Cooperative Management of Transboundary Waters between The Rule of Law and State Sovereignty

Dr. Hosam Elemam
Ex-Senior Researcher, Bergen University-Norway
Consultant of Environment and Water Law
Member of Commission of Environmental Law-IUC

Introduction

Cooperation, in principle, between riparian states on the management of their shared water resources mostly is welcomed, but still the most complicated step is the implementation of such desired cooperation on the ground, in particular when concerned states adopt contradicting strategies and inflexible positions and interpretation of the General International law in general and the water law in particular.

The main purpose of this paper is to assure the necessity of recognition of the intimate relationship between the Rule of Law and the state sovereignty with regard to cooperative management of transboundary waters. Taking into account the need to harmonize this relationship in light of the fact that International law in general and international Water Law in particular do not contradict with state sovereignty over the shared water resources, but rather it is a regulatory relationship to build better mutual understanding between the riparian states to get the best benefits from the shared water resource.

State Sovereignty

According to the historical evolution of the concept of sovereignty over shared water resources, a positive and essential change in this concept has been generated on the international arena. This could be demonstrated through the theories and doctrines that have been practiced both by upstream and downstream states based on the national interests of each.

2-1- **Absolute territorial sovereignty**:

Caponera states that at the present time few accept the thesis according to which a state is the absolute master of its own territory, empowered to use the resources it encounters therein without any consideration for the effects it may cause beyond its frontiers. This thesis attributes to the attorney general of the USA, and it is favored by upstream states(3) .

According to Caponera this theory failed to appreciate, the dual character of a

state, namely, that territorial sovereignty is a source of obligations as well as of rights. On another hand, Lipper mentions that this theory is not to be a part of the international water law, since it aims to concrete the right of state to do whatever she chooses as long as there are no related international rules(4) .

2-2- **Absolute territorial integrity**:

It is the main defense of the downstream states, which assure that the natural flow of the river should not be affected by any activities in the upstream states. Here the state is entitled to expect that the same volume of water, uninterrupted in quantity and unimpaired in quality, flow into its territory. Caponera mentions that this theory awards rights without duties(5).

2-3- **Limited territorial sovereignty and integrity**:

Here sovereignty is acknowledged and justified on the basis that every state is free to use the waters within its territory if she takes into consideration the rights and interests of all the other riparian states. This theory is well accepted in international law, as it was recognized by the permanent court of justice in 1929, in its judgment on the territorial competence of the River Oder Commission. When it affirmed that states have a common legal right to the resources of a shred river, not only a right of passage, the essential characteristic being the community of interests of all the parties in the use of the river and the exclusion of preferential privilege of any riparian state in relation to others(6).

According to the international experience, those theories failed to enable riparian states to achieve the desired cooperative management. This could be attributed basically to the very hard positions adopted by the first two that take into consideration, only, the national interests of either upstream states or downstream state, and lack of criteria to determine and identify the very flexible and vague "free use" in the third one. Reasons behind this failure could be obviously recognized when we take into consideration, from a logical and neutral perspective, that the most frequently asked questions regarding international watercourses and national sovereignty could all be answered with a resounding ***"no"(7)***:

- Does a state have ***sovereignty*** over water flowing through its territory as part of an international watercourse owing to the fact that it "contributed" to that flow a certain percentage of precipitation? No. This would be an impossible precedent to set as it would imply that states with low rainfall have correspondingly low entitlement to water.
- Does a state have ***sovereignty*** over international watercourses, to an extent that would necessarily permanently prevent the development of fellow riparian states, owing to the

fact that it was the first to use or develop the resource? No. How could it possibly be acceptable for one state to so fundamentally restrict the development and perpetuate the poverty of another state on such a basis?

The relationship between national sovereignty and the management of international watercourses should be understood in light of the fact that they can mutually reinforce each other(8). Efficient management of international watercourses can strengthen and support national sovereignty by ensuring more reliable access to higher quality water, thus averting the civil strife which can be caused by water shortages or interruptions of services and making for healthier, more secure states. For that reason, National Sovereignty should be seen as a social construct which provides a geographical and institutional framework very important to basin management and reduces the likelihood of tensions arising over water, not as the basis by which states can claim absolute rights to watercourses(9).

