CAMEROON'S LIABILITY FOR DOWNSTREAM DAMAGE BY WATERS FROM ITS LAGDO DAM*

Abstract

Contemporary conception of sovereignty as both a right and a duty is best exemplified within the framework of state responsibility for injurious extra-territorial effects of lawful acts executed within a local territorial jurisdiction. Recurrent damage caused in Nigeria by flooding resulting from Cameroon's operation of its Lagdo Dam provides the context for this paper which seeks to establish a framework for Cameroon's liability for downstream damage caused by waters from its Lagdo Dam. This paper examined theories of riparian rights and found that despite existence of the theories of absolute territorial sovereignty, absolute territorial integrity, and theory of prior use, the principle of good neighbourliness currently provides the overarching structure for the relationship of riparian states inter se. The paper examined the rights and duties of riparian states and found that in accordance with the principle of good neighbourliness, the basic rule for utilization of international rivers requires that such use must be in a manner which is not detrimental to other riparian states. The paper considered the basic principles of state responsibility and disclosed that every internationally wrongful act of a State entails international responsibility of that State. From this perspective, the paper looked at the basis for Cameroon's liability for downstream damage caused by operation of its Lagdo Dam, and found a clear basis for attribution for injury, damage and damages suffered in Nigerian territory by Cameroon's imprudent exercise of its sovereign powers within its territory. The paper concluded that Cameroon has a duty to immediately refrain from causing further downstream damage, and this duty is not dependent on whether a demand to that effect is made by Nigeria. Cameroon also has duty to make reparations. This duty is however dependent on a demand by Nigeria.

Keywords: Good neighbourliness, Flooding, International rivers, Lagdo Dam, Riparian state, State responsibility

1. Introduction and Factual Background

States possess sovereign rights to use and exploit their natural resources. On the other hand, states are held responsible for any deleterious effect their actions may have. Consequently, the right to exercise and enjoy the attributes of sovereignty over both a territory and the natural resources found on the territory is subject to a duty of care. Due to enlargement of contact and relationships between persons and nations, conflicts of interests amongst co-riparians has also become amplified. Absolute territorial sovereignty and integrity which are the two oldest legal theories for acquiring rights in international rivers utilize exclusive consideration of a state's borders to regulate individual rights in the use of the river. The third theory, which is the theory of prior use proceeds on the supposition that the first in time is first in right. With the increase in river use, these three principles, disregarding injurious effects of river use on co-riparians, and focusing solely on river use in only one state, became inadequate.[1]

River Benue is an international river originating from the highlands of northern Cameroon and flowing into Nigeria. Only 350 km of the entire 1400 km length of River Benue is within

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[1] J O Moermond & E Shirley, 'A Survey of the International Law of Rivers', (1987)16 *Denver Journal of Int'l Law & Policy* [139- 159] 139-140.

Cameroon's territory.[2] The Cameroon Lagdo Dam was built between 1977 and 1982. It is located 50 km south of the Cameroonian city of Garoua on the Benue River. It was intended to supply electricity and provide waters for irrigation in Cameroon. In 2012, waters released from the dam caused severe and substantial damage in Nigerian territory, resulting in a large number of deaths and loss of properties. A bigger effect of the flooding was at the lower Benue river region where more than 10,000 homes were submerged for more than two weeks. This left more than 10,000 hectares of farmland flooded and the streets of Makurdi, Benue State of Nigeria occupied by crocodiles and other dangerous creatures. Yet again, in September 2022, Cameroonian authorities opened overflow spillways at the Lagdo Dam to ease the pressure on the dam from the rising reservoir. According to officials of UN's International Organization for Migration (IOM) releasing of waters from the Lagdo Dam reservoir into the Benue river worsened the flooding downriver. In September 2022, according to the Executive Secretary of the Adamawa State Emergency Management Agency, 25 people died in Adamawa state of Nigeria and farmland was submerged due to floods caused by waters from the Dam.[3] Flooding displaced nearly 40,000 people from their homes in parts of Northeast Nigeria since September 2022, and at least 100 people have died or been injured, according to UN officials.[4]

This paper sets out to establish an International law framework for Cameroon's liability for downstream damage caused by waters from its Lagdo Dam. The scope of the paper is limited to damage caused by water and flooding. Issues of pollution in general or water pollution, despite the similarity in applicable principles fall outside the scope of the paper and will not be considered. The paper will reconcile the application of the principle of territorial sovereignty in upper and lower riparian states. The paper will begin with a consideration of the theories of riparian rights which include the theories of absolute state sovereignty, absolute territorial integrity and prior appropriation. Part 3 will explain and apply the good neighbour principle to the relationship of riparian states. Part 4 will explain the rights and duties of riparian states. Part 5 will explain the basic principles of state responsibility, leading up to part 6 which will explain the basis for holding Cameroon liable for downstream damage and injury caused by waters from its Lagdo Dam. The paper will then conclude.

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[2] D N Olayinka-Dosunmu, *et al*, 'Assessing River Benue flow data for flood mitigation and management in Adamawa catchment, Nigeria' (2022) 16 *Scientific African* 2, 4.

