STRENGTHENING CONSERVATION THROUGH PARTICIPATION: PROCEDURAL ENVIRONMENTAL RIGHTS OF LOCAL COMMUNITIES IN TRANSBOUNDARY PROTECTED AREAS

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ABSTRACT

Procedural environmental rights can be applied across state borders by way of the non-discrimination principle. This 'transboundary' or 'extraterritorial' dimension is first explored in the framework of regional organisations, such as the European Union and the Southern African Development Community (SADC), that can facilitate the emergence of higher participatory standards and, based on those standards, foster legislative harmonisation among the member states. The regional framework influences the dynamics of interstate cooperation in all fields, including for the conservation of shared natural resources. In the context of cross-border conservation initiatives, like transboundary protected areas (TBPAs), the extraterritorial application of procedural environmental rights can strengthen public participation of local communities. These communities are entitled to procedural environmental rights as 'public concerned' towards all partner countries since the creation of a TBPA can impinge on their survival and livelihoods. Indeed, local communities have a primary role in the sustainable management of natural resources, and their participation is crucial for the long-term success of cross-border conservation. Transfrontier Conservation Areas (TFCAs) have been established to frame cross-border conservation efforts in the SADC region; therefore, the Kavango Zambezi Transfrontier Conservation Area is used to exemplify the extraterritorial dimension of procedural environmental rights of local communities in the context of TBPAs.

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Keywords

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1. INTRODUCTION

Biodiversity is borderless: rivers often flow through political boundaries, ecosystems stretch over countries, and wild animals do not respect frontiers. Nevertheless, international borders have fragmented natural spaces, and divided territories and people: in most of the cases, such demarcations were drawn artificially disregarding not only ecological considerations, but also socio-cultural and language aspects.

In these contexts, transboundary protected areas (TBPAs)[1] can be used as effective tools to frame cross-border conservation efforts as well as to reconnect communities divided by externally imposed boundaries. The effective participation of such communities[2] to the protection and management of these

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1 The term TBPA is used by the International Union for the Conservation of Nature (IUCN) to identify transboundary conservation initiatives, thus encompassing a wide variety of approaches and arrangements adopted to this end. In this essay, the concept of TBPAs is used in a broad sense to identify any type of transfrontier conservation effort. See *B. Lausche*, Guidelines for Protected Areas Legislation, 2011, pp. 268–269.

2 In this essay, the concept of 'local communities' is used in general terms to identify the inhabitants of a circumscribed area that share their living space, have access to a common pool of natural resources, and interact with each other. The composition of local communities is context-specific and can include indigenous peoples. The identification of local communities is contended in international law, for an in-depth discussion on this topic, see *A. Bessa*, Traditional local communities in international law (Doctoral Dissertation, European University Institute) 2013. Defining 'indigenous peoples' goes beyond the scope of my essay, however, it is important to acknowledge that this concept has been extensively debated in international law. A comprehensive definition of 'indigenous peoples' in international law is missing, not only for the historical and cultural differences among the various groups, but also because indigenous peoples have been refusing externally imposed solutions and preferring a self-identification approach. In addition, a few distinctive criteria have been elaborated at the international level in order to assess the applicability of indigenous rights. For further details refer to the work of the Working Group on Indigenous Populations (a subsidiary organ of the Sub-Commission on the Promotion and Protection of Human Rights operating since 1982), the Permanent Forum on Indigenous Issues, and the UN Special Rapporteur on the Rights of Indigenous Peoples; refer, in particular, to *E.-I. Daes* (Special Rapporteur of the Sub-Commission on Prevention of Discrimination and Protection of Minorities and Chairperson of the Working Group on Indigenous Populations), Study on the protection of the cultural and intellectual property of indigenous people, U.N. Doc. E/CN.4/Sub.2/1993/28 (1993); see also *A. Fodella*, International Law and the Diversity of Indigenous Peoples, Vermont Law Review 2006 (30) 3 p. 565; *P. Thornberry*, Indigenous Peoples and Human Rights, 2002. Moreover, Cittadino provides a useful analysis of the jurisprudence of human rights bodies contributing to the recognition of indigenous peoples' participatory rights in environmental decision-making

transboundary natural spaces and the biodiversity resources included therein is essential to ensure good governance. However, the recognition of procedural environmental rights to local communities in TBPAs cannot be taken for granted.

In this essay, I explore the application of procedural environmental rights across state borders and their recognition to local communities in TBPAs. In the first section, I explain that the principle of non-discrimination and equal access enables the transboundary or 'extraterritorial' dimension of public participation, especially in the framework of regional organisations, such as the European Union (EU) and the Southern African Development Community (SADC). This extraterritorial dimension is equally applicable in TBPAs. In the second section, I discuss why local communities can be considered as 'public concerned': these communities have a privileged connection to natural resources and play a primary role for their conservation and sustainable management, including when conservation-dedicated initiatives are in place. Hence, I explore the recognition of procedural environmental rights to local communities in national protected areas (PAs). In the third section, I discuss the entitlement of local communities to exercise the same participatory rights in a transboundary context; for this purpose, I use the Kavango Zambezi Transfrontier Conservation Area as a case study.

