





- ❖ Perennial rivers including Zambezi, Kavango, Chobe and Kwando form part of Namibia's international borders (Mwange V: 2013)





Bulk of Gauteng water from  
Lesotho






August 2008 Cholera outbreak in Zimbabwe

By mid 2009 over 90 000 cases – Over 4000 deaths (WHO: Global Task Force on Cholera Control)

In 2009 Cholera spilled into: South Africa with 59 dead  
: Zambia with 55 dead and  
Mozambique with 119 dead



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# Water Security in a transnational context



- ▶ Hypothesis: Law and governance are the only practicable and viable tools to address water security issues and these can be enhanced by re-imagining water security concerns in a transnational context.

- ▶ i. What is water security
  - ▶ ii. Survey the law and governance outlook
  - ▶ iii. Contextualise transnationality and justify its relevance
  - ▶ iv. How can water security issues here-imagined

# What is Water Security

“The availability of an acceptable quantity and quality of water for health, livelihoods, ecosystems and production, coupled with an acceptable level of water-related risks to people, environments, and economies” (Grey and Sadoff: 2007)

“Water security at any level from the household to the global means that every person has access to enough safe water at affordable cost to lead a clean, healthy and productive life, while ensuring that the natural environment is protected and enhanced” (Global Water Partnership: 2000).

It means:

- Freshwater, coastal and related ecosystems are protected and improved.
- Sustainable development and political stability are promoted.
- Every person has access to enough safe water at an affordable cost to lead a healthy and productive life; and
- The vulnerable are protected from the risks of water related hazards. (World Water Forum Ministerial Declaration of The Hague on Water Security in the 21st Century described )

Anthropocentric in nature – Human security issue

## ii. (a) State laws and water security

### ❖ States laden with obligations:

- i. To Respect – Refrain from interference with enjoyment of right
- ii. To Protect – protect against all forms of deprivation from third parties
- iii. To fulfill – taking deliberate steps to ensure the progressive realization of the right to water (CESCR , General Comment 15 – 2002)

### Constitutional Water rights:

South Africa: 1994 – right of access to sufficient water [27(1)(b)]

Zimbabwe: 2013 – right to safe clean and portable water [s 77(a)]

Zambia (draft Constitution): right to water in adequate quantities and of satisfactory quality [74(2)(2)]

Water laws exist in most states



## ii. (b) Governance and Water

Political issues:

Namibia's predicament with perennial rivers

The Lesotho Water Highlands Project

Socio-economic consequences

Migration

Economic hardships

### iii. Transnationality and its relevance

**Transnational Law:** all laws and rules regulating actions transcending national frontiers. (Jessup: 1956)



**Transnational environmental law:** “may be a tool to organize our debates about domestic environmental law, comparative environmental law, and international environmental law.” (Carlarne and Farber: 2012)