[3] A Adefaye 'Cameroon, the River Benue and Nigeria' *Vanguard News*, 2 July 2013, <https://www.vanguardngr.com/2013/07/cameroon-the-river-benue-and-nigeria/> Retrieved 30 October 2022; P Omorogbe, 'Nigeria's perennial flooding and effect of Cameroon's Lagdo Dam' *Tribune Online*, 10 October 2022 <https://tribuneonlineng.com/nigerias-perennial-flooding-and-effect-of-cameroons-lagdo-dam/> Retrieved 30 October 2022; 'Disaster: Warning about impending flood' *Blueprint Newspapers*, Editorial 23 May 2018 <https://www.blueprint.ng/disaster-warning-impending-flood/> Retrieved 30 October 2022; *'Flood kills 25, displaces 130,200 in Adamawa, Plateau' Punch Newspapers*, 21 September 2022, <https://punchng.com/flood-kills-25-displaces-130200-in-adamawa-plateau/> Retrieved 30 October 2022.

[4] A Haruna, 'Water Released from Cameroon's Lagdo Dam Causing Fresh Displacements in Northeast Nigeria - IOM', *Human Angle Media*, October 10, 2022, <https://humanglemedia.com/>; Gabriel Ewepu, 'More flooding to hit Nigeria from Lagdo Dam in Cameroon — NIHSA' *Vanguard*, November 5, 2019, <https://www.vanguardngr.com/>, [The Nigerian Hydrological Services Agency, NIHSA, yesterday, announced more flooding to hit Nigeria from Lagdo Dam in Cameroon. This was disclosed by the Director-General, NIHSA, while giving an update on current flooding incidents across the country. According to him certain parts of Adamawa, Taraba, Benue and Kogi States have been experiencing flooding following the release of water from the Lagdo Dam. He explained that Nigerian authorities were not informed before Cameroonian authorities released water from the Lagdo Dam from October 10-31. He informed Nigerians and especially States contiguous to Rivers Benue and Niger that the release of water from Lagdo Dam caused the flooding in Nigeria. The water that arrived Nigeria from Lagdo Dam will be moving down to the States and communities downstream, i.e. - Edo State, especially Agenebode axis; Anambra State, it will be passing through Onitsha and Idemili; Delta State, Rivers, and then Bayelsa. It was confirmed that Cameroonian authorities opened their Dam and began to release water on October 10 and only closed their gate on the 31 of October making for three-week consecutive water release from the Dam.]

2. Theories of Riparian Rights

The issue of water resources management has a tendency to become politically sensitive for the reason that that it concerns the sovereignty and control of countries over their natural resources.[5] Sovereignty as denoting independence is an attribute of statehood. Territorial sovereignty as a concept bestows on states, authority and freedom in control of their affairs. Exclusive authority within the territorial limits of national jurisdiction is the internal aspect; while independence of conduct in international relations is the external aspect. Sovereign equality of states as a principle reflects the rights and obligations of states resulting from their attributes: sovereignty and equality.[6] International rivers pose a particular problem in the context of international law. A river system is part of a hydrological unit. An upstream State's water environment has a direct effect on the downstream. Natural and man-made occurrences, affecting water resources in one part of the watershed affect use of water in another part of the watershed. Thus, efforts to create accommodations between different States along international rivers must take account of effects upon the entire watershed as opposed to isolated segments within national boundaries.[7] Unrestricted use of natural resources within a national territory was a traditional exercise of state sovereignty. This permitted an upstream riparian state to put the waters of the river to any use it wished to even if such use depleted the river completely or caused damage in a downstream riparian state. The legality of this conduct was justified by the principle of absolute territorial sovereignty, also referred to as the Harmon doctrine. Though some measure of support exists for this doctrine, the general consensus seems to be that it is not an expression of international law, but merely a theorization that in the absence of applicable rules of international law, states were free to do as they wished. Theoretically, the doctrine is egotistic and legally, it is self-contradictory.[8] Part of the reason why the doctrine

[5] J I Uitto and A Duda, 'Management of Transboundary Water Resources: Lessons from International Cooperation for Conflict Prevention', (2002) 168 (4) *The Geographical Journal*, [365–378] 366.

[6] E Basheska, 'The Good Neighbourliness Principle in EU Law', (PhD Thesis, University of Groningen, 2014) 12.

[7] D J Lazerwitz 'The Flow of International Water Law: The International Law Commission's Law of the Non-Navigational Uses of International Watercourses,' (1993) 1 (1) *Indiana Journal of Global Legal Studies* [247-271] 249; *See generally* C J Olmstead, *The Law of International Drainage Basins* 3-8 (AH Garretson *et al.* eds., 1967).

[8] J O Moermond & E Shirley, (n 1) 140-142; [In 1895, US Attorney-General Harmon applied the concept of state sovereignty in a river dispute between US and Mexico concerning utilization of the Rio Grande. In giving advice to the Secretary of State, Attorney-General Harmon declared: *The case presented is a novel one. Whether the circumstances make it possible or proper to take any action from considerations of comity is a question which does not pertain to this Department; but this question should be decided as one of policy only, because in my opinion, the rules, principles, and precedents of international law impose no liability or obligation upon the United States*. This principle of absolute state sovereignty, became known as the Harmon doctrine. Despite some support, the Harmon Doctrine, has been nearly universally rejected. A 1958 memorandum of the US State Department stated that: *Well over 100 treaties which have governed or today govern systems of international waters have been entered into all over the world. These treaties indicate that there are principles limiting the power of states to use systems of international waters without regard to injurious effects on neighboring states. These treaties restrict the freedom of action of at least one, and usually of both or all, of the signatories with regard to waters within their respective jurisdictions. The number of states parties to these treaties, their spread over both time and geography, and the fact that in these treaties similar problems are resolved in similar ways, make of these treaties persuasive evidence of law-creating international customs*.] *See* also H. Briggs, *The Law of Nations* (2d. ed. 1952) 274; 1 L Oppenheim, *International Law* (8th ed. H. Lauterpacht 1955) 464-65; 1 Moore, *International Law Digest* (1906) 653-54; J G Lammers, *Pollution of International Watercourses* (1984) 268 [Unrestricted disposal by State A of the waters of an international watercourse flowing from that State into State B based on the idea of State A's absolute territorial sovereignty is incompatible with the unrestricted disposal of those waters to which State B would be likewise entitled on the basis of its absolute territorial sovereignty over the natural resources which nature would ordinarily bring into its territory, and *vice versa*. Thus, if not already untenable because of the social and economic injustice to which application of the principle of absolute territorial sovereignty would lead, such application would already seem impossible because of the

