

The Nile Basin Cooperative Framework Agreement: The Beginning of the End of Egyptian Hydro-Political Hegemony

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TABLE OF CONTENTS

| | |
|---|-----|
| I. Introduction | 284 |
| II. The Stakes for the Riparian States | 285 |
| III. Hydro-Politics and Egyptian Coercive Hegemony..... | 288 |
| IV. Legal Regime Governing the Nile Watercourse: An Incomplete Consolidation of Egyptian Hegemony..... | 295 |
| V. Nile Basin Initiative Cooperative Framework Agreement: Testing Egyptian Hegemony..... | 301 |
| VI. Conclusions..... | 312 |

THE NILE BASIN COOPERATIVE FRAMEWORK AGREEMENT

I. INTRODUCTION

Egypt has depended upon the waters of the Nile from times of antiquity. It is in acknowledgement of this fact that Herodotus described Egypt as the gift of the Nile.¹ Because of its dependence on the Nile, Egypt's leaders, using Herodotus' description as their hegemonic narrative, have always been industrious in ensuring a monopoly over the waters of the Nile. However in spite of Egypt's hegemony over the Nile waters, upstream states are increasingly challenging Egypt's monopoly. Beginning near the end of colonialism in Africa, Nile basin states have been slowly but surely mounting a challenge to Egyptian domination over the Nile. It seems as if the upper riparian states, from whose mountains the Nile gushes downstream, are asking Herodotus in retrospect: whose gift is the Nile anyway?

In May 2010, upper riparian states reinforced this statement by opening the Nile Basin Cooperative Framework Agreement for signature. This agreement claims to announce the rights of upper riparian states to use the waters of the Nile. This article argues that the upper riparian states have introduced this international "legal" instrument not for its legal value but its political and counter-hegemonic value. The treaty is best explained as a first step to counter and undo the hegemonic actions of Egypt that have been instigated since the beginning of the nineteenth century.

The first part of the article introduces the importance of the Nile to both the upper and lower riparian states and indicates the reasons why the Nile will become a serious bone of contention between the states of the Nile watercourse. This part underlines the fact that the Nile waters will increasingly be contested as the volume and quality of the Nile decreases with population growth and environmental degradation. The second part presents the hydro-politics underlying the relations between the lower and upper riparian states and underscores the hegemonic role played by the

¹ JEAN KERISEL, *THE NILE AND ITS MASTERS: PAST, PRESENT, FUTURE SOURCE OF HOPE AND ANGER* 34–36 (Philip Cockle, trans., A. A. Balkema Pub. 2001) (attributing the conclusion to Herodotus, the ancient Greek historian); Herodotus is also quoted as saying that "Egypt is the Nile, and the Nile is Egypt." Paul F. Gemmill, *Egypt Is the Nile*, 4 *ECON. GEOGRAPHY* 295, 295 (1928). See also Fekri A. Hassan, *The Dynamics of a Riverine Civilization: A Geoarchaeological Perspective on the Nile Valley, Egypt*, 29 *WORLD ARCHAEOLOGY, RIVERINE ARCHAEOLOGY* 51 (1997).

United Kingdom and later independent Egypt. The third part presents how the hydro-hegemony of the Nile have tried to use international law to consolidate their hegemony and shows how this has been challenged by post-colonial Nile basin states. The fourth part deals with how the upper riparian states are currently attempting to use the Nile Basin Cooperative Framework Agreement not only to resist Egypt but to turn the hegemonic tide. The article argues that the Nile Basin Cooperative Framework Agreement will not have any legal value as Egypt and the Sudans will not sign the document anytime soon. It concludes that the upper riparian states have gone ahead with signing of the treaty despite its legal inconsequentiality, because they are aware of its non-legal counter-hegemonic impact.

II. THE STAKES FOR THE RIPARIAN STATES

The Nile watercourse, considered to be the longest in the world, crosses ten states whose combined populations constitute 40% of the entire population of Africa.² The main tributaries of the Nile River are the Blue Nile and the White Nile. The source of the Blue Nile, which constitutes 86% of the volume of the Nile, is Ethiopia and to some degree Eritrea, while the contribution of the White Nile is shared amongst Tanzania, Rwanda, Burundi, Kenya, Uganda and the Democratic Republic of Congo.³ The two lower riparian states, Egypt and Sudan, are traversed by the Nile that joins in Khartoum. The states through which the Nile passes need the Nile primarily for irrigation and, in varying degrees, for hydroelectric power generation, domestic use, transportation, industrial consumption.⁴

The Nile basin is characterized by high population growth, poverty, food insecurity, environmental degradation, water scarcity and on

² TESFAYE TAFESSE, *THE NILE QUESTION: HYDROPOLITICS, LEGAL WRANGLING, MODUS VIVENDI AND PERSPECTIVE 2* (2001).

³ Ashok Swain, *Ethiopia, the Sudan, and Egypt: The Nile River Dispute*, 35 J. MOD. AFR. STUD. 675, 675 (1997); see also John Waterbury, *Is the Status Quo in the Nile Basin Viable?*, 4 BROWN J. WORLD AFF. 287, 288 (1997) (claiming that 85% of the river flows from Ethiopia).

⁴ ABIODUN ALAO, *NATURAL RESOURCES AND CONFLICT IN AFRICA: THE TRAGEDY OF ENDOWMENT* 55 (2007).

THE NILE BASIN COOPERATIVE FRAMEWORK AGREEMENT

top of it all, the potential for conflict over water.⁵ The demand for fresh water in Nile basin riparian states is likely to rise while the supply will decrease in the future.⁶ As the population of the Nile basin continues to expand, water scarcity will be at the forefront of the region's problems.⁷ Despite the enormous potential of the Nile, massive poverty and food insecurity has been an enduring feature of the Nile basin. Severe environmental degradation is also expected to diminish the future use of the Nile.⁸ The region's developmental potential is further reduced by the fact that it has one of the lowest accesses to energy.⁹ By 2025, it is expected that almost all countries in the Nile basin will experience water stress or scarcity.¹⁰

Most worrying of all, it is not uncommon for experts and scholars to identify the Nile basin as one of hot-spots where violent conflict could break out over the shared water resources because of various hydro-political intricacies that it involves.¹¹ The intricacies that may lead to conflict include: an alarming population growth, the injudicious and incomprehensive legal relations, inequitable use of water resources, interstate relations that are marred with suspicion and misunderstanding,

⁵ Niveen Tadros, *Shrinking Water Resources: The National Security Issue of this Century*, 17 NW. J. INT'L L. & BUS. 1091, 1092 (1996–1997).

⁶ Russell Smith, *Africa's Potential Water Wars*, BBC NEWS, Nov. 15, 1999, <http://news.bbc.co.uk/2/hi/africa/454926.stm>.

⁷ Henrike Peichert, *The Nile Basin Initiative: A Catalyst for Cooperation*, in SECURITY AND ENVIRONMENT IN THE MEDITERRANEAN: CONCEPTUALIZING SECURITY AND ENVIRONMENTAL CONFLICTS 763–64, (Hans Gunter Brauch et. al. eds., 2003).

⁸ Christina M. Carroll, *Past and Future Legal Framework of the Nile River Basin*, 12 GEO. INT'L ENVTL. L. REV. 269, 270 (1999); Peter H. Gleick, *Water and Conflict: Fresh Water Resources and International Security*, 18 INT'L SECURITY 79, 97 (1993).

⁹ Mohamed Abdel Aty Sayed, *Eastern Nile Planning Model, Integration with IDEN Projects To Deal with Climate Change Uncertainty and Flooding Risk*, 1 NILE BASIN WATER ENG'G SCI. MAG. 86, 86 (2008).

¹⁰ ASHOK SWAIN, *MANAGING WATER CONFLICT, ASIA, AFRICA AND MIDDLE EAST* 93 (2004); KEVIN WATKINS, *Beyond Scarcity: Power, Poverty and the Global Water Crisis*, HUMAN DEVELOPMENT REPORT 135–36 (2006).

¹¹ KINFE ABRAHAM, *NILE DILEMMAS: HYDROPOLITICS AND POTENTIAL CONFLICT FLASHPOINTS* 69–71 (2004). *See also* ARIEL DINAR ET. AL., *BRIDGES OVER WATER: UNDERSTANDING TRANSBOUNDARY WATER CONFLICT, NEGOTIATION AND COOPERATION* 1–10 (2007).

emphasis on military solution on the part of some riparian states and unilateral appropriation of the Nile waters.¹²

The lower riparian states, Egypt and Sudan, have always depended on the waters of the Nile for their life. Nile waters constitute 96% of Egypt's renewable water,¹³ while 85% of both North and South Sudan's population is in some way dependent on the river.¹⁴ Irrigation and hydroelectric power production are the major values of the Nile for the lower riparian states.¹⁵ Agriculture, more than any other use, constitutes 80% of the lower riparian state's use of Nile waters.¹⁶ The high demand and indispensability of Nile waters to the lower riparian states could be explained by the fact that these states are located in the Sahara desert and its immediate outskirts, making it impossible for them to survive without the water provided by the Nile. Egypt has exploited the Nile waters better and longer than all the other riparian states combined. The Nile is so

¹² Mohammed Abdo, *The Nile Question: The Accords on the Water of the Nile and their Implication on Cooperative Schemes in the Basin*, 9 PERCEPTIONS J. INT'L AFF. 45 (2004).

