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The Nile Basin Cooperative Framework Agreement Negotiations and the Adoption of a 'Water Security' Paradigm: Flight into Obscurity or a Logical Cul-de-sac?

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Abstract

The restive Nile basin which has long been identified as a flashpoint prone to conflict embarked on a new path of cooperation with the launching of the Nile Basin Initiative (NBI). Anchored in a Shared Vision 'to achieve sustainable socio-economic development through the equitable utilization of, and benefits from, the common Nile Basin water resources', the NBI has provided a convenient forum for the negotiation of a Cooperative Framework Agreement (CFA) to set up a permanent, inclusive legal and institutional framework. Negotiation of the CFA has, however, faced a serious impasse as a result of the introduction of the concept of 'water security'. The introduction of this non-legal, indeterminate, and potentially disruptive concept is, indeed, a regrettable detour to a virtual blind-alley. The justifications for this fateful decision are totally unfounded and specious. The decision rather makes sense as an unwarranted move pushing into further obscurity the already intractable Nile waters question, at best, and a logical cul-de-sac in the decade-long negotiations which have arguably fallen prey to the hegemonic compliance-producing mechanism of 'securitization' sneaked in under the veil of 'water security', at worst. Resolution of the Nile waters question should thus first be extricated from the morass of 'water security' and then be sought nowhere but within the framework of international water law.

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1 Introduction

In what sounds like a clarion call to humanity, McCaffrey had pointed out '[t]wo ominous phenomena relating to fresh water . . . : the dramatic and continuing increase in the use of water; and the growing pressure that is placed on the Earth's finite and constant water resources by the world's ever-expanding population'.¹ This description is arguably more appropriate to the Nile basin than to any other basin. A giant in terms of length, and a dwarf in terms of the volume of water it carries, the fabled Nile has an annual discharge constituting only a mere 6 per cent of that of the Congo, and yet has to slake the thirsts of its impoverished inhabitants whose number is poised to exceed 800 million by 2025. This grim reality is further exacerbated by the absence of an inclusive legal and institutional framework to ensure the equitable and sustainable utilization of the waters. The apparently indelible legacy of the colonial past, which in a way predetermined the basin's hydro-political configuration and the lack of genuine, inclusive riparian cooperation, has placed the basin among 'the ten flashpoints in contemporary international relations'² – one 'doomed to be the hapless cause of future wars'.³

This gloomy atmosphere gave way to a renewed hope and optimism only in

the late 1990s with the launching of the first inclusive cooperative initiative – the NBI – under a shared vision 'to achieve sustainable socio-economic development through the equitable utilization of, and benefits from, the common Nile Basin water resources'. This article examines the latest attempt by Nile riparians to strike a deal on a legal and institutional framework that would replace the transient NBI with a permanent one to ensure the realization of the 'Shared Vision'.⁴ Nile riparians have been, over the past decade, striving to work out the details of and agree on a draft Cooperative Framework Agreement (CFA) hoped to provide the basin with a permanent legal and institutional framework within which the Shared Vision will be realized.

The relatively sluggish negotiations though have taken an unwarranted turn to a virtual blind-alley with the introduction of the non-legal, destructively elastic, and indeterminate concept of 'water security' ostensibly to circumvent the 'thorny issue of the status of existing treaties' which allegedly constitutes an insurmountable hurdle stifling any headway in the negotiations. This fateful decision has been justified as an impressive feat of creative exercise injecting into the stalled negotiations the magic wand of 'constructive ambiguity' which would bring the divergent riparian positions to a compromise.

Review of the existing Nile treaty regime reveals that it is indeed poignantly at odds with the basic principles of

¹ McCaffrey, 'The Evolution of the Law of International Watercourses', 45 *Austrian J Public and Int'l L* (1993) 88.

² O. Yohannes, *Water Resources and Inter-Riparian Relationships in the Nile Basin: The Search for an Integrative Discourse* (2008), at 1.

³ J. Kerisel, *The Nile and its Masters: Past, Present, Future* (2001), at 164.

⁴ The NBI was launched in Feb. 1999 as a transitional mechanism until a permanent framework is established: T. Tafesse, *The Nile Question: Hydropolitics, Legal Wrangling, Modus Vivendi and Perspectives* (2001), at 109.

international water law, and its perpetuation would only be a negation of the Shared Vision. The argument that the 'status of existing treaties' represents an insurmountable hurdle which only the introduction of the 'water security' magic wand would overcome is, however, utterly specious and quite sophomoric, if not nonsensical. It is rather more sensible to explain the otherwise inexplicable interpolation of 'water security' into the CFA as a cunning scheme to employ the hegemonic compliance-producing mechanism of securitization in a bid to perpetuate the legally non-viable and anachronistic *status quo*.

The article begins with a synoptic review of Nile riparian cooperation which would provide the backdrop for evaluating the inherent potential for a breakthrough, as well as the latent danger of a relapse lying in the NBI which signifies both a break from and continuity with the basin's hydro-political past. The main thrust of the article is to decipher 'water security' and point out its implications in the context of the Nile waters question, and to contend that the unwarranted turn to 'water security' is a major bungle with far more disruptive consequences. The article finally points out the right course of action which should be pursued if the 'Shared Vision' is to remain what its name says it is – a vision with a prospect of realization – and not just a chimera, a pipe dream.

2 The Troubled History of Nile Riparian Cooperation

Riparian cooperation in the Nile basin has a very short and chequered history dating back to the 1950s and had been a

non-issue for quite a long time. In the distant past, Ethiopian monarchs, who had had a fair awareness of the vitality of the Nile floods for the survival of Egypt, used it as a rough diplomatic whip to pressurize their Egyptian counterparts on matters which then constituted their primary concerns.⁵ This empty threat though has had a lasting impact on the relations of the two countries to the extent that Ethiopia represented the greatest threat, keeping alive 'the fear that those who live upstream can command the lives of those downstream'.⁶

The advent of British colonialism in the basin brought with it a hegemonic plan geared towards controlling the entire basin with a view to ensuring the uninterrupted flow of the river downstream, thus creating 'a new reality that would have profound implications for inter-riparian relations long after [its] departure'.⁷ Since the territories in the basin which fell prey to colonial subjugation had to, first, battle for their existence as subjects of the international legal order, riparian cooperation in the Nile basin is essentially a post-colonial phenomenon, enormously influenced and somehow predetermined by the hydrological and hydro-political legacies of the colonial era.

Begun at the twilight of the colonial era, cooperation amongst Nile riparians proceeded, for decades, along bilateral or sub-basin arrangements which often had

⁵ H. Erlich, *The Cross and the River: Ethiopia, Egypt and the Nile* (2002), at 38–47. See also Pankhurst, 'Ethiopia's Alleged Control of the Nile', in H. Erlich and I. Gershoni (eds), *The Nile: Histories, Cultures and Myths* (2000), at 25–37.

⁶ R.O. Collins, *The Nile* (2002), at 22.

⁷ Yohannes, *supra* note 2, at 35.

single technical issues as their centre-piece. Hegemonic control and competition which constituted the central preoccupation of the colonial powers, replication of the same by the independent riparians, regional distrust, lack of integrative activities, and the highly disparate interest displayed by the riparians at the political level explain the pattern⁸ which persisted until the late 1990s, whence ‘a remarkable shift in the tone and substance of state-to-state relationships along the Nile’⁹ began to unfold.