fell into disfavour was its perception as an anachronistic and narrow view for reconciling differences among opposing States where a shared natural resources is at issue.[9] The principle of absolute territorial integrity which is a contrast to the Harmon doctrine allows the exercise of territorial sovereignty only to the extent that it does not infringe the territorial sovereignty of other states by causing damage or injury in the territory of other states. In application of this principle, an upper riparian state is enjoined from using the waters within its boundaries in a manner detrimental to the interests of a downstream riparian state.[10] In seeking to secure an absolute right to an uninterrupted flow of the river from the territory of the upper riparian, the theory posits that an upper riparian State may not develop a portion of a shared rivercourse if it will cause harm to the lower riparian State. The absence of support of this theory is because it unevenly places a burden on upper riparians without exacting a similar duty on lower riparians. Consequently, support exists for this theory only where the continued flow of water is critical to the lower riparian State's survival.[11] The principle of prior appropriation is a distinct theory which in protecting the State that first puts the water to use, favours neither the upstream nor the downstream State, but protects the uses which existed prior in time. Under this theory, depending on the date appropriation of the water began, each riparian State may be able to establish prior rights to use a certain amount of water. A shortcoming of this theory is that instead of encouraging coordinated and planned use of the water resource by all riparians, it rewards individualism. Another shortcoming of the theory is that economic and technical ability to exploit the water resource affects priority of its appropriation.[12] A middle ground between the principles of absolute territorial sovereignty and absolute territorial integrity is the principle of restricted territorial sovereignty and of restricted territorial integrity which seeks a balance between the extremes of the latter two principles.[13] Notwithstanding the various theoretical positions, the practice of nations as disclosed from several disputes that have arisen concerning the use of shared water resources suggests that each riparian has a right that the river system should be considered as a whole and entire unit, and that its own interests should be considered alongside the interests of other riparian states. This ensures that no riparian state may injure another riparian by the manner in which it uses the river system. Accordingly, if a river, whether or not navigable, traverses or separates two or more States, each of the riparian

legal contradiction inherent in the principle itself.] *See also* F Berber, *Rivers in International Law* (1959) 15-19; Bains, 'The Diversion of International Rivers,' (1960) 1 *Indian Journal of Int'l Law*, 38; Bourne, *The Right to Utilize the Waters of International River,* Can. Y. B. Int'l L. [Not only do the vast number of water treaties bear witness against it: all international and federal judicial tribunals that have experience with interstate water problems rejected it; all learned associations, institutes, and other bodies which have studied these problems rejected it in their statements of principles; and a large majority of the authors, among them some of the most respected and influential jurists, found it, a radically unsound intolerable doctrine].

[9] D J Lazerwitz, (n 7) 250; A Kiss & D Shelton, *International Environmental Law,* (1991) 119-120.

[10] J O Moermond & E Shirley, (n 1) 142-143; [Treaties and state practice do not indicate acceptance of the principle. Absence of the principle of absolute territorial integrity in state practice might be explained by its unjust result. Another, explanation might be the natural inclination of upstream states to take advantage of their upstream location]

[11] D J Lazerwitz, (n 7) 251; *see generally* William L. Griffin, 'The Use of Waters of international Drainage Basins Under Customary International Law,' (1959) 53 *American Journal of Int'l Law,* 50, 70; J O Moermond & E Shirley, (n 1) 143; B A Godana, *Africa's Shared Water Resources* (1985) 38-39.

[12] D J Lazerwitz, (n 7) 250; J G.Lammers, (n 8) 364, 366; J O Moermond & E Shirley, (n 1) 143 [The principle of prior use and appropriation gives priority to the use which is earlier in time. Other considerations are irrelevant under this principle. The first State to appropriate a quantity of a river's waters obtains a right to its continued use. Little international support exists for this principle due to the fact that just like the principles of absolute territorial sovereignty and absolute territorial integrity, it often results in unjust uses. Nevertheless, there is suggestion that compensation should be paid for injury or interference with an existing use.]

[13] J O Moermond & E Shirley, (n 1) 145.

States possesses and may exercise sovereignty on the sector of the river which lies within its territory; but in using this sector it must respect the rights of its neighbours.[14]

3. Good Neighbour Principle in International Law

A traditional customary law principle expressed as *sic utere tuo ut alienum non laedas,* (use your property so as not to injure your neighbour) limits a State's actions to the extent that such actions injure another State. This principle creates an obligation to the concept of territorial sovereignty and correlates the right of sovereignty to a duty. This principle, together with the legal theories that developed in respect of international watercourse allocation, is reflected in international water resource theory through the principles of restricted territorial sovereignty and restricted territorial integrity, which form a compromise between the principles of absolute territorial sovereignty and absolute territorial integrity.[15] Support for the concept of prohibiting a State from causing appreciable harm in the territory of another State is strongly rooted in international case law. This idea is found in *US v. Canada (Trail Smelter Arbitration)*, in which the court found that under the principles of international law no State has the right to use or permit the use of its territory in such a manner as to cause injury by fumes in or to the territory of another or the properties or persons therein.[16] Although this case was in respect of air pollution, and not to a river impact, the statement plainly confirms an across the board application of the *sic utere* principle in international law.[17] Thus, as a general principle, a State owes at all times a duty to protect other States against injurious acts from within its jurisdiction.[18] In this regard, one of the purposes for which the UN was formed was so that

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[14] F Berber, (n 8) 30-31, quoting B Winiarski, *Principes Generaux du Droit Fluvial International,* (1933) 81; J O Moermond & E Shirley, (n 1) 145.