Bringing together the two concepts of National Sovereignty and International Watercourses is a necessary step. ***"It is a terrible mistake that international watercourses have been subjected to this same "ours" and "theirs" philosophy as it is contrary to their very nature and therefore irreconcilable"***. It means that to place international watercourses under the umbrella of state sovereignty is to ignore the reality of the water cycle. The question of whether a state has "sovereignty" over water flowing through it as part of an international watercourse has been debated for so long, with so little agreement, because it is the wrong question asked for the wrong reasons(10).

2-4- Equitable and reasonable utilization:

What could be concluded is that the solution to this issue, logically, is the "regulated sovereignty" that enables each state to have a sovereign right to use water without causing harm to the other riparian states. This is the concept known as the rule of equitable and reasonable utilization, which is based on the concept that an international drainage basin is a coherent legal and managerial unit. The principle of "equitable and reasonable utilization" was adopted in the 1997 UN Convention on the non-navigational uses of international watercourses (Articles 5 & 6)(11).

Consequently, a new or increased use of transboundary waters is "lawful" where it is determined to be equitable and reasonable(12). According to Article 5 (Equitable and reasonable utilization and participation) Watercourse States shall in their respective territories utilize their shared watercourse in an equitable and reasonable manner to attaining optimal and sustainable utilization thereof and

benefits therefrom, taking into account the interests of the watercourse States concerned, consistent with adequate protection of the watercourse. Moreover, Watercourse States shall participate in the use, development and protection of the watercourse in an equitable and reasonable manner.

To support the new approach of equitable utilization, article 6 assured that Utilization of an international watercourse in an equitable and reasonable manner within the meaning of article (5) requires taking into account all relevant factors and circumstances, including but not limited to:

(a) Geographic, hydrographic, hydrological, climatic, ecological and other factors of a natural character.
(b) The social and economic needs of the watercourse States concerned;
(c) The population dependent on the watercourse in each watercourse State;
(d) The effects of the use or uses of the watercourses in one watercourse State on other watercourse States;
(e) Existing and potential uses of the watercourse;
(f) Conservation, protection, development and economy of use of the water resources of the watercourse and the costs of measures taken to that effect;
(g) The availability of alternatives, of comparable value, to a particular planned or existing use.

It is notable that the purpose of article 6 is to provide for the manner in which States are to implement the rule of equitable and reasonable utilization, which requires for its proper application that States take into account concrete factors pertaining to the international watercourse in question, as well as to the needs and uses of the watercourse States concerned. *What is an equitable and reasonable utilization in a specific case will therefore depend on evaluating all relevant factors and circumstances by each watercourse State, in order to ensure compliance with the rule of equitable and reasonable utilization,* ***in other words, compliance with the Rule of Law.***

Although Article 6 sets forth a list of factors and circumstances, however it should be noticed that this list is indicative, not exhaustive. Taking into account, the wide diversity of international watercourses and of the human needs they serve makes it impossible to compile an exhaustive list of factors that may be relevant in individual cases. Some of the factors listed may be relevant in a particular case while others may not be, and still other factors may be relevant which are not contained in the list. No priority or weight is assigned to the factors and circumstances listed, since some of them may be more important in certain cases while others may deserve to be accorded greater weight in other cases.

Being the backbone of the 1997 UN convention, all the articles of this convention were designed to support the

efficient application of the principle of equitable and reasonable utilization. For instance, Part III ("Planned Measures") progressively develops this area of the law and sets forth a system of measures to be followed by States in their development of international watercourses. The first requirement is that States "exchange information and consult each other and, if necessary, negotiate the possible effects of planned measures on the condition of an international watercourse" (Art. 11, UN Watercourses Convention). Where a watercourse State considers that a planned measure may have a "significant adverse effect" on other watercourse States, there is an obligation on the State proposing to undertake the planned measure to notify the potentially affected State(s) of the planned measure, and provide such watercourse State(s) with available information on the possible effects. If any of the potentially affected States consider that the planned measure is contrary to the principle of equitable and reasonable use, they may require consultation and negotiations with the proposing State. In the event of disagreement between States, international law requires the peaceful settlement of the dispute.

