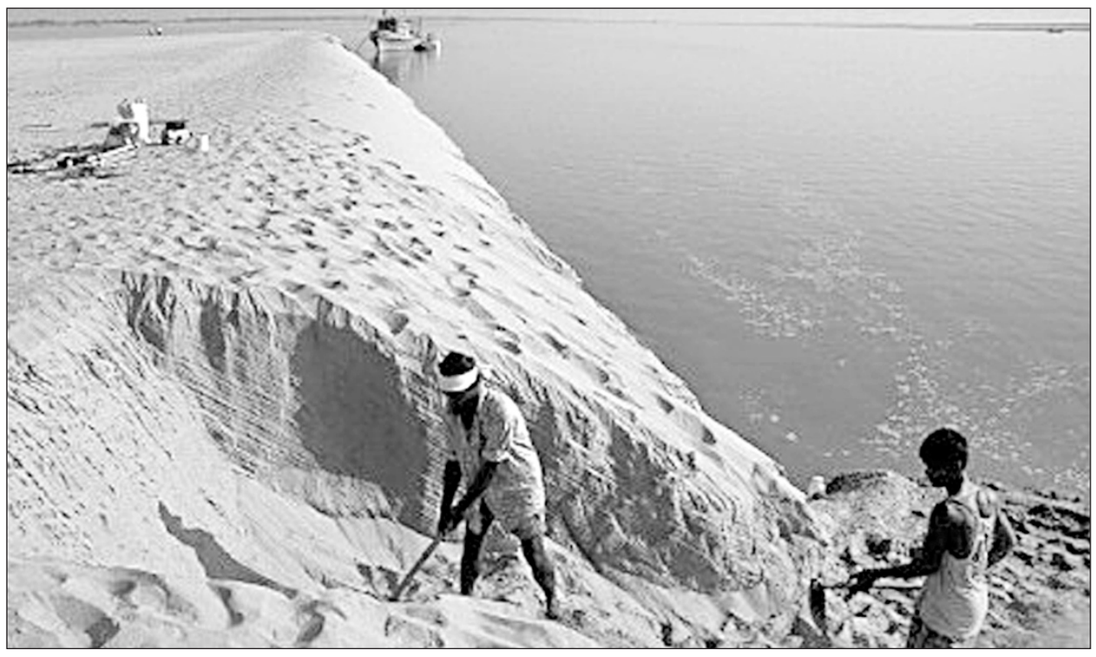
LAW *opinion*

Legality of proposed river linking plan of India

ABDULLAH AL FARUQUE



International rivers that flow across two or more countries are treated as "shared resources" and "community of interests" among the riparian states as survival and livelihood of people can be very much dependent upon the utilisation of the waters of these rivers. International rivers are supposed to serve and feed the humanity of the world. Therefore, unilateral withdrawal of water of these rivers by one state can pose threat to survival of people of another and as such, it is forbidden by international legal norm.

The proposed river linking project of India will involve rivers, many of which are also shared by Bangladesh and hence, these are international rivers in character and their utilisation clearly fall within the purview of international law. It is widely and, of course, justifiably predicted that the proposed Indian River-linking project which has also been endorsed by the directive of its apex court, if implemented, will bring catastrophic consequences for the people of Bangladesh. The implementation and operation of river linking plan will cause a major ecological disaster and desertification of the vast areas, and consequently, will lead to displacement of huge number of population of Bangladesh. This write up looks into legal validity of Indian proposal from the perspective of international law of the rivers. International law of the non-navigation use of international rivers are now settled body of norm and consists of both substantive and procedural rules which have been developed through bilateral and regional treaties relating to utilisation of waters of these rivers, decisions of international courts and tribunals. In fact, widespread state practice regarding these rules has given rise a set of customary international law relating to international law of the river to the effect these principles are binding upon all nation states.

