Hydro-hegemony and international water law: grappling with the gaps of power and law

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Abstract

In its present emergent form, International Water Law (IWL) is concerned with enabling States to demonstrate an end result of equitable and reasonable sharing of transboundary waters, and thus does not directly address the cause of behaviour which may prevent this goal from being realised. In addition, this consent-based system is insufficiently developed to redress issues arising from the use of covert ideational power by one state to achieve control over water resources shared with other states. By offering a means to describe, analyse and demonstrate how the use of power by a State is a major determinant of its behaviour regarding sharing water resources, the approach of hydro-hegemony may help address such shortcomings, and thus be of some use to IWL. This paper presents a straightforward introduction to the area overlapped by International Water Law and the Framework of Hydro-Hegemony. We further explore how the Framework could make a direct and practical contribution to the knowledge of legal norms for state behaviour regarding the use of power and water sharing. The Framework of Hydro-hegemony shows that the covert use of power by a State can be used to perpetuate water sharing arrangements that can be inequitable and unreasonable, yet tolerated and even ‘stable’, in that they are not readily challenged. At present, hegemony and IWL coexist as parallel tracks, with the law being effectively blind to what is actually happening. We suggest that international water law must become aware of these covert hegemonic practices and incorporate them into the determination of compliant State practice if the principles of equitable and reasonable use are to be properly operationalised.

\textbf{Keywords:} Hydro-hegemony; International water law; Law; Power; Transboundary water; Water conflict; Water cooperation


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1. Introduction

In all positive law is hidden the element of power and the element of interest. Law is not the same as power, nor is it the same as interest, but it gives expression to the former power-relation. Law has the inclination to serve primarily the interests of the powerful. “European” international law, the traditional law of nations, makes no exception to this rule. It serves the interest of prosperous nations. (B.V.A. Rölling 1960, cited in Malanczuk, 1997: 33).

Our present understanding of International Law and an international legal system is beset with numerous intellectual and practical challenges. Debating these issues can easily become unproductive when criticism lacks reason and fails to identify realistic remedies or alternatives to the present shortcomings. The influence of power on these debates is significant, as the quotation by Rölling shows. At one level, this paper explores the relation between International Law and State power. The use of power, we will see, takes many forms, ranging from the destructive might of military hardware to the sublime—and much more efficient—exertions of covert power. The fact that covert use of power can be effectively invisible contributes to its efficacy and maintains its position beyond the reach of law. This is particularly the case with Treaty Law, which counters overt coercion but ignores covert coercion. The resulting loophole therefore stalls compliance with the emerging legal principles of transboundary water sharing.

A growing body of research has shown that covert exertions of power routinely used in water disputes include incentives, coercion, manipulation and mild forms of thought-control. Used in combination, these forms of covert power enable one riparian state to establish hegemony over another and so control the water sharing regime. This dimension of water conflict has become known as ‘hydro-hegemony’, and can be studied using an analytical framework referred to as the Framework of Hydro-Hegemony (or ‘the Framework’).

The Framework shows that these forms of covert power are not only effective but they are also challenging to identify and harder still to quantify. International Water Law does not presently lend itself to an analysis of a States’ use of power, since its primary concern rests with outcomes of reasonable and equitable water sharing. By addressing these issues, International Water Law and the Framework are shown to share a common need to understand what defines the covert use of power leading to inequitable and unreasonable water sharing.

The purpose of this paper is twofold. Firstly, it provides an introduction to both International Water Law and the Framework of Hydro-Hegemony, written in such a way as to begin to harmonise the language and understanding emerging from these two disciplines which consider the same problem. Secondly, the paper highlights and discusses ways in which the Framework might make a direct and practical contribution to the legal understanding of norms of State behaviour regarding power and transboundary water sharing. The authors expect that this exploratory work will contribute to an emerging culture surrounding relations over transboundary water issues, and invite comment and discussion towards furthering that goal.

2. What is international law?

International law is completely different from national law and its systems of law making by a legislature, law determination by courts and law enforcement by a police force (Malanczuk, 1997: 6, fn 1). International

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1 Because the broader audience of this paper may not have access to an extensive legal library, the authors have tried to contain legal references to readily available sources from the major textbooks and internet sources. The key texts on international law cited are: Malanczuk (1997), Feltham (1998), Cassese (2005).
law is primarily concerned with how States behave with respect to one another. Making this ‘State Practice’ more predictable and being able to agree about how to disagree are crude but useful expressions of the purpose of international law. States themselves are predominantly the subjects of international law and not individuals, with States alone having the capacity to make international law. International law is a ‘horizontal legal system’, which lacks a supreme authority or the centralization of force as a means of law enforcement (Malanczuk, 1997: 3, fn1). Consequently the International Court of Justice only has jurisdiction over questions which countries agree to put before it and it cannot intervene of its own volition. A system of mutual consent and commitment aims to ensure objectives are monitored and reported. This legal system is particularly lacking a clear methodology. It has long been acknowledged that international law is subject to the whims of power. Whilst it is easy to be very critical of this international system, it is very difficult to identify an acceptable alternative. The facts that international law can appear inaccessible, lacking in effect, too complex to be of practical value and subordinate to power plays therefore beg to be addressed.

