective Spheres of Influence in Eastern Africa, Apr. 15, 1891, 2 CONSOL. T.S. 434; see also OFFICE OF LEGAL AFFAIRS, LEGISLATIVE TEXTS AND TREATY PROVISIONS CONCERNING THE UTILIZATION OF INTERNATIONAL RIVERS FOR OTHER PURPOSES THAN NAVIGATION, at 127, U.N. Doc. ST/LEG/SER.B/12, U.N. Sales No. 63.V.4 (1963).

the respective spheres of influence of the two countries in East Africa.³⁸ Pursuant to Article III, the Italian Government undertook the following obligation: “*s’engage à ne construire sur l’Atbara en vue de l’irrigation, aucun ouvrage qui pourrait sensiblement modifier sa défluence dans le Nil.*”³⁹ This agreement was followed by a series of agreements between the United Kingdom and the upper Nile riparians.⁴⁰ The first of these agreements was signed with Ethiopia in Addis Ababa on May 15, 1902.⁴¹ The relevant provision for the purposes of the utilization of the Nile waters appeared in Article III, which stated:

His Majesty the Emperor Menelek II, King of Kings of Ethiopia, engages himself towards the Government of His Britannic Majesty not to construct, or allow to be constructed, any works across the Blue Nile, Lake Tsana, or the Sobat which would arrest the flow of their waters into the Nile except in agreement with His Britannic Majesty’s Government and the Government of the Sudan.⁴²

Next, Great Britain concluded an agreement on May 9, 1906, with the Government of the Independent State of the Congo which undertook not to construct any waterworks on the Semiliki or Isango Rivers that would diminish the flow of water into Lake Albert.⁴³ Also in 1906, Great Britain, France, and Italy issued a tripartite declaration in which the three Powers pledged to protect “[t]he interests of Great Britain and Egypt in the Nile Basin, more especially as

³⁸ *Id.*

³⁹ “The Government of Italy undertakes not to construct on the Atabra any works for the purpose of irrigation that might sensibly modify its flow into the Nile.” [*Original in French, translation by the author.*] *Id.* at 128. This agreement was one of a series of agreements concluded by the colonial powers to delineate their spheres of influence in various parts of Africa. For example, on October 29, 1886, July 2–8, 1887, and July 1, 1890, Great Britain and Germany signed agreements to identify their spheres of influence in East Africa and to delimit the boundaries of the territories of Tanganyika and Zanzibar. See Agreement Between the British and German Governments, Respecting Zanzibar and the Adjoining Territories; and Their Respective Spheres of Influence in that Portion of the East African Continent, Gr. Brit.–Ger., Oct. 29, 1886, 17 H.C.T. 1174; Agreement Between Great Britain and Germany, Respecting the Discouragement of Annexations in Rear of Their Spheres of Influence in East Africa, Gr. Brit.–Ger., July 1887, 3 E. Hertslet et al., THE MAP OF AFRICA BY TREATY 888; Agreement Between the British and German Governments, Respecting Africa and Helgoland, Gr. Brit.–Ger., July 1, 1890, 3 E. Hertslet et al., THE MAP OF AFRICA BY TREATY 899. Likewise, Portugal and Germany signed an agreement on December 30, 1886 to identify their spheres of influence in South-West and South-East Africa. See Agreement Between the British and German Governments, Respecting Africa and Helgoland, Gr. Brit.–Port., Dec. 30, 1886, 3 E. Hertslet et al., THE MAP OF AFRICA BY TREATY 703.

⁴⁰ See OFFICE OF LEGAL AFFAIRS, *supra* note 37, at 115–27.

⁴¹ *Id.* at 115.

⁴² *Id.*

⁴³ Agreement Between Great Britain and the Independent State of the Congo, Modifying the Agreement Signed at Brussels, 12th May, 1894, Gr. Brit.–Congo., May 9, 1906, 4 Consol. T.S. 2920. The treaty is also reproduced in OFFICE OF LEGAL AFFAIRS, *supra* note 37, at 99.

regards the regulation of the waters of that river and its tributaries.”⁴⁴ Then, during the period of June–December 1925, Italy, acting on behalf of Eritrea, and Great Britain, acting on behalf of the Sudan, exchanged notes to determine the amount of water that would be diverted from the River Gash for irrigation purposes in Eritrea.⁴⁵

As Britain’s occupation of Egypt took on the semblances of a permanent presence, and as London’s administrators in Cairo deepened their understanding of the hydrology of the Nile Valley, it became evident that Egypt’s irrigation network was inadequate for the continued growth of the country’s economy, and therefore its political stability.⁴⁶ This prompted British and Egyptian authorities to commission a series of studies to examine the flow of the Nile and to recommend measures to increase the river’s yield to allow greater land reclamation in Egypt.⁴⁷ The resulting studies eventually led to the conclusion of the 1929 Nile Waters Agreement between Egypt and Great Britain. Described as “the dominating feature of the legal relationships concerning the distribution and utilisation of the Nile waters,”⁴⁸ the 1929 Agreement is of particular importance for the purposes of this Article because it represents the immediate antecedent to the 1959 Agreement and the foundation upon which it is predicated.⁴⁹ Therefore, the terms of the agreement and the events leading to its conclusion will be outlined in greater detail.

The 1929 Agreement is the child of both the high drama of imperial machinations and political assassination, and the relatively more mundane technical, hydrological, and agricultural studies of the Nile Valley.⁵⁰ Starting with the latter, a commission of experts was appointed in 1920 to propose the waterworks needed to support Egypt’s expanding agricultural sector.⁵¹ The recommendations presented by these experts included the construction of a series of dams along the Nile and a large reservoir in the Sudan. Cairo, however, supported the idea of constructing a single dam within Egyptian

⁴⁴ C.O. Okidi, *Review of Treaties on Consumptive Utilization of Waters of Lake Victoria and Nile Drainage System*, 22 NAT. RESOURCES J. 161, 169 (1982).

⁴⁵ OFFICE OF LEGAL AFFAIRS, *supra* note 37, at 128–31.

⁴⁶ *See* Collins, *supra* note 6, at 111.

⁴⁷ *See Id.* at 111–16.

⁴⁸ Batstone, *supra* note 30, at 527.

⁴⁹ *Id.* at 526–27.

⁵⁰ *See* C.O. Okidi, *History of the Nile and Lake Victoria Basins through Treaties*, in *The Nile*, *supra* note 6, 321, 326–27 (P.P. Howell & J.A. Allan eds., 1994).

⁵¹ *Id.* at 326.

territory.⁵² This was reflective of unease over the reality that not only would Egypt's entire existence be dependent on waters emanating from beyond its borders, but also because:

Her sorry plight is made more acute by the fact that no possibility of expansion is available without building reservoirs beyond her frontiers. Manifestly such works may not be carried out unless the neighboring power consent. It follows that, when all is said and done, the future of Egypt depends upon the solution which will be given to the question of the Sudan.⁵³

It, therefore, became apparent that the utilization of the Nile waters had become inextricably entangled with the then-ongoing negotiations on the independence of Egypt and the status of the Sudan, all of which were intimately related to British imperial interests.⁵⁴ Divergent views on these

⁵² *Id.*

⁵³ Pierre Crabites, *Egypt, The Sudan and The Nile*, 3 FOREIGN AFF. 319, 325 (1924–25).

⁵⁴ In 1920, neither Egypt nor Sudan were independent states. See J.A. HAIL, BRITISH FOREIGN POLICY IN EGYPT AND SUDAN 1947–1956, at 3–4 (1996). The former was a British protectorate from 1919 to 1922, while the latter had been under a joint Egyptian-British Condominium from 1899 until Egypt's presence in the Sudan was abolished in 1925. See *id.* Egypt had erupted in a popular revolution in 1919 to demand the lifting of the British protectorate and granting Egypt full independence. *Id.* at 5. As a result, London dispatched Lord Milner to prepare a report on the most suitable form of government for Egypt. *Id.* at 6. The importance of Egypt and Sudan to Britain's interests were best expressed by Lord Balfour in the House of Commons when he stressed that:

[T]he question of Egypt, the question of the Sudan and the question of the Canal, form an organic and individual whole British supremacy is going to be maintained and let nobody either in Egypt or out of Egypt make any mistake upon that cardinal principle of His Majesty's government.

Id. at 6. See generally M.W. DALY, EMPIRE ON THE NILE: THE ANGLO-EGYPTIAN SUDAN 1898–1934 (1986); Gabriel Warburg, *The Sudan, Egypt and Britain 1899–1916*, 6 MIDDLE E. STUD. 163 (1970), for a discussion on the status of Sudan and the evolution of the Egyptian-British Condominium.

Upon examining the situation in Egypt, the Milner Mission recommended the severance of the Sudan from Egypt and reconstituting it as a separate political entity. The report did, however, include a caveat relating to the Nile. It stated that a relationship between the two countries should be determined:

[U]pon a basis which will secure the independence of the Sudan while safeguarding the vital interests of Egypt in the waters of the Nile . . . Egypt has an indefeasible right to an ample and assured supply of water for the land at present under cultivation and to a fair share of any increased supply which engineering skill may be able to provide.

Batstone, *supra* note 30, at 527.

Ultimately, the British protectorate was abolished and Egypt granted independence on February 28, 1922, albeit with four reservations that protected vital imperial interests. See Vernon A. O'Rourke, *The British Position in Egypt*, 14 FOREIGN AFF. 698, 698 (1936); Maurice Amos, *The Constitutional History of Egypt for the Past Forty Years*, 14 TRANSACTIONS OF THE GROTIUS SOCIETY 131, 141–42, 147 (1928). These included that Egypt's independence would prejudice discussion over the future of the Sudan and what was dubbed "the

political matters prevented the reaching of an agreement on the utilization of the Nile's resources until November 16, 1924, when Sir Lee Stack, the Governor-General of the Sudan and Inspector General of the Egyptian Army, was assassinated in Cairo by Egyptian nationalists demanding the full independence of Egypt.⁵⁵ Aware of Cairo's sensitivity to any diminution of its share of the Nile waters, Britain retaliated by, *inter alia*, announcing that it would increase the water drawn from the Nile for irrigation in a major Sudanese agricultural project "to an unlimited figure."⁵⁶ This immediately caused tremors in Cairo, and, in the early 1920s, led to the establishment of a Nile Waters Commission to identify Egypt's needs from the Nile waters and recommend modalities for undertaking waterworks on the river.⁵⁷ The Commission's findings were incorporated as an integral part of the 1929 Nile Waters Agreement.⁵⁸

The treaty took the form of an exchange of notes between Egypt's Prime Minister Mohamed Mahmoud Pacha and Lord Lloyd, the British High Commissioner in Cairo.⁵⁹ Its most salient feature appeared in Paragraph 2 in which Egypt acknowledged that economic development in Sudan requires the use of greater amounts of water.⁶⁰ This, however, should not impinge on either the level of water already used by Egypt or diminish the amount of water needed by Egypt for future expansion of irrigated land. This understanding, which was to become a cause for contestation between the Nile riparians in the future, was enshrined in the following provision:

[T]he Egyptian Government has always been anxious to encourage such development [of Sudan], and will therefore continue that policy, and be willing to agree with His Majesty's Government upon such an increase of this quantity as does not infringe Egypt's natural and historical rights in the waters of the Nile and its requirements of agricultural extension, subject to satisfactory assurances as to the

security of communications," which connoted unrestricted British access to and presence at the Suez Canal. See Vernon, *supra* note 54, at 698. These issues continued to bedevil Egyptian-British relations until an agreement was reached between Gamal Abdel Nasser's revolutionary government and Britain in 1953. HAIL, *supra* note 54, at x.

⁵⁵ Donald Reid, *Political Assassination in Egypt 1910-1954*, 15 INT'L J. AFR. HIST. STUD. 625, 630 (1982).

⁵⁶ HAIL, *supra* note 54, at 8 (quoting the British High Commissioner in Egypt).

⁵⁷ Howell, *supra* note 9, at 84

⁵⁸ *Id.* at 85.

⁵⁹ OFFICE OF LEGAL AFFAIRS, *supra* note 37, at 100-07.

⁶⁰ *Id.* at 100.

safeguarding of Egyptian interests as detailed in later paragraphs of this note.⁶¹

Thus, pursuant to this provision, it had become “assured to the Egyptian *fellah* that the Nile will remain primarily his river and that that stream will be primarily dedicated to making his field productive.”⁶² To further protect Egyptian rights in the Nile waters, Paragraph 4(b) of the agreement, which was also destined to become a source of great controversy, effectively granted Egypt a “right of veto on development in the upstream territories, without any corresponding restriction on her own freedom of development.”⁶³

While the agreement was concluded between the British and Egyptian governments, the former was acting on behalf of its colonial territories and dependencies in the Nile Basin, which meant that the territorial scope of the treaty extended to Sudan, Kenya, Tanganyika, and Uganda.⁶⁴ Finally, the 1929 Nile Waters Agreement was designed and negotiated as a temporary settlement pending the completion of discussions on both the nature of relations between Egypt and Britain and the future status of the Sudan.⁶⁵ In the opening paragraph of his note to the British High Commissioner, the Egyptian Prime Minister stated that “a settlement of these [irrigation] questions cannot be deferred until such time as it may be possible for the two governments to come to an agreement on the status of the Sudan,” and then concluded by affirming that “the present agreement can in no way be considered as affecting the

⁶¹ *Id.* The report of the 1925 Nile Waters Commission calculated the quantity of Egypt’s “natural and historical rights” as being 48 billion cubic meters. Jeffrey Azarva, *Conflict on the Nile: International Watercourse Law and the Elusive Effort to Create a Transboundary Water Regime in the Nile Basin*, 25 TEMP. INT’L & COMP. L. J. 457, 467 (2011). This was an increase of 4 billion cubic meters from the report of the 1920 commission. *Id.* Sudan’s usage of the Nile waters was determined to have increased from 1.5 to 4 billion cubic meters. *Id.* These quantities were to form the basis on which the shares of both countries were calculated in the 1959 Agreement. *See id.* at 468. In addition, the agreement reserved the entire annual natural flow of the Nile River exclusively for Egypt from January 19 to July 15. Starting on July 16, water can begin to be drawn for the benefit of Sudanese irrigation projects. OFFICE OF LEGAL AFFAIRS, *supra* note 37, at 105.

⁶² Pierre Crabites, *The Nile Waters Agreement*, 8 FOREIGN AFF. 145, 149 (1929–1930).

⁶³ Batstone, *supra* note 30, at 531. The text of the provision read as follows:

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

OFFICE OF LEGAL AFFAIRS, *supra* note 37, at 101.

⁶⁴ OFFICE OF LEGAL AFFAIRS, *supra* note 37, at 101–06 (referring to paragraphs 4(b) and 4(e), which refer respectively to territories under “British administration” and “regions under British influence”).

⁶⁵ *Id.* at 101–02.

control of the river, which is reserved for free discussion between the two governments in the negotiations on the question of the Sudan.”⁶⁶

Overall, the 1929 Nile Waters Agreement, like all legal arrangements,⁶⁷ reflected its political context. The agreement was partially London’s attempt to placate the fears raised in Cairo by the 1924 announcement that it would increase the waters drawn from the Nile for irrigation in the Sudan. After all, Great Britain needed a friendly government in Egypt to ensure the protection of its more vital interests: the Suez Canal.⁶⁸ This was achieved by consecrating Egypt’s status as the “primary riparian” in the Nile Basin, without any serious consideration of the needs of Britain’s other dependencies in East Africa.⁶⁹ In addition, by acknowledging Sudan’s right to an independent share in the Nile waters, Egypt, which at the time had still hoped to enjoy some sovereign powers over its southern neighbor, made an implicit concession on the question of the status of Sudan.⁷⁰

Examined in its broader historical context, however, the agreement appears as just another reflection of Egypt’s precarious existence. Cognizant of its total dependence on the Nile as its sole lifeline, Egypt has always sought to secure unrestricted access to the river’s riches.⁷¹ While some authors have seen this and earlier treaties as embodying the “legacy of colonialism,”⁷² or expressing

⁶⁶ *Id.* at 100, 102–03.

⁶⁷ As Felix Cohen noted, it is only in the transcendental heaven of legal concepts that “one met, face to face, the many concepts of jurisprudence in their absolute purity, freed from all entangling alliances with human life.” Felix Cohen, *Transcendental Nonsense and the Functional Approach*, 35 COLUM. L. REV. 809, 809 (1935).

⁶⁸ Batstone, *supra* note 30, at 532. Crabites depicted the trilateral relationship between Great Britain, Egypt, and the Sudan eloquently:

It is accordingly clear that the Nile has always been looked upon by both Egypt and the Sudan as Egypt’s river. As long as a community of interests obtained, as long as England occupied Egypt and was but a joint partner in the administration of the Sudan, this attitude may readily be understood. It was not that Britain loved the Sudan less; it was that she loved Egypt more.

Crabites, *supra* note 53, at 327.

⁶⁹ Jacobs, *supra* note 29, at 108–09 (1993); Howell, *supra* note 9, at 85. Howell does, however, highlight the fact that while Britain did not take into consideration the needs of its East African dependencies, most of which related to the generation of hydro-electric power, “it could, of course, be argued that the construction of hydro-electric power works does not fall within the terms of the agreement so long as only the natural run of the river is allowed to pass through the turbines or sluices, since this matter neither reduces the flow nor affects the date of arrival in Egypt.” *Id.* at 85–86.

⁷⁰ Okidi, *supra* note 44, at 172.

⁷¹ *Id.* at 164–65.

⁷² *Id.* at 162.

Egyptian aspirations of “hegemonic control and dominance,”⁷³ in reality this was an exercise in survival. After all, “[t]he small and real Egypt may literally be described as ‘the river, which is Egypt,’ meaning the land formed by the deposit of the silt-laden annual flood” of the Nile.⁷⁴

While most of the provisions of the 1929 Nile Waters Agreement related to the utilization of the Nile waters in Sudan, it was in Uganda that the agreement found its most prominent application. As discussed above, a number of studies had been commissioned to propose waterworks along the Nile. Many of these studies proposed a series of dams and waterworks to be undertaken at various points on the upper reaches of both the Blue and White Niles.⁷⁵ It was in this context that, on May 30, 1949, Great Britain and Egypt signed the Agreement Regarding the Construction of the Owen Falls Dam (Owen Falls Agreement) to provide a source of hydroelectric power for Uganda.⁷⁶ In its opening paragraph, the agreement stated that it was concluded “in accordance with the spirit of the Nile Waters Agreement of 1929.”⁷⁷ Then, in compliance with the provisions of the 1929 Agreement, Paragraph 5 of the Owen Falls Agreement obliged the Uganda Electricity Board not to take any measures that “entail any prejudice to the interests of Egypt in accordance with the Nile Waters Agreement of 1929 and does not adversely affect the discharges of water to be passed through the dam.”⁷⁸ It is noteworthy that this agreement continues to be applied and respected by Egypt and Uganda, which succeeded the United Kingdom to the Owen Falls Agreement.⁷⁹

B. The 1959 Nile Waters Agreement

Like its predecessors, the 1959 Agreement was shaped by its political context. *Coups d'état* in Egypt and Sudan, the geographical and hydrological realities of the two riparians, divergent visions for the administration of the

⁷³ Abadir Ibrahim, *The Nile Basin Cooperative Framework Agreement: The Beginning of the End of Egyptian Hydro-Political Hegemony*, 18 MO. ENVTL. L. & POL'Y REV. 282, 295 (2011).

⁷⁴ Crabites, *supra* note 53, at 324.

⁷⁵ See Howell, *supra* note 9, at 83.

⁷⁶ Exchange of Notes Constituting an Agreement Between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of Egypt Regarding the Construction of the Owen Falls Dam, Uganda, Egypt.-U.K., art. I, May 30, 1949, 226 U.N.T.S. 274.

⁷⁷ *Id.* (citations omitted).

⁷⁸ *Id.* at 276.

⁷⁹ In 1991, Egypt and Uganda signed an agreement extending the application of the 1949 Owen Falls Agreement. See Exchange of Letters Constituting an Agreement between the Arab Republic of Egypt and the Republic of Uganda on the Owen Falls Extension Project, Egypt-Uganda, art. I, May 12, 1991, U.N.T.S. No. 47817.

river basin, and the aspirations of new national elites that rose to prominence after the demise of British dominance all influenced the scope and content of the treaty.

Despite the relative comfort provided by the 1929 Agreement, policy-makers in Cairo remained bedeviled by the perennial question of how to secure access to the quantities of water needed to fuel an expanding economy and to feed a growing population.⁸⁰ Likewise, with the independence of Sudan looming on the horizon, administrators and hydrological experts in Sudan began to devise developmental projects designed to exploit the Nile. Indeed, discussions between the two countries began in the early 1950's to accommodate Sudan's growing water needs and to discuss future projects along the river.⁸¹ These discussions led to informal understandings allowing Sudan to increase the quantity of water stored in its Sennar reservoir to be used in various agricultural projects.⁸²

This *modus operandi* did not, however, satisfy either country. In Egypt, a *coup d'état* toppled the monarchy and established a republic led by the nationalist leader Gamal Abdel Nasser who sought "nothing less than the regeneration of Egyptian national life."⁸³ To achieve this, Nasser embarked on a revolutionary program of political, economic, and social transformation.⁸⁴ As Nasser himself wrote, the centerpiece of this program was the construction of a dam across the Nile at the southern town of Aswan to expand the irrigable land in Egypt and to provide the electrical power needed to fuel an ambitious industrialization program.⁸⁵ The construction of the Aswan High Dam was not

⁸⁰ Batstone, *supra* note 63, at 529.

⁸¹ I.H. Abdalla, *The 1959 Nile Waters Agreement in Sudanese-Egyptian Relations*, 7 MIDDLE E. STUD. 329, 330–31 (1971).

⁸² *Id.* at 331.

⁸³ Peter Mansfield, *Nasser and Nasserism*, 28 INT'L J. 670, 688 (1973).

