FROM TENUOUS LEGAL ARGUMENTS TO SECURITIZATION AND BENEFIT SHARING:

HEGEMONIC OBSTINACY – THE STUMBLING BLOCK AGAINST RESOLUTION OF THE NILE WATERS QUESTION

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Abstract

Resolution of the Nile waters question has proved, once again, to be an elusive task. Identifying the major hurdle which has bedeviled past cooperative initiatives and rendered current efforts mere Sisyphean ones is thus of paramount importance. The main thrust of this article is to identify this challenge which has thus far stifled almost all efforts at resolution of the Nile waters question in a fair and equitable manner. The consistently obstinate position Egypt has taken over the years to maintain its poignantly inequitable "share" of Nile waters forever is the heart of the problem which makes any settlement of the Nile waters question a virtual impossibility. Relying on its status as the basin's hydro-hegemon, Egypt has so far been able to not only defend the indefensible but has also been able to effectively hoodwink and contain the non-hegemonic riparians by engaging them in "cooperative initiatives" and a "benefit sharing" scheme it effectively is using as stalling tactics while aggressively pursuing giant hydraulic projects as instruments of resource capture. A real transformation and a breakthrough in this stalemate requires, of necessity, a change in the malign, oppressive nature of Egyptian hydro-hegemony into a benign, cooperative one, at least. The non-hegemonic riparian states have thus to adopt effective counter-hegemonic strategies in order to force Egypt back to the negotiation table, developing, in the mean time, the resource and technical capability that would enable them to resist and overcome the multifaceted pressure and influence the hydro-hegemon will inevitably exert to keep them in line; failure to do so would surely condemn them to live, ad infinitum, with the grotesquely inequitable *status quo.*

Key words:

Equitable utilization; Nile waters question; cooperative framework agreement; hydro-hegemony; securitization; benefit sharing; international water law.

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Introduction

Sharing trans-boundary resources in general and trans-boundary freshwater resources in particular is quite a difficult task. Found in the water-stressed hydrographic region of the Middle East and North Africa where "negative hegemonic configurations appear to predominate"[1] the Nile poses far more serious challenges to efforts aimed at sharing its waters in fairness and equity. The comparatively much smaller discharge which contrasts with its fame and majesty, the burgeoning population of the basin which has added a serious demographic challenge to the existing problems, the extremely poor and bellicose inter-riparian relationship and, more importantly, the prevalent hegemonic hydro-political configuration entrenched in the anachronistically lopsided treaty regime constituting the *status quo* make the just and equitable resolution of the Nile waters question a daunting task, if not an utter impossibility.

Ever since its official launch in February 1999, the Nile Basin Initiative (NBI) has been a source of much hope and optimism in a basin noted for aggressive competition, mutual suspicion and lack of rapprochement and, thus, long identified as a potential flashpoint, a future scene for a merciless water war.[2] In what may be considered a clean break from the past, the NBI managed to bring all Nile riparian countries together for the first time around a shared vision "to achieve sustainable socio-economic development through the equitable utilization of, and benefits from, the common Nile Basin water resources."[3] Realization of the lofty Shared Vision has been pursued primarily through the negotiation of a Cooperative Framework Agreement (CFA) which would provide the basin with a permanent legal and institutional framework

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[1] M. Zeitoun and J. Warner (2006), "Hydro-hegemony – a Framework for Analysis of Trans-boundary Water Conflicts", *Water Policy* (8) 435 – 460, at 439.

[2] J. Kerisel (2001), *The Nile and its Masters*: Past, *Present, Future* (A. A. Balkema, Rotterdam), p. xiv.

[3] NBI, *Shared Vision,* available at: <www.nilebasin.org>. In view of the extremely poor and dangerously bellicose nature of inter-riparian relations and the many other problems rife in the basin, one may understandably find the lofty Shared Vision too good to be true. The very adoption of the Vision has thus been dismissed rather as an act of supreme hypocrisy involving "the sweeping cooptation or invocation of seemingly progressive norms" by its authors – "officials representing governments that are internationally known for their repression of their peoples, gross violation of human rights and civil liberties, wanton corruption, and their limitless contempt for political dialogue and political pluralism." Okbazghi Yohannes (2008), *Water Resources and Inter-Riparian Relationships in the Nile Basin: The Search for an Integrative Discourse* (State University of New York Press, Albany), p. 25.

within which the benefits from the shared resource would be shared amongst all the riparians.

The result of this decade-long effort though has turned out to be a disappointing one as the much hoped for CFA has ultimately fallen prey to the hegemonic compliance producing mechanism of securitization creating, thereby, a hydro-political fault line between the seven upstream riparian countries and the two downstream ones.[4] The so-called benefit sharing approach still being pursued as an alternative solution to the Nile waters question is, it will be argued, yet another hegemonic ruse employed to hoodwink the other riparinas with a view to buying time for the basin hydro-hegemon to complete its giant resource capture projects. In terms of resolving the Nile waters question, it will be argued, benefit sharing offers nothing but a false hope and is thus doomed to failure. Having thus pointed out hegemonic obstinacy as the major stumbling block stifling efforts to resolve the intractable Nile waters question in a fair and equitable manner, the article points out the elements of an effective counter-hegemonic strategy which would help extricate Nile waters question out of the "water security/benefit sharing" morass and forge a realistic way forward to ensure the equitable and reasonable utilization of the waters in line with the precepts of international water law.

1. Background: The Hydro-Political and Legal Setting

River Nile possesses unique hydrological and hydro-political features which incessantly militate against the possibility for the equitable utilization of its much needed waters by all the riparians. The menacingly erratic nature of its flow, the fact of its being perceived for millennia as the veritable lifeline of Egypt and the attendant negative historical baggage and, above all, the grand British colonial design for the basin which brought into existence a malign hydro-hegemonic political configuration undergirt with a poignantly inequitable treaty regime have, in tandem, with the unfortunate post-colonial hydro-political reality of the basin which, save for a change of actors, is essentially a

[4] The Extraordinary Nile-COM meeting held on April 13, 2009 at Sharm el-Sheikh, Egypt was hoped to bring a breakthrough in the stalemated negotiations which would lead to the signing of the CFA and the launching of the Nile River Basin Commission. The meeting ended in failure as Egypt categorically refused to sign the agreement unless it is assured that its 55.5 billion cubic metre share of the Nile waters is maintained and a veto power over any new irrigation projects upstream is granted to it – a claim vehemently opposed by the upstream riparian countries: *Egypt News*, 14 April 2010, available at: <http://news.egypt.com/en/2010041410307/news/-egypt-news/nile-sharing-meeting-fails-egypt.html> (accessed on 19 April 2010).

continuation of the colonial era,[5] rendered resolution of the Nile waters question a hugely difficult task verging on the impossible.

Though not totally immune from the negative influence of the past which plagued previous cooperative initiatives to failure, the NBI indeed represents a milestone in the troubled history of inter-riparian relationship[6] and should thus be duly credited for the unprecedented breakthrough it has made in bringing all Nile riparians together under a lofty shared vision, and more importantly, for taking up, in unprecedented boldness, the sensitive issue of equitable reallocation of the Nile waters. The renewed hope and optimism the initiative had evoked has certainly made the last decade the most important epoch in the history of the basin. Whether this atmosphere of optimism, cooperation and positive rapport would survive the impact of the Sharm el-Sheikh fiasco and thrive once again is a tough question best answered by time.

The NBI has been pursuing the daunting task of resolving the Nile waters question through two strategies. The first and, arguably, by far the most important one is the negotiation and adoption of an inclusive Cooperative Framework Agreement (CFA) which would provide the basin with a permanent and equitable legal and institutional framework within which the benefits from the shared water resources of the basin would be distributed amongst all the riparians through a benefit sharing framework which, currently, is being worked out.