2.1. Sources of international law

To introduce international law by stating that it has no defined methodology appears to confound rather than clarify. Still, it serves to show that this emergent system operates on principles of reciprocity and consensus rather than by attempting to command, create obedience and become an enforcement agency for the international community of States. Whilst States consent to international law, it remains for the States themselves to bring their own national law in line with new international practice and it follows that national law cannot be used as a justification for non-compliance with international obligations. International law has no mechanism or means to change the domestic law of a State, but a State consenting to international law must engage its own jurisdiction to decide how that law is to be adopted on the home territory. Similarly this international system recognises the principle of exhausting local remedies before engaging with any international mechanism. Ideally then, the system is populated by States who can self-monitor and achieve the mutual settlement of disputes with their neighbouring states. In fact, there is much to suggest that such behaviour has come to typify State practice regarding shared trans-boundary waters (Wouters, 1999). The system therefore aims at the maintenance of a status quo in which there is peace and cooperation between States party and an international legal regime where explicit objectives can be met and undesirable outcomes avoided. An international rule of law ought therefore to have two parts—a substantive or normative part, which sets the threshold for what is desirable or undesirable—and a procedural part, which sets out how a State can be seen to meet this obligation. For example the ‘reasonable and equitable’ substantive threshold for sharing trans-boundary water is accompanied by procedural requirements such as data sharing. The substantive rule levels the playing field and the procedural rule gives predictability to the game (Wouters, 1999).

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2 State practice is the more widely used synonym of State behaviour and often wrongly called State practise.

3 The powers of the ICJ are established by Statute, available at: http://www.icj-cij.org/icjwww/ibasicdocuments/ibasicstatute.htm

4 The correct legal terminology is in fact States parties.


Even without a defined methodology, International Law cannot arise out of nowhere, and thus the Statute of the ICJ established the widely accepted formulation of there being four ‘sources’ of international law\(^6\)\(^7\). The four sources of international law are: treaties, customary international law, general principles of law and judicial decisions together with the writings of qualified publicists. There is no common law equivalent nor is there the concept of precedent.

### 2.1.1. Treaties and conventions

Although the terminology may differ, the basic notion is that a treaty is a codified and written agreement between states—and therefore bi-lateral, multi-lateral or global—to which each of the States parties consent in writing. For more on the difference between treaties and convention, refer to Table 1.

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\(^6\) See ICJ Statute Article 38d in footnote 6 and above.

\(^7\) ‘Source’ has a special meaning in this context—it is not a fixed location or archive. It is instead akin to a source of electricity, as its meaning concerns the generation of new law.

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<table>
<thead>
<tr>
<th>Source</th>
<th>Description</th>
<th>Example of what it is</th>
<th>Example of what it is not</th>
</tr>
</thead>
<tbody>
<tr>
<td>Treaty</td>
<td>Where two or more Nations consent to be bound to a written agreement, by signature and ratification and hence accept the legal consequences arising from its violation. Often confused with Declarations which have no binding legal effect.</td>
<td>1997 UN convention on the law of non-navigational uses of international watercourses; Convention on the rights of the child.</td>
<td>The Rio declaration.</td>
</tr>
<tr>
<td>International custom</td>
<td>Whilst not necessarily in written form or based upon any historic origins, custom comprises of a general practice amongst Nations as well as their belief that this is accepted as law. It is usually confused with cultural notions of customary practises and courtesies.</td>
<td>Freedom of passage on the high seas.</td>
<td>Use of a white flag to call for a ceasefire.</td>
</tr>
<tr>
<td>General principles</td>
<td>A method of using principles which are common to most national systems of law to fill in gaps in treaty and Customary law.</td>
<td>Exhaustion of local remedies.</td>
<td>Precedent.</td>
</tr>
<tr>
<td>Judicial decisions &amp; qualified publicists</td>
<td>Whilst international courts are not obliged to follow previous decisions, these decisions may be indicative of emerging legal norms as are the works of key authors.</td>
<td>Authors have had a significant influence upon the development of the law of the sea.</td>
<td></td>
</tr>
<tr>
<td>Equity</td>
<td>Where the law is uncertain or inapplicable, a court or the parties can agree to settle a dispute on the principle of equity.</td>
<td>Equitable doesn’t mean equal; it means fair (see Box).</td>
<td></td>
</tr>
</tbody>
</table>
Customary international law sounds like but is not necessarily the product of some historical evolution of State behaviour. It is, however, distinct from treaty because it does not necessarily have to be a written law to which parties have given consent. The most significant difference, however, is that States are almost certainly bound by Customary International Law regardless of their written consent. Custom may consist of rules that impose a duty upon a State and rules which are permissive or enabling. Examples of customary international law include freedom of passage on the high seas and sovereignty over the continental shelf. Over time such laws may be codified and appear as treaties.

In recent times there has been a renewed interest in a special class of rules which are generated by the same means as custom which are called peremptory norms or jus cogens (literally—the ‘known law’). This group includes the prohibition of slavery, genocide, apartheid and wars of aggression\(^8\) and entails what is called a ‘different regime of responsibility’ because it is not possible for States to contract out of these obligations by treaty or any other mechanism. Rules of jus cogens are therefore primarily deterrents, acts which a State must not perpetrate. Transboundary water sharing rules do not currently form part of the jus cogens class of rules. Given that the prevention of reasonable and equitable use of water may threaten the human dignity, health and livelihood of a people, it is likely that the relationship between international rules for water sharing and jus cogens will be examined as stress over water resources increases.

