

**Biodiversity conservation through Transfrontier Conservation Areas (TFCAs) and the rights of local communities: Reconciliation through sustainable development**

by

**Amanda Tapiwa Mugadza**

Biuris, LLB

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## Dedication

To my precious and beautiful daughter **Marylin** born in September 2012 at the peak of my LLM studies.

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## **Abstract**

This dissertation analyses whether the rights of local communities are being recognised, respected and upheld in TFCAs as a mechanism of biodiversity conservation, and how these rights can be reconciled with a sustainable development approach. This analysis is based on the fact that most TFCAs in the southern African region encompass communal lands where rural communities and, in some instances, indigenous peoples reside.

Biodiversity conservation through TFCAs is premised on the understanding that biodiversity conservation is linked with life support systems and human development, and therefore that the TFCA mechanism is a means by which natural resource conservation and ecosystem management is explored simultaneously with human development. However, the key international and regional instruments on biodiversity conservation via TFCAs fail to consistently recognise local community involvement.

Through the Kgalagadi Transfrontier Park, Great Limpopo Transfrontier Park and Greater Mapungubwe GTCFA examples it is established that state parties to TFCAs tend to adopt an outsider's socio-economic interest in conservation that alienates local communities leaving the latter without formal recognition of their role and rights. A sustainable development approach which appreciates the balance between economic, social and environmental sustainability is proposed as a step towards the realisation of these rights in the TFCAs. The approach of the African Commission on Human and Peoples' Rights in two important decisions pertaining to the rights of local communities and indigenous people is adopted to link the three sustainability pillars to the realisation of the rights of these local communities.

## Opsomming

Hierdie skripsie analiseer of die regte van plaaslike gemeenskappe in Oorgrens Bewaringsgebiede (OBG'e) [Trans-Frontier Conservation Areas – TFCAs] erken, gerespekteer en nagekom word as 'n meganisme van biodiversiteitsbewaring, en hoe hierdie regte met 'n volhoubare ontwikkelingsbenadering versoen kan word. Hierdie analise is gebaseer op die feit dat die meeste OBG'e in die Suidelike Afrikastreek kommunale terreine omvat waar landelike gemeenskappe, en in sommige gevalle inboorlinge, woon.

Biodiversiteitsbewaring word deur OBG'e gegrond op die veronderstelling dat biodiversiteitsbewaring gekoppel is aan lewensonderhoudstelsels en menslike ontwikkeling, en dus dat die OBG'e-meganisme 'n wyse is waarop natuurlike hulpbronnebewaring en ekostelselbestuur gelyktydig met menslike ontwikkeling verken word. Die sleutel- internasionale en streeksinstrumente vir biodiversiteitsbewaring via OBG'e slaag egter nie daarin om plaaslike gemeenskapsbetrokkenheid konsekwent te erken nie.

Deur die Kgalagadi Oorgrens Park-, Groot Limpopo Oorgrens Park- en Groter Mapungubwe GOBG'e-voorbeelde is daar vasgestel dat staatspartye van OBG'e geneig is om 'n buitestander se sosio-ekonomiese belangstelling in bewaring aan te neem wat plaaslike gemeenskappe vervreem, wat laasgenoemde sonder formele erkenning van hul rol en regte laat. 'n Volhoubare ontwikkelingsbenadering wat die balans tussen ekonomiese, sosiale en omgewingsvolhoubaarheid waardeer, is as 'n stap in die rigting ter verwesenliking van hierdie regte in die OBG'e voorgestel. Die benadering van die *African Commission on Human and People's Rights* is in twee belangrike besluite rakende die regte van plaaslike gemeenskappe en inboorlinge gevolg om die drie pilare van volhoubaarheid aan die verwesenliking van die regte van hierdie plaaslike gemeenskappe te koppel.

## List of Abbreviations

ACHPR	African Commission on Human and Peoples' Rights
AU	African Union
CBD	Convention on Biological Diversity
CITES	Convention on International Trade in Endangered Species of Wild Fauna and Flora
GLTP	Great Limpopo Transfrontier Park
GLTFCA	Great Limpopo Transfrontier Conservation Area
GMTFCA	Greater Mapungubwe Transfrontier Conservation Area
KTP	Kgalagadi Transfrontier Park
NEPAD	New Partnership for Africa's Development
NEPAD EAP	New Partnership for Africa's Development Environmental Action Programme
NGOs	Non-governmental Organisations
OECD	Organisation for Economic Co-operation and Development
SADC	Southern African Development Community
SERAC	Social and Economic Rights Action Centre and the Centre for Economic and Social Rights
TFCAs	Transfrontier Conservation Areas
YBIEL	Yearbook of International Environmental Law

## CHAPTER 1: INTRODUCTION

### 1.1 *Problem statement and research question*

Southern Africa is rich in biological resources and most of the issues around these resources transcend national boundaries, given that several species of mammals, birds, butterflies and fish exhibit transboundary migration patterns.<sup>1</sup> A number of these resources have been protected by national parks and wildlife reserves of individual countries. However, this system of national parks and reserves has resulted in a disparate and disconnected chain of habitat islands which blocks natural migration patterns and places rare or threatened species at risk due to a lack of genetic mixing.<sup>2</sup> The introduction of transfrontier conservation areas (hereafter TFCAs) has been a means to salvage the survival of wildlife in the region.<sup>3</sup>

A TFCA is defined as a part or component of a larger eco region that straddles the border between two or more countries, encompassing one or more protected areas as well as multiple-resource areas for the use of communities and private landholders, managed for sustainable use of natural resources.<sup>4</sup> The above definition suggests that the involvement of local communities should be at the heart of the TFCAs initiative as a means of biodiversity conservation pursuant to sustainable development.

Sustainable development is defined in the *World Commission on Environment and Development*, commonly known as the Brundtland Report 1987, as “development that meets the needs of the present without compromising the ability of future generations to meet their own needs”. Three pillars of sustainable development have evolved over time, namely, environmental, economic and social sustainable systems.<sup>5</sup> Each of these

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<sup>1</sup> Para 1.2 SADC Regional Biodiversity Strategy.

<sup>2</sup> Ferreira 2004 *Geo Journal* 301.

<sup>3</sup> Ferreira 2004 *Geo Journal* 301.

<sup>4</sup> Munthali 2007 *Natural Resource Forum* 52.

<sup>5</sup> Kates, Parris and Leiserowitz 2005 *Environment: Science and Policy for Sustainable Development* 12.

elements is essential if local communities' rights are to be met in their involvement with TFCAs.

The creation of TFCAs in Africa, particularly Southern Africa, has been seen and welcomed by many as an initiative towards achieving biodiversity conservation in the region in line with international obligations in terms of the *Convention on Biodiversity* of 1992 (hereafter CBD). In this regard reference will be made to the Great Limpopo, Kgalagadi and Greater Mapungubwe TFCAs. Considered in the light of the *Southern Africa Development Community Protocol on Wildlife and Law Enforcement* of 1999 (hereafter SADC Wildlife Protocol), TFCAs are aimed at the fulfilment of a common conservation goal, pursuant to sustainable development as envisaged in article 3 of this Protocol. Sustainable development in this context is envisaged in TFCAs through the enhancement of socio-economic development by way of nature-based or wildlife-based tourism, as well as the promotion of peaceful relations and cooperation between the countries involved.<sup>6</sup>

However, it must be noted that the areas that are delimited as TFCAs more often than not do not only provide habitats for flora and fauna, but also in most instances for rural communities, including indigenous people. It becomes imperative to establish whether the rights of these indigenous and local communities to the natural resources in these areas are considered and adequately protected. It must be understood that the natural resources of these areas are the communities' livelihoods. Adopting the approach of the African Commission on Human and Peoples' Rights of 1987 (hereafter ACHPR) in *Social and Economic Rights Action Centre and the Centre for Economic and Social Rights v Nigeria* (Communication No. 155/96), commonly known as the SERAC case, this right can be interpreted to include not only environmental rights, but also the right to development and rights to food, health, housing and the right to natural resources as provided for in the *African Charter on Human and Peoples' Rights*, 1981.<sup>7</sup> In another decision, the ACHPR had to consider the plight of indigenous peoples over their

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<sup>6</sup> Ferreira 2004 *Geo Journal* 301.

<sup>7</sup> Para 10, SERAC case.

ancestral lands in *Centre for Minority Rights Development (CEMIRIDE) and Minority Rights Group International (MRG) (on behalf of the Endorois) v Kenya* (Communication No. 276/2003), also referred to as the Endorois case. In this case the ACHPR identified that the rights of indigenous people violated by arbitrary eviction by the Kenyan government from ancestral land for the creation of a wildlife reserve and for economic development included the right to natural resources; the right to development; the right to property; the right to religious freedom; and the right to culture.<sup>8</sup>

In examining the visions and goals of TFCAs towards biodiversity conservation there is a possibility that the communities' rights as elaborated above are undermined, if not omitted altogether. Thus there is a need to establish how the observance of these can be achieved in TFCAs through a sustainable development approach. In this regard the sustainable development approach is one which recognises that human rights fall under the social sustainability pillar and therefore to be integrated with economic and environmental sustainability of TFCAs.

## **1.2 Outline of study**

Chapter 2 of this study discusses biodiversity conservation via TFCAs. The chapter briefly discusses the concepts of biodiversity conservation and TFCAs and thereby establishes the relationship between them. In defining the TFCA, emphasis is put on the involvement of local communities in these initiatives. This is followed by a brief overview of the normative framework for biodiversity conservation through TFCAs.

Chapter 3 focuses on the three TFCAs that are used to illustrate the situation of local communities in TFCAs. A brief description of the situation of local communities in the three TFCAs is given as background to the position of their rights.

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<sup>8</sup> Para 50, Endorois case.

Chapter 4 discusses the approach taken by the African Commission in the SERAC and Endorois cases on the rights of local communities and indigenous people respectively. This chapter ends with a discussion of sustainable development and its three pillars, and how these can be used to realise the rights of the local communities in the TFCAs.

Chapter 5 addresses the findings of the research, as well as recommendations.

## CHAPTER 2: BIODIVERSITY CONSERVATION VIA TFCAS

### 2.1 Introduction

In general, biological diversity (in short biodiversity), includes flora and fauna, the variety of living organisms and the ecological communities they inhabit.<sup>9</sup> However, there is an ever-increasing threat to biodiversity emanating especially from human activity. Such human activity includes, but is not limited to, hunting, collection, persecution, habitat destruction and modification by industrial, agricultural and other activities.<sup>10</sup> The consequences of biodiversity loss are not only ecological, but also economic, medical and agricultural with moral and aesthetic implications.<sup>11</sup> In an attempt to deal with the threat to biodiversity, the international community has responded by entering into treaties and various multilateral agreements. One of the means by which the international community has been attempting to address this challenge to biodiversity has been through the establishment of protected areas in instances where biological resources<sup>12</sup> exist beyond national boundaries. The Southern Africa Development Community (hereafter SADC) region, for instance, being blessed with biological resources that do not pay heed to manmade borders, has embraced the protected areas mechanism as one of its key measures to address biodiversity loss, by adopting the TFCA programme.

This chapter provides an overview of biodiversity conservation with specific reference to the TFCA mechanism. A closer look at the TFCA mechanism will highlight the existence of local communities in these areas and their importance in biodiversity conservation. An analysis of the normative framework for biodiversity conservation will also be provided in so far as it deals with biodiversity conservation through the TFCA initiative for the SADC region.

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<sup>9</sup> Sands *Principles of International Environmental Law* 499. The legal definition of biodiversity as provided for in the CBD is provided below.

<sup>10</sup> Bodansky *The Art and Craft of International Environmental Law* 38.

<sup>11</sup> Sands *Principles of International Environmental Law* 499.

