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SOVEREIGNTY AND
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**Part I State Sovereignty, Water Systems and the
Development of International Water Law**

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INTRODUCTION

This eighth volume in the *History of Water* series addresses the most important political and judicial question in contemporary management and use of transboundary waters: sovereignty. Sovereignty has for centuries been at the very centre of political and legal arrangements between the community of states. It has been one of the constituent ideas of the post-medieval era, and it is the central organizing principle of the system of states in the present-day world. It is a term that in the contemporary world extends across continents, religions, civilizations, languages and ethnic groups, and different constructs of the sovereignty concept exist, offering varying and contradicting answers to the question of what it is.¹ The issue here is located within both a historical and geographical context, and analysed from different perspectives by world-leading authorities in their respective fields.

This chapter will focus on the issue of sovereignty from a rather unusual perspective. The meaning and changing nature, and status of state sovereignty in international politics and law have been analysed in innumerable articles and books. By 1928 it could be argued that the sovereignty doctrine had 'been turned inside out and upside down by the successive uses to which it has been put' (Ward 1928: 168). It is still widely regarded as a poorly understood concept, a confusion stemming from different sources. Consistent with this observation, the doctrine has been cited as authority for acts never intended as expressions of sovereignty, and it has been contested in ways that never conformed with practice in the real world. Most scholars, however, agree that at its core sovereignty is typically taken to mean the possession of absolute authority within a bounded territorial space: 'A sovereign state can be defined as an authority that is supreme in relation to all other authorities in the same territorial jurisdiction, and that it is independent of all foreign authorities' (Jackson 2007: 10). It is this notion of the centrality of territoriality that makes it particularly fruitful to discuss the question of sovereignty in a water perspective, since water on the move disregards political and social inventions as borders.

Here sovereignty will be analysed in relation to how state actors have behaved when it comes to international rivers and aquifers, and how interactions with this particular fluid web of nature has impacted the notions of and practices of sovereignty. Within this general framework we believe it is important to focus on three specific questions relating to areas or central topics in the international discourse on sovereignty: i) what was the Westphalian notion of sovereignty; ii) to what extent has history seen a development from a Westphalian to a post-Westphalian notion of sovereignty; and iii) what are the connections between sovereignty and conflict? We wish to show that these key issues in international relations studies and international law can be understood in a new light by focusing on these three confluences between international rivers and politics.

THE MYTH OF WESTPHALIA

A main assumption and premise in the very extensive legal and political science literature is that the idea and principle of sovereignty is a legacy of the Peace of Westphalia in 1648. Westphalia is seen as the very birthplace of the idea of absolute and unrestricted sovereignty. The main story goes on like this: the Westphalian model emerged against the background of the cataclysmic changes unleashed in Europe during the sixteenth and seventeenth centuries. The Peace Agreement of 1648 provided legitimacy for the principle and idea of the territorial, unitary and absolute sovereign state, having exclusive authority within its own geographical boundaries. Through the centuries after 1648, this legacy and ascribed tradition – as theoreticized by international law scholars and political scientists – increasingly emphasized sovereignty, and led to confrontation between claims of absolute territorial sovereignty and claims to the absolute integrity of state territory. Westphalia has come to symbolize the birth of a new world order in which states are nominally free and equal, and enjoy supreme authority over all subjects and objects within a given territory; engage in limited measures of cooperation; and regard cross-border processes as a ‘private matter’ (see Falk 1969, Cassese 1986: 396–9, Held 1995: 78, and for quote, see Held 2002: 4).

In recent decades there has been much debate about whether or not we live in a post-Westphalian world. One ‘school’ argues that due to a number of global trends, the triumphant Westphalian notion of sovereignty is now being gradually undermined. It is claimed that we live in a post-Westphalian age (Harding & Lim (eds) 1999, Westra 2010, Macqueen 2011) characterized by the ‘end of the sovereign state’ (Wunderlich & Warrie 2010: 256). Other researchers question the realism and validity of this claim, arguing that international relations remain anchored to the politics of the sovereign state (Buzan, Jones & Little 1993). They hold that differences in national power and interests, not international norms of cooperation and supranationality, continue to be the most powerful explanation for the

behaviour of states. Both ‘schools’ agree, however, that Westphalia signalled the birth and subsequent dominance of the idea of the sovereign state having a final and absolute authority over its territory. The Westphalian model has offered a ‘simple, arresting and elegant image’, and an empirical regularity for various theories of international politics (Krasner 1995: 115).

If Westphalia really marked the triumph of unfettered sovereignty, however, the text of the agreement should clearly and unambiguously advocate this new and general principle in international politics, and the negotiation process and the agreement should reflect this principle when existing transboundary issues are dealt with.² First we will take a close look at the original texts.

According to an edition published by Yale University, Article I of the agreement reads like this:

That there shall be a Christian and Universal Peace, and a perpetual, true, and sincere Amity, between his Sacred Imperial Majesty, and his most Christian Majesty; as also, between all and each of the Allies, and Adherents of his said Imperial Majesty, the House of Austria, and its Heirs, and Successors; but chiefly between the Electors, Princes, and States of the Empire on the one side; and all and each of the Allies of his said Christian Majesty, and all their Heirs and Successors, chiefly between the most Serene Queen and Kingdom of Swedeland, the Electors respectively, the Princes and States of the Empire, on the other part. That this Peace and Amity be observ’d and cultivated with such a Sincerity and Zeal, that each Party *shall endeavour to procure the Benefit, Honour and Advantage of the other* [my italics]; that thus on all sides they may see this Peace and Friendship in the Roman Empire, and the Kingdom of France flourish, by entertaining a good and faithful Neighborhood.³

In an English translation from 1697 it reads slightly differently:

That there shall be a Christian and Universal Peace, and a Perpetual, True, and Sincere Amity, between the Sacred Imperial Majesty, and the Sacred Most Christian Majesty; as also, between all and each of the Allies, and Adherents of the said Imperial Majesty, the House of Austria, and its Heirs, Successors; but chiefly between the Electors, Princes, and States of the Empire on the one side; and all and each of the Allies of the said Christian Majesty, and all their Heirs and Successors, chiefly between the most Serene Queen and Kingdom of Sweedland, the Electors respectively, the Princes and States of the Empire, on the other part. That this Peace and Amity be Observed and Cultivated with such a Sincerity and such Zeal, that each Party *shall endeavour to procure the Benefit, Honour and Advantage of each other*; that thus on all sides they may see this Peace and Friendship in the Roman Empire, and the Kingdom of France flourish, by entertaining a good and faithful Neighborhood [emphasis added].⁴

In the original French text it reads like this:

Et cette paix s'observe & cultive sincèrement & sérieusement, en sorte que chaque Partie procure l'utilité, l'honneur & l'avantage l'une de l'autre, & qu'ainsi de tous côtés on voye renaitre & refleurir les biens de cette paix & de cette amitié, par l'entretien sur & réciproque d'un bon & fidèle voisinage...' (Bougeant, vol. 6: 285)

What clearly emerges is that these texts are not a treatise for absolute sovereignty. Paragraph I underlines rather the value of restricted sovereignty and the explicit need to be concerned with the interest of each other. The above English and French versions of the text of the Peace Treaty, underlining the principle of the 'interest of each other' or 'of the other', contradict dominant assumptions that the Peace of Westphalia established and enthroned the principle of unrestricted sovereignty. The text of the Peace Agreement formulates and reflects ideas of common benefits. The content of Article I should not, however, be seen as sufficient evidence to falsify the idea that Westphalia created a semblance of a new world order premised on the recognition of sovereignty. The Peace of Westphalia did institute an international system where sovereign states were recognized as the primary actors in interstate relations on the basis of sovereign equality, but what the text shows was that absolute sovereignty or *territorial* sovereignty in all its forms were not anticipated under this new order because it was not seen as being in the best interests of the sovereign.

What is of specific concern when it comes to understanding how the Peace Agreement handles issues of *territorial* sovereignty and transboundary flows is the way the agreement describes the role of transboundary rivers in relation to territorial sovereignty. Westphalian sovereignty has often been conceptualised as the sovereignty of nation-states over their territory, and no external agents can play a role in domestic relations or structures. The Peace of Westphalia is regarded as the event that ended attempts to impose supranational authority on European states. But what did the Agreement actually stipulate? Here we limit our attention to the River Rhine, due to its *economic and political* importance.

Paragraph LXXXIX of the Agreement deals explicitly with the River Rhine:

All Ortnavien, with the Imperial Cities of Ossenburg, Gengenbach, Cellaham and Harmospach, forasmuch as the said Lordships depend of(on) that of Ortnavien, informuch that no King of France never can or ought to pretend to or usurp any Right or Power on the said Countries situated on this and the other side the Rhine: nevertheless, in such a manner, that by this present Restitution, the Princes of Austria shall acquire no more Right; that for the future, the Commerce and Transportation shall be free to the Inhabitants on both sides of the Rhine, and the adjacent Provinces: Above all, the Navigation

of the Rhine be free, and none of the Parties shall be permitted to hinder Boats going up, or coming down, detain, stop, or molest them under what pretence soever it may be, except the sole Inspection and Search which is usually done to the Merchandizes, and it shall not be permitted to impose upon the Rhine, new and unwonted Tolls, Customs, Taxes, Imposts, and other like Exactions.⁵

The text of the Agreement underlines the importance of cooperation and the need to restrict the absolute territorial power of the sovereign, i.e. the opposite of what has been generally said about it. It was a territorial violation of the ascribed Westphalian model since it involved the creation of authority structures that were not coterminous with geographical borders.

If the Peace Agreement's plan for the Rhine is analysed in a broader historical and geographical context, it becomes clear that it reflected new and emerging ideas about how the countries on the continent could benefit by improving rivers that would then promote wealth and trade. The importance ascribed to supranational cooperation over waters in the Peace Agreement was a deliberate economic strategy pushed by the leading architects of the peace process, and a response to the particular problems caused by the hydrological and geographical character of the continental rivers in an era when rivers were primarily used for goods transportation.

The Rhine, with a basin of about 180,000 km² and a length of 1,300 km, and comprising what is today the northern tip of Italy, Switzerland, Austria, Germany, France, Luxembourg, Belgium and the Netherlands, was (and still is) one of the most important trading routes in Europe. Due to its natural features, the Rhine posed many hazards for navigation and thus for trade, even for quite small vessels.⁶ From Roman times attempts had been made to improve particularly awkward stretches of the river, but success had been limited. In the centuries and decades before the Peace of Westphalia, nothing much had been done and, in order to improve it, cooperation was necessary. The river's nature incessantly created new obstacles. The river frequently shifted its course in floods, sometimes leaving flourishing river quays stranded. Towpaths and dikes were destroyed. Rocks and reefs impeded shipping.

In Germany in the early Middle Ages commercial shippers ran scheduled trips along the Rhine between Mainz and Köln. Although the medieval records fail to establish precise quantitative data about the volume or value of riverine traffic and trade, it is safe to assert that river trade was important though limited. On an average all-year basis, half of the water came down from the Alps (mostly in spring) and half from the tributaries north of Basel (mostly rain fed). The water sources of the river thus liberated the Rhine from some of the problems encountered in other French and German rivers. However, the fluvial dynamics of the Rhine above Strasbourg

prevented the construction of permanent towpaths and forced upstream traffic to depend on human muscle or wind power. Most transport was downstream, including timber rafting from the Black Forest to the Netherlands. Upstream travel was very difficult, requiring towpaths and the change of ships frequently on the way. The Rhine's 'low-to-high flow ratio' coupled with the Foehn winds, meant that the river was flood-prone. The Upper Rhine had the classic characteristics of a floodplain, and frequent floods made quay-building and the building up of a trade infrastructure a hazardous enterprise. Catastrophic flooding occurred in 1124, 1342 and 1573. Traffic on the Rhine suffered for natural and hydrological reasons, but also because of political boundaries.