¹³ Magdy Hefny and Salah El-Din Amer, *Egypt and the Nile Basin*, 67 AQUAT. SCI. 42, 42 (2005). Note that about 98% of the Egyptian population also lives in the valley of the Nile. KINFE ABRAHAM., NILE OPPORTUNITIES: AVENUES TOWARD A WIN-WIN DEAL 18 (2004). One hundred percent of crop irrigation depends on the Nile. Jan Hultin, *The Nile, Source of Life Source of Conflict*, in HYDROPOLITICS: CONFLICT OVER WATER AS A DEVELOPMENT CONSTRAINT 32 (Leif Ohlsson Ed., 1995). Also, 95% of Egypt's population live within twelve miles of the Nile river. Kristin Wiebe, *The Nile River: Potential for Conflict and Cooperation in the Face of Water Degradation*, 41 NAT. RESOURCES J. 731, 732 (2001).

¹⁴ Osman El-Tom Hamad and Atta El-Battahani, *Sudan and the Nile Basin*, 67 AQUAT. SCI. 28, 28 (2005).

¹⁵ SIMON A. MASON, FROM CONFLICT TO COOPERATION IN THE NILE BASIN, 138, 140, 156-57 (2003); Peter Chesworth, *History of Water Use in the Sudan and Egypt*, in THE NILE: SHARING A SCARCE RESOURCE: A HISTORICAL AND TECHNICAL REVIEW OF WATER MANAGEMENT AND OF ECONOMICAL AND LEGAL ISSUES 65-77 (Paul Philip Howell & John Anthony Allan eds., 1994); M. A. Abu-Zeid & F. Z. El-Shibini, *Egypt's High Aswan Dam*, 13 WATER RES. DEV. 209 (1997).

¹⁶ Fiona Flintan and Imeru Tamrat, *Spilling Blood over Water? The Case of Ethiopia, Scarcity and Surfeit* in SCARCITY AND SURFEIT: THE ECOLOGY OF AFRICA'S CONFLICTS 243, 296 (Jeremy Lind & Kathryn Sturman, eds., 2002), available at <http://www.ucc.ie/famine/GCD/Chapter6.pdf#%3B>.

THE NILE BASIN COOPERATIVE FRAMEWORK AGREEMENT

important to Egypt that it is portrayed not only as an economic lifeline but is also considered a security issue of the highest order.¹⁷

While the lower riparian states have flourished from the benefits derived from the Nile the upper riparian states have not been so fortunate. Since the utilization of a river in the upper catchment area requires some level of technical and financial strength, these states have so far been unable to tap Nile waters to their benefit. Furthermore, these states have been unable to acquire these capabilities mainly because of internal political instability and/or civil strife, and the lack of technical, financial and institutional capabilities.¹⁸ Ethiopia, for example, has been able to utilize only 0.65%¹⁹ of the water resources of the Nile basin even though the Nile constitutes 68% of the country's available water resources.²⁰ The upper White Nile riparian states, namely Kenya, Uganda, Tanzania, Rwanda, Burundi and the Democratic Republic of Congo, together use less than 0.05 cubic kilometers of the waters of the Nile.²¹ Compared to the 55.5 cubic kilometers used by Egypt one could say that these states haven't even begun using the Nile.²²

III. HYDRO-POLITICS AND EGYPTIAN COERCIVE HEGEMONY

The hydro-politics of the Nile is dominated by Egyptian hegemony played out in the spirit of controlling and owning the Nile rather than that

¹⁷ GEBRE TSADIK DEGEFU, *THE NILE: HISTORICAL, LEGAL, AND DEVELOPMENTAL PERSPECTIVES*, 150 (2003).

¹⁸ Yoseph Endeshaw, *Review of the Validity or Continuous Application of the Nile Water Treaties*, Paper Submitted at the National Water Forum, ECA, 3–4 (October 25–27, 2004); Mason, *supra* note 15, at 160.

¹⁹ The .65 billion m³ is less than 1% of the total volume of the Nile. TAFESSE, *supra* note 2, at 44.

²⁰ Yacob Arsano and Imeru Tamrat, *Ethiopia and the Eastern Nile Basin*, 67 *AQUAT. SCI.* 15, 16 (2005).

²¹ TAFESSE, *supra* note 2, at 50.

²² Fasil Amdetsion, *Scrutinizing the Scorpion Problematique: Arguments in favor of the Continued Relevance of International Law and a Multidisciplinary Approach to Resolving the Nile Dispute*, 44 *TEX. INT'L L.J.* 1, 9 (2008). *See also id.* at 35 (comparing the irrigation potential and the actual irrigated land of the upper and lower riparian states).

of regulation or cooperation.²³ Due to Egypt's monopoly over the Nile and the fact that Ethiopia is the most voluminous contributor to the waters of the Nile, the *realpolitik* of the river has mostly been played-out between the two states and to some extent with Sudan.²⁴ A brief look at the political relations of the three shall suffice to showcase the political atmosphere from which the Nile basin states are coming out. The hegemonic relation between Egypt and the other upper riparian states is reflected upon in relation of the law governing the Nile watercourse.

Although Ethiopia and Egypt do not share a border, the ecological relation created by the Nile has, for better or worse, intricately tied the two countries. This relationship was recognized hundreds if not thousands of years ago. Deep distrust, suspicion, misunderstanding and even political and military confrontations have characterized their relations throughout history.²⁵

The seriousness of the mistrust of these states is reflected in that not only is the Nile an object of nationalistic sentiment in these countries, but it has also entered the mythological beliefs of their populations and political leaders. Abundant literature exists on Ethiopian folk-tales relating to the possibility of turning Egypt into a desert by cutting off the waters of the Nile. Ethiopian Emperors have never been timid when they threatened to cut-off the Nile if their demands were not met.²⁶ Those on the other end of these threats did not for a moment doubt that the Ethiopian Emperors were able to turn off the taps of the Nile.²⁷ The

²³ Jutta Brunnee & Stephen J. Toope, *The Nile Basin Regime: A Role of Law?* in WATER RESOURCES PERSPECTIVES: EVALUATION, MANAGEMENT AND POLICY 98, 99 (A.S. Alsharhan & W.W. Wood eds., 2003); Biong Kuol Deng, *Cooperation between Egypt and Sudan over the Nile River Waters: The Challenges of Duality*, 11 AFR. SOC. REV. 41, 41–42 (2007).

²⁴ Waterbury, *supra* note 3, at 293–98.

²⁵ See ABRAHAM, *supra* note 11, at 69–71.

²⁶ For example, Ethiopian Emperors would threaten to interrupt the flow of the Nile to Egypt when Egyptian leaders prevented the patriarch of the Ethiopian Coptic Church from leaving Egypt, or when news reached the Ethiopian Emperor that Egyptian Copts were being persecuted by the Egyptian Muslim state. James McCann, *Ethiopia, Britain, and Negotiations for the Lake Tana Dam, 1922–1935*, 14 INT'L J. AFR. HIST. STUD. 667, 670 (1981); Haggai Erlich, *Identity and Church: Ethiopian - Egyptian Dialogue, 1924–59*, INT'L J. MIDDLE E. STUD. 23, 25, 32 (2000).

²⁷ McCann, *supra* note 26.

THE NILE BASIN COOPERATIVE FRAMEWORK AGREEMENT

threats that Richard Pankhurst scorns as "no more than roars of a paper lion," were so real to the Egyptian Kings, that they were willing to send gifts to Ethiopian monarchs and kings in order to ensure that the flow of Nile was not obstructed.²⁸

Rulers of Egypt have shown anxiety regarding Ethiopia's control over the Nile in modern times as well, even though Ethiopia lacked the capacity to affect their interest. Britain, the former colonial power of Egypt, was no exception. The fear the Ethiopia could control the waters of the Nile played into the British hegemonic calculus. "Since upon its mountains fell the abundant rains which furnish the very life of Egypt and the eastern [Sudan]," said the British policy-maker Lord Salisbury in 1889, "it is possible for the state in possession of these mountains to flood the Valley of the Nile or make of it a blistering desert at will."²⁹

This anxiety has shaped the policy of both Egypt in the nineteenth century and that of Britain in the early twentieth century. Before its forces were defeated in the battles of Gura in 1832, and the battle of Gundat in 1882,³⁰ Egypt had tried to encircle the Ethiopian highlands by occupying surrounding states.³¹ By this time, Egypt had already conquered the Sudan once with Turkish support and would do so a second time in the 1890s with British support.³² These same motives also prompted Britain in the early 1890s to support the Italian invasion of Ethiopia.³³

²⁸ TAFESSE, *supra* note 2, at 60; HAGGAI ERLICH, *THE CROSS AND THE RIVER: ETHIOPIA, EGYPT, AND THE NILE* 46–47 (2002).

²⁹ Harold G. Marcus, *Ethio-British Negotiations Concerning the Western Border with Sudan, 1896–1902*, 4 J. AFR. HIST. 81, 81 (1963). The anxiety of the British becomes a bit more understandable if one considered the possibility whereby a colonial power 'obstructs' the Nile either by colonizing the country or by acquiring the consent of the Ethiopian king. See Joseph W. Dellapenna, *Treaties as Instruments for Managing Internationally-Shared Water Resources: Restricted Sovereignty vs. Community of Property*, 26 CASE W. RES. J. INT'L L. 27, 48 (stating that Britain's colonial policy in East Africa was dictated by its apparent need to control the whole Nile basin).

³⁰ Flintan and Tamrat, *supra* note 16, at 299; BAHRU ZEWDE, *A HISTORY OF MODERN ETHIOPIA, 1855–1991*, 52–55 (2001).

³¹ Egypt had occupied Kasala, Metema, Masawa, Kunama and Harar. Daniel Kendie, *Egypt and the Hydro- Politics of the Blue Nile River*, 6 NE. AFR. STUD. 141, 145 (1999), available at http://muse.jhu.edu/journals/northeast_african_studies/v006/6.1kendie.pdf.

