

**Zimbabwe's Municipal Laws and Obligations under International Law:
Should
Zimbabwe Accede to the Global Water Conventions?**

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Issues covered in presentation

- Importance and relevance of acceding to, ratifying, or signing international conventions (benefits that Zimbabwe can derive from accession and potential hurdles/challenges if any)
- The process of Domesticating International Conventions in Zimbabwe; *the ways in which international treaties become part of or influences the content of national law*
- Outline of key Obligations from Global Water Conventions (Convention on the Protection and Use of Transboundary Watercourses and International Lakes (**1992 Water Convention**) and the Convention on the Law of Non-Navigational Uses of International Watercourses (**1997 UN Watercourses Convention**))
- Assessment of Existing national water laws: Whether they adequately cover or are aligned with the Global Water Conventions?
- What it all means for Zimbabwe? Implications!

Importance and relevance of Accession/ratification (domestication) of international conventions and obligations thereof

- Zimbabwe shares 5 watercourses and 1 lake with neighbours other (Buzi, Limpopo, Pungwe, Save and Zambezi watercourses and Kariba dam)
- Globally legal systems have to cope with new challenges in the advent of climate change, (water stress, droughts, floods) and for shared watercourses national laws have to approximate to international norms and laws.
- Accession to existing international law instruments e.g. on shared watercourses helps in preventing conflicts and promotes peaceful joint management water resources (promotes peace and stability)
- International water law provides opportunities for states to cooperate (foster collaboration) and pursue socio-economic and environmental development.

- *“The **community of interest** in a navigable river becomes the basis of a common legal right, the essential feature of which include equality of all riparian States in water use and the exclusion of any preferential privilege of any one State in relation to the others”.* (River Oder Case, PCIJ, 1929)
- Helps states in establishing international norms and strengthens respect for international law
- Helps states to adopt and implement international best practices and in experience sharing amongst countries.
- May enhance credibility and build a good reputation

Legal position on International Conventions: Domestication of International Conventions in Zimbabwe

- Zimbabwe uses a dualist approach to domestication of international treaties
- Dualists view international and national law as functioning at different levels: International law governs relationship between sovereign states while national law regulates rights and obligations of citizens within a state.
- Dualist doctrine: “*before any rule of international law can have any effect within the domestic jurisdiction, it must be expressly and specifically transformed into municipal law*”- transformation through amendment of municipal/domestic laws or the enactment of new legislation to include international treaty obligations
- Monist theory ‘once a treaty has been ratified and published, it becomes part of internal law

Constitution of Zimbabwe and International Conventions

- **Section 34 on national objectives provides for domestication of international instruments:** *State must ensure that all international conventions, treaties and agreements to which Zimbabwe is a party are incorporated into domestic law-**formulation helps the state to domesticate, use, interpret or implement International law.***
- **Section 46 (1) (c)** When **interpreting** on fundamental human rights and freedoms (Chapter 4) a Court, Tribunal, Forum or Body *must take into account international law and all treaties and conventions to which Zimbabwe is a party; **formulation helps the Courts use or apply International law in reaching decisions-good for jurisprudence, development of national law and for protecting rights or advancing common interests with other nations.***
- **Examples of fundamental human rights in Zimbabwe include; the Right to Water** (every person has the right to *safe, clean and potable water- **Section 77 (a)***); and Environmental rights (every person has right to have environment protected to prevent pollution, promote conservation, ecologically sustainable development and use of natural resources while promoting economic and social development (**Section 73 (1)**): *Aligned and reflects international trends/other jurisdictions (e.g pollution of shared watercourses proscribed in Global Water Conventions.*
- **Weak point:** State must take reasonable legislative and other measures, within the limits of the resources available to it, to achieve the progressive realisation of the rights (*Progressive Realisation may affect enforcement and implementation of water and environmental rights- as state institutions may always plead lack of resources*)

Process for domestication of International Law into municipal law

- **Section 326 (1) and (2) of the Constitution:** Customary international law is part of the law of Zimbabwe, *unless it is inconsistent with the Constitution or an Act of Parliament*. In interpreting legislation, every court and tribunal must adopt any reasonable interpretation of the legislation that is consistent with customary international law applicable in Zimbabwe
- By recognising customary international law means Zimbabwe is aligned to customary international water law concepts that are widely accepted as norms e.g *equitable and reasonable use, territorial sovereignty, cooperation, prior notification*: These concepts are now part of Global Water Conventions. Therefore, acceding to international water conventions should not pose problems.
- This also means the Zimbabwean Constitution follows the incorporation or harmonisation approach with regards to the legal position of customary international law in the domestic sphere. In this regard, even if the country would not have acceded or ratified some international treaty that advance customary international laws it is bound and courts may apply customary international law in reaching decisions.

