CHAPTER V

THE NILE BASIN AND THE LAW OF WATER RESOURCES

In the previous chapter the main parameters shaping the legal regime of the Nile basin were outlined. These included the physical characteristics of the watercourse, varying state interests, the extent of its development among others. It was shown how the developments that unfolded in the early nineteenth century, especially after the First World War hostilities, nullified the concept of the Nile as "an Egyptian river". Beginning with the Gezira Cotton Scheme in the Sudan and subsequent growing water demands in the Sudan and throughout the basin, the underlying assumptions upon which the utilization of the Nile waters had been based have since come under serious questioning, thus rendering its normative nature obsolete. These have raised controversial legal, political and economic issues that leading to the evolution of a conventional system of which the 1929 Nile Waters Agreement represented its seemingly complete form. Prior to 1929, however, colonial powers had already signed treaties between themselves regarding the Nile River. The aim of this chapter is to trace the evolution of the Nile doctrine from the earliest colonial treaties to the present times. The various agreements that have been concluded are surveyed abstracting the salient legal
features contained therein. The contents of the agreements are then evaluated within the context of contemporary developments as set forth in Part 1 of this inquiry. Primarily attention will be focussed on the 1929 and 1959 agreements.

Over the last one hundred years several agreements have been concluded to regulate utilization of the Nile waters in one way or another. These include agreements concluded between the colonial powers; the 1929 Nile Waters Agreement; and Post-Independence agreements.

1. AGREEMENTS BETWEEN COLONIAL POWERS

At the peak of colonial rivalry in Africa, a number of instruments relating to the Nile River were signed. Though these essentially dealt with boundary demarcation and definition of territorial spheres of influence, some of the provisions directly referred to the utilization of the Nile River.

Earliest among them was the Anglo-Italian Protocol

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of 1891 delimiting the two Parties' "Respective spheres of influence in East Africa from the Ras Kaaar to the Blue Nile" in Article 111 stipulated.

The Italian Government engages not to construct on the Atbara, in view of irrigation, any work which might sensibly modify its flow into the Nile.

On 15 May 1902, Emperor Menelik II, signed a treaty with Great Britain regulating the boundary between Ethiopia and the Anglo-Egyptian-Sudan in which it was inserted in Article 111 a provision binding the Emperor:

... not to construct or allow to be constructed any work across the Blue Nile, Lake Tana or the Sobat which would arrest the flow of their waters except in agreement with his Britanic Majesty's Government and the Government of Sudan.

Two articles contained in the London Agreement of 9 May 1906 between Great Britain and the Independent

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3 Ibid.


5 Ibid., p.116.

State of the Congo (more properly King Leopold II of Belgium), modifying the Brussels Agreement of 12 May 1894 in respect of their spheres of influence in East and Central Africa are worth noting. Article III committed the Independent State of the Congo:

... not to construct or allow to be constructed any work on or near the Semliki or Isango River, which would diminish the volume of water entering Lake Albert except in agreement with the Sudanese Government.7

Article VIII of the same agreement provided the mode of dispute settlement should it arise. In case of failure of diplomatic means to reach a settlement, the Parties consented to submit such disputes to compulsory arbitration of the Hague Tribunal.

With the belief that the Ethiopian Empire would soon disintegrate, and foreseeing the need for an arrangement to share the spoils on lines similar to the earlier Dual Entente (Britain and France), the Tripartite Agreement of 13 December 19068 or "Arrangement Concernant l'Abyssinie" between Britain, France and Italy, resolved in Article 4(a) to protect:

7 Ibid.

The interests of Great Britain and Egypt in the Nile Basin, more especially as regards the regulation of the waters of that river and tributaries (consideration being paid to the local interests mentioned in Article 4(b)).

The four set of agreements outlined above constitute the rudiments of the Nile legal framework prior to World War I. Following features have a bearing on international law:

1. Excepting the 9 May 1906 Agreement between Britain and France and Emperor Menelik II, all the other three instruments were contracted between colonial powers purportedly on behalf of the colonial peoples in their respective spheres of influence, Britain being a signatory to all of them.

2. The agreements were incidental to boundary settlement issues.

3. All the four agreements imposed absolute limitation on the control of the river by the upstream states. The principle of absolute territorial integrity or natural flow theory was uniformly reproduced in Article III of each of the treaties except in the fourth agreement, thus laying foundation for the veto clause on the Nile regime.

9 Ibid.
4. The fourth dominant element in the said agreements is the principle of priority of uses where irrigation in Egypt was given precedence over all other uses elsewhere. However, the Tripartite Agreement of 1906 gave recognition "to the local interests."

11. INTER-WAR PERIOD AGREEMENTS

During this period some more treaties were concluded, but two are of utmost significance. These are the 1934 Anglo-Belgian Agreement and the 1929 Nile Waters Agreement between Egypt and Great Britain. Because of the unique character of the latter instrument, it is proposed here to depart from a chronological order by disposing off the 1934 Agreement first.

A. Anglo-Belgian Treaty, 22 November 1934

Unlike the first set of agreements, this treaty was designed specifically to define water rights between the signatories. The agreement covered those waters shared by the Mandated Territories of Tanganyika and Ruanda-Burundi. It departs from the earlier treaties in so far as it was innovative in certain aspects, such as

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distinguishing between contiguous and successive waters, and inclusion of pollution control.

Article 1 contained provisions on conditions governing diversions and return of water in successive rivers. It was expressly agreed that either Party possessed the right to divert waters within its territory so long as such waters "shall be returned without substantial reduction to its natural bed", but this, however, had to be effected "at some point before such river or stream flows into the other territory..."

In the case of contiguous or boundary waters, the agreement specifies the uses to include mining and industrial uses.11 While recognising the right to divert waters:

Each contracting party shall have the right to divert for operations of a mining industrial nature, at any point where a stream forms a boundary between the two territories up to a maximum of half the volume of water flowing at such point measured during the season of low water, provided that such water after use shall without substantial reduction be returned to its natural bed.12

The agreement also establishes a method for the determination of the flow of the water in the streams and a

11 Ibid., Art.1V, ST/LEG/SER.8/12, p.98.
12 Ibid.
point at which such determination would be carried out.13

Of interest is the provision requiring prior notice before commencement of operations for utilization of water for irrigation. Article VI provided that where a party wished to utilize water for irrigation purposes,

...such party shall give to the other notice of such desire six months before commencing operations ... in order to permit the consideration of any objections which the other contracting government may wish to raise.14

Probably the most innovative aspect of the agreement is Article III which was directed towards protection of water against pollution, (emphasis added) both in successive and contiguous river systems. It stated:

No operations of a mining or industrial nature shall be permitted by either of the contracting governments in Tanganyika or Ruanda-Burundi respectively which may pollute or cause the deposit of any poisonous, noxious or polluting substance in the waters of any river or stream forming part of the boundary between Tanganyika Territory and Ruanda-Burundi or any tributary river or stream thereof, or in any stream flowing from one territory into the other.15

13 Ibid., Art.V.
14 Ibid., Art.VI.
15 Ibid., Art.III.
In Article 11, the Parties set a priority of uses by prohibiting one another from undertaking mining or industrial activities the effect of "which may in any way lessen or otherwise interfere with existing navigable waters". Thus, by this Article, navigation took precedence over industrial and mining uses of the waters defined in the agreement.

Articles Ull and Ulll respectively covered conditions for awarding grants, inspection, and the right of access of officials. While Article Ull guaranteed officials of either Party to inspect installations in or near successive rivers, Article Ulll permitted officials from either side, including the inhabitants, to have access to any point on any river or stream forming the common boundary for any domestic or industrial purposes.

The ninth article contained two principles. It opened freedom of navigation on the river and respect for customary rights.

Procedures for dispute settlement, should the occasion arise, it set in the last article in which the contracting parties consented to submit disputes to arbitration as mutually agreed upon.

To summarise the agreement, the following princi-
plea may be underlined:—

1. The Agreement distinguishes between contiguous and successive waters.

2. Unlike the pre-world War I treaties that invoked the doctrine of absolute territorial integrity or natural flow theory, the 1934 Agreement recognizes the right of each riparian to divert shared waters, but only limits this right. Thus the emergence of "the principle of reasonable uses".

3. Apart from the most recent Agreement forming the Kagera Basin organization, no other Nile River Treaty, specifically refers to pollution problems. It is on this count that the Anglo-Belgian agreement is of unique importance.

4. Equally important is the requirement to notify either party of any proposed works, but within a specified time-limit of six months.

5. By Article 9, the customary rights of the inhabitants as to fishing, aquatic plants and domestic purposes were recognized.

6. The other feature to note is on relating to the right of access and inspection conferred on both
parties in respect of installations in one of the other party's jurisdiction.

7. Lastly, is the mechanism for dispute settlement where arbitration is given preference.

8. The Nile Waters Agreement of 1929: 17

Of all the agreements entered into to regulate the Nile waters the 1929 instrument is of far-reaching significance. It is considered a landmark in the development of the Nile doctrine and its provisions have provoked lively debate between commentators. The agreement was an outcome of protracted negotiations between Egyptian authorities and the British in which the former attempted to gain firm political control over the waters of the river. Because of its peculiar nature directly related to the Sudanese status, it would be appropriate to preface the background leading to its conclusion.

1. The Nile Projects Commission 18


The introduction of perennial irrigation to the Gezira in the Sudan, as it was noted in Chapter IV, touched on Egyptian sensitivities and created frequent controversies with the British officials. At the beginning of the twentieth century, a master control scheme of Nile projects was drawn up with the view to increasing water supply in the Sudan and Egypt in order to meet expanding irrigation requirements in the two countries. Authored by Sir Murdoch Macdonald, the then Egyptian Minister of Public Works, the scheme envisaged key control works to comprise of Sennar and Jebel Aulia Dams, Nag Hammadi Barrage, a Reservoir in Lake Tana, the Lakes Albert-Victoria Reservoir and the Sudd Channel Project. These proposals became a subject of severe criticism in Egypt. Sir Murdoch Macdonald was accused of having manipulated vital data to justify the Gezira Scheme at the expense of Egypt.

To reassure themselves, the Egyptian Government in the same year (1920), appointed the Nile Projects Commi-

19 Ibid.
20 Ibid.
ssion of Enquiry composed of a nominee of the Government of India as its Chairman, a British nominee and an American nominee. The Commission was asked "to give to the Egyptian Government its opinion of the projects prepared by the Ministry of Public Works with a view to the further regulation of the Nile supply for the benefit of Egypt and the Sudan", and "to report upon the propriety of the manner in which, as a result of these projects, the increased supply of available water provided by them will be allocated at each state of development between Egypt and the Sudan." 22

2. Findings and Recommendation of the Commission 23

(a) The Commission endorsed the proposal to construct the Sennar and Gebel Aulia Dams, together with Nag Hammadi Barrage, but recommended further study on the other schemes.

(b) It revised water allocation forecasts from 50 to 58 milliard cubic metres for Egypt, but did not quantify the Sudanese water requirements.

(c) As to Egypt's water rights, the Commission

22 Egyptian Government, n.18, p.5.
23 Ibid.
recommended a "supply of water sufficient to irrigate an area equal to the largest area which has been irrigated in any single year since the Aswan Dam in its present form was completed", and that "Egypt has an established claim to receive this water at the particular season when it is required". It was further recommended that "all the summer and the flood waters of the White Nile, after completion of the Gebel Aulia Dam, be allotted to Egypt". At any rate, the Commission was of the opinion that the largest area to which Egypt might thus claim would be 5 milliard feddans which was under cultivation in 1916-1917. Hence Egypt's claim to the White Nile waters during the low season leaving Sudan to meet its needs from the Blue Nile flood waters.

