

Between the Scylla of Water Security and Charybdis of Benefit Sharing:

The Nile Basin Cooperative Framework Agreement – Failed or Just Teetering on the Brink?

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Abstract

The threat of water-related conflicts is comparatively more real and serious in the Middle East and North Africa hydrographic region where the Nile is found. Ominous predictions about water being the next *casus belli* in the region abound. There are many conflict determinants in the Nile basin which lend much credence to the predictions and the basin's proneness to conflict is quite evident. The unprecedented positive rapport brought about by the launching of the Nile Basin Initiative (NBI) and the enormous hope and optimism evoked by its lofty Shared Vision explain the unprecedented serenity and cooperative atmosphere the basin has witnessed over the past decade. The decade-long effort to work out and agree on an inclusive legal and institutional framework for the basin has, due to the cunning interpolation of the treacherous, non-legal concept of 'water security', ended up in failure. The subsequent shift to and endorsement of benefit sharing as an alternative, simple and cure-all solution to the Nile waters question has further dimmed the prospect for the realization of the Shared Vision which now sounds more like a pipe dream than a realizable vision. Whether these adverse developments would finally pave the way for the ominous predictions to come to pass is as much unlikely as it is perplexing. It will be argued, in this paper, that the likelihood of violent conflicts over the Nile waters is an unlikely scenario, the more likely turn of events being further continuation of the iniquitous *status quo*.

A. Introduction: Nile – Conflict Determinants

Beginning from its bifurcated sources in humble springs along the Blue¹ and White Nile² sub-basins, the Nile traverses a distance of 6825 kilometers across a vast expanse of land with diverse climatic and natural formations varying from humid mountainous highlands receiving abundant rainfall to semi-arid and arid regions receiving little or no rainfall, draining an area of about 3 million square kilometers, i.e., one-tenth of the African continent.³ Shared by ten riparians,⁴ the world's longest river also ranks first in terms ominous predictions pertaining to its waters which would be the next cause of war in the volatile Middle East region – the scene of merciless war in the third millennium.⁵ Except for some instances of covert operations by Egypt,⁶ the basin has thus far not witnessed any overt and violent water-related conflicts. The absence of such conflicts so far surely not being proof

¹ The Blue Nile has its source in the sacred spring of Sakala in the heart of the Ethiopian highland plateau from where it grows from a stream into a river called Gilgel/Wetet Abbay and flows into Lake Tana contributing, ultimately, about 59 per cent of the annual flow of the Nile. R. O. Collins, *The Nile* (2002), 88-89; T. Tefesse, *The Nile Question: Hydropolitics, Legal Wrangling, Modus Vivendi and Prospects* (2001), 28.

² The White Nile has its southernmost sources in two small springs, one atop Mount Kikizi in Burundi and another below the summit of Mount Bigugu in Rwanda. The total annual contribution of the White Nile to the flow of the main Nile is only 14 per cent while Ethiopia's contribution is a staggering 86 per cent. Collins, *supra* note 1, 27-29; Tefesse, *supra* note 1, 28.

³ Tefesse, *supra* note 1, 29-30.

⁴ The ten countries riparian to the Nile are Burundi, DR Congo, Egypt, Eritrea, Ethiopia, Kenya, Rwanda, Sudan, Tanzania and Uganda.

⁵ J. Kerisel, *The Nile and its Masters: Past, Present, Future* (2001), xiv. See also N. Kliot, *Water Resources and Conflict in the Middle East* (1994), 3, 9 speaking about the inevitability of conflict over water resources and pointing out the Nile as first among examples of current and potential surface water conflicts. Kliot mentions an ominous prediction by the Center for Strategic and International Studies that "water, not oil, will become the dominant subject of conflict for the Middle East by the year 2000." Making a similar but less certain prediction, Kliot predicted that "conflict over Nile water may arise in the next decade when the other co-riparians, especially Ethiopia, might decide to develop Upper Nile resources for the benefit of their populations.", Kliot, *supra* note 5, 18.

⁶ M. Zeitoun & J. Warner, 'Hydro-hegemony – a Framework for Analysis of Trans-boundary Water Conflicts', 8 *Water Policy* (2006) 435, 446, mention Egypt's support for the Eritrean Liberation Front (ELF) and Somali irredentism as instances of covert action aimed at consolidating the iniquitous hegemonic *status quo* by exerting coercive influence on a potential contender.

of the prevalence of peace, the Nile basin is still the most volatile and conflict prone basin where all the determinants of a potential water-related conflict exist in contradistinction to any other major international basin. The difficult hydrologic environment, the indelible impact of the colonial legacy and the stagnant post-colonial reality which is but an accentuated continuation of the ethos of the colonial era are the trilogy of conflict determinants which, in tandem, cast a dark shadow over the basin's future making it "one of the ten flashpoints in contemporary international relations"⁷.

I. Difficult Hydrologic Environment

The hydrologic environment of a basin is one of the significant determinants shaping the pattern of inter-riparian relationship and, with it, the possibility of equitable, cooperative development and utilization of the water resources. The hydrologic environment, i.e., "the absolute level of water resource availability, its inter- and intra-annual variability and its spatial distribution – which is a natural legacy that a society inherits"⁸ may be "easy" and hence conducive for equitable utilization, or it may be "difficult" and constitute a challenge to such utilization. A hydrologic environment is said to be "easy" where there is "[r]elatively low rainfall variability, with rain distributed throughout the year and perennial river flows sustained by groundwater base flows"⁹. Hydrologies "of absolute water scarcity (i.e. deserts) and, at the other extreme, low-lying lands where there is severe flood risk"¹⁰ are said to be difficult.

The hydrologic environment of the Nile though is even worse and rather epitomizes the category of "more difficult" hydrologies "where rainfall is markedly seasonal – a short season of torrential rain followed by a long dry season [which] requires the storage of water; or where there is high inter-annual climate variability, where extremes of flood and drought create unpredictable risks to individuals and communities and to nations and regions and require over-year water storage"¹¹. By far the most significant

⁷ O. Yohannes, *Water Resources and Inter-Riparian Relationships in the Nile Basin: The Search for an Integrative Discourse* (2008), 1.

⁸ D. Grey & C. Sadoff, 'Sink or Swim? Water Security for Growth and Development', 9 *Water Policy* (2007) 545, 548.

⁹ *Id.*, 548.

¹⁰ *Id.*, 549.

¹¹ *Id.*, 549.

hydrologic challenge in the Nile basin pertains to the river's discharge which is too small to match its reputation as the world's longest river. The fabled Nile "shows the lowest specific discharge of comparable large rivers"¹² as the relatively meager 84 billion cubic meters of water it carries downstream annually constitutes only "a mere cup (2 per cent) of the Amazon, perhaps a glass (15 per cent) of the Mississippi, or at best a pitcher (20 per cent) of the Mekong"¹³.

Yet another challenge pertaining to the peculiar geographical aspect of the Nile is the "great contrast between the riparian state which contributes almost all the water to the Nile but uses almost none (Ethiopia) and that which contributes nothing to the Nile but uses most of its water (Egypt)"¹⁴. The Nile basin thus constitutes a singularly distinct hydrologic environment where the pattern of utilization of the waters is in stark contrast to flow contribution. The anomaly is twofold, as the two downstream riparians – Egypt and Sudan – utilize almost the entire flow despite the fact that their contribution to the water balance is either nil or negative.¹⁵ The extreme variability and erratic nature of the Nile's discharge¹⁶ is another predicament which, apart from straining inter-riparian relationships in the distant past,¹⁷ currently poses a serious challenge to the proper management of the basin's water resources.¹⁸

¹² Kliot, *supra* note 5, 13.

