



# **Bergen Summer Research School: Water, Climate & Society**

## ***Shared Water Resources and International Water Law: A State-of-the-Art*** (Bergen, June 2016)

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# Overview

- Intro to Sources of IWL / Compliance
- IWL as a ‘Culture of Communication’
- Fragmentation or Convergence of IWL?
  - Fragmentation
    - Solutions: multiple levels of governance (global, regional, basin-level); consistent / evolving interpretation; penetration of cross-cutting norms;
  - Convergence
    - Increasing Coherence of IWL
    - ‘Structurisation’ of IWL
- Conclusions: SADC Case Study



# Part I

## Sources of International Water Resources Law



# Sources of International (Water Resources) Law

- Conventions / Treaties / Agreements (1997 UN Watercourses Convention; )
  - ‘Treaty Legislation’
    - 2000 SADC Revised Protocol
    - 1997 UN Watercourses Convention\*
    - 1992 UNECE (Helsinki) Water Convention
  - ‘Treaty Contract’
    - 1990 Cunene Agreement (Angola, Namibia)
    - 1994 OKACOM Agreement (Angola, Botswana, Namibia)
    - 1992 Treaty on Joint Water Commission (SA, Swaziland)
  - Formal Process(es) for:
    - Amendment
    - Further Rules / Guidance (Art. 5.2 ORASECOM – Recs)
  - State Consent (Sovereignty)



# Sources of International (Water Resources) Law [2]

- Customary International Law:
  - No Treaty
  - Incomplete Treaty Membership / Reservations
  - Incomplete / Vague Normative Framework
  - Treaty Interpretation
- Requirements
  - Consistent State Practice
  - *Opinio Juris* (Evidence of Belief in Normativity)
  - State Consent (Sovereignty?)
- Organic Development of International Law
  - (General) Treaty / Declarative Practice
  - Transboundary EIA (*Pulp Mills Case*)



# Sources of International (Water Resources) Law [3]

- General Principles (e.g. 'Equity')
- Soft Law:
  - Declarations (1972 Stockholm / 1992 Rio);
  - Recommendations (Art. 5.2 ORASECOM)
  - Principles / Codes of Conduct;
  - Codifications: 1966 ILA Helsinki Rules; 1997 UNWC (ILC Draft Articles)
- Secondary Sources:
  - Judicial Opinions (ICJ *Pulp Mills Case*);
  - Publicists (ILC Draft Art/ ILA Helsinki Rules);



# Rel. btn Sources of Intl. Law

- Custom
- Convention
- Soft Law
- Custom (*Opinio Juris*)
- Conventions
- Custom (Practice)





# Theories of Compliance

- 1<sup>st</sup> Party Compliance: voluntary unilateral compliance, internal political pressure from NGOs, opposition, coalition partners
- 2<sup>nd</sup> Party Compliance: bilateral / regional, 'negotiating in the shadow of the law'
- 3<sup>rd</sup> Party Compliance: independent dispute settlement, fact-finding, compliance / implementation cttee, intl arbitration, judicial fora (ICJ, PCA).





# Part II

## **International Water Resources Law as a ‘Culture of Communication’**



# International Water Law as a 'Culture of Communication'

- 'Shared Understanding' - Common Language (Interactional Theory of International Law-Making)
  - Accepted (if normatively uncertain) concepts:
    - Art. 5 UNWC – Equitable and Reasonable Utilisation
    - Art. 7 UNWC – Prevention of Significant Transboundary Harm
    - Art. 8 UNWC – Duty of Cooperation (*Lac Lanoux*)
  - Flexible framework for articulation of values
    - Art. 6 UNWC – ERU Factors [Art. 3(8)(a) SADC; Art, 13(3) ZAMCOM]
    - Arts. 9, 11-19, 32-33 UNWC – Procedural Cooperation



# International Water Law as a 'Culture of Communication'

- Language increasingly technically developed
  - Arts. 5 & 6 UNWC – ERU (Art. 10(2) VHNs / HRW)
  - Art. 12 UNWC – Notification (TB EIA – *Pulp Mills Case* [2010])
  - Art. 20 – Ecosystems Approach (Env Flows – *Kishenganga Arbitration* [2013]; Ecosystems Services – Millennium Ecosystems Assess. [2005]; 1993 UNECE Guidelines re Ecosystem Approach)
  - Ongoing elaboration:
    - Conventional Practice
      - ORASECOM Guidelines re Notification & TB EIA; MRC
      - UNECE Helsinki Conv. - Protocols / Model Provisions
    - Judicial Practice
      - Federal / International Tribunals



# International Water Law as a 'Culture of Communication'

- Starting point for all Transboundary 'Cooperation':
  - Notification / Response [Art 4.1 SADC; Art 16 ZAM]
    - Which States / activities? - precautionary principle; ecosystems approach; EIA thresholds; RBOs
    - Form of notification? - good faith, info. re nature of activity, risks, potential injury to State & watercourse (threshold lower than Art.7 – prevention); prompt / early (prior to permitting / implementation); reasonable time for response; duty to refrain [Transboundary E(S)IA]
  - Information Exchange [Art 15 OR; Art 12 IncomatiM]
    - Conditions, emissions, permits / regulations, measures
    - Readily available info, useful and comprehensible
  - Consultation & Negotiation [Art 16.5 ZAMCOM]
    - Not consent, good faith / meaningful negotiations, reasonable efforts to accommodate; no requirement to reach agreement; duty to refrain; 3<sup>rd</sup> WC States (UNWC Art 4(2)); consultation → negotiation - UNWC Art. 17(1)
  - Dispute Resolution [Art 8 OR; Art 21 ZAM; Art IM]
    - Independent fact-finding