Dualist approach: Section 327 of Constitution: International conventions, treaties and agreements

- (2) An international treaty which has been concluded or executed by the President or under the President's authority—
 - (a) does not bind Zimbabwe until it has been **approved by Parliament**; and
 - (b) does not form part of the law of Zimbabwe unless it has been **incorporated into the law through an Act of Parliament**.

The Concept of ACCESSION, Domestication, or Conclude Treaties

- **Accession means** an act by a state in accepting to become a party to a treaty already negotiated and signed by other states. Accession usually occurs after the treaty has entered into force.

International Treaties Act [Chapter 3:05].

- Provides a uniform procedure for the consideration, approval, ratification and publication of international treaties in Zimbabwe;

Key Definitions

- **“concluded”**, means that the treaty has been approved by Cabinet and Parliament and **ratified or acceded** to by the President,
- **“domesticate”**, in relation to an international treaty, means to **give it the force of law** in Zimbabwe, *whether in terms of the Act or by altering, or incorporating the treaty into*, the domestic law of Zimbabwe;
- **“self-executing”**, in relation to an international treaty, means requiring no alteration of the domestic law or no additional legislation in order to domesticate it;
- **Section 5: Appointment and functions of Public Agreements Advisory Committee (PAAC)-** members from AG, Foreign Affairs, Finance and OPC
- **Functions of PAAC:**
 - scrutinise all international treaties
 - recommend approval or scrutiny of agreements other than international treaties
 - recommend or decline to recommend approval of any international treaty

- **Section 6(2) Negotiating Ministry** required to submit a draft of agreement/treaty to PAAC, together with **additional information in writing** that PAAC may reasonably require.
- **Section 6 (3)** PAAC may recommend treaty be renegotiated; redrafted or be approved, or recommend that the treaty not be approved by the President in Cabinet and giving its reasons why.
- Section 6 (4) If treaty is approved by Cabinet and Parliament then Zimbabwe will **secure the ratification of or accession to the treaty.**
- **WEAK POINT: International Treaties Act** does not provide detailed information on how decisions of the PAAC in relation to making recommendations are made- what factors PAAC may look at in deciding to recommend or decline recommending a treaty e.g. economic/investment factors, political, social or environmental factors etc. However, assumption is that Negotiating Ministry will provide enough justification in written submissions. The law may need to be relooked at
- However, one may resort to the Environmental Management Act for guidance on motivations/justification

- **Environmental Management Act in Section 132 (1)** (on International obligations and commitments) provides some useful factors for Minister to recommend to Cabinet and Parliament to sign, ratify or accede to the instrument- as follows;
 - available resources to ensure implementation;
 - the views of interested and affected parties;
 - benefits to the nation;
 - disadvantages to the nation;
 - estimated date when the instrument is to come into effect;
 - minimum number of governments and states required to sign the instrument in order for it to come into effect;
 - respective responsibilities of all national departments involved;
 - the potential impact of accession on national matters;
 - reservations to be made etc

Outline of Key Obligations in Global Water Conventions (Water Convention and the UN Convention)

- The main legal obligations imposed by international water law conventions include equitable utilization, no-harm and cooperation principles among others
- However, these have also been viewed as entitlements or rights; but they should not be abused; “a State may not “exercise a right in a way which impedes the enjoyment by other States of their own rights

Convention on the Protection and Use of Transboundary Watercourses and International Lakes, 1992

- **Article 2:** Parties shall take measures to prevent, control and reduce any transboundary impact.
- Parties take measures to prevent, control and reduce pollution of waters causing or likely to cause transboundary impact; **Article 3:** Parties develop, adopt, implement relevant legal, administrative, economic, financial and technical measures to ensure that emission of pollutants is prevented, controlled and reduced at source; including licensing of waste-water (**features in EMA Act**)
- Ensure that transboundary waters are used in ecologically sound and rational water management, conservation of water resources and environmental protection; including restoration of ecosystems.
- Ensure that transboundary waters are used in a reasonable and equitable way,
- Parties shall be guided by **precautionary principle, polluter-pays principle** and water resources shall be managed so that the needs of **the present generation are met without compromising the ability of future generations to meet their own needs.** (**feature in EMA Act**)
- Riparian Parties cooperate on the basis of equality and reciprocity, in particular through bilateral and multilateral agreements, in order to develop harmonized policies, programmes and strategies

