

IUCN Academy of Environmental Law
2011 Annual Colloquium – South Africa
Plenary address

IHP-HELP Centre for Water
Law, Policy & Science

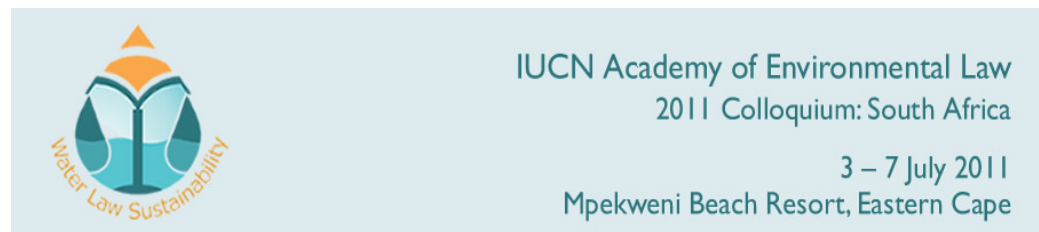
Water and the Law
Towards Sustainability
Dynamic Cooperation

5 July 2011

Prof. Patricia Wouters

Water and the Law: Towards Sustainability

Water is life. In all its forms, it is one of the most **essential** resources for animals (including humans) and plants to flourish. The **challenges** to secure a sustainable supply of water to meet the needs both of humans and of the natural environment, and to do this both for the present and for the future, are **daunting**.



Water and the Law: Towards Sustainability

The **aim** of this Colloquium is to **share** understanding and experience in this field of research, not only, however, to document the challenge, but to **gain insight** into what needs to be done, what has been tried, what is working and **what might work** as regards water and the law