³² *Id.* at 145–46; see also MOHAMED H. FADLALLA, *SHORT HISTORY OF SUDAN* 23–26, 30–31 (2004).

³³ Harold G. Marcus, *supra* note 29, at 89. See also Kendie, *supra* note 31, at 147.

The hegemonic policy of Egypt had not changed by twentieth century. A Swiss affiliate to King Khedive Ismail of Egypt, Werner Munzinger, had once remarked that; "Ethiopia . . . is a danger for Egypt. Egypt must either take over Ethiopia and Islamize it, or retain it in anarchy and misery."³⁴ Egypt had attempted the first in 1832 and 1882 but failed. In today's world, an invasion is unlikely since the use of force in international relations is strongly condemned.³⁵ Therefore, the second of the options offered by Munzinger seems to have been followed.

Egypt seized every opportunity to raise havoc in Ethiopia. This is evidenced by Egypt's involvement in major political disturbances in Ethiopia and the Horn of Africa. The Eritrean liberation movement, the war with Somalia, the Ethio-Eritrean conflict and the current threat by the Islamist Al-Shebab movement have all been fanned by Egyptian support.³⁶ Although much less notable, Ethiopia has had a reciprocal policy against Egypt's interests. For instance, Ethiopia is known to have supported to the Sudan People's Liberation Army ("SPLA") in its armed struggle to secede from the Arab-North.³⁷ Sudan has returned the favor by acting as a safe haven for whichever liberation front arose in Ethiopia.³⁸ Although relations between Sudan and Egypt have been smoother to the extent a "big-brother/small-brother relationship" persisted, there have been

³⁴ Kendie, *supra* note 31, at 145.

³⁵ Except for the provision of self-defense and collective security through the Security Council, the UN Charter prohibits the use of force in foreign relations. *See generally* Mary Ellen O'Connell, *Preserving the Peace: The Continuing Ban on War Between States*, 38 CAL. W. INT'L L.J. 41, *passim* (2007).

³⁶ Kendie, *supra* note 31, at 153–62; TAFESSE, *supra* note 2, at 64; Peter Kagwanja, *Calming the Waters: The East African Community and Conflict over the Nile Resources*, 1 J. E. AFR. STUD. 321, 325 (2007) (describing how Egypt supported destabilizing forces in Eastern Africa and how Kenya sided with Ethiopia to the extent that it even intercepted and forced Somalia bound Egyptian military transport aircraft to land in Kenya); *Nile River Politics: Who Receives Water?*, GLOBAL POL'Y F., Aug. 10, 2000, <http://www.globalpolicy.org/component/content/article/198-natural-resources/40151.html>.

³⁷ Flintan and Tamrat, *supra* note 16, at 302; GREG SHAPLAND, RIVERS OF DISCORD: INTERNATIONAL WATER DISPUTES IN THE MIDDLE EAST 81 (1997).

³⁸ SHAPLAND, *supra* note 37, at 81.

THE NILE BASIN COOPERATIVE FRAMEWORK AGREEMENT

instances in which they have aimed missiles and air strikes against each other because of conflicts regarding the use of the Nile.³⁹

Whereas Egypt's involvement in “retaining Ethiopia in anarchy and misery” is the enduring aspect of its policy, Egypt has been particularly sensitive and easily aggravated whenever the usage of Nile water was demanded from upstream countries. Bullock and Darwish have written that,

[t]he question is how far Egypt would go to stop any . . . projects [by upstream riparians] being translated into fact, and to that there is no clear answer. The foreign ministry naturally says that Egypt would use peaceful, diplomatic means to try to prevent anything happening to affect the flow of the Nile. Egyptian military men say they have no faith in diplomacy or international pressure, and believe an early show of force, at least, would be needed to back up the representation of their government.⁴⁰

At different occasions Egyptian top officials affirmed their strong will to intervene with force to any disruption of the status quo. In 1979 Anwar Sadat, then President of Egypt, said immediately after signing the peace treaty with Israel that “the only matter that could take Egypt to war again is water.”⁴¹ At another occasion he lashed out, “Any action that

³⁹ Jutta Brunnée and Stephen J. Toope, *The Changing Nile Basin Regime: Does Law Matter?* 43 HARV. INT'L L.J. 105, 106 (2002) (indicating that the two states had come to high states of military alertness and preparation as recently as in 1991); MASON, *supra* note 15, at 178–81 (noting that their relation is mainly defined by a big-brother/small-brother relationship, although Egypt has supported opposition leaders even if it had a friendly regime in Khartoum); Adams Oloo, *The Quest for Cooperation in the Nile Water Conflicts: The Case of Eritrea*, 11 AFR. SOC. REV. 95, 101–02 (2007) (describing the relationship as senior and junior partners). *See also* Jacob Høigilt & Øystein H. Rolandsen, *Dilemmas and Inertia: Egypt's Foreign Policy and the Sudan's Uncertain Future*, Peace Research Inst. Oslo 5–11 (2010), <http://www.prio.no/sptrans/-641801136/Sudan-Referendum-and-Neighbouring-Countries-PRIO-Paper-2010.pdf> (briefly outlining the political history between the two countries and the interests of Egypt in Sudan).

⁴⁰ ABRAHAM, *supra* note 11, at 61.

⁴¹ Peter H. Gleick., *Water and conflict: Fresh Water Resources and International Security*, 18 INT'L SECURITY 79, 86 (1993).

would endanger the water of the Blue Nile will be faced with a firm reaction on the part of Egypt, even if that action should lead to war.”⁴² Boutros Boutros Gahali, when he was the Egyptian Foreign State Minister, confirmed the same conclusion when he said “the next war in our region will be over the water of the Nile, not politics.”⁴³

Though these statements may be interpreted more as political rhetoric than an actual intent to go to war, they certainly indicate the fact that Egypt is willing to securitize the issue of the Nile in order to assert its hydro-hegemony. It may also, however, be a warning sign to the possibility of interests in the Nile leading the region to water conflict or even to water war. Bullock and Darwish warn that:

Egypt has a deliberate policy of preparing for action in Africa, if that should be proved necessary, calculating quite coldly that, given the present situation in countries that might affect its interests, the cost of military intervention would be low enough to justify its use.

Nevertheless, Jean-Pierre Sandwidi and Alexander J. Stein argue that the likelihood of an outright war is very negligible. They factor in the geographical non-contiguity, military preponderance and alliance, the prevalence of democracy or lack thereof, economic interdependence and the existence of common international organizations in order to reach such an opinion.⁴⁴ This conclusion is supported by numerous theories that hold

⁴² Kendie, *supra* note 31, at 141.

⁴³ Michael T Klare, *The New Geography of Conflict*, 80 FOREIGN AFF. 49, 59 (May–June, 2001). The former Vice President of the World Bank Ismail Serageldin, who is an Egyptian national, was also quoted as saying, “[m]any of the wars in this century were about oil, but wars of the next century will be over water.” Barbara Crossette, *Severe Water Crisis Ahead for Poorest Nations in Next 2 Decades*, N.Y. TIMES, Aug. 10, 1995, available at <http://www.nytimes.com/1995/08/10/world/severe-water-crisis-ahead-for-poorest-nations-in-next-2-decades.html>.

⁴⁴ Jean-Pierre Sandwidi and Alexander J. Stein, Term Paper in the framework of the interdisciplinary course of the doctoral programme at the Center for Development Research (ZEF) at the University of Bonn, *Problems and Prospects in Utilizing International Water Resources: The Case of the Nile*, 27–29, (November 2003) available at

THE NILE BASIN COOPERATIVE FRAMEWORK AGREEMENT

that water may be a part of the reason that states go to war but is never the sole or even most important factor.⁴⁵

In the wake of the Nile Basin Initiative Cooperative Framework Agreement, the political situation is essentially the same. The upper and lower riparian states have become more moderate in articulating their interests, especially since the launching of the Nile Basin Initiative.⁴⁶ While the Nile Basin Initiative's first pillar, confidence building projects, are based on matters on which the states agree, its second pillar, Nile Basin Initiative Cooperative Framework Agreement has put the states in fierce diplomatic struggle for the last decade.⁴⁷ Even though the Nile Basin Initiative has meant that the riparian states are now talking about matters they deem important, the political situation has not been radically shifted. If anything, the fact that the upper riparian states have signed a treaty that the lower riparian states unyieldingly oppose shows that the

http://www.zef.de/fileadmin/downloads/forum/docprog/Termpapers/2003_1_Sandwidi_S tein.pdf.

⁴⁵ Wolf argues that the contemporary trend in history shows that it is unlikely states would go to war over water although water could lead to political tension between states. Aaron T. Wolf, *Conflict and Cooperation along International Water Ways*, 1 *Water Pol'y* 251, 251–65 (1998). Turton, on the other hand, argues that although the disputed territories over which states go to war may include water and although water resources may be a target in wars there is no evidence showing that wars are fought over water. Anthony Turton, *Water Wars in Southern Africa: Challenging Conventional Wisdom*, in *WATER WARS: ENDURING MYTH OR IMPENDING REALITY?* 54, 55 (Hussein Solomon & Anthony Turton eds., 2000).

⁴⁶ TAFESSE, *supra* note 2, at 101–18; Musa Mohammed Abseno, *The Concepts of Equitable Utilization, No Significant Harm and Benefit Sharing under the Nile River Basin Cooperative Framework Agreement: Some Highlights on Theory and Practice*, 20 *WATER L.* 86, 88 (2010).