2. THE EXTRATERRITORIAL DIMENSION OF PUBLIC PARTICIPATION

The idea of and concerns for public participation is not relegated to the environmental sphere, but has its roots in the very concept of democracy and builds on existing human rights concepts. For instance, in its Article 21(1), the 1948 Universal Declaration of Human Rights states 'Everyone has the right to take part in the government of his country, directly or through freely chosen representatives'.[3] Its application to environmental matters was anticipated

and identifies four main trends: (1) political rights, (2) formal standards of participation, (3) the paradigm of effective participation, and (4) the prior informed consent of communities. See *F. Cittadino*, Public Interest to Environmental Protection and Indigenous Peoples' Rights: Procedural Rights to Participation and Substantive Guarantees, in E.J. Lohse & M. Poto (eds) in cooperation with G. Parola, Participatory Rights in the Environmental Decision-Making Process and the Implementation of the Aarhus Convention: A Comparative Perspective, 2015, pp. 75–90. On the role of the international jurisprudence for the protection of indigenous peoples rights in the environmental field see *A. Fodella*, Indigenous Peoples, the Environment, and International Jurisprudence, in N. Boschiero, T. Scovazzi, C. Pitea & C. Ragni (eds.), International Courts and the Development of International Law, 2013, pp. 349-364.

3 U.N. GAOR, 3RD Session, Res. 217A (III), UN Doc A/810 (1948). The connection between participatory rights in environmental matters and human rights regimes is acknowledged and mentioned several times throughout this essay, but it falls outside its scope of analysis. For a brief overview refer to *J. Ebbesson*, Principle 10: Public Participation, in J. E. Viñuales (ed.), The Rio Declaration on environment and development: A commentary, 2015, p. 297 et seq.

under the guise of environmental education in Principle 19 of the Stockholm Declaration[4] and affirmed more clearly in Principle 23 of the World Charter for Nature and Principle 10 of the Rio Declaration.[5] Public participation has been codified at national level and included in several international conventions; its maximum expression is reflected in the 1998 UNECE Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters[6] which represents a milestone in international law.

Public participation is complex both in its conceptual structure and in its practice. It is composed of three distinct pillars: (1) access to information, (2) participation in decision-making, and (3) access to administrative and judicial remedies. They are strongly interlinked and mutually reinforcing: while accessing appropriate information is essential to satisfy the right to know[7] and to participate meaningfully in decision-making, accessing to remedies provides the opportunity to both redress unjust outcomes[8] (including the refusal to access information and the use of inappropriate decision-making procedures) and directly enforce environmental law provisions, thus reinforcing the application and respect, on the part of the state and other relevant actors, of the other two pillars and of environmental law in general. It is understandable that there are several degrees of public participation since its practical application depends on the jurisdictional system considered, for example in terms of participatory mechanisms provided by national provisions, and on the conditions on the grounds, like the availability and collection of environmental information, the capability of responsible authorities/actors to share such information, and the competence of the public to contribute to decision-making processes.

In addition to the three aforementioned pillars, there is a forth and cross-cutting component that is the principle of 'non-discrimination' and equal access in environmental matters. This principle defines the 'extraterritorial' dimension of participatory rights since it enables their application across borders.[9] Ebbesson

4 See UN Conference on the Human Environment, Stockholm, 5–16 June 1972.

5 See UN Conference on Environment and Development, Rio de Janeiro, 3–14 June 1992.

6 Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters, Aarhus 28 June 1998 – in force 30 October 2001, 2161 UNTS 447. Hereinafter Aarhus Convention. Given the importance of this Convention, it is used as a reference point in this essay, for example to define key terms as 'public concerned'.

7 For example, to know the environment we are living in, to know potential risks that would affect the environment surrounding us, to know how certain activities could affect environmental conservation. The right to know is also functional to exercise the right to live in a healthy environment, thus reinforcing the human rights to life, to health, and to family.

8 *J. Ebbesson*, Access to Justice in Environmental Matters, in R. Wolfrum (ed.), Max Plank Encyclopedia of Public International Law (online ed.), para. 2.

