
Aspects of Sovereignty and the Evolving Regimes of Transboundary Water Management

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Abstract

This article examines the principle of State sovereignty in international law and how this affects the management of shared natural resources, in particular international watercourses. As one of the most fundamental principles of international law, State sovereignty is often considered an impediment to common management of international watercourses as it creates focus on national segments of the resource and on defining each State's rights and entitlements to utilization. Through the study of alternative paradigms of State sovereignty, this article will endeavour to give new perspectives on how the principle can contribute to progressive development in the management of international shared resources.

Introduction

The principle of territorial sovereignty is a fundamental and constitutive principle of international law as it accords the sovereign State exclusive rights to exercise powers within the limits of its own territory as well as the right to prevent other States from doing the same. Possession of sovereign powers has traditionally been the one defining feature of the conventional subjects on the international legal stage, and the dynamic of

exercising these powers is "an essential foundation of international relations".¹

In the field of international watercourses, the upstream-downstream nexus creates an underlying conflict between the rights, needs and uses of the different watercourse States. In order to utilize the watercourse sustainably and optimally, and to secure the needs and rights of each, the involved States are compelled to enter into cooperation.

The central guiding principles when making decisions concerning the utilization of international watercourses are the principle of equitable and reasonable utilization and the obligation not to cause significant transboundary harm.² However, in recent times we are experiencing an increased focus on the interconnectedness of natural resources and how exaggerated use of one aspect or in one particular area of the resource can cause harm, not only to other States but also to the resource itself. In addition, growing threat from climate change in form of draught, flood, and pollution do not respect political borders. There is an increasing demand for more holistic management of international natural resources, with focus on the ecosystem approach or community of interest doctrine, which both invite

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¹ *The Corfu Channel Case*, ICJ (1949), 35.

² "The United Nations Convention on the Law of the Non-navigational Uses of International Watercourses", United Nations, 1997, Art. 5 and 7.

to more committing cooperation between the involved States. The idea of managing a trans-boundary resource as one unit without much regard to the boundaries drawn across it is an obvious challenge for the traditional conception of sovereignty. It creates an interesting dynamic between two areas of State concern: the interest of sustainable and optimal management of its natural resources, and the interest of protecting its sovereignty.

In this article, I argue that instead of focusing on the right of each State to utilize the water on its own territory in an equitable manner, the whole watercourse and the needs of all watercourse States must be taken into consideration and the watercourse managed as one unit. This form of management, through the community of interest doctrine or the ecosystem approach, presents new challenges for the conventional understanding of sovereignty.

The article is composed by three main parts: the first part consists of a short historic review of the principle of State sovereignty and an examination of its fundamental content, as well as a short introduction to the community of interest doctrine. In the second part I raise the claim that the traditional perception of State sovereignty is no longer in accord with today's reality, and present three fundamental reasons for this. Further, the third part confronts the role of State sovereignty in the management of international watercourses, and raises the question whether the traditional paradigm of sovereignty can be interpreted in a manner that encourages new and more engaged forms of management of these watercourses.

Part one: Short contextual review

The concept of the sovereign State was established through the Peace of Westphalia in 1648, which marked the beginning of a shift of legal

paradigms from person-oriented to territory-oriented law.³ Although this series of peace treaties did not establish peace throughout Europe, they did establish the basis for national self-determination and the beginnings of international law. The concept of the nation State was established, and its *raison d'être* was sovereignty over its own territory and in relation to other States.

The principle of State sovereignty has been interpreted and employed by the international courts in numerous cases concerning both territorial and executive sovereignty. In the 1927 *Lotus* case, where the question was whether Turkey had jurisdiction to sentence a French marine Lieutenant for a ship accident that took place on the high seas, the PCIJ declared that “[r]estrictions upon the independence of States cannot [...] be presumed”,⁴ but that one important restriction was that power “cannot be exercised by a State outside its territory except by virtue of a permissive rule derived from international custom or from a convention”.⁵ The Court stated that “within these limits, [a State’s] title to exercise its jurisdiction rests in its sovereignty”, and concluded thereby that a State is free to exercise power on its own territory, as long as no rule of international law prohibits such activity. Since the *Lotus* case, the number of international norms and customary rules limiting State sovereignty has increased significantly, as a natural legal consequence of the obligation to respect the sovereignty of other States,⁶ but the main rule

³ Franz Xaver Perrez, *Cooperative Sovereignty: From Independence to Interdependence in the Structure of International Environmental Law* (The Hague: Kluwer Law International, 2000), 22; Rossana Deplano, “The Welfarist Approach to International Law,” in *Critical International Law: Postrealism, Postcolonialism and Transnationalism*, ed. P. Singh and B. Mayer (New Delhi: Oxford University Press, 2014).

⁴ *The Case of the S.S. “Lotus”,* PCIJ (1927), 18.

⁵ *The Case of the S.S. “Lotus”,* (1927), 18.

⁶ Antonio Cassese, *International law* (Oxford: Oxford University Press, 2005), 98.

from the Lotus case still carries deep resonance in traditional international law.