What is worth mentioning here is that although some states may claim that they are not members to the convention and that it has not entered into effect yet; therefore they are not obliged to comply with it. However, it should be recognized that the duty of equitable and reasonable utilization is a rule of customary international law, binding States regardless of the entry into force or ratification by States of the Convention. This principle provides, indeed requires, that States take into consideration the factors related to sustainable development of the resource, thus providing the legal framework for operationalizing this concept (13).

The Rule of Law

The international water law (embodied in the 1997 UN convention) has documented the international practice existing and accepted in the customary international law. This intervention has led to a new understanding of the state sovereignty theory, given that the dominant old theories of sovereignty had proved disable to support and enhance cooperative management of water resources.

The international water law did not ignore the state sovereignty when it mentioned the new approach that should replace the old theories of sovereignty, meaning the equitable utilization principle. Within the framework of this principle, the international water law has assured that each *Watercourse State is entitled to make use of the waters of an international watercourse within its territory*. ***This right is an attribute of sovereignty*** and is enjoyed by every State whose territory is

traversed or bordered by an international watercourse. In other words, the principle of the sovereign right means equality of riparian States to the use of the watercourse that is qualitatively (***not quantitatively***) equal to, and correlative with, those of other watercourse States.

In my point of view, in its attempt to make a balance between the rule of law and state sovereignty, the convention tended to establish a legitimate framework umbrella, providing states with fundamental legal principles that could match with related international changes. To make the mentioned balance, the convention has linked and affiliated the principle of equitable utilization with the "no harm rule" to reach the required and acceptable regulated sovereignty. In addition, it gave room for addition or deletion with regard to the related factors, according to the characteristics and uniqueness of each river basin. Consequently, states are free to use the shared water resource but obliged, in the meanwhile, not to cause significant harm to other riparian utilization. To determine what the equitable and reasonable utilization is, they are entitled to add or delete any related factors according to the characteristics and uniqueness of their shared basin.

This approach has been recommended in many international declarations. For instance, the provisions on principle 21 of the Declaration of Stockholm of 1972: According to the UN Charter and the principles of International Law, the States has the ***sovereign right to exploit its own resources,*** in line with its environmental policy, provided that the activities carried out under its jurisdiction or control, do ***not harm*** the environment of other States or areas beyond any national jurisdiction.

And also the principle 2, of the Declaration of Rio of 1992: The States, according to the UN Charter and the principles of International Law, have the ***sovereign right to exploit*** **its own resources** pursuant to its own environmental policies and development, and responsibility to ensure that activities within its jurisdiction or control ***do not cause damage*** to the environment of other States or areas beyond the limits of national jurisdiction.

My point is that the application of international water law principles such as equitable utilization, no harm rule, prior notification and cooperation… etc, help riparian states to achieve the sustainable development. The latter is the desired goal for riparian states taking into account that development of the part of the basin within one state individually may lead to the depletion of the water resource, since each state will tend to get the most benefits from the resource without any consideration to the effects on the utilization of the other riparian states. On the other hand, agreed sustainable development

means sustainability of the resource for all according to agreed factors and procedures.

The International Water Law embodied in the convention of non-navigational uses of international watercourses 1997, largely, has provided the legal framework for riparian states to achieve the cooperative management of their shared water resources. It took into consideration the many changes that should regulate the concept of state sovereignty in the field of cooperative management of transboundary waters, adopting the concept of sustainable development as a starting point to assure that sustainability of cooperative management of transboundary waters would be the only way for saving and supplying water for the present and future generation.

