

Managing Transboundary Natural Resources in Kenya

Kariuki Muigua

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Abstract

This paper generally discusses the main principles that apply in the management of shared resources with a particular focus on what Kenya should do to enhance and achieve peaceful co-existence with its neighbours, while drawing maximum benefits from these transboundary resources. Notably, while there may be other many shared resources, this paper mainly focuses on Lake Victoria Basin water resources as well as the Mara Ecosystem which form the bulk of the shared resources in the context of Kenya. The paper also highlights the possible means of managing potential transboundary conflicts.

1. Introduction

Under international law, every state has the right to exercise sovereignty over its natural resources found within its territorial borders.¹ However, natural resources that cross political borders, present a complex challenge particularly in managing environmental threats, and in regulating access to and use of the accruing benefits. As such, international environmental law comes in since no single State can allege to be solely entitled to access, use or manage such shared resources to the exclusion of all the others. All the concerned States must be involved in the management of shared natural resources.² This paper examines the management of transboundary resources that Kenya shares with its neighbours.

2. Definition of Transboundary/Shared Natural Resources

Transboundary or shared natural resources are resources that cross the political boundaries of two more States.³ They are natural resources that are transected in their natural state by a political boundary such as a national frontier.⁴ Plants, animals, micro-organisms,

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¹ See Stilz, Anna. "Why do states have territorial rights?." *International theory* 1, no. 2 (2009): 185-213.

² Principle 10 of the Rio Declaration on Environment and Development, 1992, provides as follows: "Environmental issues are best handled with participation of all concerned citizens, at the relevant level. At the national level, each individual shall have appropriate access to information concerning the environment that is held by public authorities, including information on hazardous materials and activities in their communities, and the opportunity to participate in decision – making processes. States shall facilitate and encourage public awareness and participation by making information widely available. Effective access to judicial and administrative proceedings, including redress and remedy, shall be provided."

³ Dhliwayo, M., "Legal Aspects of Trans-Boundary Natural Resources Management in Southern Africa," In *Commons in an Age of Globalisation,* the Ninth Conference of the International Association for the Study of Common Property, 2002.

⁴ Beyene, Z. & Wadley, I., 'Common goods and the common good: Transboundary natural resources, principled cooperation, and the Nile Basin Initiative,' *Breslauer Symposium on Natural Resource Issues in Africa*, Center for

waters, weather systems, and other elements that constitute the environment, including people, do not remain within jurisdictional boundaries. Therefore, issues of common concern arise out of shared natural area, resource system, or migratory species. A good example is the Mara-Serengeti wildebeests which migrate annually from Kenya to Tanzania and back.

3. Transboundary Natural Resources in Kenya

There are various transboundary natural resources located within the territorial boundaries of Kenya that are shared with other states. These include lakes, mountains, rivers and river basins, aquifers, wildlife etc. Kenya shares most of her natural resources with countries such as Tanzania, Uganda, South Sudan and Ethiopia.

3.1 Serengeti-Mara Ecosystem

The Serengeti-Mara Ecosystem is a trans-boundary ecosystem between Tanzania and Kenya. It is located on south-western Kenya and north-central Tanzania and comprises of ecological units within and outside the Protected Area (PA) systems of the Serengeti National Park (SNP) in Tanzania and the Maasai Mara National Reserve (MMNR) in Kenya.⁵ The Serengeti-Mara Ecosystem is believed to support the most diverse migration of grazing mammals on earth. The Mara, although only a quarter of the total ecosystem area, is the most crucial to the survival of the entire system because it is the source of forage for wildlife migrating through the Serengeti during critical points in the dry season.⁶ Further, according to statistics, only 25% of the wildlife habitat in the Mara part of the ecosystem is protected (in the Mara Reserve), while the rest lies within pastoral and agricultural areas north of the reserve.⁷ These lands outside the reserve are also under more pressure than the rest of the ecosystem, with recent unprecedented human population growth, expansion of wheat farming in wildebeest calving grounds and expansion of tourism facilities.⁸ All these issues have an impact on sustainable management of these ecosystems by the member States. The need for cooperation in managing shared wildlife resources is, for instance, captured under the *Wildlife Conservation*

African Studies, UC Berkeley, 2004, p. 3, Paper presented as part of the Breslauer Graduate Symposium on Natural Resource Issues in Africa - held March 5th, 2004 at UC Berkeley. Available at <http://escholarship.org/uc/item/9492s0k4> [Accessed on 22/11/2018].

⁵ Retouch Africa International Limited, 'Serengeti-Maasai Mara Ecosystem Protection and Monitoring Plan,' p. viii, available at <http://195.202.82.11:8080/jspui/bitstream/123456789/198/1/Serengeti%20%20Maasai%20Mara%20Ecosystem%20%20%20Serengeti%20%20Maasai%20Mara%20Ecosystem%20Transboundary%20Protection%20and%20Monitoring%20Plan.pdf> [Accessed on 22/11/2018].

⁶ Reid, R.S., et al., 'People, Wildlife and Livestock in the Mara Ecosystem: the Mara Count 2002,' Report, Mara Count, 2002, (International Livestock Research Institute, Nairobi, Kenya, 2003); See also Ayiamba, E., Owuor, S. and Kallehave, P., (eds), *Maasai Mara The Challenges Of A World Unique Ecosystem*, Maasai Mara Science and Development Initiative, 2015). Available at http://maasaimarascience.org/fileadmin/projects/masaimara/MMSDI_Policy_Paper_Final.pdf

⁷ *Ibid.*

⁸ *Ibid.*

and Management Act 2013⁹, which requires the Cabinet Secretary in charge to, subject to subsection (5), formulate and publish in the Gazette a national wildlife conservation and management strategy at least once every five years, in accordance with which wildlife resources shall be protected, conserved, managed and regulated.¹⁰ The national wildlife conservation and management strategy shall prescribe the principles, objectives, standards, indicators, procedures and incentives for the protection, conservation, management sustainable utilization and control of wildlife resources and shall, in particular prescribe, inter alia— reflection on regional co-operation and common approaches for enhancing protection, conservation and management of shared wildlife resources.¹¹

