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WATER, SOVEREIGNTY AND THE MYTH OF WESTPHALIA

This chapter will focus on the issue of sovereignty from a rather unusual perspective. Sovereignty has for centuries been at the very centre of political and legal arrangements. It has been one of the constituent ideas of the post-medieval world, and it is the central organising principle of the system of states in the present-day world. The meaning and changing nature and status of state sovereignty in international politics and law have been analysed in innumerable articles and textbooks. Despite this, it is still widely regarded as a poorly understood concept, a confusion stemming from different sources. The sovereignty doctrine has ‘been turned inside out and upside down by the successive uses to which it has been put’, it was argued already in 1928 (Ward 1928: 168). The doctrine has in line with this been cited as authority for acts never intended as expressions of sovereignty, and it has been refuted in forms that never existed in the real world. It is a term that in the contemporary world extends across continents, religions, civilisations, 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 But most scholars 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, which makes the question of sovereignty so interesting from a water-society perspective.

Here sovereignty will be analysed in relation to how state actors have performed when it comes to international rivers and aquifers, and how interactions with this particular fluid web of nature have impacted notions of and practices of sovereignty. Within this general framework

we believe it is most fruitful to focus on three specific areas or central topics in the international discourse on sovereignty: (a) what was the Westphalian notion of sovereignty; (b) to what extent has history been a development from a Westphalian to a post-Westphalian notion of sovereignty; and (c) what are the connections between sovereignty and conflict. We will show that in international relations studies and in international law these issues will appear in a new light by focusing on these three confluences between international rivers and politics.

THE MYTH OF WESTPHALIA AND CO-OPERATION OVER WATER

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 like this: the Westphalian model emerged against the background of the cataclysmic changes unleashed in Europe during the sixteenth and seventeenth centuries, partly as a result of the Reformation. The peace agreement of 1648 provided legitimacy for the principle and idea of the territorial, unitary and absolute sovereign state. Through the centuries after 1648, this legacy and ascribed tradition – as theoreticised by political scientists – increasingly emphasised sovereignty, and led to confrontation of claims of absolute territorial sovereignty with claims of the absolute integrity of state territory. Westphalia has come to symbolise the birth of a new world 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 co-operation and regard cross-border processes as a ‘private matter’ (see Falk 1969; Held 1995: 78; and, for quote, see Held 2002: 4).

In the last decades there has been a big debate about whether we live in a post-Westphalian world or not. One ‘school’ argues that due to a number of global trends, the triumphant Westphalian notion of sovereignty is now gradually undermined. It is claimed that we live in a post-Westphalian age (Harding and Lim 1999; Westra 2009; Macqueen 2011) characterised by the ‘end of the sovereign state’ (Wunderlich and 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 and Little 1993). They hold that differences in national power and interests, not international norms of co-operation and supranationality, continue to be the most powerful explanation for the behaviour of states. Both these ‘schools’ agree, however, that Westphalia signalled that the idea of the sovereign

state having a final and absolute authority over its territory was born and subsequently became dominant.

We will argue here that if Westphalia really marked the triumph of unfettered sovereignty, then a study of the history of the intricate and long negotiation process and analyses of existing transboundary linkages should support this description.² First, we will take a close look at the original texts.

Article I in the agreement reads like this according to an internet edition published by Yale University:

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* [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.⁴

In the original French text it reads like this:

& cette paix s'observe & cultive sincerement & sérieusement, enforte que chaque Partie procure l'utilité, l'honneur & l'avantage l'une de l'autre, & qu'ainsi de tous côtés on voye renaitre & resleurir les boens de cette paix & de cette amitié, par 'l'entretien sur & reciproce d'un bon % fidele voisinage avec [...]. (Bougeant, vol. 6: 285)

What clearly emerges is that these texts were not – contrary to received wisdom – a treatise for absolute sovereignty, but underlined the value of restricted sovereignty and a concern for 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' falsify assumptions that the Peace of Westphalia did establish the principle of unrestricted sovereignty. In spite of the countless books and articles stating the opposite, the text of the peace agreement formulated and reflected ideas of common benefits.