¹³ Collins, *supra* note 1, 11.

¹⁴ Kliot, *supra* note 5, 13. Despite the staggering 86 per cent contribution it makes to the annual flow of the Nile, Ethiopia's utilization stands at a dismal 0.65 billion cubic meters. The pattern of utilization by the White Nile riparians is equally insignificant as the volume collectively used by the six countries is only 0.05 billion cubic meters. Tafesse, *supra* note 1, 44, 50.

¹⁵ Kliot, *supra* note 5, 25. Kliot applies the interesting notion of negative contribution to describe the huge water loss that occurs in the territory of Sudan. Hence, the Sudd Swamp in the Sudan is the greatest source of water loss where between 12 and 30 billion cubic meters of water is lost annually, Kliot, *supra* note 5, 23. The same holds true for Egypt where between 12 and 15 billion cubic meters of Nile water is lost annually due to evaporation from Lake Nasser and another 0.6 to 2 billion is lost annually through seepage, Kliot, *supra* note 5, 39.

¹⁶ The Nile is noted for the great variability of its discharge with a mean discharge flow of 102 billion cubic meters during 1870 – 1959; 88 billion cubic meters during 1899 – 1971; 77 billion cubic meters during 1972 – 1986 and the flow fell dramatically to less than 52 billion cubic meters between 1984 and 1987. *Id.*, 18.

¹⁷ The fact that Egyptian civilization and survival depended significantly on the Nile floods for millennia determined the interruption of the flow to be the greatest fear which haunted political leaders as well as peasants of Egypt. Failure or decline in the Nile floods was, therefore, often believed to be caused by some interference upstream

II. Indelible Impact of the Colonial Legacy

The advent of British colonialism in the Nile basin almost indelibly impacted the future hydro-political and legal contours of the basin as it left, in its wake, a grotesquely iniquitous pattern of utilization supported by a patchwork of lopsided colonial treaties, and a hegemonic hydro-political configuration impervious to change. Hence, British colonial presence in the basin still has a profound negative impact as, indeed, the British did create “a new reality that would have profound implications for inter-riparian relations long after their departure”¹⁹. Domesticating the Nile in a manner that would ensure the continuous flow of its waters downstream by integrating all of its tributaries into a single hydrologic system was a necessity of cardinal importance to the success of the entire colonial project.²⁰ This imperial design for the development and utilization of the Nile waters was then implemented through the construction of hydraulic works in Egypt which laid the foundation for the hegemonic control of the waters and a series of lopsided colonial treaties were concluded thereafter, arraying British imperial design for the basin in the garment of legality.

The abject iniquity of the imperial design and the total disregard it had for the interests of the upstream territories where the headwaters of the Nile originate is evident in the fluvial clause of the 1906 Agreement between Great Britain and the Independent State of the Congo.²¹ The treaty whose essential objective pertained to the spheres of influence of the signatories in

and this apprehension then developed, over time, into a working myth about Ethiopia’s assumed ability to divert the Nile. J. Hultin, ‘The Nile: Source of Life, Source of Conflict’, in L. Ohlsson (ed.), *Hydropolitics: Conflict over Water as a Development Constraint* (1995), 29. The lasting negative impact this wrong perception has had on Ethio-Egyptian relations has been succinctly stated by Collins in the following words: “The vagaries of the Nile flood, particularly its lows, have led to some paranoid belief. Foremost among these is the fear that those who live upstream can command the lives of those downstream, an article of faith that has been inscribed on the soul of Egyptians for millennia. The Ethiopians, who collect the waters from the south Atlantic in their highland sanctuary, have always been thought to represent the greatest threat.” Collins, *supra* note 1, 22.

¹⁸ Yohannes, *supra* note 7, 42.

¹⁹ *Id.*, 35.

²⁰ *Id.*, 36.

²¹ ‘Agreement between Great Britain and the Independent State of the Congo, modifying the Agreement signed at Brussels, May 12, 1894, relating to the Spheres of Influence of Great Britain and the Independent State of the Congo in East and Central Africa, London’ (9 May 1906) available at <http://ocid.nacse.org/tfdd/tfdddocs/40ENG.pdf> (last visited 27 April 2011).

East and Central Africa enjoined, under Article III, the government of the Independent state of the Congo from constructing or allowing the construction of “any work which would diminish the volume of water entering Lake Albert, except in agreement with the Soudanese [sic] Government” which then was under Anglo-Egyptian rule. The real purpose of this provision was, indeed, the subjection to Anglo-Egyptian veto of any consumptive utilization of the Nile waters upstream in the Congo, as any such use, however miniscule, would surely diminish the flow.

The use of treaties as hegemonic colonial instruments designed to ensure control of the Nile waters reached its peak in 1929 with the conclusion of the Agreement for the Utilization of the Nile waters for Irrigation Purposes.²² A legal monstrosity of unparalleled meanness, the Agreement apportioned the then usable flow of the Nile to Egypt and Sudan, which received a respective share of 48 and 4 billion cubic meters as their historic rights.²³ The agreement, furthermore, gave Egypt a sweeping veto over any irrigation or power generation works upstream in the territories under British colonial rule, and a special privilege to carry out in the territory of the Sudan “all the necessary measures required for the complete study and record of the hydrology of the River Nile” and to construct “any works on the river and its branches, or to take any measures with a view to increasing the water supply for the benefit of Egypt”²⁴. Despite its utter irrelevance occasioned, *inter alia*, by the demise of British colonial rule in the basin and its subsequent termination three decades later upon the conclusion of another agreement by Egypt and Sudan, the allegedly continued binding force of the agreement and the resulting obligation of the successor states in the White Nile sub-basin still features as a constant refrain in the official Egyptian rhetoric of non-negotiable historic rights.²⁵ Overcoming this baseless yet obstructively uncompromising claim has proven to be a veritable impossibility which has bedeviled resolution of the Nile waters question.

²² ‘Exchange of Notes Between His Majesty’s Government in the United Kingdom and the Egyptian Government in Regard to the Use of the Waters of the River Nile for Irrigation Purposes [1929 Agreement], Cairo’ (7 May 1929) available at <http://ocid.nacse.org/tfdd/tfdddocs/92ENG.pdf> (last visited 27 April 2011).

²³ Tafesse, *supra* note 1, 74-75.

²⁴ 1929 Agreement, *supra* note 22, para. 4 (b), (c) and (d) of the Egyptian Note.

²⁵ D. Z. Mekonnen, ‘The Nile Basin Cooperative Framework Agreement Negotiations and the Adoption of a “Water Security” Paradigm: Flight into Obscurity or a Logical Cul-de-sac?’, 21 *European Journal of International Law* (2010) 421, 439.