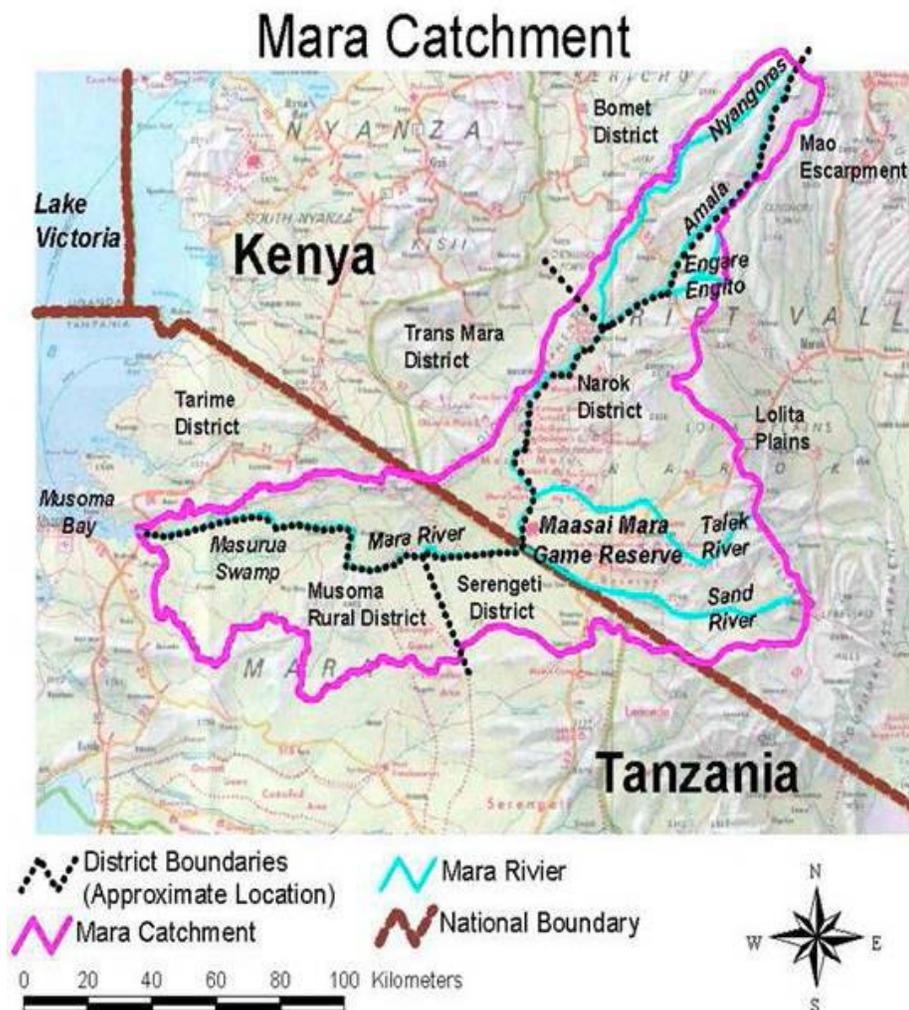


Fig. 3.0 Source: Copyright ©Retouch Africa International Limited

⁹ Act No. 47 of 2013, Laws of Kenya.

¹⁰ Act No. 47 of 2013, Sec. 5(1).

¹¹ Ibid, s. 5(2)(o).

3.2 Lake Victoria Basin

The Lake Victoria basin is located in the central region of East Africa and covers an estimated area of 194,000 square Kilometers of which 7% is in Burundi, 22% in Kenya, 11% in Rwanda, 44% in Tanzania and 16% in Uganda.¹² The lake basin contains Lake Victoria, the second largest lake in the world with an area of 68,800 Km² and a number of satellite lakes and rivers.¹³ The main lake and satellite lakes are fringed in many places by extensive wetlands.¹⁴ About 35 million people (about 30% of the entire population of East Africa) are estimated to live and derive their livelihood directly or indirectly from the basin.¹⁵ Lake Victoria also supports one of the largest freshwater fisheries in the world. By 2007, the lake was producing about one million tons of fish annually valued between 300-400 million US dollars. The lake had a high fish species diversity of over 500 species of fish most of which were endemic to the lake and were of economic and scientific value.¹⁶ The lake provides water for irrigation, hydropower generation, industrial and domestic use, and modulates local climate.¹⁷

3.3 Nile River Basin

The Nile River, with an estimated length of over 6800 km, is the longest river in the world flowing from south to north over 35 degrees of latitude.¹⁸ It is fed by two main river systems: the White Nile, with its sources on the Equatorial Lake Plateau (Burundi, Rwanda, Tanzania, Kenya,

¹² Lake Victoria Basin Commission. "Identification and mapping of ecologically sensitive areas (ESAS) in Lake Victoria," (2011), p.1. Available at https://www.researchgate.net/profile/Richard_Abila/publication/263682412_IDENTIFICATION_AND_MAPPING_OF_ECOLOGICALLY_SENSITIVE_AREAS_ESAS_IN_LAKE_VICTORIA/links/0f31753baa1568b1b1000000/IDENTIFICATION-AND-MAPPING-OF-ECOLOGICALLY-SENSITIVE-AREAS-ESAS-IN-LAKE-VICTORIA.pdf [Accessed on 22/11/2018]; See also Abuodha, J.O.Z., Muyodi, F.J., Hecky, R.E. and Mwanuzi, F.L., *Lake Victoria Environment Management Project (LVEMP) Water Quality and Ecosystem Status: Lake Victoria Regional Water Quality Synthesis Report*. 2005, p. 1. Available at http://repository.seku.ac.ke/bitstream/handle/123456789/729/Gikuma-Njuru_National%20water%20quality%20synthesis...PDF?sequence=1&isAllowed=y

¹³ Ibid.

¹⁴ Thenya, T., Wassmann, R., Verchot, L. and Mungai, D., "Degradation of the riparian wetlands in the Lake Victoria basin-Yala swamp case study," *PROCEEDINGS VOLUME II*: 483. Available at <http://www.indiaenvironmentportal.org.in/files/file/riparian%20wetlands%20in%20the%20Lake%20Victoria%20basin.pdf> [Accessed on 22/11/2018]; See also Okeyo-Owuor, J.B., Raburu, P.O., Masese, F.O. and Omari, S.N., "Wetlands of Lake Victoria Basin, Kenya: distribution, current status and conservation challenges." *Community Based Approach to the Management of Nyando Wetland, Lake Victoria Basin, Kenya 1* (2012). Available at https://www.researchgate.net/profile/Kevin_Obiero4/publication/299870176_Community_Based_Approach_to_the_Management_of_Nyando_Wetland_Lake_Victoria_Basin_Kenya/links/57068e1c08aea3d2802117d4/Community-Based-Approach-to-the-Management-of-Nyando-Wetland-Lake-Victoria-Basin-Kenya.pdf#page=13 [Accessed on 22/11/2018].

¹⁵ Lake Victoria Basin Aquatic Biodiversity Meta-Database, available at <http://lvbcom.org/aquatic/index.html> [Accessed on 22/11/2018].

¹⁶ Ibid.

¹⁷ Sewagudde, S.M., "Lake Victoria's Water Budget and the Potential Effects of Climate Change in the 21st Century," *African Journal of Tropical Hydrobiology and Fisheries*, 12 (2009): 22-30, at 30.

¹⁸ FAO, *The Nile Basin*, available at <http://www.fao.org/docrep/w4347e/w4347e0k.htm> [Accessed on 22/11/2018].

Zaire and Uganda), and the Blue Nile, with its sources in the Ethiopian highlands.¹⁹ The sources are located in humid regions, with an average rainfall of over 1000 mm per year. The arid region starts in Sudan and can be divided into three rainfall zones: the extreme south of the country where rainfall ranges from 1200 to 1500 mm per year; the fertile clay-plains where 400 to 800 mm of rain falls annually; and the desert northern third of the country where rainfall averages only 20 mm per year. Further north, in Egypt, precipitation falls to less than 20 mm per year.²⁰

The total area of the Nile basin represents 10.3% of the continental area and spreads over ten countries.²¹ For some countries, like Zaire, the Nile basin forms only a very small part of their territory while others like Burundi, Rwanda, Uganda, Sudan and Egypt, are almost completely integrated into the Nile basin.²² However, all the waters in Burundi and Rwanda and more than half the waters in Uganda are produced internally, while most of the water resources of Sudan and Egypt originate outside their borders: 77% of Sudan's and more than 97% of Egypt's water resources.²³

4. Issues in the Management of Shared Natural Resources

The main challenge in managing shared resources is balancing the interests of all the concerned parties.²⁴ Because of the competing interests over the shared resources, conflicts are bound to arise. The international regime of the management of shared resources is further coupled with challenges, as in many cases State consent is required before a decision is taken concerning a certain shared natural resource.²⁵ In this regard, consent is at times difficult to get since most States usually want to benefit most from these resources and they also jealously guard the sovereignty that they have over the natural resources within their territories.²⁶

Challenges are particularly seen in cases which involve countries in transition who in most cases want to reap the greatest benefits, from these resources. One of the main challenges in the management of transboundary resources arises from shared water resources. This is especially the case where it is a shared freshwater resource.²⁷ In the management of these resources, states

¹⁹ Ibid.