These customary international law principles have been codified by the UN Convention on the Law of the Non-Navigational Uses of International Watercourses' adopted in 1997. The Convention provides both substantive and procedural rules for the States to follow in their dealing over international watercourses. The Convention aims at ensuring the utilisation, development, conservation, environmental obligation, management and protection of international watercourses and promoting optimal and sustainable utilisation thereof for present and future generations. The convention attempts to strike a balance between the competing interests of upper and lower riparian States, and contains substantive principles of water course like 'equitable and reasonable utilisation', and the 'obligation not to cause harm'.

Apart from these substantive principles, the convention also lays down important procedural mechanisms like-co-operation which includes the obligation to exchange data and information regularly, the obligation to notify other riparian States of planned measures, the establishment of joint mechanisms, environmental impact assessments, the provision of emergency information, the obligation to enter into consultations, and the obligations to negotiate in good faith. However, irrespective of the fact that a particular State has not ratified the Convention, still it is bound by the customary principles of international law of river.

Apart from this multilateral treaty, these customary legal norms regulating utilisation of waters of international rivers have also got concrete recognition by the International Court of Justice in 1997 in its decision in the case of Gabcikovo-Nagymaros which was concerned a dispute between Hungary and Czechoslovakia over building two barrages on the Danube. The judgement of the ICJ in this case clearly indicates concept of community of interest in the international rivers as well as the necessity of co-operation of the states in the area of prevention of environmental harm arising out of activities regarding these common rivers.

Firstly, the Indian river-linking plan should be viewed in the light of existing principles of international law that are based on customary international law, multilateral treaty and decision of the ICJ.

No harm principle

The principle of 'No harm' denotes that every State is bound to act with shared natural resources in such a way that it will not cause an appreciable damage beyond the limits of its territory. The principle aims at protection of common interest of the riparian states pertaining to international rivers and seeks to balance between the exclusive use of resources and the inclusive interest of the larger community in order to prevent or minimise possible injuries.

The 'no harm' principle is also linked to the concept of 'abuse of rights' which implies that states will not abuse their rights in carrying out their activities in their territory which may produce significant harm in another country. Article 7 of the Watercourse convention of 1997 has incorporated the principle as it says that the states shall, in utilising an international watercourse in their territories, take all appropriate measures to prevent the causing of significant harm to other watercourse states. If any significant harm is caused by a state, it is under an obligation to consult with affected state for eliminate or mitigate such harm and to discuss the question of compensation.

Equitable and reasonable utilisation

The traditional principles of allocation of shared natural resources like absolute territorial sovereignty, absolute territorial integrity, prior appropriation (historical use), and limited territorial sovereignty- are no longer acceptable to the international community. Rather equitable and reasonable utilisation of international watercourses has emerged as a dominant and valid norm under international law of river. The principle has been incorporated in numerous bilateral treaties and multilateral treaties. Indeed, the concept of equitable and reasonable use of international rivers has now assumed the character of norm of jus cogen under international law. Generally, in the context of international rivers, the principle implies 'equity of needs' of the riparian States that should be reflected in legal arrangement relating to utilisation of waters of such rivers.

The determination of equitable use requires a balancing of interests of the riparian States concerned considering all the relevant factors pertaining to them. Under this principle, all of the riparian states of an international river or lake or all of the basin states of an international drainage basin have a right to an equitable and reasonable share in the uses of waters of such river. Conversely, one riparian or basin nation should not use or allow use of these waters in a way that unreasonably interferes with the legitimate interests of other co-riparian or basin states. The principle has become a recurring theme in the Watercourse convention of 1997. Article 5 of the convention provides that states shall utilise an international watercourse in an equitable and reasonable manner. Furthermore, it provides that international watercourse shall be used by states with a view to attaining optimal and sustainable utilisation thereof and consistent with adequate protection of the watercourse.

In Gabcikovo-Nagymaros case, ICJ also shed light on the principle of equitable utilisation. The ICJ observed that Czechoslovakia by unilaterally assuming control over Danube river with the continuing effects of the diversion of its water has deprived Hungary of its right to an equitable and reasonable share of water of Danube and thus, Czechoslovakia failed to respect the international law of rivers.