The first bilateral cooperation agreement between Egypt and the United Kingdom (for Uganda) dealt exclusively with a single subject—the organization and recording of meteorological and hydrological information about the Equatorial Lakes.¹⁰ In this agreement, which should better be described a service agreement rather than one of cooperation, the government of Uganda agreed to supply to the Egyptian government all the meteorological and hydrological data collected by the Hydrological Department of Uganda.¹¹ The resident Egyptian engineer at the Owen Falls Dam and his assistants were given access to all the observation posts in Uganda ‘in order to undertake periodical inspections to assure themselves that the posts are being satisfactorily maintained and the observations regularly collected’.¹² In return, Egypt agreed to

make a fixed annual contribution to the expenses incurred in obtaining and calculating the meteorological and hydrological data.¹³

A decade later, nature jolted some Nile riparians into another cooperative arrangement around a Project for the Hydro-meteorological Survey of the Equatorial Lakes, known for short as Hydromet. Hydromet was a cooperative arrangement which grew in reaction to the dictates of nature rather than the deliberate decision of the riparians involved. The sudden and unpredicted increase in rainfall in the Equatorial Lakes region which resulted in the flooding of the shores and the disastrous inundation of the Sudd floodplain was the catalyst for the launching of Hydromet.¹⁴ The catastrophe brought about by the deluge elicited a proposal from the World Meteorological Organization for a project ‘to evaluate the water balance of the Lake Victoria catchments in order to assist in any control and regulation of the lake level as well as the flow of water down the Nile’.¹⁵ The survey area was expanded to include Lakes Kyoga and Albert; Egypt and Sudan were also invited in¹⁶ and the agreement for the hydro-meteorological survey of Lakes Victoria, Kyoga, and Albert was signed in May 1967.

Though applauded as ‘the first deliberate multilateral institutional mechanism

⁸ Brunnee and Toope, ‘The Changing Nile Basin Regime: Does Law Matter?’, 43 *Harvard Int’l LJ* (2002) 122–131.

⁹ *Ibid.*, at 132.

¹⁰ Notes exchanged in Cairo, on 19 Jan., 28 Feb. and 20 Mar. 1950, available at: <http://ocid.nacse.org/qml/research/ftdd/toTFDDdocs/67ENG.htm>.

¹¹ *Ibid.*, at para. 3.

¹² *Ibid.*

¹³ *Ibid.*

¹⁴ Collins, ‘In Search of the Nile Waters, 1900–2000’, in Erlich and Gershoni (eds), *supra* note 5, at 257–258.

¹⁵ Okidi, ‘Legal and Policy Regime of Lake Victoria and Nile Basins’, 20 *Indian J Int’l L* (1980) 432.

¹⁶ *Ibid.*, at 433.

set up to promote inter-riparian cooperation in the Nile Basin',¹⁷ Hydromet, throughout its existence, served primarily as a mechanism for creating a core of water experts and technicians from the participating countries¹⁸ and remained a modest sub-regional project limited in scope to technical cooperation. Subsequent cooperative arrangements exhibited a similar feature of being bilateral or sub-basin in scope and focusing on a single issue in substance.¹⁹ A new trend marking a break from this pattern of cooperation began to emerge in the 1980s and attained its peak in the NBI.

3 The Nile Basin Initiative: A Breakthrough with Challenges

Given the long-established pattern of cooperation hallmarked with bilateralism, exclusive focus on technical issues, and riparian involvement which did not extend beyond the sub-basin level at its best,²⁰ the NBI could appropriately be

regarded as 'a breakthrough from competition to cooperation'.²¹ In contrast to the pattern entrenched for nearly half a century, the NBI promised to be a harbinger of a new era manifesting 'a remarkable shift in the tone and substance of state-to-state relationships along the Nile'.²² Officially launched in February 1999 in Dar Es Salaam, Tanzania, 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',²³ the NBI is anchored in a Shared Vision 'to achieve sustainable socio-economic development through the equitable utilization of, and benefits from, the common Nile Basin water resources'.²⁴

It would, however, be inappropriate to attribute all the credit to the NBI, as the change in the pattern of riparian cooperation did begin to take shape a bit earlier in the 1980s through 'an unofficial African regional grouping intended to serve as a platform for informal discussions regarding the overall economic development of the Nile basin region'.²⁵ Two cooperative initiatives which grew out of this unofficial platform – Undugu and TECCONILE – are notable previous efforts which paved the way for the NBI and share the credit as its progenitors, while being, at the same time, reminiscent of the past challenges passed onto and lying dormant therein.

¹⁷ Peichert, 'The Nile Basin Initiative: A Promising Hydrological Peace Process', in I. Al Baz, V. Hartje, and W. Scheumann (eds), *Co-operation on Transboundary Rivers* (2000), at 119.

¹⁸ *Ibid.*

¹⁹ The Kagera River Basin Organization (1977) and the 1994 Agreement on Lake Victoria epitomize the pattern of cooperation. The 1993 Ethio-Egypt Framework Agreement is, on the contrary, an agreement the significance of which is eclipsed by the plethora of diverse, broad objectives it is set to achieve.

²⁰ For a detailed discussion of the subject see D. Zeleke, *Equitable Utilization of Transboundary Watercourses: The Nile Basin and Ethiopia's Rights under International Law*, PhD dissertation, University of Vienna (2005), at 42–60.

²¹ Brunnee and Toope, *supra* note 8, at 137.

²² *Ibid.*, at 132.

²³ Tafesse, *supra* note 4.

²⁴ NBI, *Shared Vision*, available at: www.bilebasin.org/.

²⁵ Peichert, *supra* note 17, at 121.

A *Undugu*

The first initiative for basin-wide cooperation grew out of an Egyptian proposal to launch an informal organization named *Undugu* – the appellation derived from the Swahili word *ndugu* which means ‘brotherhood’.²⁶ Precipitated by a change in the domestic politics of Egypt which introduced a much more cooperation oriented policy towards Nile water issues,²⁷ the official purpose of *Undugu* was to discuss, in annual ministerial meetings, such issues as the Nile waters, agriculture and resource development, and the promotion of economic, technical, and scientific cooperation among the riparians.²⁸ The initiative was accepted by Sudan, Uganda, Zaire (DRC), and the non-riparian Central African Republic; Burundi, Rwanda, and Tanzania joined in later on, whereas Ethiopia and Kenya participated only as observers.²⁹

Undugu had been credited for its service ‘as an institutional locus for sharing expertise and as a group accustomed to treating the Nile as a whole, not as less than the sum of its national parts’.³⁰ It did also carry out fact-finding activities designed to help the formulation of a comprehensive economic plan including water resource development. However, it failed to lead to meaningful and concrete riparian cooperation, due primarily to lack of genuine commitment on the part of Egypt, which perceived the initiative ‘as an exercise in hegemonic influence’.³¹

²⁶ Collins, *supra* note 6, at 224.

²⁷ Peichert, *supra* note 17, at 121.

²⁸ A. Soffer, *Rivers on Fire: The Conflict over Water in the Middle East* (1999), at 62.

²⁹ Collins, *supra* note 6, at 22.

³⁰ Brunnee and Toope, *supra* note 8, at 133.