The field of international watercourses sheds a different light on the issue of sovereignty. When a shared water resource crosses the boundary between two or more States, each State's use of the water is depending on other States' use or misuse of the same resource. This interdependency creates new restrictions upon the sovereign powers of the State. Through international customary law, and now also through the United Nations Convention on the Law of the Non-navigational Uses of International Watercourses (UNWC), the current international rules of transboundary water management are those of equitable and reasonable utilization,⁷ and avoidance of significant transboundary harm.⁸ These norms compel watercourse States to enter into cooperation over the management of a shared watercourse,⁹ and to take each other's needs and rights into consideration when planning and carrying out projects in the watercourse. The principles thus limit the free exercise of State sovereignty as they construct minimum legal frames for a peaceful co-existence of watercourse States.

International courts have repeatedly stated that territorial sovereignty should not be a guiding principle for the management of shared natural resources. In the River Oder judgment, the PCIJ established the idea of the "community of interest" in an international watercourse, the main features of which are "the perfect equality of all riparian States in the user of the whole

course of the river and the exclusion of any preferential privilege of any one riparian State in relation to the others".¹⁰ This judgment gave rise to the community of interest doctrine, which, in essence, views the watercourse as one economic unit to be managed by the watercourse states in common. The doctrine is a concretization of a conception of common management and is given concrete expression in an increasing number of international agreements.¹¹

The ideas from the River Oder case were repeated by the ICJ in the Gabčíkovo-Nagymaros judgment, where one of the main questions was whether Slovenia had violated international legal norms when unilaterally carrying out a project on the Danube river that was initially planned as a cooperation between Slovakia and Hungary. The Court first confirmed that the principles from the River Oder case had been strengthened for non-navigational uses of international watercourses, and further that "Czechoslovakia, by unilaterally assuming control of a shared resource, and thereby depriving Hungary of its right to an equitable and reasonable share of the natural resources of the Danube [...] failed to respect the proportionality which is required by international law".¹² Consequently, the ICJ strengthens equity as a guiding principle for international shared resources, and confirms that State sovereignty in this field is subject to more restrictions than in other fields of international law.

⁷ "The United Nations Convention on the Law of the Non-navigational Uses of International Watercourses", United Nations, 1997, Art. 5.

⁸ "The United Nations Convention on the Law of the Non-navigational Uses of International Watercourses", United Nations, 1997, Art. 7.

⁹ See also "The United Nations Convention on the Law of the Non-navigational Uses of International Watercourses", United Nations, 1997, Art. 8.

¹⁰ *Case Relating to the Territorial Jurisdiction of the International Commission of the River Oder*, PCIJ (1929), 27.

¹¹ Stephen McCaffrey, *The law of international watercourses*, The Oxford international law library (Oxford: Oxford University Press, 2007), 155.

¹² *Case concerning the Gabčíkovo-Nagymaros Project*, ICJ (1997), para. 85.

Part two: Traditional State Sovereignty today

The international legal arena is undergoing changes. Globalization and consequences of climate change draw up new lines for State responsibility and compel States to create different forms of cooperation. New technology has permitted the construction of immense dams and similar projects of water manipulation, which, together with transboundary impact of pollution, deforestation and draught, often leaves unilateral action vain and require States to cooperate closely in the management of international natural resources. On this background, there is reason to claim that the key elements of the traditional interpretation of State sovereignty, that is the exclusive right to exercise power its own territory and the right to exclude other from doing the same, no longer reflect today's reality in international water law. The claim is based on three main reasons:

Firstly, a traditional interpretation of the principle of State sovereignty might present a real obstruction to the common management of international watercourses. According to the interpretation deriving from the Lotus case, the principle of State sovereignty would accord a State the right to exploit its resources freely and without interference from other States, as long as no rule of international law restricts such utilization. A principle of State sovereignty with emphasis on exclusive territorial powers and restrictions only upon explicit consent would accord watercourse States an unlimited freedom to utilize the resources on their territory without regards to possible harm such use could bring to other States. According to Eyal Benvenisti, it is precisely the principle of sovereignty together with the allocation of jurisdiction by political borders that "have joined forces to preclude an

efficient and sustainable use of transboundary resources".¹³

In the field of international water law, the exercise of State sovereignty has been a recurrent topic of discussion; although no authoritative body has cited sovereignty as a guiding principle for international water management and the ICJ has even declared that shared resources must be allocated on the basis of equity.¹⁴ Although the principle of equitable and reasonable utilization and the obligation not to cause significant transboundary harm restricts the free utilization, there is no doubt that State sovereignty in many cases has given rise to arguments over rights and obligations on the expense of more fruitful and sustainable management. An example of this is the cooperation, or lack thereof, in the Tigris-Euphrates watercourse where all attempts to cooperate so far have stranded in disagreement over basic definitions and the interpretation and application of international legal principles.¹⁵

A traditional interpretation of the principle of State sovereignty does not correspond well to

¹³ Eyal Benvenisti, *Sharing transboundary resources : international law and optimal resource use* (Cambridge: Cambridge University Press, 2002), 22.