⁸⁴ The literature on Gamal Abdel Nasser, his reign, his ideology, and his impact on Egypt, the Middle East, and the world at large, is vast. A good place to start is with Nasser himself. Shortly after his ascent to power, Nasser published a short book outlining his vision for Egypt. See GAMAL ABDEL NASSER, *THE PHILOSOPHY OF THE REVOLUTION* (1959); see also Fouad Ajami, *On Nasser and His Legacy*, 11 J. PEACE RES. 41 (1974). See generally R.H. DEKMEJIAN, *EGYPT UNDER NASIR: A STUDY IN POLITICAL DYNAMICS* (1971); JOEL GORDON, *NASSER'S BLESSED MOVEMENT: EGYPT'S FREE OFFICERS AND THE JULY REVOLUTION* (1992); P.J. VATIKIOTIS, *NASSER AND HIS GENERATION* (1978); PETER WOODWARD NASSER (1992).

Another important source is the writings of Mohamed Hassanein Heikal, who was Nasser's confidant and trusted advisor. See generally MOHAMED HASSANEIN HEIKAL, *THE CAIRO DOCUMENTS: THE INSIDE STORY OF NASSER AND HIS RELATIONSHIP WITH WORLD LEADERS, REBELS, AND STATESMEN* (1973).

⁸⁵ Gamal Abdel Nasser, *The Egyptian Revolution*, 33 FOREIGN AFF. 199, 204–05 (1955). The idea of constructing a large dam at Aswan had been first proposed in 1876, and was then adopted by a Greek-Egyptian

only a mammoth development project, it revolutionized the management of the Nile:

Of all the great rivers of the world, the Nile is perhaps the most unpredictable and unreliable. The volume of water it carries from the monsoon-drenched highlands of central-east Africa to the parched plains of Egypt varies enormously not only from one season to the next, but also from year to year. As a result, Egypt's economy, over the centuries, has been afflicted by the biblical cycle of fat and lean years and has been exposed to devastating floods as well as drought and famine These alternating threats of flood and famine will be removed for ever⁸⁶

The High Dam could not, however, be constructed without Sudan's consent because the backwaters created by the dam were projected to inundate the Sudanese border-town of Wadi Halfa.⁸⁷ Sudan's consent, however, was not forthcoming.⁸⁸ Khartoum had a comprehensive, and considerably divergent, plan for the utilization of the Nile waters.⁸⁹ The Nile Valley Plan developed by Sudan envisioned the construction of multiple dams and waterworks at various locations along the White and Blue Niles.⁹⁰ These projects included water storage facilities and hydroelectric plants to satisfy the needs of the Nile riparians.⁹¹ Egypt was not persuaded by Sudan's elaborate scheme.⁹² Cairo's

engineer who successfully convinced Egypt's new leaders to pursue the project. See Collins, *supra* note 6, at 119.

⁸⁶ Joachim Joesten, *Nasser's Daring Dream: The Aswan High Dam*, 16 *WORLD TODAY* 55, 61–62 (1960).

⁸⁷ See Gilbert F. White, *The Environmental Effects of the High Dam at Aswan*, 30 *ENV'T*, Sept. 1988, at 5. A total of 53,000 Nubian residents of Wadi Halfa were repatriated to villages to the southeast of Wadi Halfa. *Id.* at 7. In addition to the flooding of Wadi Halfa, the backwaters of the High Dam inundated many of the villages of the Nubian communities of southern Egypt and threatened hundreds of valuable archeological sites and ancient treasures in the area. Fekri Hassan, *The Aswan High Dam and the International Rescue Nubia Campaign*, 24 *AFR. ARCHAEOLOGICAL REV.* 73, 85 (2007). Therefore, an international campaign was launched in cooperation with UNESCO to relocate the Nubian communities and to save ancient artifacts found in the region. See generally *id.*

⁸⁸ Batstone, *supra* note 30, at 526.

⁸⁹ *Id.*

⁹⁰ *Id.*

⁹¹ *Id.* at 526. When the Egyptian government unveiled its plans to its Sudanese counterpart, the latter objected first because of the impact the dam would have on Wadi Halfa, and second because it was becoming increasingly apparent that Sudan was going to need greater quantities of water to satisfy its agricultural needs. See Collins, *supra* note 7, at 120. ("No Sudanese minister in the full flush of independence could agree to such onerous terms") It was in this context that the Nile Valley Plan was prepared by the British irrigation experts advising the Sudanese government and published in June 1958. See *id.*

⁹² Richard Elliot Benedick, *The High Dam and the Transformation of the Nile*, 33 *MIDDLE E. J.* 119, 122–23 (1979).

grand design was attractive because “alternative plans would have involved complicated international negotiations with several upstream countries, some of dubious political stability, whereas the High Dam placed the storage under Egyptian control, could be completed more quickly, and had the added advantage of providing hydroelectric power.”⁹³

Faced with Egypt’s intransigence, Sudan relented and accepted the principle of constructing the Aswan High Dam.⁹⁴ As discussions between the two countries proceeded, Khartoum presented a series of conditions for approving the project.⁹⁵ First, an agreement had to be reached on the apportionment of the Nile waters before construction commenced.⁹⁶ This was because Sudan hoped to increase its share of the Nile waters beyond the 1929 Agreement’s allotment.⁹⁷ Sudan also feared that if Egypt began construction, Egypt would argue that it had further acquired rights and thus enlarged its share of the river waters.⁹⁸ Second, Sudan demanded that Egypt defray the costs of relocating and compensating the residents of the Sudanese village of Wadi Halfa.⁹⁹ Third, Sudan required that the future agreement stipulate that it would be free to construct any waterworks that it felt were necessary to utilize its share of the Nile River.¹⁰⁰ This condition was intended to free Sudan from the virtual veto that Egypt enjoyed over waterworks in Sudan and other riparians pursuant to the 1929 Agreement.¹⁰¹ Finally, in what was to prove to be the most contentious issue during the negotiations, Sudan proposed that the net gain in the river’s yield projected by the construction of the High Dam should be divided according to a ratio of the total flow of the river.¹⁰² Egypt rejected Sudan’s proposals, asserting “That the proposals produced by the Sudan delegation were most unreasonable, and that, had they been applied, Egypt would have had to sacrifice a part of her established right to her present share.”¹⁰³

⁹³ *Id.*

⁹⁴ Abdalla, *supra* note 81, at 336.

⁹⁵ *Id.* at 331–32.

⁹⁶ *Id.*

⁹⁷ See Valerie Knobelsdorf, *The Nile Waters Agreements: Imposition and Impacts of a Transboundary Legal System*, 44 COLUM. J. TRANSNAT’L L. 622, 629 (2005–2006).

⁹⁸ Batstone, *supra* note 30, at 547.

⁹⁹ Abdalla, *supra* note 81, at 332.

¹⁰⁰ *Id.*

¹⁰¹ *Id.*

¹⁰² *Id.*

¹⁰³ *Id.*

As successive rounds of negotiations were held without fruition, political tensions between the two states heightened. First, a territorial dispute over the Halayeb and Shalateen region in southwest Egypt undermined confidence between the two parties.¹⁰⁴ Then, in what Egypt considered a violation of the 1929 Agreement, Sudan unilaterally increased the level of the Sennar reservoir and announced that it would consider the construction of the Roseires dam.¹⁰⁵ The impasse in negotiations ensued until political developments in Sudan provided the opportunity for a breakthrough. On November 17, 1958, General Ibrahim Abboud led a *coup d'état* against the civilian government, reportedly at the urging of the Prime Minister who considered the army a potential ally against his political adversaries.¹⁰⁶ Eager to showcase a foreign policy success to help entrench its local legitimacy, Khartoum's new leadership accelerated negotiations with Cairo.¹⁰⁷ Less than one year later, on November 8, 1959, the Agreement for the Full Utilization of the Nile Waters was signed in Cairo.¹⁰⁸

The agreement, which was the first to be signed between Nile riparians in the post-colonial era, includes a preamble and five parts.¹⁰⁹ The opening paragraphs of the preamble confirm that this new agreement is predicated on the 1929 Nile Waters Agreement: "While the 1959 Agreement effectively replaced allocations set forth in the 1929 Agreements, the agreements together create a comprehensive regime."¹¹⁰ This is best reflected in Part One of the treaty, which, drawing on the 1929 Agreement, identifies the "acquired rights" of both countries as being 48 billion cubic meters (bcm) for Egypt and 4 bcm for the Sudan.¹¹¹ Part Two codifies the *quid pro quo* underlying the entire agreement. Sudan approved the construction of the Aswan High Dam, and

¹⁰⁴ *Id.* at 333.

¹⁰⁵ *Id.* at 333, 336; Fadwa Taha, *The History of the Nile Waters in the Sudan*, in *THE RIVER NILE IN THE POST-COLONIAL AGE*, 188–89 (Terje Tvedt ed. 2010).

¹⁰⁶ Abdalla, *supra* note 81, at 335–36. The change in the political leadership in Khartoum indicated to Cairo that it was closer to reaching an agreement with Sudan. *Id.* at 336. Therefore, despite having not yet formally signed an agreement with Sudan, Egypt went ahead and concluded an agreement with the Soviet Union on December 27, 1958 for the financing of the Aswan High Dam. *Id.* The Soviet Union also dispatched teams of technical experts to advise the Egyptian government on the construction process. *See* Joachim Joesten, *supra* note 86, at 60–61.

¹⁰⁷ Abdalla, *supra* note 81, at 336.

¹⁰⁸ Agreement Between the Republic of the Sudan and the United Arab Republic for the Full Utilization of the Nile Waters, United Arab Republic-Sudan, Nov. 8, 1959, 453 U.N.T.S 51 [hereinafter 1959 Nile Waters Agreement].

¹⁰⁹ *See generally id.*

¹¹⁰ Knobelsdorf, *supra* note 97, at 628.

¹¹¹ 1959 Nile Waters Agreement, *supra* note 108, art. 1, para. 1.

Egypt consented to the erection of the Roseires Dam in Sudan.¹¹² The main stumbling block during negotiations, namely the division of the surplus waters that would be available after the construction of the High Dam, was overcome when Sudan dropped its previous proposals and accepted a fixed share of 14.5 bcm, while Egypt was assigned 7.5 bcm.¹¹³ This brought the total share of the two countries of the Nile waters up to 55.5 bcm for Egypt and 18.5 bcm for Sudan.¹¹⁴ Egypt also agreed to pay Sudan 15 million Egyptian Pounds as indemnification for damages incurred by the Sudanese residents of Wadi Halfa.¹¹⁵

Part Three of the agreement identifies a series of waterworks and conservation projects that the two states would undertake jointly to increase the yield of the river.¹¹⁶ This part also stipulates that the benefits incurred from these projects would be divided equally and outlined the procedures for sharing the construction costs.¹¹⁷ Part Four established a Permanent Joint Technical Commission to oversee the implementation of the agreement and to provide a forum for the joint management of the river's resources.¹¹⁸ The fifth and final part of the treaty, titled General Provisions, deals with relations between the

¹¹² See *id.* art. 2.

¹¹³ *Id.*; Abdalla, *supra* note 81, at 336–37.

¹¹⁴ 1959 Nile Waters Agreement, *supra* note 108, art. 2, para. 4. These figures were calculated on the basis of the average yield of the river during the previous century, which was determined to be 84 bcm annually. *Id.* art. 2, para. 3. It was also calculated that the average increase in the yield due to the construction of the High Dam would amount to 22 bcm, which were divided according to a ratio of 14.5:7.5. *Id.* art. 2, para. 4. Article 5 of Part Two of the agreement stipulated that, if in future years the total yield of the river increases beyond 84 bcm, then that increase would be divided equally between the two parties. *Id.* art. 5. The acceptance of the Sudanese delegation of this formula instead of their previous proposals is imputed by one author to “[t]he veiled intention of the military régime in Khartoum to buy the good will of Nasir, which was undoubtedly necessary for stable government in the Sudan.” Abdalla, *supra* note 82, at 337.

¹¹⁵ 1959 Nile Waters Agreement, *supra* note 108, art.2, para. 6. Commenting on this provision, one author noted:

The money compensation of £15 million which Egypt agreed to pay the Sudan for the damage by flooding, was much less than the most unbiased Sudanese hoped to get. It amounted to only half of the original estimate of £30 million produced by the Sudan delegation in the Nile waters talks before 1959. Certainly, it was a negligible figure if it is compared to the fantastic figure of £313,127,500, which the Halfawis had put forward.

I.H. Abdalla, *supra* note 82, at 337 (citations omitted).

¹¹⁶ 1959 Nile Waters Agreement, *supra* note 108, art. 3.

¹¹⁷ *Id.* art. 3, para. 1.

¹¹⁸ *Id.* art. 4. On January 17, 1960, Egypt and Sudan signed the Protocol Concerning the Establishment of the Permanent Technical Commission referred to in the 1959 Agreement. OFFICE OF LEGAL AFFAIRS, *supra* note 37, at 143. The Protocol determines the composition of the commission's members and determines the modalities for altering its membership. *Id.*

two parties to the treaty and the other Nile riparians.¹¹⁹ First, this part requires that Egypt and Sudan adopt a unified position during any negotiations with other riparian states.¹²⁰ Second, should these negotiations lead to the allotting of shares of the Nile waters to other states, that “amount shall be deducted from the shares of the two Republics in equal parts, as calculated at Aswan.”¹²¹

The 1959 Agreement has received mixed reviews. For one scholar, the agreement is:

[A] model International Rivers’ water-sharing agreement. It contains some “advanced” ideas and principles governing cooperation and sharing of efforts and burdens relative to the international river. A joint Technical Commission is entrusted with the study of the various Nile projects. The principles of equity, compensation for damages and respect for acquired rights have all been included in the Agreement.¹²²

Others have offered less flattering views. For example, while acknowledging that the agreement is “entirely exclusive and bilateral,” one author claims that the “the 1959 Agreement effectively bound all upstream riparians to the allocations” stipulated by the treaty.¹²³ The same author also argues that “[i]n 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.”¹²⁴ Another scholar questioned the concept of ‘acquired rights’ that underlies both the 1929 and 1959 agreements “particularly because determining the precise contents of those rights under international law has proved troublesome.”¹²⁵ A third view highlights the inadequacy of the water-shares allocated to the two signatories of the 1959 Agreement due to deepening water scarcity, growing populations, expanding agricultural sectors, and climatic events such as droughts.¹²⁶

While a full evaluation of the political, social, and economic impact of the Agreement is beyond the purview of this Article, a few remarks can be made in

¹¹⁹ 1959 Nile Waters Agreement, *supra* note 108, art. 5.

¹²⁰ *Id.* art. 5, para. 1.

¹²¹ *Id.* art. 5, para. 2.

¹²² S. Ahmed, *Principles and Precedents in International Law Governing the Sharing of Nile Waters*, in *The Nile*, *supra* note 6, at 351, 357.

¹²³ Knobelsdorf, *supra* note 97, at 629.

¹²⁴ *Id.* at 630.

¹²⁵ Azarva, *supra* note 61, at 469.

¹²⁶ Carroll, *supra* note 2, at 275, 281–82, 293.

this regard. First, the socio-economic benefits reaped primarily by Egypt, but also by Sudan, from the construction of the Aswan High Dam, which is the agreement's most tangible result, have been immense.¹²⁷ Second, unlike its colonial-era predecessors, the 1959 Agreement was contracted between two independent states.¹²⁸ This is reflected in the object, purpose, and language of the agreement.¹²⁹ As discussed above, the 1929 Agreement placed Egyptian interests at the forefront.¹³⁰ Egypt's existing uses were immune to diminution, its future uses enjoyed priority, and it could veto any waterworks in the territories of the upper riparians.¹³¹ This was a relationship of subservience to Egypt's needs. The 1959 Agreement, on the other hand, was predicated on a community of interest between sovereign equals. Egypt could not embark on a major development project without Sudan's approval, while the latter secured Egypt's consent to build an important hydrological facility across the watercourse.¹³²

More broadly, the agreement was not designed to merely authorize the construction of two dams. Rather, it sought to establish a new *modus operandi* in the Nile Basin. By establishing a forum for joint technical cooperation between the two countries, the 1959 Agreement introduced the idea of common resource management to the region.¹³³ For example, future projects were to be constructed by common agreement, their costs were to be borne jointly, and their benefits were to be equally shared.¹³⁴ This all marks a significant departure from the rationale underlying the 1929 Agreement and

¹²⁷ See M.A. Abou Zeid & F.Z. El-Shibini, *Egypt's High Aswan Dam*, 13 INT'L J. WATER RES. DEV. 209, 210 (1997).

¹²⁸ Azarva, *supra* note 61, at 459.

¹²⁹ See Carroll, *supra* note 2, at 279–81.

¹³⁰ Azarva, *supra* note 61, at 466–67.

¹³¹ *Id.* at 467.

¹³² See 1959 Nile Waters Agreement, *supra* note 108, art. 2, para. 2, art. 3, para. 2. As Lisa Jacobs observes:

[T]his treaty, although only approved because it bowed to theories of “established and prior appropriation,” actually had equitable apportionment as its guiding focus Under the agreement, established rights are only one factor considered before the evaluation of equitable shares. . . . Egypt, by acknowledging the claims of others, at long last conceded that it was not the primary “owner” of the Nile. Sudan received a much more equitable treatment than it had in the past. The other Nile Basin countries were at least mentioned as claimants that might be recognized as worthy in the future.

Jacobs, *supra* note 29, at 113 (citations omitted).

¹³³ Jacobs, *supra* note 29, at 122.

¹³⁴ 1959 Nile Waters Agreement, *supra* note 108, art. 4.

earlier instruments.¹³⁵ Finally, contrary to the aforementioned view that the treaty binds non-signatory upper riparians or that it stipulates “mandatory technical oversight and contractual supervision,”¹³⁶ the 1959 Agreement realized that those states are likely to demand larger shares of the Nile waters in the future, and it prescribed an equal deduction of the two parties’ allotment to satisfy those demands.¹³⁷

C. *Post-1959 Agreements and Arrangements for the Utilization of the Nile River*

While not the focus of this Article, a synopsis of the agreements and cooperative arrangements established since the signing of the 1959 Agreement will be useful to understanding the current state of the Nile River water-management regime that South Sudan joined as the basin’s eleventh riparian state.¹³⁸

Almost immediately after the 1959 Agreement entered into force, Egypt and Sudan entered consultations with upper riparians on the joint management of the river.¹³⁹ These discussions revealed the need to undertake studies to improve the available technical information on the hydrology of the Nile basin.¹⁴⁰ This led to the launch of the HYDROMET Survey in 1967 to “collect and analyze the data with the view to assisting the participant countries in water resources planning. The Egyptians and the Sudanese viewed this as an

¹³⁵ Compare *id.* (mandating bilateral agreement on construction projects), with OFFICE OF LEGAL AFFAIRS, *supra* note 37, at 101 (“In case the Egyptian Government decide to construct in the Sudan any works on the river and its branches, or to take any measures with a view to increasing the water supply for the benefit of Egypt, they will agree beforehand with the local authorities on the measures to be taken for safeguarding local interests. The construction, maintenance and administration of the above-mentioned works shall be under the direct control of the Egyptian Government.”).

¹³⁶ Knobelsdorf, *supra* note 97, at 630.

¹³⁷ 1959 Nile Waters Agreement, *supra* note 108, art. 4.

¹³⁸ See generally John Waterbury, *Legal and Institutional Arrangements for Managing the Water Resources in the Nile Basin*, 3 INT’L J. WATER RES. DEV 92 (1987), for a historical overview. While discussion here will be limited to basin-wide multilateral initiatives, there have been numerous bilateral agreements between various co-riparians. See generally *id.* For example, Egypt and Ethiopia signed an agreement on July 1, 1993 in which both parties undertook to “refrain from engaging in any activity related to the Nile waters that may cause appreciable harm to the interests of the other party.” Framework for General Co-operation Between the Arab Republic of Egypt and Ethiopia, Egypt-Eth., art. 5, July 1, 1993, U.N.T.S. No. 47816.

¹³⁹ Sam Laki, *Management of the Water Resources of the Nile Basin*, 5 INT. J. SUSTAIN. DEV. WORLD ECOL. 288, 294 (1998).

¹⁴⁰ *Id.*

integrated approach that would provide the groundwork for inter-governmental cooperation in the regulation, storage, and use of the Nile waters.”¹⁴¹

Then, upon Egypt’s initiative, a regional grouping of the Nile riparians, named *Undugu*,¹⁴² was established in 1983 to foster basin-wide cooperation beyond the level of hydrological studies.¹⁴³ The initiative included questions “such as infrastructure, environmental cooperation, culture and trade in the Nile River basin areas and the contiguous states.”¹⁴⁴ The *Undugu* eventually evolved, in December 1992, into the Technical Committee for Cooperation for Integrated Development and Environmental Protection of the Nile Waters (TECCONILE), which functions as a forum for consultations among the riparians on the utilization of the river’s resources for development.¹⁴⁵ This initiative set the stage for the establishment on February 22, 1999 of the Nile Basin Initiative (NBI).¹⁴⁶ The Nile Council of Ministers (Nile-COM), which oversees the NBI, agreed on a Strategic Action Plan “[t]o achieve sustainable socio-economic development through the equitable utilization of, and benefit from, the common Nile Basin water resources.”¹⁴⁷ Achieving these objectives is undertaken through a wide variety of hydrological, social, and economic projects, some of which are designed for basin-wide implementation, while others are intended for sub-basin application.¹⁴⁸

The most ambitious endeavor launched by the NBI was the attempt to reach a holistic basin-wide agreement on a legal framework to govern the utilization of the water resources of the Nile River. In 2007, after a decade of negotiations, a Comprehensive Framework Agreement (CFA) was submitted for approval by the Nile-COM, and opened for signature in May 2010.¹⁴⁹ The

¹⁴¹ *Id.* In addition to Egypt and Sudan, Burundi, Kenya, Rwanda, Tanzania, and Uganda participated in this project. Ethiopia refused to become a full member and elected to participate as an observer. *Id.*

¹⁴² *Undugu* is the Swahili word for “brotherhood.” CHARLES W. RECHENBACH, SWAHILI-ENGLISH DICTIONARY 556 (1967).

¹⁴³ Korwa Adar, *The Interface between National Interest and Regional Stability: The Nile River and the Riparian States*, 11 AFR. SOC. REV. 4, 8 (2007).

¹⁴⁴ *Id.*

¹⁴⁵ Abdel Fattah Metawie, *History of Co-operation in the Nile Basin*, 20 INT’L J. WATER RES. DEV. 47, 54 (2004).