Transboundary co-operation

The very nature of shared resource like international rivers necessitates co-operative and collaborative approaches of the States in the exploitation and management of these resources in efficient and peaceful way. On 13 December, 1973, The UN General Assembly Resolution on 'Co-operation in the field of the environment concerning natural resources shared by two or more States' adopted in 13 December, 1973, has called for the States to establish 'adequate international standards for the conservation and harmonious exploration of natural resources common to two or more States.' It also provides that co-operation between countries 'must be established on the basis of a system of information and prior consultation.' Art.3 of the Charter of Economic Rights and Duties of States, 1974 states to the similar effect: "In the exploitation of natural resources shared by two or more countries, each state must co-operate on the basis of a system of information and prior consultation in order to achieve optimum use of such resources without causing damage to the legitimate interests of others." The most important aspect of transboundary co-operation is that a State involved in any proposed project for the use of shared resources must inform the other State which is likely to be affected by such project. In this way each state will have the opportunity to determine whether the project in question is going to cause any damage or it entails a violation of principle of equitable and reasonable use of the resource.

One of the important dimensions of transboundary co-operation is an obligation of the concerned state to undertake environmental impact assessment in order to measure possible negative consequences that may ensue from the project. Article 8 of the Watercourse convention reinforces the legal obligation of the states to co-operate as it provides that States shall co-operate for mutual benefit and in good faith with a view to achieving a regime of equitable and reasonable utilisation. Such co-operation shall be based on regular exchange of data and information on any planned measures, duty to prior notification concerning planned measures with possible adverse effects, and consultation and negotiations concerning planned measures.

Therefore, unilateral plan of India involving international rivers will violate the above principles of 'No harm', 'equitable utilisation,' and 'international co-operation' relating to use of waters of international river.

Secondly, Indian proposed plan goes against spirit of existing bilateral treaty of Ganges Water Sharing treaty between Bangladesh and India concluded in 1996 for sharing water of the river of Ganges. In particular, Article 9 of the treaty provides that both governments have agreed to conclude water-sharing agreements with other common rivers on the basis of principle of 'equity', 'fairness' and 'no harm to either party.' This provision of treaty obligates to the State parties to enter into similar bilateral legal arrangement with respect to allocation of other international rivers shared by them. The treaty also contains principles like "good neighborliness", "optimum utilization of the water resources", "fair and just solution" in its preamble. The preamble of treaty also commits to the resolution of other important issues like irrigation, river basin development and generation of hydroelectric power by mutual agreement for the benefit of the peoples of the two countries. Therefore, Indian plan will come into clear conflict with these treaty obligations. The treaty should be used as reference point for the discussion and negotiation for any plan regarding use of waters of other international rivers shared by the two countries.

Thirdly, Indian Supreme Court's directive to implement proposed linking project within certain time limit is fallacious from the international law point of view. It is one of the cardinal principles of international law that municipal court is bound to respect customary international law. While municipal court remains absolutely free within domain of municipal law to dispense its obligations towards welfare of the people of the concerned State, it can not act in disregard of well established and customary principles of international law, particularly when such directive or decision involve question of international law and can produce far reaching negative consequences for the welfare and survival of people of other state. Thus, municipal court can not simply overlook the basic principles of international law of the rivers that takes into account the legitimate interests of both upstream and downstream countries in utilisation of the waters of these rivers.

From the preceding discussion, one can fairly argue that implementation of proposed inter river linking project will be a clear violation of international law of the rivers, bilateral treaty obligations and international legal norms.

Abdullah Al Faruque is an Assistant Professor, Dept. of Law, University of Chittagong.