III. Stagnant Post-Colonial Reality

As far as the East is from the West, so far is, one may say, independent existence from colonial subjugation. This apparently incontrovertible truth though does not apply to the hydro-political and legal reality of the Nile basin as the post-colonial era is but an accentuated continuation, save for change of actors, of the ethos of the colonial era. During the twilight hours of British colonial rule in the basin, it was quite evident that Egypt, with its asymmetric power advantage vis-à-vis the other co-basin states and the imperial ambitions it has long had for complete control of the Nile water resources,²⁶ would become the basin's bogeyman. When Sudan's independence was on the horizon, the campaign for uniting it with Egypt – a conviction birthed out of a traumatic experience which impressed upon Egypt's rulers “that whoever ruled Khartoum could hold Egypt for ransom”²⁷ – became a rallying slogan “viewed by Egyptian nationalists of all political shades as an absolute must”²⁸.

To the shock of Egypt and as a natural nationalist reaction, Sudan challenged, on the eve of its independence, the 1929 Agreement and called for its revision arguing that it “was no longer valid because it had been reached by Britain and Egypt [not involving Sudan] and it had discriminated against Sudan by granting it only one-twenty-second of the total annual flow

²⁶ Precipitated by the ever present fear of the possible interruption of the flow of the Nile by interference upstream, the passionate desire to gain control over the sources of the Nile with a view to ensuring the uninterrupted flow of the river downstream had for long been the major preoccupation of Egyptian rulers. The task was pioneered by Muhammad Ali (1769 – 1849) who drew a grand strategy of uniting the Nile Valley under Egyptian hegemony and unleashed a series of invasions which led to the conquest of Sudan in 1820. Muhammad Ali firmly believed that “the security and prosperity of Egypt could only be assured fully by extending conquests to those Ethiopian provinces from which Egypt received its great reserves of water” and used the conquest of Sudan as a stepping-stone to launch repeated invasions along Ethiopia's western frontier; the campaign of conquest was brought to a halt when, in 1882, Egypt itself fell under British colonial rule. D. Kendie, ‘Egypt and the Hydro-Politics of the Blue Nile’, 6 *Northeast African Studies* (1999) 141, 145; see also Tafesse, *supra* note 1, 60-62; J. Brunnee & S. J. Toope, ‘The Changing Nile Basin Regime: Does Law Matter?’, 43 *Harvard International Law Journal* (2002) 105, 122-123.

²⁷ G. Warbung, ‘The Nile in Egyptian-Sudanese Relations, 1956 – 1995’, in H. Erlich & I. Gershoni (eds), *The Nile: Histories, Cultures and Myths* (2000), 229-230.

²⁸ Warbung, *supra* note 27, 229.

of the Nile water”²⁹. It was quite understandable why the rallying slogan of the day – Unity of the Nile Valley – inspired, before Sudan’s independence, in Egyptians and their Sudanese supporters “emotional and political significance similar to that inspired by ‘Liberty, Equality and Fraternity’ among the French revolutionists; ‘The Union forever’ among the Northern elements of the United States during the Civil War; the doctrine of ‘Laissez-faire’ among capitalists; or ‘Workers of the World, Unite’ among socialists”³⁰.

Upon its independence in 1956, Sudan made it clear that the unfair terms of the 1929 Agreement would not bind it anymore and abrogated it two years later.³¹ The signing of a binding agreement on the utilization of the Nile waters by the two countries was made possible only “after the short-lived Sudanese parliamentary democracy was replaced by a military dictatorship led by General Aboud”³². The Agreement for the Full Utilization of the Nile Waters³³ provides nearly conclusive evidence of the fact that the hydro-political and legal reality in the Nile basin has not changed a bit, notwithstanding the demise of British colonial rule.

The central objective of the agreement was to realize the full utilization by the two parties of the Nile waters by replacing the 1929 agreement which “provided only for the partial use of the Nile waters and did not extend to include a complete control of the River waters”³⁴. The agreement made possible the launching of Nile Control Projects – the Sud el Ali (Aswan) and Roseires dams in Egypt and Sudan, respectively – which availed to the parties a net benefit of 22 billion cubic meters.³⁵ The 22 billion cubic meter net benefit to be obtained from the Sud el Ali reservoir was then allocated to Egypt and Sudan which received further 7.5 and 14.5

²⁹ *Id.*, 230-231.

³⁰ L. A. Fabunmi, *The Sudan in Anglo – Egyptian Relations: A Case Study in Power Politics, 1800-1956* (1960), 147.

³¹ C. O. Okidi, ‘Legal and Policy Regime of Lake Victoria and Nile Basins’, 20 *Indian Journal of International Law* (1980) 395, 423. Kliot, *supra* note 5, at 30, 34 and 72 describes the 1929 Agreement as a culmination of Anglo-Egyptian hegemony over the Sudan which Sudan, thus, did not consider itself bound by and eventually abrogated it in 1958.

³² Kliot, *supra* note 5, 72.

³³ ‘Agreement between the Republic of the Sudan and the United Arab Republic for the Full Utilization of the Nile Waters [1959 Agreement], Cairo’ (8 November 1959) available at <http://www.fao.org/docrep/w7414b/w7414b13.htm> (last visited 27 April 2011).

³⁴ *Id.*, preamble.

³⁵ *Id.*, Art. 2 (1), (2) and (4).

billion cubic meters respectively on top of their respective historic rights reaffirmed by the agreement.³⁶ The entire flow of the Nile was thus fully apportioned between Egypt and Sudan which received 55.5 and 18.5 billion cubic meters respectively, thereby entrenching a singularly iniquitous water utilization regime contingent upon zero consumptive water use by upstream riparians.

The history of Nile inter-riparian relationship has since been hallmarked with mutual distrust, aggressive unilateralism and open threats. Punctuated by occasional sabre-rattling in an atmosphere of intense bellicosity, the pattern of inter-riparian relationship has long been a tug of war between the two downstream riparians, which strive to endlessly perpetuate the *status quo*, and the upstream riparians, which call for its demise and replacement by an inclusive, fair and equitable regime. This distinctively discordant pattern, entrenched for nearly half a century, began to change dramatically with the launch of the NBI in February 1999. The decade since has been a historic epoch of optimism and good rapport signifying “a remarkable shift in the tone and substance of state-to-state relationships along the Nile”³⁷. The NBI ushered in a fundamental transformation in the basin’s history through an unprecedented inclusiveness in scope and an equally unprecedented depth in substance evident from the resolve to take up the sensitive issue of equitable reallocation which had consistently been eschewed by previous cooperative schemes.³⁸

B. The Twin Strategies of the NBI

Officially launched in February 1999 by the Council of Ministers of Water Affairs of the Nile basin states (Nile-COM) as “an inclusive transitional mechanism for cooperation until a permanent cooperative framework is established”,³⁹ the NBI adopted two strategies to resolve the intractable Nile waters question. Both strategies are rooted, albeit not equally evidently, in the Shared Vision in which the NBI is anchored. The Shared Vision “to achieve sustainable socio-economic development through the equitable utilization of, and benefits from, the common Nile Basin water

³⁶ *Id.*, Art. 1 and Art. 2(4).

³⁷ Brunnee & Toope, *supra* note 26, 132.

³⁸ Mekonnen, *supra* note 25, 423-427.

³⁹ Tafesse, *supra* note 1, 109.

resources”⁴⁰ is comprised of two strategies: the conclusion of an inclusive and equitable legal framework and a benefit sharing framework through which the variegated benefits generated from the basin’s shared water resources would be utilized fairly and equitably by all the riparians.