¹⁴⁶ *Id.*; see also *About us*, NILE BASIN INITIATIVE, http://www.nilebasin.org/newsite/index.php?option=com_content&view=section&id=5&layout=blog&Itemid=68&lang=en (last visited Sept. 10, 2013).

¹⁴⁷ Metawie, *supra* note 145, at 54; NILE BASIN INITIATIVE, *supra* note 146.

¹⁴⁸ Salah El-din Amer et al., *Sustainable Development and International Cooperation in the Eastern Nile Basin*, 67 AQUATIC SCI. 3, 8 (2005). This work also provides an example of projects undertaken in the Eastern Nile Basin under the rubric of the NBI. See *id.*

¹⁴⁹ Azarva, *supra* note 61, at 487, 489–90. The full text of the treaty is available at http://internationalwaterlaw.org/documents/regionaldocs/Nile_River_Basin_Cooperative_Framework_2010.pdf.

treaty, however, did not receive the unanimous support of all riparians. Egypt and Sudan, who throughout the negotiations adopted a unified position as stipulated by the 1959 Agreement, expressed reservations regarding Article 14 of the CFA.¹⁵⁰ This provision, titled “Water Security,” proscribes the use of the watercourse in a manner that would “significantly affect the water security of any other Nile Basin State.” Egypt and Sudan, however, proposed amending the text to state: “Not to adversely affect the water security and current uses and rights of any other Nile Basin State.”¹⁵¹

As some authors have noted, while packaged as a question of “water security,” in reality the dispute is over the status of the existing uses of the Nile waters, which are predominantly Egyptian and Sudanese.¹⁵² These two countries have sought to immunize their current uses from possible diminution due to the growing needs of their co-riparians.¹⁵³ On February 28, 2011, Burundi announced that it signed the CFA, bringing the total number of signatories to six, and allowing for the ratification process to commence.¹⁵⁴ As of this writing, Egypt and Sudan, continue to reject and denounce the CFA, and have announced that, as non-parties to the treaty, they are not bound by its

¹⁵⁰ Adonia Ayebare, *Issue Brief: A Political Storm Over the Nile* 3–4, INT’L PEACE INST. (Dec. 6, 2010), <http://ipinst.org/publication/policy-papers/detail/315-a-political-storm-over-the-nile.html>.

¹⁵¹ *Id.* at 4.

¹⁵² See Ibrahim, *supra* note 73, at 295; Dereje Z. Mekonnen, *From Tenuous Legal Argument to Securitization and Benefit Sharing: Hegemonic Obstinacy—The Stumbling Block Against Resolution of the Nile Waters Question*, 4 MIZAN L. REV. 232, 235 (2010); Dereje Z. Mekonnen, *The Nile Basin Cooperative Framework Agreement Negotiations and the Adoption of a ‘Water Security’: Flight into Obscurity or a Logical Cul-de-Sac?* 21 EUR. J. INT’L L. 421, 430 (2010).

¹⁵³ As Ambassador Nabil Fahmy, a senior Egyptian diplomat and former Ambassador to the United States, observed:

The current crisis has arisen around an initiative by five Nile Basin states to form the Cooperative Framework Agreement in May 2010 to seek more water from the Nile. This would effectively abrogate a 1929 treaty Egypt signed with British colonial authorities allowing the country veto rights over any upriver Nile development projects such as irrigation. Egypt and Sudan strongly opposed this measure as threatening their national security, with particular criticism directed at Ethiopian plans to construct the Grand Ethiopian Renaissance Dam, a large hydropower project on the Nile.

Nabil Fahmy, *Egypt in the World: A Foreign Policy for the Twenty-First Century*, 6 CAIRO REV. GLOBAL AFF. 91, 98 (2012), available at <http://www.aucegypt.edu/GAPP/CairoReview/Lists/Articles/Attachments/222/CR6-Fahmy.pdf>.

¹⁵⁴ In addition to Burundi, the other signatories are Ethiopia, Kenya, Rwanda, Tanzania, and Uganda. *Burundi Signs the Nile Cooperative Framework Agreement*, NILE BASIN INITIATIVE NEWS, <http://www.nilebasin.org/newsite/index> (last visited Aug. 24, 2013).

provisions and continue to enjoy the rights stipulated in earlier Nile waters agreements.¹⁵⁵

III. THE LAW OF STATE SUCCESSION TO TREATIES

Having outlined the catalogue of treaties and institutional arrangements governing the utilization of the Nile River waters, this Article will now examine whether the 1959 Nile Waters Agreement has devolved onto South Sudan upon its independence from Sudan on July 9, 2011.

The law of state succession to treaties supposedly provides the answer to this question. Therefore, this part commences by defining state succession and distinguishing it from *government* succession, with which it is occasionally confused. This is followed by a brief overview of the main theories developed by jurists on the impact of state succession on international treaties. Then the content and structure of the 1978 Convention on Succession of states in Respect of Treaties (1978 Convention),¹⁵⁶ purportedly the principal instrument governing this area of international law, is examined. In particular, attention will focus on the dichotomy established by the convention between states emerging out of decolonization and those that gained independence through other processes, such as secession or dissolution of political unions. Finally, recent state practice will be surveyed to determine whether the rules codified in the convention reflect customary international law. This Part concludes with the finding that the 1978 Convention is not directly applicable to the case of South Sudan, and that its provisions requiring the devolution of treaties onto states emerging from non-colonial settings, such as South Sudan, is not reflective of customary international law.

A. *Defining State Succession*

Although various definitions of state succession have been proffered,¹⁵⁷ international practice and scholarly opinion have converged on the formulation

¹⁵⁵ Salman M.A. Salman, *The Nile Basin Cooperative Framework Agreement: A Peacefully Unfolding African Spring*, 38 WATER INT'L 17, 21–23 (2012).

¹⁵⁶ Vienna Convention on Succession of States in Respect of Treaties, Aug. 23, 1978, 1946 U.N.T.S. 3 [hereinafter 1978 Vienna Convention].

¹⁵⁷ For example, writing in 1965, Karl Zemanek defined state succession in the following terms: "State succession is viewed as a problem of state responsibility. It takes place when a legally relevant event causes acts of government in a given territory to be attributed to a subject of international law other than that to which they were attributed before the event." Karl Zemanek, *State Succession After Decolonization*, 116 RECUEIL DES COURS, 182,189 (1965).

adopted by Article 2(b) of the 1978 Convention, which defines state succession as “the replacement of one State by another in the responsibility for the international relations of territory.”¹⁵⁸ A predecessor state is “the State which has been replaced by another State on the occurrence of a succession of States,”¹⁵⁹ while the successor state is one “which has replaced another State on the occurrence of a succession of States.”¹⁶⁰

In addition to successor and predecessor states, the 1978 Convention added a third category of states called “newly independent States.”¹⁶¹ This category represents the distinguishing feature of the Convention, refers to “a successor State the territory of which immediately before the date of the succession of States was a dependent territory for the international relations of which the predecessor State was responsible.”¹⁶² These definitions were reused in the 1983 Vienna Convention on Succession of States in Respect of State Property, Archives and Debts.¹⁶³

What these definitions convey is that state succession regulates the impact of change in the international legal personality of a particular territory. To put it simply, it relates to the legal effects of the birth and death of states. State succession is “concerned with the management of the many consequences of factual changes in the geography of rule It is also *transitional* in the sense that it mediates between the ‘before’ and ‘after’ of political change.”¹⁶⁴

State succession should not, however, be confused with *government* succession. These are two distinct processes. Any change in the nature and identity of the governing authority does not affect the international legal personality of a state.¹⁶⁵ In other words, international law distinguishes between a “change of State personality and change of the government of the State.”¹⁶⁶ When governments change, “[t]here is a strong presumption that the State continues to exist, with its rights and obligations, despite revolutionary

¹⁵⁸ 1978 Vienna Convention, *supra* note 156, art. 2(b).

¹⁵⁹ *Id.* art. 2(c).

¹⁶⁰ *Id.* art. 2(d).

¹⁶¹ *Id.* art. 2(f).

¹⁶² *Id.*

¹⁶³ Vienna Convention on Succession of States in Respect of State Property, Archives and Debts art. 2, U.N. Doc. A/CONF.117/14 (Apr. 7, 1983), *reprinted in* 22 I.L.M. 306 (1983). [hereinafter 1983 Vienna Convention].

¹⁶⁴ MATTHEW CRAVEN, *THE DECOLONIZATION OF INTERNATIONAL LAW: STATE SUCCESSION AND THE LAW OF TREATIES* 23 (2007).

¹⁶⁵ JAMES CRAWFORD, *THE CREATION OF STATES IN INTERNATIONAL LAW* 34 (2d ed. 2007).

¹⁶⁶ *Id.*

changes in government, or despite a period when there is no, or no effective, government.”¹⁶⁷

Despite the adoption of two U.N. conventions, numerous judicial pronouncements, and volumes of scholarly work on state succession,¹⁶⁸ this is an area of international law that remains beset with “great uncertainty and controversy.”¹⁶⁹ The ambiguity of the law of state succession remains even if investigation is limited to one particular subset of this area of international law: namely, state succession to treaties. As D.P. O’Connell, perhaps the most influential scholar on the subject, puts it:

[O]pinions on the matter are as diverse as the practice of States is incoherent. Much of the opinionated discussion has been politically and even ideologically motivated, and it has tended to concentrate upon modalities rather than upon principles. For this reason, the topic has escaped from the confines of juristic logic and has really become a feature of political science or of public administration.¹⁷⁰

The indeterminacy of the law of state succession to treaties is confounded by the fact that it is inextricably intertwined with multiple subjects and principles of international and domestic law, including the law of treaties, constitutional law, state sovereignty, and self-determination, each of which is afflicted by varying degrees of uncertainty. Despite warnings to the contrary,¹⁷¹ this is no reason for disheartenment or despair. State succession to

¹⁶⁷ *Id.*

¹⁶⁸ Other than publications that will be regularly referenced throughout this paper, some of the most important scholarly works on state succession include: TAI-HENG CHENG, *STATE SUCCESSION TO COMMERCIAL OBLIGATIONS* (2006); PATRICK DUMBERRY, *STATE SUCCESSION TO INTERNATIONAL RESPONSIBILITY* (2007); ARTHUR KEITH, *THE THEORY OF STATE SUCCESSION WITH SPECIAL REFERENCE TO ENGLISH AND COLONIAL LAW* (1907); *STATE SUCCESSION: CODIFICATION TESTED AGAINST THE FACTS* (Martti Koskenniemi & Pierre Michel Eisemann eds., 2000); Mohammed Bedjaoui, *Problèmes Récents de Succession d’Etats dans les Etats Nouveaux*, 130 *RECUEIL DES COURS*, 456 (1970); Erik Castrén, *Aspects Récents de la Succession d’Etats*, 78 *RECUEIL DES COURS* 379 (1951); Amos S. Hershey, *The Succession of States*, 5 *AM. J. INT’L. L.* 285 (1911); C. Wilfred Jenks, *State Succession in Respect of Law-Making Treaties*, 29 *BRIT. Y.B. INT’L L.* 105 (1952); R.Y. Jennings, *State Succession*, 121 *RECUEIL DES COURS*, 437 (1967); A.N. Sack, *La Succession aux Dettes Publiques d’État*, 23 *RECUEIL DES COURS* 145 (1928); Brigitte Stern, *La Succession d’Etats*, 262 *RECUEIL DES COURS* 9 (1996); Manlio Udina, *La Succession des Etats quant aux Obligations Internationales autres que les Dettes Publiques*, 44 *RECUEIL DES COURS* 665 (1933).

¹⁶⁹ IAN BROWNLIE, *PRINCIPLES OF PUBLIC INTERNATIONAL LAW* 650 (7th ed. 2008).

¹⁷⁰ D.P. O’Connell, *Recent Problems of State Succession in Relation to New States*, 130 *RECUEIL DES COURS*, 95, 170 (1970).

¹⁷¹ After studying African practice in the area of state succession, one author concluded that “[t]he international lawyer seeking a way out of this marshland is as likely as ever to be led into the centre of the miry bog itself.” Tiyanjana Maluwa, *Succession to Treaties in Post-Independence Africa: A Retrospective*

treaties remains amenable to scholarly examination, which, to instill a semblance of order to the field, this section will commence here with a brief overview of the main theoretical paradigms that have marked scholarly and policy debates in this area.

B. Theories of State Succession to Treaties

Starting as early as Aristotle's *Politics*,¹⁷² continuing with the writings of the fathers of modern international law, such as Pufendorf, Grotius, and Vattel, and extending to the doctrines developed during the era of decolonization, philosophers and jurists have advanced a myriad of theories on state succession and its legal implications.¹⁷³ Nonetheless, it is generally agreed that there are two antipodal theoretical paradigms of state succession to treaties, the first of which is the theory of universal succession.¹⁷⁴ At the opposite side of the spectrum is the *tabula rasa* or clean slate theory.¹⁷⁵

1. The Universal Succession Theory

“According to the general universal succession theory, the continuity of rights and obligations of the predecessor States is compulsory and is governed by the operation of the rules of law regardless of the consent of the States concerned.”¹⁷⁶ This theory, drawn from Roman inheritance law, was first proposed by Hugo Grotius who argued that the personality of the state is

Consideration of Some Theoretical and Practical Issues with Special Reference to Malawi, 4 AFR. J. INT'L. & COMP. L. 791, 810 (1992).

¹⁷² Under the title “Continuity of Identity of the State,” Aristotle writes:

And this topic seems to be part of yet another question—how are we to tell whether a state is still the same state or a different one? We might try to investigate this question using territory and inhabitants as criteria; but this would not carry us far, since it is quite possible to divide both territory and population into two, putting some people in one part and some into the other. . . . For the state is a kind of association—an association of citizens in a constitution; so when the constitution changes and becomes different in kind, the state also would seem necessarily not to be the same. . . . But whether, when a state's constitution is changed, it is just to disown its obligations or to discharge them—that is another question.

ARISTOTLE, *THE POLITICS*, BOOK III, 175–76 (T.A. Sinclair trans. 1981).

¹⁷³ See O'Connell, *supra* note 170, at 104–15, for a discussion of these various theories and how they reflected varying conceptions of the nature of the State.

¹⁷⁴ Yilma Makonnen, *State Succession in Africa: Selected Problems*, 200 RECUEIL DES COURS 93, 103 (1987).

¹⁷⁵ See *id.* at 114.

¹⁷⁶ *Id.* at 104.

inextinguishable.¹⁷⁷ This meant that the rights and obligations of former sovereigns necessarily devolve on their successors in the same fashion as the property and debts of deceased persons become the responsibility of their successors.¹⁷⁸ Grotius, however, qualified the universal succession rule by exempting successors from obligations contracted by sovereigns in their personal capacities and not as part of the duties of office.¹⁷⁹ This distinction becomes important later with the introduction of the concept of dispositive or ‘real’ treaty obligations.

2. *The Tabula Rasa Theory*

The *tabula rasa* or clean slate theory, which emerged in the nineteenth century, is predicated on the claim that successor States do not inherit any of the rights or obligations of their predecessors.¹⁸⁰ In other words, the successor state is born into international life with a “clean-slate” of treaty relations. As

¹⁷⁷ See HUGO GROTIUS, *THE RIGHTS OF WAR AND PEACE* 684 (Richard Tuck, ed. 2005) (1625).

¹⁷⁸ *Id.*

¹⁷⁹ In Chapter IX, “When Jurisdiction and Property Cease,” Grotius writes:

That the Person of the Heir is to be looked upon to be the same as the Person of the Deceased, in Regard to the Continuance of Property, either publick or private, is an undoubted Maxim. . . . And consequently, the Right of the Deceased is not extinct; it is continued in the Person of the Heir to whom it devolves. It is a Maxim of *Roman Law*, agreeable to the Principles of the Law of Nature, that *An Inheritance is nothing but a Succession to the whole Right which the Deceased enjoyed.*

Id.

Then in Chapter XIV, “Promises, Contracts, and Oaths of those who have the Sovereign Power,” Grotius further clarified his position on the impact of succession on what in modern parlance would be considered international treaties:

Let us now come to the Successors; and here we must distinguish between those who inherit all the Goods of the deceased King, as he who receives a patrimonial Kingdom, either by will, or from an Intestate; and between those who succeed in the Kingdom only, as by a new Election, or by Prescript, and that either in Imitation or other common Inheritances, or otherwise; or whether succeeding by a mixt Right. For they who inherit all the Goods of with the Kingdom, are without doubt obliged to perform all the Contracts and Promises of the late King . . . But how far they who succeeded barely to the Crown, or to the Goods only in Part, and to the Crown entirely, are obliged (*by the Contracts of the Predecessor*) does deserve as much to be inquired into, as it has been hitherto treated without Order. . . . But . . . *mediately* . . . on the account of the State, such successors are obliged; which must be thus understood. Every Society, as well as every particular Person, has a Power to oblige itself either by itself, or by its major Part. This Right they may transfer, their expressly, or by necessary Consequence, by transferring, for Instance, the Sovereignty: For in Morals, he who gives the End, gives all the Things that conduce to the End.

Id. at 811–12.

¹⁸⁰ Makonnen, *supra* note 174, at 107.

one scholar who canvassed the views of various proponents of this theory explains:

[U]pon total State succession the predecessor State's personality and identity completely disappear. An entirely new international sovereign personality appears in its place, but there is no legal connection or derivation between the predecessor and the successor States. . . . [T]he new sovereign is absolutely free of any of its predecessor's obligations. . . . The new sovereign is considered to be original and to derive its authority from none other than itself. Therefore, the fact that it appropriated the territory of the former State does not entail or result in derivation of rights and obligations from the predecessor sovereign.¹⁸¹

3. *The Politics and Practice of State Succession*

State succession is one area of international law where abstract theory has not stood the test of political reality. State practice in various historical periods reveals that, when faced with the necessities of governance, states do not adhere unwaveringly to either of these theories.¹⁸² “In reality, neither of these two positions is wholly tenable, nor do they provide ready solutions to the range of problems that arise in the context of state succession.”¹⁸³

Starting with the *tabula rasa* theory, it has been observed that an uncompromising application of this approach would cause considerable chaos to the international legal system.¹⁸⁴ States and other international actors would be unsure of the stability and continuity of rights and obligations enshrined in treaties contracted with their partners if such treaties were totally revocable upon succession.¹⁸⁵ Indeed, conceptually, in rejecting any possibility for

¹⁸¹ *Id.* at 107–08.

¹⁸² There have, however, been some isolated cases of full adherence to the *tabula rasa* theory. One of these is the question of the succession of Israel to legal obligations of the Mandate Government of Palestine. Jose Carlos Rozas, *La Succession d'Etats en Matière de Convention Fluviales*, in THE LEGAL REGIME OF INTERNATIONAL RIVERS AND LAKES, 131 (Ralph Zacklin & Lucius Caflisch eds., 1981). In response to a questionnaire sent by the International Law Commission to U.N. Member States during the preparation of the Draft Articles on the Law of Treaties, Israel affirmed that “on the basis of the generally recognized principles of international law, Israel which was a new international personality, was not automatically bound by the treaties to which Palestine had been a party and that its future treaty relations with foreign Powers were to be regulated directly between Israel and the foreign Powers concerned.” *Replies from Governments*, Y.B. INT'L L. COMM'N 215, U.N. Doc A/CN.4/SER.A/1950/Add.1.

¹⁸³ Matthew C.R. Craven, *The Problem of State Succession and the Identity of States under International Law*, 9 EURO. J. INT'L L. 142, 148 (1998).

¹⁸⁴ See Makonnen, *supra* note 174, at 108.

¹⁸⁵ Detlev Vagts, *State Succession: The Codifiers' View*, 33 VA. J. INT'L L. 275, 281–82 (1993).

succession to legal obligations, this theory not only undermines confidence in treaties as a prime method for concluding international transactions, “it also appears to deny the possibility of law.”¹⁸⁶

Similarly, the universal succession theory has been subjected to considerable criticism. Primarily, some scholars have questioned the appropriateness of the unequivocal importation into international law of a concept originally designed to regulate succession to the estates of natural persons.¹⁸⁷ Second, by purporting to bind a successor state to the full panoply of treaty relations of the predecessor state, this theory ignores the reality that the former enjoys an international legal personality distinct and separate from that of the latter.¹⁸⁸ This means that, in relation to the successor, the predecessor’s treaties are *res inter alios acta* and cannot entail any obligations for the successor.¹⁸⁹

The inadequacy of these two grand theories of state succession becomes ever more apparent when observing the actual state practice. Having advised multiple governments on matters of succession to treaties and investigated the matter in depth, O’Connell concluded that policy decisions were “taken on the basis of how the treaty would work in the changed circumstances. If it would work smoothly governments are prepared to continue it in force. If it would work in a distorted fashion they are likely to take the opposite view.”¹⁹⁰

The practice of the Nile riparians corroborates this observation. Indeed, the positions adopted by these states regarding the status of treaties contracted during the colonial era, especially those relating to the utilization of the Nile River, demonstrates the disconnect between the theory and practice of state succession. As they gained independence, the Nile riparians adopted a broad spectrum of positions that reflected their hydrological interests.¹⁹¹ None of these positions can be neatly categorized as falling within either of the two aforementioned theories of state succession. Rather, policies drew on elements

¹⁸⁶ Craven, *supra* note 183, at 149.

¹⁸⁷ Makonnen, *supra* note 174, at 105.

¹⁸⁸ *See id.*

¹⁸⁹ A.P. Lester, *State Succession to Treaties in the Commonwealth*, 12 INT’L & COMP. L. Q. 475, 479–80 (1963).

¹⁹⁰ D.P. O’Connell, *Reflections on the State Succession Convention*, 39 ZEITSCHRIFT FÜR AUSLÄNDISCHES ÖFFENTLICHES RECHT UND VÖLKERRECHT 725, 738 (1979), available at http://www.zaoerv.de/39_1979/39_1979_4_a_725_739.pdf.

¹⁹¹ *See* Yimer Fisseha, *State Succession and the Legal Status of International Rivers*, in THE LEGAL REGIME OF INTERNATIONAL RIVERS AND LAKES 189 (Ralph Zacklin & Lucius Caflisch eds., 1981).

of both theories and were essentially designed to give the governments of these newly independent states the flexibility to evaluate the contractual relations inherited from former colonial masters and to determine which of these treaties would devolve onto them.