LAW *campaign*

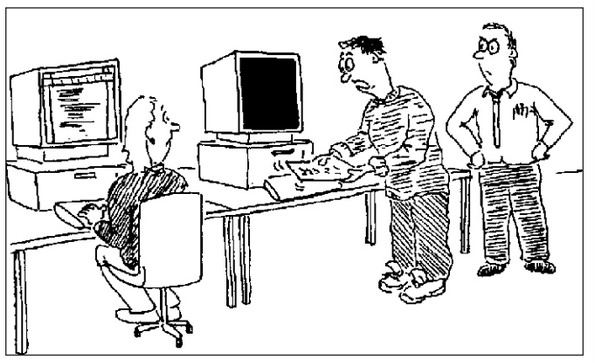
Cyber legislation

Critical challenge for Bangladesh

MOHAMMAD OSIUR RAHMAN & MOHAMMAD MAHABUBUR RAHMAN

There are no political or natural boundaries in Cyberspace. Therefore, any crime or action committed in Cyberspace is not necessarily confined to the territorial jurisdiction of any particular state. So cyber crimes have to be prevented within a uniform and universal system. But considering the global phenomenon, this can be achieved by gradual uniform changes in the domestic legislations in accordance with the multilateral treaties and conventions (e.g. the WIPO Copyright Treaty, the WIPO Performances and Phonograms Treaty, TRIPS etc) among the states. Cyber crimes can be committed against persons and property in relation to the cyber space comprising unauthorised computer trespassing through cyberspace, computer vandalism, transmission of harmful programmes, and unauthorised possession of computerised information, the transmission of pornography, harassment of a person with the use of a computer such as e-mail as well as cyber-stalking. So necessarily Cyber law has to govern the legal issues of cyberspace. The term cyberspace is not restricted to the Internet only. But it is a very wide term that includes computers, computer networks, the Internet data software etc. Cyber law encompasses laws relating to Electronic and Digital Signatures, Computer Crime, Intellectual Property, Data Protection and Privacy, Telecommunications Laws, Electronic Signatures (especially Digital Signatures). They are becoming the de-facto standard for authentication of electronic records, electronic data interchange, e-mails etc. Our growing dependence on computers and the Internet has made us all potential victims of Internet threats.

Some countries have enacted legislations that specifically deal with computer crime and others have adapted their existing laws to make computer crime an offence under existing law. These laws are under the



ambit of cyber law. Cyber law covers the Intellectual Property laws that relates to cyber space and its constituents. The Intellectual Property is related to Copyright law, Semiconductor law, Trademark law, and Patent law. Copyright law emphasises upon computer software, computer source code etc. Trademark law is related to domain names. Semiconductor law is related to the protection of semiconductor design and layouts. Patent law is related to computer hardware etc.

Many nations have enacted legislations relating to data protection and privacy within their jurisdictions. These laws would probably play a vital role because the dependence on insecure networks such as the Internet grows further. Telecommunication systems also fall within the ambit of cyber space and therefore Telecommunication Law would form an integral part of cyber laws. Adoption of dynamic cyber laws in the domestic legal system has become essential in light of the growth and advent of Information Technology systems. The use of technology by individuals and organizations for communication and business has made it imperative for the government to adopt new laws and policy. At the same time extensive changes should be introduced in the existing substantial and procedural law e.g. the Penal Code, the Criminal Procedure Code, the Evidence Act, the Copy Right Act, The Company Act etc.

IT Professionals, Security Consultants, IT students, Security auditors and network administrators, judges, bakers, Chartered Accountants other concerning people can provide logistic, linguistic and technical support to our government in the area of cyber law legislation and national IT policy to cope with the global scenario. And the government has to be much more dynamic and sincere to adapt with fast changing global and legal issues.

Mohammad Osiur Rahman is an Assistant professor, International Islamic University Chittagong and Mohammad Mahabubur Rahman is a Lecturer, Premier University Chittagong.

HUMAN RIGHTS *advocacy*

Children Ombudsman

The new concept for promoting child rights

OLI MD. ABDULLAH CHOWDHURY

UN Convention on the Rights of the Child (UNCRC) is the most venerated human rights convention that simply asserts human rights of a child. When Bangladesh submitted 2nd periodic report, CRC Committee expressed concern that there is a lack of independent monitoring mechanism in establishing the rights of the child. Office of the children ombudsman could fill up the gap to a great extent.

Though there are children ombudsperson in many European countries, their responsibilities are not similar in all cases. The examples of Sweden, Norway and French could be examined in this regard.

Swedish experience

The Children's Ombudsman is appointed by the Swedish Government for a term of six years. The current Ombudsman, Lena Nyberg, was appointed in 2001 and is in charge of the Office of the Children's Ombudsman.

