

Convention on the Law of the Non-Navigational Uses of International Watercourses



From pioneer to pragmatist or pariah: are South Africa's recent water law developments compatible with its obligations under the UN Watercourses Convention?

South Africa (SA) & UN Watercourses Convention (UNWC)

1997: PIONEER

- UNWC adopted 22 May 1997, opens for signature
- SA one of inaugural signatories, ratifies in 1998

1997-2014: PRAGMATIST?

- SA develops new domestic water law regime
- SA ratifies SADC regional agreement for shared rivers
- SA agrees multiple treaties for its key international rivers
- UNWC initially stalls then State parties increase gradually

2014 – Now: PARIAN?

- UNWC enters into force 17 August 2014

Underlying rationale to SA legal developments since UNWC?

PRAGMATIST?

- Entered into basin/regional treaties to *strengthen overall transboundary water governance* and benefit-sharing
- Enacted national water law regime that views national water issues in *context of regional/global water issues*
- **International & domestic laws incorporate/align with UNWC**

AND/OR

PARIAH?

- Entered into basin/regional treaties primarily to secure *domestic access to water*, specifically for Gauteng Province
- Enacted national water law regime operating *in isolation* from regional/global water issues
- **International & domestic laws do not incorporate or align with UNWC**

Background of SA ratifying UNWC giving context to today

UNIQUE SITUATION OF BEING BOTH UPSTREAM & DOWNSTREAM

- Upstream:
 - Limpopo/Olifants River; Incomati River; Maputo River
- Downstream:
 - Orange-Senqu River (but upstream of Namibia)

REGIONAL WATER SCARCITY UNDERPINS NATIONAL SUPPLY

- Acute reliance on Lesotho for water in Gauteng Province (Orange-Senqu)
- Rural/urban usage in northern & eastern provinces (Limpopo & Incomati) agriculture (irrigation), mining, dams and potable water for households

LEGAL DEVELOPMENTS AROUND CONSTITUTIONAL REFORM

- Domestic:
 - SA Constitution of 1994
 - Water Services Act -1997 (National Water Strategy White Paper 1997)
- International:
 - SADC established 1992
 - SADC Protocol on Shared Watercourses - 1995

SA water law developments since UNWC

REGIONAL

- SADC Revised Protocol on Shared Watercourses – 2000

INTERNATIONAL

- ORASECOM Agreement (Orange-Senqu River) – 2000
- Interim Incomati-Maputo Tripartite Agreement – 2002
- LIMCOM Agreement (Limpopo River) – 2003

NATIONAL

- National Water Act - 1998

CRITICAL QUESTION

Are each of these legal regimes compatible with SA's obligations under the UNWC now that it is in force?

UN Watercourses Convention - 1997

Convention on the Law of the Non-Navigational Uses of International Watercourses

FRAMEWORK CONVENTION FOR INTERNATIONAL WATERCOURSES

AIM: *'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... taking into account the special situation and needs of developing countries'*

CODIFIES PROCESSES FOR TRANSBOUNDARY WATER GOVERNANCE

- Notification and consultation for planned measures
- Sharing of data and information between states
- Provides legal mechanisms for redress - arbitration
- Allows scope for incorporating past/future regional water agreements

INTEGRATES RECOGNISED GENERAL PRINCIPLES/RULES OF LAW

- Equitable & reasonable utilisation (ERU) and participation
- Environmental Impact Assessment (EIA) & no significant harm
- Obligation for parties to cooperate



SADC Revised Protocol - 2000



REGIONAL TREATY FOR SHARED WATERCOURSES & DEVELOPMENT

- STATES: All SADC States excluding Zimbabwe
- IN FORCE: 2003
- AIM: Regional framework for water use management & integration
- INSTITUTION: SADC Secretariat (Water Sector Coordinating Unit)

REPLACED 1995 PROTOCOL TO ALIGN WITH UNWC

- Incorporates same principles ie ERU & no significant harm
- Similar processes ie notification & consultation for planned measures
- Encourages formation of basin agreements & institutions
- Allows for harmonisation with past/future regional water agreements

SOME KEY PROVISIONS DIFFER TO UNWC

- Priority on water use for regional integration & poverty alleviation
- Reference between no significant harm & ERU slightly altered
- Must go to SADC Tribunal for disputes unresolved by negotiations

SADC Revised Protocol compatibility with UNWC

EQUITABLE & REASONABLE USE v NO SIGNIFICANT HARM

- Difference between SADC RP & UNWC on whether principle of “equitable and reasonable utilisation” takes precedence over “no significant harm”
 - **UNWC:** may give precedence to “equitable & reasonable utilisation”
 - **SADC RP:** may prioritise “no significant harm”
 - When read with preparatory materials/preamble = it doesn't?
 - Original SADC Protocol was revised align with UNWC...