The most noteworthy policy position adopted by a Nile riparian regarding state succession to treaties came from Tanzania, which formulated what came to be known as the Nyerere Doctrine.¹⁹² Named after President Julius Nyerere, the doctrine resembles the *tabula rasa* theory in many respects, but departs from it in some of its features.¹⁹³ This doctrine was formulated in a letter from the Prime Minister of Tanzania (then called Tanganyika) to the Secretary General of the United Nations, the relevant sections of which state:

As regards bilateral treaties validly concluded by the United Kingdom on behalf of the territory of Tanganyika or validly applied or extended by the former to the territory of the latter, the Government of Tanganyika is willing to continue to apply within its territory, on a basis of reciprocity, the terms of all such treaties for a period of two years from the date of independence (i.e., until 8 December 1963) unless abrogated or modified earlier by mutual consent. At the expiry of that period, the Government of Tanganyika will regard such of these treaties which could not by the application of the rules of customary international law be regarded as otherwise surviving, as having terminated.

It is the earnest hope of the Government of Tanganyika that during the aforementioned period of two years, the normal processes of diplomatic negotiations will enable it to reach satisfactory accord with the States concerned upon the possibility of the continuance or modification of such treaties.¹⁹⁴

Clearly, this was a repudiation of the universal succession theory. But it was not an endorsement of the *tabula rasa* approach either. Rather, it was a policy that granted Tanganyika the broadest measure of discretion to determine those treaty obligations that it would accept, those it would modify, and those it would elect to revoke. The Nyerere Doctrine has been adopted by almost all Eastern African countries, including Burundi, Kenya, Malawi, and Uganda, but in a manner to meet their particular situations.¹⁹⁵

¹⁹² Makonnen, *supra* note 174, at 121.

¹⁹³ See Makonnen, *supra* note 176, at 121–48.

¹⁹⁴ U.N. SECRETARIAT, UNITED NATIONS LEGISLATIVE SERIES, MATERIALS ON SUCCESSION OF STATES, at 177, U.N. Doc. ST/LEG/SER.B/14, U.N. Sales No. E/F.68.V.5 (1968).

¹⁹⁵ Makonnen, *supra* note 176, at 136.

These positions inevitably impacted the legal regime regulating the use of the Nile River.¹⁹⁶ Consistent with the Nyerere Doctrine, the Government of Tanganyika addressed identical diplomatic notes to Britain, Egypt, and Sudan on July 4, 1962, declaring that it considered the 1929 Nile Waters Agreement to have lapsed upon the independence of Tanganyika.¹⁹⁷ Kenya and Uganda, on the other hand, remained silent on the question of the validity of the 1929 Agreement and other colonial-era agreements, which led scholars to assume that both countries considered themselves bound by the 1929 Agreement.¹⁹⁸ Meanwhile, Sudan's position regarding the 1929 Agreement was marked by considerable irresolution. Prior to Sudan's independence on January 1, 1956, officials in Khartoum announced that they would consider the 1929 Agreement to have lapsed on independence in accordance with the principle of *rebus sic stantibus*.¹⁹⁹ Following independence, however, Sudan announced that, while it was not officially renouncing the agreement or disputing the rights established therein, it was calling for revisiting its provisions which it considered as being manifestly unjust.²⁰⁰ Ethiopia, which was not subject to the 1929 Agreement because it had not been a territory subject to the British Crown, issued an *Aide-Memoire* to put on the record its position regarding the utilization of the Nile waters.²⁰¹ In this document, the Ethiopian government:

reasserted and reserved now and in the future the right to take all such measures in respect of its water resources and in particular . . . those waters providing so nearly the entirety of the volume of the

¹⁹⁶ See generally Arthur Okoth-Owiro, *The Nile Treaty: State Succession and International Treaty Commitments: A Case Study of the Nile Waters Treaties*, in OCCASIONAL PAPERS EAST AFRICA NO. 9 (2004), http://www.kas.de/wf/doc/kas_6306-544-1-30.pdf.

¹⁹⁷ *Id.* at 37.

¹⁹⁸ BONAYA ADHI GODANA, *AFRICA'S SHARED WATER RESOURCES: LEGAL AND INSTITUTIONAL ASPECTS OF THE NILE* 150–152 (1985). It should be recalled here that, as it relates to Uganda, the 1949 Owen Falls Dam Agreement, which continued to be implemented following Uganda's independence and has been renewed and reaffirmed in 1991, had been predicated on the 1929 Nile Waters Agreement. See *supra* Part II. Kenya's position remained unchanged until, in 2003, when its parliament announced that it was repudiating the 1929 Agreement. See Knobelsdorf, *supra* note 97, at 633.

¹⁹⁹ GODANA, *supra* note 198, at 144–45. See generally Malgosia Fitzmaurice & Olufemi Elias, *Contemporary Issues in The Law of Treaties* 173–200 (2005); Paul Reuter, *Introduction to the Law of Treaties* 188–93 (1995); Athanassios Vamvoukos, *Termination of Treaties in International Law: The Doctrine of Rebus Sic Stantibus and Desuetude* (1985); Oliver J. Lissitzyn, *Treaties and Changed Circumstances (Rebus Sic Stantibus)*, 61 AM. J. INT'L L. 895 (1967), on the principle of *rebus sic stantibus*, otherwise known as the "the fundamental change of circumstances."

²⁰⁰ GODANA, *supra* note 198, at 145. As discussed above in Part II, the 1959 Nile Waters Agreement is wholly predicated on the 1929 Agreement. Indeed, both Egypt and the Sudan agreed that the 1929 Agreement had been a partial framework for the utilization of the Nile waters, and that the 1959 Agreement was designed to provide a holistic framework for the joint use of the river's resources by both countries. See *supra* Part II.

²⁰¹ Fisseha, *supra* note 191, at 189.

Nile, whatever may be the measure of utilization of such waters sought by recipient States situated along the course of the river.²⁰²

Finally, reflecting its precarious hydrological position, Egypt consistently argued that all Nile waters agreements, including the 1929 Nile Agreement, devolved onto the riparian states following their independence.²⁰³

The controversies, confusion, and uncertainty surrounding the status of the Nile waters agreements demonstrates the difficulty of discerning consistent patterns of state practice from which a coherent *lex lata* on state succession to treaties can be formulated. It was against this background, and in the midst of the decolonization tsunami of the mid-1960's, that the International Law Commission drafted what was to become the 1978 Vienna Convention.

C. *The 1978 Vienna Convention on State Succession in Respect of Treaties*

Cognizant of the cataclysmic changes occurring in the structure of international relations, on December 18, 1961 the UN General Assembly instructed the International Law Commission (ILC) “to include on its priority list the topic of succession of States and Governments.”²⁰⁴ In its following session, the General Assembly amended its instructions slightly by requesting that while considering the question of state succession the ILC should give “appropriate reference to the views of States which have achieved independence since the Second World War.”²⁰⁵ This focus on the process of decolonization, which reflected the political environment of the times,²⁰⁶ was

²⁰² *Id.*

²⁰³ Godana, *supra* note 198, at 143–44.

²⁰⁴ G.A. Res. 1686 (XVI), U.N. GAOR, 16th Sess., Supp. No. 17, U.N. Doc. A/5100, at 62 (Dec. 18, 1961).

²⁰⁵ G.A. Res. 1765 (XVII), U.N. GAOR, 17th Sess., Supp. No. 17, U.N. Doc. A/5217, at 65 (Nov. 20, 1962).

²⁰⁶ One author noted:

As a result of decolonization and the emergence of former colonies as newly independent states following the Second World War, the international community grew concerned over the lack of a formal agreement on treaty succession. In response to this concern, the United Nations General Assembly directed the International Law Commission (ILC) to study the matter. The result was the *Treaty Succession Convention*, the purpose of which was to codify customary law and further develop the law of treaty succession.

Diba B. Majzub, *Does Secession Mean Succession? The International Law of Treaty Succession and an Independent Québec*, 24 *QUEEN'S L.J.* 411, 424–25 (1999).

to become the hallmark of the draft articles prepared by the ILC which evolved into the 1978 Convention.²⁰⁷

Articles 1 and 3 of the 1978 Convention limit its scope to the impact of state succession on treaties contracted between states.²⁰⁸ This means that agreements concluded between states and other subjects of international law, such as international organizations, are beyond the purview of the 1978 Convention. Similarly, the 1978 Convention does not examine the effects that a change of government has on international treaties.²⁰⁹

1. *The Structure of the 1978 Convention*

The 1978 Convention is predicated on a *summa divisio* that distinguishes between, on one side, states born out of the process of decolonization and, on the other side, states emerging from non-colonial settings.²¹⁰ The Soviet delegate at the Vienna Conference on Succession of States in Respect of Treaties expressed this basic structural feature of the convention succinctly: “The entire draft convention had been based on the premise that there were only two alternatives: either a State was a newly independent State or it was not.”²¹¹ As discussed above,²¹² a “newly independent state” denotes a category of successor states that were, prior to independence, a dependency of a predecessor state that was responsible for the international relations of that successor state.²¹³ The term “dependency” was intended as a catchall phrase to refer to all forms of colonial relationships including colonies, U.N. trusteeships, League of Nations mandates, and protectorates.²¹⁴

²⁰⁷ See CRAVEN, *supra* note 164, at 93–206, for an analysis and overview of discussions in the ILC. The 1978 Convention was adopted on August 23, 1978, and entered into force on November 6, 1996. As of 2009, the convention has 22 State parties and 19 signatories. 3 SECRETARIAT, MULTILATERAL TREATIES DEPOSITED WITH THE SECRETARY GENERAL: STATUS AS AT 1 APRIL 2009, at 541, U.N. Doc. ST/LEG/SER.E/26, U.N. Sales No. E.09.V.3 (2009).

²⁰⁸ 1978 Vienna Convention, *supra* note 156, arts. 1, 3.

²⁰⁹ *Commentaries on the Draft Articles on Succession of States in Respect of Treaties*, [1974] 2 Y.B. INT'L L. COMM'N, 174–75, U.N. Doc. A/CN.4/SER.A/1974/Add.1 (Part 1), U.N. Sales No. E.75.V.7 (Part 1) [hereinafter ILC Commentaries].

²¹⁰ 1978 Vienna Convention, *supra* note 156, art. 16.

²¹¹ 2 INT'L L. COMM., UNITED NATIONS CONFERENCE ON SUCCESSION OF STATES IN RESPECT OF TREATIES: OFFICIAL RECORDS, at 59, para. 23, U.N. Doc. A/Conf.80/16/Add.1, U.N. Sales No. E.79.V.9 (1979).

²¹² See *supra* Part III.A.

²¹³ 1978 Vienna Convention, *supra* note 156, art. 2(f).

²¹⁴ ILC Commentaries, *supra* note 209, at 176.

In relation to treaties contracted by colonial powers on behalf of these dependent territories, the 1978 Convention adopted a general rule that approximates the *tabula rasa* theory. The relevant provision of the convention states: “A newly independent State is not bound to maintain in force, or to become a party to, any treaty by reason only of the fact that at the date of the succession of States the treaty was in force in respect of the territory to which succession of States relates.”²¹⁵

The rationale for distinguishing decolonization from other state-creating processes was two-fold. First, despite lacking an international legal personality and being under the tutelage of a metropole, colonies were considered to enjoy a standing that is separate and distinct from their administering power.²¹⁶ This led to the conclusion that treaties contracted by the latter should not *ipso jure* become binding upon newly independent States.²¹⁷ Second, the international community could not ignore the seismic impact that decolonization had on

²¹⁵ 1978 Vienna Convention, *supra* note 156, art. 16. In its commentary on this provision, the ILC clarified the implications of this provision, and how it differed from an extreme version of the *tabula rasa* theory that would have called for the full renunciation of treaties contracted by the predecessor state’s treaties on behalf of the newly independent state:

The metaphor of the clean slate is a convenient way of expressing the basic concept that a newly independent State begins its international life free from any *obligation* to continue in force treaties previously applicable with respect to its territory simply by reason of that fact. But even when that basic concept is accepted, the metaphor appears in light of existing State practice to be at once too broad and too categoric. It is too broad in that it suggests that, so far as concerns the newly independent States, the prior treaties are wholly expunged and are without any relevance to its territory. The very fact that prior treaties are often continued or renewed indicated that the clean slate metaphor does not express the whole truth. The metaphor is too categoric in that it does not make clear whether it means only that a newly independent State is not *bound* to recognize any of its predecessor’s treaties as applicable in its relations with other States, or whether it means also that a newly independent State is not *entitled* to claim any right to be or become a party to any of its predecessor’s treaties. As already pointed out, a newly independent State may have a clean slate in regard to any *obligation* to continue to be bound by its predecessor’s treaties without it necessarily following that the new independent State is without any *right* to establish itself as a party to them.

See id. at 212.

²¹⁶ The Declaration on Principles of International Law Concerning Friendly Relations and Co-operation Among States in Accordance with the Charter of the United Nations echoed this sentiment when it affirmed that the right to self-determination was predicated on the fact that “[t]he territory of a colony or other Non-Self-Governing Territory has, under the Charter, a status separate and distinct from the territory of the State administering it.” G.A. Res. 2625 (XXV), U.N. GAOR, 25th Sess., Supp. No. 28, U.N. Doc. A/8082, at 124 (Oct. 24, 1970).

²¹⁷ Andrew M. Beato, *Newly Independent And Separating States’ Succession to Treaties: Considerations on the Hybrid Dependency of the Republics of the Former Soviet Union*, 9 AM. U. INT’L L. REV. 525, 533–35 (1994).

global politics: “For the first time in history, international law contained a rule granting a right to some communities, those which qualified as ‘peoples,’ to create their own independent States.”²¹⁸ The uniqueness of decolonization and the need to recognize the special status of former colonies was stressed by numerous delegations while negotiating the 1978 Convention.²¹⁹

Having applied a version of the *tabula rasa* theory to former colonies, the 1978 Convention then moved to considering the status of treaties inherited by states emerging from all the other possible scenarios by which a state can be created. The relevant provisions of the convention appear in Part IV, “Uniting and Separation of States.”²²⁰ This part covers an innumerable variety of political situations that can lead to the birth or death of a state or the reorganization of its territory. These include the creation of a new state from the unification of two or more states,²²¹ the emergence of one or more successor states from the dissolution of a union,²²² and the separation of part of a state to form an independent successor state whether or not the predecessor state continues to exist.²²³

From its survey of state practice, the ILC realized that history and political ingenuity had produced a number of possible forms and shapes for the uniting and separation of states.²²⁴ The ILC, therefore, elected to disregard these variations and designed a rule of succession that would apply uniformly to all successor states born out of any of these processes:²²⁵

²¹⁸ Marcelo G. Kohen, *Introduction to SECESSION: INTERNATIONAL LAW PERSPECTIVES* 1, 1 (Marcelo G. Kohen ed. 2012).

²¹⁹ For example, the representative of Sierra Leone expressed the opinion that “the process of decolonization could not be equated to the process of separation of States which were already independent. Those were two quite different processes and to equate them would be to deny the success of decolonization.” Conference on Succession of States, *supra* note 211, at 68. Likewise, the delegate from Austria declared that, “[h]is delegation understood the priority given by the International Law Commission to the ‘clean slate’ principle with respect to newly independent States: it was justified by the particular historical situation in which those countries had been created.” Conference on Succession of States, *supra* note 211, at 62.

²²⁰ 1978 Vienna Convention, *supra* note 156, Part IV.

²²¹ *Id.* art. 31.

²²² *Id.* art. 34.

²²³ *Id.* arts. 34–35.

²²⁴ ILC Commentaries, *supra* note 209, at 253.

²²⁵ Thus, in relation to the creation of new States by the uniting of a number of predecessor States, the ILC stated:

The succession of States envisaged in the present articles does not take into account the particular form of the internal constitutional organization adopted by the successor State. The uniting may lead to a wholly unitary State, to a federation or to any form of constitutional arrangement. In other words, the degree of separate identity retained by the original States after their uniting,

Although the Commission explicitly applied the ‘clean slate’ principle to problems of succession arising in respect of newly independent States, it departed significantly from that approach for problems of succession in respect of the uniting or separating of States. The Convention prescribes a principle of *ipso jure* continuity of treaties.²²⁶

The justification for this doctrinal *volte-face* was explained by Sir Francis Vallat, the last ILC Special Rapporteur on the subject, during negotiations on the 1978 Convention. First, it was assumed that a legal nexus continued to exist between the international legal personality of the successor State and the territory that it inherited from the predecessor State.²²⁷ Second, a rule of treaty continuity was adopted in the interest of the stability of international contractual relations and to avoid undue disruption to the foundational principle of the sanctity of treaties.²²⁸

2. *The Status of South Sudan and the Deleted Draft Article 33(3) of the 1978 Convention*

Where does South Sudan fit in this dichotomy established by the 1978 Convention? Is the world’s newest state a “newly independent State” within the meaning of the 1978 Convention, or is it an example of a successor State created by the separation of part of a state? Answering these questions is indispensable to determining the rules of state succession to treaties that are applicable to South Sudan.

First, it is important to establish the relevant terminology. The Machakos Protocol described the choice available to the southern Sudanese as one between either remaining in a unified Sudan or secession.²²⁹ On the other hand, James Crawford, an eminent authority on questions of statehood, would

within the constitution of the successor State, is irrelevant for the operation of the provision set forth in these articles.

Id. Similarly, the ILC refused to distinguish between the various processes of dissolution of unions, dismemberment of states, secession, and/or the separation of parts of a state, “[a]fter studying the modern practice, however, the Commission concluded that the almost infinite variety of constituted relationships and of kinds of “union” render it inappropriate to make this element the basic test for determining whether treaties continue in force upon a dissolution of a state. *Id.* at 265.

²²⁶ Matthew G. Maloney, *Succession of States in Respect of Treaties: The Vienna Convention of 1978*, 19 VA. J. INT’L L. 885, 908 (1979).

²²⁷ 2 INT’L L. COMM., *supra* note 211, at 107.

²²⁸ *See id.* at 104.

²²⁹ The Machakos Protocol, *supra* note 15, at 308.

categorize the independence of South Sudan as an act of devolution: “The key difference between secession and devolution is that the former is essentially a unilateral process, whereas the latter is bilateral and consensual.”²³⁰ This raises a second question: was South Sudan’s independence from the Sudan consensual? According to Jure Vidmar, with whom this author agrees, yes.²³¹ Despite emerging out of a deadly civil war and coming as the culmination of a long struggle against discrimination and marginalization, by signing the CPA, Sudan approved the creation of South Sudan: “South Sudan did not become an independent State until the central government formally agreed to hold a binding referendum on independence at which secession was supported by an overwhelming majority. . . . South Sudan is thus a rare example of a right to independence being exercised under domestic constitutional provisions.”²³²

Sudan’s consent does not, however, settle the question of whether South Sudan is a newly independent State or a separating part of a state for the purposes of the 1978 Convention. After all, in most of the undisputedly colonial cases of former African and Asian possessions of European powers “the progress to self-government or independence was consensual.”²³³ As a state created through the application of the right to self-determination, which was exercised through a popular referendum, South Sudan resembles former African colonies in some respects. On the other hand, the relationship between Sudan and South Sudan can hardly be characterized as a ‘dependency’ akin to what had prevailed between European powers and their colonial possessions. The CPA and the 2005 Interim Constitution of the Sudan granted South Sudan considerable autonomy within the Republic of the Sudan. The Government of Southern Sudan exercised broad powers in the territories under its jurisdiction,²³⁴ southern representatives occupied high executive offices in the

²³⁰ James Crawford, *State Practice and International Law in Relation to Secession*, 69 BRIT. Y.B. INT’L L. 85, 86 (1998).

²³¹ See Jure Vidmar, *South Sudan and the International Legal Framework Governing the Emergence and Delimitation of States*, 47 TEX. INT’L L. J. 541, 558 (2012).

²³² *Id.* at 553.

²³³ Crawford, *supra* note 230, at 89.

²³⁴ Schedule (B) of the Interim Constitution of Southern Sudan, which was adopted after the signing of the CPA between the Government of the Sudan and the SPLM/A, listed the following powers among those exercised by the Government of Southern Sudan in territories under its jurisdiction: organizing military, security, and police forces; taxation; budgetary matters; appointing civil servants; and overseeing matters of health, education, and welfare. INTERIM CONSTITUTION Jan. 9, 2005, Schedule (B) (S. Sudan), available at <http://www.unhcr.org/refworld/docid/4ba749762.html>.

central government,²³⁵ and held thirty percent of the seats of the transitional national legislature.²³⁶

In short, South Sudan sits uneasily in a twilight zone between the two general categories constructed by the 1978 Convention.²³⁷ It is neither a former dependency “in the classical sense of ‘salt-water’ colonialism,”²³⁸ nor is it clear case of State-creation through secession.

Remarkably, the ILC had envisioned a situation exactly like that of South Sudan. Draft Article 33 that was prepared by the Commission, which became Article 34 of the 1978 Convention, included a third paragraph that read:

Notwithstanding paragraph 1, if a part of the territory of a State separates from it and becomes a State in circumstances which are essentially of the same character as those existing in the case of the formation of a newly independent State, the successor State shall be regarded for the purposes of the present articles in all respects as a newly independent State.²³⁹

When draft Article 33 and this sub-paragraph came up for discussion during the negotiations over the 1978 Convention, what ensued turned out to be one of the most contentious debates of the conference. The Swiss and French delegations proposed revisiting draft Article 33 by applying the *tabula rasa* theory to all states, including those created by the uniting or separation of states.²⁴⁰ In essence, Switzerland and France challenged the fundamental

²³⁵ According to Article 62(1) of the Interim Constitution of Southern Sudan, one of the two Vice-Presidents of the united Sudan was from Southern Sudan. *Id.* art. 62(1). In addition, the constitution stipulated that thirty percent of cabinet seats were to be assigned to Southern Sudan in the national unity government formed after the signing of the CPA. *Id.* art. 80.

²³⁶ *Id.* art. 117(1).

²³⁷ One scholar, who examined the cases of Bangladesh and the former Soviet Republics, has also argued that these two situations bear features of both newly independent States and the separation of parts of a state, and argued for the recognition of a third hybrid category that is marked by “internal dependency.” Andrew Beato, *Newly Independent and Separating States’ Succession to Treaties: Considerations on the Hybrid Dependency of the Republics of the Former Soviet Union*, 9 AM. U. J. INT’L L. & POL’Y 525, 546, 555 (1994).