(d) The Commission, though recognising Sudan's right to irrigation water, hesitated to state its quantum. It, however, agreed that Sudan

24 Ibid., p.54.
was entitled to water for irrigation of 300,000 feddans in Gezira Scheme, provided the water so used had been stored from the flood of the Blue Nile. In essence, extension of irrigation in the Sudan was made dependent in the proposed dam at Lake Tana.

(e) On the question of water allocation at different stages of the construction of the projects, the Commission declined to give a categorical answer. It left it to depend on the circumstances as they arise.

Despite the above recommendations, it is pertinent to note that Mr. Cory, the American nominee gave a dissenting opinion. Among all other things, he suggested that:

(a) Egypt and the Sudan be considered as having vested rights of fixed quantities of water.

(b) Relying on Islamic legal tenets, Mr. Cory believed that "the as yet unappropriated waters should be allotted to Egypt and Sudan not according to the prevailing population

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26 Egyptian Government, n.18, pp.59, 77.
conditions, which were subject to fluctuation, but according to the prospective cultivable lands in both countries. Mr. Cory, therefore, seems to have had in mind the principle of optimum utilization based on comparative advantages which certainly were in favour of the Sudan,

(c) Mr. Cory further suggested that the "right of the Sudan to use Gebel Aulia water not required by Egypt, when able to pay for it" should be admitted so that the Sudan would have a "good opportunity of further development in the near future without prejudice to Egypt".

(d) In the case of lean years, he recommended that the excess water over and above such rights should be divided equally between Egypt and Sudan.

On the basis of the 1920 Commission's report, agreement could not be reached, and in the meanwhile, issues became complicated, issues linked to the political future of the Sudan. Consequently, another Commission was constituted following an exchange of Notes of 26 January
1925 between the British High Commissioner in Egypt and the President of the Egyptian Council of Ministers. The Commission consisted of an Egyptian, a British representative and a neutral Chairman, a Dutch Engineer, Mr. Canter Cramer. It was given the task to examine and propose the basis on which irrigation could be undertaken with full consideration of the interests of Egypt and without detriment to its "natural and historic rights".

3. **Provisions of the Agreement**

After protracted negotiations, the two parties finally accepted the Nile Commission Report of 1925 which is annexed to the Exchange of Notes and is considered as an integral part of the Agreement. The Agreement was concluded on 7 May 1929 between Mohammed Mahmoud President of the Egyptian Council of Ministers and Lord Lloyd on behalf of the British Government.

In Note 1, para.1, the Egyptian Government conceded to an increased quantity of water needed for the development of the Sudan, but on the condition it,

27 Relevant sections of the Report can be found in n.17, Enclosure No.1, 37/LTC/SER.8/12 pp.102-106.
...does not infringe Egypt's natural and historic rights in the waters of the Nile and its requirements of agricultural extension subject to satisfactory assurances as to the safeguarding of Egyptian interests.28

Responding to the above, the British Communication (Note No.2 para.4) took note of the "natural and historic rights of Egypt in the waters of the Nile.29

(a) Allocation of Waters:

The next substantive provision of the Agreement is one relating to the mode of allocation of water between Egypt and the Sudan, the main concern being the question of both quantity and timing. That is how much water should Sudan take and at what time of the year? As a result of the Commission's findings it was decided to limit the amount of water the Sudan could withdraw not to exceed 126 cubic metres per second before 1936 subject to the time schedule recommended by the Commission in Article 5 of its Report.30 The net effect of this was to allocate the low season water to Egypt, leaving Sudan to depend on the flood waters, but it was "subject to revision as foreseen therein.31

28 Ibid., Art.2.
29 Ibid.
30 Ibid., Note No.1, Art.3.
31 Ibid.
(b) Veto clause in respect of construction of irrigation or power works:

Paragraph 4(4) of the Egyptian Note insisted on the total control of the Nile system by providing that:

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 the 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.\(^{32}\)

(c) Right to construct water in Sudanese territory and safeguarding of local interests:

As per the right to undertake works in a foreign territory the agreement in Art. 4(b) spelt out the conditions governing such a situation:

In case the Egyptian government decides to construct in the Sudan any works in the river and its branches or take any measures with a view to increasing the water supply for the benefit of Egypt, they will agree beforehand with the local authorities or 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.\(^{33}\)

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32 Ibid., p.101.
33 Ibid.
It would seem that the Sudanese government had little say as far as use of its territory by Egypt was concerned. This is so because Egypt could deal directly with the local authorities. It did not have to obtain consent of the Sudanese government.

(d) Granting of facilities for hydrological studies:

The Parties agreed that the Egyptian government shall be afforded all facilities for carrying out "the complete study of the hydrology of the River Nile in the Sudan".34 Related to this is the arrangement for technical cooperation whereby the Inspector General of the Egyptian Irrigation Service and his staff were granted "full liberty to cooperate with the Resident Engineer of the Sennar Dam in measurements of discharges and records to satisfy the Egyptian government" that the provisions of the agreement are not violated. The British government assured that it "shall use their good offices so that the carrying out of surveys, measurements and works...is facilitated by the government of those regions under British influence."35

(e) Dispute Settlement:

The two parties agreed to settle any disputes in

34 Ibid., Art.4(d).
35 Ibid.
the spirit of good faith, failing which the matter would be referred to arbitration. 36

The treaty may be summarised in the following way.

The most prominent feature of the 1929 Agreement is the emphasis it attached to "natural and historic" rights. From it emerged a complimentary principle, that of "established rights" which may also be used interchangeably with "existing uses". Repeatedly, the exchange of notes between Egypt and Britain echoed the view that on no account should the Sudanese water needs encroach on the "natural and historic rights of Egypt". It went to the extent where one of the British Communications declared that "the safeguarding of those rights was a fundamental principle of British policy". Similarly the 1925 Commission in its report submitted that its recommendation had been guided by that major principle as set in its terms of reference. What this principle meant and its manifestations is the subject of discussion in the second part of this chapter. Suffice it to stress here that it has been considered the linchpin of the Nile doctrine and subject to various interpretations.

With the above observations, it is now proposed to examine the contents of the agreement.

36 Ibid., Article 4(f).
III. AN EVALUATION OF THE 1929 AGREEMENT

The underlying doctrine in the 1929 Agreement is the riparian principle of natural flow or the principle of absolute territorial integrity, a favourite of lower basin states. It was explicitly invoked in the pre-World War I colonial boundary treaties. In the 1929 Anglo-Egyptian Agreement, it was reformulated as "natural and historic rights" by which the natural flow of the Nile during the low season (from the 19th January to the 15th July) was reserved exclusively for the benefit of Egypt. 37 In its concrete derivation, the notion of "natural and historic rights" is nothing but the doctrine of "prior appropriation" received from the United States water resources jurisprudence. 38 The appropriative doctrine posits that "first in time is first in right",

37 Article 4 (b) bolstered this position by conferring upon Egypt a veto-like power. Without the consent of the Egyptian Government, neither Sudan nor territories under the British administration could undertake any works so as to entail any (emphasis added) prejudice to the interests of Egypt, either reduce the quantity of water... or modify the date of its arrival or lower its level, see, n.32, see Infra, Batstone, n.39, p.531.

38 supra., chap.iii.
or that the first person to use water acquires the right to its future use against later takers. It is also known as "capture and use theory." Obviously, there is a logical relationship between these three theoretical positions.

The central question that impinges on the Nile conventional system relates to the validity or generality of the principles invoked in them. Different commentators have attached varying interpretations to the agreement. Some assume that claims to established

rights constitute a legal right. Others believe that the treaty provisions found in the 1929 instrument created a subjective right in favour of the downstream states which binds all the other system states irrespective of whether they be signatories to the said agreement or not. On the other hand, there are those whose conception of the agreement does not go beyond the well-known maxim pacta tertiis nec nocent nec posunt, that as a general rule a treaty is applicable only to the parties and is a concomitant of consent and sovereign independence of states. As for third parties the treaty provisions apply res inter aliciae acta. This necessarily leads to the fundamental question as to whether the agreement consolidated any generally accepted law on the subject.

The declared intention of the Nile Waters Agreement was to formulate a framework arrangement to accommodate rising water needs in Egypt and the Sudan. In spite of these aims, however, most observers do acknowledge the inequitable provisions contained therein. The essence of the agreement was to confer upon Egypt a unilateral right to veto any developments upstream in the Sudan and in the territories then under British colonial administration.

40 See generally Ibid.
What is of concern here is to establish as to whether the treaty was an expression of legal obligations or it was merely a concession between Britain and Egypt. The first point to note is the fact that as soon as the Sudan gained sovereign independent states on 1st January 1956, it rejected the binding nature of the 1929 Nile Waters Agreement. It declared, inter alia:

It is important to remember that the Sudan was not a Party to the Nile Waters Agreement which was concluded between the Government of Egypt and Great Britain. The present Sudan Government considers that it was an unjust agreement because it limited the development of irrigation in the Sudan while leaving Egypt free to develop her irrigation as fast as she pleased.\footnote{41}

In due course Egypt and Sudan concluded a new treaty which superseded the 1929 agreement.\footnote{42}

If the treaty is considered from the British perspective, it becomes more evident that the provisions of the agreement were of a political nature rather than an exposition of legal principles. On 22nd November 1924, the British Government served an ultimatum to the Egyptian Government threatening that Britain could increase the area to be irrigated in the Gezira (Sudan) \"to an unli-

\footnote{41} Sudan, \textit{The Nile Waters Question}, n.46, p.2.
\footnote{42} ST/LEG/SER.3/12, pp.143-148.
mited figure as need may arise", and in effect that the flow of water to Egypt would be diminished by unlimited amount. Conceivably, Britain would not have issued such a threat in breach of an obligation under international law. The threat would appear to have been delivered to withdraw a political concession. The plausibility of this inference is supported by the statement of the British Foreign Secretary, Chamberlain, made to the House of Commons on 15th December 1924, according to which the British Government was to satisfy the water needs of Egypt, "if we have a friendly Egyptian Government to deal with". Again in 1925, Lord Allenby in reply to Ziwar Pasha's note clearly brings out the non-juridical character of the agreement under review. The note in part says:

43 The threat issued by Lord Allenby, the British High Commissioner in Cairo, followed the assassination of the Governor-General of the Sudan in Cairo on 16th May, 1924, see Wavell, Allenby, Soldier and Statesman (London, 1946), p.335; F. J. Berber, Rivers in International Law, (London, 1959), pp.56, 95-96. Batstone, n.39, p.528. Hosni, n.39, p.80 where the author remarks: "It was only, as a result of the assassination of British Governor-General in the Sudan and following unlimited right to the Nile Waters, that the parties agreed in 1925 to call a commission to study and report fully on a complete system for the utilization of those waters".

44 Ibid., Berber, p.96.
I need not remind your Excellency that for forty years the British Government watched over the development of the agricultural well-being of Egypt, and I would assure your Excellency at once that the British Government, however solicitous for the prosperity of the Sudan, have no intention of trespassing upon the natural and historic rights of Egypt in the waters of the Nile, which they recognize to-day no less than in the past...." Quoted in Batstone, n.39, p.529.