²⁰ FAO, *The Nile Basin*, available at <http://www.fao.org/docrep/w4347e/w4347e0k.htm> [Accessed on 22/11/2018].

²¹ Ibid.

²² Ibid; See also Swain, A., "Challenges for water sharing in the Nile basin: changing geo-politics and changing climate." *Hydrological Sciences Journal* 56, no. 4 (2011): 687-702.

²³ FAO, *The Nile Basin*, available at <http://www.fao.org/docrep/w4347e/w4347e0k.htm> [Accessed on 22/11/2018]; See also El-Fadel, M., El-Sayegh, Y., El-Fadl, K. and Khorbotly, D., "The Nile River Basin: A case study in surface water conflict resolution." *Journal of Natural Resources and Life Sciences Education* 32 (2003): 107-117, at 108; See also Frenken, Karen. *Irrigation potential in Africa: A basin approach*. Vol. 4. Food & Agriculture Org., 1997, at p.56.

²⁴ See generally, Fulazzaky, M., "Challenges of Integrated Water Resources Management in Indonesia," *Water* 6, no. 7 (2014): 2000-2020.

²⁵ Benvenisti, E., *Sharing Transboundary Resources*, (Cambridge University Press, 2002).

²⁶ See Lee, L.F., "Sovereignty over, Ownership of, and Access to Natural Resources," *International Sustainable Development Law-Volume II* (2010): 51; See also Kelleh, F., "The changing paradigm of state sovereignty In the international system." PhD diss., University of Missouri--Kansas City, 2012; See also Brown, P.M., "The theory of the independence and equality of states." *American Journal of International Law* 9, no. 2 (1915): 305-335.

²⁷ See *Gabcikovo-Nagymaros Project (Hungary v Slovakia)* Judgment, ICJ Reports 1997, p.7.

usually feel that they have different entitlements which may at times clash with those claimed by another state and this may lead to conflicts between or among states.

A good example of a case concerning the management of transboundary water resources, is the controversy surrounding the use of the river Nile waters between the lower and upper riparians. Egypt, the major downstream State and the regional power-broker, is said to consider the Nile River flow a national security issue and when the upstream State of Sudan suggested in 1995 that it might review its existing water arrangements with Egypt, the 1959 Nile Waters Agreement, the then Egyptian President Muhammed Hosni Mubarak resorted to threats of military action against Sudan, stating that: ‘*Any step taken to this end will force us into confrontation to defend our rights and our life. Our response will be beyond anything they can imagine.*’ The Sudanese Government withdrew its threats of damming the Nile.²⁸

There is also the example of the dispute in *River Oder Case*,²⁹ where it was held that “...when the States bordering an international waterway decide to create a joint regime for the use of its waters, they are acknowledging a ‘community of interests’ which leads to a ‘community of law.’³⁰ This case acknowledges the importance of states respecting these shared resources which are used as commons and the aspect of ‘community of interest’ was also introduced in this case. The holding in this case was further discussed in the *Gabcikovo-Nagymaros Project* which involved the construction of a dam on river Danube where the court stated that:

‘...in 1929, the Permanent Court of International Justice, with regard to navigation in the River Oder, stated as follows: ‘the community of interest in a navigable river becomes the basis of a common legal right, the essential features of which are the perfect equality of all riparian States in the user of the whole course of the river and the exclusion of any preferential privilege of any riparian state in relation to the others’³¹

Further, in the *Pulp Mills on the River Uruguay case*³², which was a case concerning transboundary environmental harm, the ICJ recognized the role of institutions such as the Administrative Commission of the River Uruguay (CARU) in the protection of transboundary resources.³³

The case of *Lake Lanoux Arbitration*³⁴ involved the determination of the use of the waters of Lake Lanoux, in the Pyrenees. The French Government proposed to carry out certain works for the utilization of the waters of the lake and the Spanish Government feared that these works would adversely affect Spanish rights and interests, contrary to the Treaty of Bayonne of May 26, 1866, between France and Spain and the Additional Act of the same date. It was claimed

²⁸ Beyene, Z. & Wadley, I., ‘Common goods and the common good: Transboundary natural resources, principled cooperation, and the Nile Basin Initiative,’ *op cit*, pp. 1-2.

²⁹ [1929] PCIJ.

³⁰ Case relating to the Territorial Jurisdiction of the International Commission of the River Oder, United Kingdom, Czechoslovakia, Denmark, France, Germany, Sweden v. Poland, Order Territorial Jurisdiction of Int’l Comm’n of River Oder (U.K. v. Pol.), 1929 P.C.I.J. (ser. A), No. 23, annex 4 (Order of Aug. 15).

³¹ *Gabcikovo-Nagymaros Project (Hungary v Slovakia)*, Judgment, ICJ Reports 1997, 56, para 85.

³² *Argentina v Uruguay*, Judgment, ICJ Reports, 2010.

³³ Lazić, D., “Pulp Mills on the River Uruguay (Arg. v. Uru.) (ICJ), Introductory Note by Djurdja Lazić.” *International Legal Materials* 49, no. 4 (2010): 1118-1180.

³⁴ *France v Spain*, [1957] 12 R.I.A.A. 281; 24 I.L.R. 101, Arbitral Tribunal, 1 November 16, 1957.

that, under the Treaty, such works could not be undertaken without the previous agreement of both parties.³⁵

The ICJ, further held in the *Trail Smelter Arbitration*³⁶ that Canada was in violation of the duty to prevent activities within its territory from causing injury to the territory of another state. States sharing transboundary resources with other states are under an obligation to ensure that they consult with the other state before making any changes or developments which are likely to affect the shared resource.³⁷ The decision in this case is seen to be of particular importance in the conservation of transboundary freshwater resources.³⁸

In Kenya, legislation also provides for the manner in which transboundary natural resources are to be shared among countries. The *Water Policy 2012* is one example that provides for the manner in which water resources in the country are to be shared. In its objectives, the Policy provides, *inter alia*, that the government is to maximize the use of trans-boundary water resources in coordination with other riparian countries. The government is, thus, required to domesticate international legal instruments governing transboundary water resources.³⁹

This comes against the realization that Kenya shares numerous water resources with other countries, the major one being the Lake Victoria Basin. This basin is shared by Kenya, Uganda, the United Republic of Tanzania, Rwanda and Burundi, and occupies about 251 000 km², while the Lake itself covers 69 000km².⁴⁰

The *National Land Policy 2009* recognizes the need to ensure protection of ecosystems and their sustainable management. This is in recognition of the fact that Kenya has diverse ecosystems which are in need of protection. The Policy further notes that the management of these resources make their conservation to be challenging due to conflicting uses and varied governance frameworks.⁴¹ The government is supposed to undertake a survey to establish all critical ecosystems and determine their sustainable land uses.

On the other hand, the Forest Policy, 2014 recognises that effective management of trans-boundary environmental resources including forestry necessitates the cooperation of states at both regional and international sphere. In this regard, Kenya being a signatory to a number of multilateral and regional agreements is to ensure that these instruments are integrated into the national policies and plans.

³⁵ Ibid.

³⁶ *US v Canada*, [1949] 3 UN Reports of Arbitral Awards 1905, rep. In Annual Digest of Public International Law Cases (1938-40), p.315.

³⁷ See *Lac Lanoux Arbitration*, (1957), 24 Int. L.R. 101.

³⁸ See McCarthy, E.M., "International regulation of transboundary pollutants: the emerging challenge of ocean noise." *Ocean & Coastal LJ* 6 (2001): 257.

