

African Minister's Council on Water (AMCOW) Executive Committee (EXCO) Meeting Cape Town, South Africa, 26-30 July 2010

INFORMATION BRIEF:

THE 1997 UNITED NATIONS CONVENTION ON THE LAW OF THE NON-NAVIGATIONAL USES OF INTERNATIONAL WATERCOURSES:

Role and Relevance in Africa Transboundary River Basins in Africa

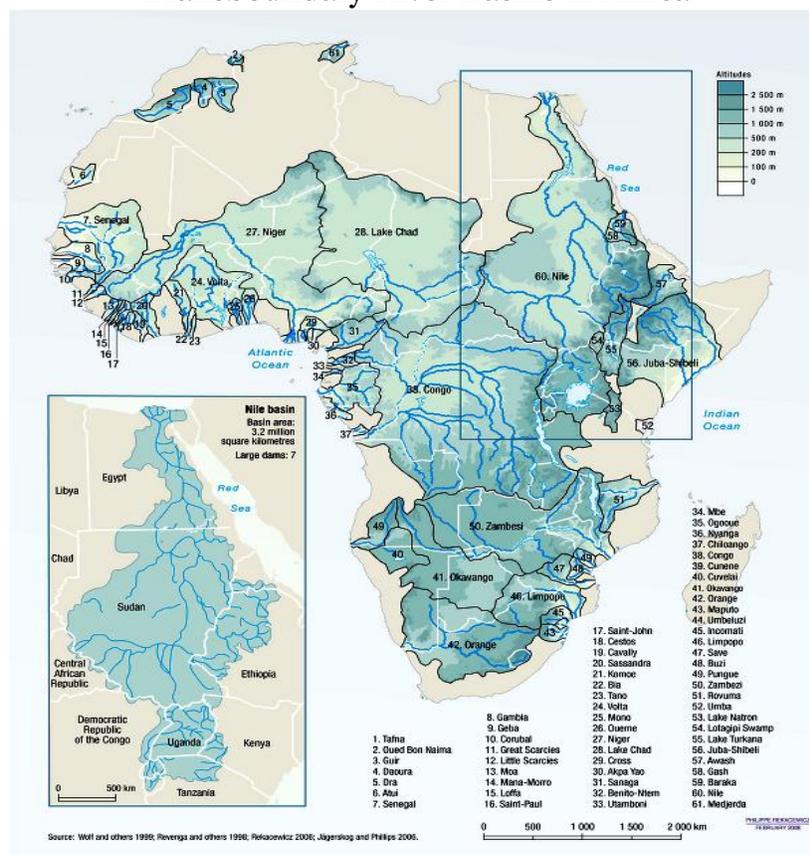


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I – Introduction

This information brief has been prepared under the *UN Watercourses Convention Global Initiative* for the 9th Ordinary Session of the Executive Committee (EXCO) of the African Minister’s Council on Water (AMCOW), in Cape Town, South Africa, 29-30 July 2010.

The global initiative aims to raise awareness and understanding of the *United Nations Convention on the Law of the Non-Navigational uses of International Watercourses* (UN Watercourses Convention),¹ with a view to facilitating the processes for its entry into force and future implementation.

The UN Watercourses Convention is a global legal framework that establishes basic principles and rules for cooperation between states on the use, management, and protection of international watercourses.

The convention aims to “ensure the utilisation, development, conservation, management and protection of international watercourses and the promotion of the optimal and sustainable utilisation thereof for present and future generations;” whilst “taking into account the special situation and needs of developing countries.”²

In Africa, where shared freshwater systems are the rule, not the exception, and where most transboundary watersheds still lack adequate legal protection, stakeholders could benefit from a more careful consideration of the convention’s role in improving transboundary water governance.

Therefore, this brief aims to inform and mobilize the meeting’s participants around efforts under the global initiative. It introduces the UN Watercourses Convention, and presents its ratification status and the extent to which African countries have endorsed and/or applied its provisions.

The brief also draws attention to the potential benefits arising from the widespread ratification of the convention by African countries.

Such widespread ratification could, if so desired, be facilitated and supported by an integrated, Africa-wide awareness-raising and capacity-building initiative, as discussed below.

The brief identifies AMCOW as a key structure in the promotion of transboundary water cooperation and which could perform a leading role in such an endeavour in support of its member states.

II – The UN Watercourses Convention

Disagreements and lack of coordination between states sharing water resources are frequent and may become even more so with climate change. However, international law can and has aided states in peacefully settling their disputes and in cooperating towards the equitable, optimal and sustainable development, management and protection of transboundary waters.

International legal instruments that codify and develop the law in this field have been adopted at the global, regional, basin, and sub-basin levels. Among those instruments, the UN Watercourses Convention is a flexible and overarching global legal framework that establishes basic principles and rules for cooperation between states on the equitable and sustainable use, management, and protection of international

¹ United Nations Convention on the Law of Non-Navigational Uses of International Watercourses, UN Doc. A/51/869, 21 May 1997, *reprinted in* 36 Int’l Legal Mat’ls 700. For more information on the convention, see [http://wwf.panda.org/what we do/how we work/policy/conventions/water_conventions/un_watercourses_convention/](http://wwf.panda.org/what_we_do/how_we_work/policy/conventions/water_conventions/un_watercourses_convention/).

² UN Watercourses Convention, Preamble.

watercourses. The convention is the outcome of a formal vote at the UN General Assembly at which more than one hundred nations approved its adoption, with only 3 states voting against it.

The UN Watercourses Convention requires states to cooperate with a view to attaining the sustainable utilization and adequate protection of international watercourses, thereby enabling the achievement of meaningful, long-lasting, and large-scale conservation and development goals. The convention is the only global UN instrument addressing the sustainable management of transboundary basins and which codifies and develops modern international water law.



In most international rivers, lakes and aquifers around the world, including in Africa, either no cooperative frameworks are in place; or existing treaties fail to involve all states within the system or do not address key water management issues, such as climate change adaptation, integrated river basin management, and transboundary pollution.

In the absence of appropriate and sufficient joint management frameworks and solid institutions around the world, it is questionable whether states will succeed in addressing the challenges of cooperative water management, including for adapting to climate change, solely through interstate efforts at the basin level.

How do we ensure the sustainable management of international watercourses in such a scenario? An effective UN Watercourses Convention, supplemented by regional treaties in this field, is necessary to integrate the water governance structure of transboundary waters, so that we have enabling frameworks at different levels that are mutually supportive.

Box 2: Main Provisions of the UN Watercourses Convention

The convention requires states to use a watercourse in an equitable and reasonable manner, consistent with their protection, while paying special regard to vital human needs and to the interests of other watercourse states. In particular, the convention requires states to:

- consider the need for watercourse agreements that implement and/or adjust the convention’s provisions to their specific circumstances and needs;

- participate equitably in the development and protection of the watercourse through, e.g., the implementation of joint measures to safeguard aquatic ecosystems;
- take all appropriate measures, when utilizing a watercourse, to avoid causing significant harm to other states, and act diligently to eliminate or mitigate such harm if it nevertheless occurs, with a view to restoring a fair balance between the states concerned;
- jointly with other riparian states, or individually, protect and preserve the ecosystems of international watercourses, including through the prevention, control and reduction of transboundary pollution, and with view to safeguarding the marine environment;
- take all appropriate measures to prevent and mitigate harmful conditions related to an international watercourse, as well as to address emergencies, such as droughts and floods;
- follow a procedure of consultation, negotiation and data exchange before implementing any measures that could have a significant adverse effect on neighbouring states;
- consult over the establishment of joint management mechanisms, such as basin organizations, management plans or water quality standards; and
- seek the peaceful settlement of disputes.

