

The duty to cooperate in state interactions for the sustainable use of international watercourses

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Abstract

The duty to cooperate is a universal principle engrained in International Law. A sequel to this principle is the concept of equitable participation and taking all appropriate measures not to cause significant harm. These principal norms in International Water Law can only function through the cooperation of states. Bilateral and multilateral treaties make this duty a mandatory obligation for contracting parties. Nevertheless, disputes still exist among riparian states over their use of international shared waters. This paper, therefore, seeks to determine how the application of the duty to cooperate in the development of transboundary water can be achieved through the procedural norm of equitable participation and the substantive norm of taking all appropriate measures not to cause significant harm. Through a doctrinal (analytical) approach, empirical studies, as well as the legal framework on international watercourses management will be examined to understand the various roles of states on a transboundary river. The duty to cooperate will also be appraised to ascertain the modalities for its application in International Water Law. This study aims to foster a sustainable pathway to ensuring cooperation in the use of international waters in state interactions. This is relevant for equitable utilization of the waters and their resources.

1 Introduction

The principle of cooperation is one of the seven basic principles of international law adopted by the United Nations General Assembly in 1970. The essence of these principles is to foster continued friendly relations between sovereign states. There has been a significant number of studies on this principle of cooperation [1–6] as applied in the different subsets of international law- International Humanitarian Law, International Environmental Law, International Criminal Law, International Water Law, among others. This principle of cooperation has led to the establishment and adoption of various international agreements and conventions- bilateral and multilateral- particularly concerning International Water Law to promote peaceful existence among riparian states and the effective management of the water resources within their boundaries.

Water is a renewable natural resource of global importance and reliance. Like energy, it is required for almost everything from complex uses to basic domestic uses. Disputes and conflicts have over centuries risen over the right to use and ownership of the waters that flow through their boundaries. This is because most sovereign states presume sole right and ownership to the section of river that passes through their territory and as such can be used as they deem fit to satisfy their need [4]. These presumptions have led to severe environmental degradation as it is counter-productive to ensuring water and sanitation for all; the sixth goal of sustainable development (SDG) [7].

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More so, the concept of a green economy and green growth is pivotal to ensuring that natural or renewable resources keep creating a conducive environment for growth and economic development. It is about this that international water law or law of international water resources seeks to govern water relations between states and between states and international organizations, to enable states to share access to river basins and waters without jeopardizing environmental development which includes sustainable development.

Cooperation is crucial for cross-border relations; its importance in the utilization of transboundary waters cannot be overemphasized. There is a consensus that the utilization of transboundary waters could be a source of political tensions, there are, however, differing opinions as to whether there is a link between waters and wars among states [3, 8–10]. This study thus focused on achieving equitable and reasonable use of transboundary waters through the cooperation of riparian states.

The duty of cooperation is an overarching principle of international law which the Convention on the Law of Non-Navigational Uses of International Watercourses (UNWC) has provided for, as a legal obligation for, states' interactions concerning the shared waters [11]. However, conflicts and disputes still occur despite this framework and other existing international water treaties. This study objective was to determine how states can achieve cooperation in the management and use of these shared waters through equitable participation and by ensuring that no significant harm is done to the waters and their resources. To achieve the objective above, a doctrinal analysis of existing legal provisions, also analytical and empirical studies that focus on cooperation among states in the management and use of shared waters was conducted and presented therein.

This article discussed the purpose and operation of cooperation on transboundary waters, its relation to the principle of equitable participation, and taking all measures not to cause significant harm. Since the existence of a treaty does not signify cooperation among states, this study explored also, the role of good faith in the cooperation of the management of transboundary waters so as to deter riparian states from taking advantage of their violation of existing treaties.

The various transboundary river basins and aquifers can be found in over 145 countries in the different regions of the world, cooperation of states over these waters could have different connotations depending on the individual state history, social, environmental, and economic systems of the regions and the states [3]. The findings of this study in addition to its scientific contributions will allow all actors particularly policymakers both at national and subnational levels foster conditions that will douse tension, reduce conflicts, promote peace as well as encourage cooperation in the sustainable development of the water resource among riparian states.

2 Obligation to cooperate on transboundary rivers

Varying interests exist among states concerning the development and utilization of the water and water resources that flow through their boundaries. These interests have resulted in conflicts and disputes among neighbouring states. Examples of these conflicts include the recent dispute between Egypt and Ethiopia over the development of a hydropower project on the Nile River. Also is the dispute in Central and Southeast Asia on the Syr Darya and the Mekong. These flames of conflict are usually fanned by the agenda of politicians [3, 12, 13], resulting in a game of influence and power over water rights. Depending on the location of the state along the transboundary water, over time different theories have been cited by riparian states concerning their rights to the water resources that have resulted in disputes.