What is of specific concern in this connection is how the peace agreement described the role of the transboundary rivers in relation to territorial sovereignty. Westphalian sovereignty has often been described as a concept of the sovereignty of nation states on their territory, with no role for external agents in domestic relations or structures, and Westphalia is seen as the place that ended attempts to impose supranational authority on European states. But what did the agreement say, and here we limit our attention to the River Rhine due to its 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 on that of Ortnavien, inasmuch 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 of 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 co-operation and the need to restrict the absolute territorial power of the sovereign; that is, the opposite of what has been generally said about it. But was this only a 'slip of the pen' and could it therefore simply be discarded as irrelevant in any analysis of how Westphalia understood sovereignty?

If the peace agreement's plan for the Rhine is analysed in a broader historical and geographical context it becomes clear that the text was not an accident, but that it reflected new and emerging ideas about how the countries on the Continent could benefit by improving rivers and waters to promote wealth and trade.⁶ The importance ascribed to supranational co-operation over waters in the peace agreement was the combined effect of the hydrological and geographical character of the continental rivers in an era when the use of the river was primarily for the transport of goods, and a deliberate economic strategy pushed by leading architects of the peace process.

The Rhine, with a basin of about 180,000 square kilometres and a length of 1,300 kilometres 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 central trading routes in Europe. The Rhine posed in its natural state many hazards for navigation and thus for trade, even for quite small vessels.⁷ 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 in order to improve it. The river's nature created new obstacles incessantly. 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 Cologne. 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 trade was vital though still 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. The fluvial dynamics of the Rhine above Strasbourg prevented, however, the construction of permanent towpaths and forced upstream traffic to depend on human muscle power or wind. 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 föhn 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 development of a trade infrastructure hazardous enterprises. Catastrophic flooding happened in 1124, 1342 and 1573.⁸

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 to improve 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 by the sixteenth century (Mellor 1983: 70). The way the Rhine ran through the landscape made it quite easy to control the trade on the river, as signified by all the castles that were built along the riverbanks and that can easily be seen from the decks of the cruise ships floating down the engineered Rhine of today. The taking of tolls was held to be an imperial right and liberal grants were made to cities and especially lords to secure loyal support for the Emperor, or as a means of filling an empty treasury. There was, moreover, no point in an individual prince improving his stretch of the river, if the other princes did not do the same along their stretches because individual action would not improve it either for the individual prince or as a common good.

The Peace of Westphalia was among other things an effort to do something with this potentially very useful north-south routeway for transport through continental Europe.⁹ 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 had 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 vision for the continental waterways. His aim was to weaken the authority and power of the Emperor and one way that France could achieve this was to facilitate economic development in the German states. The best bet was to improve the waterways, since improved trade on the rivers would also benefit France. He thus commissioned a study of the rivers of the European Continent and the potential for an expansion of the trade of goods produced along these rivers: the Vistula, the Oder, the Elbe, the Weser, the Ems (which crosses Westphalia) and, of course, the Rhine, the

dominant 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 and thus Mazarin's strategy for weakening the Emperor. He saw the Rhine as a corridor of development, but it was misused by the princes, working against their best interests. In 1642, France announced that there would be no further peace negotiations if it was not forbidden to create new tolls along the Rhine River. Even though the edict was not implemented in full, it was crucial for creating the political atmosphere that enabled the Congress of Westphalia to succeed. The edict was seen as an important economic and political initiative, benefiting not only France but the whole region since the river was a key trading route on the Continent. The 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.¹⁰ 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. Grotius 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 duty and the towpaths. The Frankish monarchy on the other hand saw it as a tax upon the river, rather than a denial of the right of passage (Chamberlain 1923: 146–7).¹¹

The agreement did not lead to fundamental improvements of the river as a trade route. Westphalia did not solve the problem of the Rhine. The regime on the Rhine in the eighteenth century has rightly been characterised as a 'landscape of petty quarrels'. 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 bird islands. They built some small dams, with only 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-kilometre stretch from Gemersheim to Rotterdam alone) – all negatively impacting on river trade.