[15] David J. Lazerwitz, (n 7) 251; B A Godana, (n 11) 40; in *Chapman v. Bennett*, 169 N.E.2d 212, 214 (1960), the court emphasized that a great number of pronouncements by leading authorities exist concerning the common law maxim *sic utere tuo it alienum non laeda* meaning *one should use his own property in such a manner as not to injure others*.

[16] *US v. Canada*, 3 R.I.A.A. 1905, 1965 (1938) [*The Trail Smelter Arbitration*] at the arbitration, it was established that damage had been caused by emission of sulphur dioxide fumes at the Trail Smelter in British Columbia, Canada, which fumes, proceeding down the valley of the Columbia River, entered the United States. In respect of damages with regard to cleared land used for crops, the Tribunal found that damage through reduction in crop yield due to fumigation occurred in varying degrees during certain years. As regards un-cleared land in its use as timberland, the Tribunal found that damage occurred to trees during the applicable years, in varying degrees, over areas varying from year to year, and from species to species. The Tribunal found that damage was caused by the Trail Smelter in [British Columbia] Canada in [the State of Washington,] USA. Indemnity to be paid was fixed at seventy-eight thousand dollars ($78,000), as complete and final indemnity and compensation for all damage which occurred between such dates. Interest was also awarded. The Tribunal, also held that the Trail Smelter shall be required to refrain from causing any damage through fumes in the State of Washington. The Tribunal pointed out that no case of air pollution dealt with by an international tribunal had been brought to the attention of the Tribunal nor did the Tribunal know of any such case. The nearest analogy was that of water pollution. But, here also, no decision of an international tribunal had been cited or been found. This case provides contextual background for the Polluter-pays-principle in environmental law. See generally, A Barthakur, 'Polluter Pays Principle as the Key Element to Environmental Law,' (2021) 11 (3) *International Journal of Scientific and Research Publications*, [274-277]; Max Valverde Soto, 'General Principles of International Environmental Law,' [1996] 3 *ILSA Journal of Int'l & Comparative Law* [193-209]*;* Christopher M Inwang, 'Application of the Polluter Pays Principle in Environmental Management,' (2021) 9 (1) *International Journal of Innovative Legal & Political Studies* 74-80.

[17] D J Lazerwitz (n 7) 258.

[18] C Eagleton, *Responsibility of States in International Law,* (1928) 80): see D Schindler, 'The Administration of Justice in the Swiss Federal Court in Intercantonal Disputes', (1921) 15 *American Journal of International Law,* 172-174, [In a case concerning, territorial relations, decided by the Federal Court of Switzerland between the Cantons of Soleure and Argovia, Soleure brought a suit against her sister State to enjoin use of a shooting establishment which endangered her territory. The court, in granting the injunction, said: *This right (sovereignty) excludes.... not only the usurpation and exercise of sovereign rights (of another State) ..... But also an actual encroachment which might prejudice the natural use of the territory and the free movement of its inhabitants*.]

nations may live together in peace with one another as good neighbours.[19] This principle of good neighbourliness, which plays an important role in establishing responsibility is one of the principles that regulate the behaviour and relations of neighbouring countries.[20] The concept of good neighbourliness has evolved into a set of legal principles which seeks to enable peaceful relations amongst neighbouring states. This set of principles seeks to create an obligation on States to take into consideration legitimate interests of neighbours and notify them of any situation that may cause damage beyond the border.[21] As a result, a duty of states to refrain from domestic activities that would have injurious results on the territory of neighbouring states is the first duty in the good neighbourliness principle. It is from this that other norms emanate.[22] In the final analysis, good neighbourliness in international law requires that when exercising their sovereignty and authority within their territory, States should ensure that their actions do not produce any severe damage or injury to the territories of other States[23]

4. 1 Rights and Duties of Riparian States

A river, either flowing through the territory of more than one State, sometimes referred to as a successive river, or one separating the territories of two States from one another, sometimes referred to as a boundary or contiguous river constitutes an international river. There are no legal distinctions between contiguous rivers and successive rivers. Thus, the same rules of international law apply to both types of rivers.[24] The basic rules for utilization of international rivers expresses the duty to use river waters in a manner which is not detrimental to the interest of other riparian states. Thus, the principle that a riparian should not use a river so as to injure

[19] See preamble to UN Charter; *Legality of the Threat or Use of Nuclear Weapons* [1996] ICJ Rep 429–555, the ICJ upheld *[t]he existence of the general obligation of States to ensure that activities within their jurisdiction and control respect the environment of other States or of areas beyond national control (as) part of the corpus of international law relating to the environment'*. In his dissenting opinion Judge Christopher Gregory Weeramantry, explained the nature and the meaning of the good neighbourliness principle as follows: *The principle of good neighbourliness is one of the bases of modern international law, which has seen the demise of the principle that sovereign states could pursue their own interests in splendid isolation from each other […] The Charter's express recognition of such a general duty of good neighbourliness makes this an essential part of international law*.

