M. Rafiqul Islam

THE TERRITORIAL SOVEREIGNTY OF INDIA AND BANGLADESH OVER THE GANGES

Introduction

The Ganges is an international river. Originating in the womb of the great Himalayas system, the Ganges flows successively across the territories of Nepal, India and Bangladesh and finally empties into the Bay of Bengal. A long-standing dispute over the allocation of the Ganges dry season flow between India and Bangladesh has been going on since 1951. In international river basin system, upstream states are, by virtue of their geographical location, in an advantageous position to control the supplies of common waters. They usually, but not always, claim complete territorial dominion over the water of an international river while flowing across their territories. Downstream states, which by reason of their location are placed in a disadvantageous position, assert their rightful share to the same water system. They invoke that riparians have only a limited territorial jurisdiction over common waters. This has precisely happened in case of the Ganges.[1] The upper part of the land over which the Ganges

1. At the outset of the Indian plan to divert the Ganges dry season flow at Farakka, India claimed complete territorial dominion on the Ganges within its territory. As opposed to this claim, successively Pakistan and Bangladesh asserted that they were also entitled to a rightful share of the Ganges water. For these claim and counter-claim, see the speech of Pakistani representative Mr. Arshad Husain in the UN General Assembly in Oct. 1968, The *Morning News*, Karachi, 15 Oct 1968: Masuma Hasan, "The Farakka Barrage Dispute : Pakistan's Case" *Paktstan Horizon*, vol. 21 (1968), pp. 358-59; the speech delivered by the leader of the Bangladesh delegation to the 31st UN General Assembly Session held in Nov. 1976, The *Bangladesh Observer*, 18 Nov. 1976.

happens to pass belongs to and is subject to the teritorial control of India. As such, India has an upper hand over Bangladesh in exploiting the Ganges water. If India wants to do so, it can utilise all of the Ganges water and leave the rest of the river in Bangladesh only a dry bed. India has indeed been drawing the maximum amount possible from the Ganges dry season flow, leaving very little or no water in the Ganges for Bangladesh during the dry season. The inevitable result of this is the conflict of national interests. The present controversy is the outcome of such a situation.

The Ganges water dispute involves, *inter alia*, the international legal question of the territorial supremacy of riparians on an international river while flowing through their national boundaries. The crux of the problem is whether riparians have absolute or limited sovereignty over the sections of an international river under their territorial control. An examination of this issue reveals the following points of law. Under the principles of international law, the territorial supremacy of a state, in so far as the use of an international river water is concerned, does not mean that it is free to do anything with the section of the river within its territory. A state must take into account the effects of its action on, and the interests of, co-riparians having a rightful share into the same water system. International law imposes certain restrictions upon the freedom of action of the riparians with the segments of the Ganges in their territories. This means that the title to and control over the Ganges, either of India or Bangladesh, is not and unassailable right to do whatever they please with the Ganges water under their territorial control without concern as to the damage that might be inflicted on the rights and interests of the other in the Ganges water system.

Territorial Sovereignty over International Rivers in State Practice

The absolute territorial sovereignty of a state implies that there is no legally organised human authority except and above that state which is competent to regulate its affairs. This omnipotence of a

state allows it to exercise supreme power over all components of its territory. The legal regime governing its territory cannot be based other than on full ownership. It is impossible for any external power to be lawfully exerted therein and any interference must be treated as illegal. By virtue of this principle, the portions of the Ganges within the territories of India and Bangladesh would be deemed to have the same status as their national rivers and should be treated no differently from the other components of their territories. Consequently, either of them could dispose of the Ganges water wholly within its territory as freely as it thought necessary, irrespective of its effects on, and rights and interests of, the other. The question is : does international law extend the principle of absolute territorial sovereignty to the waters of an international river so that the Ganges riparians could claim unqualified territorial supremacy over the Ganges within their territories?

Any legal argument levelled in support of a claim to absolute territorial sovereignty over the Ganges would seem to be based on the so-called 'Harmon Doctrine'. Originating in the US, the doctrine received its greatest boost by the US itself. In 1895, the concept crystallised into the 'Harmon Doctrine', named after Mr. Judson Harmon, the then Attorney-General of the US. He made a classic statement with regard to the water allocation of the Rio Grande between the US and Mexico. He was asked to give his opinion on the international responsibility of the US for injuriess uffered by Mexican farmers as a result of diversions of the Rio Grande water for irrigation in the US. He argued form the premise of the territorial jurisdiction of a sovereign state and reached the conclusion that the US had unrestricted sovereignty over the Rio Grande within its territory and that 'the rules, principles and precedents of international law impose no liability or obligations upon the US, to share the waters with Mexico, or pay damages for injury to Mexico caused by diversions of water in the US'.[2] The Harmon Doctrine therefore prescribe

2. Opinion of Attorney-General, vol.21 (1895), pp.274-83 ; J. B. Moore, 'Diversion of Waters' *Digest of International* Law, vol. (1906), p. 654.

that there is no duty in international law on any riparian state to restrain its use of common waters within its territory to accommodate the needs of co-riparians. Jurisdiction and control of a riparian over the segment of an international river wholly within its territory is exclusive. The recognition of any other principle would be entirely irreconcilable with the sovereignty of a state over its national dominion. Gieseke used similar arguments when he told the Edinburgh Conference of the International Law Association of the Austrian claim to sovereignty in the Rissbach river dispute with Bavaria.[3]

The unfettered right of a riparian to dispose of the water of an international river within its territory has rarely been upheld. The vagueness of the general assertion of absolute territorial sovereignty by a state over all components of its territory, in particular over the sharable and flowing water of an international river, has engen-

The vagueness of the general assertion of absolute territorial sovereignty by a state over all components of its territory has engendered numerous problems of interpretation and application.

dered numerous problems of interpretation and application. In practice, the supporters of the Harmon Doctirine admit certain obligation in using common waters towards co-riparian states. in fact, the Harmon Doctrine has never been followed and practised either by the US or by and other state. Under the treaty which resolved the Rio Grande dispute, the US agreed to provide Mexico with water equivalent to that which Mexico had used before the diversion of water in the US took place.[4] The preamble of the treaty