9 This principle is also called 'national treatment' and, according to Nanda and Pring, has both a substantive and procedural character. In its substantive stance, it requires states to treat environmental harms caused to other states as seriously as they would do for harms occurred to their own territory or citizens. As such, it is asserted in the 1974 OECD Principles Concerning Transfrontier Pollution (Title C), Principle 13 of the UNEP Draft Principles on Shared Natural Resources, Article 13 of the WCED Legal Principles for Environmental

explains that it allows 'members of the public to participate in decision-making and trigger judicial and administrative procedures in environmental matters across state borders'[10] and that it 'matters also for access to information in transboundary contexts'.[11] The non-discrimination and equal access principle is widely accepted: for instance, Article 3(9) of the Aarhus Convention reiterates its application to the three public participation pillars[12], while other instruments focus only on one of them.[13] This wide acceptance is said to indicate that the principle of non-discrimination and equal access in environmental matters has achieved the status of general international law.[14]

Ebbesson highlights that non-discrimination does not impose international minimum standards for public participation, rather it extends the application of national participatory standards to persons across state borders – i.e., extraterritorially – in order to provide non-nationals with '*no less effective opportunities* to make use of remedies and procedures *for the protection of health and the environment* in the state of the harmful activity or installation [emphasis added]'.[15] The rationale behind Ebbesson's reasoning should not be limited to environmental damages as a consequence of harmful activities or installations, but should be applied to environmental protection in general, in line with the preventive approach that has evolved in international environmental law over

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Protection and Sustainable Development, and Principle 14 of the Rio Declaration. Moreover, on the substantive level, non-discrimination derives from good neighbourliness, equity, and fairness, but, is also motivated by the fact that 'equal access to justice is yet imperfectly available, so that a state's environmental harms in other states may leave those victims without a practical remedy'. From a procedural point of view, it demands that a state proposing or carrying out an activity with transboundary environmental effects, grants non-nationals that are going to (or are likely to) be affected by such activity equal access to information, participation, and remedies as it provides to its own citizens. *V. P. Nanda & G. W. Pring*, International Environmental Law and Policy in the 21st Century, 2013, p. 59.

10 *J. Ebbesson*, Public Participation in Environmental Matters, in R. Wolfrum (ed.), Max Plank Encyclopedia of Public International Law (online ed.), para. 7.

11 *J. Ebbesson*, Access to Information on Environmental Matters, in R. Wolfrum (ed.), Max Plank Encyclopedia of Public International Law (online ed.), para. 6. See also, *J. Ebbesson*, The Notion of Public Participation in International Environmental Law, Y.B. Int'l Envtl. L. 1998 (8), p. 51, 82.

12 This is also the case of Art. 9 of the Convention on the Transboundary Effects of Industrial Accidents, Helsinki, 17 March 1992 – in force 19 April 2000, 2015 UNTS 457.

13 For example, transboundary access to information and participation in decision-making are expressly foreseen by Art. 3(8) of the Espoo Convention on Environmental Impact Assessment in Transboundary Context, Espoo 25 February 1991 – in force 10 September 1997, 1989 UNTS 309. The equal access to administrative and judicial remedies is widely embedded in international environmental law instruments; for instance, it is foreseen in Article 3 of the Nordic Environment Protection Convention, which predates the Rio Declaration. On this point, see *G. (Rock) Pring & S. Y. Noé*, The Emerging International Law of Public Participation Affecting Global Mining, Energy, and Resources Development, in D. M. Zillman, A. Lucas, & G. (Rock) Pring (eds), Human Rights in Natural Resource Development: Public Participation in the Sustainable Development of Mining and Energy Resources, 2002, p. 44 et seq.

14 *Supra* note 12 at para. 6, and note 9 at para. 7.

15 *Id.*

the years.[16] Prevention can be interpreted in extensive terms as encompassing environmental protection and conservation, thus including integrated ecological planning and management in a long-term perspective, preservation of biodiversity, and sustainable development.[17]

The extraterritorial application of participatory rights is crucial in the context of regional organisations since higher participatory standards in one country can boost improvements towards this direction in the other partner countries. This result is facilitated by the presence of an appropriate regional legal framework, as in the case of the EU, where law harmonisation has been consistently and expressly pursued, including in the field of participatory rights. The EU is a party to the Aarhus Convention and has put in place several measures to ensure its implementation at community level as well as in the member states.[18] Far from imposing complete uniformity, EU secondary law has created a common ground for the recognition of participatory rights in all EU countries and is fostering changes in those countries that do not as yet fulfil the existing obligations, especially in relation to access to remedies. Hence, on the basis of non-discrimination and equal access[19], a European citizen can access remedies in a member state different from the one of its nationality to seek redress in environmental matters. In the context of judicial procedures, the claimant can also rely on EU provisions on public participation that are precise, clear and unconditional, but have not been applied in the state of the trial[20], thus strengthening both the application of participatory rights in a transboundary context and of EU law. Therefore, the presence of a

16 On this point, Kiss and Shelton explain that most of the international environmental treaties adopt a preventive logic rather than a responsive logic: '[T]he objective of almost all international environmental instruments is to prevent environmental deterioration (…). Only a few international instruments rely on other approaches, such as the traditional principle of state responsibility for harm already caused or direct compensation of the victims by the originator of the pollution'. *A. Kiss & C. Shelton*, Guide to International Environmental Law, 2007, p. 92. In addition, Sands highlights that 'the preventive principle seeks to minimise environmental damages as an object in itself' and that it is applicable to transboundary contexts as demonstrated by international jurisprudence such as the Trail Smalter case, the Lac Lanoux Arbitration, and the Nuclear Tests case. *P. Sands*, Principles of International Environmental Law, 2003, p. 246 et seq.