The much expected CFA has, however, been a colossal failure in terms of the objective it was designed to achieve – an inclusive, equitable and lasting legal and institutional framework governing the utilization of the Nile waters. The cause for the failure is, undoubtedly, the securitization of the issue in a bid both to perpetuate the inequitable *status quo* and contain the non-hegemonic riparians in an endless negotiation process giving them the false hope that they would, once the benefits sharing framework is complete and set in motion, receive their respective shares of the benefits from the Nile waters. It has now become abundantly clear that the Nile waters question has descended into a dead end exit from which seems to be unavailable unless the whole issue is taken back into the framework of international law from which it has been cunningly

[5] The obstructively unique hydrological, hydro-political and historical factors as well as the impact British colonial presence had on the prospect of equitable utilization and cooperative development of the Nile waters has been discussed at length in Dereje Z. Mekonnen (2010), "The Nile Basin Cooperative Framework Agreement Negotiations and the Adoption of a 'Water Security' Paradigm: Flight into Obscurity or a Logical Cul-de-sac?", *European Journal of Int'l Law,* vol. 21 (2), May 2010, 421 – 440.

[6] *Ibid*., 423 – 427.

dislocated by the basin hydro-hegemon which, of course, took good advantage of the amateurish naiveté or sheer apathy of the other riparians.

That this is no cynical pessimism is evident from the simple fact that the entire annual flow of the Nile is allocated between Egypt and Sudan which consider their respective shares of 55.5 and 14.5 billion cubic metres as non-negotiable historic rights.[7] The Nile, in terms of its annual discharge, is a hydrologic dwarf, not "an inexhaustible manna from heaven."[8] The crux of the matter is, if "current uses" – a convenient euphemism for the entire flow – are said to be sacrosanct and non-negotiable, then logic dictates that the other riparians have no right to any consumptive use of the Nile waters, and the most they can make use of them would be hydropower generation in such a manner that does not diminish the flow.

In reality, what stands in the way of any breakthrough in the settlement of the Nile waters question is, therefore, what has always been there from time immemorial – the belief that Egypt "will have the right forever, *ad vitam aeternam,* to all of the water carried by the Nile, as at the time of the Pharaohs."[9] This apparently obscene claim though has been deceptively presented, over the years, under the veil of tenuous legal arguments and has, of late, picked up a much more sophisticated camouflage in the form of securitization and benefit sharing – two noted hegemonic compliance producing mechanisms currently at work in the Nile basin.

2. Tenuous Legal Arguments

The attempt to perpetuate the inequitable pattern of utilization of Nile waters is quite often made under a dubious factual basis and through tenuous legal arguments punctuated with occasional sabre-rattling. The crucial role the Nile has played in midwiving ancient Egyptian civilization which depended on the Nile floods for its very survival – a fact succinctly expressed in Herodotus'

[7] It is no secret that Egypt considers the 55.5 billion cubic metre share of the Nile waters it has granted itself under the 1959 agreement as its non-negotiable historic right. See, for instance, the uncompromising official Egyptian position demanding "an explicit approval by other signatories [of the CFA] of Egypt's historic right to 55.5 billion cubic metres of Nile water and … a veto over any projects implemented upstream." (Reem Leila, "Wading through the Politics", *Al-Ahram Weekly On*-line, 9 – 15 July 2009, Issue No. 955, available at: <www.weekly.ahram.org.eg/2009/955/eg2.htm>.

[8] Kerisel, *supra* note 2, p. 155.

[9] *Ibid.*, p. 139.

aphorism "Egypt is the gift of the Nile"[10] – provides, to-date, the historical and hydrographic backdrop for the claim of veritable ownership Egypt makes over 75 per cent of the river's annual flow.

Undeniably, Egypt depended, for millennia, on the Nile floods for its survival; it still depends on the Nile waters perhaps more than any other riparian does. The narrative which portrays the Nile waters as a veritable lifeblood even a slight reduction of which would bring mortal harm to Egypt though is a complete hoax, a total fabrication intended to bolster the untenable claim to endlessly perpetuate the poignantly inequitable utilization Egypt is making of the Nile waters. In fact, the myth of Egypt's mortal dependence on the Nile waters to an extent that would entail its virtual extinction in the event of a reduction or interruption of the flow has been effectively debunked in so powerful a manner that would render any attempt at paraphrasing it inappropriate; the fact of the matter is, thus:

> The assertion that 'Egypt is the Nile and the Nile is Egypt' entails two fallacies. Firstly, Egypt is not just the Nile, i.e. Egypt is not as dependent on the Nile as it used to be. The ancient Egyptian civilization was strongly associated with the development of Nile water resources and the Nile waters were the only 'internal' water resources. But this is no longer the case and the Egyptian economy is not as dependent on the Nile waters as in the past. The contribution of the agricultural sector in GDP, for example, moved from 20.1% in 1981 to 16.8% in 2006, while the proportion of the population involved in agriculture dropped from 55% in 1965 to its current figure of 31.5%. Furthermore, Egypt imports a significant proportion of its water in the form of virtual water 'trade' in food staples. However, 'Egypt continues to define its interests in the Nile much as it did in the 1950s, irrespective of the enormous changes since then in the Egyptian economy'. Egypt has been proportionately more dependent on the diversification of its economy than on its Nile waters in relation to the increase in its population (*in-text references omitted*).[11]

The second fallacy the assertion entails is the implied assumption that the Nile, inasmuch as it exists only for Egypt, it does exist entirely within Egypt as well. The truth, however, is that "the Nile is not just Egypt; [it] is an international basin shared by ten riparian states … [all of which] aspire to use a quota of [its]

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[10] While coining the aphoristic expression, Herodotus was referring not to the volume of water per se, but to the subsoil of the plain which the river brought with the annual floods (Kerisel, *supra* note 2, p. 36). Distorted through the years, the expression has now become a codeword for the mythical absolute dependence of Egypt on the waters of the Nile to such an extent that any reduction thereof would threaten the very survival of the country.

[11] Ana E. Cascao (2008), "Ethiopia – Challenges to Egyptian Hegemony in the Nile Basin", *Water Policy* 10 *Supplement* 2, p. 19.

water resources, although specific allocations are not yet defined."[12] Furthermore, dependence on a given trans-boundary watercourse of whatever degree is just one among the many factors to be taken into account while cutting a deal for the equitable and reasonable utilization of such resource,[13] not a title deed thereof. To assume that this fact is lost on the Egyptians would be a supremely naïve underestimation; to understand why they tenaciously cling to this narrative though is crucial to unravel the tenuous legal arguments they make in defense of the beleaguered *status quo*.