<sup>12</sup> Biological resources are defined in article 2 of the CBD as “genetic resources, organisms or parts thereof, populations, or any other biotic component of ecosystems with actual or potential use or value for humanity.”

## 2.2 Understanding biodiversity conservation

### 2.2.1 Defining biodiversity conservation

The CBD defines biodiversity as:

The variability among living organisms from all sources including inter alia, terrestrial, marine and other aquatic ecosystems and the ecological complexes of which they are part: this includes diversity within species, between species and of ecosystems.<sup>13</sup>

The above definition captures the fact that biodiversity falls under more than one category, that is, genetic diversity,<sup>14</sup> species diversity,<sup>15</sup> and ecosystem diversity.<sup>16</sup> Biodiversity is therefore the variety of life on earth at all levels, from genes to worldwide populations of the same species, and from communities of species sharing the same small area of habitat to worldwide ecosystems.<sup>17</sup>

While there is no accepted international definition of “conservation”,<sup>18</sup> a useful explanation describes it as follows:

Conservation ... includes both the “classic” elements of protection and preservation, including restoration, and the safeguarding of ecological processes and genetic diversity besides management of natural resources in order to sustain their maintenance by sustainable utilisation.<sup>19</sup>

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<sup>13</sup> Article 2, CBD.

<sup>14</sup> The variation of genes within a species. Sands *Principles of International Environmental Law* 499.

<sup>15</sup> The variety of species within a region. Sands *Principles of International Environmental Law* 499.

<sup>16</sup> The variety of ecosystems within a region. Sands *Principles of International Environmental Law* 499.

<sup>17</sup> Secretariat of the Convention Biological Diversity and Netherlands Commission for Environmental Assessment *Biodiversity in Impact Assessment* 13.

<sup>18</sup> Birne and Boyle *International Law and the Environment* 551.

<sup>19</sup> Van Heijnsbergen 1997 as cited in Birne and Boyle *International Law and the Environment* 551.

Put simply therefore, biodiversity conservation involves the preservation, protection and restoration of the variability among all living organisms, that is, genetic, species and ecosystems diversity. A more progressive understanding of biodiversity conservation sees it as the maintenance of not only earth's life support systems, but also future options of human development.<sup>20</sup> Identifying biodiversity conservation with life support systems and human development brings to the fore the understanding that ultimately what is being achieved is also for the good of mankind and not entirely for the natural environment itself. The TFCA mechanism for achieving biodiversity conservation is one way in which natural resource conservation and ecosystem management are explored simultaneously with human development.

### *2.2.2 The TFCA initiative for biodiversity conservation*

As highlighted above, one of the mechanisms whereby biodiversity conservation has been explored globally, is transboundary protected areas and management of ecosystems.<sup>21</sup> This approach has been employed in recognition of the fact that political boundaries and fences tend to cause fragmentation of ecosystems and disturb traditional migratory routes.<sup>22</sup> Transboundary conservation involves the joining of two or more contiguous protected areas from two countries to form one large unit.<sup>23</sup> The objective is to maintain and restore linkages in ecological landscapes, maintaining cross-border watersheds, ecosystem processes and critical habitats. This is achieved by the joint addressing of shared cross-border threats; by realising mutual conservation efforts and economic opportunities; and by improving cooperation between countries and communities.<sup>24</sup> In some instances these transboundary conservation areas are exclusively transboundary protected areas and in other instances they take the form of

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<sup>20</sup> Secretariat of the Convention Biological Diversity and Netherlands Commission for Environmental Assessment *Biodiversity in Impact Assessment* 13.

<sup>21</sup> Sands *Principles of International Environmental Law* 502.

<sup>22</sup> Hanks *Journal of Sustainable Forestry* 2.

<sup>23</sup> Vasilijevic "Transboundary Conservation Global Perspective" 6.

<sup>24</sup> U.S. Agency for International Development *Biodiversity Conservation: A Guide for USAID Staff* 61.

TFCAs.<sup>25</sup> It has been noted that the notion of TFCAs today is associated more with the Southern African form of transboundary conservation despite its earlier existence around the world.<sup>26</sup> The focus of this study is on the TFCA initiative in the Southern African context.

Munthali<sup>27</sup> defines a TFCA as:

a part or components of a larger eco region that straddles the border between two or more countries, encompassing one or more protected areas as well as multiple-resource areas for the use of communities and private landholders, managed for sustainable use of natural resources.

Important in the above definition is the understanding that TFCAs are established for the sustainable use of natural resources. In other words, the principal objective of TFCAs is biodiversity conservation, particularly where threats exist across national boundaries.<sup>28</sup> The rationale is that TFCAs yield more conservation benefits, that is, mutual benefits, for the collaborating parties than would be achieved independently.<sup>29</sup>

TFCAs, especially those in Southern Africa, have also been established with the intention to enhance economic development at regional, national and local level through ecotourism.<sup>30</sup> The need to promote economic development in TFCAs in itself is not necessarily an obstacle to achieve biodiversity conservation. Nonetheless, there are instances where the interests of the parties involved may create competition between the biodiversity conservation goals and those of economic development.

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<sup>25</sup> U.S. Agency for International Development *Biodiversity Conservation: A Guide for USAID Staff* 61.

<sup>26</sup> Knight, Seddon and Al Midfa *Zoology in the Middle East* 185.

<sup>27</sup> Munthali 2007 *Natural Resource Forum* 52.

<sup>28</sup> Suich et al "Transfrontier conservation areas: conservation and socio-economic impact indicators" 8. See also Cumming *Constraints to Conservation and Development Success at the Wildlife-Human Interface in Southern African Transfrontier Conservation Areas* 4.

<sup>29</sup> U.S. Agency for International Development *Biodiversity Conservation: A Guide for USAID Staff* 61.

<sup>30</sup> Knight, Seddon and Al Midfa *Zoology in the Middle East* 185.

To ensure that biodiversity conservation is actually achieved through TFCAs, participating countries need to unite in a shared vision for the conservation of their resources within a greater area.<sup>31</sup> This calls for clear commitment of the Heads of States involved in the conclusion of an international agreement and the formulation of a management plan for the running of the establishment.<sup>32</sup> Thus increased cooperation between the relevant state parties on multiple inter-government levels is imperative.<sup>33</sup> Moreover, it necessitates joint efforts in ecosystem management and collaboration between stakeholders in technical, scientific and other conservation efforts.<sup>34</sup>

As multiple resource areas, TFCAs have various land uses that go beyond natural resource management related land uses, such as national parks, private game reserves, communal natural resource management areas and hunting concessions.<sup>35</sup> Portions of the land comprising TFCAs usually also include private land and communal land.<sup>36</sup> TFCAs are therefore a “conglomerate” of the land management regimes of the participating countries resulting in complex land practices.<sup>37</sup> Ideally, the different land uses should be under a common regime to ensure that the land use planning in and around the relevant protected areas is harmonised and governed by a single unified legal institution.<sup>38</sup> In practice, however, this may not be easily achieved due to the complexities around the various interests and relationships involved at regional, national and local level, that create difficulties in unifying efforts towards the establishment of a common regime.

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<sup>31</sup> Knight, Seddon and Al Midfa *Zoology in the Middle East* 185.

<sup>32</sup> Hanks 2003 *Journal of Sustainable Forestry* 8.

<sup>33</sup> Knight, Seddon and Al Midfa *Zoology in the Middle East* 186.

<sup>34</sup> Knight, Seddon and Al Midfa *Zoology in the Middle East* 185.

<sup>35</sup> Department of Environmental Affairs Republic of South Africa Date Unknown <http://www.environment.gov.za/?q=content/projects-programmes/transfrontier-conservation-areas#update> [date of use 9 Jul 2012].

<sup>36</sup> Hanks 2003 *Journal of Sustainable Forestry* 2.

<sup>37</sup> Buscher 2005 *Debating land reform, natural resources and poverty* 1.

<sup>38</sup> Ramutsindela “Transfrontier Conservation and Local Communities” 169-188. Buscher 2005 *Debating land reform, natural resources and poverty* 1.

Munthali's<sup>39</sup> view of TFCAs as multiple resource areas for the use of local communities suggests that TFCAs are meant for the benefit of the environment and the people.<sup>40</sup> This view is supported by Cumming,<sup>41</sup> who considers the conservation of biodiversity in conjunction with sustainable development for the people living within TFCAs as the primary objective of the establishment of these areas. This confirms biodiversity conservation as an essential element in achieving human development and poverty eradication. Human development here envisages the improved livelihoods and welfare of people living within a TFCA.<sup>42</sup> In principle, therefore, local communities are meant to be at the centre of the conservation efforts as key beneficiaries, given that their land and livelihoods are incorporated into the TFCAs. However, the negotiations involving TFCAs are usually done from a socio-economic perspective that excludes or overlooks the local people. Chaderopa<sup>43</sup> explains it as an outsider's socio-economic interest in conservation that alienates local communities through their lack of skills and resources, from independently and productively using the TFCAs for their own livelihoods. For this reason local communities are not always regarded as key players in the TFCA programmes, despite their crucial role towards the conservation goals.<sup>44</sup> Suffice to say that the role of local communities arises out of the use of communal lands for biodiversity conservation and ecotourism in the TFCAs. A detailed discussion of the impact of using communal lands in TFCA objectives and how the rights of these local communities are affected will be done in the chapters that follow.

### **2.3 Overview of Normative Framework for Biodiversity through TFCAs**

Having established the relationship between biodiversity conservation and TFCAs in the preceding paragraphs, it is important to assess the relevant international and regional normative instruments. The analysis of these instruments focuses on the extent to

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<sup>39</sup> Munthali 2007 *Natural Resource Forum* 52.

<sup>40</sup> Ramutsindela "Transfrontier Conservation and Local Communities" 169-188.

<sup>41</sup> Cumming *Constraints to Conservation and Development Success at the Wildlife-Human Interface in Southern African Transfrontier Conservation Areas* 4.

<sup>42</sup> Cumming *Constraints to Conservation and Development Success at the Wildlife-Human Interface in Southern African Transfrontier Conservation Areas* 5.

<sup>43</sup> Chaderopa *Transfrontier Parks, Social Space and Local Communities' Livelihoods*.

<sup>44</sup> Knight, Seddon and Al Midfa *Zoology in the Middle East* 189.

which this link is established. For the purposes of this study the emphasis will also be on how far the local communities are envisaged in these instruments as important role players in biodiversity conservation.

### 2.3.1 *International law*

While there is a wide range of international law instruments on biodiversity conservation, the focus of this study is on the selected instruments that are pertinent in establishing the link between biodiversity conservation and TFCAs for Southern Africa. In this respect the CBD as the principal instrument on biodiversity conservation is used as a point of departure followed by an analysis of *Convention on International Trade in Endangered Species of Wild Fauna and Flora* (hereafter CITES), the *Convention for the Protection of the World Cultural and Natural Heritage*, and the *Convention on Wetlands of International Importance Especially as Waterfowl Habitat*.

#### 2.3.1.1 The CBD

The CBD as a framework convention for biodiversity provides for the international law principles that govern states in their efforts towards biodiversity conservation. Article 3 of the CBD recognises the sovereign right of states to exploit their own resources pursuant to their own environmental policies. Nevertheless, a limitation is placed upon the principle of national sovereignty over natural resources.<sup>45</sup> In terms of article 3, it is the responsibility of states to ensure that activities within their jurisdiction do not cause damage to the environment beyond their national borders.<sup>46</sup> A further limitation on national sovereignty over natural resources is provided for by the recognition in the CBD that the conservation of biological diversity is a common concern of humankind.<sup>47</sup> The principle therefore places a limitation on states' freedom of action, even where other

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<sup>45</sup> Scholtz 2008 *Netherlands International Law Review* 325.

<sup>46</sup> See also principle 21, Stockholm Declaration, 1972 and Principle 2, Rio Declaration, 1992.