²³⁸ Vidmar, *supra* note 231, at 543.

²³⁹ ILC Commentaries, *supra* note 209, at 260.

²⁴⁰ As the Swiss representative explained:

The essential part of the proposal by the French and Swiss delegations was the deletion of subparagraph (a) of article 33, paragraph 1, which imposed on the successor State the continuity of treaties concluded by the predecessor State, and of article 33, paragraph 3, which made it possible to assimilate certain cases of separation to the case of formation of a newly independent State—a provision that would be pointless once a single régime had been established.

2 INT’L L. COMM., *supra* note 211, at 54.

structure of the 1978 Convention by distinguishing between former colonies and all other states.²⁴¹ The rationale for this proposal was multifaceted. First, it was argued that, in applying the rule of continuity to states emerging from non-colonial contexts, the ILC “was not simply reflecting the present state of the law, but was proposing progressive development.”²⁴² In doing so, however, the ILC failed to adequately justify the universal application of the continuity of treaties rule to the infinite variety of cases of dissolution, dismemberment, and separation of parts of states.²⁴³ Second, the Swiss delegate highlighted that the ILC had not “proposed an objective legal criterion for distinguishing the newly independent State, in that particular sense, from other new States.”²⁴⁴ It was the absence of this clear distinguishing criterion that had compelled the ILC to introduce subparagraph 3, quoted above, to cover intermediate or controversial cases.²⁴⁵ The Swiss and French delegates noted that this “might raise insurmountable interpretation difficulties” as to the determination of the applicable rule in the various cases of State-creation.²⁴⁶ Third, anticipating that other states would object to making the *tabula rasa* theory generally applicable to all new States because that would cause major disruptions to international treaty relations, the Swiss delegate stated:

[I]n reality there was no such danger and that where there was a common interest, the two States would not fail to reach agreement in order to ensure the continuity of the treaty. Indeed, the practice of decolonization showed that in spite of the “clean slate” principle, most of the treaties concluded by the colonial Powers with third States had been maintained in force by agreement between those third States and the newly independent State.²⁴⁷

While some delegations, including Greece,²⁴⁸ Turkey,²⁴⁹ and Mexico²⁵⁰ supported this amendment, the vast majority of States rejected it.²⁵¹ For many States, the distinction constructed by the ILC between newly independent

²⁴¹ France stated unequivocally what it “had against it, was that it treated differently two identical legal situations . . . Why should a State which seceded not be considered a newly independent State?” *Id.* at 55.

²⁴² *Id.* at 53.

²⁴³ *Id.*

²⁴⁴ *Id.*

²⁴⁵ *Id.*

²⁴⁶ *Id.*

²⁴⁷ *Id.*

²⁴⁸ *Id.* at 60.

²⁴⁹ *Id.* at 58.

²⁵⁰ *Id.* at 56.

²⁵¹ *Id.* at 57–60.

States and States emerging out of the uniting or separation of States was indispensable for the stability of international relations and the security of contractual relations. The United States, for example, emphasized that “rights freely accorded under a treaty should not be cut off because one State united with another, under Article 30, or separated into two or more parts, under Article 33.”²⁵² Similarly, the United Kingdom argued that the Franco-Swiss proposal would “result in further destabilizing international treaty relations,” and warned that it would “encourage secessionist movements;”²⁵³ an argument which resonated with many delegations.²⁵⁴ For the vast majority of delegations, however, it was the unique nature of the colonial experience that necessitated the special treatment of formerly dependent territories and which justified freeing those newly independent states from treaties contracted by their colonial masters.²⁵⁵ This sentiment was unanimously expressed by African countries, and reiterated by delegations from various regions. Senegal, for example, asserted that “[w]hat put newly independent States into a category of their own was that they had emerged as a result of the decolonization process; States having separated themselves from larger territories were entirely different, and it would be totally illogical to deny that difference.”²⁵⁶ Mali,²⁵⁷ Kenya,²⁵⁸ Egypt,²⁵⁹ and Sierra Leone²⁶⁰ all espoused similar positions. Among the European countries emphatically supporting the structure of the 1978 Convention was Italy, which argued that “international law was based not only on logic but on history, political realities, and the requirements of international life. It was impossible to claim that when two States separated . . . they were beginning a completely new existence like those emerging from decolonization.”²⁶¹ Other non-African states that rejected the Franco-Swiss proposal included the Soviet Union,²⁶² Belorussia,²⁶³ Cyprus,²⁶⁴ Japan,²⁶⁵ Panama,²⁶⁶ Denmark,²⁶⁷ and Brazil.²⁶⁸

²⁵² *Id.* at 58.

²⁵³ *Id.* at 59–60.

²⁵⁴ See *id.* at 104, 106–07 for the statements of the Philippines, Ghana, Côte d’Ivoire, and Zaire, expressing support for the U.K.’s argument.

²⁵⁵ *Id.* at 104–07.

²⁵⁶ *Id.* at 61.

²⁵⁷ *Id.* at 62.

²⁵⁸ *Id.* at 65–66.

²⁵⁹ *Id.* at 68.

²⁶⁰ *Id.*

²⁶¹ *Id.* at 61.

²⁶² *Id.* at 59.

²⁶³ *Id.* at 57–58.

²⁶⁴ *Id.* at 60.

As support grew for the ILC's draft of the 1978 Convention, the debate shifted to whether it was necessary to retain subparagraph 3 to cover those intermediate cases, like South Sudan, that did not fully qualify as either a newly independent state or uniting and separating state.²⁶⁹ A minority of delegations argued in favor of preserving this provision. Citing its own experience, Singapore clarified that:

[A]t the time of decolonization in 1963, Singapore had united with Malaysia, from which it had separated two years later. Up to 1965, when it became an independent State, Singapore had never been empowered to conclude treaties. . . . [T]he wording of paragraph 3 of draft article 33 where it referred to "circumstances which are essentially of the same character as those existing in the case of the formation of a newly independent State," to be sufficiently flexible to cover the case of Singapore.²⁷⁰

Israel also supported the proposed subparagraph 3 and suggested that it could apply to "cases of 'revolutionary' separation of part of the territory of a State, involving a clean break, whereas paragraph 1 covered cases of 'evolutionary' separation."²⁷¹ Despite these appeals, most delegations favored the deletion of subparagraph 3. For these states, the principal difficulty with this provision lay with its indeterminacy and the lack of clarity regarding the characteristics of cases falling within its ambit.²⁷² As the representative of the Netherlands stated: "Paragraph 3 was superfluous . . . it established an undesirable third category of States which fell outside the definitions established in article 2 [of the draft articles] and would give rise to difficulties." As the negotiations proceeded, more delegations expressed support for deleting subparagraph 3 by mostly citing the confusion and uncertainty that this provision would cause.²⁷³

²⁶⁵ *Id.*

²⁶⁶ *Id.* at 61–62.

²⁶⁷ *Id.* at 63.

²⁶⁸ *Id.* at 64.

²⁶⁹ *Id.* at 65.

²⁷⁰ *Id.* at 65. The delegation of Suriname also referred to its experience and expressed a similar sentiment as that of Singapore. *See id.* at 106.

²⁷¹ *Id.* at 64.

²⁷² *See id.* at 65.

²⁷³ *See id.* at 106–08, for the statements of Senegal, the Soviet Union, Italy, Yemen, Tanzania, Qatar, Malaysia, and Mali expressing support for the deletion of subparagraph 3.

After nine sessions of negotiations on Article 33, the article and the proposed amendments were put to a vote.²⁷⁴ The Franco-Swiss proposal to make the *tabula rasa* theory the generally applicable rule throughout the convention was defeated by 69 votes to 7 with 9 abstentions, while the deletion of subparagraph 3 was approved by 52 votes to 9 with 22 abstentions.²⁷⁵ “[T]he effect of the Conference’s decision to remove the qualifying clause within what became Article 34 (relating to cases ‘analogous’ to decolonization) was to concretize a sharp distinction between the colonial experience on the one hand (in which the principle of self-determination would be operative) and other cases of secession.”²⁷⁶

Therefore, according to the 1978 Convention, regardless of the fact that it had gained independence through the exercise of the right to self-determination, South Sudan is a case of secession to which the rule of treaty continuity applied. This means that, assuming that Article 34 is the applicable law, upon its birth on July 9, 2011, the Republic of South Sudan inherited the treaty obligations contracted by the Republic of Sudan, including the 1959 Nile Waters Agreement.

3. *Does the 1978 Convention Express Customary International Law?*

This Article would have been shorter and easier to write had Sudan been a party to the 1978 Convention. Sudan, however, has signed the convention on August 23, 1978, but has yet to ratify it.²⁷⁷ This means that whether treaties contracted by Sudan have devolved onto South Sudan is a matter that can only be settled by reference to the relevant rules of customary international law. Therefore, this section will canvass recent incidents of State succession to determine whether State practice conformed to the 1978 Convention, particularly Part IV thereof, and thus confirmed the customary status of the rule of treaty continuity.

Upon its adoption, the 1978 Convention encountered a lukewarm reception. Regardless of whether they disapproved of the convention or applauded it, scholars unanimously considered it to be “an example of the progressive development of international law, rather than a codification of customary

²⁷⁴ *Id.* at 109.

²⁷⁵ *Id.*

²⁷⁶ CRAVEN, *supra* note 164, at 202.

²⁷⁷ 3 SECRETARIAT, *supra* note 207, at 541.

international law.”²⁷⁸ D.P. O’Connell, a critic of the convention, argued that the succession to treaties is “a subject altogether unsuited to the processes of codification, let alone of progressive development.”²⁷⁹ A more complimentary view applauded the ILC for its “innovation and courage,” and argued that the final text reflected “an altogether sensible compromise between conflicting interests.”²⁸⁰ Eighteen years later when the convention entered into force, scholars continued to consider it an unreliable “guide to this area of international law,”²⁸¹ and dismissed it as “little more than an interesting historical document.”²⁸² Less disparagingly, Oscar Schachter cited the views of the U.S. State Department Legal Adviser who considered the 1978 Convention to be declarative of custom to evince that the convention had indeed influenced state policies.²⁸³

One particularly recurring critique of the 1978 Convention centers on its structure that gave pride of place to the process of decolonization and failed to differentiate between the innumerable political processes through which States are born.²⁸⁴ This implied that the ILC “had become obsessed with a transient form of political change and had disregarded the obvious possibility that ‘future’ cases of succession would assume a very different character. . . . [A]s a consequence, the frame and orientation of the Convention appeared largely useless.”²⁸⁵ In short, for many scholars, the 1978 Convention is condemned to be a prisoner of the historical era in which it was authored, a relic of decolonization.

Nonetheless, the grounds on which to appraise the 1978 Convention and examine whether its principles are reflective of customary law is the degree to which it influenced state behavior. The trials and tribulations of the 1990s that ushered in a wave of new states provide the opportunity to examine the impact of the convention.²⁸⁶ The implosions of the Soviet Union and Yugoslavia, the

²⁷⁸ ANTHONY AUST, *MODERN TREATY LAW AND PRACTICE* 369 (2007).

²⁷⁹ O’Connell, *supra* note 190, at 726.

²⁸⁰ Maloney, *supra* note 226, at 913–14.

²⁸¹ DAVID BEDERMAN, *INTERNATIONAL LAW FRAMEWORKS* 60 (2010).

²⁸² ANTHONY AUST, *VIENNA CONVENTION ON SUCCESSION OF STATES IN RESPECT OF TREATIES* 2 (3d ed. 2009), available at http://untreaty.un.org/cod/avl/pdf/ha/vcssrt/vcssrt_e.pdf.

²⁸³ Oscar Schachter, *State Succession: The Once and Future Law*, 33 VA. J. INT’L L. 253, 257 (1993).

²⁸⁴ For example, in Ian Brownlie’s view, “the distinction between a secession [referring to a newly independent State] and the dissolution of federations and unions is unacceptable, both as a proposition of law and as a matter of principle.” IAN BROWNLIE, *PRINCIPLES OF INTERNATIONAL LAW* 668–69 (4th ed. 1990).

²⁸⁵ CRAVEN, *supra* note 164, at 16.

²⁸⁶ AUST, *supra* note 278, at 369.

unifications of Germany and Yemen, the resurrection of the Baltic States, and the death of Czechoslovakia provide ample material to determine whether the rules and principles enshrined in the convention informed state practice and policy.²⁸⁷

In theory, these latest entrants into the international club of States fall within the category of “Uniting and Separation of States” covered by Part IV of the 1978 Convention.²⁸⁸ In other words, the applicable rule would be the devolution of the predecessor state’s treaties onto the successor State(s).²⁸⁹ This would apply regardless of whether the successor state was born out of the creation or dissolution of a union, the secession or separation of part of a state, or the absorption of one state by another.²⁹⁰

Starting with the demise of the Soviet Union, on December 8, 1991, it was declared that “the Union of Soviet Socialist Republics as a subject of international law and a geopolitical reality no longer exists.”²⁹¹ Shortly thereafter, the former Soviet republics announced that they consider themselves “equal successors to the rights and obligations of the former USSR.”²⁹² Prima facie this suggests that the continuity of treaty obligations enshrined in Article 34 of the 1978 Convention was applied. Closer inspection, however, reveals that the devolution of Soviet treaty obligations did not proceed so neatly. Primarily, of all the successor States, only the Russian Federation succeeded the Soviet Union to its Permanent Seat on the U.N.

²⁸⁷ See *id.* at 369–83; Karl Zemanek, *The Legal Foundations of the International System: General Course on Public International Law*, 266 RECUEIL DES COURS 66, 84 (1997).

²⁸⁸ See generally 1978 Vienna Convention, *supra* note 156, Part IV.

²⁸⁹ *Id.* arts. 31, 34.

²⁹⁰ *Id.*

²⁹¹ Agreement Establishing the Commonwealth of Independent States Belr.-Russ.-Ukr., Dec. 8–21, 1991, 31 I.L.M. 138, 143 [hereinafter Agreement Establishing the Commonwealth]; see also Sergei Voitovich, *The Commonwealth of Independent States: An Emerging Institutional Model*, 4 EURO. J. INT’L L. 403, 404 (1993).

²⁹² Tarja Långström, *The Dissolution of the Soviet Union in the Light of the 1978 Vienna Convention on Succession of States in Respect of Treaties*, in LA SUCCESSION D’ÉTATS: LA CODIFICATION À L’ÉPREUVE DES FAITS / STATE SUCCESSION: CODIFICATION TESTED AGAINST THE FACTS, 723, 743 (Pierre Michel Eisemann & Martti Koskeniemi eds., 2000). Indeed, as one expert explained in a firsthand account of the process of the dissolution of the USSR:

[O]n December 4, 1991, before the dissolution of the USSR, eight republics signed (in fact all of the former Soviet republics were invited to sign) a Treaty on Succession to the USSR’s State Debt and Assets. On December 30, 1991 the heads of the CIS countries agreed that each had a right to a fixed and just share of the properties of the former USSR abroad.

Rein Mullerson, *New Development in the Former USSR and Yugoslavia*, 33 VA. J. INT’L L. 299, 306 (1993) (internal citations omitted).

Security Council²⁹³ and acquired the diplomatic missions of the Soviet Union.²⁹⁴ These measures were not challenged by other successor States or the international community.²⁹⁵

Second, apprehension in Western states, particularly the U.S., over the fate of the vast arsenal of Soviet weapons of mass destruction led to the conclusion of a series of legal and political arrangements to ensure successor States that inherited these weapons complied systems with the arms control agreements signed by the Soviet Union.²⁹⁶ These arrangements did not, however, treat the former Soviet republics as “equal successors” to the U.S.S.R. Rather, it was assumed that “all former Soviet republics should subscribe to the U.S.S.R.’s arms control and disarmament obligations, but that Russia should maintain control over all nuclear weapons.”²⁹⁷ Thus, the Russian Federation became a nuclear weapons state-party to the Nuclear Non-Proliferation Treaty, while other successors joined as non-nuclear weapons states.²⁹⁸

Third, the unequal treatment of the former Soviet republics extended beyond arms control. As discussed above, Article 34 of the 1978 Convention disregards the pre-independence status of successor states.²⁹⁹ All states born out of a non-colonial setting are assumed to have inherited the predecessor state’s obligations.³⁰⁰ The case of the Baltic States, however, is an example of how their status prior to their incorporation into the Soviet empire was determinative of whether or not they succeeded to Soviet treaty obligations.³⁰¹ Generally, these states did not consider themselves successors of the Soviet Union on the grounds that the Red Army illegitimately occupied their

²⁹³ Yehuda Z. Blum, *Russia Takes Over the Soviet Union’s Seat at the United Nations*, 3 EURO. J. INT’L L. 354, 360 (1992).

²⁹⁴ Långström, *supra* note 292, at 730.

²⁹⁵ Initially, Austria had expressed reservations regarding Russia’s claim to be a continuation of Soviet international legal obligations and its membership in international organizations. *See* Helmut Tichy, *Two Recent Cases of State Succession—an Austrian Perspective*, 44 AUSTRIAN J. PUB. & INT’L L. 117, 129 (1992) (observing that Austria did not explicitly recognize the Russian Federation as the a successor State to the former Soviet Union, but did welcome it “as an independent and sovereign member of the international community.”).

²⁹⁶ Agreement Establishing the Commonwealth, *supra* note 291, at 144.

²⁹⁷ Långström, *supra* note 292, at 744.

²⁹⁸ George Bunn & John Rhineland, *The Arms Control Obligations of the Former Soviet Union*, 33 VA. J. INT’L L. 323 (1993); *see also* Långström, *supra* note 292, at 745

²⁹⁹ *See supra* Part IV.C.1.

³⁰⁰ 1978 Vienna Convention, *supra* 156, art. 34.

³⁰¹ AUST, *supra* note 278, at 377–78.

territories in 1940.³⁰² These states, therefore, claimed to be merely regaining their independence after 50 years of occupation.³⁰³ Indeed, many pre-Soviet occupation agreements concluded with Western governments, including the U.S. and the U.K., were reactivated.³⁰⁴ Russia and the other former Soviet republics accepted this claim.³⁰⁵ Nonetheless, pragmatism prevailed over dogmatic doctrine. Estonia, Lithuania, and Latvia decided to continue certain multilateral and bilateral treaties applicable to their territories that were concluded by the U.S.S.R.³⁰⁶ This led one scholar to observe that “*restitutio ad integrum* after more than fifty years of being a part of another state is often more a legal fiction than a reality,” and to conclude that “[t]he rule enshrined in article 34(1) is too rigid and does not correspond to international practice. It therefore cannot be considered a customary norm.”³⁰⁷

The reunification of Germany casts further doubt over the customary status of the rule of treaty continuity enshrined in Part IV of the 1978 Convention. On October 3, 1990, the German Democratic Republic (GDR) ceased to exist as an international legal person when East Berlin and the five constitutive regions of the GDR became *Länder* of the Federal Republic of Germany (FRG).³⁰⁸ Initially, the reunification of Germany appears to be a classic case of the creation of a new state through the unification of two predecessor states, much like the creation of the United Arab Republic by the unification of Egypt and Syria in 1958.³⁰⁹ This, however, is deceiving. Actually, what occurred was the absorption of the GDR by the FRG.³¹⁰ In other words, the latter merely expanded to include the former’s territory, which ceased to enjoy independent international legal personality.³¹¹

³⁰² See generally INETA ZIEMELE, *STATE CONTINUITY AND NATIONALITY: THE BALTIC STATES AND RUSSIA*, 17–43 (2005). It is noteworthy that the 1978 Convention takes no clear position on treaties contracted by an occupying power. Article 40 thereof states: “The provisions of the present Convention shall not prejudice any question that may arise in regard to a treaty from the military occupation of a territory.” 1978 Vienna Convention, *supra* note 156, art. 40; see also ILC Commentaries, *supra* note 209, at 268.

³⁰³ AUST, *supra* note 278, at 377–78.

³⁰⁴ *Id.*

³⁰⁵ *Id.*

³⁰⁶ *Id.* at 378.

³⁰⁷ Mullerson, *supra* note 292, at 311, 316.

³⁰⁸ Frans von der Dunk & Peter Kooijmans, *The Unification of Germany and International Law*, 12 MICH. J. INT’L L. 510, 550 (1991).

³⁰⁹ See Eugene Cotran, *Some Legal Aspects of the Formation of the United Arab Republic and the United Arab States*, 8 INT’L & COMP. L.Q. 346, 347 (1959).

³¹⁰ Jochen Abr. Frowein, *Current Developments: The Reunification of Germany*, 86 AM. J. INT’L L. 152, 157 (1992).

³¹¹ ANTHONY AUST, *HANDBOOK OF INTERNATIONAL LAW*, 363 (2d ed. 2010).

In theory, Article 31 of the 1978 Convention is the applicable provision to Germany's reunification. It states: "When two or more States unite and so form one successor State, any treaty in force at the date of succession of States in respect of any of them continues in force in respect of the successor State. . . ." ³¹² As with the Soviet Union, however, practice painted a drastically different picture. In what seems to echo the Nyerere Doctrine, Article 12 of the German Unification Agreement stipulated that agreements contracted by the GDR "shall be discussed with the contracting parties concerned with a view to regulating or confirming their continued application, adjustment or expiry. . . . The united Germany shall determine its position with regard to the adoption of international treaties of the German Democratic Republic following consultations with the respective contracting parties. . . ." ³¹³ These discussions, which extended to over 135 States, led to understandings that the vast majority of the GDR's treaties lapsed upon unification. ³¹⁴ Meanwhile, the international legal personality and treaty obligations of the FRG remained unaffected by its unification with the GDR. ³¹⁵ Instead, the territorial application of these treaties merely extended to the newly absorbed territory in what scholars dubbed the "moving-boundary principle." ³¹⁶

One author explained this departure from the continuity rule by arguing that it was designed to address the creation of a new international legal personality out of the merger of two predecessor states. ³¹⁷ Germany's case, the argument goes, is distinct because it represents an accession of one state, the GDR, to another state, the FRG, which maintained its pre-accession legal personality. ³¹⁸ This is an unpersuasive argument. A fundamental feature of Part IV of the 1978 Convention is that it applies a single rule of continuity to all

³¹² 1978 Vienna Convention, *supra* note 156, art. 31.