As a global policy framework, the convention neither sets specific management targets neither exhausts the list of elements to be considered in the implementation of reasonable and equitable use and participation in the sharing of benefits from the development, management and protection of international watercourses. Instead, the convention leaves enough room for interstate negotiations and for adjusting its basic principles and rules to the specific circumstances and needs within each state and transboundary watershed.

III – The UN Watercourses Convention Global Initiative

In March 2006, WWF launched a global initiative to draw attention to the role and relevance of the UN Watercourses Convention, contribute to its ratification process and entry into force, and create enabling conditions for its effective implementation in the future.

The global initiative has mobilized several governments and other stakeholders, including those endorsing this brief, namely, Green Cross International, the IHP-HELP Centre for Water Law, Policy and Science, under the auspices of UNESCO (Centre for Water Law, Policy & Science), and the Global Water Partnership (GWP) in West and Eastern Africa and, more recently, in the Mediterranean.

Today, we are jointly calling for the entry into force of the UN Watercourses Convention by 2011, as a vital step towards enabling transboundary freshwater conservation and adaptation to climate change.

Under the global initiative, we have undertaken a number of activities at all levels to raise awareness, promote dialogue, build capacity, and support countries interested in becoming parties to the UN Watercourses Convention.

In Africa, we have worked with stakeholders in various sub-regions to sensitize and provide technical information about the UN Watercourses Convention, its content, advantages, and opportunities from ratification and entry into force.

For example, we have commissioned assessments of the convention's specific role and relevance for advancing transboundary water cooperation in West and Southern Africa and neighbouring sub-regions. The

West Africa Regional Assessment also served to inform two regional workshops to further discussions among key government and non-governmental stakeholders in the region (*see* Annex 1).

Moreover, we have engaged key African institutions such as regional economic integration organizations, river basin organizations, partner NGOs and local experts. In so doing, we aim to promote wider dialogue and ensure the initiative takes into account the needs and interests that are specific of the African continent, its countries and populations.

IV – Voting Records and Ratification Status in Africa

The UN Watercourses Convention counts today 19 contracting states – 16 short of the required for entry into force – including Guinea-Bissau, Libya, Namibia, South Africa, and Tunisia.³ Ivory Coast has signed the convention, but has yet to complete the ratification process.

Box 3: Africa's Commitment to the UN Watercourses Convention at the 5th World Water Forum and the 2009 World Water Week

At the 5th World Water Forum (Istanbul, Turkey, March 2009), *Green Cross International*, the *Global Nature Fund (GNF)*, the *European Water Partnership*, the Norwegian Government, the *UN Secretary-General's Advisory Board on Water & Sanitation (UNSGAB)*, and WWF co-hosted a high-level event to acknowledge the states that have lead the process for bringing the UN Watercourses Convention into force.

The focus was on Member States of the *European Union (EU)* and the *Economic Community of West African States (ECOWAS)* – both regions where the global initiative has achieved good progress. Leading up to the *2009 World Water Day*, which focused on transboundary waters, the event inspired new alliances and strengthened political support for bringing the convention into force by 2011.

The event included a formal ceremony to present the *Leaders for a Living Planet award* to 12 of the then 16 contracting states, including **South Africa** and **Namibia**,⁴ for their leadership in promoting international law as a key driver of sound transboundary water cooperation.

After the ceremony, key officials from non-parties, including **Benin**, **Burkina Faso**, **Chad**, **Ghana**, **Niger**, and **Sierra Leone**, handed over signed postcards symbolizing a personal commitment to our call for additional ratifications and a pledge to work proactively towards having their own countries join the convention. Moreover, the High Commissioner for the *Organisation pour la Mise en Valeur du fleuve Sénégal* delivered a signed postcard on its institution's behalf.

During the 2009 World Water Week, representatives from **Senegal** and **Nigeria** also signed a postcard, strengthening West Africa's commendable commitment to this process.

Following-up on those events, significant progress towards ratification has been made in **Benin**, **Burkina Faso**, and **Ghana**. **Niger** and **Nigeria** are currently holding internal consultations on the possibility of becoming contracting states.

As mentioned above, the UN Watercourses Convention was adopted in 1997, with 106 countries voting in favour and only 3 against.

³ For the complete status of the ratification process, see http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XXVII-12&chapter=27&lang=en.

⁴ Libya, The Netherlands, Portugal, and Qatar were invited to the ceremony, but were not able to attend.

In Africa,

- Angola, Botswana, Burkina Faso, Cameroon, Gabon, Ivory Coast, Kenya, Liberia, Morocco, Mozambique, Namibia, Nigeria, Sierra Leone, South Africa, Sudan, Tunisia, and Zambia voted in favour of the convention's adoption.
- Egypt, Ethiopia, Ghana, Mali, Rwanda, and Tanzania abstained from voting. Among the abstaining countries, Egypt, Ethiopia, Rwanda and Tanzania justified their vote.⁵

Despite expressed opposition to specific provisions of the UN Watercourses Convention, most of those countries made positive observations about the instrument as a whole. A more detailed analysis of each statement could be included in a revised version of this brief and/or developed in the context of future in-depth discussions on the role and relevance of the convention for Africa.

- Without explaining its decision, Burundi, another riparian to the Nile River, was the only African state that voted against the convention.
- There are no written records of the position of other states, which are presumed to have been absent from the voting procedures.

V – Importance of the UN Watercourses Convention for African States

Freshwater ecosystems and the services they provide are vital for human well-being. However, the impacts of population growth, rural-to-urban migration, increasing water demand and climate change are jeopardizing life-supporting freshwater ecosystem services.

Africa, in particular, is one of the most affected regions by water scarcity and climate change, and where governance systems are often weak and under-funded.

Africa faces many economic, social, and political challenges. There, dependence on natural resources for health and livelihoods is significant, and water plays a key role in enabling sustainable development.

In this sense, African governments have expressed a widespread concern regarding the “underutilization and uneven sharing of water resources in Africa.”⁶ They have affirmed that water remains a growing challenge in the achievement of food and energy securities; called for increased collaboration between states, civil society and businesses; and demanded efficiency in investments in hydropower, agriculture and water. In raising those issues, Africa has “carried [its] water crisis and policy challenges from the margins to the centre-stage of the regional development agenda.”⁷

In particular, Africa's 63 transboundary river basins cover 64% of the continent's surface area and store slightly more than 93% of its total surface water resources.⁸ The sound management of those basins, through equitable and sustainable cooperation between the states concerned, is thus vital for ensuring that Africa is positioned to address the water challenge effectively.

⁵ See UN General Assembly, 51st Session (21 May 1997), U.N. Doc. A/51/PV.9, containing the official records of the voting session).

⁶ See *2008 Sharm El Sheikh Commitments for Accelerating Achievement of Water and Sanitation Goals in Africa*, adopted at the 2008 African Union Summit (Sharm El-Sheik, Egypt, July 1st, 2008), available at http://www.unsgab.org/news/docs/080701_AUDeclarationSeS.pdf.

⁷ *Bridging Divides in Africa's Water Security: An Agenda to Implement Existing Political Commitments* (2009), Africa Regional Paper, 5th World Water Forum, p.vi (“Africa Regional Paper”), available at www.worldwaterforum5.org.