IUCN Academy of Environmental Law
2011 Colloquium: South Africa

3 – 7 July 2011

Mpekweni Beach Resort, Eastern Cape

Water and the Law: Towards Sustainability

1. Water (the challenge)
2. Law (role)
3. Towards Sustainability : **Dynamic Cooperation**



Global Water **Challenge**: Past, Present, Future

No development
without water

1.4 billion km³ of
water on Earth

Only a fraction
readily available

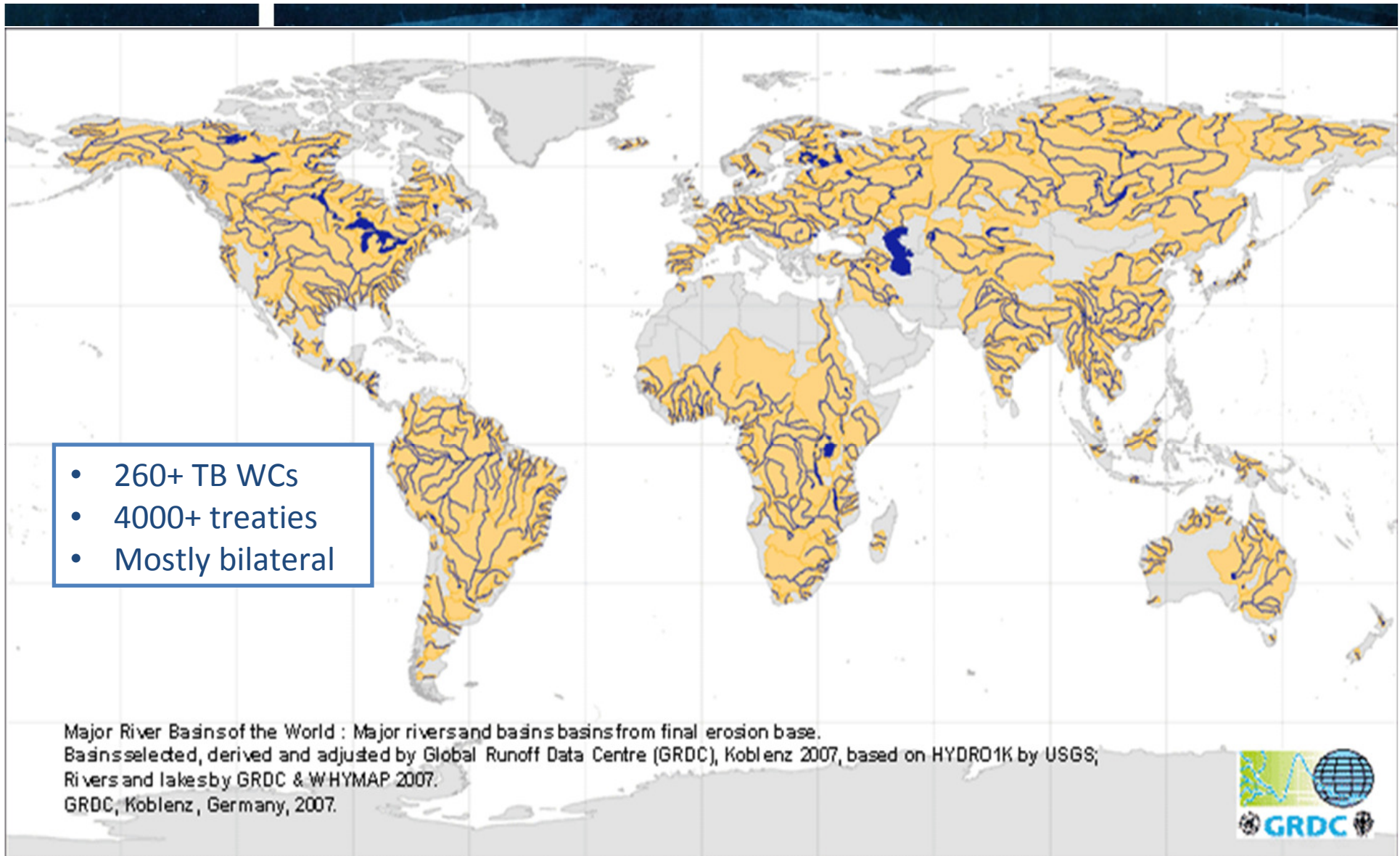


1.2 billion
without
safe
drinking
water and
2.4 billion
without

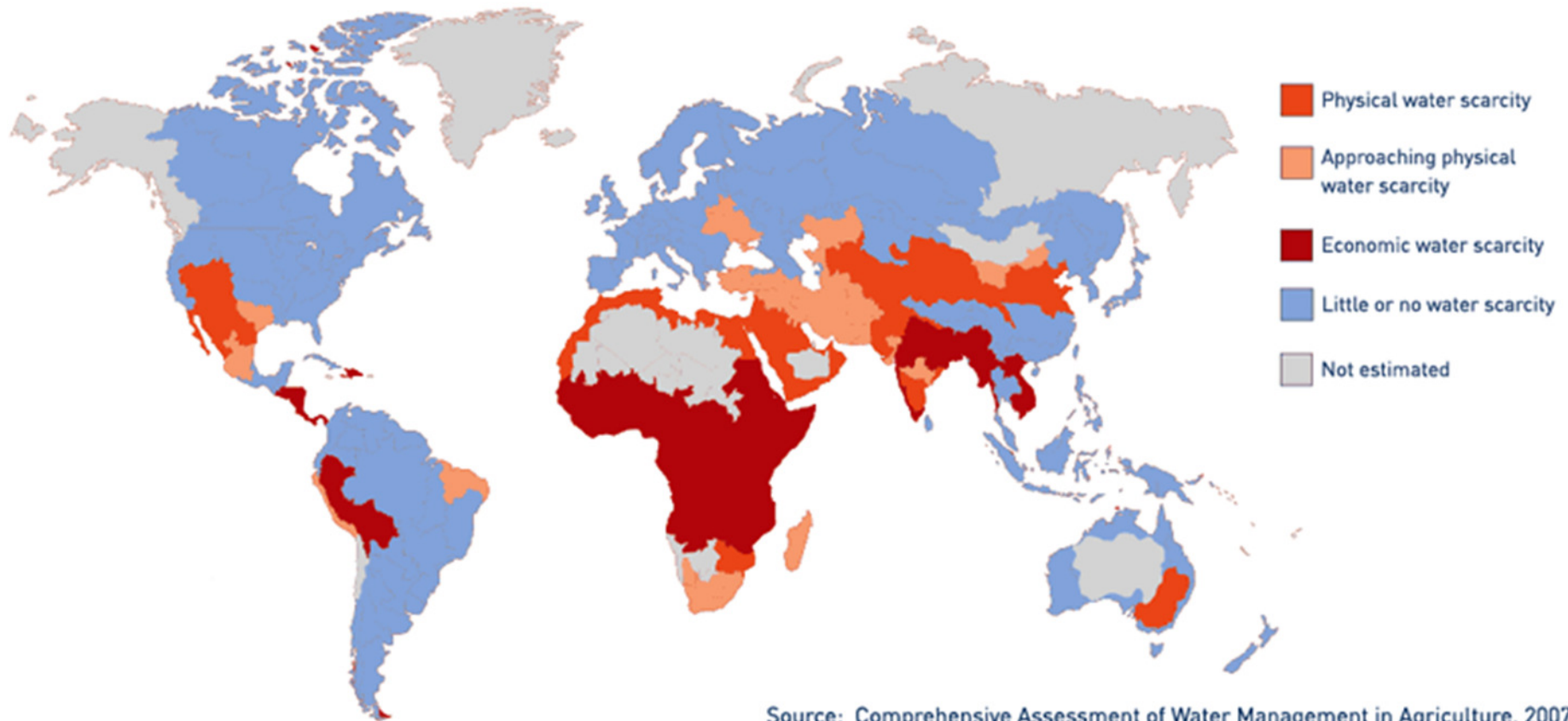
widening
water gap

Growing issues of availability, access, and conflicts-of-use

Global Water challenge: International

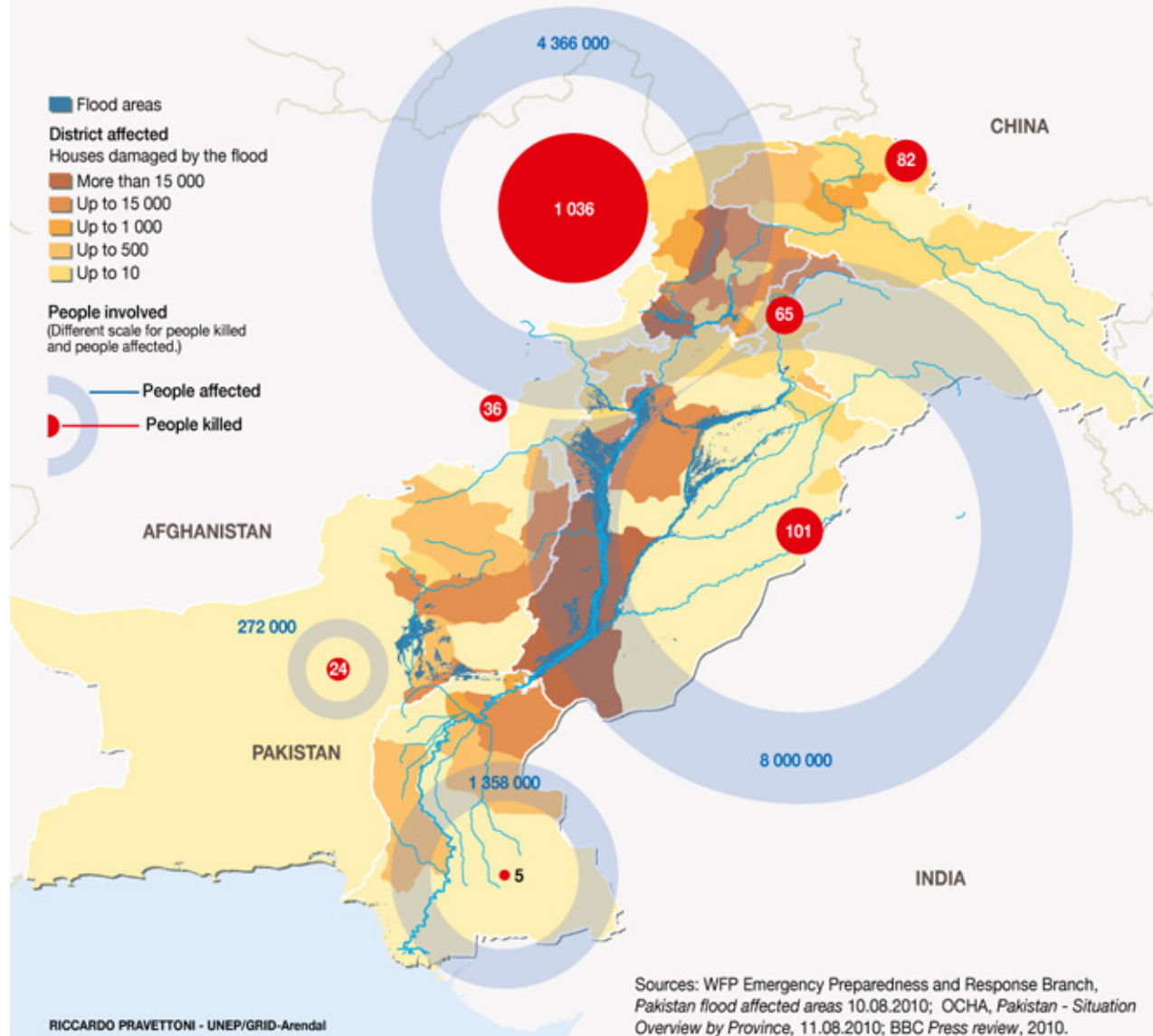


Availability and Access issues: Too little...