³¹³ Treaty between the Federal Republic of Germany and the German Democratic Republic on the Establishment of German Unity (Unification Treaty) art. 12, Aug. 31, 1990 30 I.L.M. 463.

³¹⁴ Frowein, *supra* note 310, at 159.

³¹⁵ *Id.* at 157.

³¹⁶ AUST, *supra* note 278, at 374.

³¹⁷ Frowein, *supra* note 310, at 158.

³¹⁸ *Id.* Another scholar, who was also a West German diplomat, offered a similar view. It is contended that the FRG had absorbed or incorporated the GDR, which meant that the latter had disappeared as an international legal person, while the former's legal personality and existence was unaffected. "The 'moving frontier rule' is in fact a rule of State succession. Since the Federal Republic of Germany remained identical to itself after reunification there was no State succession with regard to its treaties." Huber Beemelmans, *State Succession in International Law: Remarks on Recent Theory and State Praxis*, 15 B.U. INT'L L.J. 71, 99 (1997).

forms of unifications, separations, and/or secessions.³¹⁹ The ILC commentaries on the relevant provisions confirm this:

These articles deal with a succession of States arising from the uniting in one State of two or more *States*, which had separate international personalities at the date of the succession. *They cover the case where one State merges with another State even if the international personality of the latter continues after they have united.*³²⁰

In short, the reunited Germany disregarded the 1978 Convention as it determined the fate of treaty obligations inherited from the GDR.

When it comes to state succession to treaties, the unification of Yemen is the antipode of the unification of Germany. On May 22, 1990, two UN member states, the Yemen Arab Republic and the People's Democratic Republic of Yemen, merged to create the Republic of Yemen.³²¹ Three days earlier, the foreign ministers of the two predecessor States informed the UN Secretary General that:

The Republic of Yemen will have single membership in the United Nations and [will] be bound by the provisions of the Charter. All treaties and agreements concluded between either the Yemen Arab Republic or the People's Democratic Republic of Yemen and other States and international organizations in accordance with international law which are in force on 22 May 1990 will remain in effect As concerns the treaties concluded prior to their union by the Yemen Arab Republic or the People's Democratic Republic of Yemen, the Republic of Yemen (as now united) is accordingly to be considered as a party to those treaties as from the date when one of these States first became a party to those treaties.³²²

As with Yemen, the principle of the continuity of treaty obligations was applied in the case of Czechoslovakia.³²³ On December 31, 1991, the Czech Republic and Slovakia declared independence and announced that, in accordance with Article 34 of the 1978 Convention, they were both assuming

³¹⁹ 1978 Vienna Convention, *supra* note 156, arts. 31–38.

³²⁰ ILC Commentaries, *supra* note 209, at 253 (emphasis added).

³²¹ See generally Charles Dunbar, *The Unification of Yemen: Process, Politics, and Prospects*, 46 MIDDLE E. J. 456 (1992).

³²² 2 U.N. SECRETARIAT, MULTILATERAL TREATIES DEPOSITED WITH THE SECRETARY GENERAL: STATUS AS AT 1 APRIL 2009, at LII–LIII, U.N. Doc. ST/LEG/SER.E/26, U.N. Sales No. E.09.V.3 (2009).

³²³ AUST, *supra* note 278, at 381–82.

the treaty obligations of Czechoslovakia.³²⁴ This extended to bilateral and multilateral treaties and all reservations, declarations, and understandings lodged by Czechoslovakia to these instruments.³²⁵ Also, in accordance with the 1978 Convention, both successor states agreed that treaties solely applicable to the territory of one of them shall be exclusively binding on that successor state.³²⁶ The only treaties that were reviewed or revisited through consultations with the relevant treaty partners were those that were contracted with other Eastern Bloc states that were inapplicable after the collapse of the Berlin Wall and the end of the Cold War.³²⁷

The dissolution of the Socialist Federal Republic of Yugoslavia (SFRY) challenged the international legal order on many levels, including state succession to treaties. To examine the legal impact of the breakup of Yugoslavia, the European Community (EC) established an Arbitration Commission, known as the Badinter Commission after its chairperson, to operate under the auspices of the EC Conference on Yugoslavia.³²⁸ The first question examined by the Badinter Commission was the nature of the unfolding conflict. On November 29, 1991, the commission declared in the first of fifteen legal opinions that the SFRY was in a process of dissolution.³²⁹ In its eighth opinion, issued on July 4, 1992, the Badinter Commission declared that the SFRY had been completely dissolved, and that it no longer existed as an international legal person.³³⁰ Much like Russia, which had declared itself to be the extension of the Soviet Union, the Federal Republic of Yugoslavia (FRY) argued that it was a continuation of the SFRY and that it continued to be bound by its treaty obligations.³³¹ This claim was rejected by the international community.³³²

³²⁴ *Id.*

³²⁵ *Id.*

³²⁶ See 1978 Vienna Convention, *supra* note 156, art. 34(1)b.

³²⁷ AUST, *supra* note 278, at 382–83.

³²⁸ STEVE TERRETT, THE DISSOLUTION OF YUGOSLAVIA AND THE BADINTER ARBITRATION COMMISSION, 119 (2000); see also Marc Weller, *Current Developments: The International Response to the Dissolution of the Socialist Federal Republic of Yugoslavia*, 86 AM. J. INT'L L. 569 (1992).

³²⁹ Conference on Yugoslavia Arbitration Commission: Opinions on Questions Arising from the Dissolution of Yugoslavia, Jan. 11–July 4, 1992, 31 I.L.M. 1488, 1490–91 (1992).

³³⁰ Roland Rich, *Recognition of States: The Collapse of Yugoslavia and the Soviet Union*, 4 EURO. J. INT'L L. 36, 54 (1993).

³³¹ Zemanek, *supra* note 287, at 81.

³³² On September 19, 1992, the U.N. Security Council adopted resolution 777 in which it declared that:

[T]he Federal Republic of Yugoslavia (Serbia and Montenegro) cannot continue automatically the membership of the former Socialist Federal Republic of Yugoslavia in the United Nations . . . [and] that the Federal Republic of Yugoslavia (Serbia and Montenegro) should apply for

While the status of the FRY remained a contentious international issue, especially as it relates to its membership in the U.N.,³³³ the question of whether the other States born out of the breakup of the SFRY had succeeded to the latter's treaty obligations was comparatively less controversial. Generally, Bosnia and Herzegovina, Croatia, Macedonia, and Slovenia operated on the assumption that the rule of treaty continuity enshrined in Part IV of the 1978 Convention reflected customary international law.³³⁴ For example, on July 1, 1992, Slovenia informed the U.N. Secretary General that:

[I]nternational treaties which had been concluded by the SFRY and which related to the Republic of Slovenia remained effective on its territory This decision was taken in consideration of customary international law and the fact that the Republic of Slovenia, as a former constituent part of the Yugoslav Federation, had granted its agreement to the ratification of the international treaties The Republic of Slovenia therefore in principle acknowledges the continuity of treaty rights and obligations under the international treaties concluded by the SFRY. . . .³³⁵

The other successor States sent similar communications to the U.N. Secretary-General,³³⁶ and informed other governments, including the United States,³³⁷ that they intended to comply with treaty obligations inherited from the SFRY. For example, in relation to the status of bilateral treaties contracted with the Czech Republic, the Foreign Ministry of Bosnia-Herzegovina declared:

membership in the United Nations and that it shall not participate in the work of the General Assembly

S.C. Res. 777, para. 1, U.N. Doc. S/RES/777 (Sept. 19, 1992).

³³³ See Yehuda Blum, *UN Membership of the "New" Yugoslavia: Continuity or Break?*, 86 AM. J. INT'L L. 830 (1992); see also Vladislav Jovanovic, *The Status of the Federal Republic of Yugoslavia in the United Nations*, 21 FORDHAM INT'L L. J. 1719 (1997); Carsten Stahn, *The Agreement on Succession Issues of the Former Socialist Republic of Yugoslavia*, 96 AM. J. INT'L L. 379 (2002).

³³⁴ Indeed, upon gaining independence, these States deposited instruments of succession to the 1978 Convention. Bosnia succeeded to the convention on July 22, 1993, Croatia on October 22, 1992, and Slovenia July 6, 1992. See 3 SECRETARIAT, *supra* note 207, at 541.

³³⁵ 2 U.N. SECRETARIAT, *supra* note 322, at XLIX.

³³⁶ See *id.* at V–LIV.

³³⁷ For example, in response to a letter from U.S. Secretary of State James Baker, the Bosnian President affirmed that his government "is ready to fulfill the treaty and other obligations of the former SFRY." Paul Williams, *The Treaty Obligations of the Successor States of the Former Soviet Union, Yugoslavia and Czechoslovakia: Do They Continue in Force?*, 23 DENV. J. INT'L L. & POL'Y 1, 28 (1994). Likewise, the President of Croatia wrote to Secretary Baker affirming that "[a]s one of the successors to former Yugoslavia, the Republic of Croatia is prepared to fulfill treaty and other obligations of the former Yugoslav state." *Id.*

[I]n conformity with the general rules of international law on succession of States and the provisions of the Vienna Convention on Succession of States in respect of Treaties, signed on August 23, 1978, considers itself, as a legal successor State of the former Socialist Federal Republic of Yugoslavia, bound by bilateral treaties concluded between former SFRY and the Czech Republic which were in force on the date of succession of States in respect to the territory of the Republic of Bosnia and Herzegovina.³³⁸

A number of conclusions can be drawn from this overview of state practice and international reactions to the recent wave of dissolutions, unifications, and secessions that brought to international life a large number of states. Overall, the evidence supports the observation of one scholar that the *tabula rasa* theory, which was *à la mode* during the era of decolonization, is no longer attractive to many states.³³⁹ In a comparatively more integrated world, most new entrants to the family of nations have found the continuation of inherited treaty obligations beneficial.³⁴⁰

Does this mean that rule of treaty continuation espoused by Part IV of the 1978 Convention, and particularly, for the purposes of this Article, Article 34, attained the status of customary international law?³⁴¹ I believe not. Two elements must be satisfied for a rule to be reflective of custom. First, State practice in conformity with a rule must be general and uniform, and second, that practice must emanate from a belief that the rule being followed is legally obligatory.³⁴² For some observers, international practice associated with recent cases of State succession and the entry into force of the 1978 Convention has “breathed some life into certain of its provisions.”³⁴³ The cases of Czechoslovakia, Yemen, and the former Yugoslavia (despite the dispute aroused by the FRY’s claim to be a continuation of the SFRY) lend support to this conclusion.³⁴⁴ On the other hand, despite scholarly arguments about its

³³⁸ Juan Miguel Ortega Tero, *The Bursting of Yugoslavia: An Approach to Practice Regarding State Succession*, in LA SUCCESSION D’ÉTATS: LA CODIFICATION À L’ÉPREUVE DES FAITS / STATE SUCCESSION: CODIFICATION TESTED AGAINST THE FACTS 908 (Pierre Michel Eisemann & Martti Koskenniemi eds., 2000).

³³⁹ Zemanek, *supra* note 287, at 84–85.

³⁴⁰ *Id.* at 85.

³⁴¹ The International Court of Justice (ICJ) has recognized that a rule of customary international law may emerge from the provisions of an international treaty. *North Sea Continental Shelf* (F.R. Ger. v. Neth.), 1969 I.C.J. 4, para. 70 (Feb. 20). In the *North Sea Continental Shelf* case, the ICJ stated, “[t]here is no doubt that this process is a perfectly possible one and does from time to time occur: it constitutes indeed one of the recognized methods by which new rules of customary international law may be formed.” *Id.*

³⁴² JOHN CURRIE, PUBLIC INTERNATIONAL LAW 188 (2008).

³⁴³ AUST, *supra* note 278, at 369.

³⁴⁴ *Id.* at 370, 379–83.

distinctiveness, the reunification of Germany represents a resounding rejection of the rule of treaty continuity.³⁴⁵ The political arrangements reached to accommodate Russia's continuation of the Soviet Union's legal personality, particularly in the area of arms control, seem to situate the dissolution of the U.S.S.R. in a penumbral middle ground between those cases in which inherited treaties were upheld and the reunification of Germany.³⁴⁶

What appears, therefore, is a mixed and unsettled record. To be sure, the claim that treaties expire upon succession has been invalidated.³⁴⁷ It seems premature, however, to assert that the rule of *ipso jure* treaty continuity has been confirmed, and that an indisputable *opinio juris* has crystallized supporting the rule's status as customary international law.³⁴⁸ Indeed, while many successor states accepted the rule of treaty continuity, as a matter of principle, political realities necessitated in many instances the termination of treaties inherited from predecessor states.³⁴⁹ Ranging from the pragmatic solutions designed to address the fallout caused by the collapse of the Soviet Union to the impracticability of preserving treaties contracted during the Cold War, state practice exhibited degrees of flexibility and nuance that are absent from the "bright-line" rule of treaty continuity enshrined in Part IV of the 1978 Convention.³⁵⁰

The foregoing analysis suggests that the 1959 Nile Waters Agreement has not devolved onto South Sudan. The predecessor State, Sudan, was not a party to the 1978 Convention, and its relevant provisions, contained in Part IV, which adopt a rule of treaty continuity, do not appear to have attained the status of customary law. A final question that warrants discussion, however, is whether the nature of the 1959 Agreement *per se* alters the applicable rules in this case. In other words, do the rules governing State succession to treaties distinguish between different classes of treaties, or do they apply in a nondiscriminatory manner to all treaties regardless of their content? That is the subject of the next, and final, part of this Article.

³⁴⁵ *Id.* at 374–75.

³⁴⁶ *Id.* at 374–77.

³⁴⁷ Zemanek, *supra* note 287, at 84–85.

³⁴⁸ Andreas Zimmermann, *Secession and the Law of State Succession*, in SECESSION: INTERNATIONAL LAW PERSPECTIVES 214 (Marcelo Kohen ed., 2006); *see also* Tai-Heng Cheng, *Why New States Accept Old Obligations*, 2011 U. ILL. L. REV. 1, 5 (2011).

³⁴⁹ Mullerson, *supra* note 292, at 310–11.

³⁵⁰ Zimmermann, *supra* note 348, at 214.

IV. TERRITORIAL OBLIGATIONS, DISPOSITIVE TREATIES, AND STATE SUCCESSION

The 1959 Nile Waters Agreement regulates the use of an international watercourse by two riparian states.³⁵¹ This means that the treaty regulates the exploitation of resources flowing through the territories of these two states.³⁵² Treaties of this nature, which create obligations of a territorial character, have received considerable scholarly attention, particularly regarding the impact of state succession on the validity of these treaties.³⁵³ This final Part of the Article focuses on this category of treaties. In the following pages, juristic and judicial opinion will be surveyed to determine whether conventional and customary international law have recognized such a class of treaties, and to identify the impact of state succession on them.

A. *The Genesis of Territorial Obligations and Dispositive Treaties*

Jurists have long differentiated between various classes of international treaties on the basis of the nature of the rights and obligations they create.³⁵⁴ One such distinction is between what has been dubbed ‘personal’ or ‘political’ treaties and ‘dispositive’ or ‘real’ treaties.

The criterion of distinction was that in the one case [personal or political agreements] the performance of the treaty was a matter of reciprocal rights and duties of governments in the ordinary exercise of political discretion, affecting the State as such rather than specified territory within it, whereas, in the other [dispositive or real agreements], performance was territorial and not fundamentally dependent upon the continued jurisdiction in the territory of the contracting State. In other words, ‘dispositive’ treaties were regarded as in the nature of covenants running with the land.³⁵⁵

Lord McNair, a preeminent authority on the law of treaties, concurs and clarifies that “[o]ne of the consequences of this difference is that the treaties belonging to this category create, or transfer, or recognize the existence of,

³⁵¹ 2 D.P. O’CONNELL, STATE SUCCESSION IN MUNICIPAL LAW AND INTERNATIONAL LAW 246 (1967).

³⁵² *Id.*

³⁵³ *See, e.g.*, CRAVEN, *supra* note 164, at 191.

³⁵⁴ *Id.* at 174; *see also* Alexander Proelss, *Article 34: General Rule Regarding Third States*, in THE VIENNA CONVENTION ON THE LAW OF TREATIES: A COMMENTARY 630 (Oliver Dorr & Kirsten Schmalenbach eds., 2012).

³⁵⁵ 2 O’CONNELL, *supra* note 351, at 231.

certain permanent rights, which thereupon acquire or retain an existence and validity *independent of the treaties which created or transferred them.*"³⁵⁶

Genealogically, the emergence of this category of treaties is closely associated with the rise of the nation-State as the principal unit of socio-political organization. As jurists and philosophers reimagined the state in a personified form, it became necessary to adorn this entity with a legal identity separate and distinct from that of the Sovereign.³⁵⁷ Recognizing this, Emer de Vattel proposed in his *magnum opus*, *The Law of Nations*, a classification of treaties that distinguished between 'personal' and 'real' treaties,³⁵⁸ and declared that the latter "were intended to subsist independently of the person who has concluded them, [and] are undoubtedly binding on his successors; and the obligation which such treaties impose on the state, passes successively to all her rulers as soon as they assume the public authority."³⁵⁹

The nature of legal obligations that fall within this category evolved gradually. Initially, contracts protecting the private rights of nationals in foreign countries, as opposed to treaties concluded for the benefit of a monarch, were assumed to constitute dispositive treaties.³⁶⁰ With the advent of the twentieth century, however, the concept became predicated on a differentiation between treaties of a political nature, which were considered personal, and settlements affecting the status of territory, which are classified as being dispositive treaties.³⁶¹

Jurists have not unanimously supported the purported existence of these categories of treaties. Ian Brownlie, for example, expressed misgivings regarding the theoretical basis for distinguishing between political/personal and dispositive/real treaties; namely the claim that the former are based on a political *quid pro quo* while the latter seek to establish unassailable permanent rights.³⁶² This, Brownlie argues, ignores the reality that all treaties involve

³⁵⁶ LORD MCNAIR, *THE LAW OF TREATIES* 256 (1961).

³⁵⁷ See generally Alexander Wendt, *The State as Person in International Theory*, 30 *REV. OF INT'L STUD.* 289 (2004), for a discussion of the various schools of thought that have personified the State. See also Erik Ringmar, *On the Ontological Status of the State*, 2 *EUR. J. INT'L REL.* 439 (1996)

³⁵⁸ EMER DE VATTEL, *THE LAW OF NATIONS* 355 (Béla Kapossy & Richard Whatmore eds., Liberty Fund 2008) (1758).

³⁵⁹ *Id.* at 359.

³⁶⁰ See *id.* at 355–60.

³⁶¹ 2 O'CONNELL, *supra* note 355, at 232–33.

³⁶² IAN BROWNLIE, *PRINCIPLES OF PUBLIC INTERNATIONAL LAW* 508 (1966). Lord McNair proffered another justification for distinguishing between treaties establishing territorial obligations and other 'political' treaties. In his Separate Opinion to the Advisory Opinion of the International Court Justice on the South West

political bargaining and compromise.³⁶³ Meanwhile, Erik Castrèn accepted the existence of *obligations* of a territorial character, but rejected the claim that the *treaties* creating these obligations constituted a distinct category of treaties.³⁶⁴

One cause for scholarly caution in endorsing this concept relates to the considerable terminological confusion that bedevils the concept of dispositive treaties.³⁶⁵ The label ‘dispositive treaties’³⁶⁶ has been used as a catchall to denote a wide variety of legal relations including localized, real, and/or territorial obligations, objective regimes, servitudes, demilitarization and neutralization agreements, capitulations, and boundary agreements.³⁶⁷ At times, these terms have been used interchangeably without much clarity as to the difference between them.³⁶⁸ Because this is not the place to delimit the boundaries between each of these legal concepts, suffice it to say that they all share a basic feature. O’Connell puts it succinctly:

[I]t can be agreed that the fundamental notion underlying the expression is that a territory is impressed with a status which is intended to be permanent (or relatively so), and which is independent of the personality of the State exercising the faculties of sovereignty.³⁶⁹

Two conclusions can be gleaned from O’Connell. First, the principal distinguishing feature of these legal relations is that they are inextricably territorial in nature.³⁷⁰ It therefore makes sense to use the term ‘*territorial obligations*’ to refer to this category of international legal obligations, as opposed to other terminological options, such as real, localized, or obligations *in rem*. Indeed, this term has become employed in modern usage including, as we shall see below, by the International Court of Justice.³⁷¹ Second, it is important to conceptually distinguish between the *obligation* with which, as

Africa, Judge McNair argued that, in certain cases, treaties are concluded as a settlement that establishes an objective regime for the collective interest of the community. *International Status of South West Africa*, Advisory Opinion, 1950 I.C.J. 128, at 153 (July 11) (separate opinion of Judge Sir Arnold McNair).

³⁶³ BROWNIE, *supra* note 362, at 508.

³⁶⁴ CRAVEN, *supra* note 164, at 180.

³⁶⁵ 2 O’CONNELL, *supra* note 351, at 15.

³⁶⁶ D.P. O’Connell claims that American jurist Westlake invented the term dispositive treaties. *Id.* at 14. Lord McNair has criticized this phrase on the grounds that, in French, the term *dispositive* means the operative part of a judgment. McNair, *supra* note 356, at 656.

³⁶⁷ CRAVEN, *supra* note 164, at 177–78.

³⁶⁸ 2 O’CONNELL, *supra* note 351, at 12–13.

³⁶⁹ *Id.* at 14.

³⁷⁰ *Id.*

³⁷¹ See generally *Gabčíkovo-Nagymaros Project (Hung. v. Slov.)*, 1997 I.C.J. 7 (Sept. 25).

O'Connell described it, a territory is "impressed," and the *instrument* creating or codifying that obligation.³⁷² Given that it is commonly used in the literature, the label *dispositive* will be used to describe treaties establishing territorial obligations.³⁷³

B. *State Succession to Territorial Obligations and Dispositive Treaties*

As discussed above, political realities and the necessities of international life proved the impracticality of purist versions of the two general theories of state succession. Recognizing this, jurists and policy makers deployed the categories of territorial obligations and dispositive treaties to mitigate the disruptive effects of an unqualified application of both theories.³⁷⁴ Thus, the universal succession approach was blunted by acknowledging that successor states were not bound by the "personal" treaties of the predecessor state.³⁷⁵ Conversely, proponents of the *tabula rasa* theory understood that maintaining a minimum of predictability and stability in international relations required the devolution of dispositive treaties onto successor states.³⁷⁶

It was against this theoretical backdrop that the ILC examined the impact of state succession on territorial obligations, a matter that it admitted was at once "important, complex and controversial."³⁷⁷ The deliberations of the ILC on this matter, which, compared to other provisions, elicited unparalleled interest from U.N. member states,³⁷⁸ ultimately led to the drafting of Articles 11, 12, and 13. After lengthy discussion during the negotiations over the 1978 Convention, a fourth provision was added to the repertoire of provisions dealing with succession to territorial obligations.