[20] OW Qada, 'The Principle of Good Neighbourliness as a basis for International Responsibility for Environmental Damage', (2022) 10 (1) *Journal of Real Estate Law and the Environment*, 143, 146 [It also implies that it is an obligation on the part of the State to use its territory as it likes, without such use causing harm to other countries.] *See also* M M Ayoub & R H Salih, 'The Obligation of the Source State in Accordance with the Principles of International Law to Prevent of Transboundary Harm in the Digital Space, (2022) 15 (2) *Baltic Journal of Law and Politics*, [2174-2190] 2175.

[21] A Kalicka-Mikołajczyk, 'The Good Neighbourliness Principle in Relations between the EU and its Eastern European Neighbours, (2019) 9 *Adam Mickiewicz University Law Review* [137-150] 137-138 [The good neighbourliness principle is a fundamental principle in international law governing friendly relations among states.] H Kelsen, *The Law of the United Nations: A Critical Analyses of its Fundamental Problems*, (1951) 11–13 [Good neighbourliness is a principle of international law which should have been included into the first chapter of the UN Charter.] A Verdross, *Völkerrecht* (1964) 292–295, translated in: J G Lammers, (n 8) 565 [Good neighbourliness is a *gradually emerging principle, which has now been solemnly anchored to the Preamble of the Charter of the UN*.] M Fitzmaurice & O Elisa, *Watercourse Co-operation in Northern Europe: A Model for Future*, (2004) 5 [Good neighbourliness is *fundamental in law governing the use of shared resources*.] L F E Goldie, 'Development of International Environmental Law - an Appraisal', in: JL Hargrove (ed.,) *Law, Institutions and the Global Environmental*, (1972) 104–165 [*Good neighbourliness is an emerging principle of international law with many transnational law qualities*].

[22] E Basheska, (n 6) 26.

[23] I Mohamed & A Samad, *International Protection of the Environment from Pollution in the Light of International Conventions and Provisions of International Law*, (2016) 157; see also M M Ayoub & R H Salih, (n 21) 2176.

[24] J Lipper 'Equitable Utilization', in *The Law of International Drainage Basins* (Garretson, Hayton, Olnstead eds. 1967) 16-17; D. O'Connell, *International Law* (2d. ed. 1970) 616; James O. Moermond & Erickson Shirley, (n 1) 139-140.

a co-riparian is an accepted principle of international law.[25] From this perspective, the principles of neighbourship law, restricted territorial sovereignty and restricted territorial integrity all share the basic concept that a riparian may not use a river so as to significantly injure a co-riparian. Although the three principles have different justifications, on application, the eventual result of each is similar. A river use that causes significant injury to a co-riparian is unlawful under all three principles. Accordingly, lawfulness of a river use under these three principles is decided by a determination of the degree of injury caused to a co-riparian state.[26] From the perspective of the UN Convention on the Law of the Non-Navigational Uses of International Watercourses, in international law, a watercourse is a system of surface waters and ground waters constituting by virtue of their physical relationship a unitary whole and normally flowing into a common terminus; and an international watercourse is a watercourse, parts of which are situated in different States. A watercourse State is a State Party to the Convention in whose territory part of an international watercourse is situated, or a Party that is a regional economic integration organization, in the territory of one or more of whose Member States part of an international watercourse is situated.[27] Watercourse States are required in their respective territories to utilize an international watercourse in an equitable and reasonable manner. In particular, an international watercourse is required to be used and developed by watercourse States with a view to attaining optimal and sustainable utilization thereof and benefits therefrom, taking into account the interests of the watercourse States concerned, consistent with adequate protection of the watercourse.[28] In this regard, utilization of an international watercourse in an equitable and reasonable manner requires taking into account all relevant factors and circumstances, including amongst others, the effects of the use or uses of the watercourses in one Watercourse State on other watercourse States.[29] Accordingly, watercourse States are required, in utilizing an international watercourse in their territories, to take appropriate measures to prevent causing of significant harm to other watercourse States.[30]

4.2 Basic Principles of State Responsibility

Every internationally wrongful act of a State entails international responsibility of that State.[31] In this regard, there is an internationally wrongful act of a State when conduct consisting of an action or omission is attributable to the State under international law; and constitutes a breach of an international obligation of the State.[32] While many acts are considered wrongful both according to international and domestic law, often international law imposes obligations that do not exist under domestic law.[33] Thus, the characterization of an act of a State as

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[25] F. Sorenson, *Manual of Public International Law* (1968) 301, 329. James O. Moermond & Erickson Shirley, (n 1) 147.

[26] J O Moermond & E Shirley, (n 1) 146; J G Lammers, (n 8) 563 [*[v]arious writers have based their arguments both on the infringement of the territorial integrity of the victim State as well as on the breach of an obligation imposed by good neighbourship. The first approach appears to lay the emphasis on the infringement of a subjective international right of the victim State - i.e., the territorial sovereignty of that State over its territory - while the second approach appears to assume the existence of rule and principles of objective international law which by imposing restrictions on the exercise and enjoyment of the territorial sovereignty of neighbouring States purport to enable their coexistence.*] D J Lazerwitz (n 7) 252.

[27] See Article 2(a)(b)(c) of UN Convention on the Law of the Non-Navigational Uses of International Watercourses, opened for signature May 21, 1997, 36 I.L.M. 700 (1997) the Convention entered into force on August 17, 2014. Nigeria is party to the Convention, but Cameroon is not.