Furthermore the contention that the British Government conceived the agreement not as entailing legal obligations, but as a political instrument to pacify Egyptian nationalism, is evident by the fact that Britain on more than one occasion reserved the rights of the East African territories. The legal hollowness of the agreement is, moreover, transparent when the British position on similar situations is considered. On 12 and 15 June 1925, Italy and Britain in an exchange of notes concluded an agreement for the regulation and utilization of the waters of the Gash River. Here the natural flow theory demanded by the lower states was rejected. Instead, the principle of equal sharing was adopted. Nevertheless, it is important to emphasize two


46 ST/LEG/SER.B/12, pp.128-132; Batstone, n.39, pp.533-537.
relevant points. In case the quantity of water was too small to be apportioned between the two states, the entire flow was given to the upper riparian.\textsuperscript{47} Secondly, it is of significance to note that from the point at which the equal division of water ceased, the Sudan was to pay for the water which the upper riparian allowed to flow.\textsuperscript{48} The Anglo-Italian approach on the Gash River does reflect correct appreciation of riparian rights and interests. Where one state is not yet in a position to employ its share of water, the other riparian desirous of using that water could do so on payment of compensation for the concession given to it. Most of all, this prevents an unrestricted claim to established uses or priority of appropriation by an earlier user.\textsuperscript{49}

The arguments put forward above suggest that the 1929 Anglo-Egyptian treaty was typically a political instrument that cannot be admitted as a precedent-setter under international law. Great Britain was so preoccupied with its Empire interests that it was prepared to go to any extent to trade-off the interests of the upper ripa-

\textsuperscript{47} \textit{Ibid.}, Batstone, pp.535, 536.

\textsuperscript{48} \textit{Ibid.}, p.536; ST/LEG/SER.8/12, Enclosure No.4, p.132.

\textsuperscript{49} \textit{Ibid.}, The same position was adopted by Egypt and the Sudan in 1959 where the Sudan gave Egypt a Water loan, see \textit{Infra}. 
rians to secure what it considered its vital interests at that point of time. What was important to Britain was a "friendly Egyptian Government", that would be ready to give way on such matters as the Suez Canal and the maintenance of troops in Egypt. Thus, the 1929 Agreement was a colonial concession to Egypt without legal validity. Its import is exactly what Judge Padilla eloquently described in his dissenting opinion in the *Fisheries Jurisdiction Cases* when he said,

There are moral and political pressures which cannot be proved by the so-called documentary evidence, but which are in fact indisputedly real and which have in history given rise to treaties and conventions claimed to be freely concluded and subjected to the principle *pacta sunt servanda*. 50

The attitude of the upper riparian states to the agreement is fairly clear. Perhaps Uganda, by virtue of the Owen Falls Dam agreements, may have treaty linkages with the 1929 regime. In Article 1 (para. 2) of the 1949 Note it was stated that the two State Parties "in accordance with the spirit of the Nile Waters Agreement of 1929 have agreed to the construction of a dam at Owen Falls in Uganda for the production of hydroelectric power...

and for the control of the waters of the Nile.\(^{51}\) This position is reinforced in Article 5 which, while allowing the Uganda Electricity Board freedom of action, provided that that action must be in conformity with the provisions of the 1929 Agreement, i.e. the natural flow principle should on no account be tampered with. Before continuing the Ugandan case, it is proposed here to dispose of the Ethiopian, Kenyan and Tanzanian position since these are fairly straightforward.

**Ethiopia:** The desire by the lower riparians to control the sources of the Nile River as has been shown has been going on for several generations. It first arose as a matter of curiosity in relation to the Nile annual flood, but later assumed real interest: the need for physical control. To this end, many attempts have been made to extend the Nile doctrine as developed by the lower states to include Ethiopia. But all available evidence shows that successive Ethiopian Governments have consistently reserved that country's rights to the waters of the Blue Nile.\(^{52}\)

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52 Dante Caponera has argued out the Ethiopian position in the following way: "1. The agreements... between
Foot Note No. 52 continued:

Ethiopia and U.K. have never been ratified. Customary rights which might appear from the behaviour between lower riparians and Ethiopia would not be binding on this latter country if a purely positivistic approach toward the interpretation of the sources of international law would be upheld. 2. Ethiopia's "natural rights" in a certain share of the waters in its own territory are undeniable and unquestionable. However, no treaty has ever mentioned them. This fact would be sufficient for invalidating the binding force of these agreements, which have no counterpart in favour of Ethiopia. An international agreement is a contract freely subscribed between two or more sovereign states, between which the maxim *do ut des* (reciprocity) should automatically be a prerequisite for its validity. The existing agreements much resemble that Roman law called *pactus lenninus*, in which one party reserved for itself rights and prerogatives leaving the other party without counterpart, reciprocal concessions, or compensations. In Roman law such a pact would be null and void; it is likewise in international law. This is explainable by the international political conditions of Ethiopia in 1902. 3. The agreements were signed between Ethiopia and the U.K. (for Egypt and the Sudan). Since the latter countries either question the validity of their own water agreements...Ethiopia, which had not one single benefit from them, had even greater reason for claiming their unfairness and invalidity. The search for new agreements by Egypt and Sudan demonstrates the non-viability of these agreements. 4. The U.K. in 1935 recognized the annexation of Ethiopian Empire by Italy...U.K.'s recognition of annexation is an act which invalidated all previous agreements between the two governments. Ethiopia has never asked for renewal of the Nile agreements after such recognition. D.A. Caponera, "The Nile River Basin Legal and Technical Aspects" mimeo, paper of August 1958 being an English trans., of an Italian version, "Il Bacino Internazionale Del Nilo Considerato Giuridicamente" in La Comunita Internazionale, Vol. 14, Jan. 1959 pp. 13-14. Wondimneh Tilahun, Egypt's Imperial Aspirations over Lake Tana and the Blue Nile (Addis Ababa, 1979); Okidi, n. 95, pp. 411-13.
The 1902 Agreement between Emperor Menelik II and Britain were rejected by both Emperor Haile Selassie and the present Ethiopian Government. In 1925, Italy granted Great Britain a concession to construct a barrage at Lake Tana. The Ethiopian Government, however, lodged a protest with the League of Nations against the agreement denouncing its binding force. Ethiopia argued that it could not accept the obligations of a treaty signed by two foreign powers on waters in its territory and, moreover, she had not been consulted. Eventually, the Ethiopian argument prevailed and the matter was dropped. Negotiations with Ethiopia did continue but no result could be reached and in 1936 Italy invaded Ethiopia. Since then there is no evidence of a Nile treaty between the lower states and Ethiopia.

Tanzania: The Tanzanian attitude towards the 1929 Agreement or even the one of 1959 have been dealt with elsewhere. Suffice it here to emphasize that the

54 Ibid.
56 Ibid., Okidi, p.421.
Government of that country adopted a clean slate theory to colonial treaties. It rejected the veto clause of the Nile Waters Agreement as inimical to its sovereignty and independence because Article 4(b) of the said treaty perpetually subordinated Tanzania’s rights and interests to the Egyptian judgement. As such it explained its position to the Governments of Britain, Egypt and the Sudan in a Note dated 4 July 1962. Copies of the Note were sent to Kenya and Uganda.

While rejecting the validity of the Nile Waters Agreement, the Tanzanian Government expressed its willingness to discuss the Nile waters question with the other basin states, so as to arrive at a formula that is both just and equitable. In the meantime, it accepted to continue technical consultations between Egypt, the Sudan and the other Lake Victoria basin states.

In 1963, by a Note dated 21 November, Egypt responded to the Tanzanian Note by insisting that till a new agreement was concluded, the Nile Waters Agreement remained valid and applicable. It also favoured the continuation of informal talks between their respective technical experts. Sudan did not reply Tanzania’s Note.

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57 Ibid.
From the above it is evident that the Tanzanian legal advisers saw the Nile Waters Agreement neither as a real nor a dispositive treaty and, hence, of no legal effect to Tanzania. It may be noted that Tanzania has since spearheaded the formation of the Kagera Basin Organization, an agency responsible for the development and management of the uppermost catchment of the Nile system.\(^{58}\) Interestingly, the Kagera Agreement makes no reference either to "natural and historical rights", or "established rights", or "priority of appropriation".

**Uganda:** The position of Uganda in respect of the Nile Waters Agreement is not very clear. Does this imply that Uganda has acquiesced into the Nile regime? It is difficult to deduce an affirmative answer and it would be equally risky to presume that Uganda accepts the general validity of the obligations laid down in the Nile Waters Agreement.

The approach that Uganda adopted towards succes-

\(^{58}\) Among the immediate projects to be undertaken is the proposed Kishanda Valley hydroelectric power project which involves the diversion of water from the Kagera into the valley to create an artificial lake one hundred and sixty kilometres long, producing about 100 megawatts of electricity, see supra.
session to treaties was in general the same as that of the other former British East African territories. Therefore if the regime has been continued, it seems that this has been so not because of a legal obligation, but merely as a matter of policy based on good-neighbourliness. Otherwise, it would be hard to explain the fact that the Government of Uganda has repeatedly called upon the other basin states to convene a conference to resolve the Nile waters question amicably and for the benefit of all the communities concerned.

Theoretically, it could be argued that Uganda's silence has estopped her from relieving itself from the inherited treaty obligations. This reasoning is based on the Roman law maxim (now predominantly Anglo-American) that to keep silent when one must and can speak is tantamount to consent. Indisputedly, a state has the

59 See Okidi, 39, p.422.

60 This was the obiter dicta of the International Court of Justice in the Temple of Preah Vihear (Cambodia v. Thailand). The Court refused to admit the defendant's contentions on grounds of acquiescence declaring "Quit tacet consentire videtur ci loqui debuisse et act potuiisse", but see the dissenting opinion of Judges Spender, Koo and Quitanama, who all concur that silence is only one of the factors to be considered. It cannot be taken, of its own, as conclusive evidence. I.C.J. Reports 1962. And moreover, "the Court's appreciation of the alleged acquiescence failed to take account of the period in history and the nature of the Parties involved," Jessup, The Price of International Justice (New York, 1971), p.15.
freedom to recognize or acquiesce in any fact or situation either of law or of fact explicitly or impliedly. In which case recognition may become a source of right or obligation to the extent to which it provides an essential element in the establishment of a legal right or obligation. While it may provide evidence of fact or a state of fact, its probative value is dependent upon all the attendant circumstances. Stated briefly, silence or failure to react, even when it constitutes a relevant factor cannot by itself be relied upon as implying recognition or acceptance of the other party's claims. Particularly is this so in such a sensitive area as that of water resources. To expect a state to acquiesce to a treaty, the effect of which is to perpetually subordinate that state's sovereign rights and thereby severely restrict its freedom of action, would be too tenuous a position to sustain.

Even if the plausibility of the 1929 Nile Waters Agreement were conceded, there is nothing to stop the affected state or states from terminating an instrument that has become unduly onerous and unconscionable. As Amado once stated "treaties are inviolable but not for ever." Thus, by operation of the clausula rebus sic

61 Ibid.
stantibus, Uganda or any of the basin states, could legitimately abrogate the Agreement or certain of its clauses and demand a redefinition of rights and obligations that take into account the fundamentally changed circumstances in the Nile watercourse.

States that extracted concessions under unfair circumstances naturally insist on strict adherence to the doctrine pacta sunt servanda, on the sanctity of treaties. The only reason they advance against the clause rebus sic stantibus is that the clause is nothing but a ploy, an instrument in the hands of law-breaking Parties to rationalise their lack of good faith. It is submitted here that both pacta sunt servanda and rebus sic stantibus constitute the most important principles of international law. The two are not antagonistic, but rather complementary. To oust either inevitably leads to the collapse of international law. Neither pacta sunt servanda nor clausula rebus sic stantibus can be fetichised.

The legal nature of the doctrine rebus sic stantibus is based on the premise that there is in international

law an objective rule according to which any agreement is concluded on condition that the situation existing at the time of concluding the treaty does not radically change. The disappearance of such a situation or the occurrence of a fundamental change of circumstance authorizes either contracting Party to abrogate the treaty. Diplomatic practice, judicial decisions and opinion of jurists recognize the existence of the clause rebus sic stantibus. It is not intended here to delve into any detailed treatment of the clause, since this has been exhaustively discussed elsewhere.64

Suffice it to note that the attitude of the new Afro-Asian states towards international law is a living testimony of state practice overwhelmingly recognizing the clause rebus sic stantibus. At the United Nations Conference on the law of Treaties it was only the United States of America who opposed the concept. The International Law Commission endorsed the clause and finally it was adopted as Article 62 of the 1969 Vienna Convention

on the Law of Treaties. Without mentioning the *rebus sic stantibus* clause the Convention formulated the rule negatively that a fundamental change in circumstances may be invoked as a ground for terminating or withdrawing from a treaty if two conditions are fulfilled, viz:

**Article 62:**

1. (a) Where the existence of these circumstances constituted an essential basis of the consent of the parties to be bound by the treaty, and;

(b) The effect of the change is radically to transform the extent of obligations still to be performed under the treaty.