3. C. Eagleton, 'The Use of the Waters of internotional Rivers', *Canadian Bar Review*, vol. 33 (1955), p. 1920.
4. The 1906 Convention between the US and Mexico on the equitable distribution of the waters of the Rio Grande for irrigation purposes, see UN Legislative Series: Legislative Texts and Treaty Provisions Concerning the Utilization of International Rivers for Other Purposes Than Navigation, UN Doc. ST/LEG/SER. B/12,(1963), p.232. The US agreed to deliver 60,000 acre feet of the Rio Grande water to Mexico annually.

reflects the view that though in international law the US could withdraw the entire flow of the Rio Grande, in terms of international comity, it was willing to deliver the Rio Grande water to Mexico. It appears that the theoretical territorial sovereignty of the US over the Rio Grande within its territory was qualified by international obligatoins, at least by the principle of comity and of friendly and good-neighburly relations.[5] This treaty is not based on the common recognition of the two governments of the Harmon Doctrine. It ensures and preserves the formal legal position of each in theory while effecting a compromise in practice.

The 1944 treaty between the US and Mexico relating to the utilisation of the Colorado water may be cited to the same effect.[6] The US guaranteed to deliver to Mexico a fixed annual supply of water and a specified share of surplus waters under Article 10. Mexico had some rights to the Colorado water under international law and by this Article the US had acknowledged this right. It is explicit though in the Article that Mexico had no more rights beyond the amount mentioned in the Article, yet to that extent Mexico had a legal right. This is obviously a significant deviation from the stand that there is no duty in international law on any riparian to restrain its use of an international river within its territory. The implication of the incorporation of such a provision in the treaty is that the US could not divert the Colorado water within its territory as it thought fit, regardless of the Mexican right and interest in the Colorado water. Moreover each government agreed to construct and operate certain works at its own expense, certain others jointly in proportion to their use by each

5. The US consideration of the principle of friendly and good-neighbourly relation is clear form the statement of Mr. Adee, the then Acting Secretary of State. He said in Dec. 1905 that the US government was disposed to govern its action on the premises in accordance with the high principles of equity and with the friendly sentiments which should exist between good neighbours, see, C.C. Hyde, *International Law Chiefly As Interpreted and Applied By the US.* 2nd ed. 1974, pp.567-68.

6. *US Treaty Series*, vol. 3 (1947), p.313.

(Art.12). This allocation of water does not promote the Harmon Doctrine. It is conspicuous from the views expressed by some US officials responsible for drafting the treaty that the Harmon Doctrine as a genaral principle has undergone substantial amendment. Evidence given at the hearings before the Senate Committee on Foreign Relations is especially pertinent as it presents a complete reversal of the Harmon Doctrine. Dean Acheson, the then Assistant Secretary of State, in his testimony said of the Harmon Doctrine that it was 'hardly the kind of legal doctrine that can be seriously urged in these times'.[7] Mr. Stettinius, the then Secretary of State, in his testimony recognised that each riparian owes to the other some international obligations with respect to the use of their common water. He informed that the treaty in question recognised, defined and made provisions for meeting this mutual obligation in a manner fair and equitable to both countries.[8]

Reference may also be made to the US practice with Canada. the 1909 boundary water treaty between the US and Canada also embraces detailed provisions concerning the questions to which the harnessing of their boundary waters might give rise.[9] The first part of Article 2 reserves, in good sovereign style, to each side unrestricted territorial control over the boundary waters within their territories. In subsequent parts of the treaty, the signatories agree that if the exercise of rights guaranteed by the first part results in any injury to the other side, legal remedies are available. Neither side gives up its right to protest against what is being planned on the other side having injurious effects. Absolute territorial sovereignty in the first part is tempered

7. Hearings before the Senate Committee on Foreign Relations on Treaty with Mexico relating to the utilization of waters of certain rivers. 79th Congress, Ist Session, Part 5 (1945), pp. 1738-82; E. Arechaga, "International Legal Rules Governing Use of International Watercourses" *Inter-American Law Review*, Vol. 2 (1960) p.330.
8. M.Jawed 'Rights of the Riparian States" *Pakistan Horizon*, vol. 17 (1964) pp. 150-51.
9. *American Journal of International Law* (supl.) vol.4 (1910), p. 239.

by the corresponding rightthat the injured party acrues in the subsequent parts as a result of its injury caused by the exercise of unrestricted right of the other. Hence, the right under first part is no longer unqualified. It is qualified by corresponding duties not to injure the other or to pay compensation to the injured party.

The treaty also set up the International Joint Rivers Commission – the US and Canada with well-defined powers and functions to settle their common water disputes. They have abdicated some of their sovereign rights and vested in the commission. The treaty has made a great effort to reconcile sovereign control with the fact that neither party can have absolute sovereign control. Throughout the treaty, both sides have abandoned a considerable portion of their national sovereign control over common waters to each other and to the joint commission. Eagleton is of the opinion that the treaty reserves exclusive control and at the same time admits that neither party can have exclusive control. The result is a compromise arrangement through which co-operation is made possible, and a great deal of administrative control through the joint commission'.[10]

Under the 1961 Columbia Water Treaty, both the US and Canada have adhered to the principle of shared enjoyment and optimum utilisation of common waters through international co-operation. They have jointly undertaken comprehensive and integrated regional planning for the development of the Columbia water resources. The downstream power and flood control benefits in the US resulting from upsteram Canadian storages are divided equally between them.[11]

Austria, another supporter of the Harmon Doctrine, has settled its water disputes with its neighbours on the basis of mutual recognition of rights. In the 1948 treaty which solved the Rissbach river dispute between Austria and Bavaria, it was prescrided that each state must pay regard to the interest of the other. In course of

10. Eagleton, *op. cit.*, 1029.
11. Above note 4, p. 306.

negotiations they took the position that riparian states were to be regarded as tenants in common with each owning an individual share of the whole.[12] Austria also minimised its differences about the utilisation of the Tyrolean Ache with Bavaria[13] and the Thaya river with Czechoslovakia[14] in a similar manner.