The duty to cooperate by states creates a link between the Harmon doctrine and the theory of territorial integrity, both of which are theories of extremity. They are inimical to cross-border relations and cannot be relied on for the equitable and reasonable utilization of the waters and resources since not all states fall into the divide of upper and lower riparian. Moreover, some states with more than one transboundary river could be upper riparian as well as lower riparian.

The purpose for which cooperation by states is mandated on an International Watercourse is to attain the full equitable and reasonable use of the water thereby protecting the resource from significant harm. The Convention on the Law of Non-Navigational Uses of International Watercourse (UNWC) therefore calls for mandatory cooperation among riparians based on respect for each States jurisdiction and its permanent population, their absolute integrity, and every riparian benefiting from the development'. The UNWC places a legal obligation on every riparian on the International Watercourse to take positive steps concerning the watercourse in order to achieve the full benefit and adequate protection for the watercourse. It implies that the failure to cooperate as set out by the Convention implies a contravention of the treaty [14].

Green and sustainable development such as hydropower development, diversion for irrigation, and or navigational uses that could impact the ecosystem can be a catalyst for disputes among riparian states. However, as encouraged by the UNWC, the establishment of joint mechanisms and commissions can serve as a vehicle for cooperation among states for

the equitable and reasonable use of the water and its resources [15]. These mechanisms encourage cooperation among states as it facilitates interdependence as much it creates a platform for the growth of trust.

In response to this provision, joint commissions such as the Niger Basin Authority (NBA), the South Africa Development Commission (SADC) among others, have been created for the development of their shared resources. Other procedural mechanisms for cooperation along the transboundary waters include the prior notification of every riparian state of an intended development along the river belt which should include the possible effect of the planned measure irrespective of the expected outcome.

Consultation of all riparians, as well as negotiation with other riparians, is another key process of cooperation particularly if the planned measure could result in the use that may not be equitable and reasonable. The need to consult and if necessary, negotiate, is not concerning planned measures only but includes a situation where there is a need for the alteration, amendment, and application of existing treaties that guide the development of the states' shared resources and developments. Negotiations may not be a mandatory follow-up to consultations [14].

Cooperation mandates the continued and regular exchange of information and data as soon as they become available. This is fundamental as the non-existence of data from the co-riparian state(s) would only create very difficult situations which could trigger, aggravate, or even begin a web of events that could result in conflict among states or the devastation of the watercourse [16].

2.1 The duty of cooperation in equitable participation

The substantive obligation of equitable and reasonable utilization of the watercourse establishes two purposes; highlighting the objective expected to be achieved in the utilization of the waters. It also establishes the procedure for development taking into account every relevant factor and circumstance to create a balance for all states' needs and use.

The obligation to equitable and reasonable use is a key concept in international water law as it brings to fore the equal rights of states to use the watercourse and their accruing benefit derivable thereof. Besides these, it also highlights the corresponding duties of states that benefit from the use of the water not to deprive or deny other states their right to use and benefit from the use of the waters. This thus goes against the theory of absolute territorial sovereignty which tends to deny downstream states their equal right to participate in benefiting from their use of the water. It also goes against the theory of absolute territorial integrity which also denies upstream states their inherent right to participate in deriving benefit from the utilization of the waters.

The equal rights of states to participate in benefitting from the development of the waters is not a right ascribed but that which is inherent to states. This right does not ignore the need to give special regard to uses that are vital to human needs and ecosystem protection. Equitable participation thus refers to the equal right of riparian states -whether upstream, midstream, or downstream- to participate fully in the development of the waters so far as the development could potentially affect its utilization.

Although there have been some studies in the area of public participation in international environmental law [17–19], there is however a very limited number of studies on the right of states to participate in transboundary water cooperation. This may not be unrelated to the concept being relatively new [14]. Article 5 (2) of the UNWC [11] encourages all transboundary States' involvement in the use, development, and protection of a transboundary watercourse equitably and reasonably.

The purpose of the introduction of this concept of equitable participation is for the establishment of integrated measures for the protection, preservation, and management of the related use of the waters to achieve equitable and reasonable use [16, 20]. It encompasses the structure of entitlements (rights) and obligations (duty), discouraging the separate, individual and independent development of the water resource within a boundary [6, 20, 21].

The overarching objective of states' cooperation in developing the watercourse is for optimal and sustainable use by the co-riparians while considering the interest of each of the concerned watercourse states at the same time ensuring that the watercourse is adequately protected. Thus, the general obligation for states to cooperate highlights that all states affected by the proposed planned measure have equal right to cooperate and be cooperated with to ensure that optimal benefit is derived from the water as well as adequately protected from harm. This cooperation must however be carried out based on sovereign equality which does not mean economic and political equality but refers to the equality of rights based on the sovereignty of the states. Cooperation among states must also be based on mutual benefit, territorial integrity as well as good faith [14, 15]. The principle of equitable participation recognizes that it is only through the cooperation of states that equitable and reasonable utilization can be achieved. It implies intentionality in cooperation among riparian states.