What is of particular interest to the present paper is that States would look to customary international law as a means to obtain judicial settlement of a water dispute in situations where those States were not party to an applicable treaty. A State party to treaty based rules for water sharing might argue that non-party co-riparian States have become bound by these same rules because the rules have become international customary law. It would then require an international judicial body to establish the legitimacy or otherwise of this argument. At the core of this problem of identifying what is emergent international law is the need to observe and describe acceptable and unacceptable state practice. It is presently uncertain what uses of State power might incur an international legal response in relation to shared waters with the exceptions of clear breaches of treaty or acts of war (Box 1).

\[\textbf{Conflict vs. dispute.}\] Under International Law, States in dispute usually have some freedom to decide the method and remedy to resolve their differences, but a State resorting to armed conflict is likely to lose such freedoms and attract a penalty. As yet, there appears to be no accepted difference in meaning between the terms ‘dispute’ and ‘non-armed conflict’, as applied to inter-state competition over water resources. It is possible, however, to envisage that different legal consequences ought to follow from conflict—where, for example, the threat of the use of arms is employed to gain control of water resources. Extensive work is required to codify these concepts, to define, in other words, the difference between the coercive act of sabre-rattling and physical armed conflict. Disputes, on the other hand, are lower-level ‘slow burn’ problems. The legal consequence of a dispute might not require any special powers or outside intervention, only that the two parties exhaust local remedies to seek resolution.

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\(^8\) As distinct from non-pre-emptive self-defence.
General principles of law are used as a means of extending to an international situation principles which are common to most national systems of law. Examples of such principles are exhaustion of local remedies, honouring of contracts (pacta sunt servanda) and good faith. Recourse to general principles as a source of law is obviously more likely when there is a ‘gap’ in what is provided by treaty or custom, and has particular relevance to courts and tribunals during dispute settlement.

2.1.2. Judicial decisions and the teachings of qualified publicists. Unlike in common law systems, International Courts are not required to follow previous decisions. The ICJ has, in fact, used its decisions to introduce a number of innovations into International law. Even so, the volume of International case law arising from transboundary water resources disputes is very limited and there is no ‘supreme’ court which could harmonise the decisions of a range of tribunal or judicial bodies. For the present, treaty and customary law overshadow judicial decision as a source of international water law (Box 2).

| Equity, equality, fairness and justice. Equity is the spirit of justice enabling us to interpret laws rightly. This definition is useful because it shows that we have to ‘reason out’ what is equitable on the combined basis of fact and thought. Defining equity in precise terms would be to omit the interpretation by which it can make true sense. Where we are uncertain as to the applicability of law, or where there are gaps in law, we can resort to equity and through impartiality and even-handed dealing arrive at fairness. This is a legal mechanism to make sense of the law. Equity does not override any rules without the court or the parties agreeing that it should. In the sense of international law, equity is therefore a tool used to fashion fairness in the pursuit of justice. Where a strict understanding is applied, we might arrive at a ‘fair’ resolution of a water dispute by basing a decision on rules rather than equity. For example, the 1997 UN Convention provides the guidance and basis for such rules, in their definition of the terms and concepts surrounding ‘equitable and reasonable utilization’. Because a fair share may not be an equal share, equity and equality should not be confused. |

There is no hierarchy amongst these sources of law, with the exception that any treaty which conflicts with jus cogens is void. The determination of the law applicable to a particular situation therefore depends primarily upon the specific issues the parties seek to resolve. It might be that the situation calls for treaty interpretation, or it might be that none of these sources provide the answer sought. In this latter case a decision would be made on the basis of equity or fairness (Box 3).

2.2. Paper and practice

Where does international law keep its teeth? It is not uncommon for the reach of international law to exceed its grasp, which is another way of pointing out its apparent lack of teeth. But are punishments and
sanctions as a means to give teeth to a system of law which is based upon the free consent of those involved?

It is true to say that International Law recognises, permits and can require a range of sanctions and penalties in the wake of certain violations. Acts of retorsion, for example, are legitimate acts designed to injure a wrongdoing state. Retorsion can include the withdrawal of economic aid, since there is no law requiring one State to give economic support to another. Reprisals are acts which would normally be illegal but are permitted as a form of 'self-help' for an injured state. It is not difficult to see that reprisal and retorsion can be counter-productive inasmuch as they also act against the injured State. It is therefore increasingly common to apply sanctions endorsed by a number of States acting together. It is also increasingly common to consider reparation and remediation before retorsion and reprisal.

In effect we must ask ourselves whether the imposition of sanctions serves the cause of international justice in each specific context. In the case of water resource conflicts in particular, it can be argued that the point of the law is to achieve mutual satisfaction with a lasting result made under conditions promoting equity and procedures to ensure cooperation. Punishing a wrongdoing State in this context may prevent resolution of the conflict. Compliance with international norms therefore becomes the deliberate demonstration of such practices in the full view of the international community. It is then reasonable to consider the limitations to compliance that arise from constraints on available finance or natural resources, so long as it is evident that a State has not acted against the purpose and objectives of the law. In general then, the present system of international law seeks to establish and progressively raise the hurdles for acceptable State behaviour whilst maintaining the full consent and participation of all States. In this way international law can be said to be nurturing the future culture of managing water conflict.

For the present, and particularly with respect to shared transboundary waters, the applicable international law is mostly found in the ever-growing body of treaty law. It is increasingly the practice to consult and involve wider groups of stakeholders in the development of such law and at the same time these treaties are developing their own more stringent compliance mechanisms. As has been shown, however, treaties can only create obligations upon consenting States. It remains up to States to decide if they recognise the corpus of present treaty law or not.

### 2.3. International water law and hydro-hegemony

#### 2.3.1. Future international water law. Seen against the stark reality of conflict over water, this response from the international community is not ideal. What exists of a methodology of International Law does, however, provide two options to address the situation. We can seek to improve upon the
written law (treaty law) such that wider consent is realised, or we can seek to observe, describe and
analyse the behaviour of States and hence argue that certain acts have become norms (customary law)
whilst others have become unacceptable.