⁸ See <http://www.unep.org/dewa/africa/AfricaAtlas/PDF/en/Chapter2.pdf>.

International policy instruments, such as the *New Partnership for Africa's Development (NEPAD) Action Plan*, the *G8 Africa Action Plan*, and the *Abuja Declaration of the African Ministers Council on Water (AMCOW)*, have recognized the joint development and management of international waters among the key requirements for achieving water security, political stability within and between countries, and the water-related and other targets under the Millennium Development Goals (MDGs).⁹

⁹ See Lars Wirkus & Volker Boge, *Transboundary water management on Africa's international rivers and lakes*, in *Transboundary Water Management in Africa: Challenges for Development Cooperation* (Waltina Scheumann et al. eds.) (2006), p.16.

Box 4: The UN Watercourses Convention: What Role for Advancing Integrated Water Resources Management and the Millennium Development Goals?

The protection of the ecosystems of international watercourses, the maintenance of peaceful and equitable relations between states, and the cooperative management and use of shared river basins in support of socioeconomic progress are all necessary conditions for enabling states to pursue water-related targets under the MDGs and other international policy processes. The UN Watercourses Convention will contribute to meeting those conditions.

Recognizing this, the *Hashimoto Action Plan II*¹⁰ – the blueprint for action of the UN Secretary General’s Advisory Board on Water and Sanitation (UNSGAB) – calls on governments to ratify and implement the UN Watercourses Convention.¹¹ According to the plan, “*sustainable management of water at the basin level often requires both an IWRM approach and transboundary cooperation. While there are numerous regional and basin-level legal agreements on transboundary waters, there are also many cases where no cooperative agreements exist. An imperative need exists for an overarching layer of international water law provided by the [UN Watercourses Convention].*”¹²

UNSGAB has been working in close collaboration with the global initiative to raise awareness of the convention across Africa and beyond, including in the context of the Board’s interactions with AMCOW and the African Union. As announced at various occasions, UNSGAB members are prepared to support awareness-raising activities and the convention’s widespread ratification in Africa.

About half of Africa’s transboundary basins are shared by three or more countries, and 10 basins by four or more nations. The Congo and Niger basins cross the territories of 11 countries; the Nile basin drains 10 countries; and 8 nations share the Lake Chad and Zambezi watersheds. Transboundary aquifers are also the rule across Africa, where “one country shares as many as 7 aquifers and several others share 6 aquifers with neighbouring countries. While a few large regional aquifers have up to 6 riparian countries, in most cases only 2-4 countries share the same aquifer system.”¹³ The region is significantly dependant on groundwater for water security, with many countries and urban agglomerations relying on shared aquifers as their main source of water supply.¹⁴

On the other hand, growing water scarcity, increasing population, degradation of vulnerable ecosystems, and competing demands for shrinking supplies represent major threats to transboundary water bodies across the continent. The added pressure from climate change has become more apparent over the years and experts have now recognized its role in aggravating the risk for water conflicts within and between African states.

In this scenario, the UN Watercourses Convention can play a key role in fostering better levels of cooperation among the states concerned. In the context of the aforementioned multi-level legal governance of transboundary waters, it is noteworthy that “*most international basins [in Africa] are without any agreements on equitable use or environmental protection. Few have effective institutional arrangements for consultation or cooperation. Procedures for avoiding or resolving international disputes over water are largely lacking.*”¹⁵ In this sense,

¹⁰ UNSGAB, *Hashimoto Action Plan II* (HAP II) (Jan. 2010), available at http://www.unsgab.org/HAP-II/HAP-II_en.pdf. UNSGAB includes leading international political, legal, and scientific water experts. Their action plan identifies the concrete measures needed to achieve the Millennium Development Goal number 7, Target 10, on sustainable access to safe drinking water and basic sanitation.

¹¹ This call had already been included in UNSGAB’s Hashimoto Action Plan I (UNSGAB, *Hashimoto Action Plan I* (Mar. 2006), p.9, available at http://www.unsgab.org/docs/HAP_en.pdf.

¹² HAP II, *supra* note 10, p.15.

¹³ UNESCO, ISARM-Africa, IHP-VI, *Managing Shared Aquifer Resources in Africa*, Series on Groundwater 8 (Bo Appelgren ed.) (2004), p.9-11, available at <http://unesdoc.unesco.org/images/0013/001385/138581m.pdf>.

¹⁴ *Id.*

¹⁵ *Declaration of African Ministers responsible for Water Resources*, adopted at the International Conference on Freshwater (Bonn, Germany, 3-7 Dec. 2001), available at

- Africa's existing watercourse agreements only cover 20 of its 64 transboundary river basins.¹⁶
- Among those agreements, many are out of date and/or lack provisions incorporating and detailing basic principles and rules of international water law as codified and developed in the UN Watercourses Convention. These include, e.g., equitable and reasonable use, information exchange, procedures for the implementation of planned measures, the duty to take all measures to prevent significant transboundary harm, and obligations pertaining to environmental protection and management.
- In the case of states sharing multiple river basins, the agreements negotiated to govern each system are not necessarily harmonized, which makes coordinated and effective implementation more difficult.
- Many treaties do not involve all states within a watershed, failing to promote the basin-wide dialogue necessary for the optimal and sustainable development of freshwater systems.

Box 5: The UN Watercourses Convention in African Policy Statements and Watercourse Agreements

A continent-wide effort to raise awareness and, where appropriate, facilitate additional ratifications of the UN Watercourses Convention would likely be welcome by various states and sub-regions in Africa. While the convention has been ratified by only 5 African states, an analysis of recent policy statements and watercourse agreements shows that endorsement of the convention and its basic principles and rules is significant across the continent:

Even pending entry into force, the convention has already served as the fundamental basis for the drafting of the *2000 Revised SADC Protocol on Shared Watercourses*. The *2010 Nile River Basin Cooperative Framework Agreement (NRBCFA)* also incorporates various principles enshrined in the convention, e.g., equitable and reasonable use, no significant harm, planned measures, data and info exchange.¹⁷ Just as the convention provided useful guidance for negotiations leading up to the NRBCFA, the former is likely to prove useful again in supporting the latter's future application and interpretation, in the case of disputes between the countries concerned.

Numerous other treaties make explicit reference to the convention, e.g., the *Agreement on the Establishment of the Congo-Oubangui-Sangha Basin International Commission (1999)*, the *Orange-Senqu River Commission Agreement (2000)*, the *Limpopo Watercourse Commission Agreement (2003)*, the *Zambezi Watercourse Commission Agreement (2004)*, and the *Niger Basin Water Charter (2008)*.

The *December 2008 Ministerial Declaration of the Euro-Mediterranean Ministers of Water*, signed by the Northern African countries of Algeria, Egypt, Morocco, and Tunisia, among other states within the region, expressly makes note of the UN Watercourses Convention.

The UN Watercourses Convention has even come up in intergovernmental platforms that gather states from different African sub-regions. During the 2nd Meeting of the *Committee of West and Central African Ministers of the Guinea Current Large Marine Ecosystem Project (GCCMEP)* (Accra, Ghana, July 2010), the member states of the *Interim Guinea Current Commission (IGCC)* approved the *OSU Ministerial Declaration*. Such states include: Angola, Benin, Cameroon, Congo, Côte d'Ivoire, Democratic Republic of Congo, Gabon, Ghana, Guinea, Guinea Bissau, Equatorial Guinea, Liberia, Nigeria, Sao Tome and Principe, Sierra Leone and Togo.

