The Implementation of International Water Law in a Domestic Context: Lessons from Uganda

By: Dr. R. Kakungulu-Mayambala, Senior Lecturer, SOL, Makerere University
Key Areas to cover

✧ International Water Law (LWL) major attributes
✧ Rationale for the implementation of IWL in a Domestic Context
✧ Setting the Ground: What needs to be in place
✧ Domestication Process(es) and the distinction between “Domestication”, “Implementation” and “Enforcement”
✧ Issues of “fragmentation” of IL, “Convergence and divergence” of IL/Harmonization and “sovereignty” issues
General Introduction

- Implementation of IWL in a Domestic Context requires the domestication of IW Law standards in the municipal law
- Based on the International Practice, Customary International Law (CIL) and Municipal Law/Constitutions
- Parallelism or Dualism vs. Internationalism or Monism
  - co-existence of 2 independent juridical orders vs. primacy of International Law
Implementation of IWL in a Domestic Context

- Based on well known principles of IWL
- Based on the host countries municipal law
- Art. 123 of the Constitution (Uganda) on execution of treaties, conventions and agreements
- The Ratification of Treaties Act to operationalize Art. 123 above
- “Saving” Art. 287 on International agreements, treaties and conventions to which Uganda – 9th Oct. 1962 – was a party to shall continue (to be party to)
Contd

- National Objectives and Directive Principles of State Policy, Directive No. XXVIII on foreign policy objectives
- Also captured in Section 106 of the National Environment Act, Cap. 153, on Conventions and Treaties on the Environment
- Uganda is signatory to several Conventions and Treaties which have a bearing on water and the environment generally
- Agenda 21 – Chapter 18: Protection of the Quality and Supply of Freshwater Resources:
  - Art. 11 of the ICESCR on …the right of everyone to an adequate standard of living for himself and his family…
Key Principles of IWL that need to be implemented in the Domestic context;

As Birnie *et al* note “A sustainable supply of fresh water is not merely fundamental to environmental protection, biodiversity, and so on, but life itself…”

The key principles of equitable and reasonable participation, obligation not to cause significant harm [ICJ in Gabcikovo-Nagymaros case of 1997], duty to cooperate in good faith, regular exchange of readily available data and information, planned measures, obligation to protect, preserve and manage the ecosystem, and settlement of disputes, etc.

From the Rules/Conventions and CIL

Arts. 111 and 112 of the Treaty for the Establishment of the EAC
Treaty preliminaries: It should be in writing; it must be an agreement between entities with international personality; it must be governed by International law/rules; and it must create legal obligations

Then the State Party will be bound to implement and enforce such a Treaty: through national (State) policies, Acts of Parliament (Principal) and subsidiary legislations

See the National/ Water Policy, Land Policy, Environment Management Policy, the Water Act, NEA, Land Act, and their corresponding Regulations all aimed at ensuring the implementation of IWL among other factors
Rationale for the Implementation of IWL in a Domestic Context

- It’s a legal requirement and not mere “comity” or “courtesy”

- Gender and water rights; issues of water quality and quantity; marginalized groups: women, children, PwDs, indigenous or minority groups, PLwHIV/AIDS, protection/conservation of nature, ecosystems, and biodiversity, water sources, lakes, wetlands, rivers, etc

- Climate Change/Global warming; key principles of allocation based on territorial sovereignty and integrity and equitable utilization; pollution control, etc
The Role of Law in the Protection of Nature

- Codification and development of IL on Water protection: Quality and Quantity
- Millennium Development Goals (MDGs)
- Defining Water rights in the Domestic Context: scope and nature; rights to Groundwater; use of water rights; rights of allotees and subsequent purchasers [if any]; right to water quality (and quantity) (rationing of piped water in Uganda/Kampala by the NWSC due to acute shortages); determination of water rights
- From CIL, “hard” vs. “soft” law
Dealing with Harmonization Issues

- In the 1997 UN Watercourse Convention:
  - States may harmonize existing agreements to the provisions of the Convention;
  - States may apply or adjust the provisions of the Convention depending on the situation (Arts. 1 – 4)

- Developments at the International, Regional levels?

- Need for harmonization
The Role of the Government in the Ratification Process

- the State (Uganda) must ensure that the instrument of ratification, acceptance, or approval (of the Treaty) complies with certain international legal requirements
- the State must also do the expression of consent to be bound
Domestication of Treaties

- Implementation (of a treaty) will not be effective unless the treaty has been domesticated by incorporation as a law by passing an Act of Parliament (domesticating the treaty). Once the state has ratified a treaty at the international level, it must give effect to the treaty domestically. This is the responsibility of the States.

- Generally, there is no time limit within which a state is required to ratify a treaty which it has signed.

- On ratification, Uganda becomes legally bound under the treaty at the International level.
For dualist States such as Uganda, without translating international law into domestic law, it does not exist as law. Citizens cannot rely on the international law; judges cannot apply it (at least directly) and national laws that contradict it remain in force.

A ratified treaty must be laid before Parliament as soon as possible after ratification.
Procedure of Ratification of Treaties in Uganda

✱ Inter-ministerial consultations

✱ Clearance Certificate from Attorney-General’s Chambers on ‘constitutionality’ of the Treaty

✱ International Negotiations

✱ Reconvening of the Inter-ministerial consultations

✱ Ratification-upon receipt of the instruction from Cabinet or Parliament, the Minister of Foreign Affairs proceeds to draft, sign and deposit or exchange the instrument of ratification
Voting Threshold for consent to Ratify a Treaty in Uganda – treaties that can only be ratified by Parliament require a simple majority of Parliamentary members present and voting unless it is in relation to a treaty for which the Attorney General has certified that its implementation would require an amendment to the Constitution, Sec. 2 of the RTA.
Challenges faced by Uganda in Implementing IWL in the Domestic Context

- IL vs. municipal law [claim for supremacy by each]
- Diplomacy and “posturing” by Uganda
- Good faith *pacta sunt servanda* rule
- Limited resources to meaningful engage in and implement IWL
- Limited capacity, human resource, etc
- Reluctant “Guards” in the Judiciary
Contd

Thanks for your Attention Ladies and Gentlemen!