2. A fundamental change of circumstances may not be invoked as a ground for terminating or withdrawing from a treaty.

(a) If the treaty establishes a boundary, or;

(b) If the fundamental change is the result of a breach by the party invoking it either of an obligation under the treaty or of any other international obligation owed to any other party.65

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Before showing some of the reasons that may be invoked in respect of termination of or withdrawal from the 1929 Nile Waters Agreement, the preceding discussion could be summarised in the following way. The *rebus sic stantibus* clause is an essential rule in harmonising practice on the basis of legal constructions embodying to the highest degree possible the contemporary trends of international law, the principles of the U.N. Charter, and for the African states in particular, the principles of the O.A.U. Charter, ownership of natural resources and the basic right to development based on sovereign equality.

In the changing international relations, especially in the context of the emergence of new states, there is always a general tendency, which varies in speed and scope from case to case, for those relations to deteriorate or to be readjusted on the basis of greater equality and greater respect for the sovereignty of the new states. If treaties are viewed in this perspective, then the complementarity rather than antagonism between the doctrines *pacta sunt servanda* and *clausula rebus sic stantibus* becomes clearer and they seem useful legal instruments in harmonizing state interests.

Turning to the 1929 Nile Waters Agreement, are there sufficient grounds to warrant application of the clausula? The treaty under review was concluded in
accordance with the British imperial policy of having a friendly Egyptian Government to deal with. Far from defining and safeguarding the rights and obligations of the basin territories, the agreement as already indicated, granted far-reaching concessions to Egypt at the expense of the other interested communities. The agreement conferred upon Egypt the right to veto any developments in the Sudan and British East Africa at its own will whenever it felt such developments were detrimental to its interests on the Nile waters. The other states did not possess such a corresponding right. The point to note here is the fact that the Anglo-Egyptian accord did not reflect the position of ordinary riparians. It was an act of two powers trading-off concessions to each other.

Now an entirely new situation obtains. The "territories" once "under British administration" are sovereign independent entities. That the British Government anticipated radically transformed circumstances is evident by its declaration in 1956 that it formally reserved the right

66 Batstone, n.39, p.530, at which he writes: "It may be commented that this attitude on the part of Egypt represented a subordination rather than adjustment of interests as Sudanese needs were only to be considered after Egyptian needs had been satisfied", and he adds a footnote, "Nor is this surprising when it is remembered that the Egyptian view was that she should be allowed the exercise of her 'indisputable right of sovereignty over the (Sudan) and of control of the waters of the Nile'."
to negotiate for a share of the waters of the Nile for the upper riparian territories. Of even greater weight is the conduct of the other principal contracting Party. When the Government of an independent Sudan denounced the Nile Waters Agreement, the Egyptian Government recognized these objectively changed circumstances and negotiated in 1959, a fresh treaty with the Sudan. In the preamble to the new Nile Waters Agreement, the two signatories explicitly acknowledged the existence of fundamentally changed circumstances. It said, *inter alia*:

*Whereas the full utilization of the Nile waters for the benefit of the United Arab Republic and the Republic of Sudan requires the implementation of projects for the full control of the river and the increase of its water supply and the planning of new Working Arrangements on lines different from those under present conditions; Whereas for the establishment and working of such projects complete agreement and full cooperation between the two Republics is necessary in order to make the best use of the available water in such a manner as to guarantee both their present and future requirements; Whereas the Nile Waters Agreement concluded in 1929 has only regulated a partial use of the natural river and did not cover the future conditions of a fully controlled river supply....*

Obviously this was a recognition of the doctrine *rebus sic stantibus* although it is not directly mentioned, but

67 Lauterpacht, n.45.

68 ST/LEG/SER.8/12, p.143.
the terminology is unambiguous enough in stressing a fundamental change of circumstances as the overriding reason leading to the conclusion of a new regime. Any of the affected basin states could, for exactly the same grounds, terminate or withdraw from the 1929 Nile Waters Agreement, and Egypt and the Sudan, by estoppel, would be precluded from insisting on the binding force of the agreement.

Yet another factor of even graver dimensions rendering the regime inoperative are the factors dealt with in chapters 1 and VI of this inquiry. The impact of the interaction between man, technology, and environment, as a consequence of demographic pressures, industrialization and urbanization on water resources could not have been foreseen in 1929 when the agreement was entered into. So central are these problems that they have become a matter of universal concern. These challenges are no longer confined to the semi-arid and arid regions, but encompass the whole basin. Therefore, the legal and institutional tenets formulated in the 1929 agreement are inappropriate to cope up with the new situation. Inconceivably, neither Uganda nor Egypt or any of the basin states foresaw the construction of the Aswan High Dam

69 See Supra., Chap.1 and Infra., chap.VI.
and its ramifications both in terms of water rights and ecological effects.

In defining the water rights of the upper Nile communities two assumptions seem to have prevailed. Firstly, it was presumed that the Equatorial Nile portions were over-abundant in rain water. Secondly, it was generally believed that the economies of these societies would remain at a subsistence level for an infinite number of generations. Both assumptions have been proven incorrect. Precipitation in this part of the basin is unevenly distributed, spatially and seasonally. In addition, the region has in recent times been subjected to some of the worst droughts - witness, for example, the 1979-1980 drought that devastated almost the whole of Uganda creating famine conditions in that country. All the upper states, underdeveloped as they are, recognize the pivotal role of water resources in their overall socio-economic development and are conscious of the central function that Nile waters play in this regard. Development plans have been drawn with the aim of diversifying the agricultural base of the economies, particularly increasing agricultural output. With this background, a country could not be expected to depend on the vagaries of nature.

The preceding argumentation can be summarised by
a quotation from Maxwell Cohen. Commenting at the International Law Association Proceedings with reference to the U.S.-Canadian water relations, he observes:

We have had a unique experience in the management of our common rivers (U.S.-Canadian Waters), both boundary and transboundary, and have probably given to I.C.J. (1910), more quasi-executive power, to say nothing of the advisory authority, than most states with common river problems. Yet even after 50 years of experience, we find ourselves at this very moment in Canadian-U.S. relations up against difficulties that could not have been foreseen a generation or two ago. I refer here particularly to the claims being made by both states with respect to hydroelectric power potential of the Columbia River. Canada has taken the position that she does not wish to export power when that power will some day be required for domestic use and when its recapture is likely to prove extremely difficult when the U.S. gets a vested interest in the use of that water power of Canadian origin.

For the reasons given above, it is evident that the circumstances under which the 1929 Nile Waters Agreement was concluded have undergone a radical transformation. There are no more colonies, protectorates or empires in the Nile Basin. All are sovereign independent states. The two lower states, Egypt and the Sudan recognized these changes and replaced the treaty with the 1959 Agreement. If the two principal parties to the treaty saw it unfit to continue it, there is no reason as to why the

treaty should remain applicable to Uganda. Besides, new problems in relation to water resources have arisen demanding a new approach to the Nile basin. It would, therefore, be in the interests of the affected states to mutually work out a fresh legal and institutional framework that takes account of these changed circumstances.

Having examined the agreement in the above perspective, it is still left to see whether the principle of prior appropriation has gained the force of a local or regional customary rule of international law. This is done below.

Treaty law is limited in its operation to parties to the treaty. But this statement requires to be qualified. In certain circumstances, a treaty may become customary international law, thereby creating a subjective right to the states not parties to that treaty or treaties. In other circumstances, a treaty may merely declare or confirm the existence of a customary rule of international law, the denunciation of which by a party cannot absolve that party from its obligation. The act of denunciation in this case becomes a breach of law. Viewed in this perspective, the question is, does Egypt's insistence on having the whole natural flow of the Nile waters to itself during the low season (as provided in the 1929 agreement render the principle of prior appropriation non-opposable
to the other basin states? An answer to this question calls for a brief review of what constitutes a rule of customary international law, which is itself a matter of controversy in certain aspects, as discussed in Chapter III and need not be repeated.

It was submitted earlier that the parties to the agreement were not writing legal obligations but exchanging political concessions. Sudan challenged the validity of the agreement. Egypt accepted Sudan's contentions and the two tore apart the Nile Waters Agreement. Thus, the conduct of the two principal parties does not support the existence of a customary rule of law in the treaty. The basin states "whose interests are specially affected", and whose practice "should have been both extensive and virtually uniform", do not recognize the validity of the agreement let alone a customary rule of law. Tanzania denounced the agreement in 1963. Successive Ethiopian Governments have never recognized the Nile doctrine. In 1956 and again in 1957, the Ethiopian Government, responding to the proposals to construct the Aswan High Dam, circulated an aide memoire dated 23 September 1957 to Diplomatic Missions accredited to Cairo. It stated its position in no uncertain terms. Partly the Note stated:

The Imperial Ethiopian Government must, therefore, reassert and reserve now and for the future, the right to take all such measures in respect of its water resources and in particular, as regards that portion of the same which is of the greatest importance to its welfare, namely those waters providing so nearly the entirety of the volume of the Nile, whatever may be the measure of utilization of such waters sought by recipient states situated along the course of the river...\textsuperscript{72}

It is clear from the above passage in the Ethiopian aide memoire that that state does not recognize the Egyptian claims to "historical and natural rights", or prior appropriation, in the Nile waters. On the contrary, Ethiopia adopts diametrically the opposite position. For, in the said Note the Ethiopian Government continues:

\textit{Under these circumstances Ethiopian, alone the source of nearly the entirety of the waters involved, must, once again, make it clear that the quantities of the waters available to others must always depend on the ever-increasing extent to which Ethiopia, the original owner, is and will be required to utilize same for the needs of her expanding populations...\textsuperscript{73}}

The Note concludes that any water from the Blue Nile that the lower states (Egypt and the Sudan) may receive is dependent on how much Ethiopia requires. Having satisfied her requirements, Ethiopia, "will count it a privilege to


\textsuperscript{73} Ibid.
be able to contribute through her natural resources... to the welfare of the inhabitants of the neighbouring sister nations on the banks of the Nile." 74 This in effect means two things. One, in the event of there being insufficient water supply, the whole flow will be reserved for the upper basin state(s). Two, the lower states are entitled only to the surplus supply of the river. Categorically, Ethiopia, a state having vital interests in the Nile waters, rejects the Egyptian assertions to a prior right or for a special position in the Nile waters. Though governments have since changed in Ethiopia, there is no evidence contradicting the 1956 aide-memoire and, if anything, it seems as if the attitude of the present regime is even much harder than what it was thirty years ago.

Amongst the rest of the other basin states a similar attitude prevails. At the outset of the oil crisis, the slogan, "one barrel of oil for a barrel of water" 75 from the Nile, was raised by some authoritative circles in East Africa. What the slogan indicates, however sentimental it may sound, is the hard fact that it would be too presumptuous and even dangerous to elevate the doctrine of prior appropriation to a juridical plane having the

74 Ibid.
75 Okidi, n.39, p.446.
features of a rule of customary international law at least, as applicable to the Nile.

Practice elsewhere as shown in Chapter III does not support the existence of a customary law in respect of prior appropriation. As for natural and historic rights, there is no other treaty so far in which a state has accepted such sweeping obligations as those in the 1929 Waters Agreement. Only Mexico tried to invoke the doctrine but the United States countered it with the Harmon doctrine. In the negotiations between the United States and Mexico on sharing the waters of the Rio Grande (Bravo), Mexico rejected the U.S. attempts to base the treaty on priority of appropriation. On the Indo-Pakistan dispute over the Indus waters, India refused to recognize a rule of law in prior appropriation. Similarly, Bangladesh on the Ganges waters refuses to accord recognition to priority of appropriation as claimed by India.