The present work on a framework to analyse situations of hydro-hegemony suggests itself as a
means to analyse emergent state behaviour with respect to shared water. From the point of view of
International Law, such knowledge suggests a means to define those practices to be promoted or
prevented. The unique merit of the approach may, however, be in the fact that it considers how a state’s
use of power shapes its behaviour towards other states.

Whilst our system of international law seeks in general to enable States to realise defined standards of
conduct, its explicit response to the use and abuse of State power is thus far more concerned with
preventing extreme events—such as armed conflict. Consideration of situations of hydro-hegemony in
relation to international watercourse law therefore draws us to consider how State power relations not
only shape the outcome of extreme events but also condition and shape State practice in the presence or
absence of rules requiring the reasonable and equitable use of transboundary water resources.

For States to consent to any new norms and practices of international law they must share a
compelling belief that what is emerging is, in fact, law and also that they themselves have obligations
and responsibilities which they must act upon with respect to that law. This means that international law
is not just a matter of writing down a set of rules in the shape of a treaty or similar; international law can
and does also result from belief and reasoning that compels a response. It stands to reason that good law
will result from a good knowledge of practice, provided that there is a shared aim and cooperation.

However it may serve political analysts of transboundary water interactions—from the perspective of
International Law—that the Framework of Hydro-Hegemony appears to be a tool to describe and
analyse State behaviour with respect to water sharing. The Framework may thus be a means to capture
information to inform the law. Provision of such information would counter the tendency for the law to
address the pursuit of justice and remedy without fully considering the causal origins of dispute.

Increased understanding of how undesirable State practice leads to control of inter-state water
allocation fuels a more compelling argument to require States to cooperate and comply with legally
established norms. It is therefore useful to explore whether the methods identified through a lens of
hydro-hegemony are likely to yield knowledge of use to the progressive development of international
law and to suggest how international law might make use of such knowledge and methods. A poorly
written treaty is unlikely to provide the legal basis to remedy a dispute arising from the covert use of
power. The broader and more effective contribution may arise from new knowledge defining undesirable
hegemonic practices which become part of a rule of customary international law and would be
applicable to all States and not just those recognising treaty law.

3. The framework of hydro-hegemony

This section serves to introduce the features of hydro-hegemony that are most applicable to the
development of International Water Law. The background theory of power and the Framework is first
discussed, with a re-examination of the different forms of hydro-hegemony that can be established. This
will be shown to be directly relevant in assisting with understanding how power shapes State practice
with respect to transboundary water issues.
3.1. Elements of the framework of hydro-hegemony

The Framework of Hydro-hegemony was developed as a response to a void in established water conflict analysis. The debate over the existence of ‘water wars’ may have polarized analysts into opposing camps, which did little to advance the analysis. The dozens of low-intensity transboundary water conflicts that fall short of an all-out war have often gone under-considered in the process. Other analyses from the hydro-hegemonic perspective have shown that these less violent (but still destructive) water conflicts are informed to a large extent by exertions of power. There are at least two elements of the Framework that may serve to strengthen IWL in this regard. These include the role that power plays in water conflict and the forms of hydro-hegemony that can be maintained.

3.1.1. Potential interactions over transboundary waters. As Zeitoun and Allan (2008) discuss, international relations between co-riparians vary both in nature and form, as indicated in Figure 1. It was noted there that the analytical approach of hydro-hegemony applies primarily to those forms of interaction where control is concentrated in the hydro-hegemon’s camp. In its efforts to ‘lead’ outcomes on the shared resource, the hegemon can steer towards shared control or allow a situation where control is contested. The primary domain of analysis of the Framework remains, however, in those situations where the competition is stifled, so that loss of control is prevented (middle section of Figure 1).

It is worth repeating that a hegemon retaining control does not automatically lead to an inequitable and unreasonable allocation of the resource, at least not in the terms of IWL. The form of hydro-hegemony established is a function of the broader political context—at all levels of Warner (2005) terms a ‘layered cake’, i.e. sub-national, national, basin, regional, global. The most important features of the Framework of Hydro-hegemony in assisting with the task at hand is to (a) indicate that ‘benign’ and ‘malign’ forms of hydro-hegemony exist, and what they look like, and (b) allow that power—particularly the covert nature of ‘soft’ power—is all-important in determining such forms.

3.1.2. The hidden aspects of ‘soft’ power. In contrast to the ‘hard’ material power of military capacity, economic powerhouses and political friends in high places, ‘soft’ power alludes to the less intuitive forms that usually play out in negotiations (‘bargaining’ power) and in the discourse and thoughts of adversaries (‘ideational’ power). Bargaining power is measured by the impact that one’s own options and alternatives may have on the other—the type of power a baby may have over her mother, for example. Dellapenna (2003: 289) points out how a state may use a reference to international law to gain a sense of legitimacy for customary practices, thereby increasing its bargaining power for continued extraction from a river, for example. Daoudy (2008) attests to the influence of non-hegemonic Syria has had over Turkey through the bargaining power derived from ‘issue-linkage’.

Ideational power was said to be power in the realm of ideas, the ‘power to prevent people, to whatever degree, from having grievances by shaping their perceptions, cognitions and preferences in such a way that they accept their role in the existing order of things’ (Lukes, 2005 [1974]: 28). Strange (1994: 176) has also identified this form of power, when she asserts that ‘at this level, the strong implant their ideas,
even their self-serving ideology, in the minds of the weak, so that the weak come to sincerely believe that the value-judgments of the strong really are the universally right and true ones’. This form of power is the most difficult to observe and has been shown to veil the conflict as well as steer donor funding and policy (Zeitoun & Warner, 2006). Cascão (2008) demonstrates the counter-hegemony tactics employed by Ethiopia, which are in and of themselves types of ‘ideational’ power.