¹⁴ Stephen McCaffrey, "The Siren Song of Sovereignty in International Water Relations," in *A History of Water, Series 3, volume 2: Sovereignty and International Water Law*, ed. Terje Tvedt, Owen McIntyre, and Tadesse Kassa Woldetsadik (London: I. B. Tauris, 2015), 47. See *Fisheries Jurisdiction case*, ICJ (1974); *Case concerning the Continental Shelf*, (1985); *Case concerning the Gabčíkovo-Nagymaros Project*, (1997); *Case Concerning Pulp Mills on the River Uruguay*, (2010).

¹⁵ See Annika Kramer, Aysegul Kibaroglu, and Waltina Scheumann, *Turkey's Water Policy National Frameworks and International Cooperation* (Berlin, Heidelberg: Springer Berlin Heidelberg, 2011); Aysegul Kibaroglu, *Building a regime for the waters of the Euphrates-Tigris river basin* (London: Kluwer Law, 2002); Julie Gjørtz Howden, "Utilization of International Watercourses: Aspects of applicable international law and practice in the Tigris-Euphrates watercourse" (Bergen, 2012), Master thesis, Bergen Open Research Archive – <https://bora.uib.no/>.

the transboundary nature of international watercourses or other shared resources. It does not take into account the States' shared responsibility for protection and preservation of the resource. And instead of establishing such responsibility beyond the borders of the single State, the traditional paradigm of State sovereignty strengthens the political frontiers that divide natural resources.

Secondly, due to the complex nature of international water conflicts, the paradigm of the sovereign State as negotiator and decision-maker on the international level on behalf of its population, may not offer the most efficient or most democratic system for international resource management. Within a shared resource, utilization of water will necessarily be subject to negotiation where all relevant factors must be taken into regard. The participants in such negotiations are States, while water consumers are individuals and businesses. Sovereign States act as representatives for their respective domestic groups and organisations, which make their primary motivation for negotiating an agreement over the utilization of an international watercourse to secure the interests of their own groups. Hence conflict and competition over quantity and quality of water use will often occur between domestic groups or between transnational groups, and influence the external policies adopted by the States.

The democratic problem with this system is that relatively small high-interest groups, like agricultural or industrial lobbies, can acquire disproportionate influence over the decision-makers, on the expense of larger and less fortunate groups. These strong domestic interest groups can in many cases pressure both the negotiators of the actual treaty as well as "the legislature's attitude towards the treaty during the ratification

process",¹⁶ and thereby influence their country's attitude towards compliance with the treaty and reaction to breaches by other parties.

Moreover, the nature of political decision-making adds an essential aspect to this analysis. The State representatives negotiating international agreements, as well as the representatives who ratify them, are usually politicians, or engaged by politicians, and thereby vulnerable to popularity and public opinion. Although politicians explicitly have taken on the demanding task of managing natural resources in a long-term perspective, they are doubtlessly also influenced by the short-term aspects of elections, as well as by the financial support many political parties receive from small domestic interest groups. Balancing such contradictory interests can lead to less efficient management of the resource,¹⁷ and could also result in agreements that might not take fully into account the needs and rights of smaller interest groups with strong proximity to the resource but meagre influential power, i.e. local communities.

The third reason why the traditional conception of State sovereignty is not reflecting the present reality is that the fundamental structures of international law are changing. As seen above, international law has traditionally been understood as a system where the State was restricted by international legal norms only upon explicit consent. Bruno Simma labels this system 'bilateralism', in which "international legal obligations [...] exist at the level of relations between States individually".¹⁸ Similarly, Ellen Hey describes

¹⁶ Benvenisti, *Sharing transboundary resources : international law and optimal resource use*, 65.

¹⁷ *Sharing transboundary resources : international law and optimal resource use*, 59.

¹⁸ Bruno Simma, "From Bilateralism to Community Interest in International Law," in *Recueil des Cours* 250,

the traditional system as an inter-state pattern of international law.¹⁹ This view on international legal relations is individualistic, since every obligation or process requires the consent of the involved States. It also corroborates the traditional subject/object doctrine of international law, where States are considered subjects and individuals are objects or addressees of norms and regulations. Although this positivist view of sovereignty and international law has been gradually abandoned during the last decades,²⁰ it is still a major issue at most international negotiations.

In contrast to this traditional legal pattern, stands the evolving ecosystem approach. This approach is "a strategy for the integrated management of land, water and living resources that promotes conservation and sustainable use in an equitable way".²¹ Instead of focusing on the territorial sections of a watercourse, the ecosystem approach obliges States to manage the ecosystem as one unit. The approach thus creates new premises for cooperation, and presents an obvious challenge for the traditional conception of sovereignty. This alteration in the basic structures of international law comes with the experience of climate change

and the recognition of the holistic character of natural resources; political borders are artificial borders drawn across natural resources, and thereby not an optimal way to delimit cooperation and management. The ecosystem approach necessitates cooperation on the lowest appropriate level to ensure efficiency and equitability, and management that "involve[s] stakeholders and balance[s] local interests with the wider public interests"²² because "[t]he closer management is to the ecosystem, the greater the responsibility, ownership, accountability, participation and use of knowledge".²³ To pursue their common interest of environmental protection and sustainable utilization of natural resources, States are encouraged to create cooperation schemes on both international and transnational levels where the main objective is common management instead of the definition of individual entitlements in the resource.