The *OSU Ministerial Declaration* highlights the "vital linkage between freshwater and the coastal marine ecosystems and the need to accelerate agreements for cooperation over Africa's shared waters," towards the

<http://www.unep.org/Documents.multilingual/Default.asp?DocumentID=228&ArticleID=2973>.

¹⁶ See Lars Wirkus & Volker Boge, *supra* note 9, p.16.

¹⁷ See M. Abseno, *The concepts of equitable utilization, no significant harm and benefit sharing under the Nile River Basin Cooperative Framework Agreement: some highlights on theory and practice*, *The Journal of Water Law*, vol. 20, Issue 2/3, p. 86-95. See also M. Abseno, *How does the Work of the ILC and the General Assembly on the Law of International Watercourses Contribute towards a Legal Framework for the Nile Basin*, LL.M Thesis, Centre for Water Law, Policy and Science, University of Dundee (2009) (forthcoming).

sustainable management of “transboundary water bodies and the living resources therein, land, forests and biodiversity conservation.” In this context, the Declaration calls on the Interim Executive Secretariat to prepare a brief on the feasibility of ratification of the UN Watercourses Convention by member states, as well as to advocate and assist those countries through the ratification process.

Here are some specific examples of poor legal governance of transboundary waters:

- African transboundary basins not covered at all by international agreements include the Ouémé (3 countries), Cavally (3 countries), and Moa (3 countries), in West Africa;
- The *1978 Convention Relating to the Status of the Gambia River and to the Creation of the Gambia River Basin Development Organization* establishes a mandate for the joint body to allocate water rights only with regard to agricultural, industrial and transportation water uses. The provision disregards the need for allocation decisions to take into account the environmental flows necessary for maintaining in-stream water uses. Moreover, that convention does not apply to aquifers connected to the Gambia basin;
- The *1964 Convention and Statutes relating to the Development of the Chad Basin* lacks fact-finding procedures for solving disputes, and does not contain a requirement on data-sharing;
- The *2007 Convention on the Statute of the Volta River and Setting up the Volta Basin Authority* does not adequately address emergency situations and harmful conditions;
- The *2002 Charter of Water of the Senegal River* does not contain a general obligation on significant transboundary harm prevention and fails to codify and detail a data-sharing obligation.¹⁸

In the above examples of weak governance, the UN Watercourses Convention, if widely endorsed across Africa, could:

- Serve as an overarching umbrella to fill the gaps and address the failures of existing agreements, as well as to guide their interpretation and application;
- Enable the adoption of new agreements and the revision of the existing ones, on the basis of its provisions, as a common, widely accepted minimum denominator, ultimately bringing more stability to the treaty-making process;
- Provide a well-developed body of substantive and procedural rules for the management, use and conservation of shared water resources, for those cases where transboundary watersheds are not subject to applicable watercourse agreements; and
- Improve dialogue and cooperation between states that share water resources, but are members of different regional integration organizations – a role that regional protocols negotiated under the auspices of those bodies cannot fulfil;
- Through its implementation process, facilitate negotiations on aquifer agreements and on a future global instrument governing international groundwater law (*see* Annex III), by initiating systematic discussions on the topic; and

¹⁸ For more detailed examples, *see* Annex I, Summary Table.

- Enhance implementation of other multilateral environmental agreements, such as the Ramsar Convention and the UN Conventions on Biodiversity and Desertification.¹⁹

Box 6: The UN Watercourses Convention Can Facilitate Transboundary Climate Change Adaptation

Climate change has affected already stressed water resources and will increasingly do so, aggravating the risks for economic and political disruption, mass migration, and conflict. In particular, existing watercourse agreements that fail to incorporate climate change considerations, such as those that consider fixed volumetric criteria to apportion water flows, are likely to become inadequate as water management frameworks and even a potential source of disputes between the states concerned.

Climate change raises the stakes of non-cooperation, while, at the same time, offering new opportunities and incentives for co-riparian states. Such states can manage the water-related growing risks arising from climate change, which they share, by better cooperating on the management of transboundary waters, e.g., by pooling resources to enhance information, and adopting joint contingency plans and early warning systems.

The UN Framework Convention on Climate Change (UNFCCC) is crucial, but it is not enough *on its own* to promote better transboundary water cooperation. The overarching and flexible framework provided by the UN Watercourses Convention can facilitate that process:

- As codified in the UN Watercourses Convention, reasonable and equitable use is achieved through an ongoing process of good-faith cooperation, information exchange and coordination between states, under which evolving circumstances, such as those resulting from climate change, call for periodical reviews of water management and allocation decisions;
- The convention recognizes that climatic factors and variability are important in the achievement of an equitable and reasonable balance between co-riparian states;
- Under the convention, states must prevent and mitigate the effects of droughts and floods, likely to become more frequent and intense with climate change;
- The convention can help ensure that any measures governments take under the UNFCCC to mitigate climate change, such as hydropower development and the expansion of biofuels' production, neither harm aquatic ecosystems nor disregard the health and livelihoods of dependent communities within international watercourses.

The UN Watercourses Convention offers a solid enabling environment for African States, in consultation and coordination with all the relevant stakeholders, to implement and monitor transboundary integrated river basin management, and to improve dialogue and information exchange across the continent on the basis of a commonly agreed template setting the applicable basic legal standards.

¹⁹ For more details on the relationship between the UN Watercourses Convention and other multilateral environmental agreements, see Flavia Loures, Alistair Rieu-Clarke & Marie-Laure Vercambre, *Everything you need to know about the UN Watercourses Convention* (WWF 2009), at 18-21, available at http://assets.panda.org/downloads/wmf_un_watercourses_brochure_low_res_july2009rev_fr_1.pdf

VII – Widespread Ratification across Africa: the Need for Integration, Cooperation and Exchange

The UN Watercourses Convention is more relevant than ever in Africa, where most of the shared transboundary water resources still lack sufficient legal protection, and emerging threats resulting from rapid population growth and climate change are likely to become triggers of interstate conflict in the near future.

The convention's widespread ratification and implementation are necessary (albeit not sufficient) steps towards ensuring that states properly utilise and protect precious water supplies – now and in the future.

In this context, it is worth considering the advantages of promoting the convention through integrated efforts across Africa, combined with existing informal region-by-region smaller initiatives under the global campaign.

Up until now, the global initiative has devoted significant attention to West Africa, while, to the extent possible, monitoring and supporting ongoing efforts on transboundary water management in other places. This has been due to limited resources and because the partners under the initiative have no official standing and/or supranational jurisdiction to enable coordinated and integrated continent-wide efforts.

A more integrated and widespread African initiative towards exploring the role and relevance of the convention for the region and, where appropriate, assisting countries through the ratification process would enable substantive dialogue and experience exchange among states, and between them and other relevant stakeholders.

Such an effort would also enable coordinated action among regional integration organizations, such as the Economic Community of West African States (ECOWAS), the Southern African Development Community (SADC), the East African Community (EAC), the Arab Maghreb Union and the Union for the Mediterranean (UfM).

Finally, a continent-wide strategy to raise awareness and understanding of the convention would contribute to bridging Africa's different sub-regions in the management of the shared basins that flow across them, especially where basin-wide joint water governance bodies are missing (*e.g.*, SADC and non-SADC member states within the Congo basin; EAC member states and other countries within the Nile basin; and ECOWAS members and non-member states within the Lake Chad basin).