⁴⁷ See generally, Salah El-Din Amer, et al., *Sustainable Development and International Cooperation in the Eastern Nile Basin*, 67 *AQUAT. SCI.* 3, 11 (2005); *About the NBI*, NILE BASIN INITIATIVE, 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 Sept. 1, 2011).

states are getting ready for a showdown.⁴⁸ Ethiopia's prime minister has, in his strongest statement yet, dared Egypt to invade the country.⁴⁹

IV. LEGAL REGIME GOVERNING THE NILE WATERCOURSE: AN INCOMPLETE CONSOLIDATION OF EGYPTIAN HEGEMONY

The political history of the Nile attests to the fact that state interests are directed towards hegemonic control and dominance rather than cooperation. This has led to a situation in which the relation of the parties, especially in the eyes of Egyptian politicians, is defined by a zero-sum game where any concession to one party is considered to be a loss.⁵⁰ The legal regime governing the Nile also reflects this situation. A quick survey of the treaties concerning the Nile will provide a good idea about how these treaties favored the hegemonic interests of Britain during the colonial era, and those of Egypt at present. The main aspirations of the Nile-related agreements were to prevent upstream riparian states from erecting dams and utilizing the waters of the Nile to allow Egypt to maintain undiminished flows to quench its thirst.⁵¹ However, we cannot

⁴⁸ In the last couple of years, Ethiopia has been accusing Egypt of trying to destabilize it by supporting different insurgencies and Islamist movements in Ethiopia and Somalia. William Davidson, *Ethiopia Says it has Evidence that Egypt Supported Rebel Movements*, BLOOMBERG, Nov. 25, 2010, available at <http://www.bloomberg.com/news/2010-11-25/ethiopia-says-it-has-evidence-that-egypt-supported-rebels.html>.

⁴⁹ "I am not worried that the Egyptians will suddenly invade Ethiopia. Nobody who has tried that has lived to tell the story. I don't think the Egyptians will be any different and I think they know that." *Ethiopia PM warns of Nile war*, ALJAZEERA, Nov. 24, 2010, available at <http://english.aljazeera.net/news/middleeast/2010/11/20101124152728280839.html>. See also Yohannes Gebresellsie, *Egypt's strange behavior vis-à-vis the river Nile*, REPORTER, Dec. 18, 2010, available at http://www.ethiopianreporter.com/pre-en/index.php?option=com_content&view=article&id=1547:egypts-strange-behavior-vis-a-vis-the-river-nile&catid=103:politics-and-law&Itemid=513.

⁵⁰ Alex Grzybowski, Stephen C. McCaffrey and Richard K. Paisley, *Beyond International Water Law: Successfully Negotiating Mutual Gains Agreements for International Watercourses*, 22 PAC. MCGEORGE GLOBAL BUS. & DEV. L.J. 139, 151–52 (2010).

⁵¹ Brunnee and Toope, *supra* note 23, at 122–25; Amdetsion, *supra* note 22, at 22–23; Dereje Zeleke Mekonnen, *The Nile Basin Cooperative Framework Agreement*

THE NILE BASIN COOPERATIVE FRAMEWORK AGREEMENT

deduce from this that a zero sum game will continuously be won by the lower riparian states since the existing legal regime reflects the power politics of colonial times and not that of today. The shift in power politics is clearly reflected by how the lower riparian states have pushed for and signed the Nile Basin Initiative Cooperative Framework Agreement putting Egypt and Sudan on the spotlight.

Among the agreements that were concluded regarding the Nile Basin, the 1959 Agreement on the Full Utilization of the Nile Water (“1959 Treaty”) between Egypt and Sudan purports to be the most comprehensive one.⁵² Although this treaty claims to be a transaction on the ‘full utilization’ of the Nile and apportions the whole of the Nile between two states, it is only a bilateral treaty between two states.⁵³ The rest of the riparian states were excluded from the negotiations and their interests were not taken into account; thus, almost no water was made available to them.⁵⁴ Because the treaty was made between the two lower-most riparian states, it obligates the two states and cannot bind the other eight.⁵⁵ The main agreements affecting the White Nile either make certain

Negotiations and the Adoption of a ‘Water Security’ Paradigm: Flight into Obscurity or a Logical Cul-De-Sac?, 21 EUR. J. INT’L L. 421, 431–32 (2010).

⁵² NURIT KLIOT, WATER RESOURCES AND CONFLICT IN THE MIDDLE EAST, 67–71 (1994); John Waterbury, *Between Unilateralism and Comprehensive Accords: Modest Steps toward Cooperation in International River Basins*, 13 INT’L J. OF WATER RES. DEV. 279, 283–85 (1997).

⁵³ KLIOT, *supra* note 52, at 70; see also DAHILON YASSIN MOHAMODA, NILE BASIN COOPERATION: A REVIEW OF THE LITERATURE 13 (2003).

⁵⁴ KLIOT, *supra* note 52, at 70–71; MOHAMODA, *supra* note 53, at 13; Mekonnen, *supra* note 51, at 435; C.A. Mumma Martinon, *Nile Basin Initiative: A Possibility of turning Conflicts into Opportunities*, in SHARED WATERS, SHARED OPPORTUNITIES: HYDROPOLITICS IN EAST AFRICA 57 (Bernard Calas & C. A. Mumma Martinon eds., 2010); a translation of the treaty can be found at <http://ocid.nacse.org/tfdd/tfdddcs/230ENG.pdf>.

⁵⁵ It looks as though there is no reason to believe that this treaty is an exception to the basic principle of international law of treaties that provides that states cannot bind third states that are not party to the agreement. See Art. 34 and 35 of the Vienna Convention on the Law of Treaties, (May 23, 1969), *available at* http://untreaty.un.org/ilc/texts/instruments/english/conventions/1_1_1969.pdf; Endeshaw, *supra* note 18, at 8. Both during the negotiation and at the conclusion of The 1959 Treaty, Ethiopia had rejected the validity of the 1959 Treaty. See Kendie, *supra* note 31, at 148.

that Egypt would not lose any volume of water that it would naturally obtain⁵⁶ or are intended to increase the quantity of water that Egypt normally receives.⁵⁷ The main agreements affecting the Blue Nile are primarily intended to prevent the obstruction of the Nile in the Ethiopian highlands in order to protect the flow to Egypt.⁵⁸

One of the most contentious issues concerning the legal regime applicable to the Nile is whether the agreements created during the colonial era are still valid. If valid, these agreements would affect all of the Nile riparian states. The problem with these treaties is that they apportion the waters of the Nile to the lower riparian states leaving the upper riparian states completely forgotten. Most of the watercourse states, therefore, reject the contemporary validity of these agreements and have expressed their intent not to honor them.⁵⁹ On the other hand, the lower riparian states contend the treaties are still valid and could not be violated by the other states unilaterally.⁶⁰

One of the legal arguments against these agreements is that the colonial circumstances under which the agreements were made has changed so fundamentally that they are not valid anymore. The doctrine of *rebus sic stantibus* which is embodied in customary international law and subsequently also in the Vienna Convention on the Law of Treaties provides that a state can terminate the application of a treaty if a

⁵⁶ The Agreement between Great Britain and the Independent State of the Congo (1906), the Exchange of Notes between Egypt and Great Britain (1929), see Endeshaw, *supra* note 18, at 6.

⁵⁷ The Agreements Regarding the Owen Falls Dam between Egypt and Great Britain (From 1949 to 1953) (this agreement also allows Uganda to produce hydroelectric power for its own consumption), see Endeshaw, *supra* note 18, at 6.

⁵⁸ These are the Protocol between Great Britain and Italy of 1891, the Treaty between Great Britain and Ethiopia (1902), the Agreement between Great Britain, France and Italy (1906) and the Exchange of Notes between the United Kingdom and Italy (1925). KLIOT, *supra* note 52, at 67–71.

⁵⁹ TAFESSE, *supra* note 2, at 81–82. See also P. Godfrey Okoth, *The Nile River Question and the Riparian States: Contextualising Uganda's Foreign Policy Interests*, 11 AFRICAN SOCIOLOGICAL REV. 81, 89 (2007); Korwa G. Adar, *Kenya's Foreign Policy and Geopolitical Interests: The Case of the Nile River Basin*, 11 AFRICAN SOCIOLOGICAL REV. 63, 69 (2007).

⁶⁰ TAFESSE, *supra* note 2, at 81–82.

THE NILE BASIN COOPERATIVE FRAMEWORK AGREEMENT

fundamental change of circumstances occurs.⁶¹ This fundamental change exists when the changed circumstances are those that make up the essential grounds on which the states consented to be obligated by the agreement and the change affects the remaining obligations of the parties in a radical way.⁶² The argument of the upper riparian states is that the only interest that justified the treaties at the time of their making was Britain's need to reign over the Nile set off by whatever Britain offered other colonial powers in return.⁶³ Therefore, once the colonizers are gone, so too are the interests that they represented.⁶⁴

The position of the upper riparian states was put forward by a statement of the government of the newly independent Tanganyika, today known as the Nyerere Doctrine or the *tabula rasa* theory, and states that “Former colonial countries had no role in the formulation and conclusion of treaties done in the colonial era, and therefore they must not be assumed to automatically succeed to those treaties.”⁶⁵ The upper riparian states have adopted this concept, effectively rejecting the colonial agreements regarding the Nile.⁶⁶

It has also been argued that the treaties violate one of the most important peremptory rules or norms of international law: namely, that the upper basin states have rights to self-determination and permanent

⁶¹ Detlev F. Vagts, *Rebus Revisited: Changed Circumstances in Treaty Law*, 43 COLUM. J. TRANSNAT'L L. 459, 471–475 (2005); Vienna Convention on the Law of Treaties art. 62, 1155 United Nations Treaty Series 331 (May 23, 1969).

