



April 2011

THE 1997 UNITED NATIONS CONVENTION ON THE LAW OF THE NON-NAVIGATIONAL USES OF INTERNATIONAL WATERCOURSES AND SOUTHERN AFRICA'S TRANSBOUNDARY WATER SYSTEMS

The UN Watercourses Convention **requires** watercourse states to **cooperate on the equitable and reasonable use and management of international watercourses**, with a view to attaining their sustainable utilization and adequate protection, thereby enabling the achievement of *meaningful, long-lasting, and large-scale conservation and development goals*. The convention counts today 24 contracting states – 11 short of the required for entry into force.

The UN Watercourses Convention is **in harmony with existing agreements** governing transboundary watersheds in Southern Africa. A little after its adoption, the convention served as the **fundamental basis for the drafting of the Revised SADC Protocol on Shared Watercourses** (SADC Protocol).

The Convention will **supplement and support the interpretation and application of the SADC Protocol** by:

- 1) *Extending the harmonized legal framework that SADC states have created among themselves to basins shared with non-SADC neighbors, such as the Nile and the Congo watersheds;*
- 2) *Informing the interpretation of ambiguous provisions of the SADC Protocol and supplementing regulatory gaps;*
- 3) *Encouraging the harmonization of watercourse agreements and domestic water policies across Southern Africa and neighboring regions; and*
- 4) *Offering additional mechanisms for dispute settlement;*

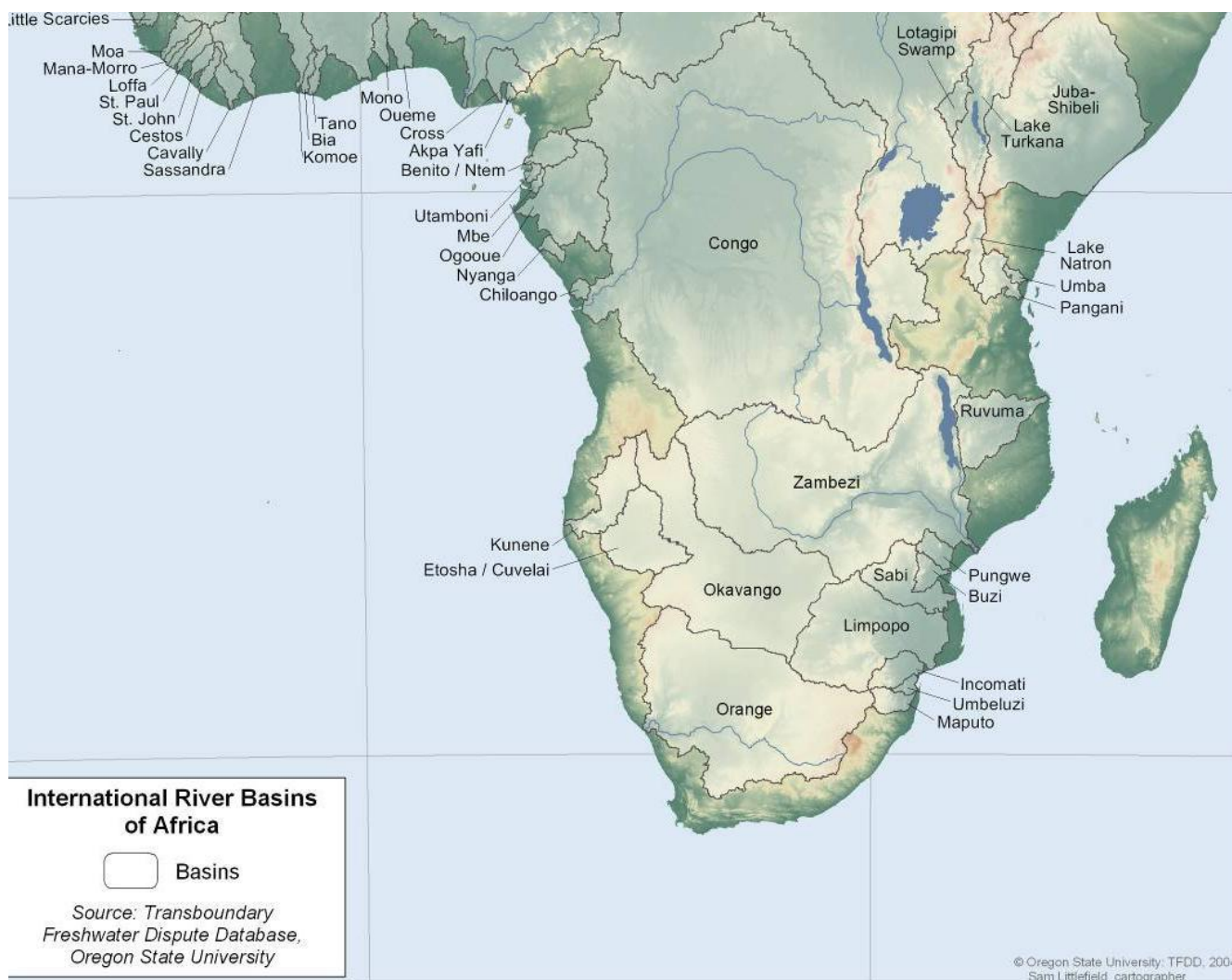
For further information, please refer to the Southern Africa Regional Assessment, at http://www.internationalwaterlaw.org/bibliography/WWF/RA_SADC_states.pdf, visit http://wwf.panda.org/what_we_do/how_we_work/policy/conventions/water_conventions/un_watercourses_convention/, or contact Flavia Loures, at flavia.loures@wwfus.org or +1(202)640-9055.

