# National Sovereignty Versus Transboundary Water Cooperation: Can You See International Law Reflected in the Water?

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## Extract

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**Current Status Under International Law of the Tension Between National Sovereignty and Transboundary Water Cooperation**

What is the tension between national sovereignty and transboundary water cooperation? Simply put, it is caused by the fact that a country, because of hydrological (upstream versus downstream) or hydropower (economic and political dominance in the region) status, can assert its sovereignty over the waters flowing through its territory causing harm to other riparians in the basin with lesser status. Upstream states tend to favor the concept of absolute sovereignty according to which they can decide how much flow to use for their own needs irrespective of any harm to their neighbors. Downstream states prefer the concept of absolute territorial integrity whereby their water needs are “frozen” in time and no alteration to the flow from upstream states can be tolerated.

In contemporary international water law, the tension between national sovereignty and transboundary water cooperation has not entirely disappeared and has, in a way, been replaced by the tension between the application of the no harm rule and the equitable and reasonable utilization (ERU) principle.[1] If the ERU principle were to always trump the no harm rule, we could find ourselves in the realm of absolute territorial sovereignty. If the no harm rule were to prevail consistently over the application of the ERU principle, absolute territorial integrity would become the key rule. However, as reflected in the UN Watercourses Convention, application of the no harm rule does not replace absolute sovereignty with an equally absolute respect of a neighbor's sovereignty.[2] In fact, a riparian state has the obligation not to cause significant harm, but also the right to utilize the watercourse, albeit in an “equitable” and “reasonable” manner.[3] There is no universal definition of what amounts to equitable and reasonable and states need to be guided by factors listed in the Watercourses Convention.[4] No one factor is more important than another, although special regard is to be given to “requirements of vital human needs.”[5] Furthermore, the presence of a wide range of procedural provisions tilt the balance towards a balanced application of the ERU principle,[6] preventing abuses that could lead to significant harm occurring nevertheless.[7]

Despite the relationship between the no harm rule and the ERU principle in international water law somewhat replacing the tension between national sovereignty and transboundary water cooperation, three considerations should make us wary of declaring the national sovereignty versus transboundary cooperation tension completely over.

First, the no harm rule is a due diligence obligation that,[8] even if applied correctly, could lead to some level of harm to a neighboring country. In fact, in order to comply with the no harm rule, a riparian state needs to put in place "appropriate measures" and ensure that any harm that nevertheless reaches the other riparian state is not "significant." National sovereignty has been notably limited by this obligation but it can still cause tensions for transboundary water cooperation depending on what amounts to an "appropriate" measure and what constitutes "significant" harm in the application of the no harm rule.

Second, adoption by the UN General Assembly of the UN International Law Commission Draft Articles on the Law of Transboundary Aquifers (the Draft Articles)[9] has been seen by some as a regression in international law.[10] They argue that the Draft Articles have opened the door again to an absolute concept of national sovereignty. Despite the presence in the Draft Articles of the no harm rule and the ERU principle,[11] the Draft Articles both make a direct reference in the preamble to the outdated concept of "permanent" sovereignty over natural resources.[12] The Draft Articles appear to bring back national sovereignty in their operative language in Article 3, which states that: "Each aquifer State has sovereignty over the portion of a transboundary aquifer or aquifer system located within its territory. It shall exercise its sovereignty in accordance with international law and the present draft Articles."[13]

Those who see this provision as a dangerous return to the past focus on the first sentence of Draft Article 3 and consider that an international legal instrument that deals with "water" should not make any reference to national sovereignty.[14] Those, like myself, who may not be fully enchanted by the wording of Draft Article 3, but can "work with it" nevertheless, focus on the combination of the first and second sentence.[15] States cannot selectively apply the Draft Articles in a way that allows them to return to a full, permanent, and absolute concept of national sovereignty. The second sentence brings the reference to national sovereignty back within the boundaries of general international law, where national sovereignty is limited, and to the Draft Articles themselves where the no harm rule applies. Moreover, a number of procedural obligations further limit an absolute approach and application of national sovereignty in the context of the law of transboundary aquifers.[16]

Third, international water legal instruments are far from universal or legally binding. The Watercourses Convention has been ratified by only thirty-seven countries with an entire continent, the Americas, completely absent from its membership.[17] The membership of the Convention on the Protection and Use of Transboundary Watercourses and International Lakes (UNECE Water Convention),[18] despite the treaty being opened to global membership,[19] is still heavily Eurocentric. The Draft Articles are soft law, promulgated through annexation to a UN General Assembly resolution, with countries merely encouraged to use them as guidance.[20]

These three considerations warrant a closer look at how the tension between national sovereignty and transboundary water cooperation plays out in the management of specific rivers, lakes and aquifers across the world, which I will now address by returning to the three scenarios that started this essay.

**The Tension Between National Sovereignty and Transboundary Water Cooperation in Practice and What This Says About International Law**

Considering three examples of current water use controversies, the following questions appear to be relevant: whether the international water law instruments introduced in the prior section apply; whether there exists an ad hoc international legal instrument that applies to the specific example; and whether customary international law is able to fill any gaps left open by the general conventions and any applicable basin/aquifer treaties.

In each of the three scenarios, the action of Turkey, Brazil or Egypt is causing "significant" harm to other countries and a balanced application of the ERU principle would mitigate such harm and promote cooperation between neighboring countries.