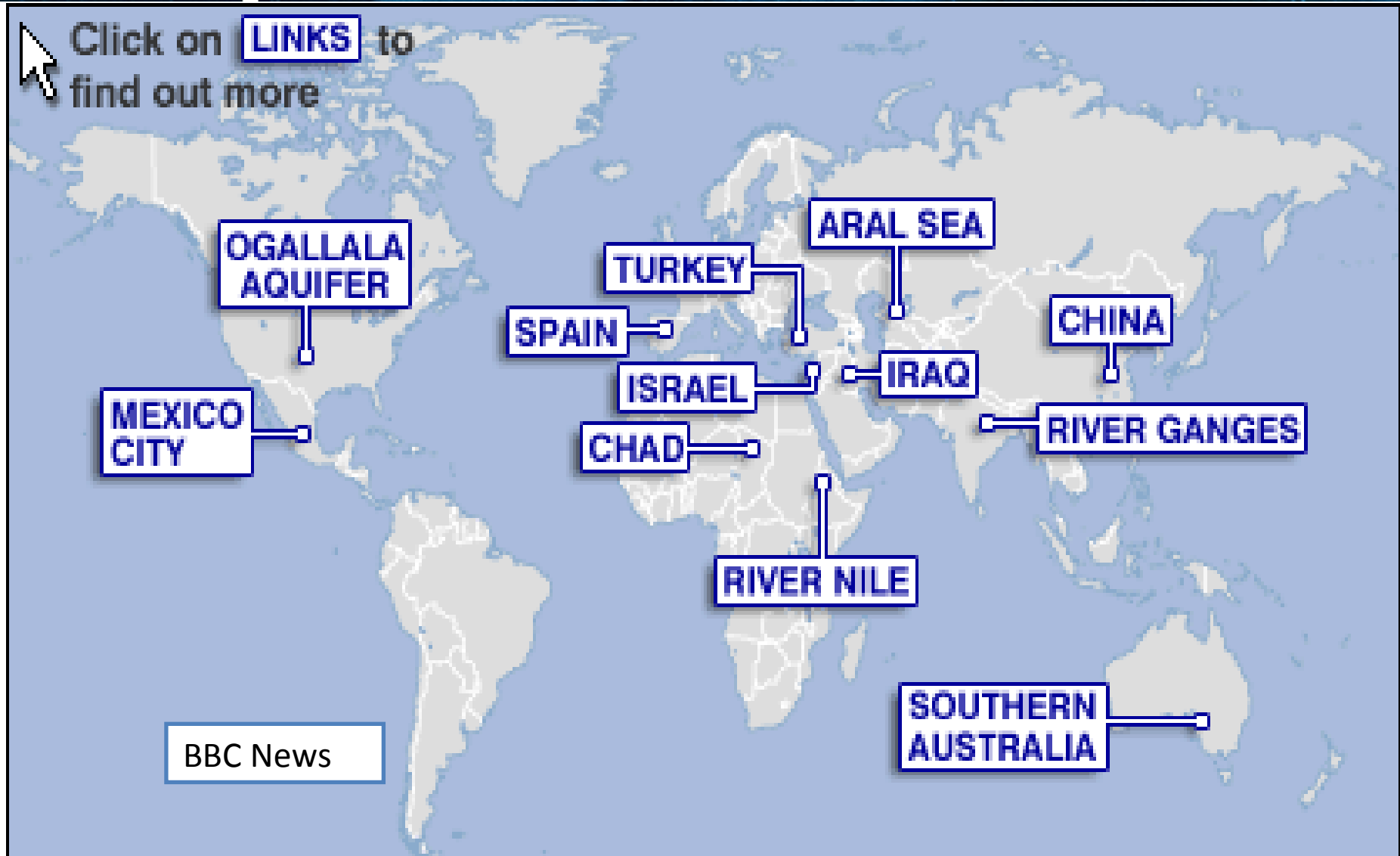


Source: Comprehensive Assessment of Water Management in Agriculture, 2007

Availability and Access issues: too much



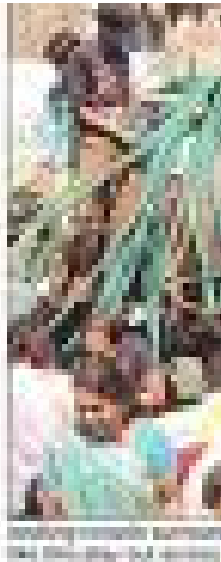
Conflicts-of-use - Water security challenges



Conflicts-of-use over water?

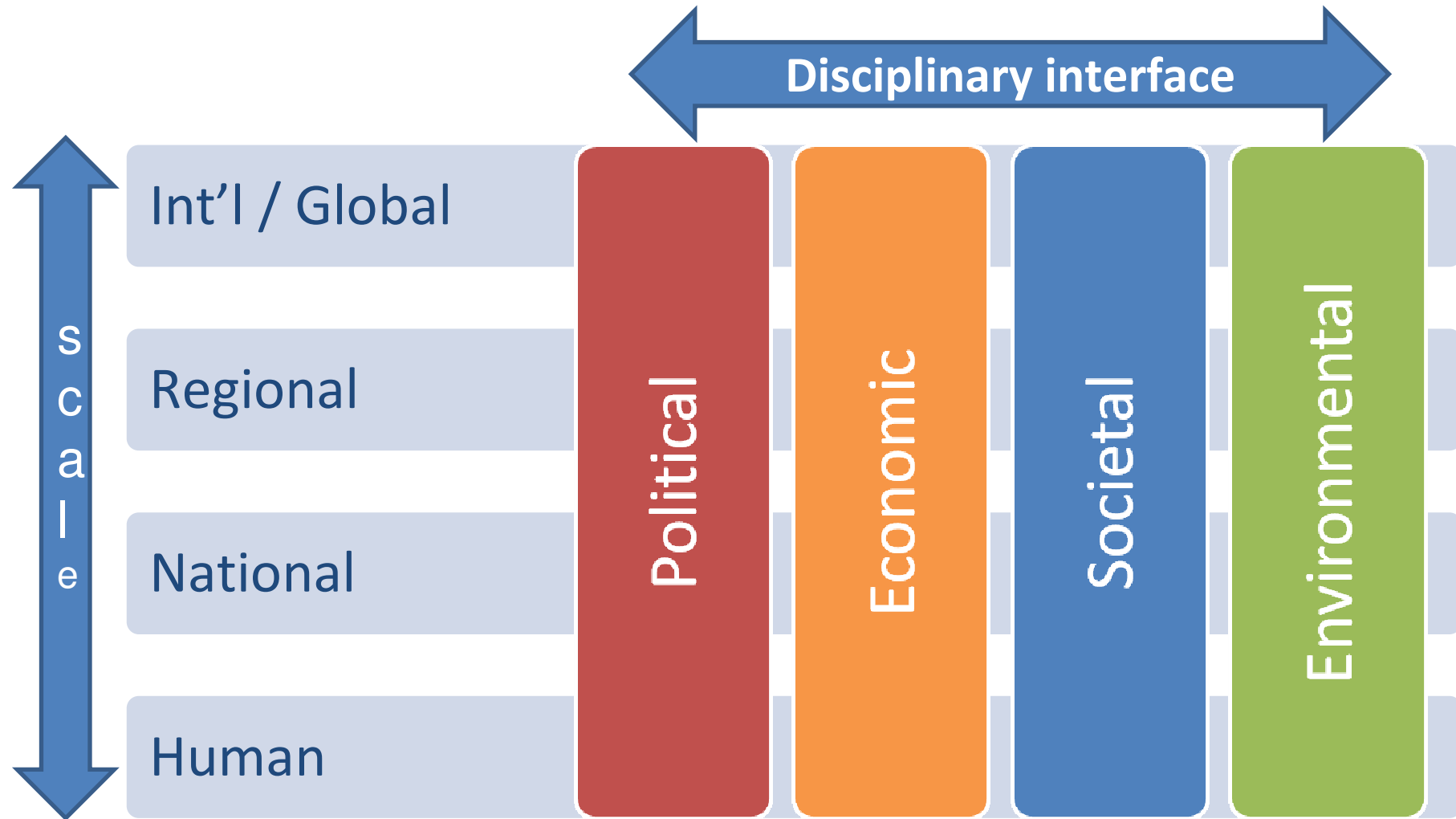
To die for: Water tankers, public taps are Madhya Pradesh's hot spots. Jeevan Malviya, wife Sita Bai and son Raju were killed for drawing water from a supply line. The state is on a water-clash alert — 50 violent incidents have already been reported this month

WATER WARS



Duty to cooperate?