Prior to the Thirty Years' War, the river was under the control of the Emperor of the Holy Roman Empire and the imperial princes were responsible for maintaining the navigability of the river. The princes' authority was weak, and they were more concerned with extracting tariffs for themselves than using resources on improving the river. The town guilds along the river acted in the same manner. In the mid-seventeenth century kings, bishops, cities and robber knights tried to profit from Rhine navigation. There were numerous tolls along the Rhine and passing ships had to pay duties to the rulers of the different Rhine sections. The number of tolling stations had increased from 19 in the late twelfth century to over 60 stations by the sixteenth century (Mellor 1983: 70). The way the Rhine runs through the landscape and the amount of castles built along the banks of the river meant that it was quite easy to control the trade on the river. The taking of tolls was held to be part of the imperial rights. Liberal grants were made to cities, and especially to lords, in order to secure the Emperor's loyal support, or as a means of filling an empty treasury. There was, moreover, no reason for the individual prince to improve his stretch of the river if the other princes did not do the same along their stretches, because individual action would not improve it as a common good.

The Peace of Westphalia endeavoured among other things to create a potentially very useful north–south transportation route that run through continental Europe. In spite of all the problems with river transport on the Rhine, it was still considered the preferable way to move goods and passengers. Previous rulers had occasionally tried to eliminate the tolls by force but these attempts failed. One fundamental aspect of the diplomatic and economic strategy of the French cardinal Jules Mazarin (1602–61), the man who effectively ran the French government during the Congress of Westphalia, was his visions for the continental waterways. His aim was to weaken the authority and power of the Emperor. For France to achieve this, economic development in the German states had to be facilitated. The best bet was to improve waterways since better trade on the rivers would also benefit France. Mazarin therefore commissioned a study of the rivers of the European continent and of the potential for an expansion of trade in goods produced along these rivers, including the Vistula, the Oder, the Elbe,

the Weser, the Ems (which crosses Westphalia), and, of course, the Rhine (the most important economic channel linking Switzerland, Germany, France and the Netherlands).

The political and territorial system on the continent hindered the development of the Rhine as a trading artery, Mazarin saw the Rhine as a corridor of development, but it was misused by the princes, working against their own best interests. In 1642, France announced that there would be no further peace negotiations if the introduction of new tolls along the Rhine were to be allowed. Even though the edict was not implemented in full, it contributed to creating the political atmosphere that enabled the Congress of Westphalia to succeed. It reflected or expressed in concrete terms the idea of the common good – the *advantage of each other*. The edict was seen as an important economic and political initiative, benefitting not only France but the whole region since the river was a key trading route on the continent. The basic understanding was that the economy was devastated by war, but was further undermined by the burden of systematic interruptions of trade on the river between northern and southern Europe.⁷ Legally, the use of the rivers was regarded as a common right and the use of the water for drinking and voyaging was free, thus undermining the idea of absolute territorial sovereignty. Hugo Grotius (1583–1645) a jurist in the Dutch Republic and one of the fathers of international law, argued that duty could not be taken for the exercise of this right, but that it should be interpreted as a compensation for the cost of maintaining the river and the towpaths. The Frankish monarchy, in contrast, saw duty as a tax upon, rather than a denial of the right of passage on the river.⁸

The Agreement did not lead to fundamental improvements of the river as a trade route. The Peace of Westphalia did not solve the problem of the Rhine. The regime on the Rhine in the eighteenth century has rightly been characterized as a ‘landscape of petty quarrels’²⁴. Between Alsace in the south and the Netherlands in the north there were 97 German states alone. The ‘knights and priestlings’ ruling these tiny states were warring with their neighbours over fishing holes and birded islands. They built some small dams, with local aims in mind, and these only increased the number of sandbars and forks. They of course defended their ‘staple’ and ‘transfer’ privileges, an important source of income to them, and manned the toll booths (34 in a 600 km stretch from Gemersheim to Rotterdam alone) – all negatively impacting river trade.

The provisions of the Treaty of Westphalia regarding the Rhine, coupled with the idea of ‘the advantage of each other’, can be seen as the first formal germs of what later – in 1815 – became the pioneering Rhine Treaty, which has been seminal in the history of European cooperation and unification and in the historical development of international water law. The situation had been somewhat improved, but the problem was

not solved and the elimination of tolls therefore remained an important issue in the Peace Conference in Vienna in 1815, even after a number of agreements had been signed in the years before, such as the Treaty of the Hague in 1795 and the Convention of Paris in 1804, on the tolls of the navigation of the Rhine. In the framework of the 1815 Peace Treaty, the riparian Rhine states voluntarily opted for free navigation and elimination of the tolls. They created the Central Commission for Rhine Navigation. The internationalization of shared rivers and lakes for navigation was initiated formally in 1815 at the Congress of Vienna, when the Rhine Commission was established, followed by the Oder and the Niemen in 1918, the Elbe in 1921, and the Weser in 1923, which were all declared international waters for navigational purposes. In 1856 the Treaty of Paris internationalized the Rhine and the Danube. Therefore, as regards international waters, the Peace of Westphalia does not belong to a tradition of unrestricted sovereignty, which is being undermined by present developments. On the contrary, by viewing regional development as a historical process clear connection between 1648 and 1815 can be made. The principle of sovereignty was modified by the rationality of and the need for cooperation over international waters from the very beginning.

This short assessment of the events that regulated shared European waters is sufficient to challenge the dominant interpretation of Westphalia.⁹ To assert that it was Westphalia that ‘formally recogniz [ed] exclusive territorial jurisdiction of monarchs’ (Wunderlich 2010: 255), and that it was in 1648 that the idea of undivided, unlimited authority and territorial exclusivity was born, contradicts not only the development of the actual peace process and the role of transboundary waters, but also the text of the Peace Agreement itself (Chamberlain 1923: 146–7).¹⁰ The text underlined the need for considering the interests of ‘the other’. It also prescribed cooperation on the Rhine running through different sovereigns’ territory.