⁶² Vienna Convention on the Law of Treaties, *supra* note 61. See also Vagts, *supra* note 61, at 472–74 (quoting from the ICJ's Fisheries Jurisdiction and Gabcikovo-Nagymaros Cases).

⁶³ Endeshaw, *supra* note 18, at 11–13.

⁶⁴ *Id.*

⁶⁵ Robert O. Collins, *In Search of the Nile Waters, 1900–2000*, in THE NILE: HISTORIES, CULTURES, MYTHS 257 (Haggai Erlich and Israel Gershoni eds., 2000) (emphasis added); see also FELIX CHUKS OKOYE, INTERNATIONAL LAW AND THE NEW AFRICAN STATES 64–66 (1972).

⁶⁶ STEPHEN MCCAFFREY, THE LAW OF INTERNATIONAL WATERCOURSES: NON-NAVIGATIONAL USES 245–246 (2001); Valerie Knobelsdorf, *The Nile Waters Agreements: Imposition and Impacts of a Transboundary Legal System*, 44 COLUM. J. TRANSNAT'L L. 622, 624–26, 632–43 (2006) (describing the different legal positions with regard to the Nile). See also P. Kenneth Kiplagat, *Legal Status of Integration Treaties and the Enforcement of Treaty Obligations: A Look at the COMESA Process*, 23 DENV. J. INT'L L. & POL'Y 259, 263–64 (1995).

sovereignty over natural resources. The free determination of people's political status and the ability to freely pursue their economic, social and cultural development has been a focal issue in the decolonization process and has since been recognized as a *jus cogens* principle.⁶⁷ This argument states that the treaties violate this principle because they freely give away the natural resources of a previously colonized state without its consent or without any past or future control over its own resources.⁶⁸

A number of arguments have been raised as to why Ethiopia is not bound by its 1902 treaty with Britain. First, the treaty never came into force as Britain did not ratify it⁶⁹ and the Ethiopian government rejected the agreement in the 1950s.⁷⁰ Second, it is argued that Ethiopia has a right to relieve itself of the duties imposed in that treaty since Britain had already violated the terms of the treaty by virtue of giving support and recognizing the Italian invasion of Ethiopia.⁷¹ Article 60 of the 1902 agreement provides that “a material breach of a bilateral treaty by one of the parties entitles the other to invoke the breach as a ground for terminating the treaty or suspending its operation in whole or in part.”⁷² Thus, a strong argument emerges favoring Ethiopia's refusal to recognize that treaty. Furthermore, since this treaty places a duty on Ethiopia not to “arrest” the waters of the Nile, its validity has also been criticized on the grounds of its phraseology. It has been argued that this treaty does not

⁶⁷ See generally ANTONIO CASSESE, SELF-DETERMINATION OF PEOPLES: A LEGAL REAPPRAISAL 133–40 (1995).

⁶⁸ Article 53 of the Vienna Convention on the Law of Treaties stipulates that “[a] treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law.” Similarly, article 64 provides that “[i]f a new peremptory norm of general international law emerges, any existing treaty which is in conflict with that norm becomes void and terminates.” Vienna Convention on the Law of Treaties art. 53, *supra* note 61.

⁶⁹ Endeshaw, *supra* note 18, at 6.

⁷⁰ *Id.* Note, however, that in 1907 the British sent a letter to Menelik promising an annual payment of E10,000 to affirm the third article of the 1902 treaty. McCann, *supra* note 26, at 671.

⁷¹ Endeshaw, *supra* note 18, at 19. See also C. Odidi Okidi, *History of the Nile Basin and Lake Victoria Basins Through Treaties*, in THE NILE: SHARING A SCARCE RESOURCE: A HISTORICAL AND TECHNICAL REVIEW OF WATER MANAGEMENT AND OF ECONOMICAL AND LEGAL ISSUES 324 (Paul Philip Howell & John Anthony Allan eds., 1994).

⁷² THOMAS LENNOX GILMOUR, ABYSSINIA: THE ETHIOPIAN RAILWAY AND THE POWERS 85 (1906).

THE NILE BASIN COOPERATIVE FRAMEWORK AGREEMENT

prohibit the use of the Nile as opposed to the arrest of the Nile, which is interpreted to mean the total blockage.⁷³

Egypt seems to be unreceptive to any of these arguments for the invalidity of the colonial treaties. The official position of the Egyptian government is that the agreements are 'real' or 'territorial' treaties and may not be rejected by the riparian states even though it was their colonial masters who signed and benefited from them.⁷⁴ The bottom line for Egypt is that whether by virtue of treaty or customary law, Egypt has a right to maintain the status quo in which its current or future use should not be interfered with.⁷⁵ The Egyptian interest is protected by historic or acquired rights that allow it to defend the status quo.⁷⁶

From a legal point of view, the Nile is governed by an incomplete and fragmented treaty regime between Nile riparian states, a majority of which do not even recognize the various treaties. There is also a lack of clarity as to which customary rule of international law applies. What is clear, however, is that the position taken by the riparian states at different times is a reflection of the Nile basin's hydro-politics. The late nineteenth century saw the ebb of Egyptian hegemony where Egypt attempted to annex the entire Nile basin. Late 20th century saw a multilayered hegemonic strategy whereby Egypt used securitization, covert action and treaties to secure its hegemonic position. After decolonization, lower riparian states have begun resisting Egyptian hegemony, though without much success.

⁷³ See Elias N. Stebek, *Eastern Nile at Crossroads: Preservation and Utilization Concerns in Focus*, 1 MIZAN L. REV. 33, 52 (June 2007).

⁷⁴ See C. O. Okidi, *Review of Treaties on Consumptive Utilization of Waters of Lake Victoria and Nile Drainage System*, 22 NAT. RESOURCES J. 161, 175 (1982) (describing Egypt's response to Tanganyika's declaration of the Nyerere Doctrine).

⁷⁵ Davin O'Regan, *Africa: The Nile River: Building or Stumbling Block?*, ALLAFRICA.COM, Apr. 30, 2004, <http://allafrica.com/stories/200404300089.html>.

⁷⁶ Takele Soboka Bulto, *Between Ambivalence and Necessity: Occlusions on the Path toward a Basin-Wide Treaty in the Nile Basin*, 20 COLO. J. INT'L ENVTL. L. & POL'Y 291, 305 (2009); Valerie Knobelsdorf, *The Nile Waters Agreements: Imposition and Impacts of A Transboundary Legal System*, 44 COLUM. J. TRANSNAT'L L. 622, 639–40 (2006).

V. NILE BASIN INITIATIVE COOPERATIVE FRAMEWORK AGREEMENT:
TESTING EGYPTIAN HEGEMONY

The Nile Basin Cooperative Framework Agreement is the latest and unique addition to the previously described economic, political and legal atmosphere.⁷⁷ At the time of writing, the Nile Basin Cooperative Framework Agreement had been signed by six upper riparian states and it is expected that one more state will soon join.⁷⁸ The agreement was met by the lower riparian's complete denunciation in addition to a threat to withdraw from any form of cooperation with the other states if the agreement is enforced.⁷⁹ According to Egypt's water resources and irrigation minister, the agreement is tantamount to asking Egyptians to "leave their culture and go and live in the desert."⁸⁰

⁷⁷ That is, while the lower riparian states cannot exist without the waters of the Nile, the upper riparian states are increasingly feeling the need to utilize its waters. The political situation is so tense that a vocabulary of war is still being used by very high-ranking officials. Additionally, the Nile Basin Cooperative Framework Agreement is born into a legal abyss as there is no international law mutually accepted by the riparian states as having authority over the Nile basin.

⁷⁸ The states that have signed are Burundi, Tanzania, Uganda, Rwanda, Ethiopia, and Kenya. The DRC has also declared its intention to sign the agreement. Though it is expected that the newly independent South Sudan may join that is not going to happen any time soon. David Malingha Doya, *Burundi Government Signs Accord on Use of Nile River Water*, BLOOMBERG, Feb. 28, 2011, <http://www.bloomberg.com/news/2011-02-28/burundi-signs-accord-on-water-usage-from-nile-that-may-strip-egypt-of-veto.html>; Makuna Chirimi, *Sign Nile Agreement - Egypt, Sudan & Congo DRC Urged*, BREAKING NEWS AFRICA, May 4, 2011, <http://www.breakingnewsafrika.co.za/sign-nile-agreement-egypt-sudan-congo-drc-urged/>.

⁷⁹ *E. African nations firm on Nile deal*, ALJAZEERA, June 28, 2010, available at <http://english.aljazeera.net/news/middleeast/2010/06/201062871134786105.html>.