2.1. The 1929 Agreement and the Myth of its Continued Binding Force

Concluded on the 7th of May1929 in Cairo through the exchange of notes between the United Kingdom and Egypt, the Agreement on the Use of the Waters of the River Nile for Irrigation Purposes[14] is the bedrock on which the claim for the perpetuity of the iniquitous *status quo* is founded. Though profoundly inequitable even to Sudan itself in respect of the extremely lopsided

[12] *Ibid.*

[13] Article 6 of the 1997 UN Watercourses Convention lists out, non-exhaustively, the various factors to be taken into account while working out, a formula for the equitable and reasonable utilization of international watercourses within the meaning of article 5. The list includes: geographic, hydrographic, hydrological, climatic, ecological and other factors of a natural character; the social and economic needs of the watercourse states concerned; the population dependent on the watercourse in each watercourse state; the effects of the use or uses of the watercourses in one watercourse state on other watercourse states; existing and potential uses of the watercourse; conservation, protection, development and economy of use of the water resources of the watercourse and the costs of measures taken to that effect; and the availability of alternatives, of comparable value, to a particular planned or existing use. It is interesting to note that none of theses factors enjoys any inherent superiority and "In determining what is a reasonable and equitable use, all relevant factors are to be considered together and a conclusion reached on the basis of the whole" (*ibid.,* sub-article 3). The only instance where a particular use might enjoy, in the event of a conflict between uses, a relative superiority is where that use pertains to "the requirements of vital human needs" (*ibid.,* article 10) which is strictly circumscribed to "sufficient water to sustain human life, including both drinking water and water required for the production of food in order to prevent starvation." (ILC, *Draft Articles on the Law of the Non-Navigational Uses of International Watercourses and Commentaries thereto, Report of the ILC on the Work of its Forty-Sixth Session,* Doc. A/49/10, *Yearbook of International Law Commission* (1994), vol. 2, part 1, pp. 89 – 135, at 110.

[14] Text available at:< http://ocid.nacse.org/tfdd/tfdddocs/92ENG.pdf>.

22:1 ratio in which it allocated the Nile waters between Egypt and Sudan, the agreement, it is maintained still binds the former British colonies in the White Nile sub-basin – Kenya, Tanzania, Uganda – as the treaty was concluded by their common predecessor state of which they now are independent successor riparian states.

This tenuous argument though is devoid of any legal basis as it is rather based on a completely erroneous perception of the principles of international law governing the succession of states in respect of treaties. The argument for the continued binding force of the 1929 Agreement has its theoretical roots in the theory of Universal Succession which entails the compulsory transmission of all the rights and obligations of the predecessor state to its successors.[15] Accordingly, Kenya, Tanzania and Uganda are, as successor states, bound by the terms of the 1929 Agreement notwithstanding the demise of the British empire – their predecessor state. This proposition is, however, without any legal basis in international law which, in respect of newly independent states, rather applies the Clean Slate (*tabula rasa)* theory which relieves such states of any duty "to maintain in force, or to become a party to, any treaty by reason only of the fact that at the date of the succession of states the treaty was in force in respect of the territory to which the succession of state relates."[16] Accordingly, the successor state is regarded as original, and hence, deriving its authority from its own sovereignty, not from that of its predecessor.[17] Succession in such cases,

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[15] D. P. O'Connell (1967), *State Succession in Municipal Law and International Law,* vol. 1 (Cambridge University Press), pp. 9-14. The theory of Universal Succession was never fully applied in practice and had many variants such as the theory of Popular Continuity according to which the state is said to have two personalities – political and social – and only the former is affected by succession and hence obligations of a political character lapse with sovereignty while those of a patrimonial, social character remain unaffected; the theory of Organic Substitution which maintains that the state is no more than a "moral organism" the succession of which should be no different from that of any other social grouping or association, and hence, the successor state takes over all the rights and duties of its predecessor excluding only those that are essentially political; and the theory of Self-Abnegation which is based on the assumption that recognition is constitutive in international law and thus maintains that though the successor state is free to take over or reject rights and obligations of its predecessor, it is materially required, under the threat of non-recognition, to take over in the interest of realizing its own aims to permit only the least disturbance.

[16] Vienna Convention on Succession of States in Respect of Treaties (1978), Art. 16.

[17] Yilma Mekonnen, "State Succession in Africa: Selected Problems", 200 *Recueil de Cours international* (1986-V), pp. 107 – 108.

therefore, entails "discontinuity of all rights and obligations completely and automatically."[18]

The claim for the continued binding force of the 1929 Agreement is rendered far more tenuous by the historical fact that the newly independent riparian states allegedly bound by its terms did adopt a common position in respect of state succession commonly referred to as the Nyerere Doctrine.[19] Essentially in conformity with the Vienna Convention,[20] the doctrine totally repudiated the theory of Universal Succession which epitomized "an effort to minimize the disruptive effects of the liquidation of the colonial empires on vested economic interests of the colonial powers by binding the emerging states through some sort of legal gimmick."[21] The focus, thus, was to forge out a formula which would ensure the complete freedom of the new state from the colonial commitments the theory of Universal Succession would burden it with, and at the same time, making sure that there would be stability in the future international relations of the new state vis-à-vis the rest of the international community,[22] thereby forestalling the total disruption the adoption of the Clean-slate theory would entail. The independent riparian states of Kenya, Tanzania and Uganda have, through the adoption of the Nyerere Doctrine (also known as the Opting-in formula), rejected the theory of Universal Succession which

[18] *Ibid.,* p. 114.

[19] Named after the late President Julius Nyerere, the doctrine is a cogent reformulation of the Optional theory of succession prevalent then in state practice. Nyerere's prime concern was to make sure that a hard-won independence would not compromised by the continued weight of the colonial era legal reality without causing unmitigated disruption which would affect the stability of the country's future international relations. Nyerere's Opting-in formula thus declared that "Tanganyika shall not in the future be bound by pre-independence commitments which are no longer compatible with her new status and interests." (Nyerere's speech of 30 November 1961 before the National Assembly, excerpted in Yilma Mekonnen, *supra* note 17, p. 134).

[20] The Vienna Convention has established two distinct regimes on succession to treaties. In the normal case of succession not arising from decolonization, the governing principle is that of clean-slate as qualified and thus not applicable to boundary and other territorial regimes (arts. 11 and 12). With regards to newly independent states, however, the Convention has a separate part (Part III, arts. 16 – 30) and the optional theory is the governing theory.

[21] Yilma Mekonnen, *supra* note 17, p. 112.

[22] *Ibid*., p. 121

would entail the wholesale transmission of all the rights and obligations of the predecessor state and, with it, the 1929 Agreement.[23]

The claim is, furthermore, inherently self-contradictory as it is negated by the very nature of the treaty itself which, upon the conclusion of the 1959 Agreement, has also ceased to exist. The official Egyptian position regarding the 1929 Agreement was, contrary to the claim of its continued binding force, to rather consider it as a temporary arrangement put in place until the political future of Sudan would be determined.[24] It was, thus, only "a political armistice …, a practical working arrangement for the engineers to administer the Nile until the politicians could determine its destiny"[25] and was never meant, as Egypt has been unscrupulously claiming through the years, to bind the successor riparian states eight decades later and indefinitely beyond.

2.2. The 1959 Agreement: A further Blow to the Tenuous Claim

Signed on 8 November 1959 between Egypt and Sudan, the Agreement for the Full Utilization of the Nile Waters[26] represents a unique, "patently anomalous"[27] deal unparalleled in the history of international water treaties as it purports to allocate the entire annual flow of the Nile between the two downstream riparinas – Egypt and Sudan – thus leaving out all others, notably Ethiopia whence nearly

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[23] Tnganyika (now Tanzania) officially declared the 1929 Agreement not binding on it on 4 July 1964 in identical notes addressed to the governments of Britain, Egypt and Sudan; Uganda and Kenya did the same on similar grounds (C. O. Okidi (1980), "Legal and Policy Regime of Lake Victoria and Nile Basins", *Indian Journal of Int'l L,* vol. 20, p. 421; S. McCaffrey (2001), *The Law of International Watercourses, Non-Navigational Uses,* Oxford University Press, pp. 245 – 246).

[24] Dereje Z. Mekonnen, *supra* note 5, p. 433.