## Part III

# Fragmentation or Convergence of International Water Resources Law



# Fragmentation of International Water Law? Solutions!

- Fragmentation – interdependence of ecological processes
  - ILC Report (2006), (Koskenniemi)
  - Treaty Congestion – parallel rules / overlap
  - Solutions
    - Interpretive Rules: *lex specialis*; *lex posterior*
    - ‘systemic integration’ – interpretive mechanism under 1969 Vienna Conv. Art. 31(3)(c) – *Iron Rhine*; *Kishenganga* (multi-level governance)
    - **N.B.** Internal / external coherence of instruments of IWL : global, regional, river-basin – *Pulp Mills*



# Convergence of International Water Law? Coherence!

- Elaboration of key / emerging substantive IWL norms
  - *Kishenganga Arb* (env. flows); Ecosys. Services
  - Biodiversity Conv; Ramsar/CMS/Heritage; Marine
- Elaboration of procedural IWL norms
  - ORASECOM (SADC) Guidance EIA & Notification
- Internal integration of IWL norms
  - Integration of procedural IWL norms – *Pulp Mills*
  - Integration of substantive/procedural IWL- *Pulp Mills*
- External integration of IWL norms
  - Intl Environmental Law; Intl Natural Resources Law
  - Intl Human Rights Law [Art. 10 UNWC; GC15];



# Convergence of International Water Law? Structurisation!

- Emerging ‘structurisation’ of IWL (Castro)
  - Plurality of sources of law
  - *Ad hoc*, sectoral nature of legal order (‘normative *bric-à-brac*’)
  - Evolving into ‘an eclectic regulatory continuum ... secured by principles that are common to other segments of the international law of natural resources and the environment’ (1992 UNECE Art. 2.5 – precaution, polluter-pays, inter-gen equity; Art 12 ZAMCOM; Art 3.2 LIMCOM)





# Part IV

## Case-Study: SADC Region

# Convergence: Global Water Resources Instruments



	1997 UNWC	1992 Helsinki Convention	2008 ILC Draft Arts on TB Aquifers		
Equitable Utilisation	Arts. 5,6	Art. 2.2(c)	Arts. 4, 5		
Duty of Prevention	Art. 7	Art. 2.1	Art. 6		
Duty of Co-operation	Art. 8	Arts. 2.6, 9, 11	Art. 7, 16		
Environ / Ecosystem	Arts. 20-3	Arts. 2.2, 3	Arts. 10, 11, 12		
Prior Notification	Arts. 11-16	Art. 9.2(h), (j)	Art. 15.1, 15.2		
Consult/ Negotiate	Art. 17	Art. 10	Art. 15.3		
Exchange Information	Art. 8	Arts. 6, 9.2(c), 13	Art. 8		
Dispute Settlement	Arts. 30-33	Art. 22, Annex IV	Art. 15.3		



# Convergence: SADC Region Water Conventions

Note: The OKACOM and LIMCOM Agreements are not analysed in detail as both Agreements are primarily concerned with institutional structure, powers and functions, rather than with setting down substantive and procedural obligations applicable to the parties.

	UNWC	2000 SADC Protocol	ORASECOM Agreement	Incomati-Maputo	ZAMCOM Agreement
<b>Equitable Utilisation</b>	Arts. 5,6	Art. 3(7)(8)	Art. 7.2	Art. 3(b)	Arts. 12, 13,14.1
<b>Duty of Prevention</b>	Art. 7	Art. 3(10)	Art. 7.3	Art. 3(c)	Art. 14.2, 4
<b>Duty of Co-operation</b>	Art. 8	Art. 3(5)	Art. 7.1	Arts. 4,5,7	Art. 14.5
<b>Environ / Ecosystem</b>	Arts. 20-3	Art. 3,	Art. 7.12-15	Arts. 6, 8	Art. 14.3
<b>Prior Notification</b>	Arts. 11-16	Art. 4	Art. 7.5-10	Art. 13	Art. 16
<b>Consult / Negotiate</b>	Art. 17	Art. 4	Art. 8.1	Art. 15(1)	Art. 16.5
<b>Exchange Information</b>	Art. 8	Art. 3(6)	Art. 7.4, 7.11	Art. 12	Art. 15
<b>Dispute Settlement</b>	Arts. 30-33	Art. 7	Art. 8.2-3	Art. 15	Arts. 20-21



# Conclusion: 'More Coherence than Fragmentation!'

- Universality
  - Entry into force of UNWC (August 2014)
  - Globalisation of 1992 UNECE Convention
  - 2008 ILC Draft Articles on Transboundary Aquifers
  - Consistent regional / watercourse conventions
- Predictability
  - Common (universal) understanding of conventional and customary principles (ERU; Prevention; Co-op)
- Elaboration
  - Conventional Guidance / Judicial Deliberation
  - Compliance Mechanisms [UNECE Implement Cttee]
  - Decision-support & Negotiation Tools / Models