The opinion of authorities already shown in Part I of this enquiry, overwhelmingly supports the view that the theory of natural and historical or priority of appro-

76 See Supra., Chapters II, III.
77 Ibid.
78 Ibid.
priation is not a rule of law, much less one of customary international law. H. A. Smith who had hailed the worthiness of the 1929 Nile Waters Agreement, however, noted that the recommendations of the 1925 Nile Waters Commission had the aim of not determining legal rights but of the progressive development and that the right accorded "did not and could not claim finality." In this context Smith did not attach any juridical inevitability to the Nile doctrine as in the Nile Waters Agreement.

Another writer, Garretson who supports the regime in question, admits that:

Although the 1929 Agreement was essentially conceived to coordinate the irrigation arrangements as they were developing in Egypt and the Sudan, nearly all observers have emphasized its apparent unilateral characteristics. In effect Egypt was given the right to veto any upstream development including hydroelectric power as well as irrigation.

Sayed Hosni, also a supporter of the Nile doctrine, under-emphasizes the point. Analysing the 1959 agreement he arrives at the following conclusion:

In no way they were based only or mainly on the concept of established rights as the case of 1929 Agreement. The principle of established rights


80 Garretson, n. 39, pp. 286-87.
therefore entered as an element in the determination of an equitable right in the 1959 Agreement, and the final share was a question of paying regard to many considerations in which benefits had to be carefully weighed against injuries, i.e. the true essence of the principle of *sic utere tuo* or equitable apportionment.  

Commenting on the statement the British Government made to reserve the rights of the East African territories to Nile waters, Lauterpercht argued that the reservation "by the U.K. to negotiate for a share of the Nile waters for the upper riparian territories" could only be interpreted in one or two ways. "Since there is no legal need for a state to reserve a right to negotiate on any matter", the only logical deduction is that the British Government's formal reservation is directed "to the substantive rights of Egypt in the Nile waters". Therefore, if the statement is viewed on this plane then impliedly, "it is a rejection of the doctrine of 'prior appropriation' at least as applied in the case of *Wyoming v. Colorado*...." In effect, "the U.K. is declaring that the extent to which the upper riparian territories are entitled to share in the waters of the Nile cannot be conclusively determined by reference to the quantities of water hitherto annually taken by the Sudan and Egypt from the river".

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81 Hoeni, n.39, pp.95, 97.
82 E. Lauterpercht, n.42, pp.135-137.
83 259 US 419; see *Supra* Chapter 111.
84 Ibid.
Similarly, R. K. Batstone disapproves with the assumption that established rights or priority of appropriation is a legal principle, but accepts its applicability only as an element to be taken into account in water allocations. For, he says: "Yet although the claims of established irrigation are not to be highly ignored, it is doubtful whether this doctrine can be accepted without modification in international law." Referring to the British Government's reservation, Batstone has noted that because of this reservation "there is no reason why any increases in irrigation purporting to appropriate waters to which these territories have a legitimate claim should be protected." He further warns that if a state undertakes diversions of shared water resources ignoring the legitimate rights of a co-basin state it would be doing so at its own risk.

85 Batstone, n.39, pp.540-44.
86 Ibid., p.543.
87 Ibid., p.544.
88 Ibid., It is interesting to note that Batstone after denying prior appropriation or established rights legal validity, arrives at the conclusion that the principle could have hardened into a regional custom of International law in relation to the Nile system. He submits that "international law, although not accepting the principle of prior appropriation, will respect the claims of existing diversions of water on the ground of a lack of opposing claims during long established use."
Footnote 88 continued:

But as far as future diversions are concerned, common assertions by the two lower states cannot impose stringent obligations on the upper states than are imposed by customary international law. He adds in a footnote that "such assertions would constitute res inter alios acta as far as upper states are concerned". Certainly Batstone could not have been aware of Tanzania's note denouncing the Nile Waters Agreement, Maliti, n.54; but the Ethiopian Note of 1956 had already been published. To base the emergence of a customary rule only on long usage ignores opinio juris considered even by the International Court as the most decisive element in the formation of a custom recognized as law, see, n.70, p.44. By attributing to the Nile doctrine the status of a local or regional custom in spite of glaring inconsistent and contradictory state practice the author again overlooks the Court's authoritative interpretations pronounced in the Asylum Case, see, I.C.J. Reports, 1950, pp.276-77; and also the North Sea Continental Shelf Cases, I.C.J. Reports, 1969, p.3, where the Court required a high degree of 'proof' of opinio juris; the Lotus, P.C.I.J.; Sec.A, n.10, p.28; U.S. Nationals in Morocco, I.C.J. Reports, 1952, p.200.
Among writers on the Nile River the opinions expressed by C. A. Pompe are noteworthy for he considers prior appropriation doctrine not as a legal principle but as an element in decisions *ex aequo et bono*.\(^\text{89}\) He concludes that "pre-existent" claims should be understood to include "only such appropriations as is not in conflict with international law and agreement."\(^\text{90}\) However, Pompe does not amplify under what circumstances priority of appropriation is in conformity or in conflict with international law. Similarly, C. O. Okidi is of the view that "the question is not one of re-negotiation of the legal regime but one of a 'clean-slate' negotiation..."\(^\text{91}\)

The list of commentators is fairly long and includes F. J. Berber and Rolet who both deny a rule of law in prior appropriation. Learned bodies, such as the International Law Association, also place claims to established uses on the list as merely one of the factors to be considered.\(^\text{92}\) The International Law Commission in its efforts to progressively develop and codify rules of law governing shared water resources adopts an approach akin to that

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\(^{89}\) Ibid., p.291-92.

\(^{90}\) Ibid., p.291.

\(^{91}\) Okidi, n.39, p.447.

\(^{92}\) See *Supra.*, Chapter 111.
suggested by the International Law Association.\textsuperscript{93}

Judicial decisions, international and municipal, have been dealt with at some length in Chapter III. To rationalize the reception of priority of appropriation in international law, there is a tendency by a section of water resources lawyers to place undue weight on the authoritativeness of the decision by the American Supreme Court in the case of Wyoming v. Colorado.\textsuperscript{94} The proponents of this strand of thought ignore the context within which the Supreme Court handed down the judgement and do not look at the totality of the Supreme Court's jurisprudence on the subject. In Nebraska v. Wyoming,\textsuperscript{95} for example, Nebraska had moved the Court to adjudge the disputed waters on the basis of prior appropriation. Justice Douglas, delivering the majority opinion declined to uphold Nebraska's contentions, and, instead the doctrine of equitable apportionment was invoked in apportioning the waters of the North Platte River.\textsuperscript{96} Thus, the Supreme Court deviated from its earlier judgement and reduced the

\begin{itemize}
\item \textsuperscript{93} \textit{Ibid.}
\item \textsuperscript{94} \textit{Supra.}, Chapter III.
\item \textsuperscript{95} \textit{Wyoming v. Colorado}, 298 U.S., 573, 578 (1936).
\item \textsuperscript{96} \textit{Ibid.}, p.584.
\end{itemize}
principle of prior appropriation into no more than an element in water apportionment. It declared that priority of apportionment though a guiding principle is not a hard and fast rule. 97 And this is the modern trend of thought.

The appropriation doctrine may have had its merits as a rule of municipal law. But to elevate it to an international juridical level, and apply it between sovereign independent states and even within a domestic setting is inadmissible because should prior appropriation receive recognition as a local rule of international law applicable to the Nile basin, it would certainly do untold injustice to millions of populations since their development would be limited to subsistence methods of production. For quite a time, down stream countries had a favourable advantage. But this position has changed drastically. Time has long past when communities could rely on seasonal rainfall which seemed to be in abundance. But the new requirements have forced every community more and more to river storage. Most frequently these communities find that the lower states have attempted to preempt their rights on the grounds of prior appropriation.

The Nile Waters Agreement had created a regime which restricted the social and economic development of the

97 Ibid.
peoples in the upper courses of the river. They could only use the water after Egypt had satisfied its needs. Thus the rights to water of the upper riparians were defined to be residual and subordinate. And yet, to paraphrase the I.C.J. in the Continental Shelf Cases, it is a fundamental rule that the right of each basin state in respect of that part, portions of a river within its territorial jurisdiction, exists ipso facto and ab initio by virtue of its sovereignty over the land and its sovereign right to exploit these resources. It is an inherent right the exercise of which does not require any special legal acts to be performed. Its existence is declaratory but not constitutive. And the right is not dependent on its being exercised. A state may choose or not choose to exploit its water resources. It is its choice.

It is not disputed that prior appropriation or protection of existing uses is a factor that has been applied in several water situations, and it was written in the 1929 Nile Waters Agreement. Yet this is not sufficient to give it the force of a rule of law, making its acceptance obligatory. In juridical terms the existence of such a rule must derive its legal validity from other factors than the existence of these advantages, though they may be important.
IV. POST-WAR AGREEMENT

Since the end of World War II, more agreements to regulate use of the Nile waters have been signed. However, only three of the are discussed here:

1. The Owen Falls Dam Agreements between Great Britain and Egypt;

2. The 1959 Sudanese-Egyptian Agreement for the full utilization of the Nile waters; and


C. The Owen Falls Dam Agreements (1949, 1950, 1952, 1953)\(^98\)

1. General:

The Owen Falls set of agreements constitutes an attempt to extend the principles embodied in the 1929 Nile Waters Agreement to the upper reaches of the Nile River. Evident from the various technical reports is the

\(^98\) The four agreements were arrived at by an exchange of Notes. The first one related to the construction of the Dam; the second concerned hydrometeorological surveys; the third dealt with awarding of contracts and the fourth covered financial matters. See, 57/LEG/SER.B/12, pp.108-115.
idea that the Great Lakes in Uganda are inevitably the most ideal and indispensable Nile control sites. Although this fact was recognized in the very earliest of the times, it was not until 1949 that it was put into practical application. This found expression in the construction of the Owen Falls Dam. Earlier, Lake Albert had been suggested as the main reservoir with Lake Victoria as a regulator including a barrage at Lake Kyoga. Authorities in Uganda rejected the scheme and instead proposed Lake Victoria as a regulator. In due course the Owen Falls Dam based on "century-storage"99 concept was constructed. Besides storage, the Dam generates hydroelectricity for Uganda and Kenya. The construction of the Dam came about in an exchange of a series of Notes constituting agreements between Great Britain and Egypt.

2. Provisions:

The first exchange of Notes took place on 30 and 31 May 1949 in Cairo wherein Egypt and the United Kingdom:-

... in accordance with the spirit of the Nile waters Agreement of May 1929, have agreed to the construction of a dam at the Owen Falls for the production of the electric power and for the control of the waters of the Nile.100

100 Ibid., Note No.1, Art.1.
By this clause, the regime established in the 1929 Agreement was extended to the headwaters of the Nile in Uganda.