- Article 4: Parties shall establish programmes for monitoring the conditions of transboundary waters.
- Article 5 research and development; and Article 6: Exchange of information
- Article 9: Riparian Parties enter into bilateral or multilateral agreements or other arrangements, where these do not yet exist, or adapt existing ones, where necessary to eliminate the contradictions with the basic principles of this Convention (allows states to adopt agreements)
- Consultations between the Riparian Parties on the basis of reciprocity, good faith and good-neighbourliness.

Convention on the Law of the Non-navigational Uses of International Watercourses 1997

- Ensure utilization, development, conservation, management and protection of international watercourses and the promotion of the optimal and sustainable utilization thereof **for present and future generations**,
- Watercourse States shall participate in use, development and protection of an international watercourse in an equitable and reasonable manner and Such participation includes both **the right to utilize the watercourse and the duty to cooperate in the** protection and development thereof.
- Affirms importance of international cooperation and good-neighbourliness,
- **Article 1 Scope of Convention:** applies to uses of international watercourses and of their waters for purposes other than navigation and to measures of protection, preservation and management
- **“International watercourse”** means a watercourse, parts of which are situated in different States; **Zimbabwe has many such watercourses.**
- **Article 3 Watercourse agreements;** Convention allows parties to enter into or apply agreements already in force: Does not affect the rights or obligations of a watercourse State arising from agreements in force for it on the date on which it became a party to the Convention. However, where necessary, harmonizing such agreements with the Convention may be necessary.
- **Article 5 Equitable and reasonable utilization and participation** of international watercourse to attain optimal and sustainable utilization and benefits (**This features in Water Act and ZINWA Act**)

- **Article 7 Obligation not to cause significant harm**; take measures to prevent harm to other watercourse States. Where harm is caused take measures to eliminate, mitigate or compensate
- **Article 8 General obligation to cooperate** on the basis of **sovereign equality, territorial integrity, mutual benefit and good faith**
- **Article 9 Regular exchange of data and information** and **Article 11 Information concerning planned measures, including** Consultations and negotiations concerning planned measures
- **Article 20** Protection and preservation of ecosystems
- **Article 27** Prevention and mitigation of harmful conditions whether resulting from natural causes or human conduct, such as flood or ice conditions, water-borne diseases, siltation, erosion, salt-water intrusion, drought or desertification (**critical as we are faced with climate change related disasters- efforts to develop Climate Change Bill**)

Existing Regional and National Water laws: Whether they adequately cover or are aligned with the Global Water Conventions?

Regional Water Treaties/Agreements

Agreement on the Establishment of the Zambezi Watercourse Commission

- Agreement shall apply to the Zambezi Watercourse and establishment of the Zambezi Watercourse Commission
- Parties: Angola, Botswana, Malawi, Mozambique, Namibia, Tanzania, Zambia and Zimbabwe,
- Article 5 Objective and functions of the Commission as follows; **promote the equitable and reasonable utilization of the water resources, efficient management and sustainable development**
- **Commission functions:** (a) collect data; coordinate and harmonise management of the water resources of the Zambezi Watercourse; (c) advise States on planning, management, utilization, protection and conservation of the Zambezi Watercourse; (d) advise States on measures for avoidance of disputes and assist in resolution of conflicts (e) foster awareness of the equitable and reasonable utilization the Watercourse; (f) co-operate with the institutions of SADC and (g) **promote and assist in the harmonization of national water policies and legislative measures;**)

- **Article 12 and 13 Principles** Member States commit to: principle of sustainable development; sustainable utilization; prevention of harm; principle of precaution; intergenerational equity; assessment of trans-frontier impacts; principle of co-operation; and principle of equitable and reasonable utilization. (Similar to Global Water conventions)
- **Article 15** Furnishing of data and information and Article 16 on Planned programmes, projects or activities of Member States
- Consolidate existing relations of good neighbourliness and co-operation on the basis of the Convention on the Law of the Non-navigational Uses of International Watercourses and the Revised Protocol on Shared Watercourses in SADC
- Reflective of Global Water Conventions objectives and principles and thrust to allow parties to enter into agreements