UNWC MORE DETAILED IN SOME PARTS THAN SADC RP & VICE VERSA

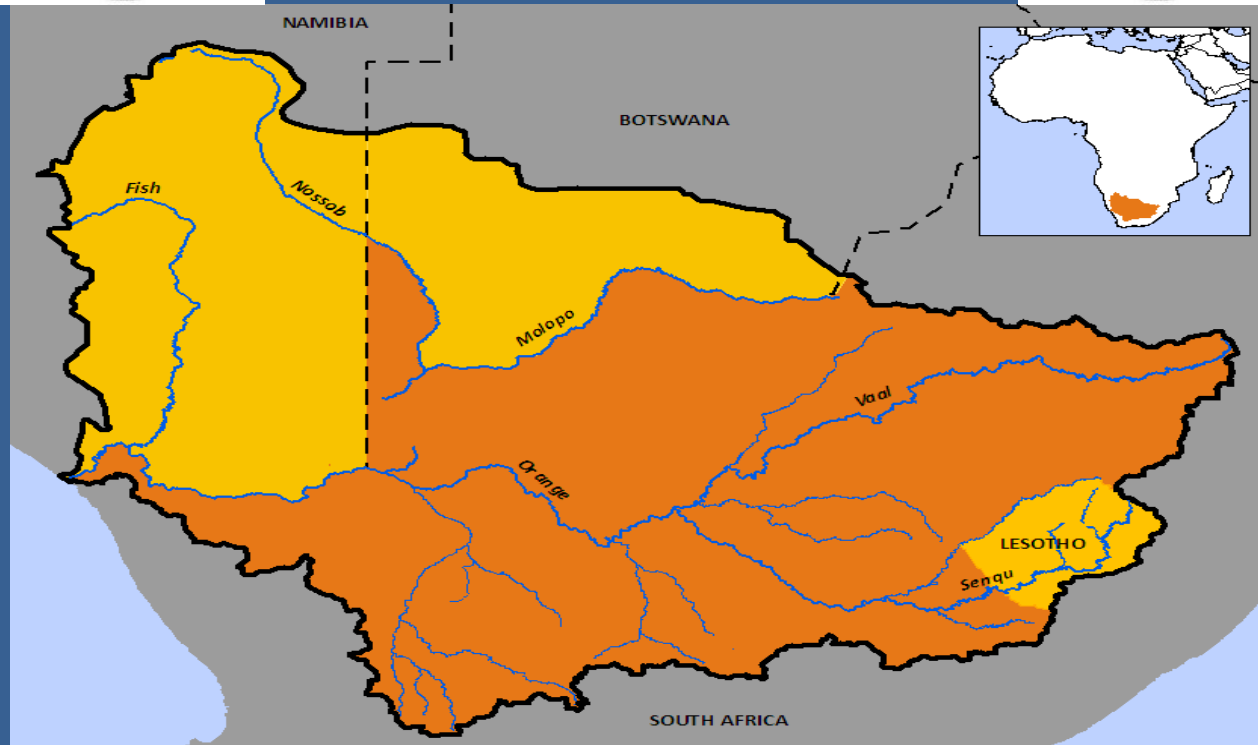
- **UNWC:** more detailed provisions in parts ie fact-finding commission
- **SADC RP:** more detailed & contextual ie regional agreements & institutions
 - General finding of legal compatibility rather than contradiction
 - UNWC support interpretation/implementation of SADC RP, vice versa

DISPUTE RESOLUTION

- **UNWC:** very specific in procedures/timeframes for dispute resolution
- **SADC RP:** parties must attempt to negotiate then use SADC Tribunal
 - Leaves scope for indecision/delay & does UNWC take precedence?