The ecosystem approach is but one example of an ideological change in international law, turning towards community structures and community values. It acknowledges that States have rights and obligations that are not exhausted by inter-state agreements, but also derive from the common, maybe even unidentified, values and interests that they have a natural engagement to realize on behalf of the international community as a whole.²⁴ This is particularly visible in en-

Recueil des Cours: Collected Courses of the Hague Academy of International Law (The Hague: Martinus Nijhoff Publishers, 1994), 230.

¹⁹ Ellen Hey, *Teaching international law: state-consent as consent to a process of normative development and ensuing problems* (The Hague: Kluwer Law International, 2003).

²⁰ Rosalyn Higgins, "Conceptual Thinking About the Individual in International Law," in *International Law: a Contemporary Perspective*, ed. Richard Falk, Friedrich Kratochwil, and Saul H. Mendlovitz (Boulder and London: Westview Press, 1985); P. K. Menon, "The Legal Personality of Individuals," *Sri Lanka Journal of International Law* 6, no. 127 (1994); Prosper Weil, "Le Droit International en quête de son identité: cours général de droit international public," in *Recueil des Cours* 237 (The Hague: Martinus Nijhoff Publishers, 1992).

²¹ "Decision V6 'Ecosystem Approach'", The Conference of the Parties to the Convention on Biological Diversity, 2000, UNEP/COP/5/23.

²² "Decision V6 'Ecosystem Approach'", The Conference of the Parties to the Convention on Biological Diversity, 2000, Principle 2.

²³ "Decision V6 'Ecosystem Approach'", The Conference of the Parties to the Convention on Biological Diversity, 2000, Principle 2.

²⁴ See e.g. Ronald Dworkin, *Law's empire* (Cambridge, Mass.: Belknap Press, 1986); Simma, From Bilateralism to Community Interest in International Law; Bruno Simma and Andreas L. Paulus, "'The International Community: Facing the Challenge of Globalization,'" *European Journal of International Law* 9 (1998); Hey, *Teaching international law: state-consent as consent to a process of normative development and ensuing problems*; Gleider I. Hernandez, "A Reluctant Guardian: The International Court of Justice and

vironmental questions, where responsibility for sustainable management and avoidance of transboundary and inter-generational harm is forcing the creation of new types of management. The traditional paradigm of State sovereignty restricts the development of this ideological turn in international law and is therefore no longer the accurate legal answer to the questions of the relationship between States.

Additionally, the traditional interpretation of the principle of State sovereignty does not reflect the constitutive development in international law. In recent times, the international legal personality of Non-Governmental Organizations and individuals enjoy increasing recognition.²⁵ NGOs are progressively taking part in international negotiations as observers or consultants, and play an important role in the making and interpretation of international law.²⁶ With regard to the status of individuals, it is becoming less controversial to consider them as independent

the Concept of 'International Community',” *British Yearbook of International Law* 83, no. 1 (2013); Andrew Hurrell, *On global order: power, values, and the constitution of international society* (Oxford: Oxford University Press, 2007).

²⁵ See e.g. Higgins, *Conceptual Thinking About the Individual in International Law*; Menon, “The Legal Personality of Individuals.”; Andrea Bianchi, “The Fight for Inclusion: Non-State Actors and International Law,” in *From Bilateralism to Community Interest. Essays in Honour of Judge Bruno Simma*, ed. Ulrich Fastenrath, et al. (Oxford: Oxford University Press, 2011); Robert McCorquodale, *International law beyond the state: essays on sovereignty, non-state actors and human rights* (London: CMP Pub., 2011); Bosire Maragia, “Almost there: Another way of conceptualizing and explaining NGOs’ quest for legitimacy in international law,” *Non-State Actors and International Law* 2, no. 1 (2002); Anne Peters, “Membership in the Global Constitutional Society,” in *The constitutionalization of international law*, ed. Jan Klabbers, Anne Peters, and Geir Ulfstein (Oxford: Oxford University Press, 2009); Steve Charnovitz, “Nongovernmental Organizations and International Law,” *American Journal of International Law* 100, no. 2 (2006).

²⁶ “Nongovernmental Organizations and International Law.”

participants in the international legal system.²⁷ The overarching idea is, as expressed by Brierly, that an expansion of the subjects of international law to include individuals may enhance the prospects for peace, because it will expand the range of interests to be considered in the settlement of disputes and counteract the pernicious tendency of governments to identify the interests of a few powerful individuals with the interests of the whole community.²⁸ This brings us back to the problem of democracy in the management of shared natural resources and the governing States’ inclination towards favouring strong domestic interest groups. The act of according non-State actors more legal personality in international negotiations is thus not only in accordance with the modern development of international law, but also a means to secure a more just and sustainable use of shared natural resources. When the traditional paradigm of State sovereignty excludes other actors than States, it is a strong indication that the paradigm no longer reflects today’s reality.