³⁹ See Article 2(5) (6), Constitution of Kenya 2010; *Treaty Making And Ratification Act*, NO. 45 OF 2012, Laws of Kenya Revised Edition 2014 [2012].

⁴⁰ UNEP, 'Transboundary issues,' available at http://www.unep.org/dewa/africa/kenyaatlas/PDF/KenyaAtlas_Chapter3.pdf [Accessed 22/11/2018].

⁴¹ National Land Policy, S.133.

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The case of *Friends of Lake Turkana Trust v Attorney General & 2 others*,⁴² was based on an alleged memorandum of understanding entered into by the Government of Kenya and Government of Ethiopia in the year 2006, for the purchase of 500 MW of electricity from Gibe III, as well as an \$800 million grid connection between Ethiopia and Kenya. The Petitioner sought to have an order of mandamus compelling the Government of Kenya and the Kenya Power and Lighting Company Limited (as it was then) to make full and complete disclosures of each and every agreement or arrangement entered into or made with the Government of Ethiopia (including its parastatals) relating to the proposed purchase of 500MW from Gibe III including, but not limited to, the Memorandum of Understanding signed in 2006. Further, they sought to have an order of prohibition strictly enjoining and prohibiting the Government of Kenya and the Kenya Power and Lighting Company Limited, from entering into further agreements and/or making further arrangements with the Government of Ethiopia(including its parastatals) relating to the proposed purchase of 500MW from Gibe III including, but not limited to implementing the Memorandum of Understanding signed in 2006, until and when a full and thorough independent environmental impact assessment, on the potential effects of Gibe III project on Lake Turkana and the affected communities has been undertaken.

The petitioner argued that, first, by agreeing to purchase 500MW of electricity from the Government of Ethiopia, the Respondents were acting in a manner that would deprive the members of the affected communities their livelihood, lifestyle and cultural heritage and attachment to Lake Turkana, in violation of Articles 26, and 28 of the Constitution, unless restrained by the Court. Further, it was argued that the proposed purchase would impinge the fundamental liberties and freedoms of members of the affected communities. Secondly, it was argued that the Government of Kenya had failed to act as a public trustee, in violation of Articles 62 and 69 of the Constitution, by failing to conduct a full, proper and thorough comprehensive impact assessment on the potential effects of construction and operation of Gibe III before committing itself to the purchase of the said 500MW. Thirdly, it was argued that the arrangements between the Government of Kenya and Government of Ethiopia would jeopardize the environment for the present communities around Lake Turkana and also threaten their cultural heritage.⁴³

It was argued by the respondents that the Government of Ethiopia had permanent sovereignty over the natural resources found within its territory and the respondent sought to rely on the *ICJ Case Concerning East Timor*⁴⁴ where it was held by the International Court of Justice that sovereignty over the economic resources is, for any people, an important component of the totality of their sovereignty. One the other hand, it was submitted by the interested party that the principle of permanent sovereignty requires that a state, in developing its resources, has due regard for the environment of neighboring states and these considerations were also to be taken into account in this case, the Omo River, being a transboundary river. Based on these

⁴² [2014] eKLR, ELC Suit No. 825 of 2012.

⁴³ [2014] eKLR, ELC Suit No. 825 of 2012.

⁴⁴ (*Portugal v Australia*) 1995.

considerations, the court directed that the government was to take the necessary steps and measures to ensure that the natural resources of Lake Turkana are sustainably managed.⁴⁵

In a bid to deal with the foregoing issues or even prevent disputes over transboundary natural resources intensifying into threats of the use of force, international law has put in place common principles and accepted international norms and standards by which transboundary natural resources may be equitably and efficiently utilized, without causing significant harm to the environment or to other users of the resource.⁴⁶

5. Principles Governing the Management of Transboundary Natural Resources

5.1 General Principle of Not Causing Transboundary Harm

States have the sovereign right to exploit their own resources pursuant to their own environmental policies, and the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction.⁴⁷ Further, States are urged to cooperate to further develop the international law regarding liability and compensation for the victims of pollution and other environmental damage caused by activities within the jurisdiction or control of such States to areas beyond their jurisdiction.⁴⁸ In addition, States are to ensure that international organizations play a coordinated, efficient and dynamic role in the protection and improvement of the environment.⁴⁹

5.2 Unlimited Sovereignty of States to Use Natural Resources for National Development

Under international law, the right of peoples and nations to permanent sovereignty over their natural wealth and resources must be exercised in the interest of their national development and of the well-being of the people of the State concerned.⁵⁰ The exploration, development and disposition of such resources, as well as the import of the foreign capital required for these purposes, should be in conformity with the rules and conditions which the peoples and nations freely consider to be necessary or desirable with regard to the authorization, restriction or prohibition of such activities.⁵¹ The free and beneficial exercise of the sovereignty of peoples and nations over their natural resources must be furthered by the mutual respect of States based on their sovereign equality.⁵²

⁴⁵ *Ibid.*

⁴⁶ Beyene, Z. & Wadley, I., 'Common goods and the common good: Transboundary natural resources, principled cooperation, and the Nile Basin Initiative,' *op cit* p. 2.

⁴⁷ Principle 21 of the *Declaration of the United Nations Conference on the Human Environment*, 1972 (Stockholm Declaration).

⁴⁸ *Ibid*, Principle 22.

⁴⁹ *Ibid*, principle 25.

⁵⁰ 1962 General Assembly Resolution 1803 on Permanent Sovereignty over Natural Resources (GAR 1803), GA Res. 1803 (XVII) / 17 UN GAOR Supp. (No.17) at 15 / UN Doc. A/5217 (1962), Part 1.1.

⁵¹ *Ibid*, part 1.2.

⁵² *Ibid*, part 1.5.

The *General Assembly Resolution 1803*, declares that international co-operation for the economic development of developing countries, whether in the form of public or private capital investments, exchange of goods and services, technical assistance, or exchange of scientific information, shall be such as to further their independent national development and shall be based upon respect for their sovereignty over their natural wealth and resources.⁵³ Further, violation of the rights of peoples and nations to sovereignty over their natural wealth and resources is contrary to the spirit and principles of the Charter of the United Nations and hinders the development of international co-operation and the maintenance of peace.⁵⁴

5.3 Cooperation Based on Information and Prior Consultation

Principle 24 of the Stockholm Declaration proclaimed that international matters concerning the protection and improvement of the environment should be handled in a cooperative spirit by all countries, big and small, on an equal footing. State cooperation through multilateral or bilateral arrangements or other appropriate means, is essential to effectively control, prevent, reduce and eliminate adverse environmental effects resulting from activities conducted in all spheres, in such a way that due account is taken of the sovereignty and interests of all States.

5.4 Public Participation

Decisions usually have to be made concerning the management of transboundary natural resources. Each state usually has its systems that have been established to provide for the manner in which decisions on the management of these resources are to be made. In formulating the decision making structures, an important consideration that has to be taken is the need to establish flexible structures which can be subject to periodic amendments in light of new conditions or knowledge that may arise.⁵⁵

Participation of members of the public is necessary both at the time of establishment of the joint institutions and when operating within these institutions. Participation is to be made effective through availing necessary information to members of the public and civil society organisations. All the groups likely to be affected in the management of the transboundary resources have to be involved in these processes and minority groups have to be particularly encouraged to take part in these processes.

5.5 Principle of Equitable and Reasonable Utilization

This principle seeks to ensure that the various countries sharing the transboundary resource get a reasonable and equitable share of these resources while respecting the share that other states are entitled to. Equitable and reasonable utilization rests on a foundation of shared

⁵³ *Ibid*, Part 1.6.

⁵⁴ *Ibid*, part 1.7.