To construct the dam, Uganda Electricity Board (hereafter UEB) was created to which the parties entrusted "the issue of an invitation for tenders and the placing of contracts" but in conformity with the plans and specifications approved by the two Governments. 101

(a) Representation of Egyptian Interests in Owen Falls Dam:

In paragraph 4 of the 1949 Exchange of Notes, it was expressly agreed that the Egyptian interests will be represented at site during the construction of the dam by an Egyptian resident Engineer who will be accorded "all facilities for the accomplishment of his duties". 102

(b) Administration and Maintenance of the Dam:

Although UEB would be the administrative organ of the dam when completed its powers are of a limited scope since the discharges to be released through the dam will be regulated:

On the instructions of the Egyptian resident engineer to be stationed with his staff at the dam by the Royal Egyptian Government for this purpose in accordance with arrangements to be agreed between

101 Ibid.
Egyptian Ministry of Public Works and the authorities pursuant to the provisions of agreements to be concluded between the two governments.103

(c) Dispute Settlement:

Parties agreed on consultation and arbitration as the means of settling any disputes that may arise. Consultation was left between the Egyptian Ministry of Public Works and UEB. In case of failure by these two organs, "the matter will be referred to arbitration in accordance with arrangements to be agreed between the two governments" (para.5).

(d) Compensation and Costs:

Matters on compensation and sharing of costs were settled in a separate exchange of notes constituting the 1952 Owen Falls Dam Agreement. The Egyptians agreed to pay the following:

(i) The cost of the dam necessitated by the raising of the level of Lake Victoria and the use of Lake Victoria for storage purposes;

(ii) To compensate local interests affected as a result of the dam, provision was made. Though

103 Ibid.
104 Ibid., pp.114-115.
no specific figure was mentioned, it was pro-
vided that it would be the costs of resettle-
ment and to create conditions similar to those
that the affected persons had been enjoying
prior to the construction of the said dam;

(iii) To pay to the UEB a sum of 980,000 pound ster-
ling by way of compensation for the loss of
hydroelectric power.

(e) Right of Access:

In an exchange of notes of 19 January and 20 March
1959,105 the Egyptian resident engineer and his staff were
granted "access to all the posts which are in Uganda in
order to undertake periodical inspections to assure them-
selves that the posts are being satisfactorily maintained
and the observations regularly collected".

(f) Research, observation, meteorological and hydrological
recording : 106

The 1950 Egyptian Note which constituted a formal
agreement also contained a clause covering hydrometeoro-
logical matters. It defined in para. 3 the extent of
activity in a basin-wide basis and to incorporate the

105 Ibid., Notes No.3, p.114.
106 Ibid., Note No.1, p.112.
areas in the Congo and Ruanda-Burundi territories. Significantly, the Uganda Hydrological Department was required to supply "all the meteorological and hydrological data and information collected... to the Egyptian Government" (para. 6). Moreover, the Egyptian Government was empowered to gather "certain additional data concerning Lake Victoria which are not at present collected by any other organisation". As to what the nature of such "additional data" meant, the agreement is silent.

With the coming into force of the Owen Falls Agreements and the Construction of the Dam, the Nile doctrine as evolved by Britain and Egypt reached the upper course of the Nile system. But it would be the last of conventions authored by a colonial power. The regime so far established had, no doubt, set a stage on which the future events would be played. In 1949 itself, it had become plain that the Sudan would emerge from the Anglo-Egyptian condominium, not as a province of Greater Egypt but as a sovereign independent state capable of defining and asserting its own rights and interests in the Nile waters. This occurred in 1956 when it achieved sovereign statehood. Throughout the Nile Basin the wave of self-determination gathered momentum so that by the end of 1960s the fate of the Nile would be determined not by Egypt and Britain alone but by nine sovereign entities. These fundamental
changes necessarily reduced the Nile doctrine into ashes, no matter how much one would wish to perpetuate the status quo. Upon attaining independent status, the Sudan challenged the existing arrangements and demanded a review of the whole arrangements. This led to the 1959 Agreement for the full utilization of the Nile waters, which forms the subject of the next discussion.

D. The 8 November 1959 Agreement for the Full Utilization of the Nile Waters

1. Background:

On 23 July 1952, the Free Officers of the Egyptian Armed Forces, among whose leadership was Gamal Abdel Nasser, overthrew the Wafd Government and deposed King Farouk. Towards the end of the year, on 8 October, the Council of National Production announced the intention of

107 Government of Sudan, Ministry of Irrigation and Hydro-electric Powers, The Nile Waters Question: The Case for Egypt and the Sudan's Reply (Khartoum, 1955), p.2 where the Sudan declared: "It is important to remember that the Sudan was not a party to the Nile Waters Agreement... The present Sudan Government considers that it was an unjust agreement because it limited the development of irrigation in the Sudan while leaving Egypt free to develop her irrigation as fast as she pleased".

108 The agreement came into force on 22 November 1959 and the translated text from the original in Arabic is found in ST/LEG/SER.B/12, pp.143-148.
the new regime to construct a massive dam - the High Dam or Sudd el Aali at a point about 6.5 kilometres South of the old Aswan Dam. The contemplated reservoir would have a gross capacity of 164 million cubic metres or 132.8 million acre feet. When completed, the dam would create an artificial lake (Lake Nasser) 700 kilometres long, extending 250 kilometres inside Sudanese territory, thereby submerging the district of Nubia, including the entire town of Wadi Halfa with its historic monuments and displacing about 50,000 inhabitants. Almost immediately the Revolutionary Council in Cairo approached the United States of America, Britain, West Germany and other West European financial sources for funds to execute the project estimated to cost 400 million dollars. Moreover, it was stated in the Egyptian budget that it was a joint scheme with the Sudan.

Expectedly, the Sudan lodged a protest against the proposed Sudd el Aali Dam. It complained that Egypt was being "high-handed" in its attitude towards Sudan since "despite repeated requests... Egypt had not thought it

109 Government of Egypt, National Production Council, Sudd el Aali Project, (Cairo, 1954).

necessary to discuss any details with the Government of the country whose territory she proposed to flood.\footnote{Sudan, n.106, p.3.} Because it was denied technical data on the proposed project, Sudan found the Egyptian contention that the High Dam was a joint project absurd.\footnote{Ibid.} Furthermore, Sudan argued that the proposed project was not the best. Any developments must be based on the principle of "hydrographic coherence.\footnote{Ibid., p.6.} Therefore, Sudan advocated for a scheme comprising the Great Lakes which were considered the most ideal storage reservoirs since additional losses due to evaporation were negligible. At any rate, a survey by the Egyptian Irrigation Service indicated two favourable sites: One near Merowe and the other near Dal Cataract, all in Sudan territory.\footnote{Ibid., p.23.} As such Sudan was apprehensive of Egypt's intentions to construct the Sudd el Aali. The other point of disagreement revolved around the formula to be applied in dividing the water. Sudan argued that their problem was not lack of land but availa-
Irrigation expansion in the Sudan had been restricted by a number of concessions in the first half of the century, notably the 1929 Nile Waters Agreement. Thus, the Sudan proposed that the water should be divided on the basis of "mean total annual discharge measured at Aswan and not the mean surplus..." Alternatively, any surplus water must be divided according to the 1920 Cory proposals, i.e. each gets one half of the gross quantity.

From September to December 1954, Sudan and Egypt held their first round of negotiations on a technical level. The Government of Sudan expressed its willingness to accept the Sudd el Aali project on three conditions:

(a) The Sudan's ultimate share in the natural flow of the Nile as measured at Aswan must be determined before work is started on the Sudd el Aali.

115 It is well-known that the British and no less so the Egyptians conceived water interests in the Sudan and the other territories as subordinate to those of Egypt. Lord Cromer in his 1905 Report stated "in respect to the vital question of water, the progress in the Sudan is being retarded, in order not to do any harm to Egypt", Report for 1905, Egypt No.1 (1906), p.115; Batetone, n.21, p.327.

116 Sudan, n.106, p.47.

117 Ibid., pp.40, 45.
(b) The Sudan will then have the right to build on the Nile or on any of its tributaries such dams or other control works as are in her opinion necessary for the effective utilization of her share in the natural flow of the Nile.

(c) The population of the town and district of Wadi Halfa must be provided with an adequate alternative livelihood in some other part of the Sudan before the water level of Halfa is raised above its present maximum. Egypt will bear the entire cost of providing this alternative livelihood and of transferring the population.\textsuperscript{118}

As to the division of the waters, the Sudan put the Nile average discharge at 84 milliard cubic metres as against Egypt's figure of 80 milliard measured at Aswan.\textsuperscript{119} It further insisted on water allocation based on

\textsuperscript{118} Ibid., p.4.

\textsuperscript{119} Egypt had given a mean figure of 80 milliard cubic metres calculated as an average extending from 1870 to 1954. Sudan, however, disputed this figure as understatement of facts. It gave the annual discharge over this period as 90 milliard cubic metres. In accepting the figure of 84 milliard cubic metres Sudan contended that it did so "in a spirit of friendliness. The figure of 84 milliards is undoubtedly on the lower side", \textit{Ibid.}, pp.30-33.
on the area of land easily irrigable. These proposals were rejected by Egypt who stuck to the idea of apportioning water only after completion of the dam and on the basis of population. Agreement could not be reached.

The next round of talks took place in 1955 but still the two sides could not reach an acceptable solution. Events at this point of the dispute were assuming delicate proportions to the extent that Ismail al-Ashraf, President of the Sudan and a pro-Unionist, fell out with Gamel Nasser.

In the meantime, negotiations between Egypt and Britain, the United States, France, West Germany and the World Bank had reached a state at which the Bank, the United States and Britain offered to advance £55 million and £15 million respectively to meet the first stage of the dam's construction, but on condition Egypt reached an agreement with the Sudan. 120 About mid-1956, just when preparatory work to start construction had been started, John Foster Dulles, US Secretary of State announced his Government's decision to cancel financial assistance to construct Sudd el Aali. 121 Shortly afterwards,

120 Senate Hearings, n.109.

121 Ibid., For the British withdrawal, see Statement by Selwyn Lloyd, British Foreign Secretary, House of Commons Debates, Vol.557, 5th series, (24 July 1956), Cols.251-252.
the British Government and the World Bank followed suit. Among other reasons advanced, the United States attributed its decision to Egypt's inability to reach agreement on the Nile waters with Sudan.

Faced with such a situation, Nasser reacted sharply by nationalising the Suez Canal on 26 July 1956 in order to raise revenue for the High Dam. The result was the Suez Crisis, a subject beyond the scope of the present discussion. 122

The year 1958 witnessed a state of strained relations between Egypt and the Sudan so much so that an armed conflict became imminent. In January yet another attempt to arrive at a negotiated solution failed miserably, and in June Sudan commenced to fill the new canals for the Menagil extension after duly notifying Egypt but without awaiting their response. By this act, Sudan, in effect, abrogated the 1929 Nile waters agreement which had reserved all the natural flow of the Nile during the low season exclusively for Egypt. In spite of this fragile state of affairs, Egypt and the USSR entered, in October that same year, an agreement for technical and financial aid towards the first stage of the High Dam. As the Soviet-Egyptian agreement approached the final stage, Egyptian-Sudanese relations, in the meanwhile

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122 see generally Baddour, Sudanese-Egyptian Relations (The Hague, 1960).
touched their lowest ebb as evidenced by Egypt's virulent radio war against the Sudanese Prime Minister who, in turn, accused Cairo of planning a coup d'état against his government.\(^{123}\)

In November 1958, after Egypt and the Soviet Union concluded the Sudd el Aali aid agreement, General Abboud overthrew Abdullah Bey Khalil. The military regime in Khartoum was promptly accorded recognition by the Revolutionary Council in Cairo.\(^{124}\) Among other things, the new regime promised to honour all the agreements that had been signed on behalf of their country during the colonial period. A year later, on 8 November 1959, Egypt and the Sudan concluded a new treaty for the full utilization of the Nile water, signed in Cairo. Its provisions are outlined below:

2. **Provisions of the Agreement:**

The 1959 Egyptian-Sudanese Nile Agreement was the first instrument concluded by two independent sovereign Nile basin states. This alone makes the provisions contained in it of great importance. In addition, the agreement, above all, is intended to provide a compre-

\(^{123}\) Ibid.