Part three: Alternative approaches to State sovereignty

In an environmental context, the traditional paradigm of State sovereignty has been deemed a possible impediment to optimal and efficient management,²⁹ since States might be reluctant to

²⁷ See e.g. Bianchi, *The Fight for Inclusion: Non-State Actors and International Law*; Jean-Marie Dupuy, *Droit International Public* (Paris: Dalloz, 1993); McCorquodale, *International law beyond the state: essays on sovereignty, non-state actors and human rights*.

²⁸ Quoted in Nehal Bhuta, “The Role International Actors Other Than States can Play in the New World Order,” in *Realizing Utopia: The Future of International Law*, ed. Antonio Cassese (Oxford: Oxford University Press, 2012).

²⁹ See Karen T. Litfin, “Sovereignty in World Ecopolitics,” *Merhson International Studies Review* 41, no. 2 (1997); Undala Alam, Ousmane Dione, and Paul Jeffrey, “The benefit-sharing principle: Implementing sovereignty bargains on water,” *Political Geography* 28, no. 2 (2009).

enter into committing cooperation that restricts their inherent sovereignty. Here one must bear in mind however, that State sovereignty in relation to the utilization of international watercourses is *de jure* restricted by the principle of equitable utilization and by the no-harm obligation.³⁰ States also have a legal obligation to cooperate over the utilization of international watercourses, codified in UNWC Art. 8.

There is no doubt, as numerous treaties show, that the principle of State sovereignty is not *de facto* impeding States from entering into cooperation over shared natural resources, although a great number of these agreements are technical or regulate the mere co-existence of watercourse States and their utilization of the waters.³¹ However, there seem to be a discrepancy between theory and practice in issues of environmental law. As numerous climate meetings and negotiations show, the big words and ambitions expressed by State representatives in advance often result in little or no concrete action because of the States' reluctance towards concluding binding agreements and compromise aspects of their sovereignty. In this regard there is no doubt that State sovereignty is an impediment to achieving optimal management, which gives reason to address the question whether the concept of State sovereignty must be interpreted differently – through other paradigms – to encourage more committed and invested coopera-

tion over international natural resources, with focus on sustainability and optimal utilization of the resource. The following subsections will thus conduct an analysis of some of the alternative approaches to sovereignty offered by legal scholars and political scientists. The first two, sovereignty bargains and extended sovereignty, are more theoretical adaptations of the principle of State sovereignty that allows more flexibility when managing natural resources. The other two approaches, the concept of benefit sharing and the transnational conflict paradigm, demand a higher degree of participation and commitment from the involved States.

Sovereignty bargains

The term 'sovereignty bargains', introduced by Bruce Byers, describes a concept where "a state gives up some measure of control over its constituent bioregions and 'nations'".³² The concept was later developed by Karen Litfin as a trade-off between the three constituent elements of sovereignty – autonomy, control and legitimacy.³³ For instance, sacrificing autonomy can enhance control, or "increased control may undercut a state's popular or international legitimacy".³⁴ Litfin further advocates that

"[t]he claim that various interdependencies, including ecological ones, are modifying the practice – and perhaps even the meaning – of sovereignty does not warrant the conclusion that sovereign states are about to be replaced by some new form of political organization. Rather, states engage in sovereignty bargains in which they voluntarily accept some limitations in exchange

³⁰ "The United Nations Convention on the Law of the Non-navigational Uses of International Watercourses", United Nations, 1997, Art. 5 and 7.

³¹ E.g. "Convention on cooperation for the protection and sustainable use of the River Danube", 1994; "Agreement between the government of the People's republic of Bangladesh and the government of the Republic of India on sharing of the Ganges waters at Farakka and on augmenting its flows", 1977; "Indus Waters Treaty", India, Pakistan, 1960; "Agreement on the protection of the Rivers Meuse and Scheldt", Belgium, France, Netherlands, 1994.

³² Bruce Byers, "Ecoregions, State Sovereignty and Conflict," *Security Dialogue* 22, no. 1 (1991), 73.

³³ Litfin, "Sovereignty in World Ecopolitics."

³⁴ "Sovereignty in World Ecopolitics," 169–170.

for certain benefits. The cumulative effect on these trade-offs, however, may be to alter the norms and practices of sovereignty by reconfiguring expectations regarding state autonomy, control and legitimacy".³⁵

The main idea is that States will accept a limitation on their sovereignty if the benefit they receive from doing so is sufficiently significant. The positive benefit from cooperation will outweigh qualms about renouncing sovereign capability.