⁵⁵ Benvenisti, E., *Sharing Transboundary Resources: International Law and Optimal Resource Use*, (Cambridge University Press, 2002).

sovereignty and equality of rights.⁵⁶ Certain considerations are usually taken into account in determining what is equitable to a given state. One of the main considerations that is usually taken into account is an examination of the needs of a state, both present and future.⁵⁷

5.6 Peaceful Settlement of disputes

It has been noted that the exploitation of transboundary resources is usually coupled with conflicts between these states.⁵⁸ In this regard, what is important is the need to ensure that whatever conflicts arise they are settled amicably. Where settlement of disputes through negotiations has failed, states are required to seek the settlement of the dispute through other peaceful means.⁵⁹ This is meant to ensure that conflicts emanating from the use of natural resources are eliminated and that natural resources have beneficial impact on states.⁶⁰

5.7 Human Rights

Governments in many places have adopted short-term gains which usually come at the expense of communities within the country. The exploitation of resources within a country, in many cases have resulted to widespread human rights violations and where such projects as the construction of dams have been undertaken and led to the displacement of many people from their homes, many times without compensation.⁶¹

The entry of foreign investors in these development projects in many cases exacerbates the problems as most of these investors are mostly pre-occupied with the maximization of profits at the expense of local communities. The long-term externalities of these investors are therefore in most cases borne by the local communities and particularly by indigenous groups.⁶² It is, therefore, imperative that the needs of the local communities are respected by these companies and this particularly relates to the exploitation of transboundary resources like rivers, and that

⁵⁶ Rahaman, M.M., 'Principles of Transboundary Water Resources Management and Ganges Treaties: An Analysis,' *International Journal of Water Resources Development*, available at <http://www.tandfonline.com/doi/pdf/10.1080/07900620802517574> [Accessed on 24/11/2018].

⁵⁷ *United Nations World Commission on Environment and Development*, Chapter 2: Towards Sustainable Development

⁵⁸ Tignino, M., "Water, international peace, and security," *International Review of the Red Cross* 92, no. 879 (2010): 647-674; Vinogradov, S., "Transboundary water resources in the former Soviet Union: between conflict and cooperation," *Natural Resources Journal* (1996): 393-415; Okumu, W., "Resources and border disputes in Eastern Africa." *Journal of Eastern African Studies* 4, no. 2 (2010): 279-297.

⁵⁹ United Nations, *Charter of the United Nations*, 24 October 1945, 1 UNTS XVI, Article 33.

⁶⁰ See Vinogradov, S., *et al*, 'Transforming Potential Conflict into Cooperation Potential: The Role Of International Water Law,' (University of Dundee, UK, 2003), available at <http://unesdoc.unesco.org/images/0013/001332/133258e.pdf> [Accessed on 24/11/2018].

⁶¹ See generally, Raftopoulos, M., "Contemporary debates on social-environmental conflicts, extractivism and human rights in Latin America," *The International Journal of Human Rights* 21, no. 4 (2017): 387-404; Borràs, S., "New transitions from human rights to the environment to the rights of nature," *Transnational Environmental Law* 5, no. 1 (2016): 113-143; Gianolla, C., "Human rights and nature: Intercultural perspectives and international aspirations," *J. Hum. Rts. & Env't.* 4 (2013): 58; Bosselmann, K., "Environmental and Human Rights in Ethical Context," *Research Handbook on Human Rights and the Environment* (2015).

⁶² Benvenisti, E., *Sharing Transboundary Resources*, (Cambridge University Press, 2002).

where dams are constructed on these rivers, the members of the community are to be accorded adequate compensation and given alternative land to settle.⁶³

6. National Frameworks governing the Management of Shared Resources in Kenya

6.1 Constitution of Kenya, 2010

The Constitution of Kenya, 2010 has important provisions that relates to the management of the environment and natural resources.⁶⁴ Although it lacks specific provisions relating to the management of transboundary natural resources, the Constitution directs how the natural resources within the territory of Kenya are to be managed. The State is charged with the obligation to, *inter alia*: ensure sustainable exploitation, utilization, management and conservation of the environment and natural resources, and ensure the equitable sharing of the accruing benefits; work to achieve and maintain a tree cover of at least ten per cent of the land area of Kenya; encourage public participation in the management, protection and conservation of the environment; protect genetic resources and biological diversity; establish systems of environmental impact assessment, environmental audit and monitoring of the environment; eliminate processes and activities that are likely to endanger the environment; and utilize the environment and natural resources for the benefit of the people of Kenya.⁶⁵

6.2 Environment (Management and Co-Ordination) Act, 1999

The *Environmental Management and Co-Ordination Act*⁶⁶ (EMCA) was enacted to provide for the establishment of an appropriate legal and institutional framework for the management of the environment and for the matters connected therewith and incidental thereto.⁶⁷ Under the Act, if a person alleges that the right to a clean and healthy environment has been, is being or is likely to be denied, violated, infringed or threatened, in relation to him, then without prejudice to any other action with respect to the same matter which is lawfully available, that person may on his behalf or on behalf of a group or class of persons, members of an association or in the public interest may apply to the Environment and Land Court for redress and the Environment and Land Court may make such orders, issue such writs or give such directions as it may deem appropriate to—prevent, stop or discontinue any act or omission deleterious to the environment; compel any public officer to take measures to prevent or discontinue any act or omission deleterious to the environment; require that any on-going activity be subjected to an environment audit in accordance with the provisions of this Act; compel the persons responsible for the environmental degradation to restore the degraded environment as far as practicable to its

⁶³ For instance, see *Community Land Act*, No. 27 of 2016, Laws of Kenya, on community land matters and compensation.

⁶⁴ See Chapter five, Constitution of Kenya 2010.

⁶⁵ Art. 69(1).

⁶⁶ Act No 8 of 1999.

⁶⁷ *Ibid*, Preamble.

immediate condition prior to the damage; and provide compensation for any victim of pollution and the cost of beneficial uses lost as a result of an act of pollution and other losses that are connected with or incidental to the foregoing.⁶⁸

The Act also provides that in exercising the jurisdiction conferred upon it under the Act, the Environment and Land Court Act is to be guided by the principles of sustainable development, *inter alia*; the principle of international co-operation in the management of environmental resources shared by two or more states⁶⁹; the principles of intergenerational and intragenerational equity; the polluter-pays principle; and the pre-cautionary principle.⁷⁰

One of the bodies under EMCA is the National Environment Management Authority (NEMA) and charged with *inter alia*: taking stock of the natural resources in Kenya and their utilization and conservation; carrying out surveys which will assist in the proper management and conservation of the environment; advising the Government on legislative and other measures for the management of the environment or the implementation of relevant international conventions, treaties and agreements in the field of environment, as the case may be; and advising the Government on regional and international environmental conventions, treaties and agreements to which Kenya should be a party and follow up the implementation of such agreements where Kenya is a party.⁷¹

The Act requires that where Kenya is a party to an international treaty, convention or agreement, whether bilateral or multilateral, concerning the management of the environment, the Authority shall, subject to the *Treaty Making and Ratification Act* —initiate legislative proposals for consideration by the Attorney-General, for purposes of giving effect to such treaty, convention or agreement in Kenya or for enabling Kenya to perform her obligations or exercise her rights under such treaty, convention or agreement; and identify other appropriate measures necessary for the national implementation of such treaty, convention or agreement; the Authority shall keep a register of all international treaties, agreements or conventions in the field of the environment to which Kenya is a party. .⁷²

7. Regional Legal and Institutional Frameworks

7.1 The African Convention on the Conservation of Nature and Natural Resources

The *African Convention on the Conservation of Nature and Natural Resources*⁷³ applies to all areas which are within the limits of national jurisdiction of any Party; and to the activities carried out under the jurisdiction or control of any Party within the area of its national

⁶⁸ Ibid, s. 3(3); Environmental Management and Co-ordination (Amendment) Act, No. 5 of 2015, ss. 2,3.