³¹ *Ibid.*

In practice, electricity generation and joint hydroelectric projects connecting the national electricity grids remained, on Egypt’s insistence, to become the top agenda of *Undugu*.³² On the contrary, Egypt kept on developing giant irrigation and land reclamation projects without any consultations with the other riparians, undermining, thereby, the very cooperative initiative it had introduced – a measure which downgraded the informal discussions held under the aegis of *Undugu* to mere ‘chummy get-togethers ... [which] were a parody of British imperial designs for Nile control’.³³

B *Tecconile*

Following the evanescence of *Undugu*, the Technical Cooperation Committee for the Promotion of the Development and Environmental Protection of the Nile (TECCONILE) was established in 1992 by Egypt, Rwanda, Sudan, Tanzania, Uganda, and Zaire (DRC), with the other riparians participating as observers.³⁴ TECCONILE was established as a transitional scheme for a period of three years with the hope that on the expiry of the period a permanent basin-wide institution would be established.³⁵ Though regarded by some as a new arrangement representing ‘an attempt to circumvent the effects of the

³² Peichert, *supra* note 17, at 121.

³³ Collins, *supra* note 6, at 225.

³⁴ Nile Basin Initiative, *Sequence of Major Events of the Nile Basin Initiative Process*, available at: www.nilebasin.org/nbihistory.htm (accessed on 15 July 2009).

³⁵ 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 Feb. 2009, at 8.

perceived political dominance of Egypt in Undugu',³⁶ TECCONILE was in fact an offshoot of Hydromet and was strongly technical in its focus, so much so that major riparians like Ethiopia were discouraged from joining as fully-fledged members.³⁷

In spite of the strong technical focus which constrained major riparians from becoming full members, TECCONILE proved to be a decisive springboard for the next phase in Nile riparian cooperation. Prominent in this regard is the Nile River Action Plan which was developed within the framework of TECCONILE and was formally approved by the Council of Ministers of Water Affairs which met in Arusha, Tanzania, in February 1995. A section of the Action Plan's fourth component – Regional Cooperation – envisaged the establishment of a basin-wide framework for legal and institutional arrangements which could not be implemented due to resource constraints and continued competitive behaviour among the riparians.³⁸ On Ethiopia's insistence, determination of the equitable entitlement of the riparians to Nile waters was included as an issue of priority rather than as a long term objective. Unanimously approved as a priority project,³⁹ the Nile Basin Cooperative Framework was then incorporated into the action plan, becoming, thus, a true progenitor of the NBCFA negotiated over the past decade under the aegis of the NBI.

The NBI is indeed a milestone which represents a departure from the past in

some respects; it also represents a continuation of the past in some other respects. Its portrayal as 'a remarkable and fragile first step'⁴⁰ is thus a succinct allusion to the leap it represents in Nile riparian cooperation as well as the inherent danger. The NBCFA which epitomizes this fusion of a break from and continuity with the past constitutes a decisive turning point the successful completion of which would replace the NBI with a permanent legal and institutional framework for the realization of the Shared Vision.⁴¹

The adoption of a 'water security' paradigm has, however, significantly tipped the balance towards the undesirable result of either freezing the *status quo* in an endless negotiation process or a return back to square one, a *déjà vu* of a sort, with the NBI very much likely to be consigned to the annals of history as 'a remarkable and fragile' cooperative initiative which degenerated into just another strategic bargaining process.

4 The Nile Basin Cooperative Framework Agreement: An Overview

Conceived in the framework of the TECCONILE and predating the NBI itself, the NBCFA is the quintessence of the transformation in Nile riparian cooperation as it, for the first time, brought onto the cooperative agenda the fundamental issue of equitable(re)allocation of the Nile waters—an issue previous cooperative schemes had completely eschewed.⁴² Being such a

³⁶ Brunnee and Toope, *supra* note 8, at 133.

³⁷ Tamrat, *supra* note 35.

³⁸ Brunnee and Toope, *supra* note 8, at 135.

³⁹ Tamrat, *supra* note 35, at 9.

⁴⁰ James Wolfensohn quoted in Yohannes, *supra* note 2, at 7.

⁴¹ NBI, *supra* note 24.

⁴² S.A. Mason, *From Conflict to Cooperation in the Nile Basin* (2004), at 201.

bold move to transform a basin noted for unilateralism and competition⁴³ into one governed by a permanent legal and institutional framework agreed upon by all riparians, it was only natural that it took a decade for the negotiations which commenced in 1997 to produce a draft cooperative framework agreement with some outstanding issues.⁴⁴ Though it was pointed out earlier in 2006 that the status of existing agreements and procedures regarding planned measures were the two outstanding issues,⁴⁵ the real outstanding issue posing a formidable challenge to any breakthrough in Nile riparian cooperation is, indeed, the *status quo* as represented and reinforced by the existing, predominantly colonial-era, treaty regime.

The draft CFA was submitted to the Nile-COM which met in Entebbe, Uganda, in June 2007. Despite extensive discussions, agreement could not be reached on the question of ‘water security’ introduced by Article 14 of the draft, in respect of which Egypt and Sudan entered reservations calling for the replacement of sub-article (b) thereof by a new sub-article (b) which the other riparians found unacceptable. The text of Article 14 adopted by the Nile-COM reads:

Having due regard for the provision of Articles 4 and 5, Nile Basin states recognize the vital importance of water security to each of them. The States also recognize that cooperative management and development of the waters of the Nile River System will facilitate achievement

of water security and other benefits. Nile Basin states therefore agree, in a spirit of cooperation:

- (a) to work together to ensure that all States achieve and sustain water security
- (b) not to significantly affect the water security of any other Nile Basin State.⁴⁶

The Nile-COM negotiations could not make headway as the other riparians rejected the Egyptian-Sudanese amendment to Article 14(b) which would instead obligate them ‘not to adversely affect the water security and current uses and rights of any other Nile Basin State’.⁴⁷ Unable to resolve this deadlock, the Nile-COM adopted the text of Article 14 agreed upon by all the other riparians together with the proposed amendment. It also decided to refer the outstanding ‘water security’ issue for resolution by the respective Heads of State and Governments of the riparian countries.⁴⁸

The draft was discussed again at the sixteenth Nile-COM meeting held in July 2008 in Kinshasa, the DRC. The meeting was convened ‘to forge a way forward in finalizing the outstanding issue [of water security] of the draft Cooperative Framework Agreement . . . which will pave the way to the establishment of a permanent River Nile Basin Organization’.⁴⁹ What

⁴³ See Zeleke, *supra* note 20, at 166–194, for comparison with other basins.

⁴⁴ The draft CFA was submitted to the Nile-COM meeting held in June 2007 in Entebbe, Uganda.

⁴⁵ Tamrat, *supra* note 35, at 14.

⁴⁶ Excerpted in Mohammed, ‘The Nile River Cooperative Framework Agreement: Contentious Legal Issues and Future Strategies for Ethiopia’, Paper Presented at the National Consultative Workshop on Nile Cooperation, 12–13 Feb. 2009, Addis Ababa, Ethiopia, at 11.

⁴⁷ *Ibid.*

⁴⁸ Tamrat, *supra* note 35, at 15.