3.1.3. Forms of hydro-hegemony. As we have discussed, evaluation of a hydro-hegemonic situation is deeply subject to perception. What looks favourable from a hegemonic perspective may not always be perceived in the same manner from the vantage point of weaker parties. Analytical focus on the cooperation between States may tend to hide the negative effects of power asymmetries, after all. The assessment of the outcome, we propose, is highly conditioned by the process. The form of hydro-hegemony is evaluated according to the outcome for the non-hegemonic state, in terms of its ability to realise its water-related interests. This could vary from ‘good’ to ‘extremely poor’, as in Figure 2.

One modality of a ‘benign’ form of hydro-hegemony may be a benign dictatorship (tendency towards left-hand side of Figure 1), in which the stronger power imposes or grants an arrangement that benefits all. While the hegemon’s ‘power over’ the others continues, this power brings the hegemonised enough ‘power to’ meet their goals to accept the hegemonic arrangement (Haugaard & Lentner, 2006). Despite the advantageous outcome for the hegemonised and its implicit acceptance, the arrangement may still be formally protested as the hegemonised cannot be seen to accept a subordinate position.

How do we as analysts, then, evaluate process and outcome of the exercise of hydro-hegemony? The proposed classification of Figure 2 is based on both the outcome of the interaction for the non-hegemonic actor and the extent of control enabled by the hegemon. The boundaries between the forms are, of course, fuzzy.

Evaluated explicitly from the non-hegemonic actor’s perspective, the outcome of the situation of hydro-hegemony relates to the influence the situation has on its ability to realise its objectives with the resource. For want of a less subjective term, a ‘good’ outcome is where the situation of hydro-hegemony does not impede on the non-hegemonic actors’ ability to realise its objectives (say flood-control, for Bangladesh). Other factors may of course impede the non-hegemon from attaining its goals (level of socio-economic development, for example), but these are not directly related to the form of hydro-hegemony. The degree of control that the non-hegemon has in matters related to transboundary flows is considered ‘significant’, according to Figure 2, in relation to the hydro-hegemon.

<table>
<thead>
<tr>
<th>Outcome (for Non-hegemon)</th>
<th>Control shared (by Hydro-hegemon)</th>
<th>Form of Hydro-hegemony</th>
</tr>
</thead>
<tbody>
<tr>
<td>Good</td>
<td>Significant</td>
<td>'Benign'</td>
</tr>
<tr>
<td>Neutral</td>
<td>Some</td>
<td>Neutral</td>
</tr>
<tr>
<td>Poor</td>
<td>Selective</td>
<td>Restrictive</td>
</tr>
<tr>
<td>Very poor</td>
<td>Minimal</td>
<td>Dominative</td>
</tr>
<tr>
<td>Extremely poor</td>
<td>None</td>
<td>Oppressive</td>
</tr>
</tbody>
</table>

Fig. 2. Forms of Hydro-hegemony, based on the outcome for the non-hegemonic State and degree of control shared by the hegemon.
Conversely, the outcome for the non-hegemonic actor may be ‘very poor’ if it finds that attempts to realise its hydro-objectives are compromised by the little control relinquished to it by the hegemon. Consider again the links between the devastating flooding in Bangladesh, and lack of data-sharing on Ganges flows from upstream and hegemonic India. Non-hegemonic Bangladesh can be understood to be dealing within a somewhat ‘dominative’ form of hydro-hegemony, or an ‘obstructive’ form to say the least, though a thorough evaluation remains to be conducted.

The hydro-hegemon seeking to establish a ‘benign’ form of hegemony has many modalities of cooperation from which to ensure positive-sum interaction under its guidance. These include basin-wide integrated approaches or benefit-sharing schemes like joint hydro-power projects. On the other end of the spectrum, a hydro-hegemon intent on concentrating control over the resources can stifle competition through the previously-discussed tactics and strategies of control, resulting in an oppressive form of hydro-hegemony.

According to the proposed method for evaluating the form of hydro-hegemony, a ‘benign’ form of hydro-hegemony could be said to exist when the control over the resources is shared roughly equally, and the outcome for the non-hegemonic riparian is ‘good’, if rarely unproblematic. Such a situation does not necessarily mean that the participants in the hegemonic arrangements are, or should be, equally powerful. The hegemon may be exploiting power asymmetry under such conditions to lead in a ‘guidance’ sort of way, as Turton and Funke (2008) claim is the case with South Africa along the Orange River. While South Africa’s economy and military prowess far exceeds that of its neighbours, the state, the authors assert, acts like a ‘gentle giant’ rather than a ‘basin bully’. A more symmetrical and egalitarian power balance between State actors is now arguably found on the Rhine. While it does not follow that egalitarian relations between hydro-political are forcibly ‘better’, there is evidently a case against extreme asymmetry when it leads to universally accepted concepts of injustice.

Finally, where control of the resources is less shared by the hydro-hegemon, and the outcome for the weaker State is ‘poor’ or ‘extremely poor’, the form of hydro-hegemony established by the hegemon, according to Figure 2 would range from ‘restrictive’ to ‘oppressive’. The situations of hydro-hegemony along the Nile (Cascão, 2008; Saleh, 2008), Jordan (Zeitoun, 2008) and the Tigris and Euphrates (Daoudy, 2008) would—and we invite debate here - merit such labels.