[28] Article 5(1), ibid.

[29] Article 6(1) (a) & (d), ibid.

[30] Article 7(1), ibid.

[31] Article 1, Responsibility of States for Internationally Wrongful Acts, ILC draft articles annexed to GA resolution 56/83 of 12 December 2001

[32] Article 2, ibid.

[33] M Dimitrovska, 'The Concept of International Responsibility of State in the International Public Law System', (2015) 1(2) *Journal of Liberty and International Affairs*, [1-16] 9-10.

internationally wrongful is governed by international law. Such characterization is not affected by characterization of the same act as lawful by internal law.[34] In this regard, the international responsibility of state depicts the limitation of external state sovereignty, in terms of establishing international responsibility when a state commits an internationally wrongful act.[35] In 1928, in the *Chorzov Factory Case*, the PCIJ, pointed out that as a principle of international law, breach of each legal obligation entails responsibility for repair of the damage. This case marks the inception of defining the concept of state responsibility. In coupling the concept of reparation to state responsibility for wrongful acts, the Court also held that *reparation must, as far as possible, annul all the consequences of the illegal act and re-establish the situation which would, in all probability, have existed if that act had not been committed*.[36] Any violation by a state of an obligation of whatever origin gives rise to state responsibility and thus to the duty of reparation. Here, international law does not distinguish between contractual and tortious obligations.[37] As a result, in order to establish wrongfulness, the only thing required is a clear conflict between the conduct of the state and the requirement of the law. The mental or psychological state of the actor is irrelevant. This renders inapplicable, the natural law theory of *culpa*. Thus, the state, as a body corporate, devoid of human passions, either obeys or disobeys prescribed rules of conduct. Consequently, from the perspective of international law, imputability is basically the consequence of a causal link between an act against international law and the action of the state perpetrator of the act.[38]

5. Liability of Cameroon for Downstream Damage by Waters from its Lagdo Dam

In mid-September 2022, the National Emergency Management Agency (NEMA) issued a warning that up to 13 states in Nigeria would experience flooding. The director general of NEMA, explained that Nigeria Hydrological Services Agency (NIHSA), informed them that the Lagdo Dam operators in the Republic of Cameroon had commenced release of waters from the Lagdo Dam reservoir on 13th September 2022. He explained that the released waters flow down to Nigeria through River Benue and its tributaries thereby inundating riparian communities, with serious consequences on states and communities along the courses of rivers Niger and Benue. The projected serious consequences is invariable in that Nigerian states downstream the River Benue drainage basin are usually flooded whenever water is released from the Lagdo reservoir.[39]

Purposes for building dams vary. Some are built to generate hydro-electric power, or to store and divert water for irrigation, water supply, or flood control. It is inevitable for river flow to

[34] Article 3 (n 40).

[35] M Dimitrovska, (n 34) 4.

[36] *Certain German Interests in Polish Upper Silesia (FRG v. Pol.)*, (1928) P.C.I.J. (ser. A) No. 17, at 29

[37] Milka Dimitrovska, (n 42) *8*

[38] P M Dupuy, 'The International Law of State Responsibility: Revolution or Evolution? (1989) 11 *Michigan Journal of International Law* [105-128] 110

1 [39] Paul Omorogbe, (n 3) [Benue State was flooded from early September this year [2022]. Reports indicated that about 3,274 people were affected and about 1,213 houses were destroyed. Farmlands and crops were destroyed and livelihoods affected. With the destruction of several hectares of farm land, the food crisis in Nigeria will worsen. Jigawa State was flooded in September. About 92 people were reported dead from flooding in Jigawa. This is apart from the loss of property, livelihood and infrastructure. In Anambra State, 651,053 persons in six local government areas were reportedly displaced by floods. Other states affected by flooding include FCT, Borno, Ebonyi, Rivers and Bauchi. The flooding of Kogi State stood out, with untold number of casualties. The flooding affected the nine Kogi State LGAs which lie along the Rivers Niger and Benue. Some of them were almost 100% under water while the rest range from 30% up. The warning issued by NEMA and its reference to the Lagdo Dam in Cameroon was not the first. About seven years ago, NEMA, informed the public that Nigerian states along River Benue could be flooded as the authorities in Cameroon announced plans to release water from the Lagdo Dam between August and November that year. In 2015, warning came after a similar exercise in 2012 resulted in a flood disaster affecting a number of states in the country.]

be affected by construction of dams for any of these purposes. This also adversely affects existing water rights of riparian states. Consequently, dams have become a major source of tension between riparian states, particularly, over the rights and obligations of the riparian states in respect of the shared rivers.[40] Another largely unexpected, menace from large dams is that though most are built in the expectation of reducing or controlling downstream flooding, many have had the reverse effect. This is particularly so during times of heavy rains, when reservoirs become filled. With the filling of the reservoirs, its operators, faced with the risk of catastrophic failure of their dam as it overfills, make emergency releases of great volumes of water that inundate and overwhelm downstream areas.[41] In respect of the River Benue, apart from the dams on some its tributaries, the Lagdo Dam, upstream in Cameroon, is the only dam along the river's entire stretch from Cameroon to Lokoja. The Lagdo Dam has modified the River Benue basin significantly. Most of the flood events experienced in Nigeria are traceable to release of large volumes of water from the Lagdo Dam.[42] The responsibility of States to ensure that activities within their jurisdiction or control do not cause damage to other states or areas beyond the limits of their national jurisdiction is undoubted. Violations of this generally accepted rule inevitably results in injuries.[43] Certainly, it may be argued that the building of a dam is inherently legal for a State, as an exercise of its sovereign territorial rights. On the other hand, these activities are legal only to the extent that they remain within the existing standards of care required to prevent harmful effects on neighbouring states. Fundamentally, in such a situation, the framework of the classical responsibility for a wrongful act remains.[44] Since the lawfulness of an activity depends on the manner of performing it, and on the presence of obligations established under the cover of a general duty of cooperation, particularly in the field of harmless use of territory, international liability, then, must be seen as a liability for activities prohibited by international law.[45]