Revised Protocol on Shared Watercourses in the SADC, 2000

- Recognises the development and codification of international water law initiated by the Helsinki Rules and the UN Convention on the Law of Non-Navigational Uses of International Watercourses
- Article 2: Meant to foster closer cooperation for sustainable and coordinated management, protection and utilisation of shared watercourse
- Promote establishment of shared watercourse agreements and institutions
- Advance sustainable, equitable and reasonable utilisation of shared watercourses
- Harmonise water uses, monitoring, regional integration and harmonisation of water legislation and policies
- Utilisation open to watercourse states within territory and without prejudice to sovereign rights
- States to respect rules of customary or general international law relating to utilisation of shared water courses (Zimbabwe as member well positioned)

- Article 4: Planned measures (exchange information on measures and consult each other and negotiate possible effects of planned measures; notification, EIAs, consultations and negotiations;
- Article 4(2) Environmental Protection and Preservation; state parties shall protect and preserve ecosystems of shared watercourse; prevent, reduce and control pollution; State parties take steps to harmonise their policies and legislation;
- Article 6: Shared Watercourse Agreements; In the absence of any agreement to the contrary, nothing in this Protocol shall affect the rights or obligations of a watercourse state arising from agreements in force for it. Parties to agreements referred above may harmonise such agreements with this Protocol.
- Reflective of Global Water Conventions objectives and principles and thrust to allow parties to enter into agreements

Limpopo Watercourse Commission (LIMCOM) Agreement, 2003

- Botswana, South Africa, Zimbabwe and Mozambique signed the Agreement on the Establishment of the Limpopo Watercourse Commission
- Agreement recognises the “spirit, value and objectives of the Revised Protocol on Shared Watercourses in the Southern African Development Community”. It also acknowledges the Convention on the Law of the Non-Navigational Uses of International Watercourses

National Water Laws: Zimbabwe

- National water laws are critical as they establish the rights, duties and obligations for citizens and establish relevant institutions to manage water resources.
- International or regional treaties also rely on national legislation for implementation of principles once domesticated into national law

Zambezi River Authority Act (CHAPTER 20:23)

- Gives effect to an inter-State agreement relating to the utilization of the Zambezi River concluded between the governments of the Republics of Zimbabwe and Zambia
- Zimbabwe and Zambia, desire to obtain economic, industrial and social development from the waters of the Zambezi River and to improve and intensify the utilization of the waters for the production of energy and for any other purpose beneficial to the two countries
- The functions of the Authority; (a) operate, monitor and maintain the Kariba Complex, investigate the desirability of constructing new dams on the Zambezi River; construct, operate, monitor and maintain any other dams on the Zambezi River; (d) collect, accumulate and process hydrological and environmental data ;, regulate the water level in the Kariba reservoir
- Forms part of bilateral agreements envisaged in Global Water Conventions

Water Act (20:24)

- Provides legal framework for water use, management and conservation in Zimbabwe
- to provides for establishment catchment councils; granting of permits for the use of water; control of the use of water when water is in short supply and protection of the environment etc;
- **Section 6: General functions of Minister;**
 - ensure equitable and efficient allocation of available water resources in the national interest for development of rural, urban, industrial, mining and agricultural sectors.
 - give effect to any international agreement, to which Zimbabwe is a party, on shared watercourse systems in a spirit of mutual co-operation;
 - ensure that research is carried out and information is obtained and kept, on hydrological and hydrogeological
 - fix standards to be maintained in the exploitation, utilization, conservation and management of water resources , in respect of environmental water quality standards in terms of the Environmental Management Act

- While Act is reflective of international law provisions, it may need to be strengthened through inclusion of specific language from the Global Water Conventions

Zimbabwe National Water Authority (CHAPTER 20:25)