⁶⁹ The case of *Friends of Lake Turkana v Attorney General and 2 others*, ELC Suit 825 of 2012.

⁷⁰ EMCA, S. 3(5).

⁷¹ EMCA, Sec. 9.

⁷² EMCA, S. 124; Environmental Management and Co-ordination (Amendment) Act, No. 5 of 2015, s. 64.

⁷³ AU African Union, 1969.

jurisdiction or beyond the limits of its national jurisdiction.⁷⁴ The objectives of the Convention are: to enhance environmental protection; to foster the conservation and sustainable use of natural resources; and to harmonize and coordinate policies in these fields with a view to achieving ecologically rational, economically sound and socially acceptable development policies and programmes.⁷⁵

The implementation of the Convention is to be guided by the principles of the right of all peoples to a satisfactory environment favorable to their development; the duty of States, individually and collectively to ensure the enjoyment of the right to development; and the duty of States to ensure that developmental and environmental needs are met in a sustainable, fair and equitable manner.⁷⁶ The fundamental obligation of Parties under the Convention is to adopt and implement all measures necessary to achieve the objectives of the Convention, in particular through preventive measures and the application of the precautionary principle, and with due regard to ethical and traditional values as well as scientific knowledge in the interest of present and future generations.⁷⁷

7.2 East Africa Community Treaty, 1999

The East African Community (EAC) as established by the East African Community Treaty⁷⁸ is the regional intergovernmental organization of the Republics of Kenya, Uganda, the United Republic of Tanzania, Republic of Burundi and Republic of Rwanda with its headquarters in Arusha, Tanzania. The EAC aims at widening and deepening co-operation among the partner states and other regional economic communities in, among others, political, economic, and social fields for their mutual benefit.⁷⁹ The objectives of the Community, as outlined in the treaty are, *inter alia*, to ensure sustainable growth and development among the partner states and to promote the sustainable utilization of the natural resources of the partner states and to take measures that would effectively protect the natural environment of the Partner States.⁸⁰

Articles 111 and 114 of the EAC Treaty provides for joint management and utilization of natural resources within the Community for the mutual benefit of the partner States. In particular, the Partner States are to: take necessary measures to conserve their natural resources; co-operate in the management of their natural resources for the conservation of the eco-systems and the arrest of environmental degradation; and adopt common regulations for the protection of shared aquatic and terrestrial resources.⁸¹ Kenya has lived up to its obligations in accordance with this provision, as it has enacted various laws and policies which guide the manner in which the

⁷⁴ Art. 1.

⁷⁵ Art. 2.

⁷⁶ Art. 3.

⁷⁷ Art. 4.

⁷⁸ Art. 2, Treaty for the Establishment of the East African Community 1999 (As amended on 14th December, 2006 and 20th August, 2007).

⁷⁹ Art. 5.

⁸⁰ *Ibid.*

⁸¹ Art. 114(1).

country is to utilize the transboundary resources that it has. The adoption of the Fisheries Policy is a good example of this.

With regard to conservation of these transboundary resources, the actions by the community shall have the objective: ensuring sustainable utilization of natural resources like lakes, wetlands, forests, and other aquatic and terrestrial ecosystems and to jointly develop and adopt water resources conservation and management policies that ensure sustenance and preservation of ecosystems.⁸²

The East African Court of Justice is established under the treaty as the judicial body of the Community, and is mandated with ensuring the adherence to law in the interpretation and application of and compliance with the Treaty.⁸³ In this regard, the Court is to ensure that the objectives of the Community are met. One such is ensuring the sustainable utilization of resources found within the Community. In this regard, the court has ensured sustainable utilization of resources in the Community and the protection of transboundary resources.

In *African Network for Animal Welfare (ANAW) v The Attorney General of the United Republic of Tanzania*,⁸⁴ it was the Applicant's contention that the construction of a trunk road across the Serengeti National Park would have deleterious effects on the Serengeti and also on the adjoining ecosystems such as Masai Mara in Kenya. It was therefore the submission of the Applicant that;

*The actions of the Respondent are a violation of Article 114 (1) (a) of the Treaty which enjoins all Partner States to conserve, protect and manage the environment and natural resources and Articles 5 (3) (c), 8 (1) (c) and 111 (2) of the Treaty which obligates Partner States to co-operate in the management and utilization of natural resources within the Community and to abstain from any measures that would jeopardise the attainment of the objectives of the Treaty in that regard.*⁸⁵

The Court held that the actions by the Respondent were unlawful and contrary to the Treaty and a permanent injunction was thus issued to the respondent restraining it from operationalizing its initial proposal for the construction of the road. The Court in this regard took cognizance of the fact that the construction of the road had potentially negative effects on the Serengeti-Mara ecosystem, which is a transboundary natural resource and hence it was imperative for the court to take some measures towards its protection in line with the Treaty.

In 2003, the member states of the EAC adopted the *Protocol for the Sustainable Development of Lake Victoria Basin*, in realization that there was need for sustainable utilization of the waters in the Lake Victoria basin and to introduce an integrated approach in the management of this resource. The Partner states thus sought to cooperate in the conservation and sustainable utilisation of the resources of the basin. Member states of the EAC have further taken cognizance of the need to ensure the protection of the resources that are shared among these countries and in this regard they have adopted the *Transboundary Environmental Assessment*

⁸² Art.111.2(c) and (d).

⁸³ Art. 23.

⁸⁴ Reference No. 9 of 2010.

⁸⁵ *Ibid.*

Guidelines for Shared Ecosystems in East Africa. It is acknowledged that effective management of the transboundary resources within the Community has the potential effect of reducing poverty in the region. The guidelines seek to ensure that member states of the EAC participate in common environmental assessments, have common regulations, procedures and guidelines for shared ecosystems. These guidelines have further taken into consideration the need to ensure that citizens of the EAC member states are also provided with opportunities to participate in the environmental assessment processes.

7.3 The Protocol on Environment and Natural resources Management

This protocol⁸⁶ was adopted to govern cooperation among partner states in the management of the environment and natural resources over the area of their jurisdiction and also including the governance and management of transboundary resources. Article 9 of the Protocol requires that the Partner States are to develop mechanisms meant to ensure sustainable utilization of transboundary ecosystems. The Protocol in particular provides for the cooperation in Environment and natural resources management.⁸⁷ More specifically, on its Article 13 on management of water resources, the protocol provides that; the partner States are to develop, harmonize and adopt common national policies, laws and programmes relating to the management and sustainable use of water resources and to utilize water resources, including shared water resources, in an equitable and rational manner.

As stated in the Kenyan Water Policy, the formulation of the Policy took into consideration principles derived from international resolutions and treaties including the EAC treaty. Similarly, the National Water Policy of Tanzania takes cognizance of the fact that the country shares water resources with other countries and hence the need to ensure that approaches are adopted to conserve these water resources. These initiatives by the EAC countries are seen to go a long way in ensuring the conservation of the water resources shared by these countries.

Article 18 of the Protocol is related to the management of mineral resources. It requires, *inter alia*, that: the Partner States should develop and harmonize common policies, laws and strategies for access to exploitation of mineral resources for the socio-economic development of the Community. This is further buttressed by the provisions of Africa Mining Vision particularly in Annex 1 which requires mining policies in different countries to be harmonized in order to ensure that there is sustainable exploitation of the mineral resources.