[25] Robert O. Collins, "In Search of the Nile Waters, 1900 – 2000", in H. Erlich and I. Gershoni (eds., 2000), *The Nile: Histories, Cultures and Myths* (Lynne Rienner publishers, London), p. 251. In fact, the 1929 Agreement was a political trade-off between the governments of Britain and Egypt; "[w]hen Egyptian nationalists, demanding the incorporation of Sudan into Egypt, murdered the British Governor-General of Sudan in 1924, the British responded by threatening unlimited Sudanese irrigation. Eventually, the British and Egyptian Governments agreed in 1929 on continued British control of Sudan with Sudan's water needs to be subordinated to Egypt's water needs." (J. Dellapenna, "The Nile as a Legal and Political Structure", in E. Brans *et al* (eds., 1997), *The Scarcity of Water: Emerging Legal and Policy Responses,* Kluwer Law Int'l, London, p. 125.

[26] Text available at: <http://ocid.nacse.org/tfdd/tfdddocs/230ENG.pdf>.

[27] Okidi, *supra* note 23, p. 429.

85 per cent of the flow comes.[28] Though it is the first ever treaty on the Nile waters concluded between two independent riparian states, it indeed is far worse, in substance, than all preceding colonial treaties as it sanctions a poignantly iniquitous allocation "contingent upon zero water use by upstream riparians."[29]

The central objective of the agreement was to fully control, through joint projects, and utilize the Nile waters which the 1929 Agreement had "provided only for the partial use … and did not extend to include a complete control of the River waters."[30] The agreement thus made possible the launching of Nile Control Projects which would significantly increase the flow of the river,[31] availing to the parties some 22 billion cubic metres of Nile waters. In allocating the entire annual flow to the parties, the agreement first reaffirmed the 48 and 4 billion cubic metres of water as the respective "acquired rights" of Egypt and Sudan[32] and the net benefit of 22 billion cubic metres, after a deduction of 10 billion cubic metres as a loss of over-year storage, was then divided between Egypt and Sudan which received 7.5 and 14.5 billion cubic metres, respectively.[33]

Despite the audacious grant of a right to the whole flow it has purportedly made to Egypt and Sudan, the 1959 Agreement has in fact significantly undermined the tenuous legal argument for the continued binding force of the 1929 Agreement the termination of which it has occasioned.[34] As Mageed has

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[28] The Ethiopian government of the day – the Imperial Ethiopian Government – commendably discharged its responsibility by making its concerns known, through an *aide memoir* circulated to the diplomatic missions in Cairo in 1957, over the country's exclusion from the negotiations and categorically reasserted the country's right to the waters of the Nile. Excerpt of the *memoir* is available in M. Whiteman, *Digest of International Law,* vol. 3 (Washington D.C.), pp. 1011 – 1012.

[29] J. Waterburry and D. Whittington (1998), "Playing Chicken on the Nile? The Implications of Micro-dam Development in the Ethiopian Highlands and Egypt's New Valley Project", *Natural Resources Forum,* vol. 22, p. 157.

[30] 1959 Agreement, preamble.

[31] Notable projects were the Sudd el Ali (Aswan High Dam) in Egypt and the Roseires in Sudan, Art. 2 (1) and (2).

[32] *Ibid.,* art. 1.

[33] *Ibid*., art. 2 (4).

[34] According to Art. 59 (1) (a) of the 1969 Vienna Convention on the Law of Treaties, "[a] treaty shall be considered as terminated if all the parties to it conclude a later treaty relating to the same subject matter and it appears from the later treaty or is

bluntly put it, "[a]s far as Egypt and the Sudan are concerned … the [1929] agreement is history, as it was superseded by the 1959 Agreement."[35] The pathetic claim that it "still binds the East African countries not to construct any works or modify the flow without consultation and agreement with the two downstream countries"[36] though is a logical fallacy of the highest order. If the agreement is admittedly history between the parties, that it, *a fortiori*, is so for the East African countries likewise cannot be lost on a sane mind.

Being a typical bilateral treaty indubitably subject to the *pacta tertiis nec nocent nec prosunt* rule of treaty law, the 1959 Agreement binds only Egypt and Sudan – its signatories.[37] The fact that the country from where nearly 85 per cent of the Nile flow comes – Ethiopia – is affected, legally, neither by the 1929 nor by the 1959 Agreements renders the tenuous arguments of little practical significance and the obstinate claim underpinned by the arguments, far more precarious. It was thus quite natural for the hydro-hegemon to tone down the obsolete and tenuous claims and shift to the more subtle hegemonic tactics which, with only a rhetorical commitment to equitable utilization as a concession, would provide it, in return, with more potent yet quite subtle instruments of coercion to stifle any breakthrough in the impasse and thus perpetuate the *status quo* without evoking the wrath or frustration of the non-hegemonic riparians.[38] Instead of relying on the use, for perpetuation of the

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otherwise established that the parties intended that the matter should be governed by that treaty".

[35] Yahia A. Mageed, "The Nile Basin: Lessons from the Past", in Asit K. Biswas (ed., 1994), *International Waters of the Middle East: From Euphrates-Tigris to Nile* (Oxford University press), p. 179.

[36] *Ibid*.

[37] This fundamental principle of treaty law is provided for under articles 34 and 35 of the 1969 Vienna Convention on the Law of Treaties.

[38] The apparently unprecedented positive transformation towards greater cooperation in the basin was, according to Brunnee & Toope, occasioned by "recognition of increasing resource limitations caused by population growth, environmental degradation, and the need to share water more widely; exploration of various modalities for cooperation that are not susceptible to hegemonic control; and understanding the changing normative framework that both renders past positions untenable and promotes positions that are more reflective of the basin states' collective concerns." (J. Brunnee and S. J. Toope, "The Changing Nile Basin Regime: Does Law Matter?", *Harvard Int'l Law Journal*, vol. 43 (1), pp. 143 – 144. In view of the unscrupulously stubborn and oppressively hegemonic positions of Egypt which has deadlocked any headways, one may legitimately conclude that the endorsement of the Shared Vision was only tactical, and the NBI was, like Undugu, a

status quo, of brute force and threats thereof, the basin's hydro-hegemon had to employ the far more subtle and cunning hegemonic mechanisms[39] to secure compliance by the other riparians with the beleaguered *status quo*.

3. Securitization and Benefit Sharing: Hegemonic Compliance Producing Mechanisms in Action

The patently iniquitous pattern of utilization of its waters, the comparatively smaller annual discharge, the extremely poor and bellicose nature of inter-riparian relationship, and the aggressive unilateralism and competition raging in the basin in the complete absence of an inclusive legal and institutional framework have led many observers to describe the Nile basin in apocalyptic terms as a hydro-political tinderbox prone to violent inter-state conflicts.[40] Defying all ominous predictions though, the basin witnessed an unprecedented

ploy to contain the non-hegemonic riparians and buy time for the malign hydro-hegemon to complete its giant resource capture projects.

[39] The framework of hydro-hegemony for the analysis of transboundary water conflicts was introduced by Zeitoun and Warner, *supra* note 1, pp. 435 – 460. The basic premise of the framework is the utilization by the hydro-hegemon of all the three dimensions of asymmetric power – structural, bargaining and ideational – it has to maximize its fluvial interests and maintain its hegemonic status to the detriment of the other co-riparians. Hence, the hydro-hegemon employs the water resource control strategies of *resource capture*, *containment* and *integration* and implements the same through the instrumentality of different compliance producing mechanisms to force its co-riparians to accept its preferred state of affairs. The compliance producing mechanisms at the disposal of the hydro-hegemon fall under four categories: (1) *Coercive compliance producing mechanisms* – which consist of military force, covert action and coercion-pressure (the threat of a military action, economic sanctions, political isolation, espionage and negative propaganda); (2) *Utilitarian compliance producing mechanisms* – which essentially are incentives for compliance with the hydro-hegemon's preferred state of affairs may take different forms such as trade benefits, diplomatic recognition and support, military protection, mutually beneficial shared-interest water projects, etc.; (3) *Normative compliance producing mechanisms,* i.e., treaties which, in effect, institutionalize the *status quo;* and (4) *Hegemonic compliance producing mechanisms* which encompass the mechanisms of securitization, knowledge construction and sanctioned discourse. The hydro-hegemon also makes use of such other coercive resources as international support, financial mobilization and the manipulation of time as may be appropriate.