I. The CFA – Development and Stalemate

The history of the CFA⁴¹ is the epitome of a promising and courageous journey began in earnest which, at some point, took a wrong turn and ended up in a blind-alley. Although all the riparians, Egypt and Sudan included, wholeheartedly endorsed the Shared Vision, the very notion of equitable reallocation of the Nile waters was an anathema to Egypt and Sudan. The whole process was accordingly encumbered from the outset by the divergent views of the upstream and downstream riparians over the issue of equitable reallocation. Primarily Egypt and, to a certain degree, Sudan, were opposed to the notion of equitable reallocation; they “were pushed to accept it because of the overwhelming support of the other upstream countries”⁴². This displeasure of the two downstream riparians is obviously one of the reasons for the extremely slow pace of the negotiations which took a decade to produce a draft CFA.

The draft CFA was submitted to and discussed during the 15th Nile-COM meeting held in Entebbe, Uganda from 24-27 June, 2007. Despite extensive discussions on the outstanding issue of “water security”, the meeting could not make any headway and wound up with a decision to refer the outstanding issue for resolution by the Heads of State and Governments of the riparian countries.⁴³ The impasse in the negotiations pertained to Article 14 (b) of the draft CFA which obliges the riparians “not to

⁴⁰ NBI, ‘About the NBI’ (28 October 2010) available at http://www.nilebasin.org/newsite/index.php?option=com_content&view=article&id=71%3Aabout-the-nbi&catid=34%3Anbi-background-facts&Itemid=74&lang=en (last visited 27 April 2011).

⁴¹ Note that the CFA predates the NBI itself; it was conceived in a previous cooperative effort, the Technical Cooperation Committee for the Promotion of the Development and Environmental Protection of the Nile (TECCONILE) established in 1992; see Mekonnen, *supra* note 25, 426-428.

⁴² I. Tamrat, ‘Prospects and Problems of the Ongoing Cooperation in the Nile Basin and the Way Forward – A Personal Ethiopian Perspective’, Discussion paper presented at the National Consultative Workshop held in Addis Ababa, Ethiopia, 12-13 February 2009, 9.

⁴³ NBI, Minutes of the 15th Nile Council of Ministers Meeting, 24-25 June 2007, Entebbe, Uganda (on file with the author).

significantly affect the water security of any other Nile Basin State”⁴⁴. Although it was accepted by all the riparians, Egypt and Sudan rejected it while the other riparians rejected, likewise, an Egyptian proposal for a reformulation, so the obligation would instead be “[n]ot to adversely affect the water security and current uses and rights of any other Nile Basin State”⁴⁵.

During the 16th Nile-COM meeting held in July 2008 in Kinshasa, the DRC, the negotiations took a strange turn. In a complete about-face, the meeting convened “to forge a way forward in finalizing the outstanding issue [of water security] of the Draft Cooperative Framework Agreement”⁴⁶ and decided to leave out the controversial Article 14 (b) adopted the CFA deferring, instead, resolution of the controversy surrounding the provision to the Nile River Basin Commission yet to come into being.⁴⁷ The signing of the CFA was postponed to the next Nile-COM meeting to be held in Alexandria, Egypt, from 27 to 28 July 2009. That meeting too did not fare any better in terms of reaching a compromise on the controversial Article 14 (b) and ended, deferring resolution of the issue once more, for “an additional period of six months to enable member states to move forward in concluding an inclusive treaty”⁴⁸. Continuing the downward spiral, the Extraordinary Nile-COM meeting held on 13 April 2010 in the Red Sea resort of Sharm El-Sheikh, with the declared objective of harmonizing the views of the riparian states on the pending issues and reaching agreement on the way forward over the CFA,⁴⁹ ended up in failure. Despite the marathon fifteen hour deliberations, “the only agreement that was reached was on minutiae in order to avoid the pitfalls of the past”⁵⁰.

Frustrated and exasperated by the Sharm El-Sheikh fiasco, the seven riparian countries – Burundi, DR Congo, Ethiopia, Kenya, Rwanda, Tanzania and Uganda – agreed to open the CFA for signature from 14 May

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ Mekonnen, *supra* note 25, 428.

⁴⁷ Mekonnen, *supra* note 25, 429.

⁴⁸ *Id.*

⁴⁹ NBI, ‘Ministers of Water Affairs to Meet again over the River Nile Treaty’ available at <http://www.google.de/search?hl=de&client=firefox-a&hs=9Cr&rls=org.mozilla%3Ade%3Aofficial&q=NBI+News%2C+%22Ministers+of+Water+Affairs+to+Meet+again+over+the+River+Nile+Treaty%22&aq=f&aqi=&aql=&oq=> (last visited 21 March 2011).

⁵⁰ G. Nkrumah, ‘Whose Water is It?’ (15-21 April 2010) available at <http://weekly.ahram.org.eg/2010/994/eg10.htm> (last visited 27 April 2011).

2010 and keep it open for not more than one year, whereas Egypt and Sudan rejected this position and proposed, instead, that the River Nile Basin Commission be launched by the basin countries as negotiations proceed to finalize the agreement on the CFA.⁵¹ Much to the chagrin of Egypt, Ethiopia, Uganda, Tanzania and Rwanda signed the agreement the very day it was opened for signature,⁵² and Kenya signed it a week later.⁵³ A journey started with an unprecedented sense of optimism and positive rapport, thus wound up creating a huge chasm separating the two downstream riparians from the seven upstream ones.

II. The Benefit Sharing Framework

Vaguely implied in the Shared Vision which speaks of “the benefits from the common Nile Basin water resources” as the means to achieve sustainable socio-economic development, benefit sharing clearly emerged as the NBI’s second strategy to resolve the Nile waters question with the inclusion of the Socio-economic Development and Benefit Sharing (SDBS) Project among the Shared Vision Programs of the NBI⁵⁴ and the development, there under, of a Benefit Sharing Framework (BSF).⁵⁵

The SDBS Project was launched in 2005 “with the main objective to enhance the process of integration and cooperation to further socio-

⁵¹ NBI, ‘Ministers of Water Affairs End Extraordinary Meeting over the Cooperative Framework Agreement’ (14 April 2010) available at http://www.nilebasin.org/index.php?option=com_content&task=view&id=161&Itemid=70 (last visited 21 March 2011).

⁵² G. Tenywa, ‘Uganda to continue River Nile talks’ (16 May 2010) available at www.newvision.co.ug/D/8/12/719720 (last visited 27 April 2011).

⁵³ D. Miriri, ‘Kenya Signs Nile Basin deal rejected by Egypt’ (19 May 2010), available at <http://af.reuters.com/article/topNews/idAFJJOE64I0EF20100519> (last visited 27 April 2011).

⁵⁴ 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; Tafesse, *supra* note 1, 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, ‘Eastern Nile Subsidiary Action Program (ENSAP)’ (2011) available at www.nilebasin.org/ensap/ (last visited 27 April 2011).