Mutual recognition of rights and the accountability of all claimants in their use of common waters is also apparent even in the most extreme common water disputes. Illustrative of such a case is the violent dispute over the sharing of the Jordan river water between the Arab states and Israel. Both the Arab states and Israel unilaterally implemented, or took steps to implement, schemes to utilise the Jordan river water despite the continuing protest of the other. The parties started negotiations through the good offices of Special Ambassador Eric Johnston, an envoy of President Eisenhower. These negotiations failed due to political reasons. Subsequently, the parties came to the position that each was entitled to a reasonable share of the Jordan river water and that they would not interefere with each other's share unilaterally.[15] In the Rio Sauca river dispute between Chile and Bolivia, despite the heat of the controversy, upstream Chile did not invoke the Harmon Doctrine in an attempt to justify its action. On the contrary, Chile recognised that Bolivia had certain rights in the Rio Lauca river water.[16]

State practices referred to indicate that the Harmon Doctrine has been rejected by virtually all riparians which have had occasion to assert the doctrine. Although the US initially adhered to the

12. P. Sevette, 'Legal Aspects of the Hydro-electric Development of Rivers and Lakes of Common Interests' UN Doc. E/ECE/136 (1952), pp. 106-7.
13. *Ibid.* p. 49.
14. The treaty between Austria and Czechoslovakia signed on 10 May 1921, *Ibid.* 98; *League of Nations Treaty Series*, vol. 9 (1922) p. 358.
15. Report of the 52nd Conference of the International Law Association, 1966, p. 487.
16. L. Lecaros, "International River : The Lauca Case', *Indian Journal of Internal Law*, vol. 3 (1963), p. 133.

doctrine, in practice it also could not maintain this stand. Shared enjoyment which recognises the rights and interests of co-riparians is explicit in almost all treaties resolving common water disputes.

Repudiation of the Harmon Doctrine may also be demonstrated by referring to the accomplished practice in the Indian Subcontinent. India and Pakistan resolved their Indus water dispute by concluding an agreement which conceded that the parties owed some mutual obligations in respect of the use of the Indus water system within their territories. Immediately after their independence in 1947, Pakistan and India quarrelled about the Indian plan to utilise the Indus water system in its territory in such a way that Pakistan would have been deprived of waters needed for irrigation. India firmly adhered to the Harmon Doctrine. It cut off some of the waters of the Indus water system and claimed the right to do so without being accountble to the right and interest of Pakistan in the Indus water system.[17] When their bilateral efforts failed to make any headway for a solution the International Bank for Reconstruction and Development offered to lend them its good offices. Finally through the mediation of the Bank the Indus water treaty was signed in 1960. The treaty is based on the shared enjoyment of the Indus river system.[18]

The Indus basin consists of six rivers and the treaty has divided them equally between the two countries. The three eastern rivers (namely, the Ravi, Bias and Sutlej) and the three western rivers (namely, the Indus, Jhelam and Chenab) are alloted respectively to India and Pakistan for their exclusive use (Art. 2). Though these rivers are alloted to them for their use, they are under some

17. F.J. Barber 'The Indus Water Dispute, *Indian Yearkbook of Legal Affair s*, vol. 6(1957), p.46; C.B. Bourne 'The Right to Utilize the Waters of International Rivers' *Canadian Yearbook of International Law*, vol.3 (1965), 205: F.H. 'The Eastern River Dispute Between India and Pakistan, *World Today*, vol. 13(1957), p. 536 ; J.S. Bains 'The Diversion of International Rivers', *Indian Journal of International Law*, vol. 1 (1960-61), p.44.
18. For the treaty, see *American Journal of International Law*, vol. 55 (1961), p. 797.

obligations to each other in using these rivers. Pakistan, for example, guaranteed the use of the western rivers to India for its existing agricultural uses, for storage purposes, for hydro-electric purposes, and for domestic and non-consumptive uses (Art 3.2). In future India would be able to use additional amounts of water of the western rivers for bringing certain new areas specified in the treaty under cultivation. Reciprocally, India conceded to limit its withdrawals for agricultural use and storages from the eastern rivers and

---

On the question of the use of international rivers, there exists a persistent pattern of state practice and community expectation of shared competence and control.

---

to make deliveries to Pakistan during the transitional period[19] (Art. 2.5). During this transitional period, Pakistan agreed to construct alternative system in substitution for the eastern rivers for its irrigation. In return, India acquiesced to the contribution of a part of the costs of the replacement works which would be constructed in Pakistan in order to irrigate the land hitherto irrigated by the eastern rivers. It is discernible that the overall arrangement is based on a mutual give and take policy and a recognition of each other's rights and existing uses.

Agreements between India and Nepal on the Kosi Project[20] and the Gandak Irrigation and Power Project[21] may be cited to the same effect. They jointly constructed these projects within the Nepalese territory for power and prevention of erosion of Indian and Nepalese areas. Inherent in these arrangements was the objective of maximising the benefit for them both through the joint co-operative development

---

19. There was a transitional period of 13 years for the replacement activities (initially 13 years with a possibility of 3 years extension).
20. The 1954 agreement between India and Nepal, see above note 4, p. 290.
21. The 1959 agreement between India and Nepal, see above note 4, p. 295.

of common water resources. They also set up a joint co-ordination committee to discuss and solve problems of common interest in this respect.[22]

On the question of the use of international rivers, there exists a persistent pattern of state practice and community expectation of shared competence and control. This pattern is reflected through the recurrence of identical provisions in a significant number of treaties all over the world.[23] These treaties specify, in one way or other,