Among SADC Member States, Namibia and South Africa have joined the UN Watercourses Convention. Except for the Democratic Republic of Congo, Madagascar, and Zimbabwe, all the Community's members are parties to the SADC Protocol.

The SADC Protocol is based on the principles of the UN Watercourses Convention and, to a large degree, mirrors the provisions of the latter.

SADC Member States could benefit from the value added by the entry into force of the UN Watercourses Convention to the SADC Protocol, for the following reasons:

TRANSBOUNDARY BASINS IN THE SADC REGION



The SADC Member States share a total of 16 international rivers among them or with neighbouring, non-SADC states, these are: Buzi, Congo, Cunene, Cuvelai, Incomati, Limpopo, Maputo, Nile, Okavango, Orange-Senqu, Pangani, Pungwe, Rovuma, Save, Umbeluzi, Zambezi

1) A Common Legal Framework among SADC and non-SADC Member States

The SADC Protocol is not applicable to non-SADC member states and thus cannot fulfil its guidance function beyond the SADC region in basins like the Nile – one of the most politically and institutionally complex basins in Africa, and the Congo – Africa’s largest river system, as well as in the Pangani watershed.

The UN Watercourses Convention could play this role once it comes into force, by encouraging watercourse states to negotiate and conclude agreements aligned with its minimum standards.

Through the entry into force and widespread ratification of the convention in the region, the principles and rules that are common to both agreements would become applicable treaty law between SADC and non-SADC member states. This would strengthen the application of the rules and principles enshrined in both legal instruments across Southern Africa and beyond.

With the SADC Protocol and the UN Watercourses Convention practically setting forth the same principles, SADC member states would benefit from the same legal clarity and harmonized basin management framework that they enjoy with fellow SADC members also in relation to non-SADC member states.

Such clarity and guidance would benefit all parties involved, with the convention becoming the first comprehensive overarching and widely agreed legal framework governing the use and management of international watercourses in the region.

2) A Legal Reference for Supporting the Interpretation of the SADC Protocol and Supplementing Regulatory Gaps

- Article 3(6) of the SADC Protocol obliges states to exchange available information regarding the conditions of shared watercourses. Article 9(2) of the UN Watercourses Convention could supplement that provision of the protocol with its more detailed rules applicable to instances where data is not readily available.