Something is relevant to a task if it increases the likelihood of accomplishing the goals of this task(14). Is the rule of law relevant to the cooperative management of transboundary waters, that is; seeking, respecting, adopting and well functioning of the rule of law, as the most appropriate mechanism that could serve in increasing the likelihood of accomplishing the desired cooperation? Based on many facts, it could be stated that the Rule of Law is relevant to the cooperative management of shared water resources, given that:

The increasing water demand and the very urgent need to achieve the optimal utilization of shared water resources, show the necessity of dealing with the shared resource as a coherent unit, i.e. ***managing it jointly and collectively.***

Cooperative management could be achieved only through ***cooperation between the riparian states.***

Collective management often requires f***ormal commitments as well as mechanisms for enforcing compliance(15)***.

To be achieved, the mentioned cooperation, needs ***negotiation among the concerned states to reach an acceptable treaty*** with regard to rights and obligation of each state.

A treaty is a legally binding agreement deliberately created by, and between, two or more subjects of International Law who are recognized as having treaty-making capacity. A treaty is an instrument governed by International Law and, once it inters into force; the parties thereto have legally binding obligations in international law(16).

To this end, ***parties should seek the Rule of Law*** embodied in the international water law in particular and the general international law in general to formulate their planned water agreement.

Consequently, what may confirm the relevance of the Rule of Law is its ability, through its specific tools and mechanisms, to support and facilitate the efficient cooperative management

of shared water resources. In the mentioned cooperation cycle, bilateral or multilateral agreements are essential mechanisms to ensure effective international co-operation concerning the conservation and harmonious utilization of water resources shared by two or more states. Therefore, states should endeavor to conclude bilateral or multilateral agreements between or among themselves in order to ***secure specific regulation of their conduct.***

Another mechanism is negotiation that offers parties an opportunity to exchange information about their domestic constraints and explore their differences in valuation, preferences, risk aversion, and other dimensions of a dispute. Moreover, negotiation experience creates an impetus to formalize interaction through institutions for the joint management of a disputed watercourse. However, it is worth mentioning that cooperative negotiation may take a long time before the parties can reach the desired goals. Negotiation, too, may go up and down. However this is what is meant by negotiation. When parties agree to negotiate it means they have conflicting interests but the intention is to reach a compromise in this regard, since they know that this compromise is a must for achieving their common interests (17).

This could demonstrate the fact that adherence to the Rule of Law in the field of management of shared water resources not only could be, but rather should be a necessity, taking into consideration that it is the best way that can facilitate and pave the way to reach and achieve the planned goals. Making the Rule of Law relevant, proving its capacity in the cooperative management of shared water resources, should be the main job of concerned legal researchers in further studies. Because if states insist or neglecting this fact, and making make arguments for resisting the application of international law in the field of transboundary water resources, the future may be really endangered, as well as neglecting the sovereignty of state on its natural resources as long as it respects the rule of law.

4- The way forward

Cooperation, generally, in practice is the practice of people, companies or states….etc. working with commonly agreed upon goals and possibly methods, instead of working separately in competition, to maximize their benefits and minimize their losses. Accordingly, in Transboundary Rivers, cooperation could be the practice of riparian states for working jointly and collectively instead of working separately in competition, ***to maximize their benefits and minimize their losses of the shared resource to meet the needs of their population.***

Notwithstanding the fact that cooperation nowadays is not only a recommendation but also an obligation, however reaching the desired cooperative

management of transboundary waters is not easy all the time. Since it depends basically on: ***first of all the common understanding of riparian states of the concept of cooperation process***, i.e. realizing that cooperation requires readiness to adapt, coordinate and harmonize their water strategies to achieve an acceptable limit of the benefits generated from the shared resource to satisfy their needs. ***Second, their readiness sometimes to abdicate or reduce some of their desired goals for the satisfaction of all the riparian states.***

In view of that, cooperative management of the transboundary water resources is to be recognized by riparian states as a cooperative game, in other words give and take process. This could be easily illustrated in light of many facts:

First of all, ***the particular nature*** of the transboundary rivers basins that make it necessary to treat it as a coherent unit. This could be done only through cooperative mechanisms.

Second, ***the very complicated situation*** that may happen if each state has decided to develop the part of the basin within its territory individually according to its national interests only, whatever the effects that may be on the utilization of the water resource in the other riparian states.

Third, ***the necessity of bilateral and multilateral agreements*** between riparian states, to address their mutual rights and obligations. This requires flexible positions to satisfy each other.