22. For example, the Co-ordination Committee for the Kosi Project, see above note 4, pp. 294-95.

23. Some more treaties containing similar provisions are: the treaty between Russia and Estonia of 2 Feb. 1920, Art. 16, *L.N.T.S.* vol, 11 (1922) p. 69; the Franco-British convention of 23 Dec. 1920, Art. 2, *Ibid*. vol. 22 1923-24) p. 355; the treaty of 26 Feb. 1921 between Persia and Russia, Art.3, *Ibid.* vol. 9(1922)p, 403: the agreement between Syria, Lebanon and Palestine of 3 Feb. 1922, *American Journal of International Law*, vol. 53(1956)p. 91; the treaty between Germany and Denmark of 10 April 1922, Arts. 29,35, *L.N.T.S.* vol. 10(1922) pp. 215, 221; the treaty between Hungary and Romania of 14 April 1924, Art.3, *Ibid.* vol. 46(1926) p. 45; the convention between Norway and Finland of 14 Feb 1925, Art.2, *Ibid.* vol. 49 (1925-27) pp. 388-89; the treaty between France and Germany of 14 Aug. 1925, Arts. 13, 15, *Ibid.* vol. 75 (1928)p. 268: the treaty between Germany and Poland of 27 Jan. 1926, Art.3, *Ibid.* vol. 64(1927)p. 159; the treaty between Portugal and Spain of 11 Aug. 1927, Arts. 1-3, *Ibid.* vol. 82(1928-29)p. 133; the treaty between Austria and Czechoslovakia of 12 Dec. 1928. Art. 28(1). *Ibid* vol. 108(1930-31)p.69: the exchange of notes between Egypt, Sudan and the UK on Nile water on 7 May 1929, para 4(b) *Ibid.* vol. 93(1920)p. 46, the convention between Romania and Czechoslovakia of 15 July 1930, Arts. 20,21, *Ibid.* vol 164 (1935-36)p. 171; the protocol between France and the UK of 31 Oct. 1931, *American Journal of International Law* vol. 50 (1956)p. 88; the convention between Poland and the USSR of 10 April 1932, Arts. 6,7, *L.N.T.S.* vol. 141 (1933-34)p.413; the frontier agreement of 13 June 1946 between Afghanistan and the USSR, *L.N. T.S.* vol. 31(1949) p. 158: the exchange of notes between the UK, Portugal and Northern Ireland of 21 Jan. 1953, *Ibid.* vol. 175 (1953)p. 14: the convention between and Switzerland of 17 Sept. 1955, Art.4, *Ibid.* vol. 291 (1958)p.220; and the Treaty of Nigar Basin of 29 Oct. 1963, Art.4, *Ibid.* vol.587(1967)p.9.

the freedom of action of the signatory riparian states. The multiplicity of these treaties is a clear evidence that riparian states have felt an obligation to work on the basis of mutuality and co-operation in the use of international rivers. The number of riparian state which are parties to these treaties, their spread both over time and geography, and the fact that 'in these treaties similar problems are resolved in similar ways, make of these treaties and negotiations persuasive evidence of law-creating international practice'.[24] The irrefutable exercise of national sovereign rights over the Ganges by its riparians would appear to be contradictory to and a deviation from the existing international practice. Further more, the practice of the Indian Subcontinent vitiate any contention of an invincible exercise of sovereign dominion over the Ganges.

Territorial Sovereignty over International Rivers in Case Law

No international decision, judicial or otherwise, supporting the purported principle of absolute territorial sovereignty of riparians over an international river within their territories has been found. There is a similar situation with national decisions. The only known case adhering to this principle is the 1913 decision of the Imperial Royal Administrative Court of Austria. The Court dealt with a Hungarian complaint on the question of territorial right of a state over a river flowing into a lower-lying state. The Court held that there was not yet any legal obligation for the upstream state to consider the interest of the downstream state, or for it to refrain from interfering with the downstream state.[25] This decision, based on absolutist principle, has consistently been over ruled by a series of subsequent decisions—both international and national.

24. W. Griffin 'The Use of Wates of International Drainage Basins Under Customary International Law', *American Journal of International Law.*, vol.53 (1959)p.50.

25. For the decision, see *American Jouranl of International Law.* vol. 7 (1913), p.653.

In 1917, France contemplated using the Lake Lanoux, a French river, as a reservoir and then diverting its water to the Ariege, another French river, where it could profit by producing hydroelectric energy. The planned diversion was designed to withdraw 25 per cent of the Carol flow, a river flowing from France to Spain. The Carol water was used by Spanish farmers. Spain raised objection against the plan. From 1917, to 1957 both countries negotiated in vain. The dispute was eventually settled by the Lake Lanoux Arbitral Tribunal in 1957.[26] The tribunal in its award recognised that there are certain general principles of international law to be followed in utilising the water of an international river. The tribunal said:

> The upstream state has, according to the rules of good faith, the obligation to take into consideration the different interests at stake, to strive to give them all satisfactions compatible with the pursuit of its own interests, and to demonstrate that, on this subject, it has a real solicitude to reconcile the interests of the other riparian with its own.[27]

Applying this principle to the Lake Lanoux case, the tribunal held that France had the right to embark on the project within its territory. But in doing so France must not ignore Spanish rights and interests in the same water system. Spain had the right to demand that its right be respected and that its interests be taken into consideration.[28]

The 1945 arbitral award rendered by the Chancellery of Brazil in a case between Ecuador and Peru over the Zarumilla river ensured

---

26. B.MacChesney 'Judicial Decision: Lake Lanoux Case', *American Journal of Internationl Law* vol. 53 (1959) p.156; J. Laylin & R. Bianchi "The Role of Adjudication in International River Disputes : The Lake Lanoux Case" *Ibid*, 30; also, *International Law Report*, vol. 24(1957), p. 101.

27. *Ibid*. MacChesney 169.

28. *Ibid*. 170.

Ecuador the co-dominion over the river in accordance with international practice.[29]

The 1942 Rau Commission award on the Indus water dispute between Sind and Punjab is also apposite.[30] In 1939, Sind province brought a complaint under the 1935 Indian Act against Punjab province. It was alleged that the existing and proposed water withdrawal from the Indus system in Punjab would lower the water level of the Indus in Sind and would affect the efficient working of the inundation canals of Sind. The Government of India appointed a commission with Sir Benegal N. Rau[31] as chairman to look into and hear the dispute. In the beginning, the commission prepared a statement of six principles of law as existing general principles of international law to deal with the problem of common water allocation. The commission formulated these principles on the basis of a thorough examination of the principles and precedents in this field adopted and practised by other states of the world. Nowhere in these principles was there any mention or cognizance of absolute territorial sovereignty over an international river as a principle of international law. On the other hand, the commission expressly rejected the principle. It mentioned that the rights of the several units in the dispute must be determined by applying not the doctrine of sovereignty but the rule of equitable apportionment, each unit being entitled to a fair share of the Indus water (principle 3).