<sup>47</sup> Preamble, CBD. According to Pathak "The human rights system as a conceptual framework for environmental law"

states' sovereign rights are not affected in a direct transboundary sense as envisaged by the "no harm" principle mentioned above.<sup>48</sup>

The above mentioned principles are critical in the establishment of TFCAs. While they may not be expressly mentioned in the agreements concluded by the state parties for establishing TFCAs, it goes without saying that these principles govern their relationships. Yet, to achieve success with TFCAs there is a need for a high level of commitment to these principles within the context of the CBD. Thus, state parties to TFCAs should allow high levels of cooperation in the TFCA initiatives with the understanding that biological diversity is a common concern of humankind. This, of course, calls for a more flexible approach towards sovereignty issues.

The key objectives of the CBD are to conserve biological diversity; to sustainably use biodiversity components; and the fair and equitable sharing of the benefits arising out of the utilisation of genetic resources.<sup>49</sup> These objectives indicate that the CBD recognises the importance of sustainable development in the exploitation of biodiversity.<sup>50</sup> In other words, the CBD accepts that biodiversity can and should be exploited for development, be it economic or human development, or both. However, this should be done in such a manner that it will not be depleted and eventually fail to meet the demands of current and future generations.

To achieve its objectives, the CBD places an obligation on state parties to, *inter alia*, adopt national strategies, plans or programmes for the conservation and sustainable use of biological diversity,<sup>51</sup> and prepare environmental assessments of proposed projects that are likely to have adverse effects on biological diversity.<sup>52</sup> It is encouraging to note that member states of the SADC have managed to adhere to the CBD

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<sup>48</sup> Brunnée "Common areas, heritage, concern" 566.

<sup>49</sup> Article 1, CBD.

<sup>50</sup> See the preamble, CBD.

<sup>51</sup> Article 6, CBD.

<sup>52</sup> Article 14, CBD.

obligations as indicated by their submission of action plans and progress reports to the CBD Secretariat.<sup>53</sup>

An important provision in the CBD is article 8, which provides for *in-situ* conservation.

*In-situ* is defined as:

the conservation of ecosystems and natural habitats and the maintenance and recovery of viable populations of species in their natural surroundings and, in the case of domesticated or cultivated species, in the surroundings where they have developed their distinctive properties.<sup>54</sup>

The focus of *in-situ* conservation is to maintain and conserve biodiversity within its natural environment. To this end the CBD places an obligation on state parties to demarcate or establish, within their territories, protected areas or special measures for *in-situ* conservation.<sup>55</sup> In particular, article 8(d) of the CBD recognises protected areas as a key mechanism to protect ecosystems and natural habitats, and to maintain viable populations of species in natural surroundings. Areas adjacent to protected areas are also to be protected for sustainable development.<sup>56</sup>

Moreover, article 8(j) acknowledges that the knowledge, innovations and practices of indigenous and local communities embody traditional lifestyles that promote conservation and sustainable use of biodiversity. It appears that the CBD recognises the existence, especially in developing countries, of large proportions of biodiversity outside of protected areas where local communities are dependent on natural resources for their livelihood.<sup>57</sup> Indigenous and local communities are therefore encouraged to participate in the conservation and sustainable use of biodiversity, and in turn profit from the equitable sharing of the benefits arising from the utilisation of their knowledge, innovations and practices.<sup>58</sup> This approach has been reiterated in the *Addis Ababa*

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<sup>53</sup> Lubbe 2007 *YBIEL* 133.

<sup>54</sup> Article 1, CBD.

<sup>55</sup> Article 8, CBD.

<sup>56</sup> Article 8(e), CBD.

<sup>57</sup> Schally "Sustainable livelihoods, community involvement and awareness as driving forces for biodiversity conservation" 5.

<sup>58</sup> Article 8(j), CBD.

*Principles and Guidelines for Sustainable Use of Biodiversity* (hereafter Addis Ababa Principles) which states that:

The needs of indigenous and local communities who live with and are affected by the use and conservation of biological diversity, along with their contributions to its conservation and sustainable use, should be reflected in the equitable distribution of the benefits from the use of those resources.<sup>59</sup>

Despite the fact that there is no express provision for TFCAs in the CBD, one can assume that the measures relating to *in-situ* conservation do facilitate and provide guidelines for the TFCA initiatives. In other words, TFCAs can be regarded as special measures that state parties to the Convention achieve to conserve biodiversity within natural surroundings without the disruptions of manmade borders. Also significant in *in-situ* conservation is the recognition that indigenous and local communities are key role players and beneficiaries of measures towards biodiversity conservation and the sustainable use of natural resources. Therefore state parties to the CBD that establish TFCAs should also adopt this same approach towards indigenous and local communities, given that these people's land and livelihoods are directly affected.

#### 2.3.1.2 CITES

CITES has as its sole aim the control and prevention of international commercial trade in endangered species or their products. CITES controls international trade through a permit system which provides for species that are threatened with extinction,<sup>60</sup> species that are not yet threatened with extinction but may become so if trade is not controlled and monitored,<sup>61</sup> and species subject to regulation in the jurisdictions of states for purposes of preventing or restricting exploitation and needing other parties' cooperation to control trade.<sup>62</sup> This Convention introduces the idea that trade must be sustainable,

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<sup>59</sup> Principle 12, Addis Ababa Principles.

<sup>60</sup> Appendix I species; article II(2)(a), CITES.

<sup>61</sup> Appendix II species; article II(2)(b), CITES.

<sup>62</sup> Appendix III species; article II(2)(3), CITES.

and through its regulatory framework, indirectly assists in the conservation of biodiversity.<sup>63</sup>

CITES does not provide for transfrontier conservation, but an integrated and harmonised approach towards its implementation in the SADC region is appropriate in the TFCA programmes.<sup>64</sup> In relation to community involvement, CITES does recognise that peoples and states are, and should be, the best protectors of their own wild fauna and flora.<sup>65</sup> It has been argued that the effective implementation of this Convention cannot be realised without the recognition of the economic, cultural and social concerns of affected communities.<sup>66</sup> Local communities living within and adjacent to TFCAs should therefore be recognised as important players in the implementation of CITES within the TFCA context.

#### 2.3.1.3 Convention for the Protection of the World Cultural and Natural Heritage

The *Convention for the Protection of the World Cultural and Natural Heritage*, 1972 (hereafter World Heritage Convention) provides for the conservation and management of world heritage sites. In terms of this Convention, member states are required to implement national measures for the protection and conservation of natural and cultural heritage situated on their territories.<sup>67</sup> To achieve this obligation state parties are encouraged to, *inter alia*, adopt policies that aim to give cultural and natural heritage a function in the life of communities.<sup>68</sup> Additionally, the Convention encourages international cooperation for the achievement of its objectives.<sup>69</sup> The World Heritage Convention does not provide for TFCAs, but can be an important instrument for TFCAs that include world heritage sites.<sup>70</sup> As such it is also useful in recognising that these

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<sup>63</sup> Birnie, Boyle and Redgwell *International Law and the Environment* 664.

<sup>64</sup> Lubbe 2007 *YBIEL* 136.

<sup>65</sup> Preamble, CITES.

<sup>66</sup> Abensperg-Traun and Schally "CITES and Community-based Conservation" 1.

<sup>67</sup> Article 4, *World Heritage Convention*.

<sup>68</sup> Article 5(1), *World Heritage Convention*.

<sup>69</sup> Article 4, *World Heritage Convention*.

<sup>70</sup> For instance the Greater Mapungubwe TFCA, to be discussed later in detail, is comprised of recognised world heritage sites. However, Lubbe 2007 *YBIEL* 134-235 has been noted that despite the importance of this Convention, it has only been ratified by a few states in SADC

sites must be beneficial for their communities. This approach, if adopted in TFCAs, will strengthen the position of relevant local communities.

#### 2.3.1.4 Convention on Wetlands of International Importance Especially as Waterfowl Habitat

The *Convention on Wetlands of International Importance Especially as Waterfowl Habitat* (hereafter Ramsar Convention), 1975 addresses conservation of wetlands as a specific form of biodiversity conservation. It is important not only because it has been ratified by a number of SADC member states, but because it also expressly provides for transfrontier conservation. In particular, member states are obliged to establish nature reserves on wetlands that traverse borders.<sup>71</sup> In this regard the Ramsar Convention emphasises cooperation and coordination between state parties in executing their obligations and in policy and regulatory measures.<sup>72</sup>

Since the Convention recognises the interdependence of man and his environment, it is useful in pointing out that the involvement of communities whose livelihoods are based on wetlands in the conservation and wise use of such resources is pertinent.<sup>73</sup> However for the SADC region it is lamentable that of its forty plus Ramsar sites, none are transboundary sites.<sup>74</sup>

#### 2.3.2 Regional law

The African Union (hereafter AU) recognises the importance of biodiversity conservation in a number of its key instruments. The *Constitutive Act of the African Union, 2000* establishing the AU as the principal instrument for the promotion of socio-economic integration, provides for biodiversity conservation in the context of sustainable

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and of these countries only South Africa seems to have adopted national legislation in accordance with its obligations.

Article 4(1), Ramsar Convention.

Article 5, Ramsar Convention.

Preamble, Ramsar Convention.

Lubbe 2007 *YBIEL* 133.

development and environmental protection.<sup>75</sup> With this in mind, this part of the study specifically focuses on those instruments that are particularly relevant to transfrontier conservation in the AU and SADC.

### 2.3.2.1 African Union law

The principal instrument on biodiversity conservation is the *African Convention on the Conservation of Nature and Natural Resources*, 1968 (hereafter Algiers Convention). An important mechanism for achieving conservation in the Algiers Convention is the establishment of “conservation areas”.<sup>76</sup> Although this Convention contemplates that these conservation areas are within the national territories of State parties, it does call for cooperation between states whenever any national measure is likely to affect the natural resources of any other State.<sup>77</sup> In its preamble the Convention acknowledges the need for joint action by States on the conservation, utilisation and development of these natural resources. This creates a platform for the creation of protected areas that cut across national boundaries, in line with its fundamental principle to ensure conservation, utilisation and development of soil, water flora and faunal resources.<sup>78</sup> A revision to the Algiers Convention in the form of the *African Convention on the Conservation of Nature and Natural Resources*, 2003 (hereafter 2003 Convention), though not yet operational, specifically calls for cooperation in the harmonisation of law and policy where natural resources or ecosystems cross national borders.<sup>79</sup> In this regard state parties shall cooperate in the management, development, and conservation of transfrontier areas.<sup>80</sup> It is important to note that this Convention requires that the conservation measures to be undertaken by member states should be in the best interests of the people.<sup>81</sup> Accordingly one can argue that the implementation of TFCAs

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<sup>75</sup> Article 3 and 13, Constitutive Act.

<sup>76</sup> Article III and Article X 1968 Convention. Article III defines a “conservation area” as any protected natural resource area, whether it be a strict natural reserve, a national park or a special reserve.

<sup>77</sup> See Article XVI(1)(b), *African Convention on the Conservation of Nature and Natural Resources*.

<sup>78</sup> See article II, *African Convention on the Conservation of Nature and Natural Resources*.

<sup>79</sup> Article XXII, 2003 Convention.

<sup>80</sup> Article XXII, 2003 Convention.

<sup>81</sup> Article II, Algiers Convention.

should be done in the best interests of the local communities as the people directly affected by the programmes.