This is important because, to realize the substantive norm of equitable and reasonable utilization, the various outlined mechanisms of cooperation are necessary [15]. These mechanisms include the establishment of joint institutions and commissions, the exchange of information and data, consultation, and negotiation, prior notification of planned measures. The actualization of these mechanisms requires the exercise of rights of participation by riparians that will be affected by the planned measures.

2.2 Duty of cooperation in the prevention of significant transboundary harm

The belief that significant harm to the upstream waters cannot happen is a misconception as overexploitation downstream probably through unsustainable withdrawal could cause significant harm to the waters upstream. The substantive norm not to cause significant harm like the equitable and reasonable utilization is an encompassing principle in international water and environmental law that requires the cooperation of states to achieve [6, 22, 23]. Both norms are derived from the allocation theory of limited territorial sovereignty which prohibits states from causing significant harm to the watercourse within their territory.

Since transboundary rivers are usually contentious that could lead to causing significant harm to the waters, no sort of competition whether it is of priority or subjective must exist rather than cooperation be encouraged to thrive through the principle of community of interest. This concept allows states to manage the river as a single unit making boundaries less important thereby making clear the obligation of states for equitable and reasonable utilization [24]. It thus becomes imperative that appropriate measures for the management of the river will require the involvement of all the co-riparian that would be affected by the potential use of the water. The Convention contains procedural duties required for cooperation, this includes the exchange of data, consultation, and negotiation where necessary, which should be before the planned development and continued all through the life of the project.

The continued exchange of information, consultation, and negotiation where necessary could lead to the prevention of potentially significant harm to the watercourse. A state that has reasonable grounds to believe that planned measures could result in significant harm, could enter into consultation and negotiation whereby information and data are exchanged and compared. This allows for a win–win situation for every state concerned since states with the planned projects based on their sovereign right cannot be indefinitely prevented from exercising their right, thus these projects could be carried out after due consultations with co-riparians that could be affected by the project development. The International Court of Justice emphasized the importance of exchange of information and data such as Environmental Impact Assessment (EIA), consultations, and the insurance of minimum environmental flows by highlighting the need for a preventive approach using appropriate indicative tools; that is taking all appropriate measures not to cause harm [23, 25, 26].

2.3 Cooperation on transboundary waters in green economy development

The concept of community of interest supports the establishment of joint institutions as recommended by the convention to facilitate cooperation [24]. As a procedural obligation, the duty to cooperate is enhanced by the rights and obligation of states to participate equitably (that is to cooperate and be cooperated with) to utilize the watercourse equitably and with reasonableness, this, in turn, will result in the protection of the watercourse.

In the development of green projects such as hydropower dams and wildlife conservation, the lack of cooperation by state(s) could be a source of significant harm to the watercourse as a result of the project depriving other states of the optimal benefit that could be derived from their use of the waters and its resources [1, 11]. This is seen in the case of China an upstream hydro hegemon state in Asia, sharing international waters with 18 countries downstream. It is yet to conclude agreements with its downstream neighbours in the Longitudinal Range-Gorge Region (LRGR) where it has continued to develop hydroelectric dams without regard for the potential risk the development pose to the environment and other states [27].

Since the benefit of green economy projects flows from being aware of the need to protect and develop the natural resources, also use them effectively; the objective for which the duty of cooperation is mandated thus encourages the development of green projects on the transboundary waters [28]. Transboundary water resources can be used to alleviate poverty through green projects that have the potential of sustaining millions of people by creating employment and improving livelihood sources in the states through which they traverse. It can also be a source of conflict, it is for this reason that cooperation should be based on the sovereign equality of states which connotes that no state has a right to

impede on the jurisdiction of another; the refrain from the use of force on any state's political independence, allowing for win–win situations for all involved and more importantly, attending all duty with good faith [11].

3 The principle of good faith and international law

The sustainable development of the water resources is essential for the development of a green economy, thus the importance of the campaign for a continued Integrated Water Resources Management (IWRM) approach. This approach highlights the critical role of cooperation among transboundary states which can be and has been operationalized through transboundary water cooperation agreements. Transboundary waters cooperation has the potential of growing economic activities such as energy generation, international trade, wildlife, and environmental conservation among others.

Agreements over transboundary waters offer an important mechanism for the avoidance of disputes and conflict. Approximately 300 treaties presently exist worldwide [27]. Even though there has been no known water conflict that has degenerated into wars [3], despite the existing number of agreements, conflict and disputes have continued to ensue among transboundary states. For example, despite the various agreements and the recent Cooperative Framework Agreement (CFA) which is expected to guide the relationship of States over the use of the Nile River, there have been disputes following the states' disagreement over the allocation of water, water rights and uses [29].