There are also some other decisions of municipal courts which are no less pertinent. These are related to the settlement of water disputes between the components of some federal entities. Absolute territorial sovereignty over international rivers was never acknowledged and applied as a rule of the US inter-state water law. The

29. Griffin, *op. cit.* 61.

30. Report of the Indus Commission of 13 July 1942, Vol. 1; R. Rao "Inter-State Water Disputes in the Indian Union", *Indian Yearbook of International Affairs*, vol. 11 (1962) pp. 165-66.

31. He was a judge of the Calcutta High Court and a member of the ICJ.

The 1977 UN Water Conference at Mar del Plata has also subscribed to this view of the responsibility of riparians in dealing with the water of an international river. The position paper prepared by the Natural Resources Committee of the UN Economic and Social Council for the conference said that a riparian state in satisfying its own needs should consider the needs expressed downstream. On options to international actions, the paper recommended that the beginnings of co-operation and understanding on the use of international rivers could be made by riparians declaring that they would take into account the effects of their respective national water policies on co-riparians and that they should try to harmonise their national policies.[40]

In a similar vein, a host of scholarly authors have come to the conclusion that the essence of international law of the right of co-riparians to use the water of an international river in their territories is the principle of mutual rights and duties between co-riparians. Eagleton observes that the sovereign right and control over an international river 'is not an absolute right, giving an unassailable right

---

The sovereign right of the Ganges riparians over the river in their territories is abated by their corresponding duty to respect the sovereign right of the other to the same water.

---

to the sovereign to do whatever he pleases and without regard to its effect upon others.'[41] Smith, in his monumental work on this subject disregards the principle of absolute territorial sovereignty over an international river as a law of international river. He describes it as essentially anarchic' and 'would permit every state to inflict irreparable injury upon its neighbours without being amenable to any control

40. *Holiday*, Dhaka, 20 March 1977.
41. Above note 3, p. 1020.

save the threat of war'.[42] The nature of territorial sovereignty of a riparian over an international river within its territory is stated succinctly by Brierly:

> Each state has the right to have that river system considered as a whole and to have its own interests take into account together with those of other states, ... each state has in principle an equal right to make the maximum use of the water within its territory but in exercising this right must respect the corresponding rights of the other steates;...[43]

The Mexican writer Cordina,[44] the Finish jurist Bjorkstan[45] and Andrassy[46] are a few among many others who are in accord with Brierly. It should be noted here that there are certain contrary views advanced by few exponents and supporters of the Harmon Doctrine.[47] But a vast majority of authors have found the doctrine as 'intolerable' and 'radically unsound'.[48]

There is among the international lawyers, associations and authors a virtually unanimity of opinion opposed the view that a riparian

---

42. Smith, *op. cit.* 144-45,
43. J. L. Brierly, *Law of Nations*, (1963) p. 331
44. He says that the internationality of rivers presupposes a combination of rights and duties that are common to neighbouring states. The legal order that governs these rights and duties affects the exercise of the territorial sovereignty of each state over its own territory. Above note 24, p. 71.
45. He affirms that sovereignty does not free the state which claims this sovereignty of some obligations in respect of the other riparian state. Above note 16, p. 135.
46. He upholds, as a matter of existing international law, the principle of mutual rights and duties betwen co-riparians of a common water. Above note 24, p. 70.
47. G. Schwarzenberger, *A Manual of International Law*, vol. 1, 4th ed. 1960, p. 105; above note 12, pp. 52-53; note 17, Bains, p. 38.
48. F.J. Berber, *Rivers in International Law*, (1959) pp. 19-40; Smith, *op. cit.* 145-47; above note 12, pp. 53-67.

state in the exercise of its sovereign right is unrestricted in the use of an iniernational river within its territorial control. They support a qualified territorial right over, and accountability of all interests involved in a common water as an established principle of international law in this field. These views tend to conform that tne sovereign right of the Ganges riparians over the river in their territories is abated by their corresponding duty to respect the sovereign right of the other to the same water.

The Physical Unity of International Rivers

Quite apart form the Harmon Doctrine, it may well be argued that the claim to absolute territorial sovereignty over the Ganges is based on the ground that endowment with water resources should be treated no differently from endowment with other resources within the territory of a state. Indeed, in the 1956 Dubronvik Conference of the International Law Association, the Indian participant claimed that the water which runs across India is the fixed property of India, like a dry land, like a tree, or a coal mine.[49] Similar argument was in fact levelled against a draft provision of the 1923 Geneva Conference relating to the development of hydraulic power affecting more than one state. The draft provision called for prior agreement of all riparians where the hydraulic power works were likely to change the natural flow of water. The Belgian representative opposed, pointing out that the proposed provision would interfere with state sovereignty. He upheld the view that states were under no obligation to part with their natural resources in favour of a neighbouring state which did not possess them. He further contended that if a state which possessed electric power could be compelled to share a certain quantity of its power with another state, the same principle should be applied to states that possess coal mines, diamond mines or any kind of natural

49. Report of the 47th Conference of the International Law Association, 1956, p. 240.

resources.[50] The delegate of Switzerland also attacked the proposed provision in a similar manner.[51] As a result, the draft provision was replaced by a provision placing an obligation on the parties to enter into negotiation.

A close reading of the provision however divulges that though the national sovereignty of a state is preserved in a good sovereign style in the final text, it is accepted that there are some limitations under international law on the sovereign right. It provides that the activities of states carrying out the development of hydraulic power may only be exercised 'within the limits of international law.'[52] This means that sovereignty does not convey an absolute right. All sovereignty is subject to international law, and wherever asserted it is followed immediately by qualification. Articles 3 and 4 introduce another limit to the right of sovereignty. They prescribe that activities by a state in common water can only be carried on with due regard to the right of other states.