The concept of sovereignty as understood in 1648 implied that to be a member of an international society of states, you would have to comply with international agreements and contribute to finding a solution to collective problems. The idea that Westphalia represented an absolutist territorial definition of sovereignty cannot therefore be historically justified, and the canonical story is in this sense a myth.¹¹ As with all other myths in history, however, it has become a myth for a reason; it has served specific political and ideological interests. The mythical story should therefore be analysed as yet another expression of the political–ideological career of the notion of sovereignty. Already in 1928 it was described in this way: ‘The various forms of the notion have been apologies for causes rather than expression of disinterested love for knowledge’ (Ward 1928: 167).¹²

THE MYTH OF 'POST-WESTPHALIA'

The dominant assumptions about the gradual undermining of the idea and doctrine of sovereignty form the backdrop of statements about the 'death of Westphalia' – a metaphor widely used to capture the perceived fall from status and strength of the sovereign state.

This assessment of gradual decline of sovereignty has been put forward by an influential school within the international relation studies. In the 1970s and early 1980s, liberal interdependence theorists (Keohane & Nye 1972 and 1977, Morse 1976, Rosencrance 1986) argued that due to global development trends, state sovereignty was being eroded by economic interdependence, global scale technologies and democratic politics.¹³ Taking this view, states' sovereignty was increasingly constrained and penetrated by 'the forces of globalization', of which international organizations can be thought to be part (Litfin 1997). There was a shift away from state-centric to multi-layered global governance (Held). This trend has also been noted by international lawyers, some of whom might go as far as to suggest that this tendency in international environmental and natural resources law leads the way in the 'communitarization' of states on a global scale, going beyond traditional 'liberal' international law, with limited functions of regulation and coexistence and based on reciprocal obligations, "to a multifunctional providential law, regulating the life of States and individuals and considered the ultimate guardian of collective well-being" [...] the implementation of which "does not depend on a corresponding implementation by the other parties".¹⁴ According to Maljean-Dubois, 'the special nature of the environment plays a large part in the transition from an international law of coexistence to an international law of cooperation', which 'is grounded not on an obligation not to do something, but on an obligation to do something, or positive obligations, because it comes from the idea of action or common tasks, which cannot be done or done well when done individually'.¹⁵

Much literature has argued that transnational environmental interdependencies have led to the demise of the state system. The ascribed mismatch between what has been conceived as the requirements of physical ecology and the reality of the social structure of politics has been expressed most famously, perhaps, in the dictum of *Our Common Future*: 'The Earth is one, but the world is not' (World Commission of Environment and Development 1987: 1). Some have anticipated sovereignty's eventual replacement by some far-reaching supranationalism or even by world government (Falk 1971 & Ophuls 1977). A number of scholars and activists have argued along the same lines that the Earth itself demonstrates the inadequacies inherent in legal principles based on states' territorial sovereignty. It has been assumed that the cumulative impact of agreements

on ecological issues would tend to undermine the institution and idea of state sovereignty, since the territorial exclusivity upon which state sovereignty is supposed to be premised appears to be fundamentally violated by transboundary environmental issues (Johnston 1992). Or in other words, the seamless web of nature is seen to be contradicting and eroding the man-made system of territorial states and, therefore, also the doctrine of state sovereignty.

Based on the above premises, the following hypothesis could be formulated: since water is always in a flux, constantly neglecting political and cartographic territorial boundaries, it should be assumed that this trend is particularly visible in the management of international river basins due to the increasing significance of water resources management of regimes of supranational governance. International rivers should, by their very nature, be constantly undermining the idea of sovereignty.

At first glance this hypothesis is confirmed. Legal theories of 'absolute territorial sovereignty' – according to which a state has an absolute right to do as it pleases with the water in its territory – and the theory of 'absolute territorial integrity' – whereby the riparians are considered as having an absolute right to the natural flow, unimpaired in quantity and quality – are not supported in the contemporary world. But this situation alone should not be taken as proof of such a trend. Sovereign rights to utilize the water have, for a long time and in many societies, been limited by the obligation to consider the sovereign rights of other stakeholders. As we have shown, that was already an aspect of the 1648 settlement, as it was in the cases of the Rhine and the Danube conventions. The first agreements on the Nile from the 1890s and the early decades of the twentieth century barred upstream countries from using the Nile without the consent of other states in the basin.

There has been a noticeable growth in the number of international institutions involved in transboundary water management – and such basin-wide organizations have made 'sovereignty bargains' an art of politics executed by many state actors. In some geographical areas one can discern a trend by which states sharing international water resources have moved from positions based on notions of unrestricted sovereignty to positions that recognize the need to limit their sovereign discretion on the basis of sovereign equality. This development does not necessarily mean a weakening of the sovereign. As it has been argued, states may engage in sovereignty bargains in which they 'voluntarily accept some limitations in exchange for certain benefits' (Litfin 1997: 170). If that is so, this development does not entail a weakening of sovereignty, just a change in the form of its manifestation.

Examples indicate that the assumed trend of a weakening of the idea of sovereignty in relation to international river basins is not so clearly directional. Parallel to the internationalization of water politics and water

management, the status of the notion of sovereignty has been strengthened 'on the ground' in many parts of the world. The post-colonial history of the management of the Nile is a case in point. A strengthening of state sovereignty has occurred to a considerable extent in relation to questions about how this international river should be managed among different 'stakeholders' in the age of modern technology. In recent years countries such as Kenya, Uganda, Rwanda, Tanzania, Burundi and Ethiopia have, as sovereign states, demanded the right to use the waters of Nile running through their lands down to Egypt and the Sudan, rejecting agreements entered into by the colonial rulers. The negotiations over the use of this common resource have created a very important new arena for these states to demonstrate their sovereignty in. The Nyerere doctrine of the 1960s and Kenyatta's proposal put forward at the same time were crucial initiatives and steps in the history of exercising state sovereignty in the region (Tvedt 2012). Similarly, the Nile Waters Agreement between Great Britain and Egypt in 1929 was a watershed event in Egypt's march towards sovereign statehood after it gained formal independence in 1922, as the Nile Waters Agreement between the Sudan and Egypt in 1959 signified the Sudan's emergence as a sovereign actor on the regional and world scenes. The prolonged discussions between India and Bangladesh about the Ganges and the Farakka Barrage has, if anything, made the status of state sovereignty stronger and increased the animosity between two neighbouring countries. The problems inherent in sharing international aquifers show some of the same development. The discussions among the countries with territories covering the Guarani Aquifer in South America, and in the International Law Commission concerning the Commission's 2008 Draft Articles on Transboundary Aquifer that in 2010 led to the Guarani Aquifer Agreement, have strengthened the status and relevance of state sovereignty. The discourse supporting these instruments asserts that water resources *belong* to the states in which they are located and are subject to the *exclusive* sovereignty of those states. These cases contradict the general hypothesis about a universal, historical trend, and suggest the need for more detailed empirical research.