⁸⁰ *Interview - Ethiopian PM warns Egypt off Nile war*, REUTERS, Nov. 23, 2010, available at <http://af.reuters.com/article/tanzaniaNews/idAFLDE6AM1LN20101123?pageNumber=3&virtualBrandChannel=0>. Ambassador Hossam Zaki a splkeperson for the Ministry of Foreign Affairs of Egypt is quoted to have said, "Egypt will not join or sign any agreement that affects its share." *East Africa seeks more Nile water from Egypt*, BBC NEWS, May 14, 2010, available at <http://news.bbc.co.uk/2/hi/africa/8682387.stm>. At the time of writing, a forty person strong Egyptian diplomatic delegation (which included Prime Minister Essam Sharaf) had convinced Ethiopia and Uganda to stay the ratification of the treaty until a new government is elected in Egypt. See Aaron Maasho, *Ethiopia*

THE NILE BASIN COOPERATIVE FRAMEWORK AGREEMENT

Despite the diplomatic belligerence, however, all the states participating in the Nile Basin Initiative have unanimously agreed on every aspect of the treaty except one. Their disagreement concerns whether the new treaty would nullify the colonial agreements possibly resulting in the reallocation the claimed shares of Egypt and Sudan. The upper riparian states want the new agreement to supersede any previous agreements,⁸¹ while lower riparian states want it to explicitly recognize all previous agreements.⁸² Even though the treaty's final version does not say anything about the fate of the colonial treaties, one can see that Egypt and Sudan are apprehensive about losing the position given to them by the colonial treaties and the 1959 Treaty.⁸³ Although the official position held by the drafting committee is to leave the issue of the colonial treaties for

Delays Nile Treaty Until Egypt's Election, REUTERS, May 3, 2011, available at <http://af.reuters.com/article/topNews/idAFJJOE7420M120110503?sp=true>.

⁸¹ An early draft of this article used to explicitly state that “Existing agreements which are inconsistent with the Framework shall be null and void,” although this formulation was later abandoned at the insistence of the Egyptian and Sudanese delegates. See Ahmed El Mufti, *The Success of the Impossible Negotiations About the Waters of the Nile: 1891–2007*, Consultation Document, March–April 2007, http://www.moj.gov.sd/images/magazine_2007.pdf.

⁸² The counter offer produced by the lower riparian states is phrased as “The Cooperative Framework shall be without prejudice to existing agreements,” or as “The present Cooperative Framework is without prejudice to existing agreements. ‘Existing agreements on the Nile River waters will be interpreted taking into account the provisions of this Framework and the rules of general international law.’” Musa Mohammed Abseno, *How does the Work of the ILC and the General Assembly on the Law of International Watercourses Contribute towards a Legal Framework for the Nile Basin?*, 76 n. 280 (October 2009) (unpublished) available at <http://discovery.dundee.ac.uk/bitstream/handle/10588/911/LLM-MUSA%20ABSENO.pdf?sequence=2>.

⁸³ The final version of the agreement seems to avoid the matter of previous agreements and refocuses its attention on a new and controversial concept of “water security” and states that states parties should not “affect in a significant manner the water security of any other Nile basin state.” Agreement on the Nile River Basin Cooperative Framework art. 14(b), available at http://untreaty.un.org/ilc/texts/instruments/english/conventions/8_3_1997.pdf. However, the lower riparian states would like Article 14(b) to oblige states parties “not to adversely affect the water security and current uses and rights of any other Nile Basin State.” Mekonnen, *supra* note 51, at 428.

later deliberation, it is very likely the new treaty will have the legal effect of annulling the previous treaties.⁸⁴

From a legal perspective, there are a number of things that show the Nile Basin Cooperative Framework Agreement to be a political rather than a legal accomplishment. First, it took the Nile basin states a decade to come up with a draft treaty that in many respects reiterates the ILC Convention verbatim.⁸⁵ This is so, despite the fact that there is only one bone of contention between the lower and upper riparian states, and it is

⁸⁴ According to article 59 of the Vienna Convention on the Law of Treaties a treaty will be terminated if a later treaty pertaining to the same matter is concluded by the same parties. Vienna Convention on the Law of Treaties art. 59, *supra* note 61. Further, even if the colonial treaties are not considered as terminated, as such, another possibility would be that the *Lex Posterior Derogat Legi Priori* principle could be applied making the colonial treaties ineffective. *See* Abadir M. Ibrahim, A Critical Assessment of the Legal Principles Underlying the Nile River Basin Cooperative Framework Agreement, 21 WATER L. 198, 204 (2011). *See also* MARK EUGEN VILLIGER, CUSTOMARY INTERNATIONAL LAW AND TREATIES: MANUAL ON THE THEORY AND PRACTICE OF THE INTERRELATION OF SOURCES 36 (2nd ed. 1985).

⁸⁵ Other than the establishment of a permanent body called the Nile River Basin Commission which is to serve as a permanent institutional framework for cooperation, the treaty seems to reiterate, mostly verbatim, the provisions of the ILC's Convention on the Law of the Non-navigational Uses of International Watercourses. Convention on the Law of the Non-navigational Uses of International Watercourses, General Assembly Supplement no. 49, May 21, 1997, *available at* http://untreaty.un.org/ilc/texts/instruments/english/conventions/8_3_1997.pdf. Given that it is generally agreed that the ILC Framework Convention is considered to reflect customary international law, one can see that the only possible substantive effect of this treaty is to level the legal playing field between the upper and lower riparian states. *See generally* Gabčíkovo-Nagymaros Project Case (Hungary v. Slovakia) (I.C.J. Reports 1997, para. 85–86) *available at* <http://www.icj-cij.org/docket/files/92/7375.pdf>; Stephen C. McCaffrey, *An Overview of the U.N. Convention on the Law of the Non-Navigational Uses of International Watercourses*, 20 J. LAND RESOURCES & ENVTL. L. 57, 69–70 (2000) (“I believe the Convention confirms the status, under customary international law, of three principles: equitable utilization, the ‘no significant harm’ principle, and prior notification of planned measures.”). *See also* Stephen McCaffrey, *International Water Law for the 21st Century: The Contribution of the U.N. Convention*, 118 WATER RES. UPDATE 11, 16 (2001); Eyal Benvenisti, *Customary International Law as a Judicial Tool for Promoting Efficiency* in THE IMPACT OF INTERNATIONAL LAW ON INTERNATIONAL COOPERATION: THEORETICAL PERSPECTIVES 85, *passim* (Eyāl Benvenistî & Moshe Hirsch eds., 2004) (commenting on the international court’s decision on customary international law in Gabčíkovo-Nagymaros).

THE NILE BASIN COOPERATIVE FRAMEWORK AGREEMENT

reasonable to expect that the experts and politicians would have known what it was. Since the establishment of cooperative initiatives between the Nile basin states in the 1970s, it has always been clear that Egypt, representing lower riparian interests, was interested in asserting a hegemonic control over the use of the Nile in the whole catchment area and did not want to commit to anything other than technical cooperation.⁸⁶ The main concern of the upper riparian states, on the other hand, was how to do away with the colonial treaties and create a new status quo so that they can embark upon large projects without hindrance.⁸⁷ Drafting a treaty knowing that it would not be signed is a clear indication of the non-legal intent of the upper riparian states who insisted on its drafting.

Second, even though the lower riparian states have unequivocally stated that they would not sign the agreement, the upper riparian states have elected to go ahead with the signing process. There is no legally sensible reason why the upper riparian states should sign such an agreement on their own because the whole point of having a treaty on the Nile watercourse is to balance upper and lower riparian interests.⁸⁸ Except for the states on the Lake Victoria basin, whose water use can affect each other's rights and interests,⁸⁹ there is no reason for upper riparian states on

⁸⁶ See Mekonnen, *supra* note 51, at 426; Brunnée and Toope, *supra* note 23, at 133.

⁸⁷ Brunnee and Toope report that the upper riparian states managed to take control of the negotiations and the Nile Basin Initiative and steer it towards legal issues despite the objection of Egyptian and Sudanese delegates. See Brunnee and Toope, *supra* note 23, at 136–37.

⁸⁸ Note in this regard that one of the justifications in the preamble of the ILC Convention is the promotion of international peace and security. Convention on the Law of the Non-navigational Uses of International Watercourses, General Assembly Supplement no. 49, preamble, May 21, 1997, available at http://untreaty.un.org/ilc/texts/instruments/english/conventions/8_3_1997.pdf. See generally Patricia K. Wouters, *An Assessment of Recent Developments in International Watercourse Law through the Prism of the Substantive Rules Governing Use Allocation*, 36 NAT. RES. J. 417, *passim* (1996).

⁸⁹ The three major states that are in the Lake Victoria basin; Kenya, Uganda, and Tanzania, have developed an extensive system of cooperation and conflict resolution on the lake system under the auspices of the East African Community. See Treaty for the Establishment of the East African Community art. 9(3), 114(2)(b)(vi), *passim*, (As amended on Dec. 14, 2006 and Aug. 20, 2007), available at http://www.eac.int/advisory-opinions/doc_download/158-amended-treaty-for-the-establishment-of-east-african-community.html. See also The Convention for the Establishment of the Lake Victoria

the Blue Nile and the White Nile to be concerned about each other's water use.

The fact that the upper riparian states are signing and possibly ratifying a treaty that will not have any legal value shows that the agreement must have some political or tactical significance in the eyes of upper riparian states. The upper riparian states have portrayed the situation as one in which consensus has already been reached and further agreement will be finalized in due time.⁹⁰ Upon closer examination however, this agreement looks more like a strategy to diplomatically corner the lower riparian states. It is not clear if the upper riparian states actually expect Egypt to cave in to this pressure, but it is clear that they expect South Sudan and eventually North Sudan to sign the deal.⁹¹

Fisheries Organization, May 24, 1996, *available at* <http://www.fao.org/docrep/W7414B/w7414b0l.htm>; Protocol for Sustainable Development of Lake Victoria Basin, Nov. 29, 2003, *available at* <http://faolex.fao.org/docs/texts/mul41042.doc>.

⁹⁰ For instance Ethiopia's Minister for Water resources has, at different occasions, portrayed the issue as one in which consensus has been built in ten years and that the consensus will be strengthened with time. *See Battling over earth's most precious resource*, AFR. BUS. J., Jan. 11, 2008, http://www.tabj.co.za/features/january11_features/battling_over_earth_s_most_precious_resource.html. *See also* Aljazeera, *supra* note 79.