In drawing an analogy between water resources and other resources within a state, one ought to bear in mind certain marked distinguishing features of water resources. The analogy that there is no distinction between water resources and other natural resources is untenable mainly on two grounds: first, the flowing character of water resources and second, the physical unity of an international river. Unlike other natural resources such as coal or diamonds, water resources in their natural course flow from one state to another unless artificially interrupted. The US Supreme Court has compared the flowing character of water resources with the flying habits of migratory birds:

> To put the claim of the state upon title is to lean upon a slender reed. Wild birds are not in the possession of anyone; and possession is the beginning of ownership. The whole foundation of the

50. Above note 12, pp. 158-50.
51. *Ibid.*
52. Art. 1, *League of Nations Treaty Series*, vol. 36 (1925) p. 77.

> state's right is the presence within its jurisdiction of birds that yesterday had not arrived; tomorrow, may be in another state; and in a week a thousand miles away. The subject matter is only transitorily within the state and has no permanent habitat therein.[53]

As a result of this flowing nature, a riparian state does not acquire and perpetual but only a transitory occupancy of water resources while within its territorial custody. This transitory possession of water resources constitutes a fundamental difference between the ownership of a state over the water of an international river and its ownership over other fixed resources and components within its territory. Consequently, the right of a state to exercise its sovereign power over flowing water and over other static resources within its territory cannot be the same. In the latter case, a state acquires full proprietorship and is, therefore, empowered to exercise supreme authority. In the former case, a riparian state is only a co-proprietor and the right of its co-sharer to the same water system prevents it from exercising full sovereign right over that water.

The sovereignty of the Ganges riparians over the river essentially differs from the sovereignty over their lands and other static resources and components within their territories. The analogy that sovereignty over the Ganges should be treated no differently from sovereignty over other resources is unacceptable on the ground of the flowing character of the Ganges. The geographic flowing of the Ganges furnishes the upstream state, India with a geographic advantage over the downstream state, Bangladesh, in respect of the exploitation of the Ganges water. This geographic advantage in exploitation is not identical with the natural possession of the Ganges water. The difference is clearly pointed out by Knauth in the 1956 Dubrovnik Conference of the International Law Association. He said that 'the water was yesterday in the rain clouds or in the snowy mountains.

53. *Missouri* v. *Holland* (1920) 252 US 416, 434, 435.

Tomorrow it has run into Pakistan, or Burma. The next day it is in the ocean'.[54] If artificially uninterrupted, the Ganges in its natural course flows from India to Bangladesh and confers upon India only a transitory occupancy of it. This impermanent possession of the Ganges water necessarily distinguishes India's ownership of the Ganges from that of other static constituents within its territory. In the latter case, India possesses pemanent occupancy and full title and is therefore empowered to exercise complete territorial jurisdiction. In the former case, temporary occupancy does not bestow any full ownership. Both India and Bangladesh are the co-sharers of the Ganges water and gain co-jurisdiction over it. Consequently, neither of them is entitled to exercise exclusive territorial jurisdiction over the Ganges while flowing across their territories.

The injurious effects that generate from the exploitation of the geographic advantage of India has made the analogy more irrelevant. An international river basin is a geographical unity. There exists, within a basin, certain unique entities or interdependencies. Explaining the nature of indivisibility and interdependency of a river and its riparians, Mc Dougal is of the opinion :

> Experience within our various countries indicates that every particular river basin has its own peculiar unities and interdependences unities and interdependences in the physical interrelations of land and water and differrent kinds of waters, in the technology of necessary control, and in the reciprocal impact of different uses each other and that the effective, conserving, and productive regulation of any particular basin requires that all these unities and interdependences be taken tnio account. The physical, technological, and utilization unities of an international river basin can scarcely be expected to abide by the national boundaries of states, established in accordance with political factors.[55]

54. Above note 49.

55. Report of the 48th Conference of the International Law Association, 1958, p. 44.

The resolutions of the 1963 UN seminar on the International River Basins[56] and the International Law Association[57] may be illustrated to the same effect.

Due to this physical unity and interdependence of a river, activities carried out in one riparian state may affect the process of the use of co-riparian states. The physical and utlisation unities in turn create similar interdependencies among co-riparians in using the water of a river. As a result, in exploiting the water of an international river in its territory, a riparian is required to consider two factors : first, the river basin as an integrated whole and not a piecemeal and secondly, the repercussions of its action on the basin outside its territory.

Notwithstanding the political and geographic sectioning of the Indian Sub-continent, the Ganges preserves its organic unity and interdependence. There exists, within the Ganges, certain unique

---

The Ganges exhibits certain unique characteristics that are not common to other resources. The flowing nature and the material indivisibility of the Ganges demand that a special system of legal principles apply.

---

entities and interdependences, which result in a similar interdependence between India and Bangladesh. Its flowing water binds the two countries together and makes them interdependent in relation to the

56. It resolved that the international river basin is an indispensible unit for meteorological, hydrological and engineering studies and is an important unit for organising, stimulating and carrying out economic and social development of land and water use practices. M.I. Chowdhury, "Farakka Barrage and Bangladesh". The *Bangladesh Observer*, 14 March 1976.

57, It provides that 'a system of rivers and lakes in a drainage basin shall be treated as an intergrated whole (and not piecemeal), abave note 55, p. 99. Its 1966 Helsinki Rules recommends that 'the drainage basin is an indivisible hydreologic unit which requires comprehensive consideration', above note 15, p. 485.

utilisation of the Ganges water. As such, the Ganges water use by one state within its national boundary may affect the Ganges water use by the other. Both of them are vulnerable to such injury. India can cause harm by reducing the water supplies to Bangladesh by upper diversion. Conversely, India may be exposed to inundation of its territory following a lower damming of the river by Bangladesh. Owing to this geographical unity of the Ganges and the close relationship between its riparians in utilising the Ganges water, it is next to impossible either for India or Bangladesh to carry out any activities in the Ganges within its territory which would not product any impact on the Ganges in the territoriy of the other, In exploiting the Ganges water within their territories, they should take into account the physical unity of the Ganges and the effects of uses beyond their national boundaries.