⁵⁵ D. Z. Mekonnen, ‘From Tenuous Legal Arguments to Securitization and Benefit Sharing: Hegemonic Obstinacy – the Stumbling Block against Resolution of the Nile Waters Question’, 4 *Mizan Law Review* (2010), 232, 250.

economic development in the Nile Basin”⁵⁶. The BSF, which is to be fully developed by the SDBS Project, is comprised of two phases and three stages. The first phase 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”⁵⁷. 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”⁵⁸. 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”⁵⁹.

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 benefits in economic, environmental and political terms.⁶⁰ The crucial question one should ask, however, is whether the BSF is capable, as its proponents claim, of resolving the intractable Nile waters question, or is just another hegemonic ruse to woo the upstream riparians for a time. The author believes the latter to be the case, not out of cynical pessimism but in recognition of the fundamental flaws inherent in the so-called “benefit sharing” approach.

C. The CFA – Prey to the “Water Security” Scylla

The Extraordinary Nile-COM meeting at Sharm El-Sheikh was poised to become the apogee in the decade-long negotiation process as it was hoped that it would mark the last step in the signing of the CFA, thereby bringing the protracted negotiation process to a victorious culmination. For any serious observer though, neither the failure at Sharm El-Sheikh nor the subsequent discord and deterioration in inter-riparian relations should come

⁵⁶ *Id.*, 250.

⁵⁷ *Id.*

⁵⁸ *Id.*.

⁵⁹ *Id.*.

⁶⁰ C. Sadoff & D. Grey, ‘Beyond the river: the benefits of cooperation on international rivers’, 4 *Water Policy* (2002) 389-403. The authors point out four major benefits of cooperation: *Benefits to the river* (393-395); *Benefits from the river* (395-397); *Reducing costs because of the river* (398-399); and *Benefits beyond the river* (399-400).

as a surprise. Both incidents were caused by a fateful measure taken much earlier by the riparians – the introduction of the concept of water security into the CFA.

The decision to include the concept of water security into the CFA was made in February 2002 by the Negotiating Committee⁶¹ as an ingenious solution to the “thorny issue of existing treaties” as, it was maintained, the concept “has the advantage of relegating existing treaties to the background in favor of the more dynamic and progressive principles of international water law”⁶². Water security 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”⁶³. That decision, one may certainly assert, marked the very unfortunate moment the CFA received the coup de grace, and Sharm El-Sheikh only made manifest the inevitable failure which had long been in the making.

The principal justification for the introduction of water security – the apparently insurmountable hurdle of “existing treaties” – pertains to a phantom, literally non-existent hurdle as the so-called “thorny issue of existing treaties” is but an allusion to the 1929 and 1959 Agreements on the Nile. As pointed out earlier, the spurious claim for the continued binding force of the 1929 Agreement on the former British colonies in the White

⁶¹ Mekonnen, *supra* note 25, 430.

⁶² G. Amare, ‘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 2009, Addis Ababa, Ethiopia, 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 Mekonnen, *supra* note 25, 429-439.

⁶³ Draft Cooperative Framework Agreement (on file with the author), Art. 3. 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.

Nile sub-basin is without any sound legal basis and is negated by the historical facts surrounding the signing of the agreement as well as by the legal position the colonies took with regards to the legal implication of their status as successors to their common predecessor – the British Empire. Hence, the 1929 Agreement which, for Egypt, was “temporary and conditional upon future political developments, especially in the Sudan”⁶⁴ was abrogated by Sudan itself⁶⁵ and the former British colonies had, by endorsing the Nyerere Doctrine of state succession, relieved themselves of any obligations purportedly passed onto them upon independence.⁶⁶

The 1959 Agreement being a typical bilateral agreement entered into by the two independent riparian countries of Egypt and Sudan, its legal force is indubitably limited to the signatories alone and it neither confers any right nor imposes any obligation upon the other riparians which are not party to it. As the agreement itself has effectively replaced the 1929 Agreement, which supposedly had some binding force on the former British colonies⁶⁷ and dealt a severe blow to the tenuous claim for historic rights over nearly the entire flow of the Nile, the spurious justification of circumventing the existing treaties hurdle through the magic wand of water security is but ludicrous. The fact that the country from where nearly 85 per cent of the Nile waters come was neither a British colony and thus not connected in any way to the 1929 agreement nor party to the 1959 agreement further downgrades this ludicrous justification to arrant nonsense.

The shift to water security was, contrary to the flimsy justifications, a cunning hegemonic maneuver designed to derail negotiation of the CFA into a dead end so that the already intractable Nile waters question would become completely securitized. Given the poignantly iniquitous *status quo*

⁶⁴ Klot, *supra* note 5, 67.

⁶⁵ *Id.*, 72.

⁶⁶ The Nyerere Doctrine of state succession represents a position which is the exact opposite of the theory of Universal succession. Also known as the ‘Opting-in Formula’, the doctrine rejects the wholesale transmission of colonial treaties and reserves the right of the successor state to choose from among such treaties and decide which ones it wants to opt-into. For a detailed discussion of the subject and the respective positions of the White Nile riparian countries, see Mekonnen, *supra* note 25, 432- 434.

⁶⁷ That the 1929 Agreement has been replaced by the 1959 Agreement is made manifest in the language of the preamble of the latter. This position is also in consonance with Article 59 of the Vienna Convention on the Law of Treaties; Vienna Convention on the Law of Treaties, done at Vienna on 23 May 1969, entered into force on 27 January 1980, 1155 UNTS 331. See also Mekonnen, *supra* note 25, 435.

underpinned with extremely tenuous arguments and the impossibility of resorting to the use or threat of brute force to perpetuate the same, it was only natural for the basin hydro-hegemon to employ the more subtle hegemonic compliance producing mechanism of securitization – a potent yet quite subtle instrument of coercion – to stifle any breakthrough and perpetuate the *status quo* without evoking the wrath or frustration of the non-hegemonic riparians.⁶⁸ It is quite baffling that the other riparians, which had been enthusiastically engaged in the negotiations, had to wait for Sharm El- Sheikh to realize that they had cunningly been lured into the “water security” trap laid in 2002.

The concept of water security is a non-legal, amorphous and potentially disruptive concept alien to international legal instruments dealing with the subject of trans-boundary watercourses. Its inclusion into the CFA is thus quite anomalous. The concept which essentially signifies “[h]arnessing the productive potential of water and limiting its destructive impact”⁶⁹ has been defined as “the availability of an acceptable quantity and quality of water for health, livelihoods, ecosystems and production, coupled with an acceptable level of water related risks to people, environments and economies”⁷⁰. In the CFA, the concept is sanitized by expunging the reference to water related risks and is defined entirely positively as “the right of all Nile Basin States to reliable access to and use of the Nile River System for health, agriculture, livelihoods, production and environment.”⁷¹ In view of the negative hydrologic environment, it is quite ludicrous to expect the already exhausted Nile – a hydrologic dwarf with a meager annual flow constituting only a cup (2%) of that of the Amazon – to provide still more water for all these purposes and the false promise that it would is, indeed, “a cornucopian illusion the realization of which would require an

⁶⁸ 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.”, Brunnee & Toope, *supra* note 26, 143-144.

⁶⁹ Grey & Sadoff, *supra* note 8, 547.

⁷⁰ *Id.*, 548.

⁷¹ Agreement on the Nile River Basin Cooperative Framework (on file with the author), Art. 3.

equally illusory Nile ‘swelled by the rains of Zeus, ... born in paradise’, and thus constituting ‘an inexhaustible manna from heaven’⁷².