ORANGE-SENQU RIVER & ORASECOM - 2000



Source: The Orange-Senqu River Awareness Kit www.orangesenquirak.org



ORANGE-SENQU RIVER & ORASECOM - 2000



ORANGE-SENQU RIVER & TRIBUTARIES

- STATES: SA, Botswana, Lesotho, Namibia,
- MAIN USES: Industry (mining, irrigation), hydropower, potable water
- KEY ISSUES: supply (Gauteng relies on Lesotho), water contamination

ORANGE-SENQU AGREEMENT - 2000

- STATES: All within basin
- INSTITUTION: ORASECOM provides coordination mechanism
- MANDATE: Inter-governmental body limited to technical advisory role
- IMPLEMENTATION: National governments via IWRM basin plans

KEY PROVISIONS & PRINCIPLES

- Acknowledges existing water agreements, including SADCRCP & UNWC
- Outlines obligations of parties & general provisions in line with SADCRCP
- Allows scope for adaptation based on future agreements/amendments

ORASECOM Agreement compatibility with UNWC

UNWC MORE DETAILED IN PARTS THAN ORASECOM, VICE VERSA

- **ORASECOM:** Key principles ie ERU mirror SADC RP, focus on ORASECOM
- **UNWC:** Detailed procedures ie Environmental Impact Assessment (EIA)
 - General finding of legal compatibility rather than contradiction
 - UNWC details can aid interpretation/implementation of ORASECOM

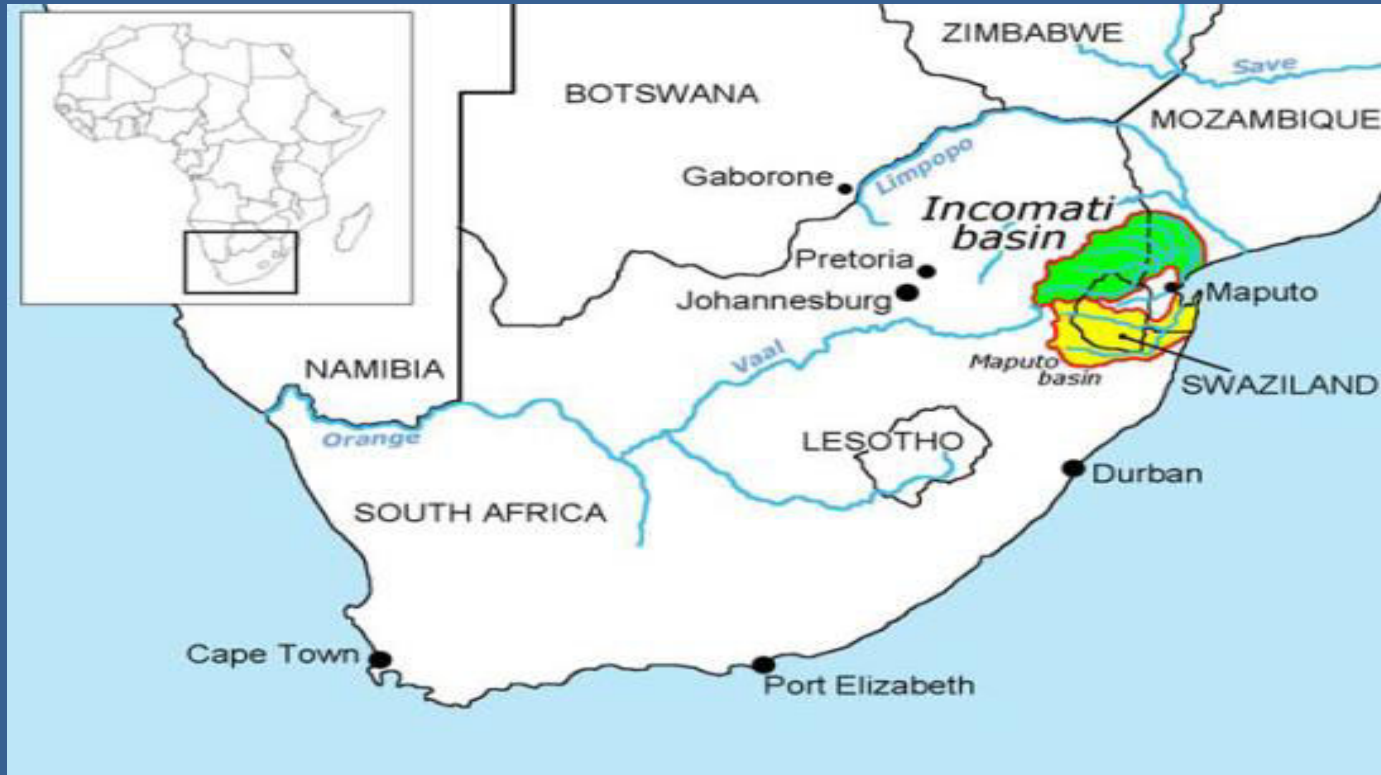
DISPUTE RESOLUTION

- **ORASECOM:** mirrors SADC RP – parties negotiate then use SADC Tribunal
- **UNWC:** very specific in procedures/timeframes for dispute resolution
 - Does UNWC take precedence in disputes between SA & Namibia?