[40] See Kerisel, *supra* note 2, p. 164 describing the Nile basin as one "doomed to be the hapless cause of future wars", whereas Okbazghi Yohannes, *supra* note 3, p. 1 describes it as being among "the ten flashpoints in contemporary international relations."

transformation in inter-riparian relations attended with heightened hope and optimism occasioned by the launching of the NBI.

In contrast to the long-established pattern of inter-riparian relationship the distinctive features of which had been bilateralism and focus on fringe technical issues with consistent eschewal of the crucial issue of equitable allocation,[41] the NBI represents a significant departure both in its inclusiveness and resolve to deal with the hitherto sidelined sensitive issue of equitable allocation. The NBI thus understandably kindled a rare light of hope and optimism as it ushered in new era signifying "a remarkable shift in the tone and substance state-to-state relationships along the Nile."[42] A decade later though, the optimist, positive tone in state-to-state relationships has given way to rancour and discord and the much touted NBI has become the target of scathing criticisms ranging from those which have already declared it a failure[43] to those deriding it as "a mere bureaucratic reorganization …"[44] – a shoddy fundraising scheme, "some kind of face saving diplomatic engagement" set up "for some kind of clearance from the World Bank in order to access funding sources from western donors or potential investors."[45]

Though the criticisms undeniably have some valid points, capitalizing on the shortcomings of the Initiative and vilifying the same without looking into the causes for its apparent failure to resolve the Nile waters question would be a dangerously naïve approach which may end up throwing the baby with the bathwater. Despite the various shortcomings it is maligned for, the NBI has attained important milestones for which it should be duly appreciated. It is an undeniable fact that under the auspices of the NBI, inter-riparian relationship in the basin reached an unprecedented, higher level in terms of inclusiveness and attained an equally unprecedented depth in terms of substance by taking up the hitherto shunned yet crucially important issue of equitable reallocation of the Nile waters. The NBI still presents the best opportunity to bring a lasting resolution to the intractable Nile waters question which the riparians can hardly

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[41] For a review of the nature and pattern of Nile riparian cooperation, see Dereje Z. Mekonnen, *supra* note 5, pp. 423 – 427.

[42] Brunnee and Toope, *supra* note 38, p. 132.

[43] Ana E. Cascao (2009), "Changing Power Relations in the Nile River Basin: Unilateralism vs. Cooperation?", *Water* Alternatives 2 (2), p. 263.

[44] Fasil Amdetsion (2008), "Scrutinizing the *Scorpion Problematique:* Arguments in Favor of the Continued Relevance of International Law and a Multidisciplinary Approach to Resolving the Nile Dispute", *Texas Int'l Law Journal,* vol. 44 (1), p. 38.

[45] Yakob Arsano (2004), *Ethiopia and the Nile: Dilemmas of National and Regional Hydropolitics*, PhD dissertation, University of Zurich, p. 58.

afford to squander. The Sharm el-Sheihk fiasco and the resultant discomfiture should thus in no way be pretexts for chastising it as both the failure to agree on and sign the much hoped for CFA as well as the subsequent deterioration in inter-riparian relations are only effects of a viciously cunning cause – the hijacking of the Initiative to serve the interests of the basin hydro-hegemon through the instrumentality of securitization and benefit sharing.

3.1. Securitization

The Extraordinary Nile-COM meeting held on 13 April 2010 in Sharm-el Sheikh, Egypt, was poised to be an historic event marking the last step in the signing of the CFA and thus bringing the decade-long strenuous effort to a victorious culmination. Unfortunately, it turned out to be a colossal failure as, after a marathon fourteen hours of deliberations, "the only agreement that was reached was on minutiae in order to avoid the pitfalls of the past."[46] The relatively harmonious cooperative atmosphere and rapprochement the NBI had forged over the decade soon crumbled as the seven upstream riparian countries, defying Egypt's threat and plea for the launching of the Nile Basin River Commission and further continuation of the negotiations, agreed to open the agreement for signature on the 14 of May 2010.[47] To Egypt's consternation, Ethiopia, Uganda, Tanzania and Rwanda signed the agreement the very day it was opened for signature[48] whereas Kenya did sign it a week later[49] creating, thereby, a huge hydro-political chasm, a fault line of the sort which might as well portend a future frontline.

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[46] Gamal Nkrumah, "Whose Water is It?", *Al-Ahram Weekly On-line*, Issue no. 994, 15-21 April 2010, available at: <http://weekly.ahram.org.eg/2010/994/eg10.htm> (Accessed on 23/04/10)

[47] The seven upstream riparians of Burundi, DR Congo, Ethiopia, Kenya, Rwanda, Tanzania and Uganda agreed to open the CFA for signature for a period not exceeding one year from 14 May 2010 – a position rejected by Egypt and Sudan as reflective only of the views of the seven states; NBI News, Ministers of Water Affairs end Extraordinary meeting over the Cooperative Framework Agreement, available at: <http://www.nilebasin.org/index.php?option=com_content&task=view&id=161&Itemid=70> (visited on 20/05/10).

[48] NBI News, Agreement on the Nile River Basin Cooperative Framework opened for signature, available at:

<www.nilebasin.org/index.php?option=com_content&task=view&id=165&Itemid=1> (visited on 20/05/10)

[49] Kenya Signs Nile Basin deal rejected by Egypt, *Kenya Broadcasting Corporation,* available at: <www.kbc.co.ke/story.asp?ID=64057> (visited on 22/05/10).

What happened at Sharm el-Sheikh and thereafter should not be a surprise at all as it was an inevitable outcome of what had taken place much earlier – a stealth securitization of the Nile waters question through the introduction of "water security" into the CFA. The fateful decision to include the treacherous concept of water security in the CFA was made in February 2002 by the Negotiating Committee[50] and it is now one of the general principles of the agreement in accordance to which "[t]he Nile River Basin and the Nile and the Nile River System shall be protected, used, conserved and developed."[51] That decision, one may certainly assert, marked the very unfortunate moment the CFA received the *coup de grace* which caused its demise made manifest at Sharm el-Sheikh.

The fateful decision though has been doggedly justified by some as an appropriate and ingenious solution to "the thorny issue of existing treaties" as the concept of water security allegedly "has the advantage of relegating existing treaties to the background in favor of the more dynamic and progressive principles of international water law."[52] That the non-legal, destructively elastic and conceptually amorphous "water security" notion was a hegemonic bait cunningly injected to lure negotiation of the CFA into a dead-end could not,

[50] Dereje Z. Mekonnen, *supra* note 5, p. 430.

[51] Art. 3, Draft on Cooperative Framework Agreement (on file with the author). The Draft Agreement lists out fifteen general principles under Art. 3: cooperation, sustainable development, subsidiarity, equitable and reasonable utilization, prevention of causing significant harm, the right of the Nile River states to use water within their territories, protection and conservation, information concerning planned measures, community of interest, exchange of data and information, environmental impact assessment and audit, peaceful resolution of disputes, water as a finite and valuable resource, water has social and economic value, and water security. Having seen such an unusually long list of "general principles" some of which are mere verbatim repetitions of the contents of some of the principles while others are mere elementary facts of common knowledge, one cannot help being baffled by the penury of the expertise that has gone into the formulation of this document.