The principle of *pacta sunt servanda* is a central principle of International Law. It enjoins states to uphold agreements entered and to do so in good faith [30, 31]. Under Article 18 of the Vienna Convention on the Law of Treaties (VCLT) [32], a state is obliged not to carry out acts that will defeat the purpose of a treaty to which it is a party. Article 26 [32] mandates states to perform their duties as enshrined in treaties to which they are a party, with good faith. It is thus imperative that states act in good faith to achieve the purpose of the treaty which they have agreed to as well as desist from acts that will defeat the purpose of the treaty.

Good faith, as a fundamental principle, aligns the behavior of parties to the objective of the agreement. It needs to be applied during the negotiation and performance of an agreement [33]. It is the most important principle in international law which the resolution of most cases is hinged upon, particularly where treaties and customary law fail to resolve [34]. Depending on its application the definition of good faith is likely to vary. Nevertheless, it is the basis on which decisions on the standards of fairness and sincerity of actions in agreements are made, also appearing in various pieces of legislation [35, 36]. The importance of good faith is seen as the UNWC mandate states to cooperate also based on good faith.

3.1 Good faith for cooperation

The UNWC calls for the negotiation of transboundary water agreements with good faith as it seeks to protect genuine legal relationships between two or more riparian states, the idea, and objective of the agreement, the relations, and the prohibition of not friendly behavior [14]. The essence is to dissuade states from taking advantage of their wrong action [37]. A water cooperation treaty does not necessarily mean that the states are cooperating [15].

The principle of good faith does not seek to operationalize legal concepts or ideas but to actualize the contents of International legal instruments as provided in the Instruments, whether bilateral or multilateral, in order not to deprive the international agreements of their object as was noted in the judicial decision concerning Nicaragua and United States of America (USA) in which it was ruled that the action of the USA deprived the treaty of its object and purpose.

Good faith in international water law is an overarching duty difficult to establish, thus it cannot be over-emphasized. This is because some international agreements are made up of principles and guidelines which are non-binding rules, and do not force any legal duty on states, and is not legislated by any central authority [34, 38].

The duty to participate equitably and that of not causing significant harm to the watercourse are respectively procedural and substantive obligations contained in international water agreements to achieve equitable and reasonable use of the water resources through the cooperation of the riparians. They can thus be described as necessary ingredients for cooperation for equitable and reasonable utilization.

The peculiarity of equitable participation and that of not causing significant harm is such that the operation of these duties has no standard measurement but requires that equity be key in carrying out these duties to avoid varying interpretations. However, equity also cannot be measured as it does not connote equality but refers to fairness in the allocation of rights and duties. On this note, it is thus imperative that states act in good faith in carrying their obligation of equitable participation and in ensuring that no significant harm is caused to the waters.

4 Concluding remark

This paper did set out to investigate how states can achieve cooperation in the management and use of transboundary waters through equitable participation and by ensuring that no significant harm is done to the waters. In order to contribute to the ongoing discussion of green projects development, it sought to understand the roles of states along the transboundary river and how these roles can be applied or effectively conducted to achieve equitable and reasonable utilization of the water resources for the benefit of all riparian states. Transboundary waters are thus, critical economic assets, also a major source for public benefit.

The UNWC, an institutional framework that mandated cooperation among transboundary states, as well as other secondary data sources were analyzed, it was discovered that the institutional framework may not be sufficient to protect the object and purpose of the various treaties on the international waters. It also discovered that an Institutional framework may also not be sufficient to prevent disputes and conflicts among riparian states, as states may first be interested in their derived benefit from the shared water rather than the collective interest.

Following the analysis, it was also discovered that the role of each transboundary state as mandated by the convention should be towards the equitable and reasonable use of the water through the cooperation of riparian states, that, states must cooperate based on the duty of equitable participation and duty not to cause significant harm. It is nevertheless, not sufficient to prevent disputes, as seen in the case of Egypt and Sudan against Ethiopia. This is because of the immeasurable nature of the substantive duty of equitable participation and duty not to cause significant harm.

Cooperation that is devoid of dispute and conflict can be realized with all parties performing their duties as provided for in the various treaties in good faith so that the object of the treaty agreement is not defeated. Various factors are capable of triggering disputes and conflicts on the transboundary basin, Cooperation however can be achieved on any international watercourse, despite the various factors, guidelines, procedures, even ideological differences, through states acting in good faith having no intention of deceit or contrary motive.

Given the growing environmental and climate change challenge, the demonstration of good faith in transboundary waters cooperation has the potential of improving economic activities in transboundary states particularly as it concerns green development such as increasing energy generation for energy security, improved agricultural production for food security, border integration, international trade, wildlife, and environmental conservation among others.

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