The Egyptian proposal at Sharm El-Sheikh to further continue the negotiation under the auspices of the Nile Basin River Commission⁷³ proves that the non-hegemonic riparians are allowed only to endlessly negotiate with and never to win any concessions from the basin bully. To accept this, however, would be a volitional forfeiture by the non-hegemonic riparians of their right to any consumptive use of the Nile waters; hence, the Sharm El-Sheikh fiasco. It should thus be no surprise that what had been said of the Pharaohs millennia ago may validly be said of Egypt’s rulers of today: “Pharaoh king of Egypt, [...] you say, ‘The Nile is Mine; I made it for myself’⁷⁴”.

D. The “Benefit Sharing” Charybdis – a Viable Alternative?

Sharing trans-boundary waters in equity and fairness is understandably quite difficult; it may even tend to be impossible in basins with a negative hydrologic reality hallmarked by worsening scarcity. Even in an ideal situation where the need for sharing is fully espoused, how this would be done is often frustratingly difficult to sort out, and crafting formal rules of allocation and other rights is, thusly, rightly said to be a necessity.⁷⁵ Though indubitably difficult to work out, allocation is one of the fundamental requirements of sound water distribution which ensures secure access to a predictable volume and promotes “equitable sharing of the burdens of water scarcity, restrains the exertion of superior force or political influence, and contributes to the efficient use of available water volumes”⁷⁶. Determination in volumetric terms of the entitlement of every riparian has thus far been the most common approach. The notion of benefit sharing

⁷² Mekonnen, *supra* note 25, 438.

⁷³ Egypt had vehemently argued against the signing of the CFA, insisting instead that the negotiations be further continued under the auspices of the Nile River Basin Commission – a position rejected right away by the upstream riparian countries who decided to go on with the signing of the CFA despite Egyptian and Sudanese opposition to the move.

⁷⁴ Ezekiel 29:3, *NIV*.

⁷⁵ Brunnee & Toope, *supra* note 26, 158.

⁷⁶ F. du Bois, ‘Water Law in the Economy of Nature’, in J. A. Allan & C. Mallat (eds), *Water in the Middle East: Legal, Political and Commercial Implications* (1995), 111.

represents a relatively recent approach focusing on the allocation or sharing of the benefits rather than the water itself; its proponents laud it as a much easier approach entailing incomparably higher advantages especially in terms of efficient and sustainable utilization beneficial to the ecological integrity of the basin.

The enormous and wide-ranging benefits that cooperative development of shared water resources avails to the riparians are incontrovertible. In the case of the Nile basin, for instance, it has been demonstrated that the annual economic value of cooperation involving limited infrastructure development in the Blue Nile would range 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”⁷⁷. The question here though is whether these enormous potential benefits can be made real and reaped by the impoverished Nile riparians or, given the basin’s unfavorable hydro-political and legal reality, whether they are simply mere pipe dreams.

More importantly, would it still make sense to pin one’s hope on benefit sharing as an alternative framework or modality to resolve the Nile waters question in spite of the fact that the much anticipated signing of the CFA and the inauguration of a permanent legal and institutional framework governing the equitable utilization of the waters has failed to materialize? The writer holds the position that benefit sharing cannot provide an alternative solution for the Nile waters question as it is yet another hegemonic hoax which, apart from being fundamentally flawed in its underpinning assumptions, is starkly incompatible with the foundational principle of international water law and conveniently ignores the hegemonic hydro-political configuration prevalent in the basin.

I. Flawed Assumptions

The flaws of benefit sharing are rooted in the very definition of the notion itself which contains as an integral part the unfounded denigration of the allocation approach as “a zero-sum, rights-based approach” focusing “on water as a commodity to be divided”⁷⁸. By contrast, benefit sharing is

⁷⁷ D. Whittington, X. Wu & C. Sadoff, ‘Water Resources Management in the Nile Basin: The Economic Value of Cooperation’, 7 *Water Policy* (2005), 227, 244, 249.

⁷⁸ M. A. Giordano & A. T. Wolf, ‘Sharing Waters: Post-Rio International Water Management’, 27 *Natural Resources Forum* (2003), 163, 168.

lavishly lauded as an integrative, positive-sum approach “that equitably allocate[s] the benefits derived from water, not the water itself”⁷⁹. As it “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”⁸⁰, 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”⁸¹.

The major flaw of this proposition pertains to the derisive misrepresentation of the rights-based allocation or apportionment approach as a zero-sum approach which allows only for winners and losers. Inquiring into the veracity of this erroneous assertion is therefore a matter of necessity. The enormous and wide ranging benefits of cooperative development of any shared water resource, the Nile included, is beyond question. However, denigration of the long practiced rights-based allocation approach in a bid to magnify the advantages of the benefit sharing approach and to make the same more salable is either a naïve commitment to a relatively new and appealing notion or a sinister scheme to deploy another hegemonic coercive tactic⁸² under a convenient camouflage. The assertion is seriously flawed as it draws a false dichotomy between the sharing of water and the benefits thereof as alternative approaches.⁸³ The fact though is that the negotiation of water rights and of benefits are not alternative strategies; rather, “an explicit or implicit recognition or negotiation of property rights is a necessary precondition for the realization of a benefit sharing scheme”⁸⁴. The rights-based allocation approach, far from being a zero-sum game, is rather a necessary precondition for the realization of a benefit sharing scheme.

Allocation or apportionment is an integral part and a necessary outcome of the principle of equitable and reasonable utilization, which is a fundamental principle of international law governing the non-navigational

⁷⁹ *Id.*, 168.

⁸⁰ *Id.*, 170.

⁸¹ *Id.*

⁸² For a discussion of such tactics, of which benefit sharing is one, see Zeitoun & Warner, *supra* note 6, 444-447.

⁸³ Sadoff & Grey, *supra* note 60, 396.

⁸⁴ I. Dombrowsky, ‘Revisiting the Potential for Benefit Sharing in the Management of Trans-boundary Rivers’, 11 *Water Policy* (2009)125, 137.

use of trans-boundary watercourses.⁸⁵ The essence of the principle being the sovereign entitlement of every riparian country “within its territory, to a reasonable and equitable share in the beneficial uses of the waters of an international river”⁸⁶, derision of the allocation approach as a zero-sum approach allowing only for winners and losers makes no logical sense.

The principle of equitable and reasonable utilization, of which allocation is an essential attribute, endows every riparian country with a sovereign right to use the waters of an international river. Contrary to the derisive assertion, therefore, the principle itself as well as the resultant allocation never allow for winners and losers. In basins like the Nile where the existing pattern of utilization is distinctly inequitable, reallocation might occasion a big “loss” to those riparians whose utilization is way beyond their equitable share. As such, “factual loss” does not constitute injury to a legal right - it neither constitutes a legal injury which must be stopped or compensated nor does it in any way enjoin other riparians to exercise their sovereign right to use the waters.⁸⁷

The approach is also flawed in respect of its promise to bring forth a “win-win” solution which would accord every riparian country involved in the process its due share of the benefits. Sharing benefits logically presupposes a prior agreed mechanism for the determination of such shares which cannot be but the right of every riparian country to use the waters. Sharing benefits without there being an agreed determination of rights is an oxymoron at best, or, at worst, a cunning hegemonic tactic designed to bewitch the non-hegemonic riparians into believing that some benefits would accrue to them sometime in the future.