Water resources and other natural resources are not governed by the same principles of law. Unlike water resources, all other natural resources except the air are divisible. As a result, the legal regimes which govern their use must necessarily be different from those governing water resources. The Ganges exhibits certain unique characteristics that are not common to other resources. The flowing nature and the material indivisibility of the Ganges demand that a special system of legal principles apply. The territorial sovereignty of the riparians over other static resources and components within their territories should be treated differently from rights to the Ganges within their territories. The idea of exclusive territorial sovereignty from the national frontier point of view may be applicable in the former but is inappropriate in the latter. For both India and Bangladesh have co-dominion over the Ganges.

The Principles of Integrity, Reciprocity and Good Neighbourliness

The freedom of action of the riparians over the Ganges within their territories is also limited by the principles of integrity, reciprocity

and good neighbourliness. Articles 2 (4) and 74 of the UN Charter respectively recognise the principle of territorial integrity of a state and of good neighbourliness. One of the sanctions that ensures the observance of these principles is the rule of reciprocity. Max Huber points out that in addition to the principle of territorial sovereignty emphasised by Harmon, it is imperative to reckon with another equally worthy principle, that of territorial integrity. Every state is entitled to respect for its territorial integrity. A state is free to undertake any activities within its territory and exercises its power therein. However, a state does not have the right to invade or exert influence in the territory of another state, nor any duty to tolerate in its territory any foreign interference. Andrassy maintains that 'while examining the rules of neighbourhood rights concerning waters, one finds, first of all, a principle well established restricting all changes in the natural conditions as well as in the existing system if this change is prejudicial to neighbours.[58] Some authors among the supporters of the Harmon Doctrine also expressly recognise the existence of these principles. Berber, for instance, admits the existence of the principles of good neighbourship and mutual consideration for each other between riparians, which he thinks to be the 'general principles of law' governing water relations between independent states.[59] In a case between the Swiss cantons on the territorial rights of cantons over an inter-canton stream, the Swiss Federal Court held that because of the sovereign equality of riparian cantons, none has the right to undertake measures in its territory in such a way as to infringe the territorial rights of its neighbours.[60] It is observed by the Italian Court of Cassation that 'international law recognizes the right on the part of every riparian state to enjoy as a participant of a kind of partnership created by the river'.[61]

58. Above note 8, Jawed, p. 142.
59. Berber, *op.cit.* 211-12.
60. *Aargau* v. *Zurich* (1878), above note 33.
61. *Societe Energie Electrique du Littoral Mediteranean* v. *Campagnia Imprese Elettriche Liguri* (1939), *Annual Dig.* vol. 9(1938-40)p. 121.

The Ganges riparians must comply with the principles referred to in exercising their territorial right over the Ganges. The territorial integrity either of India or Bangladesh counteracts the absolute territorial sovereignty of the other. The essential legal consequence of their territorial sovereignty is the equality of them both before international law and when confronted with a rule of international law they are both on the same footing. Each of them, irrespective of their size and political influence, has equal right to territorial integrity and is under a reciprocal duty to respect each other's right. The ground on which either of them claims absolute territorial dominion for the same reason it should respect the teritorial integrity of the other, which can also likewise claim absolute territorial right and shall not allow any interference within its territory. This necessarily contravenes their freedom of action over the Ganges. An injured Ganges riparian will not concede the sovereign right of the other to interfere and do injury within its territory. Thus, the territortal sovereignty over the Ganges either of India or Bangladesh is neutralised by the right to territorial integrity of the other.

Clauses regarding the obligations of a state to maintain good neighbourly relations with its neighbours are a common feature of international treaties. There is hardly a treaty between neighbours that has not incorporated such a clause. As such, only a small sample need be given here. The 1930 Final Protocol of the Franco-Turkish Delimitation Commission provides :

> Whereas their neighbourhood on the Tigris imposes on the riparians specific obligations, it becomes necessary to establish rules concerning the rights of each sovereign state in its relations with the other. All questions, such as navigations, fishing, industrial and agricultural utilization of the waters, and the policing of the river, shall be solved on the basis of complete equality.[62]

62. A.H. Hirsch 'Utilization of International Rivers in the Middle East' *American Journal of International Law*. vol. 50 (1956) p.86.

The 1926 Franco-Turkish Convention of friendship and good neighbourly relation,[63] the 1946 treaty of friendship and neighbouring relation between Iraq and Turky,[64] and the 1926 agreement to facilitate good neighbourly relations between Palestine, Syria and Lebanon[65] are a few of other innumerable examples.

There exists between India and Bangladesh a treaty of friendship, co-operation and peace concluded in 1972.[66] The treaty solemnly conforms to the principles of good neighbourly relations of peaceful co-existence, of mutual co-oparation, of non-interference in internal affairs and respect for territorial integrity and sovereignty. According

---

Neither India nor Bangladesh can do anything at will with the segments of the Ganges in their territories, as their freedom of action is compromised by the treaty provisions.

---

to this treaty neither of them is empowered to take any action at will either internally or externally which will effect the other adversely. They have agreed to refrain from such activities which will be detrimental to their friendship and good neighbourly relations. Their territorial rights are safeguraded in a good sovereign style in the sense that each has exclusive control over its own territory. Nonetheless, the treaty subsequently specifies the magnitude of the exercise of their territorial rights. It limits the exercise of their freedom of action to the extent that while action on their sovereign right in their territories, neither of them is entitled to inflict any harm in the territory of the other. Furthermore, they have also agreed to respect each other's independence, sovereignty and territorial integrity on the basis of equality and mutual benefits. They have mutually

63. *League of Nations Treaty Series*, vol. 54(1926-27)p· 197.
64. *UN Treaty Series*, vol. 37(1949)p. 281.
65. Hirsch, *op.cit.* 91; *League of Nations Treaty Series*, vol.56 (1926) p.81.
66. *Indian Journal of International. Law.*, vol. 12(1972) p. 131.

abdicated some of their sovereign rights to each other. This in effect reciprocally restricts each other's freedom of action on the Ganges within their territories. The territorial right of one over the Ganges is counterbalanced by the same right of the other.