⁴⁹ ‘Nile Cooperative Framework Agreement to be discussed at extra-ordinary Nile-COM meeting in Kinshasa’, NBI News, available at: www.nilebasin.org/index.php?option=com_content&task=view&id=130&Itemid=70 (accessed on 21 June 2009).

transpired in the meeting and what was pronounced to be the final outcome thereof, however, fell far too short of the declared purpose the meeting was convened to achieve. The Nile-COM decided to adopt sections of the CFA, leaving out the contentious Article 14(b) on water security, which would be taken up and resolved by the Nile River Basin Commission.⁵⁰

One may question the propriety and wisdom of this decision to carve out the contentious issue of water security and leave it for the future Nile River Basin Commission to grapple with. Challenging the legitimacy of this decision and in a show of protest, the Sudanese delegation stormed out of the meeting, insisting that the matter should be referred to the Heads of State and Governments of the riparian countries; their position though was misconstrued as a 'vote of no confidence on the Nile-COM' and the draft CFA was adopted by the other delegates.⁵¹ In the first place, the establishment of a permanent Nile River Basin Commission is by no means a matter of certainty as the CFA has yet to be finalized, agreed upon fully, and ratified. But, even more importantly, the assumption underpinning the decision that the Nile River Basin Commission would succeed in what almost 10 years of negotiations have been unable to attain is Utopian, to say the least.

The 17th Nile-COM meeting held from 27 to 28 July 2009 in Alexandria, Egypt, concluded with a decision 'to allow an

additional period of six months to enable member states to move forward in concluding an inclusive treaty' and expressing the hope that 'their next meeting will mark the last step of signing of the Cooperative Framework Agreement'.⁵² The Council also mandated the Technical Advisory Committee and the Negotiating Committee to consult with international experts on procedures for signing the CFA and submit their report to an extraordinary Nile-COM meeting to be convened to receive the report.⁵³

Whether the Advisory and Negotiating Committees assisted, as proposed, by international experts, will be able to devise an acceptable formula leading to the signing of the CFA has yet to be seen. The grim reality though is that even the successful signing of the CFA with 'water security' as its element would only mark either a logical cul-de-sac in the decade-long negotiations or the beginning of yet another round of endless negotiations under the auspices of the Nile River Basin Commission.

5 The Turn to 'Water Security': An Unwarranted Detour to a Dead End

The concept of 'water security' was a belated inclusion in the CFA made by the Negotiating Committee the Nile-COM established at its Cairo meeting held in

⁵⁰ 'Sudan walks out of Nile River talks', *The Daily Nation*, 24 May 2009.

⁵¹ Menyay, 'Sudan Walks out of Nile River Talks', *Daily Nation*, 27 May 2009, available at: www.nation.co.ke/news/africa/-/1066/602492/-/13a26k7z/-/ (accessed on 5 June 2009).

⁵² '17th Nile Council of Ministers in Charge of Water Affairs Reaffirm Basin-Wide Cooperation', NBI News, available at: www.nilebasin.org/index.php?option=com_content&task=view&id=137&Itemid=102 (accessed on 5 Aug. 2009).

⁵³ *Ibid.*

February 2002 with mandate to negotiate the draft.⁵⁴ This fateful decision to introduce the non-legal concept of ‘water security’ which would, practically, mean anything a riparian country wanted it to mean, has been justified as an ingenious solution to ‘the thorny issue of existing treaties’.⁵⁵ It is thus contended that ‘water security’ will pave the way for a compromise as it, allegedly, ‘has the advantage of relegating existing treaties to the background in favor of the more dynamic and progressive principles of international water law’.⁵⁶

The concept has also been positively portrayed as a vehicle for the transfusion of ‘constructive ambiguity’ into the CFA, which, in turn, will make it possible to bring closer the divergent views held by the upper and lower riparians.⁵⁷ Despite these contentions, the true purport of the concept is perpetuation of the legally anachronistic and non-viable *status quo* under the cloak of water security. The decision to interpolate this concept into the CFA thus represents a rather unwarranted detour to a dead-end, not a headway towards a compromise and ultimate resolution of the Nile waters question.

Both justifications, thus, do not stand any scrutiny as they are based on fundamentally flawed and unwarranted assumptions. The first justification – circumventing the thorny issue of existing

treaties – is underpinned by the assumption that there exists a legitimate treaty regime binding all the riparians and constituting an insurmountable legal hurdle the circumvention of which is allegedly made possible by the introduction of ‘water security’. A cursory glance into the Nile treaty regime though discloses that there is no such treaty regime. The attempt to perpetuate the *status quo* is based, instead, upon a tenuous argument for the continued binding force of the 1929 Agreement on Kenya, Sudan, Tanzania, and Uganda.

The second justification, which portrays the amorphous and non-legal concept of water security as a conduit for ‘constructive ambiguity’, which would in turn help bring the divergent riparian positions into a compromise, is no less outlandish. Leaving aside the dubious logical soundness of the argument that a breakthrough in the negotiation of a deal on a vital scarce resource vied for by 10 riparians would be achieved by resorting to ‘constructive ambiguity’, the positions of Egypt and Sudan with regard to the purport of ‘water security’ in the context of the CFA have become so unambiguously clear that there literally is nothing to be constructively ambiguous about.

The far broader and nebulous definition given to ‘water security’ in the CFA and elsewhere makes it even far more inappropriate to the Nile basin the hydrological reality of which is the exact opposite of what the definition assumes. The question therefore is neither one of circumvention of the ‘existing treaties’ hurdle nor of bringing divergent riparian positions into a compromise via ‘constructive ambiguity’. It is rather one of either rejecting the securitization of the Nile waters question altogether or keeping on

⁵⁴ Tamrat, *supra* note 35, at 14.

⁵⁵ 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 Feb. 2009, Addis Ababa, Ethiopia, at 5.

⁵⁶ *Ibid.*

⁵⁷ *Ibid.*

playing with the water security tar-baby and remaining entangled in apparently endless negotiations in an atmosphere of obscurity.

6 Existing Treaties: Hurdles Circumvented by Water Security?

That the existing Nile treaty regime is a formidable hurdle stifling any headway towards equitable and reasonable utilization is a long established fact which a mere cursory glance over the various treaties discloses beyond any shadow of doubt. The assertion that these treaties constitute, in legal terms, an insurmountable hurdle which could only be circumvented via the non-legal and destructively elastic concept of water security though is extremely tenuous, as it has no factual and legal basis and is flawed, in substance, as it signifies an attempt to resolve an essentially legal problem by adopting an indeterminate, non-legal solution.

The treaty regime, constituted substantially by a patchwork of colonial treaties, represents an anachronistic and iniquitous legal structure undergirding an equally anachronistic and iniquitous pattern of utilization where the entire flow of the river is apportioned between the two lower riparians. In fact, there is no other major international basin where the legal regime and pattern of utilization are poignantly incompatible with the principles of international water law as they are in the Nile basin.⁵⁸ This odd-

ity though is the product of a multitude of historical, hydrological, and hydro-political factors dating back to the times of the Pharaohs.

The near absolute dependence of Egypt on the Nile for its survival and the erratic flow the river is noted for worked in tandem to instil, in the minds of Egyptians, fear of a possible diversion by those upstream – 'an article of faith that has been inscribed on the soul of Egyptians for millennia'.⁵⁹ The immediate impact of this imagined fear⁶⁰ was the perception of the Nile waters question as a matter of national security, and one posing an existential threat to the very survival of Egypt.⁶¹ This in turn led to the pursuit, by successive Egyptian rulers, of a policy of territorial conquest over the sources of the Nile to ensure the uninterrupted flow of the waters downstream into Egypt.⁶²

The existing treaty regime began to take shape with the advent of British colonial rule in the basin. Fully cognizant, to an extent no other imperial power ever was, of 'the centrality of Nile waters to the actualization of the colonial project',⁶³ the British wasted no time in realizing their hegemonic control over the Nile waters. That most of the basin area fell under direct British colonial rule made it easy to ensure the uninterrupted flow of the Nile waters into Egypt; where this was not the

⁵⁹ Collins, *supra* note 6, at 22.