7.4 The EAC Regional Environment Impact Assessment Guidelines for Shared Ecosystems

Noting the urgency to institute measures, policies, guidelines, laws and programmes that will promote their cooperation in the conservation and sustainable use of the shared ecosystems EAC has developed the regional EIA Guidelines for shared ecosystems. The regional EIA Guidelines are for enabling the identification and application of environmentally sound

⁸⁶ East African Community, Arusha, Tanzania, 3 April, 2006.

⁸⁷ Chapter Three.

approaches to management and ensure the sustainability and biophysical integrity of the shared ecosystems within the East African region. The activities that are to be considered for transboundary environment impact assessments have been said to be those that are implemented in the geographical area of the transboundary ecosystem and include such activities that are likely to involve major changes in land use and likely to cause transboundary impacts in neighbouring countries.⁸⁸ A criterion has thus been established for determining transboundary environmental impacts and the costs associated with conducting of these assessments are to be met by the developer of a certain project in these areas. The Guidelines play an important role in the management and conservation of the shared ecosystems such as fresh water, forests and protected areas.

7.5 Lake Victoria Basin Commission (LVBC)

The East African Community has designated Lake Victoria and its Basin as an "area of common economic interest" and a "regional economic growth zone" to be developed jointly by the Partner States.⁸⁹ The East African Community established the Lake Victoria Basin Commission formerly known as the Lake Victoria Development Programme in 2001, as a mechanism for coordinating the various interventions on the Lake and its Basin; and serving as a centre for promotion of investments and information sharing among the various stakeholders.⁹⁰

The Commission envisages a broad partnership of the local communities around the Lake, the East African Community and its Partner States as well as the development partners. The Commission's activities are focusing on the: Harmonization of policies and laws on the management of the environment in the Lake and its catchment area; Continuation of the environmental management of the Lake, including control and eradication of the water hyacinth; Management and conservation of aquatic resources, including fisheries; Economic activities in the development of fishing, industry, agriculture and tourism; and Development of infrastructure, including revamping the transport system on and around the Lake. In this regard, focal ministries have been identified in the different countries sharing this resource and these are supposed to assist with the implementation of the policies adopted.⁹¹

In Kenya, the focal point is the Ministries in charge Environment, Water and Natural Resources. These Ministries have overseen the implementation of various legislations meant at ensuring conservation of these resources. These include implementation of EMCA and the Fisheries Act. The focal point in Tanzania is the Ministry of Water. Through this Ministry

⁸⁸ EAC, 'Transboundary Environmental Assessment Guidelines for Shared Ecosystems in East Africa,' May 2005.

⁸⁹ Lake Victoria Basin Commission. Available at <http://www.lvbcom.org/index.php/who-we-are/overview-of-lvbc> [Accessed on 24/11/2018].

⁹⁰ *Ibid.*

⁹¹ See generally, East African Community, East African Legislative Assembly Committee on Agriculture, Tourism and Natural Resources Report of the Workshop on Governance of Natural Resources in the EAC Region, 13th-15th December 2012, Nairobi – Kenya. Available at http://www.eala.org/uploads/FINAL%20REPORT%202013_JAN_08%20RECOMMENDATIONS%20AND%20RESOLUTIONS%20OF%20THE%20WORKSHOP%20ON%20GOVERNANCE%20OF%20NATURAL%20RESOURCES%20_FIN_%20.pdf

several activities have been undertaken and this includes the improvement of the collaborative management of the transboundary natural resources of the Lake Victoria basin. The Ministry of Water and Environment forms the focal point in Uganda. Through this Ministry, policies are to be adopted to govern the transboundary resourced shared with other countries. The Commission further places emphasis on poverty eradication and the participation of the local communities. It is expected to make a significant contribution towards reduction of poverty by uplifting the living standards of the people of the Lake region. This is to be achieved through economic growth, investments and sustainable development practices that are cognizant of the environment.⁹²

7.6 Lake Victoria Fisheries Organisation (LVFO)

The LVFO East African Community Institution constituents are from Kenya, Tanzania and Uganda. The Organization's aim is to harmonize, develop and adopt conservation and management measures for the sustainable utilization of living resources of Lake Victoria to optimize socio-economic benefits from the basin for the three Partner States.⁹³

The fisheries of Lake Victoria are shared between Kenya, Tanzania and Uganda and provide an immense source of income, employment, food and foreign exchange for East Africa.⁹⁴ The lake produces a fish catch of over 800,000 tonnes fish annually, currently worth about US \$590 million of which US \$340 million is generated at the shore and a further US\$ 250 million a year is earned in exports from the Nile perch fishery. The lake fisheries support almost 2 million people with household incomes and meet the annual fish consumption needs of almost 22 million people in the region.⁹⁵

LVFO is implementing fisheries co-management on Lake Victoria, by legally empowering fisheries communities to become equal and active partners with Government in fisheries management and development.⁹⁶ LVFO is guiding, supporting and implementing the building of the capacity of communities to participate in management and is making a real difference to their lives.⁹⁷

⁹² Lake Victoria Basin Commission. Available at <http://www.lvbcom.org/index.php/who-we-are/overview-of-lvbc>.

⁹³ Orbital Admin, "The Lake Victoria Fisheries Organization Profile," 21st August 2009, available at <https://stopillegalfishing.com/news-articles/the-lake-victoria-fisheries-organization-profile-5/> [Accessed on 24/11/2018].

⁹⁴ East African Community Lake Victoria Fisheries Organization, available at <http://www.lvfo.org/index.php/2-uncategorised/1-welcome-to-lvfo> [Accessed on 24/11/2018].

⁹⁵ *Ibid.*

⁹⁶ Ogwang, V.O., Nyeko, J.I. and Mbilinyi, R., "Implementing Co-management of Lake Victoria's Fisheries: Achievements and Challenges," *African Journal of Tropical Hydrobiology and Fisheries* 12 (2009): 52-58.

⁹⁷ East African Community Lake Victoria Fisheries Organization, available at <http://www.lvfo.org/index.php/2-uncategorised/1-welcome-to-lvfo>.

7.7 UN Convention on the Law of the Non-navigational Uses of International Watercourses (1997)

The UN Convention on the Law of the Non-navigational Uses of International Watercourses (1997) ⁹⁸applies to uses of international watercourses and of their waters for purposes other than navigation and to measures of protection, preservation and management related to the uses of those watercourses and their waters.⁹⁹ The Convention defines “International watercourse” to mean a watercourse, parts of which are situated in different States.¹⁰⁰ Certain general principles have been outlined in the Convention as being important in guiding its application. One of the principles that has been outlined is the requirement that watercourse states utilize international watercourses in an equitable and reasonable manner driven at ensuring sustainable utilization of these resources.¹⁰¹

The Convention provides that, utilization of an international watercourse in an equitable and reasonable manner within the meaning of article 5 requires taking into account all relevant factors and circumstances and the potential impacts on other states.¹⁰² Further, in utilizing an international watercourse in their territories, watercourse States are, to take all appropriate measures to prevent the causing of significant harm to other watercourse States.¹⁰³ Where significant harm nevertheless is caused to another watercourse State, the States whose use causes such harm is, in the absence of agreement to such use, to take all appropriate measures, to eliminate or mitigate such harm and, where appropriate, to discuss the question of compensation.¹⁰⁴

Watercourse States are to cooperate based on sovereign equality, territorial integrity, mutual benefit and good faith in order to attain optimal utilization and adequate protection of an international watercourse.¹⁰⁵ The Watercourse states can thus establish joint mechanisms for cooperation on different matters.¹⁰⁶ Cooperation by these states can take the form of exchange of data on the condition of watercourse upon request by other states.¹⁰⁷

The absence of agreement or custom to the contrary, no use of an international watercourse enjoys inherent priority over other uses. In the event of a conflict between uses of an international watercourse, it is to be resolved with reference to articles 5 to 7, with special regard being given to the requirements of vital human needs.¹⁰⁸ Watercourse States are, individually and,

⁹⁸Adopted by the General Assembly of the United Nations on 21 May 1997. See General Assembly resolution 51/229, annex, Official Records of the General Assembly, Fifty-first Session, Supplement No. 49 (A/51/49).