Actual historical development is more multi-faceted than the dominant trend-analysis, but why is this so? Since sovereignty is not only an attribute of the state, but is attributed to the state by other states or state rulers, there are no reasons why international or transnational river basins or aquifers should – due to geographical necessity – erode the status and legitimacy of sovereignty. It turns out that geographically speaking, artificial borders across international water bodies are challenged by international institutions and modern legal thinking, but that they also serve an increasingly important symbolic function in encouraging manifestations of state sovereignty. By focusing on territorial borders within a river basin, the political leaders make themselves easily visible as defenders of 'the interests

of their people'; since all inhabitants in all states need water, the state and its leaders can acquire legitimacy as sovereigns defending their people in negotiations over such cross-boundary ecological structures.¹⁶ Moreover, states often exercise this sovereignty in multilateral, international institutions, characterized by being distanced from societal and democratic control since state bargaining with society is bypassed and also normatively defended by the idea of multilateralism. This externally induced, state-led challenge of democratic control should not simply be interpreted as an erosion of sovereignty. It might rather be an indication of an opposing trend, since this context gives the actors representing the sovereign increased freedom in their sovereignty bargains. This is especially so in relation to international waters, where it is easy to use nationalistic slogans to mobilize people in the street, but where more de-politicized negotiations may facilitate the most optimal solutions, both for the river and for the states sharing it. To use a reified, ahistorical notion of sovereignty, disregarding the actual complexity of practices that exist, will fail to grasp the multiple dimensions of sovereignty and its meanings and how these are in constant flux.

This short analysis has rejected the universal validity of the above trend analysis of the status of sovereignty, primarily by testing the hypothesis in relation to international river basins, an area where one should assume that its validity should be confirmed.

The dominant but mythical story about Westphalia misrepresents the past with the consequence that the present is misunderstood: the differences between 'then' and 'now' are far less than the talk about 'the end of Westphalia' presupposes. Regarding water and river management in particular, it is empirically misleading and theoretically problematic to talk about a post-Westphalian age signified by cooperation and the undermining of the absolute power of the sovereign, since Westphalia initiated an era of cooperation on water between sovereigns in continental Europe.

SOVEREIGN STATE ACTORS AND CONFLICT

The manner in which states conduct their hydropolitics with one another has, in general within the field of international relations, been analysed through theoretical frameworks associated with ideas of the sovereign state actor (Dalby 1998). The basic idea within this tradition is that unilateral development based on a sovereign's interests will be conflicting by nature or result in conflict. We will here contest this general assumption. We will argue that the idea shared by realists and neo-realists – that sovereign states driven by power and interests will find it very difficult to cooperate given that they ultimately insist on maintaining and safeguarding their own autonomy, control and legitimacy – overlooks both the nature of rivers as transboundary resources and how these can be approached by

state actors. Empirical, historical studies show that neither conflicts nor 'tragedies of the commons' are given or guaranteed outcomes in the absence of cooperative framework agreements in international river basins. This is so, due to a combination of natural characteristics of water bodies and historical processes, issues are seldom integrated in analysis within this type of social analyses (Tvedt 2004).

Given the fact that almost all big rivers are shared by two or more sovereign states and that almost half the population of the world live in international river basins on the one hand, and that there have been very few wars or open conflicts between sovereign states about how to use these rivers on the other hand, sovereign states have managed to solve a lot of conflicting issues in a peaceful manner. This is not an argument against the idea that sovereign state actors create conflict, but it refutes the assumption that sovereign state actors are not able to resolve differences in a peaceful, non-conflictual manner. It is possible to regard the unique cooperation among sovereign European states on the continent's big rivers in the seventeenth and early nineteenth centuries as forerunners to the European Union of the twenty-first century. The Indus Water Treaty in 1960 was made possible by an agreement between two sovereign states, brokered by the World Bank, disregarding the interests of individual regions, such as Kashmir, and ethnic groups in the basin. There are thus a number of examples that show that states can enter into agreements and by such an act contain potential conflicts between other and different actors.

There is, however, another geographically related argument that is more interesting and intriguing when it comes to the role of the sovereign (See Tvedt 2004 & 2015). In large river basins, economic, political, technological and ecological conditions can vary considerably from one part of the basin to another, and this fact presents sovereign states located within international river basins with different and potentially non-conflicting strategic choices. Climatic conditions, soil types, velocity and flow characteristics may have created fundamentally different options of adaptations in the past, and they will create a wide array of possibilities in the present and the future. For example, irrigation may not be a priority in one country as sufficient rainfall enables rain-fed agricultural production there while, at the same time, irrigation may be a fundamental approach to water resource utilization in another country within the basin. In some parts of the basin the water can produce hydropower, while in other parts this is not possible or feasible. The need for water and the way states are capable of relating to it will vary markedly depending on a number of historical factors. The point is that the sovereign's territorial interests in maximizing water usage may not always be in conflict with another sovereign state's plan to maximize its water usage, contrary to the case in a traditional 'commons' as described by Garret Hardin and others. Even in cases when sovereigns enjoy full sovereign freedom, their actions may be to

the benefit of others. When, for instance, Ethiopia erects the highly controversial Renaissance Dam within its territory it might frighten Egypt for geopolitical reasons, but it may still be in the real, long-term interest of Egypt as far as technical management of scarce water resources is concerned. In an international river basin it need not always be a zero-sum game, where a participant's gain (or loss) must be balanced by the losses (or gains) of the utility of the other participant(s). Instead of having a situation where, when the total gains of the participants are added up and the total losses are subtracted they will amount to zero, one might have a situation where everyone will benefit. The particular aims of the different sovereigns created by history and geography might therefore prove to be an advantage for optimal utilization as compared to what would have taken place had there been one river authority ascribed the power to act on behalf of all.