⁶⁰ The threats were, indeed, 'no more than roars of a paper lion': Pankhurst, *supra* note 5, at 35.

⁶¹ Hefny and El-Din Amer, 'Egypt and the Nile Basin', 67 *Aquatic Sciences* (2005) 44. The authors aver: '[t]he Egyptian concerns with regard to the Nile are . . . both a matter of national security and a life or death issue'.

⁶² Tafesse, *supra* note 4, at 60–62.

⁶³ Yohannes, *supra* note 2, at 34.

⁵⁸ For a comparison with other major basins see Zeleke, *supra* note 20, at 166–194.

case, the British still secured their objective ‘through treaties designed to establish control over the Nile’.⁶⁴ A significant portion of the treaties dealt primarily with boundary and sphere of influence issues, addressing, incidentally, the Nile waters question with a standard fluvial clause restricting, and at times effectively prohibiting, the utilization of Nile waters upstream.⁶⁵ The lynchpin of the existing treaty regime though is constituted by two water utilization treaties concluded in 1929 and 1959, respectively.

A *The 1929 Nile Waters Agreement*

The 1929 Agreement⁶⁶ was concluded between the United Kingdom and Egypt whereby Egypt recognized Sudan’s right to utilize an increased quantity of the Nile waters – an increase in ‘quantity as does not infringe Egypt’s natural and historical rights in the waters of the Nile and its requirements of agricultural extension’.⁶⁷ In return, Britain acknowledged the natural and historical rights of Egypt in the waters of the Nile and to regard safeguarding of the same ‘as a fundamental principle of British policy’.⁶⁸ The Agreement then allocated the entire utilizable annual discharge to Egypt and Sudan as ‘acquired rights’ measuring 48 and 4 billion cubic metres respectively.⁶⁹

The continued binding effect of the treaty beyond the demise of British colonial rule in the basin though has been met with a two-pronged challenge: one based on the question of succession to the treaty by the former British colonies, and another pertaining to the contents of the agreement and its subsequent replacement by the 1959 Agreement.

The subject of state succession has for long been an unsettled area of international law where ‘not many settled legal rules have emerged as yet’.⁷⁰ The divergent and contradictory theories which prevailed in the course of the development of the concept,⁷¹ coupled with the interplay of political considerations and the resultant inconsistency in state practice, have made international law rather vague in respect of the legal problems ensuing from state succession.⁷² In relation to the 1929 Agreement, the claim to its continued binding effect on Kenya, Tanzania, Sudan, and Uganda is rooted in the theory of Universal Succession. This theory – inspired by the Roman law conception of succession to the property of a deceased person – regards the sovereign personality of the state as ‘permanent and immortal and thus transmissible to the successor’, and state territory as property sanctioning, thus, the compulsory transmission of all the rights and

⁶⁴ Brunnee and Toope, *supra* note 8, at 122.

⁶⁵ From 1891–1925, five boundary and sphere of influence agreements were concluded.

⁶⁶ Concluded through the exchange of notes in Cairo on 7 May 1929, available at: <http://ocid.nacse.org/qml/research/tfdd/toTFDDdocs/41ENG.htm>

⁶⁷ *Ibid.*, Mohamed Mahmoud Pasha’s Letter to Lord Allenby, Cairo, 7 May 1929, at para. 2.

⁶⁸ *Ibid.*, Lord Lloyd’s Letter to Mohamed Mahmoud Pasha, Cairo, 7 May 1929, at para. 4.

⁶⁹ Tafesse, *supra* note 4, at 74–75.

⁷⁰ I. Brownlie, *Principles of Public International Law* (5th edn, 1998), at 650.

⁷¹ See D.P. O’Connell, *State Succession in Municipal Law and International Law* (1967), i, at 9–14; Mekonnen, ‘State Succession in Africa: Selected Problems’, 200 *Recueil de Cours international* (1986-V) 103–108.

⁷² Hafner and Kornfeind, ‘The Recent Austrian Practice of State Succession: Does the Clean Slate Rule Still Exist?’, 1 *Austrian Rev Int’l and European L* (1996) 2.

obligations of the predecessor state to the successor.⁷³

Rightly discredited as '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',⁷⁴ the theory was discarded by the Vienna Convention on Succession of States in Respect of Treaties⁷⁵ which applies, in the normal cases of state succession, the clean slate principle.⁷⁶ A claim for the continued binding force of the agreement is nonetheless made by invoking the 'dispositive', 'real' or 'localized' treaties exception, according to which such treaties survive the impact of succession and bind the successor state.⁷⁷

This claim though is based on a specious argument primarily because the normative validity of the exceptions is seriously challenged⁷⁸ and there is, as well, serious disagreement on the type of treaties which fall under the exception.⁷⁹ Furthermore, the historical facts and the perception Egypt had of the agreement negate the claim for its categorization

as 'dispositive' or 'localized'. As stated in paragraph 5 of Mohamed Mahmoud Pasha's letter to Lord Lloyd, the agreement 'can in no way be considered as affecting the control of the river, which is reserved for free discussion between the two Governments in the negotiations on the question of the Sudan'.⁸⁰ This official Egyptian position to consider the agreement as a temporary arrangement 'pending determination of the political future of the Sudan' proves that it was intended to be 'neither a real nor a dispositive agreement'.⁸¹ It was rather 'a political armistice . . . , a practical working arrangement for the engineers to administer the Nile until the politicians could determine its destiny',⁸² thus not lending any support for the claim about its continued validity and binding force.

The type of treaties falling under the exception being only boundary treaties which are so 'on clear considerations of stability in territorial matters',⁸³ the claim for the transmission of colonial era fluvial treaties onto the independent successor states has no legal foundation. That the Convention established a distinct legal regime based on the optional theory applicable to newly independent states also makes the argument even more tenuous,⁸⁴ since, by virtue of the unqualified clean slate principle, the Convention has adopted with regard to such states, a state 'is not bound to maintain in force, or to become a party to, any treaty by

⁷³ Mekonnen, *supra* note 71, at 107–108; Fiedler, 'State Succession', in R. Bernhardt (ed.), *Encyclopedia of Public International Law* (2000), iv, 641–656.

⁷⁴ Mekonnen, *supra* note 71, at 112.

⁷⁵ 17 ILM (1978) 1488.

⁷⁶ See Arts 8, 9, 10, 16, and 24 of the Convention.

⁷⁷ Mekonnen, *supra* note 71, at 114; see also Jennings, 'General Course on Principles of International Law', 121 *Recueil de Cours international* (1967-II) 327, at 446; L. Oppenheim, *International Law* (8th edn, 1955), i, at 159.

⁷⁸ For a detailed discussion of the challenges see Zeleke, *supra* note 20, at 124–134.

⁷⁹ See Oppenheim, *supra* note 80, at 159; J.L. Brierly, *The Law of Nations* (6th edn, 1963), at 154; L. McNair, *The Law of Treaties* (1961), at 656–660.

⁸⁰ Mohamed Mahmoud Pasha's Letter to Lord Lloyd, *supra* note 66.

⁸¹ Okidi, *supra* note 15, at 423.

⁸² Collins, *supra* note 14, at 251.

⁸³ Brownlie, *supra* note 70, at 665.