INSTITUTIONAL MANDATE & GOVERNANCE OVERLAP

- **ORASECOM:** key overarching institution limited to technical advisor role
- **UNWC:** Namibia & SA only parties
 - If UNWC Secretariat established would require close coordination
 - National governments implement IWRM Basin Plans (via ORASECOM)

INCOMATI-MAPUTO RIVERS & TRIPARTITE AGREEMENT - 2002



Source: UNESCO <http://webworld.unesco.org/water/wwap/pccp/zaragoza/basins/incomati/incomati.pdf>

INCOMATI-MAPUTO RIVERS & TRIPARTITE AGREEMENT - 2002

INCOMATI & MAPUTO RIVER BASINS

- STATES: SA, Mozambique, Swaziland
- USES: agricultural irrigation & forest plantations, inter-basin transfers
- MAIN ISSUES: over-allocated usage, water scarcity, past conflict

INTERIM INCOMATI –MAPUTO TRIPARTITE AGREEMENT – 2002

- STATES: All within both basins
- INSTITUTION: Tripartite Permanent Technical Committee (TPTC)
- MANDATE: Inter-governmental body for data sharing & allocation plans
- IMPLEMENTATION: National governments based on agreed allocations

KEY PROVISIONS & PRINCIPLES

- Water-sharing agreement with usage allocations based on agreed data
- Basic principles & processes ie transboundary harm, dispute settlement
- Detailed annexes ie water uses for each river, existing/planned projects
- Lists past water agreements that remain in force so far as don't conflict

Incomaputo Tripartite Agreement compatibility with UNWC

SPECIFIC USAGE & FLOW ALLOCATIONS MORE DETAILED THAN UNWC

- **UNWC:** provides basic principles & processes for agreeing uses/flow
- **INCOMAPUTO:** specifies percentages/figures for water allocation/uses
 - UNWC compatible as supports specific & contextual basin treaties

CURRENT STATUS & EXISTING USES / FLOW / PROJECTS

- **UNWC:** entered into force 2014
- **INCOMAPUTO:** in force until 2010 or superseded by new river agreements
 - Unsure of status of new agreements & whether currently in force?
 - Incorporate both rivers & all basin States or now separate agreements?
 - Do they build on UNWC processes to agree water uses/flow/projects?

DISPUTE RESOLUTION

- **UNWC:** very specific in procedures/timeframes for dispute resolution
- **INCOMAPUTO:** specifies negotiation, then arbitration, lastly SADC Tribunal
 - No fact-finding first & specificity leaves potential for conflict with UNWC

LIMPOPO RIVER & LIMCOM - 2003



Source: Limpopo River Awareness Kit www.limpoporak.com

LIMPOPO RIVER & LIMCOM - 2003



LIMPOPO RIVER & TRIBUTARIES

- STATES: SA, Botswana, Zimbabwe, Mozambique
- MAIN USES: Agricultural irrigation (50%), potable water, mining
- KEY ISSUES: Diminishing rainfall, dams, water contamination

LIMCOM AGREEMENT - 2003

- STATES: All within basin
- INSTITUTION: LIMCOM provides coordination & technical advise
- MANDATE: Inter-governmental body making IWRM recommendations
- IMPLEMENTATION: National governments via plans from studies

KEY PROVISIONS & PRINCIPLES

- Acknowledges existing water agreements, including SADCRCP & UNWC
- Allows scope for adaptation based on future agreements/amendments
- SADCRCP principles/processes ie pollution prevention, EIA, disputes

LIMCOM Agreement compatibility with UNWC

UNWC MUCH MORE DETAILED THAN LIMCOM

- **LIMCOM:** Basic principles/processes mirror SADC RP, focus on LIMCOM
- **UNWC:** Detailed procedures/principles that go beyond SADC RP
 - Generally compatible despite some terminology ie “prevention principle”
 - UNWC details can aid interpretation/implementation of LIMCOM