The legal response to address such situations is found in the doctrine of ‘restricted sovereignty’, which is associated with the previously mentioned principle of ‘equitable and reasonable utilization’, as developed in the 1997 UN Convention. It would not be surprising to find that the more ‘malign’ forms of hydro-hegemony are maintained in disregard of the principles of IWL, which may wish to see the situation otherwise.

12 Though nuances and objection to the argument are offered by Mutembwa (1998), Quibell (2006).
13 The potential for a hydro-hegemon to shift from ‘basin bully’ to ‘gentle giant’ may hold practical applications for policymakers. Such a reformist approach to improved relations on a basin is quite distinct in nature from the counter-hegemonic strategies outlined by Cascão (2008), though the outcome can in theory be similar.
14 Those interested in reforming or contesting the status quo would do well to more deeply explore the motives that could lead ultimately to less damaging forms of hydro-hegemony. The previously-mentioned costs associated with being a hegemon may be a good motivator for a shift in leadership style. As was the case with South Africa, states known as the ‘regional police force’ may be interested in shaking the stigma. Influence from other sectors may also impart a change in the form of hydro-hegemony. A state deciding to shift its electrical power policy away from hydro-power to, say, nuclear or alternative power, would be ‘freed up’ to take a less rigid approach with its neighbours all the while maintaining its hydro-hegemonic status. Such suggests the theory, which awaits exemplification.
3.1.4. Combining the framework and IWL. Table 2 is an attempt to project such assertions in a way that may allow identification of general trends. The form of hydro-hegemony is associated with the likelihood of the hegemon maintaining correspondence with the principles of international water law. Exemplification from various river basins is provided on the right-hand side, with an indication of which States have acceded to the 1997 UN Convention.

The initial approximation of Table 2 proposes that basin States interacting within a ‘benign’ form of hydro-hegemony—that is to say, fully cooperating over water issues—are likely to be doing so in compliance with the principles of IWL. In other words, and at the risk of sounding trite, rules that are equitable and reasonable can appeal to states that are equitable and reasonable with their co-riparians. Such is the case, it is suggested, along the Rhine and, arguably, Orange rivers.

At the other extreme, Table 2 suggests that hegemons maintaining less ‘benign’ forms of hydro-hegemony are likely to do so in transgression of the principles of IWL. This is, as we have seen, a major present weakness of the international community—because the inability to promote and enable the sharing of transboundary water is exposed in situations of non-aggressive conflict between States with little history of shared rules of conduct. The cases of the Nile and Jordan rivers approach this extreme, though qualification of the position in all cases is obviously required.

Israel, for example, has explicitly recognized ‘Palestinian water rights’ (Oslo II, Article 40) and Jordanian ‘rightful allocations’ (Fischhendler, 2008). Such concessions in bi-lateral agreements appear to coincide with the principles of IWL. To date, however, there has been no quantification and implementation of ‘Palestinian water rights’, and attempts to do so have proven unfruitful. Zeitoun (2008) catalogues the covert expressions of power Israel has used to maintain the status quo and identifies how the Palestinian Water Authority is unable to manage the water sector while also obliged to consider Israeli political and military interests. Thus, while the letter of the agreement appears to agree with IWL, the spirit does not. This deception is an effect of ideational power.

In between the two extremes we have all different intensities of hydro-hegemony, ranging from those where the weaker party has some share of the responsibility for the resource (i.e. protection from pollution) to those where the hegemon maintains restrictions against the weaker states but does not generally dominate cooperative elements of it. Cases where the hydro-hegemon refuses to become

<table>
<thead>
<tr>
<th>Form of HH</th>
<th>Corres. with IWL</th>
<th>Basin</th>
<th>Hegemon</th>
<th>Co-riparian states</th>
<th>Instituted mechanism</th>
</tr>
</thead>
<tbody>
<tr>
<td>Complete</td>
<td>'Benign'</td>
<td>Rhine</td>
<td>Germany*</td>
<td>Switzerland, Netherlands†</td>
<td>ORASECOM</td>
</tr>
<tr>
<td></td>
<td>High</td>
<td>Orange</td>
<td>South Africa†</td>
<td>Lesotho, Namibia†</td>
<td></td>
</tr>
<tr>
<td></td>
<td>Neutral</td>
<td>Kagera</td>
<td>DRCongo</td>
<td>Rwanda, Burundi, Uganda</td>
<td>(EAC)</td>
</tr>
<tr>
<td></td>
<td>Restrictive</td>
<td>Mekong</td>
<td>China</td>
<td>Laos, Cambodia, Viet Nam</td>
<td>MRBC</td>
</tr>
<tr>
<td></td>
<td>Obstructive</td>
<td>Euphrates</td>
<td>Turkey</td>
<td>Syria, Iran, Iraq†</td>
<td>(none)</td>
</tr>
<tr>
<td></td>
<td>Dominative</td>
<td>Eastern Nile</td>
<td>Egypt</td>
<td>Sudan, Ethiopia</td>
<td>NBI</td>
</tr>
<tr>
<td></td>
<td>Oppressive</td>
<td>Jordan</td>
<td>Israel</td>
<td>Jordan* Syria*, Leb† Palestine</td>
<td>JWC</td>
</tr>
</tbody>
</table>

*Signed 1997 UN Watercourses Convention.
† Ratified 1997 UN Watercourses Convention.
engaged in pro-active water management without necessarily ill effect on the other riparians may be considered ‘neutral’ forms of hydro-hegemony.

4. Using the framework of hydro-hegemony to describe and analyse state practice

This section discusses how the Framework of Hydro-hegemony may serve to describe and analyse State behaviour. We noted at the outset of this paper that, were it able to do so, this would be the second practical contribution that the approach of hydro-hegemony could make to International Water Law.