Water Security Matrix: connectivity



Global Water Challenge: Governance

*The water problem is **broad and systemic**. Our work to deal with it must be so as well. The problem is that we have **no coordinated global management authority for water** in the UN system or the world at large.*

(Ban Ki-Moon)

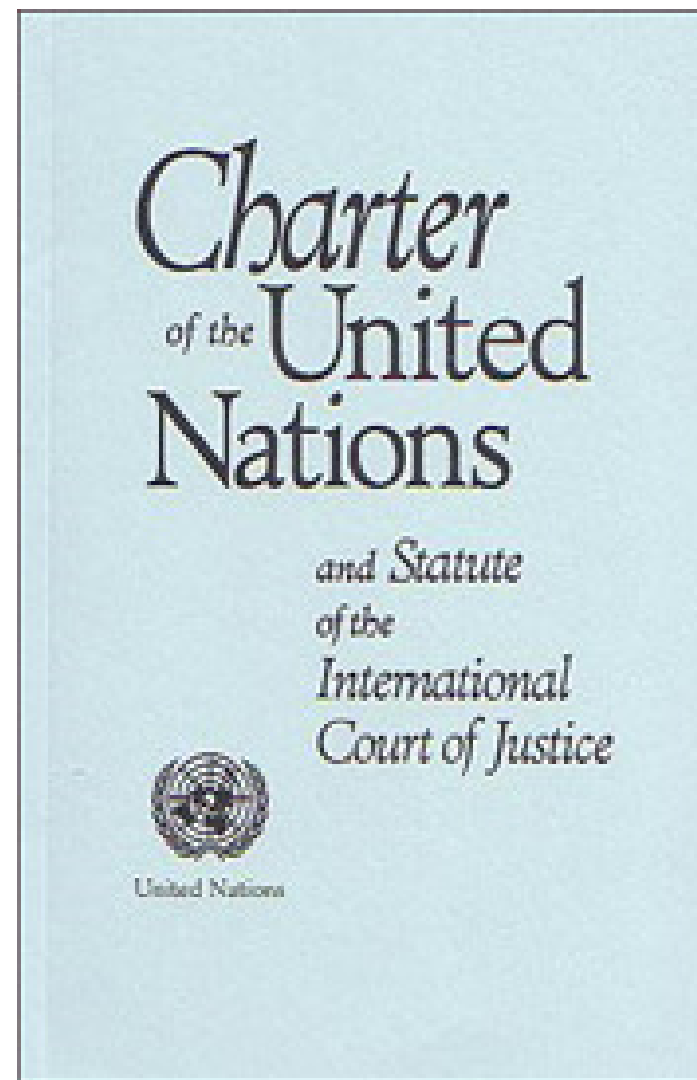
***Transboundary cooperation** is therefore necessary to prevent negative impacts of unilateral measures This makes transboundary water resources management one of the **most important challenges** today and in the **years to come**.*

(UN ECE, 2009)

Context = The Law of Nations

“to maintain international
peace and security ...
and ...
the fundamental freedoms
of all ...”

UN Charter



Role of International Law

International law is clearly much more than a simple set of rules. It is a culture in the broadest sense in that it constitutes a *method of communicating* claims, counter-claims, expectations and anticipations as well as providing a *framework for assessing and prioritising* such demands.

(Shaw, 2003)



Role of Law = Rule of Law

" If the daunting challenges now facing the world are to be overcome, it must be in important part through the medium of rules, internationally agreed, internationally implemented and, if necessary, internationally enforced.

That is what the rule of law requires in the international order. "

Lord Bingham The Rule of Law (2010)

Rule of law as foundation for a fair society

Rule of Law as foundation for:

1. good governance
2. accountability
3. certainty
4. legality

As core conditions for an effective economy and a fair society.

International Water Law / Law of Nations

Law of nations

Rule of law

Transboundary
waters

Water security

Hydro-
solidarity

Hydro-
diplomacy

Water for all? Reconciling competing needs

Legal
Template
for analysis:



“Who” gets
“what” “water”,
“when” and
“why”?