[52] Girma Amare (2009), "Contentious Issues in the Negotiation Process of the Cooperative Framework Agreement on the Nile", Paper Presented at the National Consultative Workshop on Nile Cooperation, 12 – 13 February, Addis Ababa, Ethiopia, p. 5. The author also gives a second justification based on the "constructive ambiguity" mantra and maintains that the concept of water security will serve as a vehicle to transfuse into the CFA a measure of constructive ambiguity which will bring closer the divergent views held by the upper and lower riparians. The justifications and the flawed assumptions underpinning them have been elaborately discussed in Dereje Z. Mekonnen, *supra* note 5, pp. 429 – 439.

unfortunately, dawn on Nile riparians who, instead, sheepishly let the hydro-hegemon bewitch them until the very last moment.

Securitization is one of the plethora of coercive resources a hydro-hegemon may deploy to secure compliance with its preferred state of affairs. Such resources are classified into four categories.[53] *Coercive compliance-producing* mechanisms which form the first category include military force which is rarely used as a last resort; covert action which involves "undercover operations aimed at weakening the political, military or hydraulic apparatus of … competitor[s]" or making pact with others who would do this on behalf of the hegemon; and coercion-pressure – a commonly used, politically 'invisible' tactic involving threats of military action, economic sanctions or political isolation deployed to ensure that a riparian "drops its claims over the resource, or at least stops creating a (potentially compromising) row."[54]

Utilitarian compliance-producing mechanisms constitute the second category which is essentially comprised of variegated "[i]ncentives for compliance with the hydro-hegemon's preferred state of affairs" which may assume the form of "trade incentives, diplomatic recognitions, military protection, and … [m]utually beneficial 'shared interest' water projects."[55] In category three – *Normative compliance-producing mechanisms* – treaties are the sole instruments used by the hydro-hegemon to institutionalize the *status quo* to its advantage.[56] Under the fourth category – *Hegemonic compliance-producing mechanisms* – the hydro-hegemon wields the three potent instruments of securitization, knowledge construction and sanctioned discourse.[57] Expounding the meaning and implications of securitization, Zeitoun & Warner write:

> "Securitization" is the speech act that legitimises a state to take exceptional measures over an issue by propelling it into the realm of security. Promoting a project to a national-security concern equates criticism to treason, thus silencing critical voices in the bureaucracy and maintaining a form of hegemonic thought control. Securitization facilitates politicians' ability to "construct knowledge" around any water-related issue to fit other political interests. This approach is an example of what Plato refers to as a "noble lie" and reinforces Gramsci's proposition that beliefs are held by people who do not experience them as beliefs. In the name of national or water security, for example, Israel threatened to attack Lebanon over the relatively minor Wazzani

[53] Zeitoun and Warner, *supra* note 1, pp. 446 – 449.

[54] *Ibid*., p. 446 – 447.

[55] *Ibid*., p. 447.

[56] *Ibid*.

[57] *Ibid*., p. 448 – 449.

> springs project in 2002, while diverting its public's attention away from much more serious water-management issues.[58]

That the fateful decision to graft the treacherous concept of water security into the CFA is indeed a regrettable detour to a blind alley is evident from the implications of securitization whose purpose, in the case of the Nile waters, cannot be any different. As Hafney and Amer admit, "[t]he Egyptian concerns with regard to the Nile are … both a matter of national security and a life or death issue"[59] which should, of necessity, be securitized so that the hegemon would conveniently legitimize its obscene claim to a veritable ownership of the entire flow without necessarily being explicit about it. The colossal failure to agree on and sign the CFA with "water security" as its component, was, thus, an inevitability which had been in the making since 2002. The disgruntled and perplexed riparians which now find themselves ensnared in the "water security" trap have only their own inexcusable ineptitude to blame.

3.2. Benefit Sharing

In as much as sharing trans-boundary waters is difficult, designing the appropriate modality in which this arduous task would be carried out is as difficult and perplexing. Even in an ideal situation where the riparians are in full agreement on the core issue of the need to share, how this is to be done is often frustratingly difficult to sort out. Rooted in the principle of equitable utilization and forming part of its essential objective, determination in volumetric terms of the entitlement of every riparian is the most common approach often referred to as allocation or water-sharing. A relatively recent approach focusing on the allocation or sharing of the benefits thereof rather than the water itself has been propagated as a much easier approach with incomparably higher advantages especially in terms of efficient and sustainable utilization beneficial to the ecological integrity of the basin.

A closer reading of the Shared Vision of the NBI implies the adoption, though in a not so clear manner, of both approaches as the phraseology there speaks of equitable utilization and, by necessary implication, of allocation which is its essential element and alludes to benefit sharing as well as it speaks about the benefits from the common Nile water resources. What was alluded to in the Shared Vision was therefore made manifest later on with the inclusion of the Socio-economic Development and Benefit Sharing (SDBS) project among the

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[58] *Ibid*., p. 448.

[59] M. Hafney and S. Amer (2005), "Egypt and the Nile Basin", *Aquatic Sciences,* vol. 67, p. 44.

NBI's Shared Vision Programs[60] and the development, thereunder, of a Benefit Sharing Framework (BSF).[61]

The SDBS Project was launched in 2005 "with the main objective to enhance the process of integration and cooperation to further socio-economic development in the Nile Basin."[62] The BSF which is to be fully developed by the SDBS Project is comprised of two phases and three stages. The first phase which has been developed covers stage one "which provides the concepts and principles behind benefit sharing such that a basis (common understanding) for the steps towards trust and cooperation is established."[63] Phase two entails stage two "which will give the qualitative significance of a broad range of benefit sharing scenarios in a visual format such that the positive sum of outcomes can be identified and potential 'baskets of benefits' proposed;"[64] stage three will, then, complete the framework by giving "the quantitative magnitude of 'baskets of benefit scenarios' (and their related costs) under a range of modeled situations and portfolios."[65]

Thus, when completed and put into operation, benefit sharing will not only make possible resolution of the intractable Nile waters question but will, as an integrative and positive-sum approach, also provide a firm ground for cooperation which would avail to the riparian countries a wide spectrum of

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[60] The Shared Vision Program (SVP) constitutes one of the two complementary programs comprising of the Strategic Action Program of the NBI, and it focuses on basin-wide projects (Tesfaye Tafesse (2001), *The Nile Question: Hydropolitics, Legal Wrangling, Modus Vivendi and Perspectives,* Lit Verlag Munster, p. 109). Currently, the SVP includes 8 such projects dealing with applied training, confidence-building and stakeholder involvement, regional power trade, shared vision coordination, socio-economic development and benefit sharing, trans-boundary environmental action, efficient water use for agriculture, and water resource management (NBI, *Shared Vision Programs,* available at: <http://www.nilebasin.org/index.php?option=com_content&task=view&id=28&Itemid=116> (visited on 25/07/10).

[61] The SDBS Project developed the first phase of the Benefit Sharing Framework (BSF) for the riparian countries in June 2009. NBI News, "Benefit Sharing Framework for Nile Basin Countries Developed", available at <http://www.nilebasin.org/index.php?option=com_content&task=view&id=134&Itemid=102> (Visited on 25/07/10)

[62] *Ibid*.

[63] *Ibid*.