Transfrontier conservation is specifically provided for in the AU's development plan, the New Partnership for Africa's Development (hereafter NEPAD). Though it is a non-binding instrument, all members of the AU are automatically members of NEPAD.<sup>82</sup> In particular, the NEPAD Environmental Programme (hereafter NEPAD EAP) has singled out a transboundary conservation of natural resources project, among its other environmental projects, to specifically address biodiversity issues by assisting African states in the implementation of their obligations under the CBD and other biodiversity-related conventions.<sup>83</sup> The rationale behind this particular programme is that transboundary collaboration on the sustainable use, conservation and management of natural resources can provide both economic and conservation benefits greater than can be achieved if countries work individually.<sup>84</sup> The TFCAs in SADC have been implemented in line with this NEPAD EAP.<sup>85</sup>

It is important to note that, in adopting the AU approach to biodiversity conservation, the *African Charter on Human and Peoples' Rights*, 1981 (hereafter Banjul Charter) is crucial in so far as it provides for the right to a satisfactory environment. Article 24 of the Banjul Charter states that:

All peoples shall have the right to a general satisfactory environment favourable to their development.<sup>86</sup>

The African Commission on Human and Peoples' Rights (hereafter ACHPR) in the *Social and Economic Rights Action Centre and the Centre for Economic and Social Rights v Nigeria*,<sup>87</sup> commonly known as the SERAC case, held that this right places a duty upon states to, *inter alia*, promote conservation, and secure an ecologically

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<sup>82</sup> Kamga *Human rights in Africa: Prospects for the realisation of the right to development* 255.

<sup>83</sup> para 54 and 127, NEPAD EAP.

<sup>84</sup> para 116 NEPAD EAP.

<sup>85</sup> Ferreira 2004 *Geo Journal* 301.

<sup>86</sup> Article 24, Banjul Charter.

<sup>87</sup> Communication No. 155/96.

sustainable development and use of natural resources.<sup>88</sup> Thus, where developmental activities are undertaken by countries, the communities to be affected are to participate in the decision making.<sup>89</sup>

The *Treaty Establishing the African Economic Community*, 1991 also recognises the right to a healthy environment as a necessity in the development of its regional economic integration.<sup>90</sup> However, it does not define a “healthy environment” nor does it elaborate on the means by which such an environment is to be achieved.<sup>91</sup> It can therefore be assumed that, in pursuing its socio-economic agenda, which should take cognisance of environmental protection, this right should be recognised.<sup>92</sup> A more detailed discussion of this right is provided in the chapter that follows. Suffice to say at this juncture that TFCAs as conservation mechanisms should ensure that the communities involved are entitled to this right in so far as it relates to their own development.

#### 2.3.2.2 SADC law

The *SADC Treaty*, 1992 includes the sustainable use of natural resources and the effective protection of the environment as one of its key objectives.<sup>93</sup> The Treaty designates natural resources and the environment as an area of co-operation for member states.<sup>94</sup> It is in this respect that the protocols relevant to environmental protection have been established. For conservation the common approaches by and between member states are to be seen in the sustainable use of these natural resources, harmonisation and enforcement of legislation between and among states parties, information sharing, and capacity building.<sup>95</sup> Credit should be given to the

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<sup>88</sup> Paragraph 52, SERAC Case.

<sup>89</sup> Paragraph 53, SERAC Case.

<sup>90</sup> Article 58, *Treaty Establishing the African Economic Community*, 1991.

<sup>91</sup> Lubbe 2007 *YBIEL* 139.

<sup>92</sup> See Articles 55 and 58 which provide for energy and natural resources, and environmental protection.

<sup>93</sup> Article 5, SADC Treaty.

<sup>94</sup> Article 21, SADC Treaty.

<sup>95</sup> This is reiterated in all relevant protocols to be discussed below.

Treaty for its recognition of environmental conservation as one of its key objectives despite the fact that it does not elaborate on this particular objective. However, it is important as a basis upon which relevant protocols should address the issue in detail.

The *Protocol on Wildlife Conservation and Law Enforcement*, 1999 (hereafter Wildlife Protocol) specifically addresses the conservation and sustainable use of wildlife to the exclusion of forestry and fisheries.<sup>96</sup> Its approach is based on the understanding that the conservation and sustainable use of wildlife in the SADC region contributes not only to sustainable economic development, but also to the conservation of biological diversity.<sup>97</sup> Consequently, its main objective is to have the SADC and individual State parties establish common approaches towards the sustainable use of wildlife resources.<sup>98</sup> More importantly, the Protocol sees the establishment of TFCAs as an important mechanism to achieve cooperation in the sustainable use of the wildlife resources in the region.<sup>99</sup> Thus member states are obliged to promote the development of these areas where key wildlife resources are located near international boundaries.<sup>100</sup> However, there are no provisions to elaborate on the TFCA mechanism, leaving it to member states that adopt this approach to develop their own structures and mechanisms. As shall be discussed in the chapter that follows, this has not always been easy to implement in practice.<sup>101</sup>

It is worth noting that the Wildlife Protocol recognises the involvement of local communities in wildlife conservation efforts. Thus it mandates the heads of wildlife departments in member states to support efforts of governments and non-governmental organisations (hereafter NGOs) to ensure the involvement of local communities in conservation, and to promote cooperation between national wildlife law enforcement authorities, communities and NGOs on enforcement issues.<sup>102</sup> Therefore the Wildlife Protocol sets the basis for state parties to TFCAs may include local communities in conservation and law enforcement mechanisms.

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<sup>96</sup> Article 2, Wildlife Protocol.  
<sup>97</sup> Preamble, Wildlife Protocol.  
<sup>98</sup> Article 4(1), Wildlife Protocol.  
<sup>99</sup> Article 4(2), Wildlife Protocol.  
<sup>100</sup> Article 7(9), Wildlife Protocol.  
<sup>101</sup> See paragraph 2.2 below.  
<sup>102</sup> Article 5(8)(d) and (e), Wildlife Protocol.

The *Protocol on Shared Watercourses*, 2000 emphasises the need for cooperation between member states that share watercourses and thus envisages, *inter alia*, the conclusion of agreements, coordination and integration of management, harmonisation of legislation and policies, information exchange, and capacity building.<sup>103</sup> It places an obligation on State parties to individually and, where appropriate, jointly protect and preserve ecosystems of a shared watercourse.<sup>104</sup> Lubbe<sup>105</sup> explains that this obligation places a mutual and reciprocal duty on member states to conserve the ecosystems intertwined with their shared watercourses. In terms of article 3 one of the principles governing the implementation of this Protocol by member states is the maintenance of

a proper balance between resource development for a higher standard of living for their people and conservation and enhancement of the environment to promote sustainable development.<sup>106</sup>

Applied to the TFCA setting, this provision would mean that the improvement of the standard of lives of local communities should be high on the agenda. The same can be said for a further provision in article 3 also stating that the equitable use of a shared watercourse includes, *inter alia*, the population dependent on the shared watercourse.

The *Protocol on Fisheries*, 2001 was established to promote responsible and sustainable use of the living aquatic resources and aquatic ecosystems of interest to State parties.<sup>107</sup> It is aimed at promoting food security and human health, safeguarding the livelihood of fishing communities, generating economic opportunities for nationals in the region, ensuring that future generations benefit from these renewable resources, and poverty alleviation. While the Protocol pays more attention to the national responsibilities of State parties, it does provide that, where the resources are shared, cooperation between countries in terms of science, technology and information

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<sup>103</sup> Article 2, Shared Watercourses Protocol.

<sup>104</sup> Article 4(2), Shared Watercourses Protocol.

<sup>105</sup> Lubbe 2007 *YBIEL* 141.

<sup>106</sup> Article 3(4), Shared Watercourses Protocol.

<sup>107</sup> Article 3, Fisheries Protocol.

exchange is paramount.<sup>108</sup> Lubbe argues that these harmonisation and cooperation obligations are in recognition of the need for integrated transfrontier conservation. In pursuing transfrontier efforts, the ultimate objectives of the Protocol, that are people-centred, should be considered. There is merit in this argument as the preamble of this Protocol does explicitly recognise that aquatic resources and ecosystems have a unique transboundary character which call for cooperation in the management of shared resources.

The *Protocol on Forestry*, 2002 (hereafter Forestry Protocol) aims to see the development, conservation, sustainable management and utilisation of all types of forests and trees promoted.<sup>109</sup> Also important is the goal to link effective environmental protection with the safeguarding of the interests of both the present and future generations.<sup>110</sup> State parties are therefore called to cooperate, *inter alia*, in the development and use of common criteria and indicators for sustainable forest management,<sup>111</sup> information exchange,<sup>112</sup> and integrated management of transboundary forests and protected areas.<sup>113</sup>

This Protocol appears to be the most progressive in its recognition of the role and rights of local communities in the conservation of forests. In this respect, article 3 requires states to cooperate in respecting the rights of local communities, and in facilitating their participation in the conservation mechanism for the equitable sharing of benefits derived from forests and related traditional knowledge without prejudice to property rights.<sup>114</sup> This provision is crucial in the implementation of TFCAs in transboundary forest areas as it specifically emphasises the need for cooperation of State parties with respect to local communities. Additionally, article 12 mandates State parties to adopt policies and mechanisms that enable local communities to benefit from and participate in the

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<sup>108</sup> Article 4(1); 17; and 18, Fisheries Protocol.

<sup>109</sup> Article 3(a), Forestry Protocol.

<sup>110</sup> Article 3(c), Forestry Protocol.

<sup>111</sup> Article 8(4), Forestry Protocol.

<sup>112</sup> Article 21, Forestry Protocol.

<sup>113</sup> Article 14, Forestry Protocol.

<sup>114</sup> Article 3(2)(g), Forestry Protocol.

sustainable use and conservation of forests.<sup>115</sup> It is submitted that the approach in this Protocol is one that should have been adopted in the other instruments that are relevant to transfrontier conservation. If it had been so, perhaps the position of local communities in TFCAs would have been strengthened, and therefore meaningful, for them.

## **2.4 Conclusion**

Pursuing biodiversity conservation through TFCAs is premised on the understanding that biodiversity conservation is linked with life support systems and human development, and therefore that the TFCA mechanism is a means by which natural resource conservation and ecosystem management is explored simultaneously with human development. TFCAs are multiple resource areas for the use of local communities, which means that their primary objective is to achieve sustainable development for the people living within these areas. Nonetheless, it is lamentable that the position of local communities is usually excluded as an important consideration in the negotiations involving TFCAs.

The key instruments on biodiversity conservation via TFCAs fail to consistently recognise local community involvement. The CBD as the principal instrument does expressly identify local communities as key players and beneficiaries in biodiversity conservation. However, the rest of the discussed international instruments are not so clear on this point. The faltering in consistency also seems to be present in AU and SADC law on the subject. As shall be seen in the following chapter, which focuses on selected examples of TFCAs in Southern Africa, the position of local communities is also not desirable.

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<sup>115</sup> Article 12, Forestry Protocol.

## CHAPTER 3: ANALYSIS OF SELECTED TFCAS IN SOUTHERN AFRICA

### 3.1 Introduction

Having established a link between biodiversity conservation and TFCAs and that the involvement of local communities is pertinent, it is important to assess this finding in real life examples of TFCAs. The focus of this Chapter is on the analysis of selected TFCAs in Southern Africa in so far as they provide for biodiversity conservation, sustainable development and the recognition of the rights of local communities. The TFCAs to be examined are the Great Limpopo Transfrontier Park (hereafter GLTP), Kgalagadi Transfrontier Park (hereafter KTP), and the Limpopo-Shashe TFCA renamed the Greater Mapungubwe GTCFA (hereafter GMTFCA). A brief background to the establishment of TFCAs in SADC will be given, followed by a discussion of each TFCA. The TFCAs will be analysed in relation to their establishing agreements and the extent to which they provide for biodiversity conservation, sustainable development and the rights of local communities.