Under the convention, when a state requests its neighbour to supply data not readily available, the latter must employ its best efforts to comply with the request, but may condition its compliance upon payment by the requesting state of the reasonable costs for generating and processing such information. The convention requires states to endeavour to collect and process information in a manner that facilitates its utilization by other co-watercourse states.

If, for example, a case arose among SADC states in which they were unsure as to how to implement their data-sharing obligation, the convention, especially if widely ratified in the region, could be invoked to aid in the interpretation of the relevant provision of the SADC Protocol.

- Another case in which the UN Watercourses Convention could support the application of the SADC Protocol relates to Article 3(8) of the latter, which lists the factors that are relevant for determining when a certain water use is “equitable and reasonable.”

Article 10(2) of the convention makes specific reference to the concept of *vital human needs* in the case of conflict among different water uses. The concept of vital human needs has received growing recognition under international law, but the SADC Protocol does not refer to it expressly.

If the convention became binding on SADC states, countries and courts would rely on it more strongly when deciding on the interpretation of the SADC Protocol. This would contribute to strengthening the consideration of vital human needs as a factor for applying the principle of reasonable and equitable use within the framework of the protocol.

- Article 28(4) of the UN Watercourses Convention could supplement the SADC Protocol on emergency measures. Article 4(5) of the protocol and Article 28 (1)-(3) of the convention establish the same notification and mitigation obligations in cases of emergency.

But Article 28(4) of the convention takes a step further by requiring state to prepare joint contingency plans where necessary to enforce their obligations related to emergency prevention and remediation.

That provision could provide an important incentive for SADC states to develop adaptation strategies to respond to the drought and flood-related effects of climate change, for example.

3) Revision of Watercourse Agreements and Relevant National Policies

Neither the UN Watercourses Convention nor the SADC Protocol affect the rights and obligations of states resulting from existing watercourse agreements, but both treaties encourage states to harmonize those agreements with their respective principles and substantive rules.

In particular, both instruments require states to take steps to harmonize their policies with respect to the prevention, reduction, and control of pollution in international watercourses, thus providing guidance for states to cooperate on those matters.

The goal under the UN Watercourses Convention towards policy harmonization would contribute to improving relations between SADC and non-SADC co-watercourse states, which fall outside the scope of the SADC Protocol. This would advance the interest of SADC states in creating a harmonized approach to the management of the watercourses that are shared internationally across Southern Africa and neighbouring regions.

Since there is currently no agreement requiring such harmonization in relation to non-SADC states, the convention could offer a guiding framework for informing interstate negotiations on the adoption of new or revised domestic legislation or agreements.

In addition, as discussed above, the Convention's entry into force would provide an additional push towards strengthening the dialogue and exchange between SADC and non-SADC states.

Although directly provided for in the Convention only in relation to pollution, that transboundary harmonization process could progressively lead to better aligned national water laws and policies across the region.

4) Dispute Settlement and Prevention

It may be in the direct interest of SADC member states to join the UN Watercourses Convention because of the latter's well-developed dispute prevention and settlement mechanisms.

Generally, the convention gives precedence to dispute resolution procedures already in force between the states concerned – in this case, the SADC Protocol.

Still, in addition to the protocol's dispute settlement procedures, SADC states that became parties to both agreements would be able to rely on the convention's fact-finding mechanism, as an additional option for seeking the peaceful resolution of disagreements between co-riparians.

Furthermore, the UN Watercourses Convention's detailed dispute prevention and resolution rules could serve as a common framework between SADC and non-SADC states.

There are no binding regional or basin-wide agreements in place between such states. Consequently, there are no universally agreed procedures for the resolution of disputes over shared watercourses across Southern Africa and neighbouring regions.

Once in force and widely ratified across those areas, the convention could provide such procedures, as a solid legal foundation for the settlement of disputes between SADC and non-SADC member states.