The idea of sovereignty bargains presupposes a multidimensional understanding of the concept of sovereignty, where sovereignty is being conceived more as a collection of norms and practices that can display variation and flexibility.³⁶ Or, according to Litfin, not as a fixed principle but rather "a field of meanings that are in constant flux".³⁷ Brad Roth advocates that sovereignty can be regarded as a set of presumptions for a pluralist order.³⁸ Both views are reminders of the fact that *de jure* and *de facto* sovereignty may sometimes act as two different concepts; while *de jure* sovereignty is a legal principle of indivisible and absolute authority, *de facto* sovereignty is the result of the States' interpretation of this principle, their actions in accordance with it.³⁹ The concept of sovereignty bargains thus focus on the latter – the actual exercise of sovereignty, and tasks and responsibilities associated with it. As Litfin points out, these tasks can be, and regularly are, separated.⁴⁰

Sovereignty bargains can be formally encapsulated as international agreements or institutions.⁴¹ In practice, the agreement is the most common manifestation of cooperation over international resources. This indicates that States may not be as intentional and conscious towards the concept of 'sovereignty bargains' as the term suggests.⁴² When creating an institution for the management of a shared resource, member States will accept a trade-off of autonomy and control, and in some cases also legitimacy, in order to ameliorate the utilization of the waters and achieve common goals. A cumulative effect of such bargains may eventually be an alteration in the conception of sovereignty, and its norms and practices, by "reconfiguring expectations regarding state autonomy, control and legitimacy".⁴³

Extended sovereignty – State consent as consent to a process

Ellen Hey describes two normative patterns of international law – the inter-state normative pattern, which is briefly described above, and the common interest normative pattern.⁴⁴ The latter suggests a different approach to the question of State sovereignty and State consent: Instead of considering State consent a prerequisite for the creation and binding nature of an international legal norm, the common interest pattern perceives State consent as consent to a process of normative development.⁴⁵ The thriving interactions and exchanges of the globalized world demands a different form of legal regulation for issues of common interest, and "as such issues

³⁵ "Sovereignty in World Ecopolitics," 170.

³⁶ Christopher Rudolph, "Sovereignty and Territorial Borders in a Global Age," *International Studies Review* 7 (2005), 4.

³⁷ Litfin, "Sovereignty in World Ecopolitics," 171.

³⁸ Brad R. Roth, "The Enduring Significance of State Sovereignty," *Florida Law Review* 56 (2004).

³⁹ Litfin uses the terms 'legal' and 'operational' sovereignty (Litfin, "Sovereignty in World Ecopolitics.")

⁴⁰ "Sovereignty in World Ecopolitics," 171.

⁴¹ Alam, Dione, and Jeffrey, "The benefit-sharing principle: Implementing sovereignty bargains on water."

⁴² Litfin, "Sovereignty in World Ecopolitics."

⁴³ "Sovereignty in World Ecopolitics," 170.

⁴⁴ Hey, *Teaching international law: state-consent as consent to a process of normative development and ensuing problems.*

⁴⁵ *Teaching international law: state-consent as consent to a process of normative development and ensuing problems*, 12–23.

are being addressed, it is becoming apparent that existing decision-making processes are intimately linked to the inter-state normative pattern and not attuned to the common-interest normative pattern where actors other than states may be directly affected by decisions taken".⁴⁶ A proposed response to the challenge of transboundary resource management is to view State consent not as consent to a specific rule of international law, but as consent to a process of normative development, "the outcome of which is undetermined at the time at which that consent is given".⁴⁷ States give their consent to an instrument of international law aimed at regulating the common interest, and in so doing they also commit to participate in the normative development and to accept its final outcome.

An example of such consent to a process of normative development is the European Court of Human Rights. The Court belongs to the common interest normative pattern as it engages in questions that concern humanity as a whole. When States ratify the European Convention on Human Rights, they do not only give their consent to specific rules of international law, but also to a process of legal development through the judgments of the ECHR. The Court's decisions are binding for its parties and contribute to the development of international law.

Most instruments seeking the regulation of common interests contain provisions that allow integration of evolving principles. An example can be found in the initial agreement between Hungary and Czechoslovakia over the Gabčíkovo-Nagymaros-project which requires that the parties "while carrying out their obligations to ensure that the quality of water in the Danube is

not impaired and that nature is protected, to take new environmental norms into considerations when agreeing upon the means to be specified in the Joint Contractual Plan".⁴⁸ By agreeing to take into consideration new environmental norms, Hungary and Czechoslovakia consented in practice to a process, the final outcome of which was not known to the parties at the time of the agreement. The softening of the principle of State sovereignty implied in this provision provides flexibility in the cooperation between the parties and the possibility of achieving a dynamic process where the original agreement can incorporate and deal with new development without revision of the agreement or the parties' explicit consent.

The elasticity of the common-interest pattern is what makes it suitable as guiding pattern for the management of international watercourses. This is especially important when watercourse States create a joint commission to manage the watercourse and carry out decisions on their behalf, the flexibility in the long-term consent will lead to a more efficient management of the resource since States agree on the overarching goals instead of the small steps. Additionally, providing a neutral commission with the competence to manage a watercourse in accordance with agreed principles and towards a common goal might also help neutralize domestic political pressure. On the other hand, it is clear that this form of government demands a great level of trust amongst the watercourse States and clear agreement on a common vision for the cooperation. This might be particularly challenging in water scarce areas where the threat of draught can lead to competition between watercourse States eager to satisfy their minimum needs.

⁴⁶ *Teaching international law: state-consent as consent to a process of normative development and ensuing problems*, 19.

⁴⁷ *Teaching international law: state-consent as consent to a process of normative development and ensuing problems*, 13.

⁴⁸ *Case concerning the Gabčíkovo-Nagymaros Project*, ICJ (1997), para. 112.