### 3.2 Background to establishment of TFCAs in Southern Africa

Southern Africa is rich in biological resources and most of the issues around these resources transcend national boundaries, given that several species of mammals, birds, butterflies and fish exhibit transboundary migration patterns.<sup>116</sup> A number of these resources have been protected in national parks and wildlife reserves of individual countries. However, this system of national parks and reserves has resulted in a disparate and disconnected chain of habitat islands which blocks natural migration patterns and places rare or threatened species at risk due to a lack of genetic mixing.<sup>117</sup> The introduction of TFCAs has been a means to salvage the survival of wildlife in the region.<sup>118</sup>

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<sup>116</sup> Para 1.2 SADC Regional Biodiversity Strategy.

<sup>117</sup> Ferreira 2004 *Geo Journal* 301.

<sup>118</sup> Ferreira 2004 *Geo Journal* 301.

For Southern Africa, as with much of Africa, the existence of biodiversity that cuts across national boundaries is a consequence of the division of territories during the colonial era. This was done without due regard for the ecological consequences.<sup>119</sup> As Africa began to regain independence from colonialism, the newly established states embraced the principle of *uti possidetis* in terms of which colonial boundaries of countries are to be maintained.<sup>120</sup> Also influential is the stance of African states towards sovereignty, that is, there should be non-interference in the domestic affairs of other states. Consequently, neighbouring states, though having similar environmental challenges, have established protected areas that, in many instances, share similar borders, but are managed separately under their respective national jurisdictions. This more often than not creates a situation of geographical fragmentation where the same biodiversity is addressed by different and conflicting domestic policies, legislation, ideals and goals. However, by establishing TFCAs it is intended that countries with similar biodiversity challenges cooperate with each other to ensure sustainable resource management and the regulation of biodiversity.<sup>121</sup>

### **3.3 TFCAs in SADC: A closer look at three examples**

#### **3.3.1 KTP**

The KTP, the first TFCa in southern Africa, was opened in 2000 between South Africa and Botswana with the signing of a memorandum of understanding (hereafter the KTP Agreement). It is an amalgamation of the Gemsbok National Park in Botswana and the Kalahari Gemsbok National Park in South Africa, together forming a large ecosystem without much human influence.<sup>122</sup> It is known to be among the few ecosystems in Southern Africa where a variety of mammals, including a number of endangered

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<sup>119</sup> Ferreira 2004 *Geo Journal* 302.

<sup>120</sup> Ratner 1996 *American Journal of International Law* 590.

<sup>121</sup> Lubbe 2007 *YBIEL* 147.

<sup>122</sup> Hanks 2003 *Journal of Sustainable Forestry* 3.

mammals, bird species and species endemic to the arid southwest region of Southern Africa are found.<sup>123</sup>

The KTP Agreement concluded in recognition of the KTP is intended to retain the designated area as far as possible

in its natural state as an undivided ecosystem for the purpose of biodiversity conservation, research, visitors and the larger community with particular reference to those communities adjacent to the Park.<sup>124</sup>

It is clear that the ultimate goal of the KTP is biodiversity conservation. To achieve this goal, article 3 provides for management objectives of the KTP. One of these objectives is the guaranteeing of long term conservation of the wildlife resources in the Southern Kalahari in order to maintain the integrity of the Kalahari ecosystem.<sup>125</sup> The Agreement is also aimed at encouraging

the full realisation of the economic potential of the Parks and surrounding areas which will bring economic benefits to the Republic of Botswana and the Republic of South Africa especially to the local communities adjacent to the Parks.<sup>126</sup>

The inclusion of an economic component to the objectives of the KTP suggests that the participating countries anticipated that, through biodiversity conservation, economic development could also be achieved. It is assumed from the above that the participating countries recognised that local communities were to be one of the main beneficiaries of the proceeds from the economic activities in the KTP.

The local communities living adjacent to the KTP and in surrounding areas predominantly comprises of the Khomani San and Mier communities.<sup>127</sup> Of significance

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<sup>123</sup> South African National Parks (SANParks) Date Unknown [http://sanparks.org.za/conservation/transfrontier/kgalagadi/major\\_features.php](http://sanparks.org.za/conservation/transfrontier/kgalagadi/major_features.php) [date of use 10 Jul 2012].

<sup>124</sup> Article 1, *KTP Treaty*.

<sup>125</sup> Article 3(1)(a), *KTP Treaty*.

<sup>126</sup> Article 3(1)(d), *KTP Treaty*.

<sup>127</sup> Thondlana, Shackleton and Muchapondwa *Environmental Research Letters*.

here is the fact that the Khomani San are regarded as indigenous people.<sup>128</sup> These communities together form part of the management bodies of the KTP.<sup>129</sup> They were evicted from their lands during the colonial era with the creation in South Africa of the Kalahari national park.<sup>130</sup> By the end of 2002 their land, comprising of part of the KTP and adjacent lands, was restored to them and they were awarded rights to sustainable harvesting for cultural, traditional and symbolic purposes within and outside of the KTP.<sup>131</sup> With this development the Khomani San and Mier communities were incorporated into the management of the KTP as co-managers. Nevertheless, the governments still retain power over the management of the resources in this park. It appears that the communities' rights over the land have been limited only to the right of use and nothing more. Furthermore, it has been reported that there are no park-based projects in the KTP for these communities.<sup>132</sup> This is despite the existence of a number of ecotourism activities within this KTP. Thus the Khomani San and Mier communities have only enjoyed minimal benefits from the KTP.<sup>133</sup>

The situation of the local communities in the KTP indicates a failure by the contracting parties of the KTP Agreement to ensure that the main beneficiaries in the economic activities of the park are the local communities, as contemplated in the agreement. It is interesting to note that the KTP Agreement failed to recognise the rights of these communities, some of which are indigenous people, over the natural resources and the portions of their land in the KTP. Perhaps the non-recognition of the rights of the communities in the agreement can be seen as a reluctance to give the communities power over the land and resources in the KTP that would impact the operationalisation of the KTP from its conception.

### 3.3.2 *GLTP and GLTFCA*

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<sup>128</sup> Thondlana, Shackleton and Muchapondwa *Environmental Research Letters*.

<sup>129</sup> Backteman 2012 <http://www.efdinitiative.org>.

<sup>130</sup> Thondlana, Shackleton and Muchapondwa *Environmental Research Letters*.

<sup>131</sup> Backteman 2012 <http://www.efdinitiative.org>.

<sup>132</sup> Moswete, Thapa and Child "Stakeholder Perspectives on the Potential for Community-based Ecotourism 28.

<sup>133</sup> Moswete, Thapa and Child "Stakeholder Perspectives on the Potential for Community-based Ecotourism 28

The GLTP was established in 2002 by a treaty between South Africa, Mozambique and Zimbabwe. The areas making up the GLTP include the Limpopo National Park in Mozambique; the Kruger National Park and Makuleke Region in South Africa; and the Gonarezhou National Park, Malipati Safari Area, Manjinji Pan Sanctuary and the communal areas in Zimbabwe which constitute the biodiversity corridor linking Gonarezhou to the Kruger National Park.<sup>134</sup> However, the GLTP actually falls under the Great Limpopo Transfrontier Conservation Area (hereafter GLTFCA) which covers a wider area and different land uses.<sup>135</sup> In South Africa and Zimbabwe there are privately-owned and state owned conservation areas that border the TFCA.<sup>136</sup>

The preamble of the GLTP Treaty indicates that, by establishing the park, the parties to the treaty are desirous to achieve biodiversity conservation. Apart from biodiversity conservation, the parties take into cognisance the responsibility towards sustainable development, through the conservation and sustainable use of natural resources for present and future generations.<sup>137</sup> Accordingly, article 2 states that the establishment of the GLTP is for the purpose of conservation, socio-economic development and public enjoyment.

To this end the objectives of the GLTP, as provided for in the establishing treaty, are to:

- (a) foster trans-national collaboration and co-operation among the Parties which will facilitate effective ecosystem management in the Transfrontier Park;
- (b) promote alliances in the management of biological natural resources and cultural heritage resources by encouraging social, economic and other partnerships among the Parties, including the private sector, local communities and non-governmental organisations;
- (c) enhance ecosystem integrity and natural ecological processes by harmonising environmental management policies and procedures across international boundaries and striving to remove artificial barriers impeding the natural movement of wildlife;

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<sup>134</sup> Article 3, *GLTP Treaty*.

<sup>135</sup> Spierenburg, Steenkamp and Wels 2007 *Representation, Equity and Environment* 11.

<sup>136</sup> Article 3(2)(b), *GLTP Treaty*.

<sup>137</sup> Preamble, *GLTP Treaty*.

- (d) facilitate the establishment and maintenance of a sustainable sub-regional economic base through appropriate development frameworks, strategies and work plans;
- (e) develop trans-border eco-tourism as a means of fostering regional socio-economic development; and
- (f) establish mechanisms to facilitate the exchange of technical, scientific and legal information for the joint management of the ecosystem.<sup>138</sup>

The focus on cooperation, collaboration and harmonisation for the purposes of ecosystem and cultural resources management in the first three objectives of the Treaty may be regarded as further indication of a commitment by the parties towards biodiversity conservation.

However, the Treaty does not elaborate further on how this ecosystem and cultural heritage management is to be achieved. In fact, none of the objectives above explicitly mention biodiversity conservation as a goal.<sup>139</sup> There is no mention of the term “conservation” in all of the objectives, except for the mention of ecosystem integrity and processes, ecosystem management, and management of biological resources.<sup>140</sup> Arguably, the inclusion of terms such as "ecosystem" and "integrity" and "management of biological resources" can be seen as a different way of coining biodiversity conservation in this treaty. But without explicit and detailed provisions for biodiversity conservation in the treaty, there may not be much that can bind the parties to ensure that this goal is achieved in the actual running of the TFCA. The same is seen in the GLTP's *Integrated Development and Business Plan, 2009* which provides for the administrative and management activities, but does not include conservation objectives for both the GLTP and GLTFCA.

Be that as it may, one of the means by which natural resource management is to be pursued, is through alliances and partnerships with local communities and other stakeholders in natural resource management.<sup>141</sup> This stems from the recognition of the

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<sup>138</sup> Article 4, *GLTP Treaty*.

<sup>139</sup> Cumming *Constraints to Conservation and Development Success at the Wildlife-Human Interface in Southern African Transfrontier Conservation Areas 4*.

<sup>140</sup> Cumming *Constraints to Conservation and Development Success at the Wildlife-Human Interface in Southern African Transfrontier Conservation Areas 4*.

<sup>141</sup> Article 4(b), *GLTP Treaty*.

private sector and local communities in the sustainable use of these resources.<sup>142</sup> Interestingly, the objectives on socio-economic development are framed in such a way that the development is at regional level. There is no express recognition of the role of the local communities in socio-economic development, nor is there any indication that these people are key beneficiaries in the GLTP. Also important is the absence of any mention of the rights of the local communities in the treaty's objectives. Such an omission has far-reaching consequences for the position of the local communities, as they cannot hold any of the parties accountable. It is therefore necessary to assess the situation on the ground for these communities.

A number of communities are situated near the GLTP and/or within the GLTFCA. For instance, the Madimbo corridor, which is located in the far northeast of South Africa and borders on Zimbabwe, was, prior to the colonial era, home to and a source of livelihood to the Makuleke clan and a number of Venda families.<sup>143</sup> This corridor also provided them with hunting ground, livestock grazing areas and paths that connected them with social relations across the Zimbabwean border.<sup>144</sup> While these land and resource rights have been returned to them after contestation before national law, they have not been able to enjoy them in their entirety even with the establishment of the GLTFCA.<sup>145</sup> As it is, the repossession of their land has given them access to the land, to use it and derive commercial benefits from it, but they cannot alter their ownership rights over it.

The local communities on the Mozambican and Zimbabwean side of the GLTFCA are in no better situation. On the Mozambican side, the creation of the Coutada Sixteen National Park as part of the GLTP meant that the local communities had to be relocated.<sup>146</sup> Also, the opening of this National Park resulted in wildlife being moved

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<sup>142</sup> Preamble, *GLTP Treaty*.