⁸⁴ Mekonnen, *supra* note 71, at 114.

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'.⁸⁵ There have been a number of instances where newly independent states concluded devolution agreements to take over the rights and obligations of their predecessors by succeeding to the treaties they made; they did this, however, in exercise of their right to opt in where 'they found it convenient, not because they considered themselves obliged to do so'.⁸⁶

The adoption of the 'optional theory' is in accord with the long-standing positions of Kenya, Tanzania, and Uganda which were formulated in what came to be known as the Nyerere Doctrine of state succession. Also known as the Opting-in formula, the doctrine was formulated and declared by Julius Nyerere on 30 November 1961 while he was the premier of the then autonomous but not yet independent Tanganyika. The doctrine, which essentially endorsed the classical clean slate (*tabula rasa*) theory, rejects 'any categorization of international obligations which a successor state might have to accept or reject only because of the nature or type of the obligation',⁸⁷ without, however, disregarding customary international law. The doctrine thus represents an embodiment of a consistent and uniform continental position rejecting the imposition of colonial treaties – dispositive or otherwise – without disregard though for customary international

law.⁸⁸ The government of Tanganyika then made its position clear, in identical notes addressed to the governments of Britain, Egypt, and the Sudan on 4 July 1964, on the 1929 Agreements in the following terms:

The Government of Tanganyika has come to the conclusion that the provisions of the 1929 Agreement purporting to apply to the countries 'under British Administration' are not binding on Tanganyika. At the same time, however, and recognizing the importance of the waters of the Nile that have their source in Lake Victoria to the Government and peoples of all the riparian states, the Government of Tanganyika is willing to enter into discussions with other interested Governments at the appropriate time, with a view to formulating and agreeing on measures for the regulation and division of the waters in a manner that is just and equitable to all riparian states and of the greatest benefits to all their peoples.⁸⁹

Uganda and Kenya followed Tanganyika in rejecting the agreement as not binding upon them on the same grounds.⁹⁰ Even Sudan, which acquired an annual share of 4 billion cubic metres, did not hesitate to challenge the lopsided 22:1 allocation ratio the agreement ordained and rejected it in 1958, only two years after independence.⁹¹ The agreement had

⁸⁸ The doctrine was adopted by many independent countries in African and beyond. See Mekonnen, *supra* note 71, at 136, 139–141; F.C. Okoye, *International Law and the New African States* (1972), at 64–66.

⁸⁹ Quoted in Okidi, *supra* note 15, at 421.

⁹⁰ S. McCaffrey, *The Law of International Watercourses: Non-Navigational Uses* (2001), at 245–246.

⁹¹ Brunnee and Toope, *supra* note 8, at 167. Muluwa, 'Succession to Treaties and International Fluvial Law in Africa: the Niger Regime', 33 *Netherlands Int'l L Rev* (1986) 359, states that Sudan formally repudiated the agreement in 1958.

⁸⁵ Art. 16.

⁸⁶ P. Malanczuk (ed.), *Akehurst's Modern Introduction to International Law* (7th edn, 1997), at 165.

⁸⁷ Mekonnen, *supra* note 71, at 123.

thus long been reduced to a thing of the past for Egypt and Sudan and, *a fortiori*, for the former British colonies of Kenya, Tanzania, and Uganda as well, 'as it was superseded by the 1959 Agreement'.⁹²

B The 1959 Nile Waters Agreement

The Agreement for the Full Utilization of the Nile Waters⁹³ was signed at Cairo on 8 November 1959 by Egypt and Sudan to realize, through joint projects, the full control and utilization 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'⁹⁴ by the two republics. This objective to fully control and exclusively utilize the Nile waters has been rightly described as 'patently anomalous'.⁹⁵ The anomaly lies in the fact that 'while it is purely bilateral, it seeks to apportion the entire flow of the Nile to Egypt and Sudan, excluding the interests of any other riparian, notably Ethiopia'.⁹⁶ It is indeed an utterly iniquitous agreement 'contingent upon zero water use by upstream riparians'.⁹⁷

The agreement made possible the launching of Nile Control Projects – the Sudd el Ali and the Roseires dams to be built in Egypt and Sudan, respectively – which would increase the flow of the Nile.⁹⁸ It also reaffirmed the 'acquired rights' of the two parties measured in annual volumetric terms at 48 and 4 billion cubic metres respectively.⁹⁹ This volume of 'acquired rights' was thus deducted from the total annual flow, and the net benefit, after a further deduction of 10 billion cubic metres as a loss of over-year storage, of 22 billion cubic metres to be obtained from the Sudd el Ali reservoir was allocated to Egypt and Sudan, which received 7.5 and 14.5 billion cubic metres respectively.¹⁰⁰

Though lauded as the first ever treaty concluded between two independent riparians which 'ushered in a new era in the history of the Nile basin',¹⁰¹ the agreement is, in substance, not much different from previous colonial era treaties, as its main thrust is to sanction 'a monopoly on the waters of the Nile by Egypt and the Sudan'.¹⁰² The viability of this monopoly though is without any legal foundation, as the agreement on which it is anchored is a typical bilateral agreement subject to the *pacta tertiis nec nocent nec prosunt* rule of treaty law¹⁰³ which, therefore, has no binding force on the other riparians.¹⁰⁴ In view of the fact that neither the 1929

⁹² Mageed, 'The Nile Basin: Lessons from the Past', in A.K. Biswas (ed.), *International Waters of the Middle East: From Euphrates – Tigris to Nile* (1994), at 179.

⁹³ See the text at: <http://ocid.nacse.org/qml/research/tfdd/toTFDDdocs/110ENG.pdf>.

⁹⁴ *Ibid.*, preamble.

⁹⁵ Okidi, *supra* note 15, at 429.

⁹⁶ Brunnee and Toope, *supra* note 8, at 125–126.

⁹⁷ Waterbury and Whittington, 'Playing Chicken on the Nile? The Implications of Micro-dam Development in the Ethiopian Highlands and Egypt's New Valley Project', 22 *Natural Resources Forum* (1998) 157.

⁹⁸ 1959 Agreement, Art. 2(1) and (2).

⁹⁹ *Ibid.*, Art. 1.

¹⁰⁰ *Ibid.*, Art. 2(4).

¹⁰¹ Okidi, *supra* note 15, at 429.

¹⁰² Tafesse, *supra* note 4, at 77.

¹⁰³ Vienna Convention on the Law of Treaties, done at Vienna on 23 May 1969, entered into force on 27 Jan. 1980, 1155 UNTS 331, Arts 34, 35.

¹⁰⁴ See the official Ethiopian response in: *Aide memoir* of 23 Sept. 1957, excerpted in M. Whiteman, *Digest of International Law* (1964), iii, at 1011–1012.

nor, *a fortiori*, the 1959 agreement has any binding effect on the other Nile riparians, the unwarranted interpolation of the newfangled concept of ‘water security’ into the CFA under the professed justification of circumventing the phony hurdle of ‘existing treaties’ is, thus, quite sophomoric, if not utterly nonsensical.

7 Water Security: Conduit for Constructive Ambiguity?

The justification that the introduction of ‘water security’ would infuse a measure of ‘constructive ambiguity’ into the negotiations, which would, in turn, help bring the divergent riparian positions into a compromise, is questionable in many respects. To begin with, the very proposition that an almost intractable problem pertaining to a vital scarce resource would have a better chance of being resolved if the negotiations were conducted in an atmosphere of ‘constructive ambiguity’ is, indeed, anomalous.