The Treaty of Westphalia regarding the Rhine coupled with the ideas about restricted sovereignty and co-operation over the Rhine can be seen as the first formal germs of what later – in 1815 – became the pioneering Rhine treaty in the history of European co-operation and unification and in international water law. The situation was somewhat improved but the problem was not solved and elimination of tolls was therefore also an important issue in the peace conference in Vienna in 1815, 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 on the navigation of the Rhine. In the framework of this peace treaty, the riparian Rhine states voluntarily voted for free navigation and elimination of the tolls. They created the Central Commission for the Rhine navigation. The internationalisation of shared rivers and lakes for navigation was initiated formally in 1815 at the Congress of Vienna when the Rhine Commission was established, then the Oder and the Niemen in 1918, the Elbe in 1921 and the Weser in 1923 were all declared international waterways for navigational purposes. In 1856, the Treaty of Paris internationalised the Rhine and the Danube. Later, the development of hydropower led to the 1932 Geneva Convention for the development of hydropower in rivers affecting more than one state. The Peace of Westphalia can in this water perspective not be seen as belonging to a political tradition of unrestricted sovereignty and a tradition which is currently undermined due to present economic developments and ecological constraints. On the contrary, by viewing regional development as a historical process there is a clear connection between 1648 and 1815 and 1932. The principle of sovereignty was from the very beginning modified by the rationality of and the need for co-operation over international waters.

This short assessment of what took place regarding the waters of Europe is sufficient to falsify the dominant interpretation of Westphalia.¹² To assert that it was Westphalia that was 'formally recognizing exclusive territorial jurisdiction of monarchs' (Wunderlich and Warrie 2010: 255), 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. The text underlined rather the need for considering the interests of 'the other'. It also prescribed co-operation over the Rhine that ran through different sovereigns' territories in the following words: '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.' The concept of sovereignty as understood in 1648 meant that an aspect of being a member of an international society of states was the requirement to comply with international agreements and to contribute to and participate in the solution of collective problems. The absolutist definition of sovereignty cannot therefore be historically justified in the way it has been, and the canonical story is in this sense a myth. But like all other myths in history, it is 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).

THE MYTH OF 'POST-WESTPHALIA' AND THE CONFLICT OVER WATER

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 widely used metaphor to capture the perceived fall of status and strength of the sovereign state.

This assessment of the gradual decline of sovereignty has been forwarded by an influential school within international relations studies. In the 1970s and early 1980s, liberal interdependence theorists (Keohane and Nye 1972 and 1977; Morse 1976; Rosecrance 1986) argued that due to global development trends, state sovereignty was being eroded by economic interdependence, global-scale technologies and democratic politics. The sovereignty of states was within this perspective more and more constrained and penetrated by 'the forces of globalisation', of which international organisations can be thought to be a part (Litfin 1997). There was a shift away from state-centric to multilayered global governance (Held 1995).

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 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 its eventual replacement by some far-reaching supranationalism or even by world government (Falk 1969; 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 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 for 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, the 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 recognised in the contemporary world. But this development cannot merely be interpreted as a sign of such a trend. Sovereign rights to utilise 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 1648 as it was of the Rhine and the Danube conventions. The first agreements about the Nile from the 1890s and the first 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 – both UN-sponsored institutions and NGOs – and basin-wide organisations that have made 'sovereignty bargains' an art of politics executed by many state actors. In some geographical areas one can discern a development in which states sharing international water resources have moved from positions based on notions of unrestricted sovereignty to positions which recognise the need to limit their sovereign discretion on the basis of sovereign equality. But 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 manifestations.

There are examples that indicate that the assumed trend towards a weakening of the idea of sovereignty in relation to international river basins is not so clearly directional. Parallel to the internationalisation 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. An increasing status of state sovereignty has to a considerable extent been developed in relation to questions about how this international river in the age of modern technology should be

managed among different 'stakeholders'. In recent years, countries like Kenya, Uganda, Rwanda, Tanzania, Burundi and Ethiopia have demanded as sovereign states the right to use the waters of the 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 and new arena for these states to demonstrate their sovereignty. 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 a sovereign state after it gained formal independence in 1922, just as the Nile Waters Agreement between the Sudan and Egypt in 1959 signified the Sudan's emergence as a sovereign actor in the world scene and in the regional scene. The prolonged discussions between India and Bangladesh about the Ganges and the Farakka Dam have, if anything, made the status of state sovereignty stronger and increased the animosity between the 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'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 agreement 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 falsify the overall hypothesis about a universal, historical trend, and ask for more detailed empirical research.

The actual historical development is more multifaceted 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 a kind of geographical necessity – erode the status and legitimacy of sovereignty. It turns out that geographically unnatural 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.¹³ States exercise this sovereignty, moreover, often in multilateral, international institutions, characterised 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 a sign of an opposite development, 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 mobilise people in the street but where more de-politicised negotiations may be 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 fewer 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 co-operation and the undermining of the absolute power of the sovereign, since Westphalia initiated an era of co-operation over water between sovereigns in continental Europe.