<sup>143</sup> Whande "Window of Opportunity or Exclusion?" 148. Whande explains that the Madimbo corridor was created during colonial and apartheid South Africa as a means to control local people's movements, veterinary diseases, livestock production and to provide security from the activities of liberation movements in the 1960s and beyond. This resulted in the displacement and restriction of movement of the local people.

<sup>144</sup> Whande "Window of Opportunity or Exclusion?" 148.

<sup>145</sup> Spierenburg, Steenkamp and Wels 2007 *Representation, Equity and Environment* 11. See also Whande "Window of Opportunity or Exclusion?" 148.

<sup>146</sup> Spierenburg, Steenkamp and Wels 2007 *Representation, Equity and Environment* 11.

from the South African side into this area. The invasion of their land by these animals forced the communities to leave.<sup>147</sup> All this was done without the consultation and participation of the communities in the decision making process.<sup>148</sup> In Zimbabwe the inclusion of communal land which constitutes the biodiversity corridor linking Gonarezhou to the Kruger National Park, has also been done without the full approval and participation of the communities.<sup>149</sup> As such the livelihoods of these communities are bound to be compromised.

### 3.3.3 GMTFCA

The third TFCA is the GMTFCA entered into between South Africa, Botswana and Zimbabwe, established by a Memorandum of Understanding signed in 2006.<sup>150</sup> The TFCA is made up of the Northern Tuli Game Reserve in Botswana, the Mapungubwe National Park and World Heritage Site in South Africa, and the Tuli Safari Circle area, Maramani and Machuchuta Communal Lands, Sentinel and River Ranches, and Nottingham Estate<sup>151</sup> in Zimbabwe.<sup>152</sup>

The objectives of the GMTFCA are currently worded in similar terms as those in the *GLTP Treaty*, 2010, and therefore indicate similar biodiversity conservation efforts as those in the latter.<sup>153</sup> Once again the agreement does not seem to indicate a strong commitment to biodiversity conservation. Therefore, without further elaboration on how biodiversity conservation and ecosystem and cultural heritage management are to be achieved, there is not much to bind the parties to their responsibilities towards biodiversity conservation.

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<sup>147</sup> Spierenburg, Steenkamp and Wels 2007 *Representation, Equity and Environment* 11.

<sup>148</sup> Spierenburg, Steenkamp and Wels 2007 *Representation, Equity and Environment* 11.

<sup>149</sup> Spierenburg, Steenkamp and Wels 2007 *Representation, Equity and Environment* 11.

<sup>150</sup> Notugre 2009 <http://www.notugre.com/downloads/section/1-greater-mapungubwe-tfca>.

<sup>151</sup> The Sentinel Ranch, River Ranch and Nottingham Estate are wildlife management areas.

<sup>152</sup> Article 6, *GMTFCA Final Treaty for Approval*.

<sup>153</sup> Article 7, *GMTFCA Final Treaty for Approval*. Since the Treaty has not yet been approved the wording is tentative but it seems that this will be adopted as is in the final treaty.

Furthermore, the parties to the GMTFCA agreement seem to adopt the same approach as that of the GLTP with respect to the involvement of local communities and their rights in relation to conservation and socio-economic development, since the wording of the relevant objectives are currently verbatim to those of the GLTP Agreement.

The land forming the GMTFCA belongs to different stakeholders and is therefore a conservation initiative that is meant to involve partnerships between governments, private landowners and local communities.<sup>154</sup> The importance of the communities in the GMTFCA is not only linked to the Mapungubwe archaeological site, but also to the development of the TFCA which envisages the preservation of culture as part of its biodiversity conservation initiative.<sup>155</sup> However, the communities in the Maramani, Machuchuta and Masera communal lands situated on the Zimbabwean side of the GMTFCA are currently facing threats of displacement from their lands.<sup>156</sup> The Peace Parks Foundation has been calling for the relocation of these people to form a corridor to be named the Maramani Wildlife Corridor, which is to link the Northern Tuli Game Reserve in Botswana and the Sentinel Ranch in Zimbabwe.<sup>157</sup> It is clear that the lack of formal recognition of the role and rights of local communities in the GMTFCA will exclude these people from any participation or benefits from the socio-economic activities that are to take place in this TFCA. It is therefore impossible to see how biodiversity conservation or sustainable development will be effectively achieved if there is no revision of the terms of the draft treaty.

### **3.4 Conclusion**

The situation of local communities in TFCAs should be understood in light of the complexities involved in the whole set up of the TFCA initiative. In particular there is the

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<sup>154</sup> South African National Parks (SANParks) Date Unknown [http://sanparks.org.za/conservation/transfrontier/kgalagadi/major\\_features.php](http://sanparks.org.za/conservation/transfrontier/kgalagadi/major_features.php) [date of use 10 Jul 2012].

<sup>155</sup> GMTFCA TTC 2010 *Greater Mapungubwe Transfrontier Conservation Area 2*.

<sup>156</sup> CESVI 2001 *Sustainable development and natural resources management in Southern Zimbabwe* 10.

<sup>157</sup> CESVI 2001 *Sustainable development and natural resources management in Southern Zimbabwe* 10.

involvement of a number of other stakeholders apart from the State parties, such as NGOs, donors, and private actors, whose interests contribute to the marginalisation of local communities. However, the position of local communities is largely contributed to the fact that the implementation of the TFCA initiatives is structured in such a way that conservation, tourism and security interests are centralised.<sup>158</sup> The wording of the establishing agreements indicates the intention of the State parties to have a top down approach where the national governments take the lead in the running of the management programmes. Typically, the management committees of these TFCAs do not include any community representatives or NGOs concerned with community development or land rights issues.<sup>159</sup> Accordingly, local communities are not only excluded from any meaningful participation in the management of their land and resources, but are in many instances physically barred from the land itself.<sup>160</sup> Whande<sup>161</sup> explains that the absence of local community representation in the TFCA official structures of the GLTP and GLTFCA indicates that TFCAs exclude the very same beneficiaries to whom they claim to be bringing development.

So far the state parties to TFCAs adopted an outsider's socio-economic interest in conservation that alienates local communities. Without formal recognition of the role and rights of local communities in the TFCAs, the conservation and sustainable use of natural resource objectives of the above mentioned TFCAs will not be realised. The chapter that follows considers how the rights of these local communities can become a crucial component of biodiversity conservation and sustainable development.

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<sup>158</sup> CESVI 2001 *Sustainable development and natural resources management in Southern Zimbabwe* 10.

<sup>159</sup> Whande "Window of Opportunity or Exclusion?" 148.

<sup>160</sup> Whande "Window of Opportunity or Exclusion?" 148. Whande states that the involvement of the Peace Parks Foundation as facilitator of the GLTFCA and GLTP has been actively pushing for the alienation of the local communities in the implementation process. For instance, the Peace Parks Foundation produces maps of the TFCA which mark property boundaries without showing how some of these boundaries are contested and negotiated by local demands for land and natural resources based on historical claims.

<sup>161</sup> Whande "Window of Opportunity or Exclusion?" 157.

## **CHAPTER 4: RECONCILING THE RIGHTS OF LOCAL COMMUNITIES IN TFCAS THROUGH SUSTAINABLE DEVELOPMENT**

### **4.1 Introduction**

The marginalisation of local communities in TFCAs through displacement or restrictions over the access and use of their land and natural resources can be seen as a violation of their human rights. It is proposed in this chapter that a sustainable development approach which appreciates the balance between economic, social and environmental sustainability may be a step towards the realisation of these rights in the TFCAs. As such, it is pertinent to examine the approach of the African Commission on Human and Peoples' Rights (hereafter African Commission) in two important decisions pertaining to the rights of local communities and indigenous people. This approach is then linked to the proposed sustainable development as a means by which these local communities and their rights can be reconciled.

### **4.2 Understanding the rights of local communities**

The focus of this part of the Chapter is on the approach taken by the African Commission in interpreting the rights in the Banjul Charter pertaining to local communities in the SERAC and ENDOROIS cases.

#### **4.2.1 SERAC case**

In this case the government of the Republic of Nigeria was alleged to have violated the rights of the Ogoni people, whose lands were exploited by the state-owned National Nigerian Petroleum Company and Shell Petroleum Development Corporation. It was alleged, *inter alia*, that the Nigerian government did not monitor the activities of these oil companies, nor did it require them to consult with the Ogoni people on issues concerning the development of their land. As a result the government had violated the following rights in the African Charter: article 2 on the right to non-discrimination, article

4 on the right to life, article 14 on the right to property, article 16 on the right to health, article 18 on the right to family, article 21 on the right to freely dispose of their wealth and natural resources, and article 24 on the right to a satisfactory environment.

In addressing the alleged human rights violations, the African Commission adopted an obligations approach.<sup>162</sup> In terms of this approach all human rights, that is, civil and political, or economic, social and cultural, create obligations for States.<sup>163</sup> The African Commission therefore identified that states have the obligation to respect, protect, promote and fulfil human rights.<sup>164</sup> It was held that the duty to respect requires that the States should refrain from interference in the enjoyment of all fundamental rights.<sup>165</sup> This means respect for right-holders, their freedoms, autonomy, resources, and liberty of action.<sup>166</sup> For socio-economic rights, this duty requires that the State should respect the free use of resources owned by or at the disposal of the individual.<sup>167</sup> The duty to protect requires the State to take measures to protect beneficiaries of the protected rights against political, economic and social interferences.<sup>168</sup> Along the same lines, the State has the obligation to promote the enjoyment of all human rights and must therefore ensure that individuals are able to exercise their rights and freedoms.<sup>169</sup> The last duty for the State is to fulfil the rights and freedoms it freely undertook under the various human rights regimes by the direct provision of basic needs.<sup>170</sup> The Commission therefore concluded that, for some rights, all of these duties are to be observed as they are interrelated and interdependent.<sup>171</sup> It is against this background that the Commission assessed the alleged human rights violations by the Nigerian government.

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<sup>162</sup> Coomans 2003 *International and Comparative Law Quarterly* 752.

<sup>163</sup> Coomans 2003 *International and Comparative Law Quarterly* 753.

<sup>164</sup> Para 44, SERAC case.

<sup>165</sup> Para 45, SERAC case.

<sup>166</sup> Para 45, SERAC case.

<sup>167</sup> Para 45, SERAC case.

<sup>168</sup> Para 46, SERAC case.

<sup>169</sup> Para 46, SERAC case.

<sup>170</sup> Para 47, SERAC case.

<sup>171</sup> Para 48, SERAC case.

The Commission considered the right to health in article 16 together with the right to a satisfactory environment in article 24 and found that both rights are important in having a clean and safe environment.<sup>172</sup> The Commission linked these two rights with economic and social rights where the environment affects the quality of life and safety of the individual.<sup>173</sup> The Commission therefore held that this placed an obligation on States to avoid any direct threat to the health and environment of their people.<sup>174</sup> In carrying out this obligation in terms of articles 16 and 24, States are further required to, *inter alia*, permit independent scientific monitoring of threatened environments, undertake social and environmental impact assessments, provide information to affected communities, and afford individuals the opportunity to be heard and to participate in the development decisions affecting their communities.<sup>175</sup>

With respect to article 24 in particular, the Commission linked the right to a satisfactory environment to social and economic rights and to the development of the people.<sup>176</sup> Consequently this right places an obligation on States to take reasonable and other measures to prevent pollution and ecological degradation, to promote conservation, and to secure an ecologically sustainable development and use of natural resources. The approach of the Commission was therefore that, despite the need to balance development and the right to a satisfactory environment, the latter was not to be undermined where there were negative impacts arising out of economic development.<sup>177</sup>

The Commission concluded that the Nigerian government had been in violation of articles 16 and 24 by condoning and facilitating the activities of the oil companies leading to the pollution and contamination of Ogoniland and related health problems of the Ogoni community.<sup>178</sup>

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<sup>172</sup> Para 51, SERAC case.