Having the initiative implemented across the continent would entail official leadership in the long-term by Africa's supra national entities, especially the African Union and AMCOW. Such bodies are in a unique position to bring together all of the region's nations, international organizations, donors, local NGOs and other relevant stakeholders, under the common task of considering the convention's role in contributing to improved transboundary water governance in the region and then taking the appropriate actions in a timely and coordinated fashion.

AMCOW has performed a key role in the promotion of IWRM and interstate cooperation on water issues. As such, AMCOW could take the lead in coordinating the implementation of the global initiative in Africa.

This would be in line with AMCOW's mandate to “promote cooperation, security, social and economic development and poverty eradication among member states through the management of water resources.”²⁰ It would also further AMCOW's mission of providing “political leadership, policy direction and advocacy in the provision, use and management of water resources for sustainable social and economic development and maintenance of African ecosystems.”²¹

²⁰ See AMCOW's webpage, at <http://www.amcow.net/index.php?Itemid=1>.

²¹ *Id.*

In taking up such a task, AMCOW could foster further discussions on the convention's role and relevance for Africa and, upon request, facilitate its ratification and future implementation among the countries concerned. In this process, AMCOW would be well-positioned to mobilize and reach out to all the stakeholders concerned, including NGOs, regional and river basin organizations, and local and international experts.

AMCOW-lead activities could, *inter alia*, focus on capacity-building and awareness-raising, including, e.g.:

- Experience-sharing/research & learning workshops to enable dialogue among co-basin states and neighbouring regions, as well as coordination and exchange among regional integration and river basin organizations;
- Regional and/or basin-specific assessments of the role and relevance of the convention in Africa;
- Regular monitoring of progress, including by inviting countries to report back during official high-level meetings;
- Incorporation of the convention into official interstate dialogue platforms and meetings; and
- An invitation to African countries that are already signatories and/or contracting states to share their valuable experience and work leading up to the signature/ratification of the convention, in order to facilitate and inform the ratification process elsewhere.

The global initiative could support AMCOW in this process, in particular by:

- Recruiting a regional coordinator for Africa to follow the AMCOW process, participate in key meetings, and maintain momentum and support for the initiative across the continent;
- Providing expert/legal support for interested countries and regions, including through the development of national baseline studies and analysis of national and international regulatory frameworks, and their relationship to, and compatibility with, the convention;²² and
- Participating in relevant AMCOW meetings and contributing to the relevant discussions.

The process of raising awareness and understanding of the UN Watercourses Convention in Africa should incorporate research, learning and training components, in order to facilitate the widespread ratification and effective implementation of the convention itself *and* of related principles and rules under international water law.

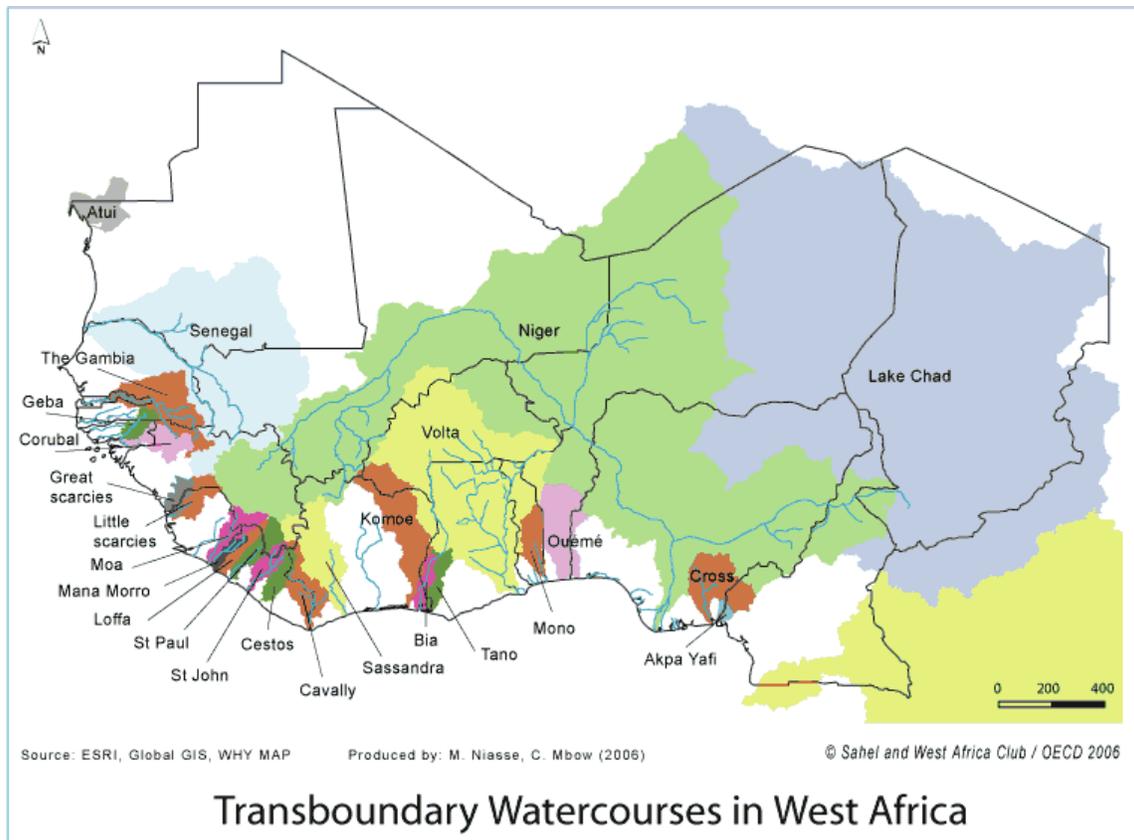
This would ensure that the convention and the discussions around its role and relevance are placed into a broader context, enabling the global/African initiatives themselves to contribute to advancing international water law and the capacity of key stakeholders to implement it.

Accordingly, the initiative in Africa would advance a broader policy outcome, even pending entry into force of the convention: that of building a stronger role for international law in general and of watercourse agreements in particular to support transboundary water cooperation to the benefit of dependent countries, populations and ecosystems.

Through the promotion of the UN Watercourses Convention, therefore, AMCOW could strengthen awareness and understanding of international water law and policy. This, in turn, would enable capacity development among key actors for the implementation not only of the convention itself, but also of existing water agreements and arrangements, as well as customary law.

²² The Centre for Water Law, Policy & Science is well-positioned to lead this component of the global and regional initiatives, reaching out to local experts and other relevant organizations, such as IUCN, as necessary and appropriate.

Annex I – West Africa Regional Brief²³



Source: ECOWAS/OECD (2006)

²³ For more information, see Amidou Garane, *West Africa Regional Assessment: UN Watercourses Convention: Applicability and Relevance in West Africa* (2008), available at http://www.internationalwaterlaw.org/bibliography/WWF/RA_West_Africa.pdf.

1. The Role and Relevance of the UN Watercourses Convention for West Africa

There are 28 transboundary river basins in West Africa, covering 71% of the region's total land mass, including the Niger (11 countries), the Senegal (4 countries), the Volta (6 countries), the Lake Chad (8 countries), and the Gambia basins (3 countries). With the exception of Cape Verde, all West African states share at least one watercourse with a neighbouring country.

Various factors have triggered and, in the future, could worsen interstate tensions over West Africa's transboundary waters. Those include high hydrological interdependence among states, problems related to access to water where and when needed, an overall reduction of surface water availability, and an increase in infrastructure projects, such as large dams, irrigation canals, and inter-basin transfers.