- Establishes the Zimbabwe National Water Authority
- **Section 5 Functions of Authority**; advise Minister on formulation of national policies and standards on water resources planning, management and development; hydrology and hydrogeology; dam safety and borehole drilling; and assist in on planning of the development, exploitation, protection and conservation of water resources;
- Exploit, conserve and manage the water resources of Zimbabwe with the objective of securing **equitable accessibility and efficient allocation, distribution, use and development**;
- Take appropriate measures to minimise the impacts of droughts, floods or other hazards (**reflected in UN Water Convention**);
- Promote **an equitable, efficient and sustainable allocation and distribution of water resources (reflected in Conventions)** and
- **Promote such mechanisms for the co-operative management of international water resources as the Minister may determine; (Aligned with Global Water Conventions)**

Environmental Management Act (Chapter 20:27)

- To provide for the sustainable management natural resources and protection of the environment;
- Establishment of an Environmental Management Agency
- Prevention of pollution and environmental degradation (aligned with Global water conventions)
- **Environmental Management Agency (Section 10)** has water quality control and management functions: formulation of quality standards, monitoring the collection, disposal, treatment, recycling of waste and keeping records or register of all licences and permits of polluters
- **Section 57:** Water pollution prohibition; **Section 73:** Prohibition of discharge of hazardous substances into any waters and **Section 123** on prohibition of placement of invasive alien species in any watercourse, river or stream

- Section 4 recognises Environmental rights and principles of environmental management; Right to **protect the environment for the benefit of present and future generations**, development must be socially, environmentally and economically sustainable (Sustainable Development), **Precautionary Principle; Polluter Pays Principle; National interests should be followed in complying with international treaties, standards and other responsibilities;** (Sovereignty) and EIAs
- **International treaties:** Section 5 (2) (b) General function of Minister of Environment to recommend to Government which international and regional conventions on the environment Zimbabwe should become a party to and to secure the incorporation of such conventions into domestic law.
- It is also the function of EMA in terms of Section 10 (1)(b) (x) to recommend to the Government the conventions which the country may join, and incorporate their provisions into national law;
- Section 132 (1) International obligations and commitments; Minister may recommend to Cabinet and Parliament to sign, ratify or accede to the instrument. Recommendation to be made by the Minister shall include different factors—resource availability, views of interested parties, benefits to the nation, potential impact of accession etc

- Regulations and other laws: Environmental Management (Effluent and Solid Waste Disposal) Regulations SI 6 of 2007 *replaced the* Water (Waste and Effluent Disposal) Regulations (S.I 274/2000), Environmental Management (Hazardous Waste Management) Regulations S.I. 10 of 2007

Likely Implications of Accession

- Generally, Zimbabwe has the legal tools and institutions to accede to and implement the Global Water Conventions.
- No major conflict of laws envisaged, but if any, it can be resolved through Constitutional provision on application of customary international law or international treaties in relation to conflict of laws
- Role of Negotiating Ministry (**Ministry of Lands... and Water**) is important in motivating for accession: should consider adopting factors stated in EMA Act on assessing benefits of acceding, including economic, social benefits etc
- SADC Protocol on Shared Watercourse and the Zambezi Watercourse Commission Agreement provisions are largely similar to UN Conventions and therefore it will be easy for Zimbabwe to accede to the Conventions.
- It is clear that the global conventions are not formulated to replace existing bilateral and multilateral agreements as they recognise the reality of states that have already entered into or may contemplate entering into other agreements. Convention allows parties to enter into or apply agreements already in force. Therefore, the conventions will complement existing or anticipated agreements. However, where necessary, harmonizing such agreements with the Convention may be necessary.

- In the event that Zimbabwe accedes to the Global Water Conventions there is need to ensure that the provisions are also reflected in environmental management legislation (EMA) and water management legislation (Water Act and ZINWA). This is because obligations in Global water conventions are governed by different entities and Ministries and institutions in Zimbabwe (ZINWA and EMA)
- There are indications that many African states have or are contemplating acceding to the global water conventions including those in the SADC region Zambia, Mozambique and Botswana. This should act as a motivational factor for Zimbabwe to accede to the Global Water Conventions
- Acceding to the global water conventions is not likely to significantly dismantle Zimbabwe's sovereign rights since the country already adheres to customary international law which includes the key elements of equitable utilisation, cooperation, no-harm and intergenerational equity among others.
- Acceding to the conventions may also bring the following benefits; strengthened implementation, application and development of international water law and its principles; prevention of conflicts and improved water governance
- As Zimbabwe is open for business, enhancing harmonisation of laws, policies and programmes that enhances investments, economic, social and sustainable development including generation of renewable energy such as electricity from shared watersources becomes imperative.

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