³⁷² 2 O'CONNELL, *supra* note 351, at 14–15.

³⁷³ *Id.* at 14.

³⁷⁴ See ILC Commentaries, *supra* note 209, at 196–97.

³⁷⁵ *Id.* at 204.

³⁷⁶ CRAVEN, *supra* note 164, at 174. The necessity of adapting general theories of State succession to the realities of international affairs was recognized during the negotiations over the 1978 Convention. For example, while discussing the question of the impact of a succession of States on international boundaries, the representative of Ethiopia stated:

Clearly, the international community as a whole was against an absolute "clean slate" principle of State succession. Like any other principle of law, it was subject to exceptions, the most important of which was contained in article 11 [on boundary regimes]. That exception had been admitted by most jurists and accepted in State practice.

I INT'L L. COMM., UNITED NATIONS CONFERENCE ON SUCCESSION OF STATES IN RESPECT OF TREATIES: OFFICIAL RECORDS at 116, U.N. Doc. A/Conf.80/16, U.N. Sales No. E.78.V.8 (1978) at 116.

³⁷⁷ ILC Commentaries, *supra* note 209, at 197.

³⁷⁸ *Id.* at 206.

The first of these, Article 11, "Boundary Regimes," stipulates that a succession of states shall not affect "a boundary established by a treaty; or obligations and rights established by a treaty relating to the regime of a boundary."³⁷⁹ Article 12, "Other Territorial Regimes," prescribes:

1. A succession of States does not as such affect:

(a) obligations relating to the use of any territory, or to restrictions upon its use, established by a treaty for the benefit of any territory of a foreign State and considered as attaching to the territories in question;

(b) rights established by a treaty for the benefit of any territory and relating to the use, or to restrictions upon the use, of any territory of a foreign State and considered as attaching to the territories in question

2. A succession of States does not as such affect:

(a) obligations relating to the use of any territory, or to restrictions upon its use, established by a treaty for the benefit of a group of States or of all States and considered as attaching to that territory;

(b) rights established by a treaty for the benefit of a group of States or of all States and relating to the use of any territory, or to restrictions upon its use, and considered as attaching to that territory.

3. The provisions of the present article do not apply to treaty obligations of the predecessor State providing for the establishment of foreign military bases on the territory to which the succession of States relates.³⁸⁰

Article 13, which was added during the negotiations for the 1978 Convention, assured that "nothing in the present Convention shall affect the principles of international law affirming the permanent sovereignty of every people and every State over its natural wealth and resources."³⁸¹ Finally, Article 14 confirmed that "[n]othing in the present Convention shall be considered as prejudging in any respect any question relating to the validity of a treaty."³⁸²

³⁷⁹ 1978 Vienna Convention, *supra* note 156, art. 11.

³⁸⁰ 1978 Vienna Convention, *supra* note 156, art. 12.

³⁸¹ *Id.* art. 13.

³⁸² *Id.* art. 14.

The general principle applied by these articles is a rule of continuity that immunizes territorial obligations from the effects of state succession.³⁸³ This applies equally to both newly independent states and states born out of the uniting or separation of states.³⁸⁴ Article 12 is the most relevant provision for the purposes of this Article. It is impossible, however, to examine this article in isolation. The structure and content of this Article were developed in tandem with Articles 11, 13, and 14 of the 1978 Convention and should be viewed as part of that package.³⁸⁵

The overwhelming majority of states supported the ILC's proposal that international boundaries should be unaffected by state succession.³⁸⁶ As the representative of the GDR declared: "States had described article 11 as right, reasonable, balanced and realistic, incontestable, well-established and universally recognized, or in full harmony with State practice and the general principles of international law."³⁸⁷ The principal justification for adopting this provision was the desire to maintain international peace and security and avoid the chaos that would ensue should international boundaries be subject to revision upon succession.³⁸⁸ States from various regions cited resolutions adopted by the Organization of African Unity and the Non-Aligned Movement, which together represent a sizable majority of the U.N. member states, affirming the inviolability of colonial boundaries to evidence that a customary norm had crystallized to that effect.³⁸⁹ Furthermore, having been adopted less

³⁸³ ILC Commentaries, *supra* note 209, at 169.

³⁸⁴ *See id.*

³⁸⁵ The connection between these provisions, especially Articles 11 and 12, is confirmed by the fact that the ILC Commentaries, which provide the rationale and legal grounding for these provisions, dealt with these two articles in unison. ILC Commentaries, *supra* note 209, 196–208.

³⁸⁶ *Id.* at 199.

³⁸⁷ 1 INT'L L. COMM., *supra* note 211, at 119.

³⁸⁸ For example, the delegate of Ghana expressed support for Article 11 because it "was of overriding importance for the maintenance of international peace and security." *Id.* The delegate of Hungary also stated that: "article 11 was linked with the need to establish international peace and security." *Id.* Similarly, India affirmed that this provision was "vital to the maintenance of world peace and security . . . and that chaos would ensue if newly independent States unilaterally repudiated the boundaries they had inherited." *Id.* at 121.

³⁸⁹ *See id.* at 122–23, for the statement by the Delegation of Kuwait. Delegates from Latin America also referred to the principle of *uti possidetis juris*, which emerged in the context of the independence of former Spanish possessions in Latin America and prescribed that the former administrative boundaries between these former colonies should become their post-independence borders. *See, e.g., id.* at 128 for the statement of the Delegation from Bolivia. The ICJ also confirmed the customary status of this principle in a number of cases, the most prominent of which was in a boundary dispute between Burkina Faso and Mali. *See generally* Frontier Dispute Case (Burk. Faso v. Mali) 1986 I.C.J. 554. *See* Steven Ratner, *Drawing a Better Line: Uti Possidetis and the Borders of New States*, 90 AM. J. INT'L L. (1996); Malcolm Shaw, *Peoples Territorialism and Boundaries*, 8 EURO. J. INT'L L. (1997); Malcolm Shaw, *The Heritage of States: The Principle of Uti*

than a decade earlier, the 1969 Vienna Convention on the Law of Treaties had a palpable impact on discussions regarding Draft Article 11.³⁹⁰ Many delegations supported the conclusion reached by the ILC that:

The weight of the evidence of State practice and of legal opinion in favour of the view that in principle a boundary settlement is unaffected by the occurrence of a succession of States is strong and powerfully reinforced by the decision of the United Nations Conference on the Law of Treaties to except from the fundamental change of circumstances rule a treaty which establishes a boundary.³⁹¹

Despite the chorus of delegations supporting the draft article, a number of governments expressed skepticism regarding the continuity of international boundaries inherited from predecessor states. Afghanistan, which had proposed the deletion of draft Article 11, argued that the proposed text would “have the effect of prejudging a boundary dispute where one of the parties challenged colonial or unequal treaties on the basis of the right of self-determination.”³⁹² Somalia concurred with Afghanistan and argued that concretizing colonial boundaries threatens international peace and security by undermining “peaceful negotiations for the settlement of boundary disputes inherited from the colonial past.”³⁹³

This is where Article 14 of the 1978 Convention, which appears as Article 13 in the ILC Draft Articles, enters the story. For most States, the ILC had already foreseen these arguments.³⁹⁴ In recognition of the fact that the defining feature of boundary agreements is their territorial character, Article 11 prescribes that it is the boundary regime, as opposed to the treaty establishing that regime, which remains unaffected by State succession.³⁹⁵ As the delegate of Pakistan explained, “[i]n the context of succession, therefore, the main point was not so much the continuance in force of a treaty as the continuance of a territorial situation resulting from the prior implementation of the treaty” that

Possidetis Juris *Today*, 67 BRIT. YRBK INT'L L. (1996). for academic commentary and consideration of this principle.

³⁹⁰ See, 1 INT'L L. COMM., *supra* note 211, at 117, 126–27 for the statements of Ethiopia and Brazil, as examples.

³⁹¹ ILC Commentaries, *supra* note 209, at 201.

³⁹² 1 INT'L L. COMM., *supra* note 376, at 114.

³⁹³ *Id.* at 116.

³⁹⁴ ILC Commentaries, *supra* note 209, at 207.

³⁹⁵ 1978 Vienna Convention, *supra* note 156, art. 11.

established the boundary regime.³⁹⁶ Article 14 was inserted to reaffirm this.³⁹⁷ Its effect is to assure successor States that succession did not divest it of the right to invalidate treaties inherited from their predecessor States.³⁹⁸ In other words, while succession *per se* does not provide grounds for renouncing international boundaries, successor States may challenge these boundaries and the treaties establishing them through other means provided for in international law.³⁹⁹ Ultimately, the many supporters of draft Article 11 prevailed, and the provision was adopted by the wide margin of seventy-one votes to one, with eight abstentions.⁴⁰⁰

Draft Article 12, however, was a much more contentious provision. Indeed, the U.S. representative observed that “article 12 was perhaps the one which had caused the International Law Commission the greatest difficulties,”⁴⁰¹ and more graphically, the Italian delegate lamented that “[t]here was something disturbing, if not vaguely nightmarish” about this Article.⁴⁰² Canvassing the views of delegations about Draft Article 12 reveals that the concerns expressed about this provision can be divided into two categories.

First, mirroring earlier debates about Article 11, some countries contended that the continuity rule enshrined in Draft Article 12 collided with the principles of self-determination and detracted from the sovereignty of successor states. Namibia, for example, highlighted that, upon independence, former colonies found themselves “saddled with treaties to which they had been neither party nor privy, concluded by the predecessor State with one or more States, which regulated the use of the territory of the successor State, thereby denying it the full exercise of its sovereignty.”⁴⁰³ Similarly, Guyana

³⁹⁶ *Id.* at 118.

³⁹⁷ ILC Commentaries, *supra* note 209, at 208.

³⁹⁸ *Id.*

³⁹⁹ *Id.* The representative of India during the negotiations over the 1978 Convention confirmed this by noting that the ILC draft:

[P]rovided that a treaty’s validity was not affected by a succession of States; succession could neither validate nor invalidate a treaty. That was not to say that treaties governing boundaries or other territorial regimes were immutable; it was generally considered that the International Law Commission did not intend the two articles [articles 11 and 12] to prejudice the question of validity of treaties or the right of States to seek a change by lawful means available to them under international law.

1 INT’L L. COMM., *supra* note 376, at 121.

⁴⁰⁰ 1 INT’L L. COMM., *supra* note 376, at 11.

⁴⁰¹ 2 INT’L L. COMM., *supra* note 211 at 139.

⁴⁰² 1 INT’L L. COMM., *supra* note 376 at 142.

⁴⁰³ *Id.* at 132.

argued that draft article 12 should be redrafted to ensure that it entailed no restrictions on the exercise of the right to self-determination, which it posited had evolved into a peremptory norm of international law.⁴⁰⁴

Second, considerable apprehension regarding the scope of Draft Article 12 emanated from the ambiguity surrounding the concept of territorial obligations.⁴⁰⁵ Much of the debate centered on identifying the forms of treaties, legal relations, and territorial obligations that this category comprised, and discussing whether they were equally deserving of being immunized against state succession.⁴⁰⁶ The ILC Commentaries were not instructive on this count. The ILC merely proffered a non-exhaustive illustrative list of these treaties, including “rights of transit on international waterways or over another State, the use of international rivers, demilitarization or neutralization of particular localities.”⁴⁰⁷

The principal concern expressed by many delegations related to whether the language of Draft Article 12 was permissive enough to protect treaties establishing foreign military bases on the territories of successor states. Immediately upon opening the debate on this draft article, Mexico,⁴⁰⁸ Cuba,⁴⁰⁹ and Argentina⁴¹⁰ tabled amendments aiming to ensure that “military bases of the predecessor . . . State party should be excluded from the application of the provisions of article 12.”⁴¹¹ Despite assurances from major military powers, such as the US, Britain, and the Soviet Union,⁴¹² that draft Article 12 did not apply to military installations, most delegations insisted on clearly stipulating that agreements relating to the military presence of a foreign power were excepted from the continuity rule.⁴¹³ To assuage the fears of these countries, a provision that ultimately became paragraph 12(3) of the 1978 Convention was

⁴⁰⁴ *Id.* at 139.

⁴⁰⁵ As the Yugoslav delegate complained, “article 12 was too general and somewhat unclear, and it might lead to misunderstandings and other problems.” *Id.* at 141.

⁴⁰⁶ See generally 1 INT’L L. COMM., *supra* note 373, at 140–51.

⁴⁰⁷ ILC Commentaries, *supra* note 209, at 197.

⁴⁰⁸ 1 INT’L L. COMM., *supra* note 376, at 129–30.

⁴⁰⁹ *Id.*

⁴¹⁰ *Id.* at 130–31.

⁴¹¹ *Id.* at 131.

⁴¹² The U.S. delegate confirmed that “article 12 had no connexion with the problem of military bases,” and the British representative affirmed that “[t]reaties concerning military bases, which were mentioned in the three amendments, did not come within the scope of article 12, which in no way sanctioned the continuance of such treaties.” *Id.* at 136–37. The Soviet Union adopted that same position. *Id.* at 145–46.

⁴¹³ See *id.* at 132–34, 141, 145–46 for the statements of Namibia, Côte d’Ivoire, Madagascar, Yugoslavia, and Iraq as examples.

added to affirm that successor states did not inherit treaties establishing foreign military bases.⁴¹⁴

Another category of territorial obligations that became the subject of spirited negotiations related to what many delegations labeled servitudes, particularly when these entailed obligations relating to the use and exploitation of natural resources.⁴¹⁵ Tanzania, and to a lesser extent Kenya, were the most emphatic in calling for nullifying treaties that limited the unfettered freedom of a successor state to use natural resources within its territory. Tanzania called for deleting Draft Article 12, which in its view “attempted to maintain the inequities arising from colonial situations by creating servitudes.”⁴¹⁶ Kenya adopted a more nuanced position. It suggested rewording the article to guarantee successor states the right to revisit servitudes inherited from predecessor states and to reach agreements on the future of these servitudes that would protect the vital interests of beneficiary states without jeopardizing the independence of the successor state.⁴¹⁷

No other delegations called for deleting Draft Article 12. Rather, many countries applauded the “wisdom” of the draft article, and emphasized the importance of protecting certain obligations with which the territory of one state was impressed for the benefit of either a specific state or the international community as a whole.⁴¹⁸ Examples of these obligations that delegations pointed to included the use of waterways,⁴¹⁹ settlements reached in the interest of all states,⁴²⁰ and transit rights of landlocked states.⁴²¹ Speaking in favor of Draft Article 12, Ethiopia summed up the position of delegations calling for its inclusion in the final text:

⁴¹⁴ The overwhelming support for this proposal became apparent when it was adopted with eighty-four votes in favor, none against, and one abstention. 2 INT’L L. COMM., *supra* note 211, at 140.

⁴¹⁵ In many instances, the question of the exploitation of natural resources was intertwined with other forms of legal relations. Thus, Argentina argued that “treaties which conferred specific rights on nationals of a particular foreign State” should not be considered territorial obligations. 1 INT’L L. COMM., *supra* note 376 at 131. Similarly, Madagascar associated agreements that relate to the use of natural resources to concessions granted to foreign countries and companies, and argued that these should not be granted immunity under Article 12. *Id.* at 134.

⁴¹⁶ *Id.* at 132.

⁴¹⁷ *Id.* at 135.

⁴¹⁸ See *id.* at 142–46, for the statements of the Federal Republic of Germany, Algeria, Iraq, Denmark, and Italy expressing their opinion on the importance and wisdom of Article 12.

⁴¹⁹ *Id.* at 136.

⁴²⁰ *Id.* at 139–40.

⁴²¹ *Id.* at 142.

The provisions of article 12 could affect the vital interests of countries, particularly in the sphere of rights relating to water, navigation and transit, which could not be compromised without endangering peace and security. The article was more particularly concerned with economic questions, and to delete it might compromise the economic situation of the States concerned or even “strangle” certain countries.⁴²²

These delegations also reiterated, as they had during the negotiations over Draft Article 11, that the continuity rule applies to the territorial *obligations* and not to the *treaties* establishing those obligations.⁴²³ Therefore, in a bid to secure broad-based support for Draft Article 12, a new Article 12 *bis*, which ultimately became Article 13 of the 1978 Convention, was drafted.⁴²⁴ This Article reaffirmed international legal principles guaranteeing the permanent sovereignty of peoples and states over their natural resources.⁴²⁵ The rationale for introducing this new provision and how it related to Draft Article 12 becomes apparent from the comments it elicited from the negotiating states. The delegation of Argentina introduced the provision, and explained that Articles 11 and 12 represented exceptions to the *tabula rasa* rule that were applied to newly independent states.⁴²⁶ Unlike Article 11, which applied to the specific case of boundary agreements, Draft Article 12, as prepared by the ILC, appeared overly ambiguous “which would create uncertainty and open the way for important derogations from the general principle.”⁴²⁷

Nonetheless, the interplay and relation between Articles 12 and 12 *bis* remained unclear. Unlike the new Paragraph 12(3), which clearly exempted foreign military bases from the continuity rule, questions were raised as to the impact of Article 12 *bis* on the obligations enshrined in draft article 12.⁴²⁸ The *travaux préparatoires* of the 1978 Convention help to demystify the matter. The predominant opinion during the negotiations was that Article 12 *bis* served to reiterate the general principle of the permanent sovereignty of peoples and states over their natural resources as enshrined in various international

⁴²² *Id.* at 133.

⁴²³ *Id.*

⁴²⁴ Given the contentiousness of the topic, the Chairperson of the conference referred Article 12 to an “informal consultations group” that was entrusted with discussing the amendments submitted on the article and on reaching a consensus on the text. *Id.* at 150–51.

⁴²⁵ *Id.* at 149.

⁴²⁶ *Id.* at 130.

⁴²⁷ 2 INT’L L. COMM., *supra* note 211, at 132.

⁴²⁸ *Id.* at 139.

instruments, especially U.N. General Assembly resolution 1803.⁴²⁹ It was assumed that Article 12 *bis* would be applied in accordance with the relevant principles of international law, which were outlined in that resolution.⁴³⁰ Titled “Permanent Sovereignty over Natural Resources,” Resolution 1803 pertains to the relationship between governments and foreign investors involved in the development and exploitation of natural resources, especially in former colonies.⁴³¹ It also outlines the general principles governing the process of expropriation of foreign capital and the duty to compensate foreign investors.⁴³²

This suggests that Article 12 *bis* was designed to exclude concessionary agreements granted by predecessor states to foreign corporations or investors from the rule of continuity enshrined in Article 12. The fact that servitudes serving the interests of foreign *states* were not the target of Article 12 *bis* is confirmed by the text of Resolution 1803 itself.⁴³³ The declaration states that it does not “in any way prejudices the position of any Member State on any aspect of the question of the rights and obligations of successor States and Governments in respect of property acquired before the accession to complete

⁴²⁹ See *id.* at 131–34, 137–40, for the statements of Argentina, Ghana, India, Algeria, Sierra Leone, Somalia, and the United States expressing this opinion.

⁴³⁰ For example, the representative of United Kingdom stated:

While recognizing the existence of that principle, it considered that its application was governed by the principles of international law, which, in the final analysis, ought to be able to resolve any possible conflict between the principle of permanent sovereignty and other concepts, such as that of acquired rights. It was in that sense that his delegation would interpret article 12 *bis*. Account should, moreover, be taken of General Assembly resolution 1803 (XVII), which contained the most recent generally recognized description of the concept of the permanent sovereignty of States over their natural resources and of its relationship to international law.

Id. at 140.

⁴³¹ G.A. Res. 1803 (XVII), U.N. Doc. A/RES/1803 (Dec. 14, 1962).

⁴³² For example, paragraph 4 of the declaration states:

Nationalization, expropriation or requisitioning shall be based on grounds or reasons of public utility, security or the national interest which are recognized as overriding purely individual or private interests, both domestic and foreign. In such cases the owner shall be paid appropriate compensation, in accordance with the rules in force in the State taking such measures in the exercise of its sovereignty and in accordance with international law. In any case where the question of compensation gives rise to a controversy, the national jurisdiction of the State taking such measures shall be exhausted. However, upon agreement by sovereign States and other parties concerned, settlement of the dispute should be made through arbitration or international adjudication.

Id. para. 4.

⁴³³ G.A. Res. 1803 (XVII) at 14, U.N. Doc. A/RES/1803 (Dec. 14, 1962).

sovereignty of countries formerly under colonial rule.”⁴³⁴ A number of delegations reiterated this reading of the Article.⁴³⁵ The representative of Australia put it concisely:

His country recognized the permanent sovereignty of every State over its natural resources but considered that a State was also under an obligation not to prejudice the legitimate interests of neighbouring State and other States dependant on shared natural resources. The principles of international law did not confer on States the right to unrestricted exercise of their permanent sovereignty over their natural resources. The principles of international law beneficial to neighboring States should be taken into account.⁴³⁶

Ultimately, the new Article 13, the new paragraph 3 added to Article 12 on the non-devolution of agreements establishing military bases, and the text of Article 12 as drafted by the ILC were all adopted by the negotiating parties by overwhelming majorities.⁴³⁷

A general observation that can be drawn from this overview of the *travaux préparatoires* of the 1978 Convention is that none of the participating delegations questioned the notion of territorial obligations or doubted the existence of dispositive treaties as a distinct category of treaties.⁴³⁸ Rather, what many delegations sought was to reach the appropriate balance between

⁴³⁴ *Id.* Former Legal Adviser of the U.S. State Department and former ICJ Judge Stephen Schwebel confirms this in his account of the negotiations over GA resolution 1803:

It was clearly understood that agreements concluded by states other than sovereign states and property rights acquired under colonial rule were in no way prejudiced by passage of the resolution. As the delegate of the United States put it in proposing the revised US-UK amendments: “The text now clearly was without prejudice to any aspect of state succession and to rights acquired in former colonial territories.”