⁸⁵ S. McCaffrey, *The Law of International Watercourses: Non-Navigational Uses* (2001), 325, 345; P. W. Birnie & A. E. Boyle, *International Law and the Environment*, 2nd ed. (2002), 303; A. Nollkaemper (1996), ‘The Contribution of the International Law Commission to International Water Law: Does it Reverse the Flight from Substance?’, 27 *Netherlands Yearbook of International Law* (1996) 39, 44.

⁸⁶ D. Caponera, ‘The Legal Status of the Shatt-al-Arab (Tigris & Euphrates) River Basin’, 45 *Austrian Journal of Public and International Law* (1993) 147, 156.

⁸⁷ Making a distinction between ‘factual harm’ and ‘legal injury’ is crucially important for understanding the essence of the principle of equitable and reasonable utilization; failure to distinguish between the two may lead to far reaching absurd consequences in such basins as the Nile as the principle might be construed as prohibiting significant ‘factual harm’ and thereby sanctioning extremely inequitable utilization patterns which deny other riparian countries of their sovereign right to consumptive use of an international river. See McCaffrey, *supra* note 85, 325.

II. Incompatibility with International Water Law

Benefit sharing may well be a convenient modality for cooperative development of shared water resources, and the community approach it entails has a huge potential for ensuring optimum and sustainable utilization. Nile riparians should indeed be commended for adopting the community approach which avails to them “the potentially rich returns from cooperative development”⁸⁸. However, it should not be lost on them that cooperative development of the Nile waters with a view to sharing the benefits thereof can become a reality only if an inclusive and equitable legal regime determinative of the rights of the riparians is put in place first. The admittedly difficult yet indispensable allocation approach which benefits sharing purports to bypass is an attribute of the principle of equitable and reasonable utilization⁸⁹ – a fact which renders the approach incompatible with international water law.

The principle of equitable and reasonable utilization primarily governs allocation⁹⁰ 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”⁹¹. Allocation of shared water resources, however difficult to work out, is a rather indispensable course which would ensure a predictable volume of water, thereby promoting the “equitable sharing of the burdens of water scarcity, restrain[ing] the exertion of superior force or political influence, and contribut[ing] to the efficient use of available water volumes”⁹². As such, it forms an indispensable feature of the principle which translates the mere

⁸⁸ C. B. Bourne, ‘The Development of International Water Resources: The ‘Drainage Basin Approach’’, in P. Wouters (ed.), *International Water Law: Selected Writings of Professor Charles B. Bourne [Selected Writings]* (1997), 22.

⁸⁹ X. Fuentes, ‘Sustainable Development and the Equitable Utilization of International Watercourses’, 69 *British Yearbook of International Law* (1998) 119, 137; see also U. Kuffner, ‘Contested Waters: Dividing or Sharing?’, in W. Scheumann & M. Schiffler (eds), *Water in the Middle East: Potential for Conflicts and Prospects for Cooperation* (1998), 75 arguing that a volumetric division of the average flow according to percentages of the actual yearly or monthly flows is the most appropriate quantitative principle which would make certain that the parties would receive equitable shares of the available flows.

⁹⁰ McCaffrey, *supra* note 85, 325; X. Fuentes, ‘The Criteria for the Equitable Utilization of International Rivers’, 67 *British Yearbook of International Law* (1996) 337, 341.

⁹¹ Bourne, ‘Canada and the Law of International Drainage Basins’, in P. Wouters (ed.), *Selected Writings*, *supra* note 88, 297.

⁹² Du Bois, *supra* note 76, 111.

generic riparian right “to participate in the sharing of the watercourse ... [into] the specific right to certain volumes of water or the right to undertake certain activities on the watercourse”⁹³.

Any benefit sharing framework which purports to bypass the indispensable prerequisite of a rights-based allocation would thus be a negation of this fundamental principle of international water law. Its proponents who strive to sell it as a panacea for the Nile waters question and the enthusiastic followers enticed by the false promise it gives should all be reminded of the fact that the moderate scarcity they are facing now will surely become “unmanageable scarcity unless some means of allocation is devised which caps what would otherwise be an unbridled and ultimately self-defeating scramble for too little by too many”⁹⁴. Such a framework, it should as well be noted, can only be complementary and not alternative to the unavoidable rights-based allocation approach which is the lynchpin of international water law. The pursuit of benefit sharing as an alternative route which would dispense with the admittedly arduous task of allocation would surely be a futile exercise doomed to failure.

III. Negative Hydro-Hegemony Conveniently Ignored

Cooperative development, without doubt, entails enormous potential benefits including benefits to the river which accrue as a result of cooperation which would ensure a “healthy” river system with, *inter alia*, protected watersheds, conserved wetlands, floodplains and groundwater recharge areas, protected riverine biodiversity, and controlled water abstraction and wastewater discharge;⁹⁵ benefits from the river which pertain to the increased quality, quantity and economic productivity of river flows cooperative management makes possible;⁹⁶ reduction in the costs arising because of the river – political benefits achieved through cooperation which “can ease tensions over shared waters, and provide gains in the form of the savings that can be achieved, or the costs of non-cooperation or dispute that can be averted”⁹⁷ and benefits beyond the river – “broader

⁹³ X. Fuentes, *supra* note 89, 130.

⁹⁴ T. M. Franc, ‘Fairness in the International Legal and Institutional System: General Course on Public International Law’, 240 *Recueil de Cours international* (1993-III) 9, 31-32.

⁹⁵ Sadoff & Grey, *supra* note 60, 393 – 394.

⁹⁶ *Id.*, 395.

⁹⁷ *Id.*, 398.

economic growth and regional integration that can generate benefits even in apparently unrelated sectors”⁹⁸.

Realization of these variegated benefits, however, would require by necessity a far deeper and harmonious inter-riparian relationship than would be requisite to conclude an inclusive water-sharing agreement. Whether inter-riparian relationship in the Nile basin has attained the level and depth requisite for the proper functioning and implementation of the BSF depends, to a large measure, on the hydro-political configuration prevalent in the basin – a crucial variable which cannot simply be ignored.

Undeniably, the launching of the NBI a decade ago has brought about a remarkable improvement in inter-riparian relationship.⁹⁹ The hydro-political configuration prevalent in the basin though still remains to be malignly hegemonic.¹⁰⁰ The hope for a possible transformation towards a benign hydro-hegemonic configuration was dashed by the uncompromising claims of Egypt and Sudan for a veritable ownership of the entire flow of the Nile and a veto over any upstream developments thereon.¹⁰¹ With its uncompromising stance to exert, as a matter of policy, its “relative power to indefinitely keep the 55.5 bcm allotment [of the Nile waters]”¹⁰², Egypt has, once again, unabashedly affirmed the role it has chosen to play in the basin to be the exact opposite of that of 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”¹⁰³. Being the only basin-hegemon which has signed and ratified the UN Watercourses Convention,¹⁰⁴ South Africa has chosen to be

⁹⁸ *Id.*, 399.

⁹⁹ Mekonnen, *supra* note 25, 423-427.