⁹⁹ Art. 1(1).

¹⁰⁰ Art. 2 (b).

¹⁰¹ Art. 5(1).

¹⁰² Art. 6(1).

¹⁰³ Art. 7(1).

¹⁰⁴ Art. 7(2).

¹⁰⁵ Art. 8(1).

¹⁰⁶ Art. 8(2).

¹⁰⁷ Art. 9(2).

¹⁰⁸ Art. 10.

where appropriate, jointly, to protect and preserve the ecosystems of international watercourses.¹⁰⁹

The Convention states that watercourse States are, at the request of any of them, to enter into consultations concerning the management of an international watercourse, which may include the establishment of a joint management mechanism.¹¹⁰ The Watercourse States are also to cooperate, where appropriate, to respond to needs or opportunities for regulation of the flow of the waters of an international watercourse.¹¹¹

Provisions for dispute resolution have also been provided for by the Convention. Parties are thus required to settle arising disputes by peaceful means and may seek mediation by a third party state or subject the dispute for determination by the International Court of Justice.¹¹²

8. Transboundary Environmental Conflicts Management

As already pointed out, the main challenge in managing shared resources is the balancing of the interests of all the concerned parties, with the eventuality that conflicts are bound to arise due to the competing interests of the concerned parties. In a bid to ensure compliance with the international principles on the management of transboundary resources, which are meant to help in balancing such interests, there have been numerous cases, settled through both litigation and Alternative Dispute Resolution Mechanisms (ADR), before international law institutions. Article 33 of the U.N. Charter states that the parties to any dispute, the continuance of which is likely to endanger the maintenance of international peace and security, shall, first of all, seek a solution by *negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements*, or other peaceful means of their own choice.¹¹³

However, there are problems in resorting to public international law in dealing with transboundary environmental disputes. The opponents argue that there is lack of a forum with universal compulsory jurisdiction in transboundary environmental cases. There are also no remedies to states and their scope.¹¹⁴

One of the most famous case law on transboundary environmental harm is the *Trail Smelter Arbitration*,¹¹⁵ which is an arbitration case where the United States (P) sought damages from Canada by suing it in court and also prayed for an injunction for air pollution in the state of

¹⁰⁹ Art. 20.

¹¹⁰ Art. 24(1).

¹¹¹ Art. 25.

¹¹² Art. 33(2).

¹¹³ United Nations, *Charter of the United Nations*, 24 October 1945, 1 UNTS XVI.

¹¹⁴ See Ladan, M.T., 'Access To Environmental Justice In Oil Pollution And Gas Flaring Cases As A Human Right Issue In Nigeria,' Paper Presented at Institute For Oil And Gas Law Training Workshop For Federal Ministry of Justice Lawyers, Abuja, November, 28-30, 2011, p.15, available at www.abu.edu.ng/publications/2012-11-10-143702_3901.docx [Accessed 25/11/2018]; Mrinmoi, C., 'Environmental Harm in Developing Countries: An Interface of Public and Private International Law,' November 25, 2013, available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2359748 [Accessed 25/11/2018]; Hanqin X., 'Transboundary Damage in International Law,' *Cambridge Studies in International and Comparative Law*, Vol. 27, (Cambridge University Press, 2003).

¹¹⁵ *United States v Canada*, Arbitral Trib., 3 U.N. Rep. Int'l Arb. Awards 1905 (1941).

Washington, by the Trail Smelter, a Canadian corporation which is domiciled in Canada (D).¹¹⁶ The issue was whether it is the responsibility of the State to protect other states against harmful acts by individuals from within its jurisdiction at all times. The question was answered in the affirmative in that the duty to protect other states against harmful acts by individuals from within its jurisdiction at all times is the responsibility of a State. It was held that, no state has the right to use or permit the use of its territory in a manner as to cause injury by fumes in or to the territory of another or the properties or persons therein, as stipulated under the United States (P) laws and the principles of international law. This case is widely accepted as an illustration of environmental litigation. It is noteworthy, that the United Nations and the international community at large endorse all the mechanisms outlined under Article 33 of the Charter, as long as they are aimed at peace building.

9. Conclusion

The utilization of transboundary resources in most cases can result to conflicts among States that usually have competing interests over those resources. There is, therefore, need for joint efforts towards the management of these resources in order to ensure that they are sustainably used and managed. It is also important that transnational institutions be established to oversee the management of resources and to also ensure that any disputes arising from the utilization of these resources are resolved amicably. There is particular need to involve NGOs in the management of these resources. These groups play a critical role in overseeing the management of these resources on behalf of the public who may not have sufficient resources to administer them. Further, it is important that the citizens of the respective countries, where these resources are found, be involved in the process of managing these resources and avenues for their participation be availed.

The 2030 *Agenda for Sustainable Development Goals*¹¹⁷ envisages a better world and life for every person in every country for the current and future generations. One of the most important resources is water. The 2030 *Agenda* encourages more international cooperation, protecting wetlands and rivers, sharing water-treatment technologies—that leads to accomplishing the Goal of ensuring availability and management of water resources and sanitation for all.¹¹⁸ Notably, the achievement of these goals hinges on the cooperation and working together of the international community to especially eliminate extreme poverty. The shared resources all over the globe can be utilised towards this goal. Managing these resources sustainably and peacefully can ensure that all the interested states get their fair share. Indeed, it has been argued that transboundary water cooperation is a critical component to ensuring water and sanitation for all (SDG6) and an important requirement and catalyst for achieving other

¹¹⁶ *Casebriefs, Trail Smelter Arbitration*, (United States v. Canada), available at <http://www.casebriefs.com/blog/law/international-law/international-law-keyed-to-damrosche/chapter-18/trail-smelter-arbitration>[Accessed 25/11/2018].

¹¹⁷ United Nations, *Transforming our world: the 2030 Agenda for Sustainable Development*, Resolution adopted by the General Assembly on 25 September 2015, [without reference to a Main Committee (A/70/L.1)], Seventieth session, Agenda items 15 and 116, 21 October 2015.

¹¹⁸ See Goal 6.

SDGs on poverty, food security, health and wellbeing, sustainable energy, climate action, ecosystem protection and peace. In transboundary basins where cooperation is lacking, it will be hard to achieve sustainable development for all.¹¹⁹

The transboundary natural resources falling within Kenya's territorial boundaries, can indeed contribute to the economic development and wellbeing of the people of Kenya. However, due to the challenges of their international co-management, it is important to enlighten the communities living around them on the implications of this management so as to ensure that Kenya as a state abides by international principles of management and best practices. There is also the need to fully exploit the regional institutional and legal frameworks, and actively engage other state players to ensure that there is minimal conflict.

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¹¹⁹ United Nations, "The contribution of transboundary water cooperation to achieving the sustainable development goals," July, 2018. Available at <http://www.unwater.org/the-contribution-of-transboundary-water-cooperation-to-achieving-the-sustainable-development-goals/> [Accessed on 26/2018]; Sindico, F., "Transboundary Water Cooperation and the Sustainable Development Goals." (2016). Available at http://www.unesco.org/new/fileadmin/MULTIMEDIA/HQ/SC/pdf/Transboundary_Water_Cooperation_and_the_SDGs.pdf

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