Benefit sharing

One of the main objectives behind the Convention on Biological Diversity is “the conservation of biological diversity, the sustainable use of its components and the fair and equitable sharing of the benefits arising out of the utilization of genetic resources”.⁴⁹ The concept of benefit sharing, as manifested in the convention, has gained increased recognition during the last decades, especially in the context of natural resource management. Alam et al. define the concept within a freshwater context as “the development of water uses in their ‘optimal’ locations, and the distribution of these benefits, rather than the water, to users across the basin”.⁵⁰ Phillips et al. argue that benefit sharing “becomes the outcome of a process of issue-linkage”,⁵¹ where basic dilemmas like the complexity of common pool resources and the prospect of over-exploitation due to lack of regulation or non-compliance are considered. And it is when solving such fundamental dilemmas that the major benefits are to be found. The basic idea is that watercourse States, when negotiating the management of shared watercourses, can focus either on the allocation of rights or on the distribution of benefits.⁵² Arrangements of benefit sharing will involve payment or compensation for benefits deriving from strengthened management.⁵³ For instance, Sadoff and Grey argue that “stewardship of headwaters and watersheds might entitle upstream riparians to

share some portion of the downstream benefits that their stewardship helps to facilitate, and thus share the costs of that stewardship. Seen the other way around, if they did not protect the watershed it would impose costs on downstream riparians”.⁵⁴ A scheme of benefit sharing could thus mean that some States must renounce some of their actual water use, or available water, in exchange for a monetary compensation from those States who put this water into its most efficient use.⁵⁵ At the other end of this process are three broad categories of benefits: security, economic development and environmental protection.⁵⁶

Alam et al. recognize that the implementation of the benefit sharing principle centres on two aspects: “the countries’ willingness to embrace their hydro-interdependency and [...] the means they use to embed their mutual interest, or in other words, to frame their liability and vulnerability to one another”.⁵⁷ The first aspect is clearly among the main motivations to establish cooperation over a shared watercourse; instead of competing over individual entitlements that are both limiting and potentially harmful, States must realize that their interests are best achieved by sharing the benefits from the water management. The other central aspect, the means the States choose to pursue their shared interests and benefits, is essential for the functioning of the cooperation, its duration and trust-building among the watercourse States. To ensure the equal sharing of benefits and for the cooperation

⁴⁹ “Convention on Biological Diversity”, 1992, Art. 1.

⁵⁰ Alam, Dione, and Jeffrey, “The benefit-sharing principle: Implementing sovereignty bargains on water,” 93.

⁵¹ David Phillips et al., “Trans-boundary Water Cooperation as a Tool for Conflict Prevention and Broader Benefit Sharing”, (2006), 173.

⁵² C. W. Sadoff and D. Grey, “Cooperation on international rivers: A continuum for securing and sharing benefits,” *Water International* 30, no. 4 (2005), 422.

⁵³ Owen McIntyre, “Benefit-sharing and upstream/downstream cooperation for ecological protection of transboundary waters: opportunities for China as an upstream state,” *Water International* 40, no. 1 (2015), 50.

⁵⁴ Sadoff and Grey, “Cooperation on international rivers: A continuum for securing and sharing benefits,” 423.

⁵⁵ A. Dan Tarlock and Patricia Wouters, “Are Shared Benefits of International Waters an Equitable Apportionment?,” *Colorado Journal of Environmental Law and Policy* 18, no. 2 (2007), 527.

⁵⁶ Phillips et al., “Trans-boundary Water Co-operation as a Tool for Conflict Prevention and Broader Benefit Sharing”, 174

⁵⁷ Alam, Dione, and Jeffrey, “The benefit-sharing principle: Implementing sovereignty bargains on water,” 94.

to be advantageous for all States, the collective investments and benefit sharing must take place within clearly defined legal frames.

The transnational conflict paradigm

Benvenisti's transnational conflict paradigm offers yet another alternative to the Westphalian tradition, as it suggests that States are composed of many competing domestic groups that should be given more autonomy in the process of shared resource management. The paradigm looks through the veil of sovereignty and explains the sources and cures of international conflict and agreements.⁵⁸ The reason for this, Benvenisti explains, is that these domestic groups are often competing over the same resources and opportunities and that this competition is reflected in the States' external policies. As seen above, conflicts over the utilization of an international watercourse does not necessarily originate from disagreements between States, but in many cases rather "from transnational competition among rival domestic groups or even from collusion between several interest groups, all in an effort to capture a disproportionately larger share and externalize costs at the expense of other interest groups within those states, including future generations".⁵⁹ This makes international negotiations a two-level game where States consult both with each other and with their respective domestic actors, without having any guaranteed control over the process or the outcome. An example of the influence of such domestic pressure groups can be found in the Gabčíkovo Nagymaros case. The second main questions in this case was whether Hungary could legally withdraw from the agreement because of pressure from domestic environmental groups. The possible

environmental impact of the planned project had gained much negative attention in Hungary, and as a result of the "intense criticism which the Project had generated"⁶⁰ from various groups, the Hungarian government first decided to suspend the works at Nagymaros and later to abandon the project all together. The Court stressed the importance of international obligations at the expense of domestic pressure groups, and found that Hungary's unilateral withdrawal from the project was a breach of its treaty obligations.⁶¹ Consequently, the pressure on the government from Hungarian interest groups eventually resulted in a violation of the country's international legal obligations.