<sup>173</sup> Para 51, SERAC case.

<sup>174</sup> Para 52, SERAC case.

<sup>175</sup> Para 53, SERAC case.

<sup>176</sup> Para 51, SERAC case.

<sup>177</sup> Van der Linde and Louw 2003 *African Human Rights Law Journal* 179.

<sup>178</sup> Para 54, SERAC case.

On the right to freely dispose of wealth and natural resources as provided for in article 21 of the African Charter, the Commission reasoned that this right called for cooperative economic development and had been intended as a reminder to African States to avoid depriving its people of their birthright by alienating them from their land as had been done under colonialism.<sup>179</sup> However, the government of Nigeria had facilitated the destruction of Ogoniland by allowing the oil companies to “devastatingly affect the well-being of the Ogonis.”<sup>180</sup>

Dealing with the alleged violation of the right to housing the Commission considered articles 14, 16 and 18 together. The Commission reasoned that article 14 on the right to property read with article 16 on the right to health and article 18 on the right to family prohibited the destruction of shelter since the latter adversely affects property, family and health.<sup>181</sup> The right to housing was also extended to mean the right to be protected from forced evictions, which entails protection from permanent removal of families or individuals from their homes against their will, without according them access to legal remedy.<sup>182</sup> Through its security forces which destroyed the houses of the Ogoni and attacked or killed those who attempted to rebuild, the government of Nigeria had indeed violated articles 14, 16 and 18.

The Commission further held that the Nigerian government had violated the right to food. Though not included in the African Charter, the Commission held that this right was implicit in the right to life in article 4, the right to health in article 16 and the right to economic, social and cultural development in article 22.<sup>183</sup> This right, at the core minimum, requires that food sources are not to be destroyed or contaminated and that people should not be prevented from efforts to feed themselves.<sup>184</sup> By condoning the

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179 SERAC case, para 56.  
180 SERAC case, para 58.  
181 SERAC case, para 60-61.  
182 SERAC case, para 63.  
183 SERAC case, para 64.  
184 SERAC case, para 65.

actions of security forces and the oil companies to destroy and contaminate the food sources of the Ogoni, the Nigerian government had violated the right to food.<sup>185</sup>

Lastly the Commission reasoned that the widespread violations of the above mentioned rights were also a violation by the Nigerian government of the Ogoni people's right to life.<sup>186</sup>

Applying the approach of the African Commission on human rights violations to the situation of local communities in TFCAs, it can be said that State parties to the TFCAs are obliged to respect, protect, promote and fulfil the rights of local communities. One way of achieving this would have been the inclusion of these rights in the establishing agreements.

The displacement of these communities from their lands or the deprivation of full access to their land and natural resources results in the violation of a number of their rights. The deprivation of land for the local communities usually results in resettlement on less favourable land under worse conditions. To begin with, the displacements can be regarded as a violation of the right to property, and the right to freely dispose of their wealth and natural resources as provided for in the African Charter. Adopting the approach of the Commission on the right to housing, the local communities are deprived of adequate shelter, family and the right not to be permanently removed from their homes against their will without legal redress. It can also be said that, without their land or adequate access to their land rights, the local communities in TFCAs are also being deprived of their rights to health to the extent that this right relates to their quality of life and safety.

More importantly, the removal of local communities from their land and denying them access to the resources, potentially deprives them of the right to enjoy a healthy and safe environment, since they usually find themselves relocated to unfavourable land.

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<sup>185</sup> SERAC case, para 56.

<sup>186</sup> SERAC case, para 67.

Taking from the African Commission, this right to a healthy and safe environment cannot be undermined at the expense of economic development. It is worth repeating that a healthy environment requires the securing of an ecologically sustainable development and use of natural resources. In this regard there is a need for balancing out the interests of state parties to TFCAs and other stakeholders with the need to ensure that the local communities reside in and survive on satisfactory environment. This requires that these communities be afforded opportunities to participate in decisions pertaining to their land and where these rights might be affected, to have access to and be afforded opportunities to seek legal redress.

### 3.2.2 *The Endorois case*

In *Centre for Minority Rights Development (CEMIRIDE) and Minority Rights Group International (MRG) (on behalf of the Endorois) v Kenya* (Communication No. 276/2003), also referred to as the Endorois case, the Commission had to consider the rights of indigenous peoples over their ancestral lands. In this case the Endorois people, a pastoral semi-nomadic indigenous community in Kenya, were evicted by the Kenyan government from their ancestral lands to establish a nature reserve and tourist facilities. Upon their eviction they received minimal compensation and were relocated to an area that was unsuitable for their pastoral livelihood. The only access granted to their land was for practising their spiritual beliefs and were promised a share in the proceeds from the new establishment. It was therefore alleged that the Kenyan government had violated the following rights of the Endorois people: the right to religion in article 8, right to property in article 14, right to culture in article 17, right to natural resources in article 21, and the right to development in article 22. The Endorois community claimed restitution to their land, compensation for the eviction and a declaration that their above mentioned rights, as indigenous people, had been violated.

In addressing the alleged violation of the rights of the Endorois the Commission clarified the concept of 'people', particularly indigenous people. Thus, indigenous people were identified by the following criteria:

The occupation and use of a specific territory; the voluntary perpetuation of cultural distinctiveness; self-determination as a distinct collectivity, as well as recognition by other groups; an experience of subjugation, marginalisation, dispossession, exclusion or discrimination.<sup>187</sup>

It was therefore held that the Endorois did fall under these criteria and were therefore indigenous people.<sup>188</sup> Consequently, the alleged violations affected the right of indigenous people to the preservation of their identity through identification with ancestral lands, cultural patterns, social institutions and religious systems.<sup>189</sup>

With respect to the right to religion, it was held that, for indigenous people, this right involves the protection of fragile ecosystems as sacred sites for their spirituality.<sup>190</sup> Consequently, denying the Endorois access, amounts to a restriction on their freedom to practice their religion, without any significant public security interest or other justification. Thus, allowing them to practice their religion on the land would not be a hindrance for conservation or economic development of the area.<sup>191</sup>

On the right to property the Commission held that the mere access to land did not meet the right as contemplated in the Charter.<sup>192</sup> Also, the creation of a national park was disproportionate as a justification for eviction of these indigenous people from the land.<sup>193</sup> Furthermore, indigenous ownership enabled them to engage with the State and third parties as active stakeholders rather than passive beneficiaries.<sup>194</sup> Here the Commission relied on Articles 26 and 27 of the *UN Declaration on the Rights and Fundamental Freedoms of Indigenous Peoples*, and concluded that indigenous peoples have a recognised claim to ownership of ancestral land under international law, even in the absence of official title deeds.<sup>195</sup> It has been noted that this approach of the

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<sup>187</sup> Endorois case, para 153.

<sup>188</sup> Endorois case, para 153

<sup>189</sup> Endorois case, para 153

<sup>190</sup> Endorois case, para 166.

<sup>191</sup> Endorois case, para 167.

<sup>192</sup> Endorois case, para 259.

<sup>193</sup> Endorois case, para 204.

<sup>194</sup> Endorois case, para 204.

<sup>195</sup> Endorois case, para 207.

Commission demands that communities such as the Endorois should not be regarded as “mere recipients of even well intentioned state or non-state development interventions”, but that they participate actively in any developments on its land.<sup>196</sup>

The right to culture was linked to the use of land resources in a specific way and the right to live in reserves protected by law.<sup>197</sup> Therefore it was held that the creation of a game reserve, though legitimate, was not sufficient justification to deny the Endorois access for the celebration of their cultural festival and rituals since this would not pose any harm to the ecosystem of the reserve.<sup>198</sup>

On the right to natural resources the Commission held that there was a need for the State to assess whether any restriction on the property rights of the Endorois, through the mining of rubies on the land, was necessary for their survival. In this regard it was concluded that these mining activities did affect the community in the way in which they related to other natural resources such as water, and was therefore only to be done following prior informed consultation and compensation.<sup>199</sup>

On the right to development the Commission found that it is both a procedural and substantive right which requires both elements to be satisfied in order for there not to be a violation thereof.<sup>200</sup> The Commission laid down criteria for the fulfilment of the right. Thus, the right to development must be:

equitable, non-discriminatory, participatory, accountable and transparent, with equity and choice as important and over-arching themes.<sup>201</sup>

Accordingly, development goes beyond the simple provision for basic needs or of services to include providing the people with the ability to choose where to live.<sup>202</sup> Thus

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<sup>196</sup> Sing'Oei “The Endorois’ Legal Case and its Impact on State and Corporate Conduct in Africa”.

<sup>197</sup> Endorois case, para 249.

<sup>198</sup> Endorois case, para 249.

<sup>199</sup> Endorois case, para 267.

<sup>200</sup> Endorois case, para 277.

<sup>201</sup> Endorois case, para 277.

<sup>202</sup> Endorois case, para 278.

the Commission viewed the right to development as involving a development process that would enhance, rather than diminish, the communities' choices and capabilities.<sup>203</sup> For the Endorois people this meant that their displacement from their lands resulted in difficulties for them in obtaining food, because the area where they were moved to was not conducive for their subsistence farming, fishing and gathering.<sup>204</sup>

The Endorois decision is important for drawing parallels with those local communities in TFCAs that are indigenous people. From this decision it is established that, before addressing the human rights violations for given communities, it is important to identify whether they are indigenous people or not. In the event that they are indigenous people, they should fall under the criteria provided by the African Commission. This distinction is important in defining the nature and extent of the rights involved and how such people benefit as right holders within the TFCA initiatives. The removal of indigenous people from their ancestral lands for the furtherance of the TFCA initiative may contravene the rights of these people and therefore negatively impact on their human development.

In addition to the above, the Endorois case assists in the understanding that development must be equitable, non-discriminatory, participatory, accountable and transparent. Also important in this case is that prior informed consent has been set as the standard for the participation that is required in the right to development.<sup>205</sup> While this right is discussed in the context of indigenous people, it can be employed in advocating for the rights of all local communities in the TFCAs whose livelihoods have been dependent on the land and resources in these areas.

The approach employed by the African Commission in the SERAC and Endorois cases can be used in the development of a sustainable development approach, particularly on the social sustainability pillar. The next section attempts to develop an approach to reconcile the rights of local communities with the TFCA initiatives in the context of the three pillars of sustainable development.

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<sup>203</sup> Endorois case, para 283.

<sup>204</sup> Endorois case, para 285.

<sup>205</sup> Kamga 2011 *De Jure* 390.

### 3.3 A sustainable development approach

The involvement of local communities, and indeed the recognition of their rights, should be at the heart of the TFCAs initiative for the success of biodiversity conservation pursuant to sustainable development, as envisaged by state parties in their establishing agreements. The focus will be on its three pillars, namely, environmental, economic and social sustainable systems. The sustainable development approach is a possible option to addressing the rights of local communities as these issues may be said to relate to the social pillar of sustainable development.

#### 3.3.1 The three pillars of sustainable development

Sustainable development as defined by the Brundtland Commission is

development that meets the needs of the present without compromising the ability of future generations to meet their own needs. It contains two key concepts:

- the concept of “needs”, in particular the essential needs of the world’s poor, to which overriding priority should be given; and
- the idea of limitations imposed by the state of technology and social organisations on the environment’s ability to meet present and future needs.<sup>206</sup>

There have been objections to this definition of sustainable development, but for the purposes of this discussion it will suffice.<sup>207</sup> The aim of sustainable development is to meet the needs, now and in the future, of human, economic, and social development within the restraints of the life support systems of the planet.<sup>208</sup> The notion of defining sustainable development was recognised in the *Rio Declaration*, 1992 which places human beings at the centre of concerns for sustainable development.<sup>209</sup> There is therefore a responsibility on States to reduce and eliminate unsustainable patterns of

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<sup>206</sup> *World Commission on Environment and Development* of 1987 commonly known as the Brundtland Commission’s report.