To analyse sovereignty and conflict as abstract models of principles or as conflicting or cooperating legal relationships between basin states may therefore blur the understanding of underlying issues in a particular river basin and might also hinder peaceful utilization of the watercourse. For a couple of decades there has been extensive debate on whether international river basins will be a source of war or of cooperation between riparian states. Water wars theories suggest that as each riparian state maximizes its use of the scarce water resources, conflict ensues and – particularly in water-stressed basins – war may be the end result. In reaction to the water wars theories, other researchers have advanced water as a pathway to peace theories, suggesting that because of greater interdependence between riparian states, they will commonly come together for the core purpose of managing water jointly.

Both these basically deterministic theories can be contested, as the configuration of power, history and relations among actors in river basins are more diverse than the theories allow for. The society–water interactions are bi-directional, since the social attributes of the actors, their values, interests, and the power relations that influence how the physical environment is conceived, are so diverse. Water's presence within the territory of a nation-state is often very specific to the geographic features of that country, and the local people often identify strongly with these water resources and geographic features, considering them part of their national heritage and identity. The place occupied by an international water body in a nation's cultural life will vary over time, often according to the country's transactional situation with regard to its water. This fact supports the argument that nation-states cannot be entrusted with the burden of protecting other peoples' rights to the same water. Additionally, however, societies cannot manipulate their environment at will since geographical and hydrological factors define what is possible with different means. Thus societies' exploitation of water resources is not only solely based on political, social, economic and technical capacities, but must also be suited to the

ecological contexts in which such exploitations take place. Moreover, as the physical environment changes by natural and human-induced forces, societies constantly have to modify their relationship to the physical environment in order to sustain themselves.

These dynamic society–water interactions vary from one basin state to another, particularly in large basins with different ecological conditions. It is these patterns and histories of interactions between the different basin states and their physical environment that influence how these states enter the international hydropolitical arena, the strategic choices adopted and the forms of cooperation that are preferred. In river basins it is too easy to conclude that the modern sovereign state is creating or solving the problem of cooperation or conflict (Tvedt 2010). Instead of resorting to general models and universal principles, it is the particular ‘rules of the games’ in the particular river basin that should be properly analysed in order to avoid conflict and promote further cooperation. Resolution of water conflicts is, therefore, essentially a negotiation of particular linkages, of which the particular geographical and hydrological linkages are but two.

PROPERTY, SOVEREIGNTY AND HYDROLOGY

Historical studies have made it clear that there is no grand theory of development that can explain and grasp change and continuity in international water law, and neither national nor international water law has evolved systematically or naturally according to their own methodology or internal laws (Howarth 2014). Resolution of particular cases in particular man/water relations has often proved to be the ‘tail’ that wags the ‘dog’ of legal principle (Howarth 2014). Water law as found around the world today has aptly been described as ‘a patchwork of local customs and regulations, national legislation, regional agreements, and global treaties’ (Dellapenna 2014), reflecting that water law developed in a highly contextual manner mirroring different political systems, religious traditions and economic activities and relations. Some laws are drawn from Talmudic interpretations or from Islamic law regarding Allah as the legislator; others are influenced by European continental law traditions or the common law traditions, where the judges have the key role in making the law. According to Article 38 of the Statute of the International Court of Justice, the sources of international law are a mix of international conventional law, international customary law, the general principles of law recognized by ‘civilized nations’, and the judicial decisions or international case law and the teachings of the most qualified publicists.

The fundamental reason for different legal practices in different sovereign states and in different international river basins is not only that all societies and regions have different political, economic and religious histories, but also that they at all times have had to relate to and distribute

the particular water running through or underpinning their societies in some way or another. Since legal norms and traditions can only be understood by making reference to the attitudes of the human beings who established them, to reconstruct their history requires an understanding of the situation as apprehended and conceived by the agents whose acts impacted legal developments.

Here it is argued that in addition to political, cultural and judicial history, it is also necessary to integrate an analysis of the water body subject to law-making, since it forms part of this 'situation' as filtered through the lens of the actors. The legal history of international water will therefore also have to integrate into the analysis such non-social issues as the physical characteristics of different water bodies (aquifers, wells, and other specific types of running water and river basins, etc.). In order to understand the history of international water law and sovereignty one therefore ought to study the general historical context in which these laws developed as well as the particular geographical and hydrological features of the legal objects for which the laws were developed. The point we will make is that geography matters when it comes to understanding the development of international water law and the particular notions of sovereignty dominating in different river basins.¹⁷

The Danube Convention is a case in point and demonstrates the need for a broad, multidisciplinary approach. It was formalized against the background of a very particular historical–geographical situation in the lower part of the Danube River at the end of the Crimean War. The countries in the region wanted to ensure that trade on the Danube, which had been such an important waterway for centuries, should no longer be hampered by narrow national interests. Commerce and shipping had almost been stopped by hydrological and geographical features of the river. The sanding of the delta, which was shared by different countries, made commerce and trade almost impossible. Boats could hardly travel upstream from the Black Sea and *vice versa*. In 1865, the year the treaty was signed, the situation was especially bad and the mouth of the Danube was littered with the wrecks of sailing ships and made hazardous by hidden sandbars. By internationalizing the river this hydrological and natural problem could be solved in the best interest of all the states concerned. Through cooperation among the states (Britain and Italy were also part to the agreement), the common enemy – the sand – could be more easily moved. It was in fact only by cooperation and agreement that this particular problem facing them all could be solved. The hydrology of this river acted as a definite push towards international, cooperative agreements.¹⁸ Politically as well as historically this was a golden moment, and the countries grabbed the opportunity. Later in the nineteenth century a number of new agreements relating to the Danube River were signed, concerning the jurisdiction and powers of what was called 'the European Commission' on the Danube (Kaeckenbeeck 1920: 233).