\(^{124}\) Ibid.
hensive formula for the "full utilization of the Nile waters". The validity of the designation "full" will be discussed in a later section. Here, however, it is to be noted that the essence of the agreement was a rejection of the 1929 Nile Waters Agreement and an endeavour to work out a new arrangement given the changed circumstances. Thus, in the preface, the parties recognize first the need for more projects if they are to reap the full benefits of the Nile waters which logically necessitates "new working arrangements on lines different from those followed under present conditions" i.e. as provided in the Nile waters agreement of 1929. Secondly, the imperative to cooperate is stressed in paragraph two. Thirdly, the inadequacies of the then existing regime is acknowledged since it "did not cover the future conditions of a fully controlled river supply". Having stated their intentions and the purposes of the agreement, the two parties then spelt out their respective rights and conditions under which such rights can be exercised.

(a) The Problem of Established Rights:

Established rights had been a thorny issue in the

125 Ibid., Preamble, para. 1.
126 Ibid., para. III.
127 Ibid., Chapter I.
whole dispute as outlined above. Chapter 1(1) of the Agreement defines what constitutes an established right and when it arises. It states:

The quantities of water actually used...until the date of signing this Agreement constitute their established right prior to the benefits accruing to them through the implementation of the control works referred to in this agreement....

Established uses for the two Parties were allotted as follows: Egypt 48 milliard cubic metres and the Sudan 4 milliards. Aswan was fixed as the point at which the measurement of water quantities are taken.

(b) Control Works and Sharing of Benefits: 129

Chapter 11 of the Agreement contains provisions governing construction works and benefit sharing ratio. The first clause confirms the construction of the High Dam as an over-year storage for which Egypt is entirely responsible. Secondly, Sudan's right to undertake any conservation works solely for its benefit are recognized. As to the net benefits accruing from the Sudd el Aali, it was agreed that the figure of 84 milliard cubic metres be taken as representing the average annual natural discharge of the Nile. 130 Out of the net benefit of 22

128 Ibid., Art.1(1).
129 Ibid., Chapter 11,
130 Ibid., Art.3.
milliard cubic metres from the High Dam, Sudan gets 14.5 milliards and Egypt the remaining 7.5 milliards.\textsuperscript{131} When these are added to the respective established quantities the totals work out to 18.5 milliards cubic metres for the Sudan and 55.5 milliards for Egypt.\textsuperscript{132} Should the mean natural flow exceed 84 milliards, the net surplus arising out of such an increase would be divided equally between the two contracting governments.\textsuperscript{133} However, the volume of 22 milliards stored at the High Dam is subject to revision from time to time in view of evaporation losses.

(c) Compensation:\textsuperscript{134}

Consequent to the construction of the Sudd el Aali there arises the question of liability for injury and damage. More than 50,000 Sudanese were rendered homeless and important historical monuments of ancient Nubia were submerged due to substantial flooding caused by the Dam. The Egyptian government agreed to pay a sum of 15 million Egyptian pounds towards resettlement of the displaced population.\textsuperscript{135} While it was the obligation of Egypt to

\textsuperscript{131} Ibid., Art.4.
\textsuperscript{132} Ibid.
\textsuperscript{133} Ibid.
\textsuperscript{134} Ibid., Art.6.
\textsuperscript{135} Ibid.
pay compensation to the affected population, the Sudan agreed to make arrangements to transfer the population in the affected areas before July, 1963.

(d) Future Control Works: 136

A problem that has constantly featured in the utilization of the Nile waters is one related to evaporation, particularly in the Sudd portion of the river. It has been said time and again that a large quantity of water is lost in these "floating swamps". Thus the need to conserve it. 137 Concerned with this problem, Chapter III of the Agreement is addressed to measures to recover these waters, thereby increasing the flow of the Nile down to Aswan. Therefore, it was agreed that the Sudan is "agreement with Egypt" would undertake to drain the swamps of Bahr el Gebel, Bahr el Zeraf, Bahr el Ghazal and its tributaries, River Sobat and its branches and the White Nile in order to minimize water losses due to evaporation. Costs incurred on such works and benefits realized therefrom shall be equally shared. Where the Sudan is unable to carry out the project or is not in immediate need to

136 Ibid., Chapter III.

undertake the said works, Egypt could execute them provided it gives the Sudan a two-year notice of its intention to commence the works. All the same, as and when the Sudan's needs arise, it is at liberty to use its share of the water in accordance with the terms of the agreement. The Sudan "shall then reimburse to the United Arab Republic their share in the cost in the same proportion to the total cost as their share in the benefit is to the total actual benefit of the scheme". At any rate, it shall not exceed fifty per cent of the benefits.

(e) Technical Cooperation: 138

Also provided in the agreement is the need to set up a Technical Joint Commission charged with the responsibility of overseeing the operational aspects of the agreement. It was also given the duty to conduct meteorological and hydrometeorological surveys in the entire Nile system and it was to be composed of an equal number of representatives from both countries. 139

138 Ibid., Chapter IV, pp.145-146.

139 The Technical Committee was instituted by the 1960 Protocol, Ibid.
(f) General Provisions:140

Both parties pledged to adopt a united strategy should the upper riparians raise the Nile waters question. In a situation where the other riparians claim a share of the Nile waters, the two parties agreed that such quantities of water shall be deducted from their shares on an equal basis.

In Annexure 1, Sudan consented to give Egypt a water loan amounting to 1.5 milliards cubic metres till November 1977.141

Before analysing the agreement a few points may be reiterated at this stage. The 1959 Nile Waters Agreement stressed the doctrine of established rights and priority of appropriation. At the same time, it recognized the principle of fundamental change of circumstances by replacing the 1929 Agreement. Unlike its predecessors which rested on the concept of "natural and historic rights", the 1959 Agreement, instead, admits equality of rights of the basin states to utilize shared water resources and that this right can only be varied in a manner explicitly consented upon by the interested parties.

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140 Ibid., Chapter V.

141 Ibid.
V. ANALYSIS OF THE 1959 AGREEMENT

The most outstanding feature of the agreement is the principle of established rights. In the preceding sections the merits of this principle were discussed. How this principle was applied in the 1959 Agreement to readjust the claims of Egypt and the Sudan is what is presented here. We shall also discuss the probable and possible impact of the 1959 regime, so far considered the keystone in the Nile waters on the other seven states.

A host of questions spring as a result of the allocation of water between Egypt and the Sudan. By acknowledging Egypt's established uses, did the Sudan renounce its earlier claims to the invalidity of the 1929 Nile Waters Agreement? Was the division just and equitable? Is it to be inferred from Section 1, Article 1, that because of economic dependence a state is entitled to a larger volume of water? Concerning the question whether the Sudan thence accepted the validity of the 1929 Agreement, opinion is divided. A. H. Garretson, for instance,

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thinks that since the Sudan accepted 4 milliards, a limit imposed by the 1929 Agreement, this amounts to its recognition of the validity of that agreement. He writes:

It would seem quite clear that the Sudan thereby renounces any claims to the invalidity of the 1929 Agreement. Moreover the full scheme of the 1959 Agreement is clearly an adaptation and extension of the 1929 Agreement. 143

It is difficult to agree with Garretson's appreciation of the facts for the following reasons. The Nile Waters Agreement did not specify the exact volume of Egypt's established uses. It also makes reference to "natural and historic rights" without quantifying these rights. 144 Moreover, the Sudan while accepting the figure of 84 milliards explained that "the Sudan Government has agreed in a spirit of friendliness to accept the figure of 84 milliards, which is undoubtedly on the low side". Further detailed argument on this point is unoccasioned.

143 Garretson, n.39, p.287.

144 On this point, it is pertinent to take note of the opinion of the Nile Commission Report. ST/LEG/SER.8/12, Enclosure in No.1, Report of the Nile Commission, 1925. "It has always been recognised that a lowering of levels in Upper Egypt, with consequent increased difficulty of filling the basins, must result from the working of the Gebel Aulia and Gezira schemes. The basins in the Sudan will be similarly affected. The present Commission is not disposed to enter into an argument on general principles as to how far the maintenance of levels can be regarded as an established right".
since it has been established in a previous section that the 1929 Agreement purposefully intended to codify the theory of territorial integrity, a theory rejected by an overwhelming authority, including the International Law Commission.

In any case the question of established uses is clearly not a unilateral matter left to the arbitrary decisions of one state. But it is an issue to be explicitly agreed upon by the interested states. If the influence of the 1929 doctrine crept into the 1959 Agreement, it was an express agreement of the wills of those states written in a treaty, but not dictated by any inherent inevitability.

Three learned view-points\(^\text{145}\) appearing in Egyptian

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Review of International Law are of particular significance. Azizi Fahmi writing as recently as 1967 believes that since Egypt has been using the waters of the Nile for a long time "without the objection of other co-riparians", Egypt can only reassess the waters taking established uses as the starting point. 146 And furthermore:

A state that has built its economy, and indeed may be its very existence, on the waters from a common river will never accept a general reassessment of the waters of the river. Any reassessment shall be of surplus water, the water that is actually not being used. 147

Fahmi's supposition that Egypt's established uses are entitled to protection under international law irrespective of an agreement, overlooks one important factor. When advocating the sanctity of established uses it must be remembered that sufficient water was available and this too, between the parties. Thus, the concern with surplus water. 148 But what happens when surplus water is not available to maintain existing uses? This could easily be the case in the Nile waters where the needs of the other seven riparians are most likely to upset the balance worked out between Egypt and the Sudan. It is inst-

146 Ibid., Fahmi, n.141, p.56.
147 Ibid.
ructive to recall by analogy the observation made by I.C.J. in the Continental Shelf Cases in reference to the equidistance method of delimitation. In refuting the contention that the equidistance had become a rule of customary international law, the Court drew attention to the inequities in the method. 149 The analogy to the principle of existing uses is quite clear. If the method of taking established uses as the starting point in any division of water is converted into a general rule of law, it would produce extremely extraordinary results which are unreasonable since it will deprive some states of their water rights.

The legal implications of these contentions are fairly clear. Its essence is that Egypt's claim to established uses is a sovereign right in itself the possession of which, though within the limits of the 1959 Agreement conferring them is independent of the Sudan's sovereignty whose status are merely those of a servient state. 150 Obviously, Fahmi's conceptions reflect the view prevalent in the lower section of the Nile that economic dependence, long usage, and of course the pro-


150 Ibid., Fahmi, n.141, p.56.
visions of the 1929 Nile Waters Agreement, have created a servitude on the Nile waters in favour of the lowest riparian.

Articulating a similar opinion in the same media, Badr felt that Sudan should not have been allotted 14.5 milliards of the surplus water. Commenting on the division of surplus water between the Sudan and Egypt, he makes the following observation:

One is led to inquire into the justification of the share allotted to the Sudan in the Waters of the High Dam by the new Agreement. Is this a grant based on international comity, or a recognition of rights supported by a treaty provision. The premises supplied by International Law and their application to the factual situation of Egypt and the Sudan allow only one inference: in section 11, para. 3 of November 8, 1959 Agreement the United Arab Republic was providing rights and not recognizing them. This is not the first instance of an

\[151\] Ibid., p.59. The continued reference to the 1929 Nile Waters Agreement as being declaratory of prescriptive rights is misleading. In addition to the evidence put forward in the course of discussion there is nothing to suggest that there was an intention to create immutable rights in rem. The 1925 Report of the Nile Waters Commission is quite clear on this because, given existing circumstances it "decided to approach its task with the object of devising a practical working arrangement which would respect the needs of established irrigation, while permitting such programme of extension as might be feasible under present conditions and those of the near future, without at the same time compromising in anyway the possibilities of the more distant future". ST/LEG/SER.B/12, p.104; See also A. P. Lester, "State Succession To Treaties in the Commonwealth", I.C.L.Q. Vol.12 (1963), p.500.
international agreement having a political rather than a legal basis. A state is of course at liberty to accept less than is due to it, should it so decide for consideration of policy of which it is the only judge. But the exercise of such liberty in an international treaty or agreement makes it inadvisable to draw legal conclusions from such an instrument...152

The principle of benefit sharing one of the foundation stones of equitable utilization of shared water resources is well known. It has been employed in several situations and it forms the framework of the International Law Commission in its endeavours to draft a convention on the subject. In practice, only a few instances may be cited. The classic case in this connection is the treaty between Canada and the United States relating to the Cooperative Development of the water resources of the Columbia River, 17 January 1961. Canada's right to compensation and access to downstream benefits was recognized. Another instance is the Indo-Nepalese Agreement relating to the Kosi Project. Like in the Canadian-US treaty, India endorsed Nepal's right to downstream benefits. Within the Nile system itself, the Kagera Basin Organization is conceived along the principle of benefit sharing.