SOVEREIGN STATE ACTORS AND CONFLICT AND CO-OPERATION OVER WATER

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 sovereign's interests will be conflicting by nature. 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 co-operate 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 co-operative framework agreements in international river basins. This is so due to a combination of natural characteristics of water bodies and historical processes, issues seldom integrated within this type of social analysis (Tvedt 2004a and 2010).

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 lives 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, the 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 they are not able to solve differences in a peaceful, non-conflictual manner. It is possible to regard the unique co-operation among sovereign European states over the Continent's big rivers in the seventeenth and early nineteenth centuries as a forerunner 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 and 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.

But there is another geographically related argument that is more interesting and intriguing (see Tvedt 2010 and 2014) when it comes to the role of the sovereign. In large river basins, economic, political, technological and ecological conditions can vary extremely 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 route 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 a sufficient amount of rainfall enables rain-fed agricultural production there, while, at the same time, irrigation may be a fundamental approach to water resource utilisation 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. The need for water and the way states relate and are capable of relating to it will vary markedly depending on a number of historical factors. The point is: the sovereign's territorial interests in maximising water usage may not always be in conflict with another sovereign state's plan to do so, contrary to what is the case in a traditional 'commons' as described by Garrett 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 Grand 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 must 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, the result will be zero, one will 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 utilisation as compared to what would have taken place had there been one river authority, ascribed the power to act on behalf of all.

To limit reflection on sovereignty and conflict to abstract models regarding principles or legal or conflicting or co-operating relationships between basin states may therefore blur the understanding of underlying issues in a particular river basin and can also hinder a peaceful utilisation of the water course. For a couple of decades, there has been a big debate on whether international river basins will be a source of war or of co-operation between riparian states. Water war theories suggest that, as each riparian state maximises 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 war 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 falsified, and the configuration of power and 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 and 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 geographical features of that country, and the people living there will often identify strongly with these water resources and geographical features, considering them part of their national heritage and identity. The place an international water body will have in a nation's cultural life will vary over time, often according to the transaction situation the country is in regarding this water. This fact supports the argument that nation-states cannot be entrusted with the burden of protecting other people's right to the same water. But additionally, 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 an exploitation takes place. Moreover, as the physical environment changes by natural and human-induced forces, societies have constantly 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 hydro-political arena, the strategic choices adopted and the forms of co-operation that are preferred. In river basins it is too easy to conclude that the modern sovereign state is creating or solving the problem of co-operation 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 co-operation. Solving 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; neither national nor international water law has evolved systematically or naturally according to its own methodology or internal laws (Howarth 2014). Resolution of particular cases, especially 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 and Gupta 2014); such laws are 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 common law traditions where the judges do not make the law, they only discover it. 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 recognised by 'civilised nations' and judicial decisions or international case law and the teachings of the most qualified publicists.

The fundamental reason for different law practices in different sovereign states and in different international river basins is not only that all societies and areas 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 if reference is made to the attitudes of the human beings who established them, to reconstruct their history requires the understanding of the whole situation as apprehended and conceived by the agents whose acts impacted on law developments.

Here it is argued that in addition to political, cultural and judicial history, it is also necessary to integrate analytically 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 in the analysis non-social issues such 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.¹⁴

The Danube Convention is a case in point and demonstrates the need for a broad, multidisciplinary approach. It was formalised against the background of a very particular historical-geographical water-society relation in the lower part of the Danube River at the time. It was at the end of the Crimean War. The countries in the region wanted that trade on the Danube, that had been such an important waterway for centuries, should no longer be hampered by narrow national interests. Commerce and shipping were almost stopped by hydrological and geographical features of the river. The filling up with sand of the delta, which was shared by different countries, made commerce and trade almost impossible. Boats could hardly go up the river from the Black Sea and vice versa. The situation was especially bad in the year the treaty was signed, 1856, and the mouth of the Danube was littered with the wrecks of sailing ships and made hazardous by hidden sandbars. By internationalising the river this hydrological and natural problem could be solved in the best interest of all concerned. By co-operation among the river states (Great Britain and Italy were also party to the agreement), the common enemy – the sand

– could more easily be moved. It was in fact only by co-operation and agreement that this particular problem facing them all could be solved. The hydrology of this river acted as a definite push towards international, co-operative agreements.¹⁵ 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 river were signed, and the jurisdiction and powers of what was called ‘the European Commission’ on the Danube were established (Kaeckenbeeck 1920: 233).