<sup>207</sup> See Ramos *How can Transfrontier Conservation Areas (TFCAs) Promote Sustainable Development?* 12.

<sup>208</sup> Kates, Parris and Leiserowitz 2005 *Environment: Science and Policy for Sustainable Development* 12.

<sup>209</sup> Principle 1, Rio Declaration.

production and consumption.<sup>210</sup> Moreover, Principle 10 of the *Rio Declaration* provides that environmental issues are best handled with the participation of all concerned citizens, at the relevant level. This includes access to information, participation in decision making, public awareness and information dissemination, and access to judicial processes for the benefit of the public.<sup>211</sup>

The economic pillar entails maximising society's wellbeing and poverty eradication through the optimal and efficient use of natural resources.<sup>212</sup> Here the overriding priority is the basic needs of the world's poor. Thus, in striving for economic development that is aimed at poverty eradication, the focus should be on ensuring that maximum net benefits for now and in the future are yielded from the use and conservation of biodiversity.<sup>213</sup> Moreover, this calls for equitable sharing of these net benefits in accordance with applicable national, regional and international law.<sup>214</sup>

In TFCAs the economic pillar is characterised by ecotourism. Ecotourism is defined as

An activity where the authorities, the tourism industry, tourists and local people cooperate to make it possible for tourists to travel to genuine areas in order to admire, study and enjoy nature and culture in a way that does not exploit the resource, but contributes to sustainable development.<sup>215</sup>

From the above it is clear that ecotourism is characterised by, *inter alia*, minimising negative impacts upon the natural and socio-cultural environment, the protection of natural areas, the creation of revenue for local communities, the tourism industry and authorities managing the natural resources through conservation.<sup>216</sup>

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<sup>210</sup> Principle 8, Rio Declaration.

<sup>211</sup> Principle 10, Rio Declaration.

<sup>212</sup> Commission on Sustainable Development "Guidance in Preparing a National Sustainable Development Strategy" para 7.

<sup>213</sup> OECD 2004 <http://acts.oecd.org>.

<sup>214</sup> OECD 2004 <http://acts.oecd.org>.

<sup>215</sup> Ramos *How can Transfrontier Conservation Areas (TFCAs) Promote Sustainable Development?* 23.

<sup>216</sup> Ramos *How can Transfrontier Conservation Areas (TFCAs) Promote Sustainable Development?* 23.

The Commission on Sustainable Development<sup>217</sup> explains the social component as:

the relationship between nature and human beings, uplifting the welfare of people, improving access to basic health and education services, fulfilling minimum standards of security and respect for human rights.<sup>218</sup>

The social aspect also includes the development of various cultures, diversity, pluralism and effective grass roots participation in decision-making.<sup>219</sup> In this regard, equity, that is, the distribution of benefits and access to resources, is indispensable for the economic and social aspects of sustainable development.<sup>220</sup> The focus of this study has thus far been on respect for the human rights of the local communities as a means of achieving social sustainability in TFCAs. Adopting the approach of the African Commission in the SERAC case on the obligation of states towards human rights, the respect, protection, promotion and fulfilment of the rights of local communities will ensure that the distribution of benefits and access to resources is done equitably. For instance, the approach taken by the African Commission in the Endorois case on right to development can be adopted by State parties to TFCAs to ensure that local communities actively and meaningfully participate in the activities that improve their quality of life.

Lastly, the environmental pillar focuses on the conservation and enhancement of the physical and biological resource base and ecosystems.<sup>221</sup> Biodiversity conservation as it has been discussed in this study is one of the means by which environmental sustainability can be achieved.

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<sup>217</sup> Commission on Sustainable Development “Guidance in Preparing a National Sustainable Development Strategy” para 7.

<sup>218</sup> Commission on Sustainable Development “Guidance in Preparing a National Sustainable Development Strategy” para 7.

<sup>219</sup> Commission on Sustainable Development “Guidance in Preparing a National Sustainable Development Strategy” para 7.

<sup>220</sup> Commission on Sustainable Development “Guidance in Preparing a National Sustainable Development Strategy” para 7.

<sup>221</sup> Commission on Sustainable Development “Guidance in Preparing a National Sustainable Development Strategy” para 7.

Not only should these three components be balanced, but they must be integrated in such a way that they all bring about the best possible form of sustainability.

### 3.3.2 *Applying the three pillars to the TFCA initiative*

Given that the *Johannesburg Declaration*, adopted at the World Summit on Sustainable Development in 2002 calls for a collective responsibility to advance and strengthen the three pillars at local, national, regional and global levels, this responsibility should be a *sine qua non* in the operation of the TFCA programme.<sup>222</sup>

This means that in pursuing the economic objectives of the TFCA projects, that is ecotourism, State parties should not only envisage national and regional economic growth, but it should first and foremost focus on the wellbeing and eradication of poverty amongst the local communities involved. Local communities should not only be given menial jobs, but should be assisted and supported in developing their own tourism projects in these TFCAs. These efforts assist in the realisation of the right to development of local communities as the development process would enhance rather than diminish the communities' choices and capabilities. Moreover, their right to a satisfactory environment is also realised in so far as this right relates to development. In this way their quality of life is improved and their rights are respected and promoted. It is worth noting that these efforts do not only improve their right to development and right to a satisfactory environment but that a respect of their socio-economic rights will be achieved through a respect of these two rights. Adopting the approach in the SERAC case even civil and political rights such as right to property and right to life are respected through the right to a satisfactory environment and right to development.

It is argued that the meaningful and active involvement in the management of the TFCAs via community based management programmes that are well structured in a bottom-up rather than top-down approach, promotes efficient natural resource

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<sup>222</sup>

Para 5, Johannesburg Declaration.

conservation and management. In this way the environmental conservation pillar can be effectively integrated with the other two in the TFCA programmes.

Of course the involvement of other stakeholders, such as private actors, donors and NGOs cannot be undermined, but their input should be structured in such a way that the economic growth and social equity of the local communities is not compromised. Thus, the exclusion of local communities by marginalisation is ultimately detrimental to the goals of TFCAs, as it overlooks the fact that these people are intricately intertwined with the ecosystems. In the Endorois case the court often applied a proportionality test to weigh out the interests of the State and private actors on the land of the indigenous community. Thus where the State rationalised its actions in terms of nature conservation, the Commission measured them against the rights of the indigenous community. In some instances the actions of the State and other stakeholders may justify the compromise of the rights of the local communities. However, the aim is to ensure that local communities in TFCAs are not unjustifiably marginalised as a result of the self-interests of State parties in the initiatives.

#### **4.4 Conclusion**

Local communities are situated in, or in near proximity to, most TFCAs in Southern Africa, as is reflected in the KTP, GLTFCA and GMTFCA. For some of these communities, especially indigenous communities, the lands forming these transboundary conservation areas are ancestral lands and are central to their survival and livelihood. Sadly, their claims over these lands have been threatened under national conservation initiatives and the situation has not been improved by the establishment of TFCAs. In some instances the actual creation of the TFCA has resulted in the displacement of these communities, as the drivers of the economic objectives have seen them more as obstacles rather than essential players. As a result a number of their rights, closely related to the land and resources, have been violated or ignored. Adopting the African Commission's approach, these rights include social and economic rights and third generation rights such as developmental and environmental

rights. A sustainable development approach which recognises the need to balance and integrate economic, social and environmental sustainable development, is ideal in reconciling the rights of these local communities in the TFCA programmes.

## **CHAPTER 5: CONCLUSION AND RECOMMENDATIONS**

### **5.1 *Introduction***

This study has been an attempt to establish whether the rights of local communities are being recognised, respected and upheld in TFCAs as a mechanism of biodiversity conservation, and how these rights can be reconciled with a sustainable development approach. A closer look at the concept of biodiversity conservation at international and regional level was done in order to understand how it plays out in TFCAs. Through the KTP, GLTFCA and GMTFCA examples the situation of local communities was examined in order to establish whether due regard is given to their rights. A sustainable development approach was then proposed where its three pillars are employed to reconcile the rights of these people in the TFCA programmes. This chapter summarises the findings of the study and attempts to pave a way forward for the recognition of the rights of local communities in the TFCA projects in Southern Africa.

### **5.2 *Findings***

It has been established that the SADC region has taken the TFCA mechanism for achieving biodiversity conservation very seriously as a number of countries have entered into TFCA agreements. However, biodiversity conservation has not been the sole objective and seems to compete with that of socio-economic development, in particular, eco-tourism.

A study of the KTP, GLTFCA and GMTFCA indicates that the biodiversity conservation objective of the TFCAs in the SADC region does not fully envisage the important role of local communities in achieving environmental protection, despite the recognition of their existence in these areas. The preambles to the establishing agreements of these TFCAs do recognise the role local communities in promoting and sustainable use of natural resources. Yet the actual implementation of the agreements has seen their role overlooked. In this regard there are communities that have been threatened to be

evicted from their homelands with the establishing of these TFCAs. Other communities have actually been displaced, while others are on their lands after contestation, but with limited rights over use and ownership.

The exclusion or undermining of local communities is a consequence of the complexities involved in the relationships that exist amongst the various stakeholders in the TFCAs. The various interests of private actors, NGOs, donors and other parties have usually taken precedence over those of the local communities. Local communities are not considered as contributing much to the management of the TFCAs or the implementation of the agreements, and therefore are not given their rightful place in whole set-up.

Consequently, the rights of local communities are compromised, ignored or removed, thus stripping these people of their livelihoods and very survival. In certain instances these communities include indigenous people that are stripped of their ancestral land and the essence of who they are. The rights involved are closely tied to the land and natural resources, and include, *inter alia*, the right to property, the right to life, the right to natural resources, and the right to environment. Adopting the approach of the African Commission in decided cases these rights, especially the right to environment, also includes social and economic rights such as the right to health, housing, shelter and others. This right to environment is also linked to development and thus, the right to development.

While the TFCA initiative is also hinged upon sustainable development, that is, sustainable use of natural resources and conservation for the present and future generations, the failure to fully recognise the rights of the local communities indicates a limited understanding of the importance of sustainable development in biodiversity conservation.

### **5.3 Recommendations**

- A more robust sustainable development approach which balances and integrates economic growth, social equity and environmental protection is essential to salvage the rights of local communities in TFCAs. This approach should be applied with local communities as the central focus. This requires an appreciation of local communities, not just as stakeholders in the TFCA initiative, but as an important component of the ecosystems involved and thus of ecosystem management.
- By applying the sustainable development approach as suggested in this study, the local communities should be afforded: access to information, effective grass-roots participation in decision-making, distribution of benefits and access to resources, and access to judicial proceedings. In doing so, the rights of these communities will start to be a reality.
- The establishing agreements and perhaps the implementation instruments of TFCAs need to be amended to recognise the rights of local communities as key to the sustainable use of natural resources. Moreover, these compliance and monitoring mechanisms should be created within the TFCA management programmes that ensure that the rights of local communities are being respected and fulfilled.
- In order for the sustainable development approach to be feasible, issues of governance need to be addressed. One of the challenges facing the management of the TFCA programmes is that of a lack of good governance in individual State parties. For the GLTFCA and GMTFCA, Zimbabwe and Mozambique struggle with governance problems as is reflected by their political and economic instability. These challenges are obviously carried through and impact on the effectiveness of the management of the TFCAs.

#### **5.4 Conclusion**

This study has established that the rights of local communities are not being respected and fulfilled within the TFCA initiative, despite the importance of local communities as key players and beneficiaries in achieving biodiversity conservation. Thus, a sustainable development approach can be viable in reconciling these rights if the three pillars of sustainable development are well balanced and integrated.

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