The reference to providing and not recognizing

152 n.144.
should not, therefore, call for any confusion. To deny an upstream state, whose territory is being used for the benefit of the lower state, of the right to share in the benefits accruing from the use of its territory and waters takes no notice of the legal rights of the upper riparians. Such a position is untenable under any theory of law especially so when the states affected: rank among the poorest underdeveloped countries; have their whole territories geographically within an international basin; are those whose territories the river originates. On the contrary, these factors alone would give weight to these states’ priority of interest in the river.

That may be desirable but it does not accord with the given facts. There is no evidence to support the assertion that in concluding the 1959 Agreement, the Sudan was either declaring an already existing servitude or granting one. On the contrary it would seem that the Sudan meant to erase the idea of Egyptian Egyptocentricism over the Nile waters. Of relevance here is not the reason why the Sudan accepted a lower volume of water, but what is important to understand and to emphasize is the difference between what established rights meant in 1929 and what they came to mean thirty years later in the 1959 Nile Waters Agreement. Hoani for example, though a supporter of the theory of established uses, recognizes
its limitations and the risk of attaching undue importance to it. In 1929, Egypt's claims to established rights extended to infinity while the Sudan's were curtailed, in fact unspecified. This was not the case in 1959 when claim to established rights was not a matter to be unilaterally decided by one state. In any case, there is nothing in the 1959 to suggest that established uses enjoy perpetuity of entitlement in the shares allotted. The agreement itself foresees a possible change in these volumes with changing circumstances, for this is clearly evident in Section 1 of the agreement headed "The present (emphasis added) Established Rights". The temporary nature of these rights is again indicated in Section V entitled "General Provisions", where it is realized that there are seven other riparians with vital interests in the Nile waters. Whenever the occasion arises the two High Contracting Parties have to adjust accordingly in spite of their desire to maintain the status quo ante.

From the above review, the logical question that arises as a result of the 1959 Agreement relates to an inevitable conflict with the third states. Whatever

153 Hosni, n.39.
154 ST/LEG/SER.B/12, p.143.
155 Ibid.
formula and technological methods Egypt and the Sudan adopted, the rights of these states (upper riparians) were relegated to secondary importance. Such an approach overlooks the very nature of a river. Water rights, it is generally agreed, are appurtenant to territory. Therefore, each riparian possesses a sovereign right to use these water resources at any point of time it desires to do so.

In contemporary times water uses are multipurpose and each state determines its own priorities as dictated by internal exigencies. If granted a larger share of water, this has always come through an agreement between the interested states, but not as a legal obligation incumbent upon the granting state. Moreover, whenever these facilities have been accorded the practice is that the recipient state pays an agreed amount. Such, for example, were the provisions of the Anglo-Italian treaty (1925) on the Gash River. Likewise, the Portuguese-South African Agreement of 1926 in respect of the waters of the Kunene River provided in para. (9) of the Preamble that "the Government of the Republic of Portugal for reasons of humanity agree, under certain conditions, to allow

156 ST/LEG/ SER. 8/12, Enclosure No. 4, p. 132.
the diversion of the waters of the River Kunene for the benefit of the Mandated Territory..."157 This is an instance where a co-riparian was granted water on humanitarian grounds and comity. In 1961, Canada and the U.S. elaborated in more detail the general rule that economic dependence by itself does not confer upon a state a legal right of access to resources of whatever nature. To use the Canadian section of the Columbia River for flood protection and hydroelectric power generation, the United States agreed to recompense Canada.158

The case for the other seven riparian states is quite clear and has been explained in an earlier section. Ethiopia outrightly does not recognize the claims of the lower riparians. When in 1956 the proposals to construct the High Dam were underway, the Imperial Ethiopian Government, in a Note already referred to, stated its position univocally, inter alia, that it reserved all rights to the entire waters of the Lake Tana-Blue Nile system. At any rate, whether a state reserves its legal right to shared water resources within its territory or not is of no consequence. A customary rule of international law entitles a riparian, in the present case the upper ripa-

157 Ibid., p.133.
158 Supra. Chap.11.
rians, to employ ass much water for irrigations purposes as that utilized by the lower states. 159

From this discussion of the 1959 Sudan-Egyptian Agreement the following submissions may be made:

1. In spite of the admission of established uses by the Parties, the effect of this must be evaluated against the background of the agreement.

2. The agreement was exclusively bilateral, and concluded by two lower Nile states. Recognition of its provisions by third states upstream without an express agreement is very doubtful.

3. The agreement was yet another attempt by a relatively developed downstream state to impose restrictions on a weaker upstream neighbour. Nevertheless, there was a shift to take due consideration of legal rights of the upper riparian states.

4. This leads to the conclusion that the agreement does not provide a valuable international legal precedent for the resolution of problems arising when a use in one state affects established uses elsewhere. The fact is that a state is not entitled to the quantity of water it

159 Batstone, n.39, p.553.
actually uses. What the 1959 Agreement demonstrates is the fact that the Nile is a complex watercourse whose regulation cannot be founded on any supposed customary law, regional or international, but rather the object of conventional law, and on the basis of the general principle of equitable apportionment. In so far as functions are concerned, the agreement begins to look far beyond irrigation which had been the main preoccupation of earlier compacts. Other uses, such as hydroelectric generation, industrial uses and fishing now gain a place in the Nile waters. Thus the concept of multipurpose uses of water resources, and its corollarv, integrated water development assume prominence.

E. The Kagera River Basin Agreement 1977: 160

The treaty establishing the Kagera Basin Organisation is the most recent agreement on the Nile Basin system and marks expanding interests in the Nile River system. Unlike the 1959 Nile Waters Agreement, the Rusumo Agreement as it is popularly referred to is a

160 The treaty was signed on 24 August 1977 between Rwanda, Burundi and Tanzania. At the Seventh meeting of the organisation held in Arusha (12-16 May 1980), Uganda's application for membership was accepted in principle. Uganda has since acceded to the treaty. Text of the agreement was obtained from Ministry of Regional Cooperation, Government of Uganda.
multilateral instrument signed between the upper basin states: Burundi, Rwanda, Tanzania and Uganda. Significantly, the agreement, while applying the concept of multipurpose or integrated development of water resources, brings out the idea of subsystem development. 161

Thus, Kagera Basin though considered part of the Nile system, has been defined to be independent enough to merit separate treatment from the Nile as a whole.

Para. 4 of the preamble recognises the geographical unity of the Kagera as, however, a "unit offering a valuable base for fruitful cooperation between the riparian states". By this, the interrelation between the geographical unity of a river and its economic concept are established. Could the same be said to apply juridically? Although that the agreement is concerned with the Kagera system, the possibility of extending it geographically is envisaged. This is elaborated in Article 3 which defines the territorial jurisdiction of the KBO to encompass "the area drained by Kagera River and its tributaries and sub-tributaries, an area which can be extended by an agreement between the organisation and any member state if found desirable". Conceivably, the KBO could

161 This is also the approach adopted by the International Law Commission, see for example the proposed draft Article 3, *Yearbook... 1980, Vol.11, part 11, p.112.*
cover the whole basin, provided the member states agreed to it.

Activities of the KBO as defined in Article 2 are very comprehensive in scope. They range from water and hydroelectric power development, agriculture and livestock, forestry, land reclamation, mineral exploration and exploitation, industrial development to transport and communication, trade, fisheries, wildlife, and environmental protection.

To fulfil the above objectives, the parties establish an organ or agency whose terms of reference are laid down in Chapters II and III of the agreement. The organisation will be headed by a Commissioner who is its legal representative appointed for a period of four years by rotation. Besides the Commissioner, there are four directors one from each member state and are appointed by the Commission. Each of them heads a department. The Commission arrives at its decisions unanimously or through consensus.162 It meets in ordinary sessions three times per year such meetings being held by rotation. In case there is need for an extraordinary session this may be called "with the agreement of at least three representatives".163 In order to enable the organisation to func-

162 Ibid., Article 7.
163 Ibid., Article 6.
tion effectively it is provided that it "shall enjoy in the territory of each member state such legal entity as may be necessary for the exercise of its functions and the fulfilment of its purposes" and the "Executive Secretary shall be the legal representative of the organisation".\textsuperscript{164} Other provisions include the opening of Regional offices in each member country.

Chapter IV of the Agreement is addressed to financial and budgetary matters. There was a controversy on this aspect, especially in view of Uganda's entry into the organisation.\textsuperscript{165} On Uganda's accession, it became necessary to work out a new financial formula.

Uganda contested the proportions that had been worked out prior to its application for membership on the grounds that they were arbitrary and without basis. It argued that in determining the financial contribution of each member state, the Commission should take the following factors into account: territorial distribution and where the main activities of the Organisation would be concentrated; benefits likely to be derived and; the

\textsuperscript{164} Ibid., Article 16.

\textsuperscript{165} Government of Uganda, Report prepared by Uganda Delegation, State Attorney's Meeting of the KBO, held in Kigali, 21-23 July 1980.
ability to pay. Consequently, the Kigali formula was evolved in which the contribution ratios were fixed as: Burundi, twenty four per cent; Rwanda and Tanzania each, thirty three per cent and; Uganda, ten per cent.

An agreement could not be arrived at on the basis of these ratios. At its eighth meeting the Commission decided on equal contribution. Even this could not produce an acceptable solution since "unfortunately the Uganda delegation had no mandate to change the position as decided in Kigali i.e. ten per cent contribution by Uganda".

In summary, it may be noted that the Kagera Basin Organisation Treaty provides a point of departure in the development of the Nile Basin water resources. Its starting point conceives of a basin as an economic unit to

166 Ibid.,
167 Ibid.
168 The Commission arrived at this formula on the basis of the following factors: Unanimity rule (Article 7); appointment of the Executive Director is rotational (Article 8(b); the equitable distribution of appointments (Article8(c); the programmes of the organisation take into account equitable distribution of projects; benefits to be gained by each member are not yet known; percentage distribution of the basis in each country does not necessarily reflect the benefits to be gained; all the member states are poor, Report on the Eighth Meeting of the Commission of the KBO, 22-26 September 1980 (Government of Uganda, 1980), pp.3-5.
be developed in an integrated manner. It recognises the fundamental fact that the issue in water resources is not water per se, but it is the relationship between the totality of basin resources that is important. The second observation to make relates to the definition of an international river. The treaty is in tune with the modern trends in acknowledging that even within a basin there are portions of it that are distinct enough to command subsystem agreements is in operation here.

The Nile conventional system as developed during the colonial period has tended to favour Egypt the lowermost riparian. As such the regime is both inequitable and inadequate viewed in the context of contemporary trends. It is clear from this study that the treaties have not developed into a local custom peculiar to the Nile basin. This places the Nile regime in a delicate balance in which the upstream-downstream conflict, prior uses versus new developments is likely to raise complicated issues. Some of these issues and challenges are outlined in the next chapter and point out the urgent need for the Nile system states to negotiate a new regime that will be equitable to all the riparian states.