[64] *Ibid.*

[65] *Ibid.*

benefits in economic, environmental and political terms.[66] The huge economic potential which could be realized through cooperative full development of the basin is tantalizing. The annual economic value of cooperation involving limited infrastructure development in the Blue Nile has, for instance, been estimated, through the Nile Economic Optimization Model (NEOM), to be between US$ 1.15 and 1.97 billion whereas the "total (potential) annual direct gross economic benefits of Nile water utilization in irrigation and hydroelectric power generation are on the order of US $ 7 – 11 billion."[67] Cooperation, therefore, is not only a rewarding route promising enormous economic returns but is also an unavoidable one, a *sine qua non* for the equitable utilization, be it of the waters or the benefits thereof, and as such, is an obligation of the riparian countries sanctioned by international water law.[68]

The crucial question one has to pose here though is whether the benefit sharing approach would have any reasonable significance in resolving the Nile waters question where the decade-long effort to cut a deal on the subject has ended up in failure. Bluntly put, the crux of the matter is whether benefit sharing could lead to the equitable and reasonable utilization of the Nile waters and, in effect, resurrect the defunct CFA; or is it just another "noble lie", a hegemonic shenanigan to woo, until its inevitable demise comes to pass, the disgruntled riparians which must be contained.[69] The very essence of "benefit sharing"

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[66] Claudia W. Sadoff and David Grey (2002), "Beyond the River: The Benefits of Cooperation on International Rivers", *Water Policy* (4), pp. 389-403. The authors point out four major benefits of cooperation: *Benefits to the river* (pp. 393-395); *Benefits from the river* (pp. 395-397)*; Reducing costs because of the river* (pp. 398-399)*; and Benefits beyond the river* (pp. 399-400)

[67] D. Whittington, X. Wu and C. Sadoff (2005) "Water Resources Management in the Nile Basin: The Economic Value of Cooperation", *Water Policy* (7), p. 244, 249.

[68] The indispensable significance of genuine cooperation is evident from the structure of the 1997 UN Watercourses Convention which sets forth, as one of its general principles, the obligation of watercourse states to cooperate (Art. 8). The other general principles of the Convention are equitable and reasonable utilization and participation (Art. 5), factors relevant to equitable and reasonable utilization (Art. 6), obligation not to cause significant harm (Art. 7), regular exchange of data and information (Art. 9), and relationship between different kinds of uses (Art. 10).

[69] Containment is one of the water resource control strategies used by the hydro-hegemon which, when "[f]aced with the demands of a competitor and aware of customary law concerning the sharing of transboundary resources, … may find it more efficient to co-opt its weaker competitors, rather than trying to ignore or discredit their claims." Since the strategy requires engagement with competitors, the hydro-hegemon seeks, through bilateral or multilateral arrangements, "either to integrate the competitors or to contain them in as asymmetric a position as possible,

which is underpinned with fundamentally flawed assumptions and the malign, oppressive hydro-hegemonic configuration prevalent in the Nile basin, as will be pointed out, impel any reasonable observer to categorically write it off as a ruse.

The proponents of benefit sharing lavishly tout it as an integrative, positive-sum approach "that equitably allocate[s] the benefits derived from water, not the water itself"[70] and claim that it "allows for a positive-sum agreement, occasionally including even non-water-related gains in a 'basket of benefits', whereas dividing the water itself only allows for winners and losers."[71] The very notion of benefit sharing is thus underpinned by an erroneous and derisive characterization of the allocation approach as a zero-sum, rights based approach which allows only for winners and losers[72] in stark contrast to its own elevated status as the apotheosis of fairness and equity which "concerns the distribution of benefits from water use – whether from hydropower, agriculture, economic development, aesthetics, or the preservation of healthy aquatic ecosystems – not the water itself."[73]

The foundational principle of equitable utilization to which all Nile riparians have long committed themselves governs, primarily, the issue of allocation[74] and its function is to ensure that "each basin state is entitled, within its territory, to a reasonable and equitable share in the beneficial uses of the waters of an international drainage basin."[75] Translating this into reality through an inclusive basin-wide or even sub-basin agreement is no easy task at all. Dismissing the indispensable allocation approach by derisively disfiguring it as one which "only allows for winners and losers" though is only a tactless chicanery. If application of the principle would entitle every riparian, within its territory, to a reasonable and equitable share in the beneficial uses of the waters of a trans-

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through the use of coercive, utilitarian, normative or hegemonic compliance-producing mechanisms." Zeitoun and Warner, *supra* note 1, p. 445.

[70] Meredith A. Giordano and Aaron T. Wolf (2003), "Sharing Waters: Post-Rio International Water Management", *Natural Resources Forum,* vol. 27, p. 168.

[71] *Ibid*., p. 170

[72] *Ibid.*, p. 168, 170; see also Sadoff and Grey, *supra* note 66, p. 395.

[73] *Ibid*., p. 170

[74] S. McCaffrey, *supra* note 23, p. 325; X. Fuentes (1996), "The Criteria for the Equitable Utilization of International Rivers", *British Yearbook of Int'l Law,* vol. 67, p. 341.

[75] Charles B. Bourne, "Canada and the Law of International Drainage Basins", in P. Wouters (ed., 1997), *International Water Law: Selected Writings of Professor Charles B. Bourne* (Kluwer Law Int'l, London), p. 297.

boundary river, say the Nile, how such a result could still be discounted as total victory for some and total loss for others defies all logic and, thus, epitomizes a fallacy of the highest order.

The benefit sharing approach is, furthermore, fatally flawed as it draws a false dichotomy between the sharing of water and the benefits thereof as alternative approaches[76] despite the fact that "an explicit or implicit recognition or negotiation of property rights is a necessary precondition for the realization of a benefit sharing scheme."[77] The supposed reaping of benefits generated under such a scheme would thus only be an emotive incantation, a veritable pie in the sky as long as the scheme shuns or shies away from putting in place, at the same time, the yardstick or mechanism with which the share of the benefits every riparian is entitled to would be determined. That yardstick is, of course, provided by "equitable utilization which constitutes the basis of the specific right to certain volumes of water or the right to undertake certain activities on the watercourse."[78]

Effective and smoothly functioning benefit sharing presupposes also the launching of feasible and visible joint multi-purpose projects which would generate the benefits to be shared. The tragic fact though is that such projects are conspicuously absent[79] and the likelihood of their existence somewhere sometime is actively negated by the aggressive unilateralism raging downstream through giant hydraulic works being carried out in total disregard of the fact that "decisions to engage in serious dialogue about basin-wide cooperation represent irreversible commitments to forego unilateral development."[80] A functioning benefit sharing scheme also requires, of necessity, a conducive hydro-political configuration where the basin hydro-hegemon is willing and determined to play a positive, leadership role.[81]

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[76] Sadoff and Grey, *supra* note 66, p. 396.

[77] I. Dembrowsky (2009), "Revisiting the Potential for Benefit Sharing in the Management of Trans-boundary Rivers", *Water Policy* (11), p. 137.

[78] X. Fuentes (1998), "Sustainable Development and the Equitable Utilization of International Watercourses", *British Yearbook of Int'l Law,* vol. 69, p. 130.

[79] Tesfaye Tafesse (2009), "Benefit Sharing Framework in Transboundary River Basins: The Case of the Nile", Paper Presented at the National Consultative Workshop, 12 – 13 February, Addis Ababa, Ethiopia, p. 10 – 11.

[80] D. Whittington (2004), "Visions for Nile Basin Development", *Water Policy* (6), p. 15.