By this instrument the parties have assumed certain undertakings to do or refrain from doing any act or acts in a particular manner. They are not entitled to act in a way incompatible with or repugnant to their assumed obligations. The preamble of the UN Charter requires a member state to discharge 'the obligations arising from treaties and other sources of international law'. in the *Wimbledon case*, the Permanent Court of International Justice dealt with the issue of the conclusion of a treaty by which a state undertakes to perfrom or refrain from performing a particular act. The court held that 'any convention creating an obligation of this kind places a restriction upon the exercise of the sovereign right of the states in the sense that it requires them to be exercised in a certain way'.[67] Hence, neither india nor Bangladesh can do anything at will with the segments of the Ganges in their territories, as their freedom of action is compromised by the treaty provisions.

International Subsidiary Obligations

Even in the absence of any specific treaty provision, the freedom of action of the Ganges riparians is qualified by some subsidiary obligations deriving from their involvement in present interdependent international life. The international community seems to be more co-operative and interdependent than ever. Various kinds of international law now regulate the behaviour of states. The adherence to the UN Charter, statutes of specialised agencies and other intra and inter-global treaties and conventions has led to situations in which, on the basis of principal obligations, new

67. PCIJ ser.A.1. (1923) p.25; C.N.Okeke, *Controversial Subjects of Contemporary International Law*, 1974, p. 30.

subsidiary obligations are imposed on states. Today, there are seldom any state that has not conceded some of its sovereign rights through these instruments. Oppenhim maintains that sovereignty does not allow a state to do what it likes without any restriction whatsoever. There is hardly a state in existence which is not in one point or another restricted in its territorial supremacy by treaties with other states. Even a neutral state is not free to do anything it likes, it cannot make war except in self-defence, cannot conclude alliances, and are in other ways hampered in their liberty. He is of the opinion:

> The mere fact that a state is a member of the international community restricts its liberty of action with regard to other states, because it is bound not to intervene in the affairs of other states. And it is generally admitted that a state can through conventions, such as a treaty of alliance or neutrality and the like, enter into many obligations which hamper it more or less in the management of its international affairs.[68]

A similar view is echoed in the statements of Cohen,[69] Knauth[70] and Griffin.[71]

Both India and Bangladesh are the members of the UN and some of its specialised agencies. They are also the signatories of some intra and inter-regional agreements and conventions. The positivist notion of sovereign consent cannot explain the voluntary nature of obligations assumed by them simply through the membership of the family of nations. The principal obligations emerging from these instruments introduce some restrictions on the exercise of their freedom of action. On the basis of their principal obligations, a number of subsidiary and unforeseeable obligations are also imposed on them. These obligations are subsidiary and unforeseeable in the sense that the liabilities

68. L. Oppehheim, *Inrernational Law — A Treatise*, 1955, 8th ed. pp.289-92.
69. Above note 49, p. 238.
70. *Ibid.* 240.
71. Above note, 55, p. 44.

emanating from adherence by them to these multilateral conditions are not only not anticipated but the future development of the rule and its concomitant obligations may also be unpredictable. Their UN membership, to give an example, creates to that extent future obligations which are involuntary in that they must take the rules as they find them from time to time. Due to the existence of these obligations in the international arena, they cannot exercise their sovereign rights at will even in the absence of any instrument restricting their freedom of action, In the *Lake Lanoux case*, France contended that apart from treaty obligations it was not subject to any legal restraint in the use of the Lake Lanoux waters. It argued that the treaty limitations on the use of water in France must be strictly construed, because they were in derogation of sovereignty. The tribunal rejected the notion and held:

> The tribunal could not recognize such an absolute rule of construction. Territorial sovereignty plays the part of a presumption. It must bend before all international obligations, whatever their origin .....[72]

It therefore appears that freedom of action of the Ganges riparians over the river is also limited by some subsidiary and unforeseeable obligations that flow from international instruments. The territorial rights of both India and Bangtadesh must submit to such obligations.

Conclusion

The concept of state sovereignty from the national frontier point of view, as it is commonly understood and applied, is no longer absolute. States recognise their interdependence and realise that the theoretical notion of unffettered sovereignty is in practice qualified by numerous socio-econimic, political and cultural factors. Yet, in the course of diplomatic negotiations in the event of international river disputes, riparians, particularly the upstream riparians, still make

72. Above note 24, p.62, note 26 Mac Chesney p. 159.

extreme claims for the legality of their liberty to act as they please with the section of common waters in their territory irrespective of the effects of such use on downstream riparians. But upstream riparians have not behaved in accordance with the principle they profess and have eventually settled their common water disputes in a moderate way on the basis of shared enjoyment and mutual accommodation.

Any claim of absolute territorial sovereignty over the Ganges has no past or present acceptance in international law. The only probable defence may be the Harmon Doctrine. It appears unlikely that an international forum or tribunal can be persuaded by this doctrine. In view of the existing norms and established precedents referred to, it would be difficult to find the doctrine to be a generally recognised principle of international law. Rather the doctrine appears to be a 'slender reed' to lean upon.

The principle applicable in this order, and one which is amply recognised international law, is that a riparian may exercise its right to territorial sovereignty in the form and to the degree that it deems desirable but on the condition that it does not impair the same territorial right of co-riparians. In other words, the sovereign title to and control over the segments of the Ganges, either of India or Bangladesh, is not an unassailable right to be whatever they desire regardless of the injury it may cause to the right of the other. The physical unity of the Ganges and the dependence of the riparians on the river and its resources create a regime of mutual interdependence and reciprocal obligations among the riparians in exploiting the river. Consequently, the exercise of absolute territorial sovereignty over the Ganges is neither possible nor desirable. Since the Ganges is essentially an international river of common interest, international law imposes certain restrictions upon the freedom of action of the riparians with the segments of the Ganges within their territories.