For example,

- Senegal has planned to deviate part of the water of the Senegal River to a 3,000 km network of ancient watercourses. Mauritania has voiced concerns over the impact of such diversions, and the project is currently on hold.
- In 1998, the water level in Lake Volta fell sharply, which in turn had an impact on hydropower generation in Ghana. It was then argued that increased water withdrawals in Burkina Faso over the years had resulted in lowering water levels downstream, but the exact causes of such lowering were never clarified due to the absence of a clear mechanism for the effective exchange of data on the conditions of the basin.
- Nigeria is concerned that the construction of the Kandadji Dam in Niger and the Tossaye dam in Mali might reduce Niger River flows and affect Nigeria's enormous hydro-agricultural and energy investments in that basin.

With increasing levels of water demand across the region and the added pressure from climate change, the risk for water conflicts among West African states has become even more apparent. By 2025, with the predicted improvement in food security and greater domestic and industrial water use, water consumption is expected to quintuplicate in relation to current levels. The multiple dams projected for West Africa will aggravate pressures on river ecosystems even further.

This emerging scenario calls for improved coordination among watercourse states and for the establishment of appropriate dispute settlement and prevention mechanisms for all transboundary basins in West Africa. Responding to this need, states in the region have adopted watercourse agreements with respect to West Africa's largest transboundary watersheds: the Senegal, Gambia, Volta, Lake Chad, and Niger basins.

Yet, the UN Watercourses Convention still has an important role to play in the region:

- The Senegal and Niger River Charters make express reference to the UN Watercourses Convention, and the recent Volta Basin Convention largely reflects the former's provisions. Albeit recent, those treaties leave out important aspects of cooperation codified by the UN Watercourses Convention.
- Many other agreements in West Africa predate the convention and thus considerably fail to incorporate and develop its principles and rules.
- The region's multiple treaties have been agreed in a piecemeal fashion, which makes implementation

more difficult.

The states in the region have yet to agree on minimum, harmonized cooperation standards – something that the UN Watercourses Convention could provide, standardizing practice and bringing moral and legal pressure to bear.

Within the ECOWAS region, the UN Watercourses Convention is already facilitating negotiations on a regional water protocol to be applicable in the future as a common framework among member states. The widespread ratification of the convention would contribute to triggering similar efforts in neighbouring areas.

The ultimate goal would be to ensure a harmonized approach to the utilization, management, and protection of international watercourses among ECOWAS member states and their neighbouring co-basin countries: *Cameroon, Chad, and Mauritania*.

- There are 20 internationally shared basins in West Africa, including the Komoe (4 states), Ouémé (3 countries), Cavally (3 countries), and Moa watersheds (3 countries), which are not covered by any international governance mechanisms.

In those basins, the UN Watercourses Convention could address the existing regulatory gap and directly govern interstate relations.

In West Africa, therefore, even though states' commitment to existing watercourse agreements and joint water bodies are to be praised, the potential for conflict still exists and unresolved disputes are pending.

Once in force and widely ratified in the region, the UN Watercourses Convention will:

- In the short-term, serve as a binding common denominator among co-riparians containing minimum cooperation standards;
- Progressively spur the revision and strengthening of existing watercourse agreements and the adoption of new basin-specific treaties where none exist; and
- Improve dialogue and cooperation between ECOWAS member states and non-members sharing water resources within the region.

2. Regional Commitment to the UN Watercourses Convention

THE 2007 DAKAR CALL TO ACTION

On 20-21 September 2007, GWP-West Africa, in cooperation with other institutions, held in Dakar, Senegal, a regional workshop on the relevance of the UN Watercourses Convention in the region. The workshop brought together 10 countries in the region, sub-regional integration organisations, river basin organisations, and the civil society.

As an outcome of the workshop, participants called on West African Governments to join the convention, underscoring that:

- West African states have become increasingly aware of the need for transboundary water cooperation and thus have adopted many basin agreements. These agreements can be supplemented by the convention and should be progressively updated to reflect the convention's provisions.

- Lack of a more widespread participation by West African states in the drafting and adoption of the UN Watercourses Convention and in its ratification does not reflect opposition to it, but rather lack of awareness of the important role the convention can play to improve cooperation and water management and prevent disputes in the region.
- As many state officials are still unfamiliar with the UN Watercourses Convention, it is imperative to raise awareness of the convention's role and importance in the region and to engage West African states in the process for its entry into force and implementation.
- Widespread adoption and implementation of the UN Watercourses Convention by West African states will represent a major contribution by the region to improving interstate cooperation globally and strengthening international water law.

2008 ECOWAS REGIONAL CAPACITY-BUILDING WORKSHOP: KEY RECOMMENDATIONS

On 9-12 June 2008, the Ghanaian Government, ECOWAS, UNDP, and the UN Office of Legal Affairs, among others, co-hosted in Accra the *Regional Capacity-Building Workshop on Treaty Law and Practice and the Domestic Implementation of Treaty Obligations*. The workshop gathered representatives from all ECOWAS member states, except for Liberia, which was invited, but did not send a representative. The workshop devoted an entire session to the UN Watercourses Convention, its global relevance, and applicability in West Africa.

During discussions and in the *Joint Statement of Recommendations and Conclusions*, participants underscored the need for the UN Watercourses Convention to be widely ratified and implemented across the region.

3. Summary Table

VALUE ADDED BY THE UN WATERCOURSES CONVENTION TO WEST AFRICAN WATERCOURSE AGREEMENTS		
Conventional texts	Weaknesses	Relevant provisions of the Convention
<p>1987 Revised Convention Pertaining to the Creation of the Niger Basin Authority</p> <p><u>Parties:</u> Benin, Burkina Faso, Cameroon, Chad, Cote D'Ivoire, Guinea, Mali, Niger, Nigeria.</p> <p>Algeria and Sierra Leone share in the Niger basin, but are not parties to the 1987 Convention.</p>	Absence of the principle of equitable and reasonable use and participation	Principle of equitable and reasonable use and participation (Articles 5-6)
	Absence of rules on water allocation among various users	Guidelines on water allocation: absence of priority among water uses; duty for states to give due regard to vital human needs in the case of conflict among water uses (Articles 5-6, 10)
	Narrow codification of an obligation of transboundary harm prevention	Due diligence duty on significant transboundary harm prevention (Article 7)
	Absence of a clear and detailed conflict prevention procedure in relation to planned measures	Detailed rules on planned measures (Articles 11-19);
	Absence of a requirement for regular exchange of information and data	Regular data and information exchange (Article 9)
	Exclusive resort to the basin organization for conflict settlement, with no mechanisms involving the intervention by third parties	Conflicts settlement mechanisms involving third parties (Article 33)
<p>2008 Niger Basin Water Charter</p> <p><u>Signatories:</u> Benin, Burkina Faso, Cameroon, Ivory Coast, Guinea, Mali, Niger, Nigeria, Chad</p>	Enunciation of a duty not to cause transboundary harm, without clarifying its relationship to the principle of equitable use;	Recognition of the principle of reasonable and equitable use as the convention's cornerstone (Article 7(2))
	General enunciation of duties related to emergencies and harmful conditions	More detailed provisions on emergencies and harmful conditions (Article 28)