Accordingly, the way forward to manage the shared waters depends on ***how the concerned parties understand the cooperative game***. In addition, ***to what extent did they plan their strategies for a positive outcome of this game?*** Collective action theory suggests that to reach the desired cooperative win-win outcome states should cooperate in the management of their shared water, otherwise they should be ready for lose-lose outcome or at the best win-lose. In the two scenarios there will be losers and maybe by the end of the day all the players will be losers because the winner will tend to the over exploitation of the resource to get as much benefits as he, the result in this situation can be the depletion of the resource, ***i.e. all are losers***.

The cooperative game, first and foremost, is a relationship among the basic units of the International Law, namely the states, to manage jointly an international water resource. This sort of relationships requires a legitimate umbrella to determine rules and principles governing mutual relations between riparian states. This umbrella, as mentioned hereinbefore, is a bilateral or multilateral treaty, that can be formulated only in terms of the international water law in particular and the general international law in general.

On the international arena, the rule of

law can be defined as "the laws and principles that conduct interstate relations, and serves as a constraint regarding some practices and behavior that might harm the harmony of these relations". Consequently, states should adhere to the International Rule of Law as the principle of governance in which all states are accountable to laws that are publicly promulgated (18). ***Nevertheless, self-interests usually cause the conflict between the rule of law and state sovereignty.***

The point that should be taken into account, ***the tensions created by the sovereignty of states,*** and the fact that they ***cannot be forced to accept international law if it clashes with their interests***. Moreover, in terms of state sovereignty, they may seek non-compliance as a means for getting these interests, in light of the general absence of a neutral enforcement mechanism, when international law often has no better method for sanctioning violations(19). Consequently, in some cases, upstream states may adopt the absolute territorial sovereignty approach, claiming that they own the water that flows from their territories and they have the right to use it as they wish! On the other hand, some states may presume the state sovereignty and absence of a neutral enforcement mechanism to adopt non-compliance, claiming that it is the only mean of updating the law which they refuse to adhere to .

In this regard, according to a commentator, what does the word law mean if violation of it is permitted (20)? In addition, what does it mean to be a legal system if disobedience is tolerated? In an attempt to answer these questions, a commentator says that sovereignty is not, and has never been, an unlimited power to do all that is not expressly forbidden by international law(21). It can only be defined as the very criterion of states, by virtue of which such an entity "possesses the totality of international rights and duties *recognized by international law*"(22)

Another commentator assures that ***sovereignty is something made for the benefit of those whose interests it protects***. In its international aspect, the sovereignty and sovereign freedom of the individual state is equally an artifact of international law. What sovereignty is and what it amounts to is determined by the rules of the international order. In this regard states are supposed to operate lawfully and in a way that is mindful that the peaceful and ordered world that is sought in international law, a world in which violence is restrained or mitigated, a world in which travel, trade, and cooperation are possible, is something sought not for the sake of national sovereignty in it self, but for the sake of millions of men, women, communities, and businesses that are committed to

their care. These millions are the ones who are likely to suffer if the international order is disrupted; they are the ones whose prosperity is secure when the international order is secure(23).

Although there are some cases on the international arena for violation of the rule of law, however noncompliance cannot be permitted as a rule. Noncompliance should be regarded and dealt with as an exception and unlawful act; in a changing world, those exception may be obliged one day to adhere to the rule of law. Therefore, it should be stated that any breach of the rule of law, in particular in the water field, could constitute an international crime taking into account that it would endanger present and future generation.

The Nile Basin: controversial case

The very controversial situation in this region of the world could be attributed, to a large extent in my view, to the interpretation of both the rule of law and state sovereignty principles.

In the upstream, countries think and repeat day after day that downstream states are taking ***their*** (***ours*** and ***theirs*** approach still exist) water resources according to old agreements signed in the colonial ages. Claiming that those agreements are the main reason behind the failure to achieve and reach the desired development, since they require agreement of downstream states on projects of upstream states, which means restriction of state sovereignty on water resources. ***On the other side***, downstream states seek the rule of law to protect their historical water rights, claiming that upstream states should adhere to the provisions of the existing agreements (the rule of law) if they want to make use of the water.