4.1. Establishing what is ‘fair’ and ‘unfair’

Fairness of the use of transboundary water resources as it is suggested by customary and treaty law may be intuitive to the layman. The concept of fairness immediately illicits the notion of States interacting over the resource, sharing it. The principles and features that accompany the 1997 UN Watercourse Convention’s definition of ‘equitable and reasonable utilization’ provide the foundation for measuring each riparian State’s equitable share of the resource. These include: availability of alternative water sources; existing and potential use; the effects of the use; population dependent on the source; socio-economic needs of affected riparians, and geographical and hydrological considerations (UN ILC, 1997). As we have pointed out in Table 2, there is considerable overlap between the terms of the UN Convention, the water management principles of basin-wide IWRM and a ‘benign’ form of hydro-hegemony.

Practicioners and academics active in the transboundary water sector generally regard behaviour that obstructs basin-wide integrated water management as unhelpful. It is safe to say there may be consensus that such obstructions conducted at the State level could be judged as ‘unfair’. This view tends to hold even on those riverbasins where States are not equally dependent on the flows, such as in the case of Mexico’s unfulfilled obligations to the US on the Rio Grand and Columbia (Fischhendler & Feitelson, 2003). It is proposed, on the other hand, that ‘fair’ water-sharing management exists when all parties have equitable footing and some form of proportionate say in the management.

4.2. Assessing ‘fair’ and ‘unfair’

The first indication of ‘unfair’ situations of hydro-hegemony would likely take the form of a grievance decrying the absence of one State’s proportionate say in affairs. An initial assessment of the grievance may be achieved directly from Table 2. In simplistic terms, if there is evidence of ‘benign’ hydro-hegemony (control is shared and the outcome for the weaker party is ‘good’), it follows that the hegemonic State’s behaviour be considered ‘fair’. Likewise, and just as simplistically, if there is evidence of ‘restrictive’ or ‘dominative’ hegemony in the basin (responsibility and control of the flows are selectively or barely shared with the weaker state, resulting in a poor outcome), it follows that the State’s behaviour would be judged as ‘unfair’.
The challenge then is to define each form of hydro-hegemony in practical and observable indicators, and to link it to the letter of the 1997 UN Convention. This is a hugely political matter, of course. A measure of the intensity of the conflict is one potential indicator. Proof of exertions of power in order to gain compliance may not prove sufficient to be another.

4.3. Indicators of ‘fair and ‘unfair’

We have stated that basin-wide IWRM is generally accepted by practitioners as ‘fair’, but is it? The debate about IWRM even as a water management paradigm is not resolved. There are furthermore numerous challenges in dealing with social or economic concerns in a transboundary resource.

The term ‘cooperation’ has been equally loosely used. But ‘cooperation’ on a water course is far from being completely understood, as the researchers of the London Water Research Group are pointing out.

4.4. A lacuna in treaty law

If there is difficulty in judging the fairness of the outcomes of exertions of power, is there scope for judging the process itself? Proof of exertions of structural power are the easiest to observe. Direct military action is, of course, readily observable, and provisions for an international legal response exist. In fact, the international legal system enables a treaty signed as a result of coercion to be rendered void to the affected party.

The Vienna Convention on the Law of Treaties is quite specific about countering the role that coercion plays in a treaty. Articles 51 and 52 refer specifically to the use of ‘Coercion of a representative of a State’, or ‘Coercion of a State by the threat or use of force’.

It is important, however, to recognise that this is a very specific provision concerning treaties signed as a result of overt coercion. This provision cannot be applied to covert coercion, or situations where no treaty exists. Whilst coercion by thinly veiled threats is measurable to a degree there remains extensive work to be done on definitions and thresholds. This lacuna in Treaty Law has considerable implications.

It is certainly more challenging to find proof of exertions of the more subliminal bargaining and ideational power. We may be assisted with this task by the earlier discussions on and classification of power theory. The Framework of Hydro-hegemony has furthermore identified tactics used by riparians in their quest to maintain concentrated control over the resource (Zeitoun & Warner, 2006). Tactics associated with ideational power have been identified as securitisation (as in Israel’s refusal to allow discussion of re-allocation of existing water resources onto the negotiating agenda, despite its recognition of ‘Palestinian water rights’ under the terms of the Oslo II Accord) and knowledge construction (as when Egyptian authorities carry on parallel discourses over Nile water use with its own people, with its co-riparians and with international donors). The crafting and signing of treaties skewed in the hegemon’s favour has been identified by the Framework of Hydro-hegemony as an exertion of bargaining power. Before it is even possible to think in terms of remedy it is necessary to establish not only where the authority lies to observe hydro-hegemony but also to develop more precisely what the boundaries are.

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16 The full text of Article 52 reads ‘A treaty is void if its conclusion has been procured by the threat or use of force in violation of the principles of international law embodied in the Charter of the United Nations.’
between ‘benign’ and oppressive forms of hydro-hegemony and how these influence equitable and reasonable use. This leads to a generous body of work to which all readers are welcome to join.

4.5. The notion of a legal remedy to negative-sum hydro-hegemony

Supposing it is possible for the law to ‘see’ hydro-hegemony, what should we suppose the role of the law then becomes? Determining where the authority lies to judge is essential if the basis for any third party intervention is to be justified by law. Ideally of course—where a treaty exists—a non-‘benign’ situation of hydro-hegemony could be resolved between the parties. Where the imbalance cannot be addressed, we can for the purposes of this argument assume that resolution is to be found beyond the provisions of that treaty. Therefore, as soon as we establish capacity to observe and comment on hegemony—in a legal sense—we will need a facility to work with the parties involved. The exact nature and powers of that facility will depend upon the nature of the problem. In general, however, where inequality and no (effective) treaty is the basis of a dispute, the law would have to look at other sources of law such as custom in order to establish a basis to require intervention.