	No clause for the suspension of activities during consultations and negotiations on planned measures	Clear obligation to maintain implementing activities suspended in the course of negotiations/consultations during a fixed period (Article 17(3))
	Provisions on pollution are not explicit on the duty to take <i>joint</i> measures, where appropriate;	Includes an express requirement that states must act jointly, where appropriate, in order to prevent, reduce and control water pollution;
1972 Conventions Relating to the Statute of the Senegal River & Pertaining to the Creation of the Organization for the Management of the Senegal River <u>Parties:</u> Guinea, Mali, Mauritania, Senegal	Fail to incorporate important obligations and procedures	Codification & clarification of the principle of reasonable and equitable use and participation (Articles 5-6) Provisions on data exchange, environmental protection, harmful conditions and emergencies (Articles 20-23, 25-28)
	Absence of detailed procedures and rules regarding planned measures	Detailed rules on planned measures (Articles 11-19)
2002 The Charter of Water of the Senegal River <u>Parties:</u> Guinea, Mali, Mauritania, Senegal	Definition of the “catchment area of the river” does not include aquifers	Definition of international watercourses as a system of surface and underground waters (Article 2(a)-(b))
	<p>Fails to incorporate the principle of reasonable and equitable participation as a framework for benefit-sharing</p> <p>Fails to provide for guidance in the application of the principles of reasonable and equitable use and participation</p> <p>Does not contain a general obligation on significant transboundary harm prevention and is silent on the relation between basic principles</p>	Codification and clarification of the principles of reasonable and equitable use and participation and of significant harm prevention (Article 5-7)
	Does not codify and detail a data-sharing obligation;	Requirements on regular exchange of data and information (Article 9)

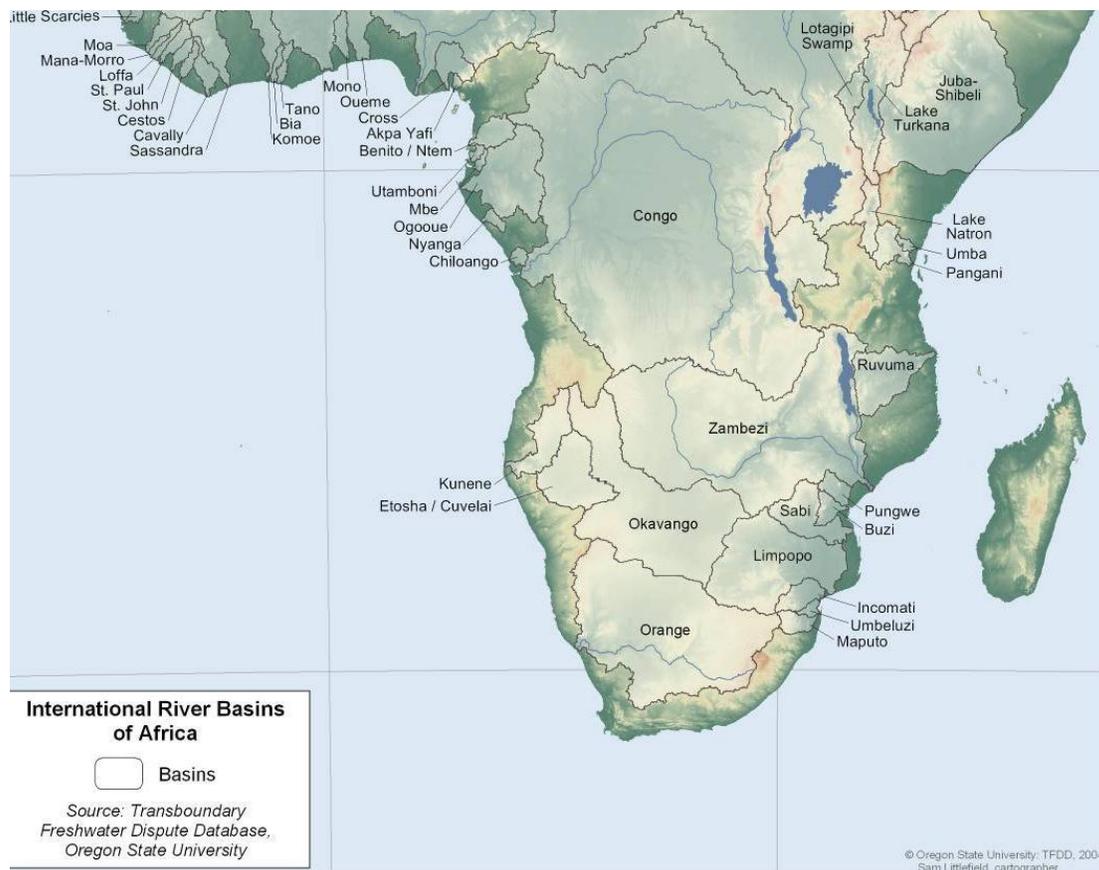
	No timelines limiting the period for parties to achieve an agreement at the Ministerial level on planned measures	Rules on consultations and negotiations on planned measures (Article 17)
	No provisions on fact-finding procedures, in the absence of agreement through other settlement mechanisms within a certain period	Codifies and details fact-finding procedures (Article 33(3)-(9))
1978 Conventions Relating to the Status of the Gambia River & to the Creation of the Gambia River Basin Development Organization <u>Parties:</u> Gambia, Guinea, Guinea-Bissau, Senegal	Does not apply to groundwater connected to the Gambia river	Definition of international watercourses as a system of surface and underground waters (Article 2(a)-(b))
	Fails to incorporate obligations related to harm prevention and equitable use	Codification and clarification of the principles of reasonable and equitable use and participation and of the no-harm rule (Article 5-7, 10)
	Does not codify and detail a data-sharing obligation	Clarifies the data-sharing obligation (Articles 9 and 31)
	No provisions on environmental protection	Rules relating to the protection, preservation, and management of international watercourses (Articles 20-26)
	Provisions on planned measures are too generic	Detailed rules on planned measures (Articles 11-19)
	No provisions on fact-finding procedures, in the absence of agreement through other dispute settlement mechanisms within a certain period	Incorporates fact-finding procedures (Article 33(3)-(9))
1964 Convention and Statutes relating to the Development of the Chad Basin <u>Parties:</u> Cameroon, Central African Republic, Chad, Niger, Nigeria <u>Observers:</u> Sudan	Although groundwaters are mentioned for purposes of use and exploitation, the definition of the “Chad basin” does not seem to include aquifers	Defines international watercourses as a system of surface and underground waters (Article 2(a)-(b))
	Fails to incorporate obligations related to harm prevention and equitable use	Codifies and clarifies the principles of reasonable and equitable use and participation and the no-harm rule (Articles 5-7)
	Does not codify and detail a data-sharing obligation	Clarifies the data-sharing obligation (Articles 9 and 31)