Rule of Law

Legal Analytical Framework (Rule of Law)

Key Elements	Details
1. Scope	<ul style="list-style-type: none">• Legal reach (what waters?)• Definitions (watercourse; uses)• Parties (States; RIEOs)
2. Substantive Rules	<ul style="list-style-type: none">• Legal duties & entitlements (equitable and reasonable utilisation; due diligence; protection)• Rules of substance (general or precise)
3. Procedural Rules	<ul style="list-style-type: none">• Rules of procedure (duty to cooperate as bridge)• Notification / exchange of information
4. Institutional Mechanisms	<ul style="list-style-type: none">• Joint bodies (RBOs)• Conference of the Parties (MoP; CoP)• Organisations / organs (Ministerial level; other)
5. Dispute Settlement	<ul style="list-style-type: none">• Dispute avoidance (consultation)• Dispute settlement (Art. 33 UN WC; other)• Compliance verification (reporting; facilitation)

Legal Analytical Framework: State Practice

1	Scope	Rhine Convention; Danube; Mekong; Nile (water security)
2	Substantive Rules	1992 UNECE Helsinki Convention
3	Procedural Rules	EU Water Framework Directive
4	Institutional Mechanisms	Mekong; Columbia; Colorado; Rhine; Danube
5	Dispute avoidance / compliance	Indus; Mekong; Canada/USA; EU; UNECE practice

Role of Law: **Water Security**

Ministerial Declaration, “Water Security in the Twenty-First Century”

Main challenges to achieve water security:

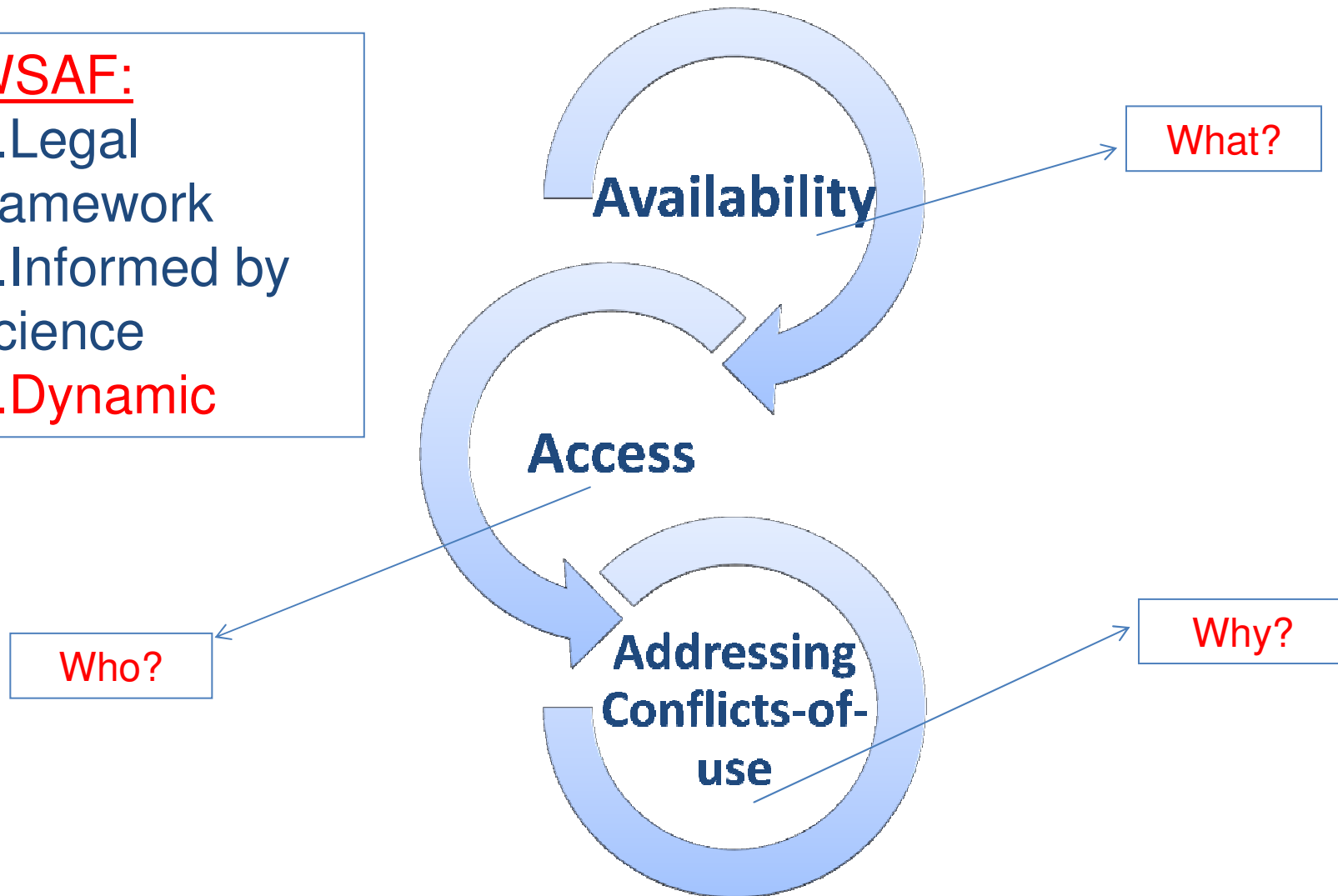
1. Meeting basic needs
2. Securing food supply
3. Protecting ecosystems
4. Sharing water resources
5. Managing risks
6. Valuing water
7. Governing water wisely

(WorldWaterCouncil2000)

Water Security: Legal Analytical Framework

WSAF:

1. Legal framework
2. Informed by science
3. Dynamic



International Water Security: AAA

Water Security Analytical Framework

Availability	Access	Addressing conflicts-of-use
<ul style="list-style-type: none">• Scope• Management & control• Natural integrity of the resource	<ul style="list-style-type: none">• Legal entitlement (right to use)• Allocation and re-allocation	<ul style="list-style-type: none">• Process / governance framework• Preventing / resolving disputes