**Could Turkey dam the Tigris and Euphrates and deprive its downstream neighbors of vital water resources?**

In this specific case, only the two downstream states, Iraq and Syria, are parties to the Watercourses Convention, while Turkey is not, and none are parties to the UNECE Water Convention. The answer to the question therefore needs to be found in specific agreements between the countries or in customary international law.

Starting with specific agreements, the main challenge is that there still is no ad hoc basin wide agreement to provide guidance and direction in the management of the two river basins. What we have is a patchwork of agreements and Memoranda of Understanding (MoUs) developed and negotiated from just after the end of Second World War to 2009. Turkey's acquaintance with EU water management rules and institutions appears to be percolating into these MoUs, which cover more than just technical matters and encroach into the management of the rivers.[21] However, the MoUs do not go as far as including the no harm rule or references to the ERU principle.

The question becomes whether those rules and principles that deal with such tension in the Watercourses Convention and the UNECE Water Convention amount to customary international law. The no harm rule certainly does and the ERU principle can increasingly be considered to be crystallizing into customary international law, together with several procedural obligations that enable both the no harm rule and the ERU principle to operate.

**Could Brazil over-pump the Guarani Aquifer System to the detriment of the other aquifer states?**

This question takes us to Latin America and to one of the largest reservoirs of freshwater in the world: the Guarani Aquifer System found under Argentina, Brazil, Paraguay, and Uruguay.[22] None is a party to the Watercourses Convention nor a member of the UNECE Water Convention. However, the nature of the natural resource in question (i.e., a transboundary aquifer with some of its parts being non-renewable) means that it may not be straightforward to conclude that such international legal instruments would apply to the Guarani Aquifer System even if the relevant nations were parties. The Draft Articles would apply, but they are not legally binding. Hence, once again, we need to explore whether an ad hoc international treaty or customary international law can help.

In this case, a treaty does exist. The Guarani Aquifer Agreement was signed in 2010 and entered into force in 2020.[23] The no harm rule is included in its text and there are also facets of the ERU principle within the Agreement.[24] However, it also includes direct references to national sovereignty [25] akin to what can be found in the Draft Articles. As in the Draft

Articles context, some have criticized the reference to national sovereignty in an agreement related to water. I believe that a good faith implementation requires sovereignty to be read in conjunction with general international law (which rejects an absolute approach to sovereignty) and the rest of the Agreement.[26] The Agreement as a whole includes both substantive and procedural norms that, together, should be able to tame national sovereignty in the management of the aquifer. In other words, only an erroneous interpretation of the Guarani Aquifer Agreement may lead to abuses allowing Brazil to cause significant harm to its neighbors. A further safeguard against this happening should be guidance of the Commission, which needs to be developed for the management of the aquifer (per Article 15 of the Agreement). The Commission would apply the Guarani Aquifer Agreement in accordance with customary international law, hence reconciling the possible tension between sovereignty and transboundary water cooperation.

**Could Egypt put pressure on upstream Nile states and prevent them from developing river related infrastructure that could limit the downstream flow?**

Here we find ourselves in a scenario where the unilateral action causing significant harm stems from the downstream state debunking the myth that harm can only be caused by upstream states.[27] None of the Nile Basin countries are parties to the Watercourses Convention or the UNECE Water Convention. Hence, the answer to the question lies, again, in customary international law and ad hoc treaties.

The list of legal instruments that have helped (or not) to govern the longest river in the world is as long as the number of colonial powers who had stakes across its territory for centuries. The latest iteration of this normative history is the Agreement on the Nile River Basin Cooperative Framework (CFA).[28] The ERU principle and the no harm rule both are key principles therein.[29] Sovereignty appears to be absent from the text, hence making a unilateral action like the one suggested in the scenario difficult to reconcile with the spirit of the agreement. However, Egypt has not ratified it, which means its provisions will not bind Egypt unless they reflect customary international law. As we have seen earlier, customary international law recognizes a balanced application of the ERU principle. Furthermore, the principle's relationship with the no harm rule is capable of taming possible tensions between sovereignty and transboundary water cooperation.

Overall, the three scenarios suggest that international water law, as portrayed in the Watercourses Convention, the UNECE Water Convention, and the Draft Articles, is not always reflected in the management of specific rivers, lakes and aquifers of the world. Turkey is not a party to the Watercourses Convention and there is no overarching legal framework applicable for the combined Tigris and Euphrates river basins. Brazil may, at least in principle, abuse the wording of the Guarani Aquifer Agreement and impose its sovereignty in the management of the transboundary aquifer. The Nile does possess an ad hoc normative framework in the CFA, but Egypt is not a party to it.

**Conclusion: The Role of Customary International Law**

The tension between national sovereignty and transboundary cooperation can be dealt with by a good faith application of the ERU principle and of the no harm rule. They allow states to take sovereign decisions over their transboundary waters, but such decisions need to fully consider the interests of the other riparian or aquifer states. The ERU principle and the no

harm rule apply to transboundary waters covered by the Watercourses Convention, the UNECE Water Convention and the Draft Articles. However, hydropolitics, the limited membership of the two global treaties, and the soft law nature of the Draft Articles are likely to create ripples that may disturb their application. However, the ripples triggered by international law in practice may leave space for a clearer reflection of international law in the waters of rivers, lakes, and aquifers through the application of customary international law. If the latter fully embraces the ERU principle and the no harm rule, the tension between sovereignty and transboundary cooperation should be manageable in the field of transboundary waters.

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