Cameroon's legal right, in exercise of its sovereign competence over its territory to construct and operate the Lagdo Dam remains unassailable. Its construction and use of the dam is not only legal, it is also peaceful. Mere use of the dam does not attract any legal consequence. There is no complaint in Nigeria that the dam's use has restricted the quantity of water available for downstream use. There is also no complaint of environmental degradation or pollution as a result of uses to which the dam is put. Nigeria's complaint revolves around imprudent release of waters from the dam by its operators. In this regard, the fact of the release of large volumes of water, at such times and in such manner that downstream flooding and inundation is the inevitable and natural consequence is undisputed. It is also undoubted that the result of the release of large volumes of water from the dam is the inundation of Nigerian territory by floods,

[40]S M A Salman, 'Dams, International Rivers, and Riparian States: An Analysis of the Recommendations of the World Commission on Dams', (2001) 16 (6) *American University International Law Review* [1477-1505] 1477-1478.

[41] Fred Pearce, 'Dams accused of role in flooding', *WWF International Research Paper: Dams and Floods*, (2001) [Initially, dam managers attempt to capture the water. The primary purpose of their dams is to capture water in order to generate hydroelectricity and/or provide water for cities and irrigation projects. Dam managers also often have a remit to guard against flooding downstream by capturing the flood flows of rivers. During moderate floods this usually works well. But in times of high rainfall and exceptional river flows, the dam's capacity to capture water becomes a menace. As the reservoir becomes full, its operators are faced with the choice of risking catastrophic failure of their dam as it overfills, or of making emergency releases of water down spillways. Anxious not to cause downstream flooding, they often leave it too late to make the fateful decision. The result is emergency releases that are far greater and more sudden than flows that would have occurred during the natural river flooding].

[42] D N Olayinka-Dosunmu, *et al* (n 1) 5.

[43] M Valverde Soto (n 17) 202.

[44] PM Dupuy, (n 39) 117.

[45] ibid. 127.

destruction of towns and villages, destruction of farms and other economic assets, large scale deaths by drowning, and social disruptions. The wrongful act is undisputed. Causation is clear. Injury is established. The question now is what Cameroon's international obligation in the light of all these should be? At the very least, the first step for Cameroon to take is to ensure that the imprudent release of waters from its Lagdo Dam ceases. This is in accordance with the rule that the State responsible for any internationally wrongful act is under an obligation to cease that act, if it is continuing.[46] Thus, existence of legal consequences for the state that did the wrongful act, does not release that state from the initial obligation to have refrained from committing that act. This implies that the existence of legal consequences for breach of an obligation is consistent and parallel to the duty of performing the obligation and is not mutually exclusive.[47] This rule is replicated in the UN Water Convention which establishes that a watercourse State, in utilizing an international watercourse in its territory, if significant harm is caused to another watercourse State, the State whose use causes such harm shall take all appropriate measures to eliminate or mitigate such harm.[48] Although Cameroon is not party to this Convention and has not acceded to it, so that the Convention may not be binding on it, nevertheless, to the extent that the Convention does not create new law, but rather reflects customary international law, Cameroon is bound by the principles. In order to give effect to obligation to cease the injurious act, it is not necessary to take down the dam or in any manner, impair its operational efficiency. All that is required is to manage the dam more efficiently, and ensure that the release waters form the reservoir is not left off until it approached criticality.

Having ceased repetition of the internationally wrongful act for which it is responsible, Cameroon is under another obligation to offer appropriate assurances and guarantees of non-repetition, if circumstances so require.[49] This inevitably leads to a duty to offer to full reparation to Nigeria for the injury Nigeria and its citizens suffered as a result of the wrongful act. Cameroon is under an obligation to make full reparation for the injury caused by the internationally wrongful act.[50] Any violation by a state of an obligation of whatever origin gives rise to state responsibility and thus to the duty of reparation.[51] Although, possibly not exclusive, the obligation to make reparation for the damage caused by its violation of law remains a vital consequence of engagement of a State's responsibility.[52] In the *Chorzov Factory Case*, the PCIJ, explained that the essential principle contained in the notion of an illegal act is that reparation must, as far as possible, wipe out all the consequences of the illegal act and re-establish the situation which would, in all probability, have existed if that act had not been committed. Restitution in kind, or if it is not possible, payment of a sum corresponding to the values which a restitution in kind would bear; the award, if need be, of damages for loss sustained which would not be covered by restitution in kind or payment in place of it - such are the principles which should determine the amount of compensation due for an act contrary to international law.[53] In other words, an illegal act violates the rule of law, and also violates the interest protected by the law. Restoration encompasses the reestablishment of the legal situation before the action and compensation for the damage incurred. At times, these aims are achieved