Rule of Law = New Politics of Water

Politics - “the activities associated with the **governance of a country** or area, especially the debate between parties having **power**”; “the activities of governments concerning the **political relations between states**” (Oxford dictionary)

Rule of law - “Dicey’s three aspects of the rule of law—**regulating government power**, implying **equality before the law**, and **privileging judicial process**—are commonly regarded as basic requirements of a formal understanding of the rule of law. “ (S. Chesterman, 2008)

Rule of law as platform for integration and implementation (water+ arena)

1. Conditions for constructive foreign policy approaches	<ul style="list-style-type: none">• Law of nations – UN Charter: regional peace and security and fundamental freedoms of all• Duty to cooperate (substantive and procedural)• Peaceful settlement of disputes
2. Effective water sharing agreements	<ul style="list-style-type: none">• <u>Legal Analytical Framework</u>: (i) scope; (ii) substantive rules; (iii) procedural rules; (iv) institutional mechanisms; (v) dispute settlement• 1997 UN Watercourses Convention• Regional watercourses agreements (dynamic cooperation)
3. Sustainability / Stress Resilience test?	<ul style="list-style-type: none">• <u>Water Security Analytical Framework</u>: (i) Availability; (ii) Access; (iii) Addressing conflicts-of-use• Governing rule of <u>equitable and reasonable utilisation</u> (all relevant factors considered together)• <u>Rule of Law</u> as integrating & implementation platform

Water, Law, Sustainability: **Dynamic Cooperation**



The only thing that will redeem mankind is cooperation

Bertrand Russell

Dynamic Cooperation: Larger Freedom

... the cause of larger freedom can only be advanced by broad, deep and sustained global cooperation among States

(Report of The Secretary-General, 2005)

...International law is more than a set of rules for States; it is a 'language of communication'

(Boutros Boutros-Ghali, 1995)

Dynamic Cooperation: Hydro-solidarity

*There is an urgent need for a **water diplomacy** which would agree on the balance of the great continental water reserves, the **mitigation of potential conflicts** over several transboundary basins and on the **refinancing of the debt** of the poorest countries in favour of water and sanitation.*

(Loïc Fauchon, WWC, 2007)

Dynamic Cooperation – Competition?

New York Times - **When the Nile Runs Dry**

Lester R. Brown (1 June 2011)

“Affluent countries like Saudi Arabia, South Korea, China and India have descended on fertile plains across the African continent, acquiring huge tracts of land to produce wheat, rice and corn for consumption back home. .. Growing water demand, driven by population growth and foreign land and water acquisitions, are straining the Nile’s natural limits. ”

Dynamic Cooperation: **Duty to cooperate**

*“**Competition** has been shown to be useful up to a certain point and no further, but cooperation, which is the thing we must strive for today, begins where competition leaves off.”*

Franklin D Roosevelt

General obligation to cooperate - Watercourse States **shall cooperate** on the basis of sovereign equality, territorial integrity, mutual benefit and good faith in order to attain optimal utilization and adequate protection of an international watercourse (Art. 8, UNWC)

Cooperation on the **Okavango** (March 2011)

Southern Africa Water - Working Together On River Management

- **Angola** - irrigation for development,
- **Namibia** - clean drinking water & sanitation
- **Botswana** - Okavango Delta for tourism.



Dynamic Cooperation: state practice

Asia, Europe march ever closer

By Claire Rosemberg (AFP) – 7 June 2011

GODOLLO, Hungary — From nuclear safety to climate change and growth, **46 nations from Asia and Europe** wound up two days of talks Tuesday pledging to tighten the bonds between 60 per cent of the planet's people. .. "We are **all inter-dependent**," said Hungary's Foreign Minister Janos Martonyi. "All parties agreed on the **deepening of this cooperation**." .. "Food, water, energy and climate security are interconnected and inseparable. These four elements underpin global security, prosperity and equity."

(ASEM groups the EU, the 10-member Association of Southeast Asian Nations (ASEAN), China, Japan, South Korea, India, Pakistan, Mongolia, Australia, New Zealand and Russia -- four billion people representing over 60 per cent of world trade.)