Stephen Schwebel, *The Story of the UN’s Declaration on Permanent Sovereignty over Natural Resources*, 49 A.B.A. J. 463, 468 (1963).

⁴³⁵ See 2 INT’L L. COMM., *supra* note 146, at 137 where Egypt supported this reading of the Article.

⁴³⁶ *Id.* at 138.

⁴³⁷ Each of these provisions was voted on separately. *Id.* at 140. Article 12 *bis* (which became Article 13 of the convention) was adopted by seventy-four votes to none, with twelve abstentions. *Id.* Article 12(3) was adopted with eighty-four votes in favor to none, and one abstention, while the whole text of Article 12 was adopted by eighty-six votes to none with one abstention. *Id.*

⁴³⁸ For example, Mexico, which led the process to redraft Article 12 admitted that “the continuation of boundary treaties and other territorial régimes, as laid down in draft Articles 11 and 12, was completely acceptable in regard to obligations towards other States concerning normal trade, development and cooperation.” 1 INT’L L. COMM., *supra* note 376, at 129–30. Moreover, Yugoslavia, which supported the Mexican, Argentinean, and Cuban amendments, also affirmed that it “did not question the validity of territorial régimes which had been recognized by customary international law and the practice of States as being generally acceptable.” *Id.* at 141.

competing legal principles and policy considerations.⁴³⁹ On one side were the principles of sovereignty, self-determination, and the need to grant states emerging from colonization a clean slate of treaty relations upon independence. On the other side were territorial obligations, dispositive treaties, and the realization that maintaining a degree of order in the relations among nations required a semblance of predictability. The end result was a pragmatic and reasonable compromise that, on the one hand protected most territorial obligations, particularly those established for the benefit of other states, and on the other hand, allowed for the expiration of obligations that were most depreciating of national sovereignty, namely foreign military bases and concessions granted to foreign individuals or corporations.

The test of whether Article 12 of the 1978 Convention attained the status of a norm of customary international law came in 1997. Hungary and Slovakia brought a case before the International Court of Justice (ICJ) to examine the status of the 1977 Treaty Between the Hungarian Peoples Republic and the Czechoslovak Socialist Republic Concerning the Construction and Operation of the Gabčíkovo-Nagymaros System of Locks.⁴⁴⁰ One of the questions examined by the Court was whether Slovakia succeeded Czechoslovakia to the 1977 Treaty.⁴⁴¹ Hungary, which requested that the Court find that the treaty was terminated upon the disappearance of Czechoslovakia, argued, first that Article 34 of the 1978 Convention was not reflective of customary international law,⁴⁴² and, second, that there was no general rule of international law prescribing automatic succession to bilateral treaties.⁴⁴³ Third, Hungary maintained that the 1977 Treaty was a joint investment agreement, which meant that it did not create “rights ‘considered as attaching to [the] territory’ within the meaning of Article 12 of the 1978 Convention, which would, as such, be unaffected by a succession of States.”⁴⁴⁴ Implicitly, therefore, Hungary admitted that Article 12 of the 1978 Convention and the continuity rule enshrined therein reflected a rule of customary international law.

⁴³⁹ See generally 1 INT’L L. COMM., *supra* note 376, at 229–32.

⁴⁴⁰ See generally Gabčíkovo-Nagymaros Project (Hung. v. Slov.), 1997 I.C.J. 7 (Sept. 25). The principal purpose of the 1977 Treaty had been to facilitate cooperation between the two countries to produce hydroelectric power and improve navigation in this area of the Danube River. HILAL ELVER, PEACEFUL USES OF INTERNATIONAL RIVERS 227 (2002).

⁴⁴¹ Gabčíkovo-Nagymaros Project (Hung. v. Slov.), 1997 I.C.J. 7, para. 117 (Sept. 25).

⁴⁴² *Id.* para. 119.

⁴⁴³ *Id.* para. 118.

⁴⁴⁴ *Id.* para. 119.

On the other hand, Slovakia asserted that it succeeded Czechoslovakia to the treaty by virtue of Article 34 of the 1978 Convention, which it argued reflected customary international law.⁴⁴⁵ Slovakia also opined that contemporary international practice relating to the dissolution of unions confirmed that successor States automatically inherited a predecessor state's treaty relations.⁴⁴⁶ In addition, Slovakia confirmed that Article 12 of the 1978 Convention reflected customary international law and described it as:

[A] specific territorial régime which operates in the interest of all Danube riparian States, and as “a dispositive treaty, creating rights *in rem*, independently of the legal personality of its original signatories.” Here, Slovakia relied on the recognition by the International Law Commission of the existence of a “special rule” whereby treaties “intended to establish an objective régime” must be considered as binding on a successor State. Thus, in Slovakia's view, the 1977 Treaty was not one which could have been terminated through the disappearance of one of the original parties.⁴⁴⁷

The Court reached a number of conclusions on these issues, which are of significance for this Article.⁴⁴⁸ First, exercising judicial economy,⁴⁴⁹ the ICJ declined to opine on the customary status of Article 34 of the 1978 Convention,⁴⁵⁰ and thus avoided the polarized doctrinal debate over the effects of State succession, especially in light of contradictory patterns of State practice.⁴⁵¹ Second, the Court disagreed with Hungary on the nature of the

⁴⁴⁵ *Id.* para. 121.

⁴⁴⁶ *Id.* para. 120–21.

⁴⁴⁷ *Id.* para. 122 (citation omitted) (internal quotation marks omitted).

⁴⁴⁸ The judgment of the ICJ in this case also had an impact on many other field of international law, including the law of treaties, international environmental law, and the law of the non-navigational uses of international watercourse. *See generally*, Peter Bekker and Bernard H. Oxman, *Gabčíkovo-Nagymaros Project (Hungary/Slovakia)*, *Judgment*, 92 AM. J. INT'L L. 273, 278 (Apr. 1998); Malgosia Fitzmaurice, *The Gabčíkovo-Nagymaros Case: The Law of Treaties*, 11 LEIDEN J. OF INT'L L. 321, 321–22 (1998); Johan Lammers, *The Gabčíkovo-Nagymaros Case Seen in Particular From the Perspective of the Law of International Watercourses and the Protection of the Environment*, 11 LEIDEN J. INT'L L. 287, 287(1998); Phoebe Okowa and Malcolm Evans, *Case Concerning the Gabčíkovo-Nagymaros Project (Hungary/Slovakia)*, 47 INT. & COMP. L. Q., 688, 688–89 (1998); Daniel Reichert-Facilides, *Down the Danube: The Vienna Convention on the Law of Treaties and the Case Concerning the Gabčíkovo-Nagymaros Project*, 47 INT. & COMP. L.Q. 837, 838 (1998).

⁴⁴⁹ Judicial economy has been defined as meaning that the adjudicating body need not “rule on every single claim made by complaining parties, only on those required to settle the dispute in question.” *See* Alberto Alvarez-Jiménez, *The WTO Appellate Body's Exercise of Judicial Economy*, 12 J. INT'L ECON. L. 393, 393 (2009).

⁴⁵⁰ *Gabčíkovo-Nagymaros Project (Hung. v. Slov.)*, 1997 I.C.J. 7, para. 123 (Sept. 25).

⁴⁵¹ Jan Klabbers, *Cat on a Hot Tin Roof: The World Court, State Succession, and the Gabčíkovo-Nagymaros Case*, 11 LEIDEN J. INT'L L. 345, 349 (1998).

1977 Treaty.⁴⁵² While it did include features resembling an investment agreement, the Court found that the treaty's object and purpose was to establish an "integrated and indivisible complex of structures and installations on specific parts of the respective territories" of the two countries, which meant that, as Slovakia argued, the treaty established territorial obligations.⁴⁵³ Third, the Court agreed with Slovakia that Article 12 of the 1978 Convention was reflective of customary international law:

The Court considers that Article 12 reflects a rule of customary international law; it notes that neither of the Parties disputed this. Moreover, the [International Law] Commission indicated that treaties concerning water rights or navigation on rivers are commonly regarded as candidates for inclusion in the category of territorial treaties . . . Taking all these factors into account, the Court finds that the content of the 1977 Treaty indicates that it must be regarded as establishing a territorial régime within the meaning of Article 12 of 1978 Vienna Convention. It created rights and obligations attaching to the parts of the Danube to which it relates; thus the Treaty itself cannot be affected by a succession of States. The Court therefore concludes that the 1977 Treaty became binding upon Slovakia on 1 January 1993.⁴⁵⁴

The World Court also reached a fourth, and slightly perplexing, conclusion. As discussed above, for the purposes of state succession, the 1978 Convention differentiated between *territorial obligations* and *treaties* establishing those obligations.⁴⁵⁵ The language and *travaux préparatoires* of Articles 12 and 14 clearly immunize the former, not the latter, from expiration upon succession.⁴⁵⁶ The Court, however, adopted a different view:

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

⁴⁵² Gabčíkovo-Nagymaros Project (Hung. v. Slov.), 1997 I.C.J. 7, para. 123 (Sept. 25).

⁴⁵³ *Id.*

⁴⁵⁴ *Id.* (internal quotation marks omitted).

⁴⁵⁵ 1 INT'L L. COMM., *supra* note 376, at 132–33.

⁴⁵⁶ 1978 Vienna Convention, *supra* note 156, arts. 12, 14.

longer in force. Those that remained in force would nonetheless bind a successor State.⁴⁵⁷

One can only conjecture as to why, despite the unambiguous language of the 1978 Convention, the ICJ reached this conclusion.⁴⁵⁸ One possible explanation is that in some instances, international boundary settlements or territorial obligations appear in treaties that include many provisions of a non-territorial nature. The legal regime of the Nile River provides an illustrative example.⁴⁵⁹ The agreement of April 15, 1891, between Italy and Great Britain was aimed primarily at identifying their respective spheres of political influence in the Horn of Africa.⁴⁶⁰ Article III of that instrument established a territorial obligation in the nature of a servitude for the benefit of Egypt.⁴⁶¹ The presence of that single provision does not, however, transform the entire agreement into a dispositive treaty. Realizing this, the Court could have been constructing a distinction between treaties, such as the 1977 Gabčíkovo-Nagymaros Treaty, designed to exclusively establish territorial obligations and which are unaffected by succession, and treaties including multiple forms of obligations.

This aspect of the judgment aside, it can still be confidently asserted that it is firmly established in customary international law that territorial obligations are unaffected by State succession.⁴⁶² Therefore, it would seem in consonance with the principles of international law to claim that, upon independence, the Republic of South Sudan inherited the obligations enshrined in the 1959 Nile Waters Agreement between Egypt and the Sudan.

⁴⁵⁷ Gabčíkovo-Nagymaros Project (Hung. v. Slov.), 1997 I.C.J. 7, para. 123 (Sept. 25) (citations omitted).

⁴⁵⁸ Jan Klabbers argued that distinguishing between the 1977 Treaty and the territorial regime it established would have been artificial and unnecessary given the facts of the case. Klabbers, *supra* note 451, at 354–55. This does not, however, explain why the Court decided to couch its judgment in general terms. Klabbers also argues that the Court sought to avoid entering into the doctrinal debate as to whether it was permissible to distinguish between treaties and obligations enshrined therein. *Id.* Matthew Craven, on the other hand, imputes this conclusion to a desire on the part of the Court to avoid reaching an absurd result whereby Slovakia would have inherited a set of territorial obligations which, in light of the facts of the case, it would have had to honor with no reciprocal rights incumbent on Hungary. CRAVEN, *supra* note 164, at 249.

⁴⁵⁹ See *supra* Part II.

⁴⁶⁰ OFFICE OF LEGAL AFFAIRS, *supra* note 37, at 127.

⁴⁶¹ *Id.* at 128.

⁴⁶² Gabčíkovo-Nagymaros Project (Hung. v. Slov.), 1997 I.C.J. 7, para. 123 (Sept. 25).

C. *The Scope and Content of Obligations Inherited by South Sudan*

While judgments of the World Court command this author's respect, one hesitates to conclude that the secession of South Sudan transformed the 1959 Agreement from a bilateral treaty into a multilateral treaty that is binding on South Sudan. Articles 11, 12, and 14 of the 1978 Convention and their negotiating history simply do not admit such a conclusion.⁴⁶³ A more prudent assertion is that South Sudan is bound by the territorial obligations established by the 1959 Agreement. Identifying these obligations is what this final section of this Article will undertake.

While the primary purpose of the 1959 Nile Waters Agreement was to enable Egypt to construct the Aswan High Dam, its overall objective was to institute a holistic and jointly administered management system for the Nile waters in Egypt and the Sudan.⁴⁶⁴ As described in Part Two above, the agreement comprises eight parts, only the second of which is dedicated to the construction of the Aswan High Dam in Egypt and the Roseires Dam in the Sudan. The remainder of the treaty identifies the acquired rights of the two parties,⁴⁶⁵ stipulates that further waterworks shall be jointly constructed in Sudan,⁴⁶⁶ establishes a permanent technical commission for the joint management of the river's resources,⁴⁶⁷ and recognizes the right of other riparian States to a share of the Nile waters.⁴⁶⁸ This bears many resemblances to the 1977 Gabčíkovo-Nagymaros Treaty. Both treaties authorized the construction of major waterworks in two riparian States, created a joint management system for parts of international watercourses, and included provisions affecting the interests of third parties.⁴⁶⁹ In short, like the 1977 Gabčíkovo-Nagymaros Treaty, the 1959 Nile Waters Agreement established a territorial regime for the management of the Nile River in Egypt and the Sudan.⁴⁷⁰ It is that territorial regime that South Sudan has inherited.

⁴⁶³ See 1978 Vienna Convention, *supra* note 156, arts. 11–12, 14.

⁴⁶⁴ This is confirmed by the language of the preamble of the treaty, which states that the full utilization of the Nile by both parties requires the implementation of “projects, for [the] full control [of the] river and for increasing its yield.” 1959 Nile Waters Agreement, *supra* note 108, pmb1. The preamble also states that the 1929 Agreement had been incomplete because it “provided only for the partial use of the Nile waters and did not extend to include a complete control of the River waters.” *Id.*

⁴⁶⁵ *Id.* art. I.

⁴⁶⁶ *Id.* art. III.

⁴⁶⁷ *Id.* art. IV.

⁴⁶⁸ *Id.* art. V.

⁴⁶⁹ Compare 1959 Nile Waters Agreement, *supra* note 108, with Treaty Concerning the Construction and Operation of the Gabčíkovo-Nagymaros System of Locks, Hung.-Czech., Sept. 16, 1977, 1109 U.N.T.S. 235.

⁴⁷⁰ 1959 Nile Waters Agreement, *supra* note 108.

To determine the nature and scope of these obligations, guidance can be sought from the manner in which the ICJ examined the various aspects of the territorial regime established by the 1977 Gabčíkovo-Nagymaros Treaty. The Court noted this regime had multiple objectives:

None of these objectives has been given absolute priority over the other, in spite of the emphasis which is given in the Treaty to the construction of a System of Locks for the production of energy. None of them has lost its importance. In order to achieve these objectives the parties accepted obligations of conduct, obligations of performance, and obligations of result.⁴⁷¹

The Court also acknowledged that, since the conclusion of the treaty in 1977, many developments have occurred that altered the factual situation relating to the river's management regime.⁴⁷² Therefore, the Court found that while the facts on the ground should be taken into consideration, the future application of the obligations enshrined in the 1977 Treaty should be undertaken in accordance with the underlying object and purpose of the treaty.⁴⁷³

The 1959 Nile Waters Agreement is in a similar situation. Since its entry into force, numerous developments have occurred. Primarily, parts of the treaty have been implemented. The Aswan High Dam has come into existence and is functioning.⁴⁷⁴ Second, some of the conservation projects envisioned in the agreement, such as the Jonglei Canal, were commenced but remain uncompleted.⁴⁷⁵ Third, South Sudan has joined the NBI,⁴⁷⁶ and the overall institutional framework managing the Nile's resources has evolved over the past decades.⁴⁷⁷ Fourth, considerable progress has been achieved in areas of the law of the non-navigational uses of international watercourses and international environmental law, both of which are relevant to the management

⁴⁷¹ Gabčíkovo-Nagymaros Project (Hung. v. Slov.), 1997 I.C.J. 7, para. 135 (Sept. 25).

⁴⁷² *Id.* para. 133.

⁴⁷³ *Id.*

⁴⁷⁴ See, e.g., Paul Howell, *East Africa's Water Requirements: The Equatorial Nile Project and the Nile Waters Agreement of 1929. A Brief Historical Review*, in THE NILE, *supra* note 6, at 81, 88.

⁴⁷⁵ See Paul Howell & Michael Lock, *The Control of the Swamps of the Southern Sudan: Drainage Schemes, Local Efforts, and Environmental Constraints on Remedial Development*, in THE NILE *supra* note 6, at 243, 243.

⁴⁷⁶ *South Sudan Admitted to the Nile Basin Initiative*, NILE BASIN INITIATIVE NEWS. http://www.nilebasin.org/newsite/index.php?option=com_content&view=article&id=127%3Asouth-sudan-admitted&catid=40%3Alatest-news&Itemid=84&lang=en (last visited Aug. 30, 2013).

⁴⁷⁷ See *supra* Part II.

of the Nile River resources.⁴⁷⁸ These facts cannot be ignored when determining the scope and content of the obligations South Sudan inherited from the 1959 Agreement.

In light of the above, the territorial regime of the 1959 Nile Waters Agreement can be divided into two categories. The first includes Part I of the treaty, which identifies the “acquired rights” of the two parties.⁴⁷⁹ As discussed above, this provision was incorporated into the 1959 Agreement from the 1929 Nile Waters Agreement, which has been recognized as a prime example of dispositive treaties.⁴⁸⁰ While Egypt’s share of 55.5 bcm should remain unaffected by the secession of South Sudan, the latter must enter into negotiations with Sudan to reapportion their respective shares. These negotiations should be undertaken against the background of, first, the territorial regime established by the 1959 Agreement, and second, the relevant customary rules of riparian and environmental law.⁴⁸¹

The second category of obligations flowing from the territorial regime established by the 1959 Nile Waters Agreement relates to future waterworks and the overall joint management of the watercourse. Article 3 of the agreement identifies geographic areas that are candidates for water conservation projects, most of which are now in South Sudan.⁴⁸² As a sovereign state, implementing these projects requires the consent of South Sudan. In accordance with obligations contained in the 1959 Agreement, however, South Sudan should enter into good faith consultations with its two partners, Egypt and Sudan to agree on these future waterworks. These consultations should take into consideration, *inter alia*, the developmental needs of South Sudan, projects planned as part of the NBI, and existing investments and projects. Agreeing on and implementing these projects could be undertaken through the joint technical commission established by the 1959 Agreement, which South Sudan should be invited to join.⁴⁸³

⁴⁷⁸ See *supra* note 448 and accompanying text.

⁴⁷⁹ 1959 Nile Waters Agreement, *supra* note 108, art. I.

⁴⁸⁰ See *supra* notes 109–15 and accompanying text.

⁴⁸¹ See generally STEPHEN MACCAFFREY, *THE LAW OF INTERNATIONAL WATERCOURSES* (2007); Mohamed S. Helal, *Sharing Blue Gold: The 1997 UN Convention on the Law of the Non-Navigational Uses of International Watercourses Ten Years On*, 18 *COLO. J. INT’L ENVTL. L. & POL’Y* 337 (2007).

⁴⁸² 1959 Nile Waters Agreement, *supra* note 108, art. 3.

⁴⁸³ This mirrors the findings of the ICJ in the *Gabčíkovo-Nagymaros* case. Commenting on the exact obligations of the two parties, the ICJ declined to identify the specific measures that both parties should undertake to fulfill their treaty obligations and declared that:

In short, the obligation inherited by South Sudan is to become a full-fledged partner in a regime that endeavors to jointly manage, conserve, and increase the water resources of the Nile River.

CONCLUSION

Most authors try to end academic articles on a positive note. This author, however, feels that it is unfortunate that this Article had to be written in the first place. Had the Comprehensive Framework Agreement enjoyed the unanimous support of the Nile riparians, the impact of South Sudan's independence on the 1959 Nile Waters Agreement would have been a moot point.⁴⁸⁴ South Sudan would have simply joined its ten co-riparians in a holistic regime for the collective management of the Nile Basin.

Regrettably, that is not the case. The Nile remains governed by a fragmented legal regime. Some of the treaties comprising this regime are anachronisms inherited from the colonial era. While contracted by sovereign nations, the post-colonial treaties are not much better. Because these instruments, including the 1959 Nile Waters Agreement, were authored in the mid-twentieth century, they do not take account of recent developments in the fields of international environmental law and international watercourse law. In addition, reflecting the prevalent state-centric mentality of the times, the logic underlying these treaties was a desire to apportion the river's resources among distinct and disjointed territorial units. This conception is no longer viable. The existing institutional and legal regime of the Nile is simply incapable of meeting the many challenges facing the watercourse and its riparian states.

Rising demand for water, due to development and population growth, has led to rising water costs, diminishing supplies, and water pollution. Two hundred fifty million people now live in the Nile basin, and the population is increasing by a rate of three percent annually. The population is projected to reach four hundred million

It is not for the Court to determine what shall be the final result of these negotiations to be concluded by the Parties. It is for the Parties themselves to find an agreed solution that takes account of the objectives of the Treaty, which must be pursued in a joint and integrated way, as well as the norms of international environmental law and the principles of the law of international watercourses. . . . What is required in the present case by the rule *pact sunt servanda*, as reflected in Article 26 of the Vienna Convention of 1969 on the Law of Treaties, is that the Parties find an agreed solution within the cooperative context of the Treaty.

Gabcikovo-Nagymaros case, *supra* note 440, para. 141–42.

⁴⁸⁴ See *supra* Part. II.

by 2025 and one billion by 2050. In addition to population pressure, some scientists believe that climate change is reducing the amount of water in the Nile Basin.⁴⁸⁵

The Nile riparians must reimagine themselves as parts of a coherent and connected drainage basin predicated on a community of interest among these States. The NBI sought to lay the foundations of this vision, but it remains to be fully realized. Until then, Egypt, Sudan, and South Sudan will remain bound by the regime established by the 1959 Nile Waters Agreement.

⁴⁸⁵ Carroll, *supra* note 36, at 275 (internal citations omitted).