

A HISTORY OF WATER
SERIES III, VOLUME 2

SOVEREIGNTY AND
INTERNATIONAL WATER LAW

EDITED BY
TERJE TVEDT, OWEN MCINTYRE
AND TADESSE KASSE WOLDETSADIK

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A History of Water

Series III

Volume 2: Sovereignty and International Water Law

Edited by

**Terje Tvedt, Owen McIntyre *and* Tadesse Kassa
Woldetsadik**

I.B. TAURIS

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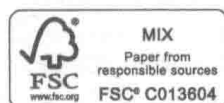
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Part I State Sovereignty, Water Systems and the Development of International Water Law

1 Sovereignty, the Web of Water and the Myth of Westphalia

Terje Tvedt, Owen McIntyre and Tadesse Kassa Woldetsadik

INTRODUCTION

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

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

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

THE MYTH OF WESTPHALIA

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

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

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

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

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

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

In an English translation from 1697 it reads slightly differently:

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

In the original French text it reads like this:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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