[81] Hydro-hegemony is said to be of a positive, leadership form where the riparians control have a shared control of the resource on the basis of an inclusive water-sharing agreement entered into by all; where, on the other hand, the hydro-hegemon

The reality in the Nile basin though is antithetical to this as the malign, oppressive hydro-hegemon – Egypt – has literally no propensity for such transformation. It would, thus, be delusional to hope or believe that Egypt would opt to act rather like a 'gentle giant' as has South Africa which "[i]n choosing to play the leadership role at the river basin level, … has attempted to create a positive-sum hydro-hegemonic configuration through the incentive of benefits-sharing."[82] The potential of benefit sharing to serve as a convenient modality for an equitable and sustainable utilization of a shared water resource notwithstanding, the principal purport of its pursuit in the Nile basin is, for the reasons put forth above, only one of deceit and manipulation as it indeed is a "ploy to delay the upstream countr[ies'] unilateral action, or a ruse to buy time [for those downstream] to pursue their own plans."[83]

4. What is to be Done?

If resolution of the Nile waters question sounds to be a frustratingly elusive, Sisyphean effort to any cautious observer, that is because it is so, indeed. This does not, however, mean that it is an absolute Gordian knot which requires an Alexander the Great to slice through it. Surely, Egypt would remain to be the basin's Alexander the Great for quite a while in view of the existing power asymmetry vis-à-vis the other riparians. Yet, the hydro-hegemon has its own vulnerabilities and it would be a heartening wisdom which would imbue the upper riparians with a renewed vigour and resolve to find the chink in the behemoth's armour.

One such chink in the armour of the hydro-hegemon is the grotesquely inequitable nature of the *status quo* which stands out in stark transgression of the fundamental principles of international water law. Egyptian hydro-hegemony being of the virulent, malign form maintained in utter disregard of the principles of international water law,[84] reliance on the principles of

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has already attained or seeks to attain and consolidate maximum control of the water resources through unilateral action, the particular form of hydro-hegemony is said to be of a negative, dominative, exploitative configuration; Zeitoun and Warner, *supra* note 1, p. 444.

[82] Zeitoun and Warner, *supra* note 1, p. 452. It is interesting to note that South Africa is the only hydro-hegemon which has signed and ratified the 1997 UN Watercourses Convention.

[83] Whittington, *supra* note 80, p. 11.

[84] M. Woohdhouse and M. Zeitoun (2008), "Hydro-hegemony and International Water Law: Grappling with the Gaps of Power and Law", *Water Policy* 10 *Supplement* 2, p. 113.

international water law accords the hegemonized riparians with a potent power to deal with the hegemon and their counter-hegemonic strategy should thus be anchored in international water law. Apart from exposing the singularly iniquitous nature of the *status quo*, international law also endows the non-hegemonic riparians with enhanced structural power and improved bargaining position towards the hydro-hegemon.[85] It is, thus, incumbent upon Nile riparians to make a timely return to the framework of international water law by completely removing from the CFA the treacherous, hegemonic bait of "water security" which has derailed the whole process in the first place and caused the current stalemate.

Return to the framework of international law though is only the proper, crucial first step which may ultimately lead to a successful and lasting resolution of the Nile waters question. This hinges on the extent to which the substance and practical implications of international law are understood by all the riparians and, more importantly, the willingness of Egypt primarily and Sudan, also, to accept the consequences thereof. If all Nile riparians, Egypt and Sudan included, have committed themselves for over a decade now to the principle of equitable utilization through their endorsement of the Shared Vision, one should conclude that they all have undertaken to accept and live with the new reality the implementation of this principle would entail; obviously, equitable reallocation is the unavoidable reality as it indeed is the essence of the principle of equitable utilization which, in turn, constitutes the lynchpin of international water law.[86]

For the hydro-hegemon and its junior partner, the very idea of reallocation is an unwelcome anathema and they will for sure strive, as always, to eclipse it by bringing to centre stage such globally hegemonic trends in water governance as the river basin approach, multi-stakeholder platforms and the commonly prescribed "a-political and technically informed notion" of integrated water resources management.[87] It is thus imperative for Nile riparians to first break the sanctioned discourse so that the way for a return to the framework of international water law will be opened. "Sanctioned discourse" is an appellation of a hegemonic compliance producing mechanism used to impose constraints "upon those who may wish to speak or think *outside* of the discursive hegemony" so that the contention between alternative discourses with which

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[85] M. Daoudy (2008), "Hydro-hegemony and International Water Law: Laying Claims to Water Rights", *Water Policy* 10 *Supplement* 2, p. 94.

[86] McCaffrey, *supra* note 23, p. 325; Fuentes, supra note 74, p. 341; Bourne, *supra* note 75, p. 297; Fuentes, *supra* note 78, p. 130, and Dombrowsky, *supra* note 77.

[87] J. Warner, P. Wester & A. Bolding (2008), "Going with the Flow: River Basins as the Natural Units for Water Management", *Water Policy* 10 *Supplement* 2, pp. 121 – 123.

actors try to support their definition of reality "results in a prevailing discourse heard above the others – the sanctioned discourse, by definition endorsed by the more powerful side."[88] The reality of the Nile basin provides the quintessence of sanctioned discourse in full swing:

> [A] tactic of sanctioning the discourse in the world of water conflicts may serve to veil certain aspects of riparian relations (e.g. inequitable distribution) while emphasising others (e.g. the merits of technical cooperation). The official Egyptian discourse promoting the benefits of the Nile Basin Initiative, like the official Israeli discourse of cooperation through the Palestinian-Israeli Joint Water Committee, for instance, are regularly heard at international fora and in the journals. These discourses effectively drown out opposing viewpoints presented less frequently and eloquently by Ethiopian or Palestinian civil society outside the halls of power. The 'cooperative' tone of the more powerful actors' discourse can be expected to sit well with the international donor community, which thereby assists in sanctioning the prevailing discourse while excluding the alternatives.[89]

Nile riparains should thus break the sanctioned discourse and usher in a new reality of fairness and equity by actively charting out the proper, realistic route along which the Nile waters question could be resolved. Such a route should start with a determination, through a basin-wide or sub-basin agreement, as may be appropriate, of the respective share of every riparian as its sovereign entitlement in line with the principles of international water law. This does not and should not necessarily result in the abandonment of joint development efforts or benefit sharing schemes which, in the absence of such determination though, would only remain empty promises at best or deceptive hegemonic tactics at worst. A necessary and urgent measure of perhaps far more importance to the non-hegemonic riparians is to keep their houses in order by building a just, equitably inclusive and stable economic and socio-political order which would help create a strong human and material resource base to back up their national interest. As long as they remain poor, weak and unstable polities bogged in internal political bickering and strife though, the hydro-hegemon would not make even the slightest of concessions, and why would it?

Conclusion

Despite the latest unfortunate development which has overshadowed the optimism and cooperative atmosphere the NBI has brought about in the Nile basin, ensuring the equitable and reasonable utilization of the Nile waters is, still, not an impossibility. It has, undeniably, become far more difficult as a

[88] Zeitoun and Warner, *supra* note 1, p. 448.

[89] *Ibid.,* pp. 448 – 449.

result of the missteps taken in the course of negotiation of the CFA and the non-hegemonic riparians which have inadvertently allowed securitization to hold sway will have to row against the tide of hegemonic obstinacy. They should act, this time though, with understanding and foresight lest this arduous task should once again be another exercise in futility.

The crucial first step in this regard would be the complete removal of the hegemonic bait of "water security" from the CFA. Breaking the sanctioned discourse and bringing, instead, the cardinal question of equitable reallocation to centre stage is another task of no less importance. Circumscribing the wildly nebulous and unruly notion of benefit sharing within the confines of international water law (by reaffirming that it can only be a possible modality of cooperative utilization complementary to that of reallocation and never as its substitute) is yet another gargantuan task awaiting Nile riparians. The truth of the matter is that "[t]he most stable situation in terms of riparian relations is likely to be when the riparians share control of the resource, as the case whereby the hegemon has negotiated a water-sharing agreement that is perceived positively by all riparians."[90]

[90] Zeitoun and Warner, *supra* note 1, p. 444.