# Transnationally

## Holistic Approach



BUT  
TRANSNATIONALITY  
NOT AN END  
IN ITSELF

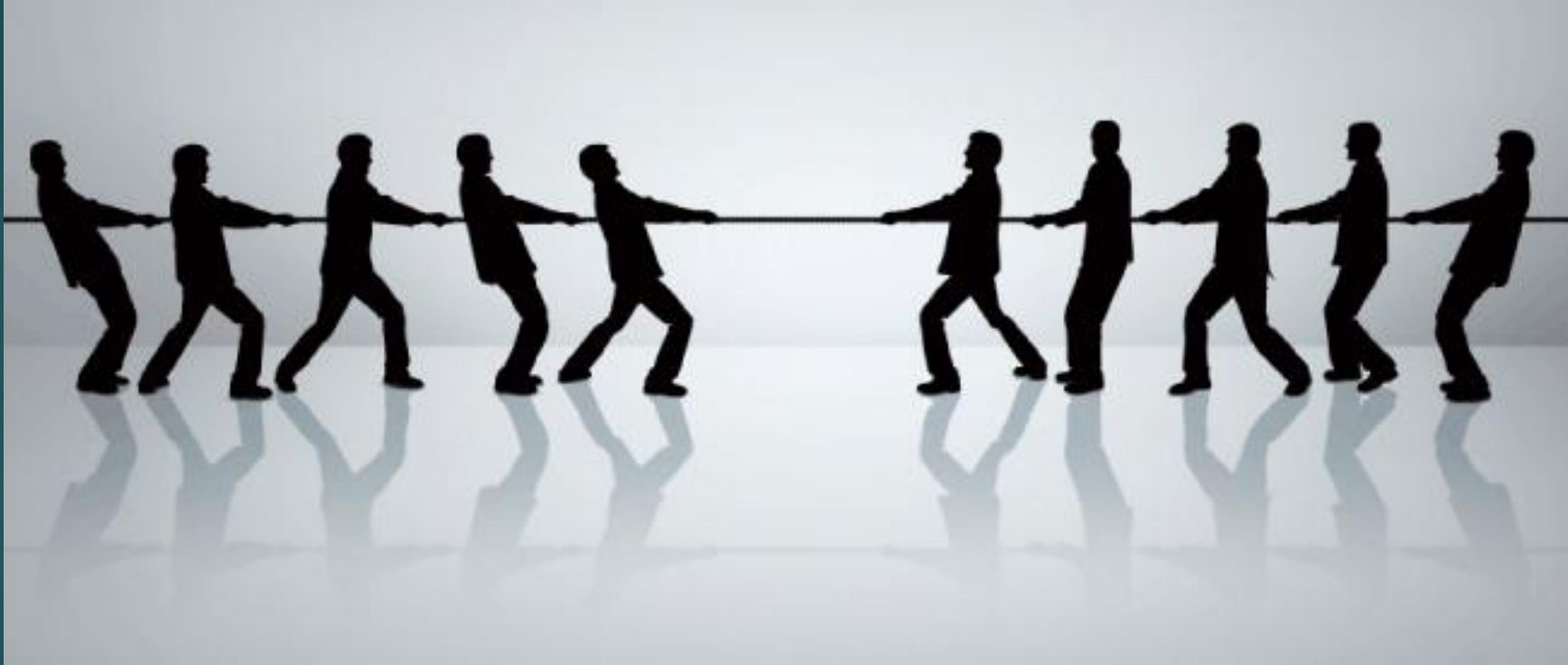


### iii. Why a Transnational dimension?

Water knows no boundaries (a commons)



A potential source of conflict (competing  
uses)



# Affects other dimensions of security (social and economic)





# Any benefits of a transnationality of water issues?

- ▶ Trans-jurisdictional learning and cross-pollination of laws (domestic solutions could be adopted elsewhere)
- ▶ A more unified continental approach to addressing water security issues.
  - ▶ Improve and facilitate development

# Transplantation/Transposition

- ▶ ‘The moving of a rule or system of law from one jurisdiction to another’ (Watson: 2001, 1993)
  - i. Opportunity for horizontal development (constitutional water rights)
    - ▶ Zimbabwe followed SA
    - ▶ Potential for Namibia, Lesotho and Botswana
  - ii. Trans-echelon development (vertical developments/uploads and downloads)

Multi-country efforts that result in similar approaches (Shaffer and Bodansky 2012)

- Concerted efforts
- Common functional demands
- E.g. SADC Protocol on Shared Watercourses





# Networking

The sharing and dissemination of ideas by like-minded networks and epistemic communities.

- African Centre for Water Research
- Africa Water Vision
- African Ministers' Council on Water (AMCOW) etc.



#### iv. Judicial Interpretation

- ▶ Judicial activism and innovation can be adopted (e.g. in Indian Courts' interpretation of constitutional environmental rights revolutionary (Yang and Percival: 2009)
- ▶ New rules can be created (e.g. the no harm rule)
- ▶ Wider meaning for norms or rules (Kotze and Du Plessis: 2010)

## Practical example


*City of Cape Town v Strümpher* 2012 (4) SA 207 (SCA)

- ▶ Respondent argued unlawful dispossession (spoliation order)
- ▶ Unilateral cut off of water supply without judicial approval akin to deprivation of property

*Mushoriwa v City of Harare* HH 195-14/HC 4266/13 (2014 case)


- ▶ Applicant argued unlawful dispossession (spoliation order)
- ▶ Unilateral cut off of water supply without judicial approval not in public interest
- ▶ ‘I take comfort in that the Supreme Court of South Africa in a related case of [Strümpher] came to the same conclusion on facts that are on all fours with this case’. (page 7)





► ‘The increased citation of judgments and borrowing of legal doctrines from international and foreign courts by domestic judges is a concrete sign of a developing transnational legal culture.’  
(Ip: 2010)

- ❖ Experience Transplantation /borrowing,
  - ❖ Facilitate Integration and harmonisation,
  - ❖ Encourage Networking
  - ❖ Judicial Interpretation

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- ▶ Water security as a law and governance issue should be reimagined and reappraised in a transnational context.....because in the end its not just about Zimbabwe or South Africa.....but the commons we find ourselves in!!