Dynamic Cooperation: USA foreign policy

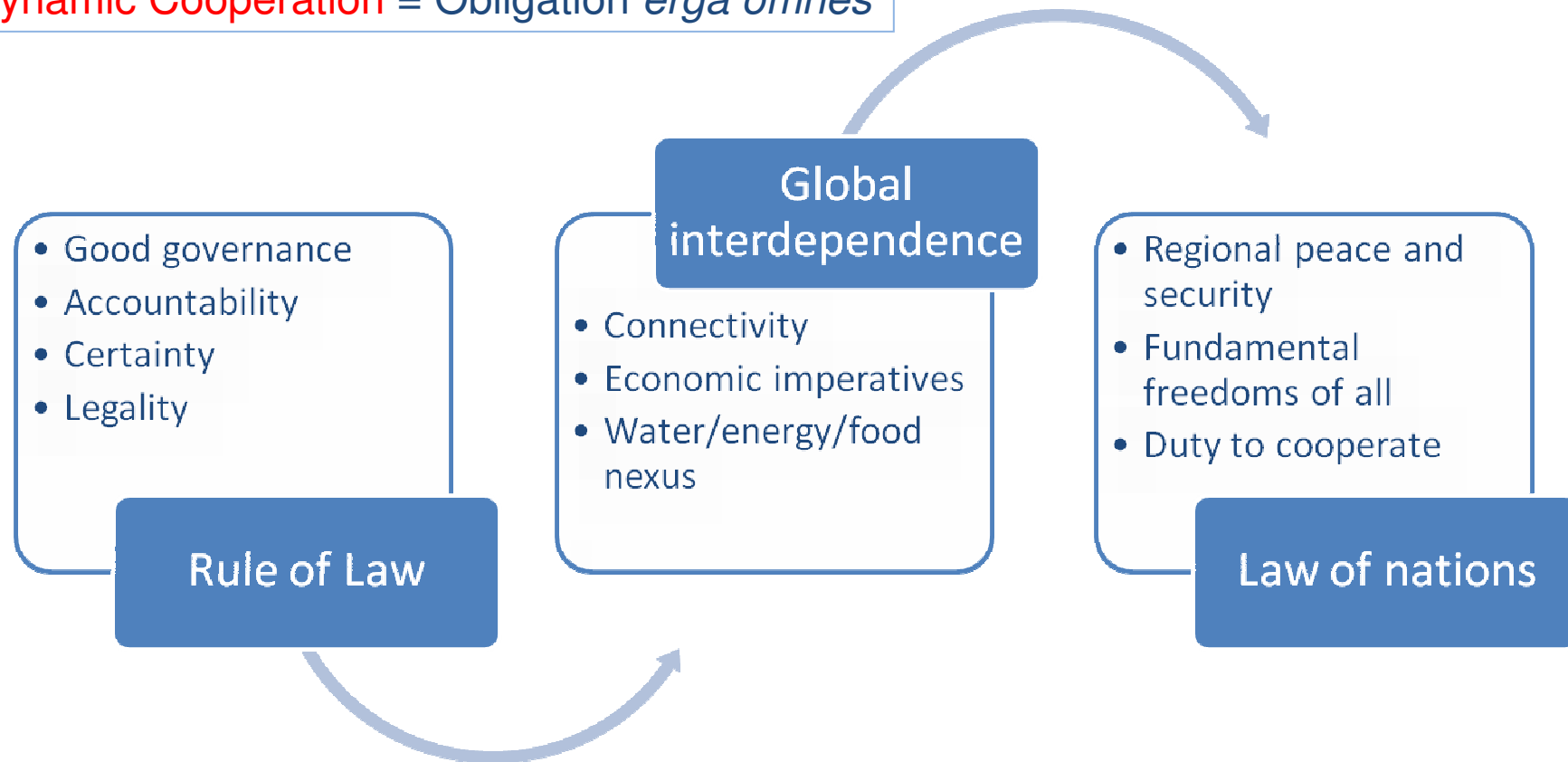
- We should view every regional watershed or aquifer as an opportunity for stronger international cooperation.
- Access to reliable supplies of clean water is a matter of human security. It's also a matter of national security.
- There could be huge political and economic benefits from regional water diplomacy.
- Water is actually a test case for preventive diplomacy.

5 streams of action

1. Capacity development (local, national, regional)
2. Elevate diplomatic efforts and we need to better coordinate them
3. Mobilizing financial support
4. Harness the power of science and technology
5. Broadening the scope of our partnerships

Dynamic Cooperation Framework

Dynamic Cooperation = Obligation *erga omnes*



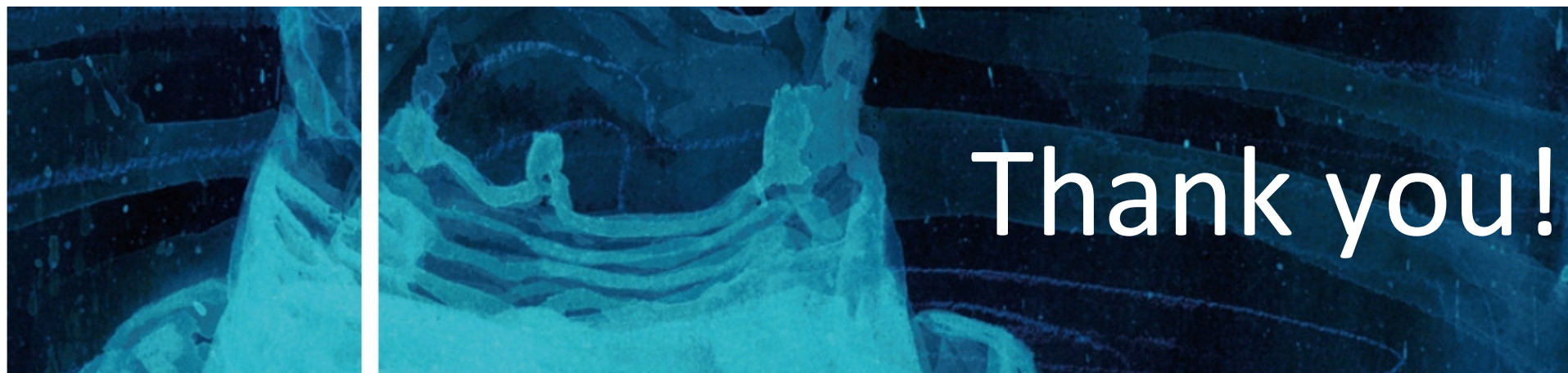
Water Security Hierarchy (**capacity tower**)



Water and the Law: Towards Sustainability

To save the world
requires faith and
courage: faith in
reason, and courage to
proclaim what reason
shows to be true.

Bertrand Russell



www.dundee.ac.uk/water

www.glasgow2015.org