⁹¹ In an interview with Aljazeera, the Prime Minister of Ethiopia Meles Zenawi dismissed Sudan as "not the main problem" and singled out Egypt as the main culprit for the lack of agreement. Interview by Aljazeera with Meles Zenawi, Prime Minister of Ethiopia (May 2010) *available at* http://www.diretube.com/talk-to-jazeera/meles-zenawi-full-interview-23-min-video_9015e4dd9.html.

THE NILE BASIN COOPERATIVE FRAMEWORK AGREEMENT

The political calculation of the upper riparian states makes a lot of sense since the only possible outcome that is beneficial to them is if they are able to pressure the lower riparian states to relinquish their claims based on the colonial agreements and the 1959 Treaty between Egypt and Sudan. The possible outcomes of negotiations between the parties can be represented in the following way:

| | Egypt/Sudan push | Egypt/Sudan back down |
|-----------------------|-------------------------|---|
| URS* push | Maintain status quo | Greater share for lower riparian states |
| URS* back down | Maintain status quo | Maintain status quo |

* URS – Upper riparian states

The possible outcomes of negotiations, except the one in which the lower riparian states are made to relinquish their position, lead towards a status quo that is not agreeable to the upper riparian states. In this status quo, upper riparian states have found it difficult to finance large projects because Egypt has exerted tremendous and successful pressure on international financial institutions, such as the World Bank, the African Development Bank and the International Monetary Fund.⁹² Because of Egypt's strategic and economic importance, it is also unlikely that upper riparian states will find non-western donors or lenders who will make exception to Egypt's influence.⁹³

⁹² Joseph W. Dellapenna, *The Nile as a Legal and Political Structure*, in *THE SCARCITY OF WATER: EMERGING LEGAL AND POLICY RESPONSES* 133 (Edward Brans et al. eds., 1997); Brunnée and Toope, *supra* note 23, at 127; John Waterbury and Dale Whittington, *Playing Chicken on the Nile? The Implications of Microdam Development in the Ethiopian Highlands and Egypt's New Valley Project*, 22 NAT. RES. F. 155, 156 (1998); Lisa M. Jacobs, *Sharing the Gifts of the Nile: Establishment of a Legal Regime for Nile Waters Management*, 7 TEMP. INT'L & COMP. L.J. 95, 119 (1993). See also JOHN WATERBURY, *THE NILE BASIN: NATIONAL DETERMINANTS OF COLLECTIVE ACTION* 71–72 (2002) (claiming that since Sadat era Egypt has been placing its people in these institutions so that they represent their country's interests in matters pertaining to the Nile); YACOB ARSANO, *ETHIOPIA AND THE NILE: DILEMMAS OF NATIONAL AND REGIONAL HYDROPOLITICS* 44, 221, 225 (2007).

⁹³ See SAMUEL LUZI, *DOUBLE-EDGED HYDROPOLITICS ON THE NILE: LINKAGES BETWEEN DOMESTIC WATER POLICY MAKING AND TRANSBOUNDARY CONFLICT AND COOPERATION* 144–45 (2007).

Whether to change the status quo, therefore, is not an issue with the upper riparian states. The issue is how to change it by forcing Egypt and Sudan to give up their entrenched positions. In the past, Kenya and Ethiopia followed an “aggressive silence” policy, boycotting all cooperative endeavors to express their discontent with the status quo.⁹⁴ However, it became apparent that their boycott policy had failed. The upper riparian states subsequently shifted to a policy of isolating Egypt by portraying it as the state that is not willing to sign an agreement that is “fair,” “benefits all,” “harms none,” and “leaves none out.”⁹⁵ Therefore the question is, how effective is the Nile Basin Cooperative Framework Agreement as a political tool for isolating and pressuring Egypt?

There is no reason to believe that the introduction of the Nile Basin Cooperative Framework Agreement could single-handedly change the dynamics of the Nile hydro-politics. Since Egypt has been, and continues to be, the hydro-political hegemon,⁹⁶ it will continue to wield considerable influence. Egypt will not lose its diplomatic influence over potential donors and lenders such as the World Bank and Western governments, which means that the upper riparian states will not be better off in garnering funds for significantly large projects.⁹⁷ Furthermore, Egypt's hegemonic position gives the country numerous devices to counter whatever small effects the Nile Basin Cooperative Framework Agreement could have. Egypt has immense potential to change “facts on the ground”

⁹⁴ WATERBURY, *supra* note 92, at 71; Brunnée and Toope, *supra* note 23, at 133–34. *See also* Deborah Pugh, *Egypt: Next War Could Be Over Water Quotas From the Nile*, GUARDIAN, Oct. 12, 1990 (stating that Ethiopian non-participation was to pressure Egypt to stop tunneling Arab military aid to Ethiopian rebels). *See also* Jacobs, *supra* note 92, at 118–19; Reem Leila, *Wading through the Politics*, AL-AHRAM WKLY. ON-LINE, July 9–15, 2009, <http://weekly.ahram.org.eg/2009/955/eg2.htm>.

⁹⁵ *See* Interview by Aljazeera with Meles Zenawi, Prime Minister of Ethiopia, *supra* note 91.

⁹⁶ Brunnée and Toope, *supra* note 23, at 123; Mekonnen, *supra* note 51, at 423–24, 431–32, 440. *See also* Melvin Woodhouse and Mark Zeitoun, *Hydro-hegemony and International Water Law: Grappling with the Gaps of Power and Law*, 10 WATER POL'Y 103, 114 (2008) (suggesting that Egypt approximates a dominative or oppressive model of hydro-hegemony).

⁹⁷ *See* Anja Kristina Martens, *Impacts of Global Change on the Nile Basin: Options for Hydropolitical Reform in Egypt and Ethiopia*, Discussion paper, INT'L FOOD POL'Y RES. INST. 16 (Jan. 2011).

THE NILE BASIN COOPERATIVE FRAMEWORK AGREEMENT

with its own resources or with the aid of donors/lenders from the West or other Arab Countries.⁹⁸ The means available to Egypt range from supporting destabilizing forces within countries to partnering with some of the basin countries to give them incentives for not cooperating with the upper riparian states.⁹⁹ According to some commentators, the tools in Egypt's hegemonic tool-box include "resource capture strategy," "military force," "securitization," "incentives," "treaties," "knowledge construction," "sanctioned discourse," "international support" and "financial mobilization."¹⁰⁰

Despite the fact that the Nile Basin Cooperative Framework Agreement will not have any significant legal or political effect in the short term, it could provide great long-term political utility for upper riparian states if it is used as a first step in a coordinated counter-hegemonic strategy. If the Nile Basin Cooperative Framework Agreement is to have any future significance, the upper riparian states need to succeed on two fronts. First, they must be able to use the new agreement to create a new counter-hegemonic narrative. Second, they should develop the ability to affect the flow of the Nile to Egypt; at least enough to convince the later that non-cooperation will lead to independent upper riparian development. From the point of view of Cascao and Zeitoun, success in these fronts coupled with their geographic position (i.e. the fact that the water passes through their territory before it reaches Egypt) should significantly weaken the hegemonic position of Egypt.¹⁰¹

The hegemonic narrative of the Nile has been that Egypt is highly dependent on the waters of the Nile and that tampering with this status quo is going to threaten the national security of Egypt. The upper riparian

⁹⁸ Waterbury and Whittington, *supra* note 92, at 159 n. 10. See generally Elisa Cascao, *Ethiopia – Challenges to Egyptian Hegemony in the Nile Basin*, 10:5 WATER POL'Y 13 (2008).

⁹⁹ Mark Zeitoun and Jeroen Warner, *Hydro-Hegemony – A Framework for Analysis of Trans-Boundary Water Conflicts*, 8 WATER POL'Y 435, 444–50 (2006).

¹⁰⁰ *Id.*

¹⁰¹ Ana Elisa Cascao & Mark Zeitoun, *Power, Hegemony and Critical Hydropolitics*, in *TRANSBOUNDARY WATER MANAGEMENT: PRINCIPLES AND PRACTICE* 31–32, 36 (Anton Earle et. al. eds., 2010) (singling out geography, material power, bargaining power, and ideational power as pillars of hydro-hegemony, point out that the capability of riparian states to undertake projects on the water, and collective bargaining power in negotiations should be considered important components of riparian power relations).

states have recognized the need to reset these narratives. For example, in an interview on Egyptian state television, the Prime Minister of Ethiopia tried to present a non-securitized and morally laden counter-narrative. He contended that the Nile Basin Cooperative Framework Agreement does not aim at negatively affecting lower riparian interests, because it will only result in projects that will benefit all states involved.¹⁰²

The counter hegemonic narrative is not, however, consistently maintained, as the same Prime Minister has also made public statements that securitize the issue of the Nile, supporting the hegemonic paradigm.¹⁰³ Other upper riparian states, on top of rejecting the colonial treaties, have generally been reiterating that the new agreement is for the benefit of all states involved.¹⁰⁴ The fact that this narrative is pursued reinforces its delivery and effectiveness.¹⁰⁵ Yet, the fact that the upper riparian states reflect conflicting narratives at different times indicates that there is a slight possibility they may not capitalize on the momentum for a counter-hegemonic policy created by the Nile Basin Cooperative Framework Agreement.