It has been maintained that the use of ‘constructive ambiguity’, which is widely attributed to the field of International Relations, ‘can defuse many controversies over the appropriation of shared natural resources under power-imbalanced conditions’.¹⁰⁵ Besides its alleged ability to resolve conflicting issues and ‘to overcome any potential impasse in negotiations’,¹⁰⁶ ‘constructive ambiguity’ has also been credited with such advantages as increasing flexibility in stiff negotiations, helping the accommodation of divergent riparian

interests, defusing conflicting negotiating positions, creating the opportunity for political compromise, and steering enduring negotiations towards a final agreement.¹⁰⁷

With regard to shared water resources and negotiations over their utilization, the central premise of the ‘constructive ambiguity’ argument is the alleged normative ambiguity inherent in international water law, including the 1997 UN Watercourses Convention, ‘in its provisions concerning “equitable and reasonable utilization of the water resources”’.¹⁰⁸ It has been argued that ‘ambiguity is . . . commonly incorporated in agreements pertaining to natural resources, and water in particular’,¹⁰⁹ and the Watercourses Convention has, likewise, been described as an endorsement of ambiguity ‘of a “basket of Halloween Candy” nature . . . [which] provides something for everyone, enabling all sides to claim partial victory while not providing any tools for resolving competing claims’.¹¹⁰ Despite the undeniably tumultuous drafting history and the intense and at times sterile debate surrounding its two core principles,¹¹¹ the Convention, which

¹⁰⁷ Cascao, ‘Use of Ambiguity in Transboundary River Basins Negotiations: The Case of the Nile River Basin’, available at: www.inweb.gr/twm4/abs/CASCAO%20Ana.pdf (accessed on 20 Aug. 2009).

¹⁰⁸ *Ibid.*; Fischhandler, *supra* note 105, at 80.

¹⁰⁹ *Ibid.*

¹¹⁰ *Ibid.*

¹¹¹ The proposal for a convention on the subject was challenged as premature and unwarranted intervention into the business of the riparians. See ILC, Verbatim Record, *Yearbook of the International Law Commission* (1986), i. It took the ILC over two decades to complete the task and the Convention was adopted by the General Assembly (GA Res A/RES/51/229 of 21 May 1997). See text in 36 ILM (1997) 700.

¹⁰⁵ Fischhendler, ‘Ambiguity in Transboundary Environmental Dispute Resolution: The Israeli-Jordanian Water Agreement’, 45 *J Peace Research* (2008), DOI 1177/0022343307084925, at 81.

¹⁰⁶ *Ibid.*

embodies 'codification and progressive development of rules of international law regarding non-navigational uses of international watercourses',¹¹² has the necessary normative clarity which could rationally be expected of a framework convention¹¹³ and is by no means a 'Halloween Candy basket' of ambiguity.

One of the Convention's core principles – the principle of equitable and reasonable utilization – being a fundamental principle of international law governing the non-navigational uses of international watercourses,¹¹⁴ and one constituting 'the conceptual backbone of international water law'¹¹⁵ entitling every riparian country, 'within its territory, to a reasonable and equitable share in the beneficial uses of the waters of an international river',¹¹⁶ the validity of the 'constructive ambiguity' proposition is questionable. Applying the basic principles of international water law enshrined in the Convention and translating the same into specific basin-wide agreements to ensure equitable and reasonable utilization is,

without doubt, a Herculean task.¹¹⁷ The huge difficulty involved though is no justification for an unwarranted characterization of international water law as one hallmarked with ambiguity.

Despite the difficulty inherent in the process of working out a reasonable and equitable reallocation agreement for such shared waters as fiercely vied for as those of the Nile, it is the existing international legal framework and its implementation – not the fog of 'constructive ambiguity' – which stands a much better chance of success. It should, thus, not be lost on Nile riparians that the Watercourses Convention 'provides a starting point for the negotiation of agreements relating to specific watercourses, and, in the absence of any applicable agreement, sets basic parameters governing the conduct of states riparian to those watercourses'.¹¹⁸

The particular hydro-political and legal reality prevalent in the Nile basin poses an even stronger challenge to the alleged ability of 'constructive ambiguity' to bring divergent riparian positions into a compromise. The conceptual capsule of 'water security' through which the 'constructive ambiguity' laxative is infused to ease up and bring to a positive closure the deadlocked CFA negotiations is, hence, a cloak, the latest in a series of shenanigans the true purport of which is

¹¹² UN Watercourses Convention, Preamble, at para. 3.

¹¹³ It 'identifies basic principles on which the parties can agree regardless of the adoption of further agreements covering specific watercourses'; and 'provides a flexible basis for the development of institutions and the harmonization of laws and policy for each regional watercourse': P.W. Birnie and A.E. Boyle, *International Law and the Environment* (2nd edn, 2002), at 329.

¹¹⁴ *Ibid.*, at 303; McCaffrey, *supra* note 90, at 325, 345.

¹¹⁵ Nollkaemper, 'The Contribution of the International Law Commission to International Water Law: Does it Reverse the Flight from Substance?', 27 *Netherlands Yrbk Int'l L* (1996) 44.

¹¹⁶ Caponera, 'The Legal Status of the Shatt-al-Arab (Tigris & Euphrates) River Basin', 45 *Austrian J Public and Int'l L* (1993) 156.

¹¹⁷ The two core principles (Arts 5 and 7) set the doctrinal parameters in which divergent riparian interests should be brought to a compromise by taking into account all the relevant factors (Art. 6) in a transparent and cooperative atmosphere (Arts 8, 9).

¹¹⁸ McCaffrey, 'The Contribution of the UN Convention on the Law of the Non-Navigational Uses of International Watercourses', 1 *Int'l J Global Environmental Issues* (2001) 261.

the legitimization and further perpetuation of the anachronistic and non-viable *status quo*.

The non-legal and indeterminate concept of 'water security' is found nowhere in international legal instruments dealing with international watercourses, notably, the 1966 Helsinki Rules and the 1997 UN Watercourses Convention. Broadly understood to mean '[h]arnessing the productive potential of water and limiting its destructive impact',¹¹⁹ the term 'water security' 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'.¹²⁰ Though the term essentially signifies the fair distribution of the variegated benefits of water as well as the risks related thereto, it has been defined in the CFA 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'.¹²¹

Defined thus, the achievement and sustenance of water security in the basin is a cornucopian illusion belied by the hydrologic environment of the river – 'a giant in terms of length, . . . a dwarf in terms of the amount of water it carries at the end of its course'.¹²² An important prerequisite for ensuring water security – a favourable 'hydrologic environment – the absolute level of water resources

availability, its inter- and intra-annual variability and its spatial distribution – which is a natural legacy that a society inherits'¹²³ is notably lacking in the Nile basin. Given its comparatively meagre annual discharge constituting only a mere 2 per cent of that of the Amazon, 15 per cent of that of the Mississippi, or 20 per cent of that of the Mekong,¹²⁴ to expect the already exhausted Nile to provide still more water for 'health, agriculture, livelihoods, production and environment' is, indeed, a cornucopian illusion the realization of which would require an equally illusory Nile 'swelled by the rains of Zeus, . . . born in paradise', and thus constituting 'an inexhaustible manna from heaven'.¹²⁵ In reality, the hegemonic hydro-political configuration prevalent in the basin¹²⁶ poses a formidable challenge to even a modest equitable reallocation of the Nile waters amongst all the riparians, let alone reliable access by all for health, agriculture, livelihoods, production, and environment.