The situation on the Nile was very different. The primary use of the river was for irrigation rather than transport, and its hydrology has not acted as a push for cooperation, since the basic and fundamental feature of the river is that it runs for 2,000 km through one of the hottest deserts in the world, and through two countries totally dependent on water discharge they do not control since all the waters come from upstream. The 1929 Agreement was therefore not an agreement aiming at resolving common problems, but the outcome of political and diplomatic rivalry between Great Britain and Egypt. London exploited for political and diplomatic reasons the fact that the upstream countries at the time could be considered as having no interest in the river at all because they could rely on other parts of the water system: rainfall. London institutionalized a policy of limited sovereignty for the East African territories in order to establish a form of basin-wide cooperation between the two dominant powers, London and Cairo. The 1929 Agreement on the Nile cannot be understood without taking into consideration the Nile as a complex water system with three different and interconnecting layers: i) power relations within the Nile Basin; ii) technological development and human modifications of the river; and iii) the river's enormous length, the fact that it traverses extremely different climatic zones, its variable hydrology, etc (Tvedt 2014).

The infamous Harmon Doctrine must also be analysed in connection to the specific ecology of the Rio Grande and the years of drought that preceded the formulation of the doctrine, just as the general applicability of lessons from the up-to-now successful 1960 Indus Treaty between Pakistan and India are limited, since the solution of assigning all the water of the eastern tributaries of the Indus to India and the western tributaries and the main channel to Pakistan was made possible by special territorial and hydrological features that are not found elsewhere.

In order to understand the development of international water law it is therefore not sufficient to study the development of law itself; one must also study historical context in a broad sense as well as geography and hydrology. The importance of geography should not be seen in a narrow, one-dimensional and deterministic way. There are no necessary or determining relations between geographical location and international law practices, or between varying river systems and treaty design differences. To argue that the most fundamental elements in the analysis of conflict and cooperation over an international river are the geography of the river itself and the location of each state *vis-à-vis* that river is to overstate the case. Even in those cases where rivers bind states into a complex web of interdependencies, geography is only one factor, and it is the combined impact of geographic location, economic might, technological capabilities, water management capacities and military muscle that influence symmetry and asymmetry in international river agreements (Dinar 2008: 46). Of course, there are some widespread characteristics. The most important factor of long-term consequence is that bargaining power not available to

downstream states may be available to upstream states (Sprout & Sprout 1962: 366). It is not always the case, however, that whoever controls the upper parts of a river basin has a distinct strategic advantage *vis-à-vis* sovereign downstream actors. In the relationship between Lesotho and South Africa regarding the rivers feeding the urban centres of Johannesburg and Pretoria, Lesotho as the upstream power has become a victim of its location upstream in a river basin controlled politically and economically by a very strong downstream neighbour. Sovereign states with apparently enormous potential water power may turn out to be weak in a given confrontation with seemingly weaker states if analysed from a purely geographical perspective. It has been argued that the geographical position of the state – whether it is located upstream or downstream – is the ‘key to this veto symmetry’ (Dinar 2008: 45), but there are enough cases from river basins around the world to contradict this general theory. Politics triumph most often – but not always – over geography, at least in the short run.

The popular idea that upstream sovereign states always have a geographical advantage is deterministic, and should be regarded as a dogmatic substitute for concrete investigations. It may or may not be the geopolitical constellation, depending on the geography of politics and economies in a much wider sense than just in relation to the one-factor upstream/downstream dichotomy. The Nile might be a case in point. Ethiopia has been an upstream country on the Nile for thousands of years but, because it was technologically very difficult to exploit the river at all within its territory due to a number of geographical factors, Egypt, located at the river’s outlet and surrounded by deserts, developed as the strongest regional power. Ethiopia was not in a position to exploit its upstream position while Egypt used its downstream position to develop by far the most powerful state actor in the whole basin. As time passed and the basin entered the Modern Period, Ethiopia was barred from using the little water it could use by asymmetric treaty arrangements benefitting the downstream power. Now this is about to change and any general theory must be able to explain why, until now, an upstream location has been a strategic disadvantage. These examples are sufficient to indicate that right, might and location are interlinked in much more multi-faceted relations than popular ideas comprehend.

To bring geography into the picture is nothing new. The 1911 Madrid Declaration of the Institute of International Law made it clear in its preamble that its principles of law were deduced from ‘the permanent physical dependence’ of co-basin states.¹⁹ As Bourne has summarized it: ‘The physical features of a drainage basin, its geography’, were now to be ‘the foundation of the legal rules applicable to its development’.²⁰ But as Bourne rightly commented, ‘an argument based on geography alone does not carry conviction’,²¹ due to alterations of river basins by man. To understand the historical development of notions of sovereignty in

international river basins or in international law, it is crucial to bring into the analysis both human modifications of the river system and ideas about how the water can best be used and distributed. Additionally, geography is more complex than the Madrid Declaration has acknowledged. In both the hydrological and a geomorphological sense, drainage basins are dynamic rather than static entities. The processes of fluvial geomorphology shapes landforms over and through which the water moves. They influence water-table depths and how far water is running underground, impact soil profiles and, not least, the stream channels. One can talk about a 'fluvial hydrosystem' (Amoros & Petts 1993, Petts & Amoros 1996), viewing fluvial systems as interdependent combinations of the aquatic and terrestrial landscapes, as meandering alluvial rivers, changing river channel patterns, erosional processes and slopes, changing over time the longitudinal stream profiles, etc. The basin scale, although in some cases very large, may nevertheless be too small for the effective study of environmental, economic and political issues. One needs, moreover, to take account of the global nature of the hydrological cycle. The issue of scale has been regarded as one of the major unresolved problems in hydrology (Sivapalan & Kalma 1995,²² Ward & Robinson 2000: 346)²³ since macro, meso- and micro-scale are all relative terms.