Given the global importance of such a judgement, it is difficult to envisage a decision to intervene arising from anything other than an international court. Where there may be a valid and applicable legal instrument to determine equitable and reasonable use—but the parties are unable to use it by themselves—the intervention of a third party with some degree of binding authority will be called for. In keeping with the foundation of international law, the parties would have to accept the jurisdiction of that body as a first step, and indeed the parties might play a key role in its design.

Table 3. Legal responses related to Hydro-hegemony.

<table>
<thead>
<tr>
<th>Form of HH</th>
<th>Situation</th>
<th>Legal response</th>
</tr>
</thead>
<tbody>
<tr>
<td>‘Benign’</td>
<td>States agreement to share water is tested by a change in conditions.</td>
<td>States are reasonable and equitable in their responses. They solve the problem through international law and local means and do not require outside intervention (‘self-executing treaty’).</td>
</tr>
<tr>
<td>Neutral</td>
<td>Crisis due to a failure to fulfil the basic human need for water.</td>
<td>Fundamental UN instruments provide the basis for self help and mutual international cooperation to resolve the situation. Increasingly justified from a Human Rights perspective.</td>
</tr>
<tr>
<td>Restrictive</td>
<td>People lack a basic water supply</td>
<td></td>
</tr>
<tr>
<td>Obstructive</td>
<td>States “laissez faire” approach to sharing water is tested by a change in conditions</td>
<td>States in water “conflict” to the point that human dignity and welfare suffers in contravention of UN Charter. But the form of conflict falls short of the basis upon which UN intervention can be agreed.</td>
</tr>
<tr>
<td>Oppressive</td>
<td>States have no recent history of agreement on sharing water, changes in conditions precipitate aggressive conflict</td>
<td>Fundamental UN instruments provide the basis for third party intervention to halt conflict and enable restoration of flows and possibly reparation.</td>
</tr>
<tr>
<td>Control is contested, situation in disequilibrium</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>
These suggestions are for the present entirely speculative, and anticipated to generate discussion. As in practice, it will be important to develop the most appropriate and effective responses to realise and require remedies to the root causes of non-‘benign’ forms of hydro-hegemony. Indeed, transferring hydro-hegemony from the academic to the practical realm will depend upon the effectiveness of its dispute resolution techniques, and the law’s precise response is as yet undefined.

As previously mentioned, the response of the law in certain cases is already defined and accepted. The response in other cases is only suggested, as in Table 3.

Table 3 demonstrates that it is in the extreme cases where law is found to be applicable. The table shows, for instance, that UN instruments exist already for those cases of no waer conflict or of violent water conflict. In other words, if the competition is fierce enough to take a military form, the UN can intervene. At the other extreme, where States act ‘equitably and reasonably’ with each other under the presence of a hegemon, there is no need for law, and the relations themselves become an effective ‘self-executing treaty’. Law’s blind spot, as we have pointed out, is in the middle; those instances of restrictive or oppressive forms of hydro-hegemony maintained in part by covert exertions of power. This is the range of water conflict that requires more study.

5. Conclusion and implications

The Framework of Hydro-hegemony is developing an increasingly cogent argument and framework for describing, analysing and demonstrating that State practice over transboundary water issues is determined to a significant degree by the use of power. The International legal system at present appears to be ‘blind’ to such causes of skewed water sharing arrangements and focuses instead upon realising a remedy to its effects. International law is effectively weakened when one State dominates another and particularly when treaty law is seen as the only legal means to achieve reasonable and equitable utilisation of a shared water resource. The development and practice of treaty provisions for water sharing are certainly modified by the hegemonic behaviour of a powerful State. It appears that, for the ‘carrot’ of international law to be attractive, the ‘stick’ of hegemony has first to be removed. Hegemony clearly diminishes the effectiveness of international legal principles.

The possible contribution of the Framework of Hydro-hegemony to international water course law is threefold.

Firstly, by describing the nature of hegemony, the law will be able to observe where it is happening and what it’s result can be. This would begin a process of enabling the law to ‘prevent’ the causes of inequitable and unreasonable water sharing—rather than its present approach which aims to ‘cure’ the effects by legal remedy. A significant body of professional knowledge and experience already exists in this field and ought to become accessible in the legal domain.

Secondly, through the analysis and description of State practice, a corpus of knowledge could be built up that represents the clear identification of practices which ought to be encouraged and those which ought to be prevented. This knowledge of the behaviour of States would serve to inform both treaty law and the much more broadly applicable customary law. For the present, hegemony appears to be able to neutralise the legal effect of treaty law, but this may not be true for customary law.

Thirdly the Framework of Hydro-hegemony may have a fairly specific field of applicability with respect to International Watercourse law. This concept arises from a simple ‘three case’ model in which properly consenting States will ‘self-execute’ treaty provisions and achieve reasonable and equitable
utilisation of water, whereas unreasonable States will resort to conflict to capture a share of water. Between those two extremes lies a ‘lacuna’ for the law, yet much of the world’s inequitable sharing of water may be practiced in that grey area. To date, the law on shared waters has been largely defined by these ‘extreme situations’. However, by describing and analysing State practice in this presently grey area it may be possible to identify new and more effective regimes of legal responsibility and remedy, and address the most likely scenarios where inequitable water sharing is found.

Acknowledgements

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