The challenge is evident in the entrenched positions of Sudan and Egypt which are determined to perpetuate the *status quo* and reject any 'modification of their shares of the river per the 1929 and 1959 treaties'.¹²⁷ Hence, they

¹²³ Grey and Sadoff, *supra* note 119, at 548.

¹²⁴ Collins, *supra* note 6, at 11.

¹²⁵ Kerisel, *supra* note 3, at 155.

¹²⁶ It is 'a malign form of hydro-hegemony . . . maintained in disregard of the principles of international law': Woodhouse and Zeitoun, 'Hydro-hegemony and International Water Law: Grappling with the Gaps of Power and Law', *Water Policy 10 Supplement 2* (2008) 94.

¹²⁷ 'Ethiopia Says all Nile States Agreed on NBI, but not Sudan and Egypt', *Sudan Tribune*, 7 Aug. 2009, available at: www.sudantribune.com/spip.php?article32053 (accessed on 10 Aug. 2009).

¹¹⁹ Grey and Sadoff, 'Sink or Swim? Water Security for Growth and Development', 9 *Water Policy* (2007) 547.

¹²⁰ *Ibid.*, at 548.

¹²¹ Mohammed, *supra* note 46, at 11.

¹²² Kerisel, *supra* note 3, at 15.

construe 'water security' as a codeword for acknowledgement of the special privilege and veritable ownership they claim to have over the Nile waters. It is no surprise, therefore, that from the point of view of the basin's hydro-hegemon, 'negotiating a new Nile agreement is perceived as increasing Egypt's insecurity, rather than guaranteeing security',¹²⁸ and hence 'water security' is but a euphemism for the obscene claim for 'an explicit approval by other signatories of Egypt's historic right to 55.5 billion cubic metres of Nile Water and . . . a veto over any projects implemented upstream'.¹²⁹ The audacious Egyptian/Sudanese proposed amendment to Article 14(b) further sends an unambiguously clear message that should dissipate any lingering false hope for a reallocation of the Nile waters.

Far from being an impressive feat of ingenious exercise designed to usher in the panacea of 'constructive ambiguity' to circumvent the 'thorny issue of the status of existing treaties', the introduction of 'water security' into the CFA rather makes more sense as a disguised attempt to put into action the hegemonic compliance-producing mechanism of securitization.¹³⁰ If the stalled negotiations fail to overcome the impasse within the six-month period set during the July 2009 Nile-COM meeting,¹³¹ then

'Nile basin countries will refer the whole issue to higher authorities in order to reach a compromise regarding this sensitive matter',¹³² taking, in effect, the negotiations back to the stage they were in in June 2007.¹³³

Short of a miraculous formula acceptable to all the riparians the Negotiating Committee and the Nile Technical Advisory Committee might, with the assistance of international experts,¹³⁴ come up with, Nile riparians would still be left with the 'water security' conundrum to grapple with. The negotiation has thus been stuck in a blind alley and the likelihood of a breakthrough is very slim, indeed. The way out of the stalemate seems to be acceptance, by Egypt and Sudan, of draft Article 14 as formulated or acceptance, by the other riparians, of the Egyptian/Sudanese amendment. Whichever route the negotiations may take, the outcome is doomed to be disappointing as long as the destructively elastic and indeterminate concept of 'water security' is retained in the CFA.

Realization of the first alternative would surely constitute a resounding victory. But such victory will be a Pyrrhic one in terms of outcome as 'water security' will then have pushed resolution

¹²⁸ Mason, *supra* note 42, at 204.

¹²⁹ Leila, 'Wading through the Politics', *Al-Ahram Weekly On-line*, 9–15 July 2009, Issue No. 955, available at: weekly.ahram.org.eg/2009/955/eg2.htm (accessed on 27 July 2009).

¹³⁰ Zeitoun and Warner, 'Hydro-hegemony – a Framework for Analysis of Trans-boundary Water Conflicts', 8 *Water Policy* (2006) 435, at 448.

¹³¹ NBI News, *supra* note 52.

¹³² Kamal Ali Mohamed, Sudan's Minister of Water Resources and Irrigation, quoted in Leila, 'Water Matters: Ministers in Charge of Water Affairs from all 10 Nile Basin Countries agreed to disagree over how to allocate the most precious of commodities', *Al-Ahram Weekly On-line*, 30 July–5 Aug. 2009, Issue No. 958, available at: weekly.ahram.org.eg/2009/958/eg2.htm (accessed on 10 Aug. 2009).

¹³³ It was decided then to refer the outstanding issue to the Heads of State and Governments of the riparians for possible resolution.

¹³⁴ NBI News, *supra* note 52.

of the Nile waters question into further obscurity. Since accepting the Egyptian/Sudanese amendment would mean, to the other riparians, a voluntary forfeiture of their rights to the Nile waters, it cannot be considered a plausible scenario. Rejection of the proposed amendment and rejection, likewise, by Egypt and Sudan of draft Article 14 – by far the most probable outcome – though would inevitably bring the decade-long negotiations to a logical cul-de-sac.

8 Conclusion

Long identified as one of the potential flashpoints – a hotspot for water-related conflicts – the Nile basin still remains the only major basin lacking an inclusive, permanent legal and institutional framework for its utilization and management. Given the enduring legacy of the colonial past which left in its wake a patchwork of lopsided agreements enthusiastically endorsed and reinforced by the lower riparians, the launching of the NBI was, indeed, an unprecedented breakthrough. The adoption of the Shared Vision marked a significant departure in the hydro-political history of the basin from, on the theoretical level, one of hegemonic control to shared control. Ten years later though, this significant departure has yet to get past the phase of rhetorical commitment and translate into a concrete legal and institutional framework. The introduction of the non-legal, disruptive concept of ‘water security’ is, in this regard, a major setback to what would otherwise have been a courageous step towards the realization of the Shared Vision.

The arguments proffered to justify the fateful interpolation of water security in the CFA are utterly specious and

unfounded. Likewise, the *status quo* has no legitimate basis and its perpetuation would only be a negation of the Shared Vision the realization of which hinges, of necessity, on its demise and substitution by a new treaty regime in tune with the principles of international water law. It should as well be noted that the introduction of ‘water security’ has effectively dislocated the Nile waters question outside the framework of international law, return to which is a must, and the resultant reallocation of the Nile waters – hitherto almost exclusively used by Egypt and Sudan – unavoidable.

Reduced share of the Nile waters is surely a bitter pill Egypt will for certain be unwilling to swallow easily. The truth though must be told forcefully, that it is time for Egyptians to let go of the wrong belief ‘that their country will have the right forever, *ad vitam aeternam*, to all of the water carried by the Nile, as at the time of the Pharaohs’.¹³⁵ The impoverished inhabitants of the basin count on the waters of the Nile to slake their thirst and better their lots somehow. Whether their governments would have the will and zeal to make this dream a reality is an open question; their unassailable right to a share of the Nile waters though is as strong as ever. It is thus time to echo, with renewed vigour and indignation, Kerisel’s query that if, indeed, ‘[t]he Pharaoh is the king of the waters [and] it is he who gives water to the land, [as] we are told by the texts, [then] why should this right be refused to the upriver populations?’¹³⁶

¹³⁵ Kerisel, *supra* note 3, at 139.

¹³⁶ *Ibid.*, at 153.