CONCLUSION

By using water as an entry point, this chapter has shed new light on sovereignty and the history of the doctrine's status. It has shown that the dominant interpretation of both Westphalia and the 'death of Westphalia' are based on a neglect of empirical data and a disregard for the particular character of the ecology and economy of rivers.²⁴ Westphalia was not the birthplace of unlimited sovereignty, since it also encouraged and codified cooperation among state actors to improve cooperation on the major continental rivers. The notion that the idea and status of sovereignty is currently being unavoidably undermined by ecology and ecological concerns has moreover been questioned by bringing forth empirical examples showing contradicting historical developments in some important river basins. The chapter has also shown that although treaty-making cannot be understood properly unless analysed from an inclusive geographical perspective, there is definitely no one-factor causal relationship between a state's geographic position in a river basin and its bargaining power. The relationship is far more bi-directional and complex. A critical analysis of the interconnectedness between state sovereignty, the history of international law and the character of the water system is important because it will reduce the risk of self-delusion regarding the progress achieved in theories, laws and practices of international conduct in international river basins.

NOTES

- 1 The definition of sovereignty in *Black's Law Dictionary* (<http://thelawdictionary.org/sovereignty/#ixzz2m1XWXxr7>) reads: 'The possession of sovereign power; supreme political authority; paramount control of the constitution and frame of government and Its administration; the self-sufficient source of political power, from which all specific political powers are derived; the international independence of a state, combined with the right and power of regulating its internal affairs without foreign dictation; also a political society, or state, which is sovereign and independent.'
- 2 Croxton and Tisher summarize the problem of historical analyses of Westphalia very accurately: 'Taken together, the congress and the peace are so complex that historians still discover new aspects of it today' (Croxton & Tisher 2002: xx). The literature on the peace process, the Peace Agreement and their consequences are voluminous. This article highlights only one aspect of the whole process, and how it has been analysed and reconstructed in literature in international law and international relations studies.
- 3 Treaty of Westphalia. Peace Treaty between the Holy Roman Emperor and the King of France and their respective Allies, see http://avalon.law.yale.edu/17th_century/westphal.asp. The Yale translation talking about the advantage of 'the other' is less accurate than the old English translation, but what is significant is that the principle that the sovereign should work to the advantage of each other is common to both of them.
- 4 The Articles of the Treaty of Westphalia. *Peace Treaty signed and sealed at Munster in Westphalia the 24th October, 1648* (London: W. Onley, 1697), p.31.
- 5 The Articles of the Treaty of Westphalia. *Peace Treaty signed and sealed at Munster in Westphalia the 24th October, 1648*. (London: W. Onley, 1697), p.31.
- 6 For a description of these difficulties, see Mellor, 1983.
- 7 On the other hand, the Agreement closed the River Scheldt to the Belgic provinces, thus ruining the commerce of Antwerp (Kaeckenbeeck 1920: 31), an expression of the fact that the agreement was less concerned with principles than with pragmatic solutions suiting the most powerful. There was some pretext for this exceptional rule. This portion of the Rhine had been radically modified by Dutch engineers. It has also played important roles at different points in time; it was the forcible opening of this passage by the French in favour of the Flemings and against the Dutch that led the former to enter into the war of the French Revolution. Access to the river was also the subject of the brief 1784 Kettle War.
- 8 First after the next big European peace conference, the Vienna Congress in 1815, and after the French Revolution had swept away the old order partly by establishing the Confederation of the Rhine in 1806, did the countries in the region succeed in developing the Rhine as a transport artery. Then it took place under the leadership of the famous German water engineer Johan Gottfried Tulla, who deepened and channelled the Upper Rhine. This remodelling of the Rhine required, of course, a technological competence level in river manipulation that was not available in the seventeenth century.
- 9 Similar conclusions have recently been drawn by historians researching other aspects of Westphalia. The Thirty Years' War was accompanied by permanent

negotiations and the opponents never totally broke off political contact, and ideas of mutual destruction did not exercise a decisive influence over the political elites (Kampmann 2010: 204).

- 10 There is also a discussion about when the idea of sovereignty entered international diplomatic language. Caporaso (2000: 3) and de Mesquita (2000: 93) argue that sovereignty entered the vocabulary of international relations 500 years before, in connection with the Condordat of Worms, 23 September 1122. Spruyt (1994: 94) and Thomson (1994), in contrast, claim that the contemporary form of territorial sovereignty developed much later. These are important questions that might diminish the 'model' role of Westphalia from another angle.
- 11 For arguments that the Westphalian model was a geographical expression of authority, invariable and inevitably territorial, see for example Agnew, 2005: 456 and Axtman, 2004: 260.
- 12 Krasner argues that the 'Westphalian model is better conceptualized as a convention or reference point that might or might not determine the behavior of policymakers who are also motivated' by different interests, national ideals and influenced by power relations (Krasner 1995: 117).
- 13 By the liberal interdependence school, sovereignty has been seen as being synonymous with the degree of control exercised by public authorities over transborder movements, i.e. the ability to regulate the flow of things across borders.
- 14 Maljean-Dubois, 'The Making of International Law Challenging Environmental Protection', in Y. Kerbrat and S. Maljean-Bubois (eds), *The Transformation of International Environmental Law* (A. Pedone & Hart, Paris and Oxford, 2011), pp. 25–54, at 34, quoting from various writings by E. Jouannet.
- 15 Ibid., pp. 34–5.
- 16 The point about borders and their increasingly symbolic functions is made by Rudolph, 2005.
- 17 Dinar (2008) is one of the few books underlining the importance of geography in understanding water law, but the approach and explanations are very different from the suggestion put forth here.
- 18 The role of the Danube Commission was so strong that an observer in the 1930s argued that 'the need for protecting the integrity of the commission will some day lift it out of the twilight of statehood and accord it full membership in the League of Nations.' See Blackburn, 1930.
- 19 Quoted from Wouters, 1997: 4.
- 20 Quoted from Wouters, 1997: 4.
- 21 Quoted from Wouters, 1997: 15.
- 22 Sivapalan and Kalma, 1995. 'Scale Problems in Hydrology', in Kalma, J.D. and M. Sivapalan (eds), *Scale Issues in Hydrological Modelling* (Chichester: Wiley, 1995), pp. 1–8.
- 23 Ward, R.C. and M. Robinson, *Principles of Hydrology* (London: McGraw-Hill, 2000).
- 24 Thanks to Pierre Beaudry that I became interested in the interpretations of Westphalia, see Beaudry 2010.

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