The question that should be raised here is: may downstream states use the rule of law to prevent upstream states from using the water in the development process? And may upstream states use the state sovereignty to stop the water that flow to downstream states?

Despite the fact that the basin states have a notable history of cooperative attempts, however it could be stated that they couldn't reach the desired goal, at least up to now. This could be easily proved through the current situation of the Cooperative Framework Agreement (CFA) that shows the gap between the two sides, namely up and down stream states.

The CFA is a very good example for our paper's issue. The pending issues in this CFA are the articles relevant to existing Nile water agreements which reflect the issue of compliance of upstream states to the rule of law. In addition to the articles on prior notification that reflect the issue of sovereignty of basin states in general and upstream states in particular on the shared water resources, the two sides spent many years in negotiations but reached nothing concerning the previous pending issues. Six countries have signed the agreement, still the down-

stream states (Egypt & Sudan) refuse to sign it before amending the controversial issues. Seeking a solution before the International Court of Justice (ICJ) could be a choice, if and only if the parties accept the court competence. However let us try to predict the ruling in our case if they decide to do it.

Before the court:

The grounds of upstream states before the court, according to their proclaimed situations, are nullity and invalidity of existing Nile water agreements because they were signed in the colonial periods, in addition to the fundamental change of circumstances, and human rights to sustainable development……etc, the ruling of the court in response to such arguments, ***in light of the previous ruling on Gabcikovo-Nagymaros dispute between Slovakia and Hungary***, will be the validity of existing agreements based on succession of international agreements rules. Moreover, the court will decide that those agreements don't constitute any constraints, since they don't include any provision to hinder the desired development. According to the existing agreements upstream states are obliged not to arrest, i.e. not to stop, the water that flows to downstream states, this is a logical obligation and conforms to the order of things. ***Sovereignty doesn't mean to stop the water, but rather to use the water in an equitable and reasonable manner and without causing a significant harm to the other riparian states***.

Concerning the obligation of prior notification, there is no doubt that the court will condemn the party, whether upstream state or downstream, that refuse to comply with this obligation. The principle doesn't restrict state sovereignty but rather it regulates it through mutual consultations and exchange of data and information concerning the planned project, to evaluate and assess its potential effects on the other riparian states.

On the other side the court will decide that compliance with the rule of law doesn't mean the right to stop or to arbitrary control of the development process in the upstream states. Accordingly, downstream states may seek the rule of law to confront, only the claims of absolute sovereignty, not to abrogate the sovereignty in general. Therefore, downstream states, in their strategy, must take into consideration the limits within which upstream states can practice the right of sovereignty to exploit the shared waters, the sovereignty that conforms to the equitable and reasonable utilization, prior notification and no harm rules…etc.

Mostly, in this kind of disputes the court will recommend, by the end of the day, the concerned parties to return to the table of negotiations to settle their pending issues. Continuation of negotiation with the same misunderstanding means new failure.

6- Conclusion

What is clear is that there is no con-

tradiction between the Rule of Law and State Sovereignty in the field of cooperative management of water resources. The evolution of the concept of sovereignty shows that the only concept that could help riparian states to achieve the desired cooperation is the principle of equitable and reasonable utilization since all the other approaches are based on hard positions. This principle has been adopted and documented by the International water law embodied in the 1997 UN convention, and basically by the Customary International Law.

State sovereignty doesn't mean that states are free to neglect or violate the rule of law, on the other hand the rule of law doesn't mean that states may stop the state sovereignty (if legitimate) on the shared watercourse. The balance between the two principles can be reached if and only if a new mutual and concrete understanding is established, which assure that cooperation in the management of shared water resources is a must, in other words working jointly and collectively instead of working separately in competition, ***to maximize benefits and minimize losses of the shared resource to meet the needs of present and future generations.***

In the Nile Basin, would riparian states try, before continuation of any future negotiations, to recognize that the abovementioned balance - between the rule of law and state sovereignty - is a must to protect their people who will suffer if they insist to adopt hard positions?

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