¹⁰⁰ M. Woodhouse & M. Zeitoun, ‘Hydro-hegemony and International Water Law: Grappling with the Gaps of Power and Law’, 10 *Water Policy* (2008), 103, 113. Hydro-hegemony could assume a positive/leadership form where control of the resource is shared among the riparians on the basis of a water-sharing agreement agreed upon and perceived positively by all, or it may, on the contrary, take a negative/dominative, exploitative form where the hegemon, through unilateral action, seeks to attain and consolidate maximum control of the resource as is the case with Egypt in the Nile basin; Zeitoun & Warner, *supra* note 6, 452. Woodhouse & Zeitoun, *supra* note 99, 112 further stratify the forms of hydro-hegemony into benign, neutral, restrictive, obstructive, dominative, and oppressive.

¹⁰¹ Mekonnen, *supra* note 25, 439.

¹⁰² Yohannes, *supra* note 7, 42.

¹⁰³ Zeitoun & Warner, *supra* note 6, 452.

¹⁰⁴ M. Daoudy, ‘Hydro-hegemony and International Water Law: Laying Claims to Water Rights’, 10 *Water Policy* (2008), 89, 94.

a benign hegemon willing to act rather like a “gentle giant” than a “basin bully”¹⁰⁵. Egypt has yet to make such a constructive transformation.

E. Conclusion and Prospects

The Sharm El-Sheikh fiasco is, indeed, far more tragic than the failure of a meeting as it rather signifies the culmination, in failure, of a decade-long strenuous effort to cut a lasting deal which would bring forth the desperately needed legal and institutional framework for the equitable and reasonable utilization of the Nile waters. It is equally tragic that with the signing, by the five upstream riparian countries, of the CFA containing the treacherous concept of water security as one of its general principles, a golden opportunity to extricate the Nile waters question out of the morass of securitization was irreversibly lost. The so-called benefit sharing framework is, as demonstrated in the preceding section, incapable of resolving the Nile waters question. It is just another hegemonic bait, a complete hoax which will crumble in due course. What then does the future hold for the basin’s impoverished inhabitants who hope to somehow fend off the fangs of drought and famine by breaking the curse of mortal dependence on the fickle seasonal rains which determine their life and death, one should query.

The prospect of inter-state conflict and the possibility of the Nile basin becoming “the scene of a merciless war over water”¹⁰⁶ is a very unlikely, remote scenario. Given the extremely asymmetric power relationship the basin hydro-hegemon has vis-à-vis the other riparians, the likelihood of violent conflict is quite improbable. None of the other riparians is capable of facing up to the behemoth in a military showdown; it surely takes two to fight, one may thus say, as it does to tango. The prospect of reallocation and equitable utilization of the Nile waters is, likewise, equally elusive and far beyond the horizon as the political diagnosis of all the actors as afflicted with a congenital political deficiency which renders them incapable of achieving this lofty objective¹⁰⁷ is, though frustrating, convincing and hard to refute.

¹⁰⁵ Woodhouse & Zeitoun, *supra* note 100, 113.

¹⁰⁶ Kerisel, *supra* note 5, xiv.

¹⁰⁷ Yohannes, *supra* note 7, 25 forcefully argues questioning the ability of the Nile riparians to properly handle and resolve the intractable Nile waters question as they are represented by “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”.

The more likely turn of events would be the continuation of the *status quo*, and with it an iniquitous hegemonic stability which may be given a facelift through continued dialogue and rhetorical cooperation. Given the precarious nature of the *status quo*, it would be quite naïve to assume that the basin's hydro-hegemon would lean back and hope the current state of affairs to continue forever. It would, rather, work ceaselessly to further consolidate its vested interests through co-optation and such other hegemonic tactics as land grabbing, of which there is some evidence already.¹⁰⁸ Though ironic, a "great land grab" in the trans-boundary context may well be the more likely future path towards the "peaceful" utilization of the Nile waters as this would conveniently sideline the "national interest" thorn in the neck paving, thereby, the way for the ultimate marriage between

¹⁰⁸ See, for example, R. Leila, 'Seeking Mutual Benefits', (15-21 July 2010) available at <http://weekly.ahram.org.eg/2010/1007/eg2.htm> (last visited 27 April 2011), reporting about aid and investment projects Egypt is offering to upstream countries as part of its political and diplomatic efforts to woo Nile Basin states. An Egyptian delegation led by foreign minister Ahmed Abu-Gheit and minister for international Cooperation Fayza Abul Naga met with the Ethiopian premier and the minister of foreign affairs. The Egyptian delegation repeatedly stressed that Nile Basin countries must cooperate fully in order to maximize the mutual benefits of the Nile. During the meeting, the signing of the CFA was high on the agenda of talks and the Ethiopian premier told reporters that "Ethiopia had never sought a reduction in the Egyptian quota of Nile water and the agreement signed by the five riparian countries did not represent a threat to Egypt." Abu-Gheit reportedly reciprocated by insisting that "Egypt has no problems with Ethiopia using Nile waters to generate electricity" as "[s]uch projects will not affect water flow in the river, though they should be implemented within the framework of the joint cooperation plan between the eastern basin countries of Egypt, Sudan and Ethiopia." The phenomenon of land grab which is spreading like wild fire in the poor countries across the globe is yet another disastrous development whose impact on the already intractable Nile waters question deserves a closer examination. That the Nile basin states are the leading actors in this new venture, and that Ethiopia, with about 7.5 million acres of its most fertile land up for grab, is at the forefront of the 'leasing/selling out' spree is quite worrisome. According to the 2010 report by the Oakland Institute, the Ethiopian government has offered up "vast chunks of fertile farmland to local and foreign investors at giveaway rates." S. Daniel & A. Mittal, '(Mis)investment in Agriculture: The Role of the International Finance Corporation in Global Land Grabs' (2010) available at http://www.oaklandinstitute.org/pdfs/misinvestment_web.pdf (last visited 27 April 2011), 28. The report describes what it calls a paradox in the following terms: "Ethiopia is one of the hungriest countries in the world with more than 13 million people in need of food aid, but paradoxically the government is offering at least 7.5 million acres of its most fertile land to rich countries and some of the world's most wealthy individuals to export food back to their own countries".

the ruling elites in the agro-industrial sector.¹⁰⁹ This would surely bring a short term peace in the basin and may even bring forth an economic boom aggravating, however, the misery and woe of the millions of impoverished inhabitants of the basin. Inevitably, this would shift the epicenter of potential conflict from inter- to intra-state level which would equally inevitably lead to violent explosions or implosions the consequences of which are hard to fathom.

Heralding despair not being the intention of the author, pointing out a possible way out of this quagmire is however in order. This truly arduous task involves the un-signing of the CFA, its complete de-securitization through the removal of the concept of 'water security', and return of the Nile waters question into the framework of international water law with due recognition of the fact that 'benefit sharing' can only be complementary to, and not a substitute for, the admittedly difficult yet indispensable rights-based allocation approach.

¹⁰⁹ For a lucid discussion of the consequences and implications of land grab by state elites and foreign investors see, in this volume, A. Telesetsky, 'Resource Conflicts over Arable Land in Food Insecure States: Creating an United Nations Ombudsman Institution to Review Foreign Agricultural Land Leases', 3 *Goettingen Journal of International Law* (2011) 1, 283.