INSTITUTIONAL MANDATE & GOVERNANCE OVERLAP

- **LIMCOM:** only in force 2011 but no executive power (national governments)
- **UNWC:** no institution but SA must implement obligations via LIMCOM
 - LIMCOM interface with bodies ie Joint Permanent Technical Committee
 - If UNWC Secretariat established would require close coordination

DISPUTE RESOLUTION

- **LIMCOM:** simplifies SADC RP so parties negotiate then use SADC Tribunal
- **UNWC:** very specific procedures/timeframes for dispute resolution ie ICJ
 - UNWC can aid process, yet SADC Tribunal decision is “final & binding”

National Water Act - 1998



ADVANCED LEGAL FRAMEWORK TO ADDRESS PAST INJUSTICES

PURPOSE: *“ensure that the nation’s water resources are protected, used, developed, conserved, managed and controlled [...] and for achieving this purpose to establish suitable institutions and to ensure that they have appropriate community, racial and gender representation”*

NATIONAL WATER REGIME CODIFIES PROCESSES/PRINCIPLES

- Provides for water allocation procedures & catchment area authorities
- Establishes base water quality standards, monitoring & enforcement
- EIA legislation to assess projects, determine impacts, prevent harm

INTERNATIONAL WATER MANAGEMENT ADDRESSED IN CHAPTER 10

- Minister can establish bodies to implement transboundary agreements
- Encourages management & “regional cooperation on water resources”

National Water Act compatibility with UNWC

GENERAL PRINCIPLES SIMILAR BUT FOCUS DIFFERS

- **UNWC:** focus on transboundary water, with sovereign aspects
- **NWA:** focus on sovereign water, with transboundary aspects
 - Based on National Water Policy 1997 which incorporates Helsinki Rules
 - Progressive so favours IWRM & benefit-sharing than national isolation
 - Overall general compatibility despite differing scale of focus

BASIC WATER MANAGEMENT PROCESSES COMPATIBLE

- **UNWC:** specific provisions for transboundary EIA, water allocations/quality
- **NWA:** specific provisions for EIA, water allocations & quality standards
 - Processes compatible but grey area for SA v basin allocations/quality

GOVERNANCE GAPS OR OVERLAP

- **UNWC:** no formal institutional structure (Secretariat may be developed)
- **NWA:** national institutional structure is highly complex re scales/agencies
 - Gaps/overlap leave scope for indecision/delay on implementing UNWC?

SA & UNWC: Pragmatist, pariah or somewhere in between?

REGIONAL

- Mirrors UNWC so overall very compatible (dispute process?)
- UNWC detail can support interpreting SADC RP, vice versa
- **Potential issues:** ERU or no significant harm takes precedence?

INTERNATIONAL

- Basin agreements: generally compatible & not contradictory
- Institutional focus, can elaborate water-sharing using UNWC
- UNWC detail on processes/principles can aid interpretation
- **Potential issues:** dispute process, governance overlaps/gaps

NATIONAL

- Basic compatibility re water allocation, water quality, EIA
- **Potential issues:** SA water use/allocations & ERU v basins

Issues for future SA water laws & compatibility with UNWC

DOMESTIC WATER ALLOCATION V REGIONAL WATER SCARCITY

- *SA water 98% allocated, 2% for future uses* CNBCAfrica, 2015
- No Orange-Senqu or Limpopo agreements re ERU, flow, allocations
- Enhance basin institutions' mandates to execute IWRM plans?

TRANSBOUNDARY HARM FROM MINING & FERTILIZERS

- *"By 2015, 80 percent of South Africa's fresh water resources will be so badly polluted that no process of purification available in the country will be able to make it fit for consumption"* The Times, 2010
- SA must address urgent transboundary pollution ie AMD on Limpopo
- Risk of legal disputes & liability under UNWC 'no harm' obligations

DEVELOPING TRANSBOUNDARY AQUIFER AGREEMENTS

- *70% of 250m people in SADC rely on groundwater* World Bank, 2014
- UNWC, SADCRCR, SA basins lack detailed provisions re groundwater

THANK YOU



27/05/2015

Rémy Kinna - IWRA World Water Congress 2015, Edinburgh, Scotland

22