Ombudsman would work on the basis of UNCRC. The Children's Ombudsman shall assiduously encourage implementation of the Convention and monitor compliance with it. In this connection, the Children's Ombudsman shall give particular attention to ensuring that laws and other statutes and their application agree with the Convention on the Rights of the Child [The Act (2002:377)]. Accountability has been thus ensured in relation with Article 4 of UNCRC.

'Barneombudet' in Norway

Norway's sixth state ombudsman was established through legislation passed on 6 March 1981. The task of the children's ombudsman is to promote the interests of children. The children's ombudsman is appointed by the king for a four-year period. At the time of the appointment an advisory council is also selected in order to assist the ombudsman. Neither the ombudsman nor the council has any executive powers, but the ombudsman enjoys unrestricted access to all public and private institutions for children. Similarly he/she has the right to be provided with information, to study the protocols etc without being prevented by considerations to professional secrecy. He has on occasion reported municipalities to the police for their failure to fulfil the statutory regulations regarding children's rights

The heavy workload of this ombudsman is illustrated by the approximately 2,000 enquiries he receives per year, 10-12 per cent of these from children. These enquiries are considered especially important. The law specifically prohibits the Barneombudet from interfering in disputes with families.

Trond Viggo Torgensen, the physician who has been appointed as the Barneombudet, has set up a free phone number children can call with their messages about what they think is important, with a TV show once a week in which he will take up their topics. His staff, which includes a sociologist, a lawyer and a secretary, answers thousands of phone calls and letters each year; and their phone number is listed in every phone book in Norway.

Experience from France

A former journalist and Director of Information with UNICEF, Claire Brisset is the first children's Ombudsman in France, an independent authority with a brief to promote and defend the rights of the child. There are four major duties of children ombudsman: to listen to the individual grievances of children who think that their rights have not been respected.

The second brief is to identify any eventual collective dysfunction that arises to the children's detriment (the situation of minors in prison, for example, who must not be mixed with adults according to the International Convention on the Rights of the Child.

The third brief is to provide training and information on the rights of the child aimed at professionals and at the general public, adults and children, notably by means of a web site. At the Rights of the Child Day, on November 20, the Ombudsman publishes an annual report, which is submitted to the French President and to Parliament.

The fourth brief is to provide opinions and make suggestions for changing or introducing legislative or statutory texts.

The context of Bangladesh

The governments of Bangladesh have showed their commitment towards children; nevertheless, Bangladesh is one of the earliest signatory of UNCRC. The government has also showed interest in establishing the office of an ombudsman for children in Bangladesh. A Joint Secretary of the Ministry of Women and Children Affairs (MOWCA) has already made a draft proposal for an Ombudsman for children in Bangladesh. Apart from this, a high-level government delegation visited France, Norway and Sweden during the last week of January, 2004 at the invitation of the various governments to acquaint themselves with the process of creating and running an independent commission for children. Prime Minister has agreed on principle to the proposal and a committee has been already formed with representatives from civil society. The proposed new office could comprise of one Ombudsman for children and a 10- member Board of Directors, which will include 3 representatives from teenagers. Child rights organisations especially, Save the Children along with UNICEF has advocated and lobbied a lot for establishing the office of Ombudsman.

As stated in the proposal, this new office of the Ombudsman for Children could be established by promulgation of a new law based on the Ombudsman Law of 1980, Child Right Convention and the "World Fit for Children" agenda. The new office can monitor the implementation process of the New NPA for children for 2002-2007 and NPA for CSAET, Millennium Development Goal (MDG) and the "World Fit for Children" agenda. It could also monitor the implementation of CRC and concluding observation.

Although there had been a provision of Ombudsman in the Constitution of the People's Republic of Bangladesh (Article77), it never became a reality in Bangladesh. However, the new office of the ombudsman for children could be empowered by law to ask for information on the progress made by different ministries and institutions in implementing the measures aimed at protecting and promoting the rights of children.

Oli Md. Abdullah Chowdhury, is a Programme Assistant, Save the Children Sweden Denmark.