[46] Article 30(a) (n 40).
[47] M Dimitrovska, (n 34) 8.
[48] Article 7(2) (n 36).
[49] Article 30(b) (n 40).
[50] Article 31 ibid.
[51] M Dimitrovska, (n 34) 8.
[52] P M Dupuy, (n 39) 112; the ICJ decision in *US Diplomatic and Consular Staff in Tehran (US v. Iran)*, 1980 ICJ 3, 45, demonstrates this consistency in state responsibility. Having noted the Islamic Republic's violation of several of its international obligations, the Court concluded that: *The government of the Islamic Republic of Iran is under an obligation to make reparation to the Government of the United States of America for the injury caused to the latter by the events of the 4th November 1979 and what followed from these events*.
[53] (n 45) 377.

by material compensation for the damage caused. Often, compensation is accompanied by apologies by the responsible State, addressed to the Victim State, by which satisfaction is deemed to have been given. In respect of injury caused to the person or damage caused to property, material restitution or money payment and restoration of the legal situation are interwoven.[54] From the foregoing, it is clear that three basic forms of reparations exist on commission of internationally wrongful acts. These are: restitution, compensation and satisfaction. Any combination is possible. Though, the quality of reparations may vary qualitatively, they are not retributive. Restitution, i.e. returning to previous condition *restitutio in integrum* as far as possible is given priority. In most situations, restitution might be impossible of attainment. If restitution is impossible, compensation will be paid. This involves recompense in damages for monetarily assessed damage. If despite the existence of moral damage or injury, restitution or compensation are impossible, the reparation is performed in the form of satisfaction, which entails public acknowledgment of the breach, an expression of regret, formal apology or a promise that the wrongful act will not be repeated.[55]

The question now is what Cameron must do. Clearly, construction and operation of the Lagdo Dam are in lawful exercise of sovereign powers. Use of the dam for hydro-electricity power generation and irrigation are lawful uses. These do not form any basis for Cameroon's breach of international law. However, Cameroon, in operating the dam in such a negligent and careless manner as to cause substantial, recurring damage and injury to the lower riparian is in breach of international law. The first duty on Cameroon is to discontinue operation of the dam in such a manner as to cause downstream damage. This duty is not dependent on the existence of a complaint by Nigeria. This duty to cease being the cause of further injury is automatic upon proof that injury is the effect of the current mode of operating the dam. Consequently, Cameroon has an immediate, irrefutable and mandatory duty to desist from causing flooding in Nigerian territory by its imprudent, rash and uncontrolled release of waters from its Lagdo Dam. In this regard, international law requires that a State responsible for the internationally wrongful act is under an obligation, to cease that act, if it is continuing; and, to offer appropriate assurances and guarantees of non-repetition, if circumstances so require.[56] Thereafter, the issue of reparations for already caused damage will arise. This will depend on a demand from Nigeria. Although a state responsible for an internationally wrongful act is under an obligation to make full reparation for the injury caused by the internationally wrongful act,[57] it is not required to volunteer reparations. It is lawful to await a demand for reparations from the injured state, with details of the damage caused and the monetary or other value of the damages. In this regard, on this particular issue, it is lawful for Cameroon to await a formal demand from Nigeria. Where there is no demand for reparations from Nigeria, an obligation by Cameroon to make reparations will not arise.

6. Conclusion

In international law, sovereignty is a basic principle. It encompasses the fullness of authority and dominion accruing to a territorial sovereign, and which it is permitted to exercise both

[54] PM Dupuy, (n 47) 121 [When the French embassy in Libya was set afire by demonstrators, revealing a defect in the Libyan authorities' preventive measures, the host government discharged itself, of its obligation to restore the situation, both material and legal, to what it had been before the incident, by assuming the costs of a new embassy building. The compensation awarded constituted recognition that the act at the origin of the incident was of an illegal nature and imputable to this State.] R. Lillich, 'The Current Status of the Law of State Responsibility for Injuries to Aliens*',* in *International Law of State Responsibility for Injuries to Aliens* (R. Lillich ed. 1983) 1-16.

[55] M Dimitrovska, (n 34) 9.

[56] Article 30 (n 40).

[57] Article 31 ibid.

within its local territory and in international law. During the early stages of the formation of the theory of sovereignty, it designated unrestricted and absolute power within a jurisdiction. Currently, sovereignty no longer entails the classical notion of power by a local sovereign to exercise unrestricted authority within his domain and therein to dictate outcomes to others. On the other hand, under the current concept of sovereignty, the emphasis is on the responsibility of the local sovereign to exercise sovereign power in accordance with what is perceived as the best interest of the global community. Under current customary international law, while a state may exercise its sovereign authority and powers within its territoriality, it must be careful to ensure that the effect and consequences of such exercise of powers do not reverberate or resound within the territory of another sovereign. To do so would be to violate the territorial integrity of the sovereign in whose territory, the consequences and effects of the act are felt. The lawfulness of the act causing the harm or damage is irrelevant within this construct of responsibility. This paper in founding a theory of Cameroon's liability for downstream damage in Nigeria caused by release of waters from Cameroon's Lagdo Dam establishes that notwithstanding the lawfulness of the construction and use of the dam in Cameroon as a lawful exercise of sovereign powers, to the extent that the imprudent and careless management of the dam has caused, and is causing damage in a downstream state, the basis for Cameroon's international liability is activated. In this regard, from the perspective of international law, Cameroon must immediately cease and desist from causing further downstream damage. This immediate responsibility arises whether or not a demand to that effect is made by the lower riparian. Thereafter, upon a demand by the lower riparian, the issue of reparations would arise to be decided and settled. In this regard, the decision in the Trail Smelter Arbitration is as relevant today as in day it was made.