¹⁰² His arguments were as follows: That the upper riparian hydroelectric development will reduce downstream siltation; dams in upper riparian states will prevent or control flooding and draught on lower riparian states; hydroelectric development is ideal if it is done upstream and shared with downstream states because of the altitude differences; and upstream dams will increase total waters of the Nile because of lower upstream evaporation. Interview by Egyptian TV with Ethiopian Prime Minister Meles Zenawi (July 18, 2010) available at <http://www.youtube.com/watch?v=2zzXLFKU0HM>.

¹⁰³ See Aljazeera, *supra* note 49.

¹⁰⁴ For instance Kenyan officials have repeatedly pointed out on media appearances that the colonial treaties do not apply to them and that the new treaty now allows them to utilize the waters of the Nile unilaterally. See generally Jennifer Wanjiru, *East African Water Clash Slams Nile Treaty*, ENV'T NEWS SERV., Oct. 18, 2001, available at <http://www.ens-newswire.com/ens/oct2001/2001-10-19-01.asp>; John Kamau, *Can EA Win the Nile War?*, NATION (Kenya) (Mar. 28, 2002) available at <http://chora.virtualave.net/ea-nile.htm>; Cam McGrath & Sonny Inbaraj, *Wars Loom Along Nile*, NEWS 24, Jan. 16, 2004, available at <http://www.news24.com/Africa/News/Water-wars-loom-along-Nile-20040116>.

¹⁰⁵ See Ana Elisa Cascao & Mark Zeitoun, *Power, Changing Nature of Bargaining Power in the Hydropolitical Relations in the Nile River Basin*, in TRANSBOUNDARY WATER MANAGEMENT: PRINCIPLES AND PRACTICE 190–93 (Anton Earle et. al. eds., 2010).

THE NILE BASIN COOPERATIVE FRAMEWORK AGREEMENT

There is ample scientific evidence showing that the lower riparian states would benefit from a basin-wide cooperative framework.¹⁰⁶ Upper riparian states should exploit this evidence to de-securitize the issue and convince the lower riparian decision makers and the public that working with the upper riparian states might not be a lose-lose situation. Since such a framework would be more beneficial to the Sudans than Egypt,¹⁰⁷ a big part of the upper riparian states' effort to create a counter-hegemonic narrative should involve bringing South Sudan into their camp. This would presumably be easier with regard to South Sudan than North, but the effort should be aimed at both.

Creating a counter-hegemonic narrative will not, however, bring about significant changes in the hydro-politics of the Nile if the upper riparian states are not able to create and implement projects that can threaten Egypt's negotiating power. There is no reason to believe that the upper riparian states can use the Nile Basin Cooperative Framework Agreement to change the minds of state actors or international funding institutions in the short-run. However, it may be possible for the upper riparian states to raise enough funds among themselves to enable them to embark upon projects which they are unable to conduct individually. Such efforts would certainly be more feasible if the upper riparian states can co-opt both North and South Sudan in their effort, as not only are the Sudans better equipped in water technology¹⁰⁸ but its new found oil wealth may be a valuable asset.

However, the upper riparian states have yet to put forward any credible project demonstrating their ability to take action to significantly and unilaterally affect the amount of water flowing downstream. The Ethiopian government seems to have recognized the importance of creating new opportunities that change the negotiating positions of the

¹⁰⁶ J. Anthony Allan, *The Nile Basin: Evolving Approaches to Nile Waters Management*, Occasional Paper 20, SOAS Water Issues Group (June 1990), available at <http://web.macam.ac.il/~arnon/Int-ME/water/OCC20.PDF> (noting that the Aswan High Dam Project was controversial among engineers even at the time of its building as it was more sound to construct a dam in the highlands of Ethiopia than in the deserts of Egypt); Kendie, *supra* note 31, at 164–65; MARQ DE VILLIERS, *WATER: THE FATE OF OUR MOST PRECIOUS RESOURCE* 228 (2000); Martens, *supra* note 97, at 17.

¹⁰⁷ TAFESSE, *supra* note 2, at 92–94; ARSANO, *supra* note 92, at 228.

¹⁰⁸ WATERBURY, *supra* note 92, at 72.

riparian states. The Grand Millennium Dam Project is the latest feat by the Ethiopian government to impress the Egyptian and Ethiopian population.¹⁰⁹ Nevertheless, the credibility of this project is questionable. The project envisages the building of a dam that promises to be the largest in Africa, and cost more than 4.5 billion dollars, without any support from any foreign state or non-state actor.¹¹⁰ Ethiopia's previous "grand-threat" was its planned micro-dams project, a project that has not come to pass. Out of the five hundred micro-dams planned in the state of Tigray, only fifty have been constructed.¹¹¹ Even these micro dams have generally proven unsuccessful because they suffered from overtopping or insufficient inflow due to flood estimation problems, seepage, sedimentation, lack of upkeep/maintenance, cracking and other structural failures.¹¹² Thus, even though there is evidence showing that the government of Ethiopia is making counter-hegemonic moves, its efforts do not seem to be credible or coordinated enough with that of the other upper riparian states to truly change the narrative.

¹⁰⁹ The project's name was later changed by the Council of Ministers to "The Grand Ethiopian Renaissance Dam Project." *Council of Ministers Approves Regulation Establishing Council on Grand Dam*, GRAND MILLENNIUM DAM (April 17, 2011) available at <http://grandmillenniumdam.net/council-of-ministers-approves-regulation-establishing-council-on-grand-dam/>.

¹¹⁰ Meles Zenawi, Prime Minister, Speech on the corner stone laying ceremony broadcasted on Ethiopian Government Television (April 2, 2011).

¹¹¹ Lulseged Tamene Desta, Reservoir Siltation in Ethiopia: Causes, Source Areas, and Management Options 10, 78 (2005); Mintesinot Behailu & Mitiku Haile, *Water Harvesing in Northern Ethiopia: Environmental, Health and Socio-Economic Impacts*, in INTEGRATED WATER AND LAND MANAGEMENT RESEARCH AND CAPACITY BUILDING PRIORITIES FOR ETHIOPIA 187 (P.G. McCornick et. al. eds., 2003).

¹¹² Yilman Seleshi, *Micro-Dams: River Structures Research Cluster 2005*, NILE BASIN CAPACITY BUILDING NETWORK 11–13 (2005), available at http://www.nbcbn.com/Project_Documents/Progress_Reports/RS-G2.pdf. See also Mohammed Abdulkadir Abdurahman, *Assessment of micro-dam irrigation projects and runoff predictions for ungauged catchments in Northern Ethiopia* 11 (Ph.D. dissertation, Westfalische Wilhelms-Universitat Munster 2009), http://miami.uni-muenster.de/servlets/DerivateServlet/Derivate-5275/diss_abdurahman.pdf. Desta, *supra* note 111, at 79–80.

VI. CONCLUSIONS

On first impression, it looks as though the Nile Basin Cooperative Framework Agreement is destined to be a legal document regulating the legal relations between the Nile watercourse states. At the signing ceremony of the treaty where Egypt and Sudan withdrew from sending representatives, delegates of upper riparian states implied that there was only a small procedural problem on which the states did not agree. They proceeded as though their disagreement was about the phrasing of Article 14(b).¹¹³ However, close scrutiny reveals that the Nile Basin Cooperative Framework Agreement is intended to be a counter-hegemonic move disguised as a treaty. Therefore, an analysis of the agreement will not yield any practical import unless its political effect, rather than any legal result, is taken as a subject of study.

An examination of the hydro-political background of the Nile basin reveals that the lower riparian states do not have a reason to give up their near exclusive claim over the waters of the Nile. Egypt, the hydro-hegemon for more than a century, still retains the power, influence, funds and the political will to withstand force to give up its favorable position. It was obvious a decade ago, when the process of drafting this treaty was initiated, that Egypt would not sign an agreement proposing Egypt give away this favorable position. The same situation exists today. Given that Egypt and probably both Sudans will not sign the agreement in the near future, analyzing the Nile Basin Cooperative Framework Agreement as a legal instrument does not elucidate why the upper riparian states would sign a treaty that purports to clap with one hand.

Looking at the Nile Basin Cooperative Framework Agreement as a counter-hegemonic move rather than a treaty, however, captures the essence of the upper riparians' attempts to undo what Egypt has been maintaining for more than a century. The Framework Agreement may not, on its own, upset the hegemonic balance prevalent on the Nile watercourse. However, it may be a first step in turning the tide against Egypt's hegemony. Evidence shows that the upper riparian states are going to use the treaty to create a new counter-hegemonic narrative. Such a narrative could be successfully promoted if the upper riparian states

¹¹³ Agreement on the Nile River Basin Cooperative Framework, *supra* note 83.

maintain a unified diplomatic front; they substantially outnumber the lower riparian states and can thus create immense diplomatic pressure. Their counter-hegemonic narrative should assert that they are pushing for a framework that would help them in their struggle against poverty without seriously threatening the wellbeing of the lower riparian states. The only sacrifice required by the lower riparian states, according to this narrative, is their legal claim to exclusive use of the Nile.

Even though it is conceivable that the counter-hegemonic narrative can be successfully promoted, that by itself will not upset the hegemonic balance. The only way Egypt could lose its negotiating power and usher in an era of balanced powers is if the counter-hegemonic narrative is reinforced by a credible threat to develop the waters of the Nile, independent of Egypt's input and control. Since Egypt is currently capable of blocking international funds, the states will have to find their own public funds or private investors above the sphere of Egypt's influence. Perhaps the upper riparian states could jointly raise public funds so that they might collectively be able to afford projects they cannot individually carry out. Unless a situation is created to coerce Egypt into giving up its claim of historic rights, the Nile Basin Cooperative Framework Agreement will, from a legal point of view, remain a dead letter. It is only if and when it succeeds as a political instrument that it will ever be relevant as a legal document.