The transnational conflict paradigm is constructed on a modern understanding of international law and its actors. It suggests that collective action problems are best solved on a transnational level, where groups and institutions are given an individual voice and opportunity to participate in law making and negotiations instead of being represented by their respective governments. The challenge for classic sovereignty rests in the fact that the paradigm redistributes power that is normally reserved States. Domestic pressure groups may thus achieve an individual voice and

⁵⁸ Benvenisti, *Sharing transboundary resources : international law and optimal resource use*, 49.

⁵⁹ *Sharing transboundary resources : international law and optimal resource use*, 49.

⁶⁰ *Case concerning the Gabčíkovo-Nagymaros Project*, ICJ (1997), 25. On the influence of environmental groups and the domestic debate in Hungary see Lilliana Botcheva, "Focus and Effectiveness of Environmental Activism in Eastern Europe: A Comparative Study of Environmental Movements in Bulgaria, Hungary, Slovakia and Romania," *Journal of Environment and Development* 5, no. 3 (1996); Nick Manning, "Patterns of Environmental Movements in Eastern Europe," *Environmental Politics* 7, no. 2 (1998); Tamàs Fleischer, "Jaws on the Danube: Water Management, Regime Change and the Movement Against the Middle Danube Hydroelectric Dam," *International Journal of Urban and Regional Research* 17, no. 3 (1993).

⁶¹ *Case concerning the Gabčíkovo-Nagymaros Project*, ICJ (1997), 46. See also Benvenisti, *Sharing transboundary resources : international law and optimal resource use*.

a possibility to participate directly in the process of managing an international watercourse. This could prevent domestic political constraints to spill over to the international scene,⁶² at the same time as it might ensure a closer connection between the decision-makers and the users of the waters.

Although the transnational conflict paradigm reduces the total power of the State, it might contribute to an increase of the effective sovereign power in areas other than international resource management. Moreover, as is the case with many of the alternative perspectives on sovereignty, the act of opening up for alternatives is itself an act of sovereignty. The power of the State is thus not lost but redistributed.

Conclusion

According to Benvenisti, we are left with two possibilities when choosing our fundamental approach to freshwater management: we can either invest in defining individual entitlements in order to ensure the market value of water as an object of trade, or we can “forgo such differentiation and develop alternatives to market transactions”.⁶³ The community of interest approach, with its ruling vision of the unity of the watercourse and the demand for close cooperation and commitment amongst the watercourse States, might offer such an alternative to market transactions. When establishing a community of interest, the process of defining and trading individual entitlements of utilization is counter-productive to the very essence of the approach. The traditional, or archaic, understanding of sovereignty as freedom of action within territorial borders is, in spite of the obligation to take into consideration the rights of other States, an

impediment to the optimal utilization of the watercourse. Hence, when committing to managing an international watercourse through the community of interest approach, States are also committing to an alternative understanding of State sovereignty.

Interpreting sovereignty within the community of interest approach must be in accordance with the inherent objectives of the approach, and facilitate the pursuit of common interests as well as the sustainable and optimal use of the resource. A first reflection is that long-term management of a natural resource demands much flexibility from the watercourse States and a certain dynamic in the agreements among them. Consenting to a process of development or management as described by Hey thus appears to be a constructive approach. Whenever watercourse States decide to establish a community of interest in the management of a shared watercourse, they agree on certain principles and norms that create the basis for the cooperation. These norms and principles become the framework within which explicit State consent to every decision is not required. The involved States have already agreed explicitly to the process of management. This approach to sovereignty ensures efficiency in managing the watercourse while also strengthening the community notion amongst the involved States.

A second reflection is that the community of interest among watercourse States is a means to realize the interest that these States share. As opposed to defining individual entitlements, the community of interest approach focuses on the benefits of close cooperation and the common and individual gains. When turning the focus away from individual entitlements and towards common interest, the benefits from common management become more apparent. Interests and benefits are similar in this regard since they both are significant motivating factors for the cre-

⁶² *Sharing transboundary resources : international law and optimal resource use*, 47.

⁶³ *Sharing transboundary resources : international law and optimal resource use*, 25.

ation of the cooperation. Identification of shared interest is a first step towards the sharing of benefits from a community of interest cooperation, but when establishing a community of interest in a shared watercourse, the actors are sharing not only benefits, but also risks, expenses and environmental responsibility associated with such management.

In consequence, the principle of State sovereignty is not necessarily an impediment for common management of an international watercourse

through the community of interest approach. However, this conclusion presupposes an alternative interpretation of sovereignty that is more adapted to the modern development of international law and to the issues of collective action and common pool resources. By moving away from individual entitlements and allocation of water quanta, watercourse States can use their sovereign powers to create more dynamic forms of water management where they consent to the process and the main principles and focus on the sharing of benefits and costs.