The situation on the Nile was very different. The use of the river was for irrigation and not for transport, and its hydrology has not acted as a push for co-operation since the basic and fundamental feature of the river is that it runs for 2,000 kilometres through one of the hottest deserts in the world, and through two countries totally dependent on water discharge they do not control since it all comes from upstream. The 1929 agreement was therefore not one aimed at solving common problems, but the outcome of political and diplomatic rivalry between Great Britain and Egypt. For political and diplomatic reasons London exploited 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 another part of the hydrological system: rainfall. London institutionalised a policy of limited sovereignty for the East African territories, in order to establish a form of basin-wide co-operation between the two dominant powers, London and Cairo. The 1929 agreement on the Nile cannot be understood without taking into consideration the river as part of a complex and quite fixed water-society system at the time, with three different and interconnecting layers: (a) the river’s enormous length, the fact that it traverses extremely different climatic zones, its variable hydrology; (b) technological development and human modifications of the river; and (c) power relations within the Nile basin and especially British imperial Nile strategy and Egyptian ideas about the Nile as an Egyptian river (see chapters on the Nile in this book).

The infamous Harmon Doctrine must also be analysed in connection with the specific ecology of the Rio Grande River and the years of drought that preceded the formulation of the doctrine, as the general applicability of the up to now successful Indus Treaty between Pakistan and India in 1960 has limited universal relevance 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 very special territorial and hydrological features that are not found elsewhere in international river basins.

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. But the importance of geography should not be seen in a narrow, one-dimensional and deterministic way. There are no law-like patterns between geography and international law practices, or river systems and treaty design differences. To argue that the most fundamental elements in the analysis of conflict and co-operation over an international river are the geography of the river itself and the location of each state *vis-à-vis* that river is not helpful. Even in those cases where rivers bind states into a complex web of interdependencies, geography is but only one factor since it is the combined impact of geographical 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 consequences is that bargaining power not available to downstream states may be available to upstream states (Sprout and Sprout 1962: 366). But it is not always the case 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 falsify 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 it was technologically very difficult to exploit the river at all there due to a number of geographical factors, while Egypt, located at the river’s outlet 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. And as time passed and the basin

entered the Modern Period, Ethiopia was barred from using the little water she could use by asymmetric treaty arrangements benefiting the downstream power. Now this is about to change and any general theory must be able to explain why, until now, upstream location has been a strategic disadvantage. These examples are sufficient to indicate that right and might and location are interlinked in much more multifaceted relations than popular ideas comprehend.

To bring geography into the picture is nothing new. In the 1911 Madrid Declaration of the Institute of International Law it was made clear in its preamble that its principles of law were deduced from 'the permanent physical dependence' of co-basin states.¹⁶ As Bourne summarised it: 'The physical features of a drainage basin, its geography', were now to be 'the foundation of the legal rules applicable to its development.'¹⁷ But as Bourne rightly commented, 'an argument based on geography alone does not carry conviction',¹⁸ due to alterations of river basins by man. To understand the historical developments of notions of sovereignty in international river basins or of 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. But additionally, geography is more complex than the Madrid Declaration acknowledged. In both the hydrological and a geomorphological sense drainage basins are dynamic rather than static entities. The processes of fluvial geomorphology shape landforms over and through which the water moves. They influence water table depths and how far water is running underground, they impact on soil profiles and not least on stream channels. One can talk about a 'fluvial hydrosystem' (Petts and Amoros 1996), viewing fluvial systems as interdependent combinations of the aquatic and terrestrial landscapes, as the meandering of alluvial rivers, the changing of river channel patterns, erosional processes and slopes, the change over time of longitudinal stream profiles, and so on. The basin scale, although it is 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 (Kalma and Sivalapan 1995; Ward and Robinson 2000: 346), since macro-, meso- and micro-scale are all relative terms.

CONCLUSION

By using water as an entry point this chapter has thrown new light on how to understand 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. Westphalia was not the birthplace of unlimited sovereignty since it also encouraged and codified co-operation among state actors to improve co-operation on the major continental rivers. The notion that the idea and status of sovereignty are currently and 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 being analysed in an inclusive geographical perspective, there is definitely no one-factor causal relationship between geographic position in a river basin and bargaining power. The relationship is far more bi-directional and complex. A critical analysis of the interconnectedness between state sovereignty, history of international law, and water, is important because it will reduce the possibility of self-delusion about progress achieved in theories, laws and practices of international conduct in international river basins.