	No provisions on environmental protection	Rules on the protection, preservation, and management of international watercourses (Articles 20-26)
	Does not address emergency situations and harmful conditions of an international watercourse	Rules on emergency situations and harmful conditions (Articles 27-28)
	Absence of a clear and detailed conflict prevention procedure in relation to planned measures	Detailed rules on planned measures (Articles 11-19)
	No provisions on fact-finding procedures, in the absence of agreement through other mechanisms within a certain period	Incorporates fact-finding procedures (Article 33(3)-(9))
<p>2007 Convention on the Statute of the Volta River and Setting Up the Volta Basin Authority</p> <p><u>Parties:</u> Benin, Burkina Faso, Ivory Coast, Ghana, Mali, Togo</p>	<p>Fails to apply the principles of reasonable and equitable participation to the protection of the Volta River</p> <p>No guidance for applying the principles of reasonable and equitable use and participation.</p>	<p>Codifies and clarifies the principles of reasonable and equitable participation (Article 5(2))</p> <p>Contains guidelines on water allocation and benefit-sharing (Articles 5-6, 10)</p>
	Does not qualify the no-harm rule and is silent on the consequences of significant transboundary harm	Details the no-harm rule and its relationship with the principle of reasonable and equitable use (Article 7)
	Although authorizing major projects is within the mandate of the Volta Basin Authority, the convention lacks detailed procedures for planned measures	Detailed rules on planned measures (Articles 11-19)
	Codifies a data-sharing duty, without clarifying its content and scope	Clarifies the data-sharing obligation (Articles 9 and 31)
	No provisions on environmental protection, except for a general enunciation of the principles of ecosystem protection, precaution & prevention	Rules relating to the protection, preservation, and management of international watercourses (Articles 20-26)
	Does not address emergency situations and harmful conditions	Rules and procedures on emergency situations and harmful conditions (Articles 27-28)

	Fails to incorporate the principle of non-discrimination	Codifies the principle of non-discrimination (Article 32)
	No timelines limiting the period for parties to achieve an agreement in disputes submitted to third-parties; No provisions on fact-finding procedures	Establishes a timeline after which, in the absence of agreement, unilateral submission to a fact-finding commission is allowed, and details fact-finding procedures (Article 33(3)-(9))
Protocol of the Agreement on the Management of the Koliba-Korubal River <u>Parties:</u> Guinea, Guinea-Bissau	Complete absence of specific rules and procedures to facilitate, guide, and inform the work of the technical committee the agreement creates	Most provisions of the UN Watercourses Convention would be relevant in this case

Annex II – Southern Africa Regional Brief²⁴

Transboundary Watersheds in Southern Africa



²⁴ For more information, see Daniel Malzbender & Anton Earle, Southern Africa Regional Assessment; *The Impact and Implications of the Adoption of the 1997 UN Watercourse Convention for Countries in Southern Africa* (2008), available at http://www.internationalwaterlaw.org/bibliography/WWF/RA_SADC_states.pdf.

The SADC member states share a total of 16 international rivers among them or with neighbouring, non-SADC states. These are the Buzi, Congo, Cunene, Cuvelai, Incomati, Limpopo, Maputo, Nile, Okavango, Orange-Senqu, Pangani, Pungwe, Rovuma, Save, Umbeluzi, and the Zambezi basin.

The UN Watercourses Convention is generally in harmony with the agreements that govern some of those watersheds. A little after its adoption, as mentioned above, the convention served as the fundamental basis for the drafting of the Revised SADC Protocol. The SADC Protocol is based on the convention's principles and, to a large degree, mirrors the provisions of the latter. Except for the Democratic Republic of Congo, Madagascar, and Zimbabwe, all the Community's members are parties to the SADC Protocol.

Upon entry into force and widespread endorsement in the region, the UN Watercourses Convention would serve as a stronger, more persuasive instrument to supplement and support the interpretation and application of the SADC Protocol by:

- **EXTENDING THE HARMONIZED LEGAL FRAMEWORK THAT SADC STATES HAVE CREATED AMONG THEMSELVES TO BASINS SHARED WITH NON-SADC NEIGHBOURS:**

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.

- **INFORMING THE INTERPRETATION OF AMBIGUOUS PROVISIONS 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 neighbor 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.

- **ENCOURAGING THE HARMONIZATION OF WATERCOURSE AGREEMENTS AND DOMESTIC WATER POLICIES ACROSS SOUTHERN AFRICA AND NEIGHBOURING REGIONS:**

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.

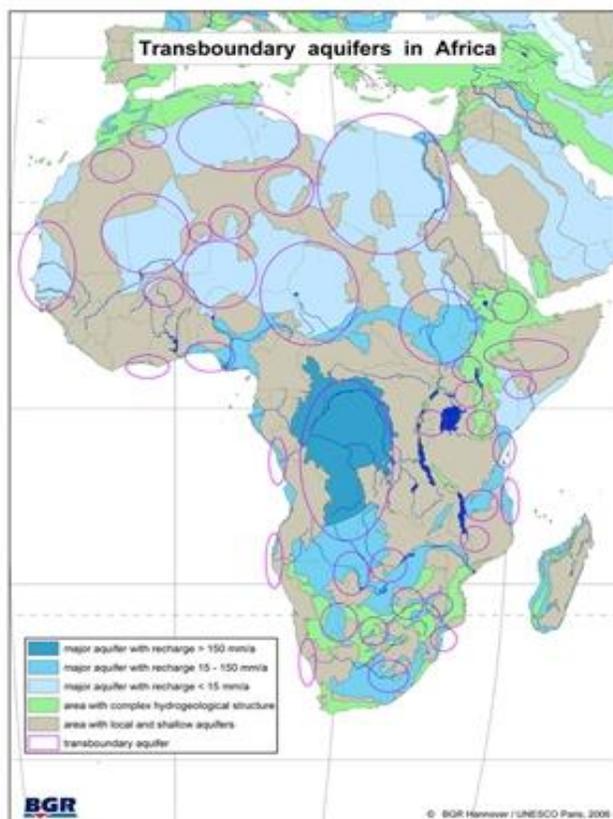
In addition, as discussed above, the Convention’s entry into force would provide an additional push towards strengthening the dialogue and exchange between SADC and non-SADC states.

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.

- **OFFERING ADDITIONAL MECHANISMS FOR DISPUTE SETTLEMENT:**

It may as well 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.



Annex III – The Scope of the UN Watercourses Convention and the ILC Draft Articles on Transboundary Aquifers

The UN Watercourses Convention applies to international watercourses, defined as a “system of surface waters and ground waters constituting by virtue of their physical relationship a unitary whole and normally flowing into a common terminus... parts of which are situated in different States.”²⁵ Therefore, groundwater is within the scope of the convention to the extent that it is hydraulically connected to a water system located within the territories of two or more countries.

In order to develop in more detail the specific rules and principles of contemporary international groundwater law, the International Law Commission adopted in 2008 a set of 19 draft articles that aim to apply and adjust the provisions of the UN Watercourses Convention to the specific case of

²⁵ UN Watercourses Convention, Article 2(a)-(b).

transboundary aquifers: the ILC Draft Articles on Transboundary Aquifers (ILC Draft Articles).²⁶

Recently, the UN General Assembly took note of the ILC Draft Articles and encouraged States to apply its provisions when adopting bilateral or regional arrangements for the management of transboundary aquifers.²⁷

A decision by the UN General Assembly as to the final shape, scope and content of the ILC Draft Articles is still pending.

In the meantime, the UN Watercourses Convention, as a formal treaty adopted by an overwhelming majority of the states at the UN General Assembly, remains as the most important codification of international water law, both with regard to surface and underground waters.

In practical terms, the convention can offer guidance and serve as a first entry point for African countries to manage those aquifers that are in themselves transboundary and/or are connected to transboundary watersheds.

This brief was prepared by:



²⁶ International Law Commission, Draft articles on the Law of Transboundary Aquifers (2008), available at http://untreaty.un.org/ilc/texts/instruments/english/draft%20articles/8_5_2008.pdf.

²⁷ UN GA Resolution 63/124, UN Doc. A/RES/63/124 (15 Jan. 2009).