17 *A. Kiss & C. Shelton*, *supra* note 17 at p. 92 et seq.

18 For further details see the draft report prepared by the Commission as the basis of the 4th EU Aarhus Implementation Report and currently open for consultation at http://ec.europa eu/environment/aarhus/pdf/EU_aarhus_implementation_report_2017.pdf [accessed 29 December 2016].

19 Also Article 18 of the Lisbon Treaty introduces the principle of non-discrimination based on nationality. Treaty of Lisbon Amending the Treaty of European Union and the Treaty Establishing the European Community, Lisbon 13 December 2007 – in force a December 2009.

20 The European Court of Justice has actively strengthened the primacy of EU law over national laws especially through the theory of direct effect introduced in the Van Gend en Loos judgement (Case 26–62), while the supremacy doctrine was developed in the decision of the Costa/ENEL (Case 6–64). The Treaty of Lisbon explicitly recognises the primacy of EU law over the law of the member states (Declaration n. 17).

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regional legal framework with effective participatory provisions strengthens public participation both in its national and extraterritorial dimensions.

The Southern African Development Community (SADC)[21], instead, does not have any common provision on participatory rights[22], but such rights are recognised in some member states more than others. For instance, public participation is entrenched in the South African legal framework: Section 24 of the Constitution establishes the environmental rights of South Africa's citizens and, in its paragraph (b), foresees a proactive attitude of the government which, according to A. Du Plessis, 'implies a need for public participation in environmental decision-making at all levels'.[23] Such a need is further exemplified in other constitutional provisions that encourage the involvement of the public, especially at local level[24] and it is conceived as a principle governing public administration.[25] Participation in decision-making is complemented by the right to access to information[26] and the right to just administrative action[27]; therefore, the South African Constitution integrates the three pillars of public participation. This constitutional framework is supplemented by secondary legislation[28] that emphasises the importance of participation in environmental matters also as a means of personal and community growth – by understanding and being

21 SADC is an international organisation (Art. 3 of the founding Treaty) aiming to achieve economic development, peace and security, growth, poverty alleviation, higher standard and quality of life of the peoples of Southern Africa through regional integration based on democratic principles, and equitable and sustainable development. It is composed of Southern African Countries, namely Angola, Botswana, Democratic Republic of Congo, Lesotho, Madagascar, Malawi, Mauritius, Mozambique, Namibia, Seychelles, South Africa, Swaziland, United Republic of Tanzania, Zambia, and Zimbabwe. Regional cooperation is functional to achieve the objectives established in Art. 5 of the SADC Treaty, therefore, it has a multi-sectoral character as exemplified in Art. 21 of the same Treaty. Declaration and Treaty of the Southern African Development Community, Windhoek 17 August 1992. Hereinafter SADC Treaty.

22 In this regard, Ebbesson highlights that the development of participatory rights has mostly occurred at regional level through both their inclusion in environmental agreements and the jurisprudence of human rights bodies. Nevertheless, he notices remarkable geographical asymmetries: Europe and Central Asia are the most supportive to participatory rights, the Americas and Africa also promote these rights to a significant degree, while Asia and the Pacific are the weakest in this sense. See *J. Ebbesson, supra*, note 4, p. 293, 298 et seq. In Ebbesson's analysis emerges that several provisions of the 1981 African Charter on Human and Peoples' Rights (Nairobi, 27 June 1981 – in force 21 October 1986) are relevant for the promotion of participatory rights in Africa (*id*. at 302). Notwithstanding the gap of participatory provisions at SADC level, those included in the African Charter bind SADC countries that are all parties to it. Moreover, by virtue of Art. 19(3), the Aarhus Convention is open to all the member states of the United Nations, therefore, any SADC state could accede to the aforementioned Convention upon approval by the Meeting of the Parties.

23 *A. Du Plessis*, Public Participation, Good Environmental Governance and Fulfilment of Environmental Rights, PER 2008 (2), p. 14.

24 Section 152(1)(e).

25 Section 195 (e).

26 Section 32.

27 Section 33.

28 For further details on South African secondary legislation including participatory provisions, *id*. at p. 15 et seq.

aware of environmental issues – and of inclusion of all interested and affected parties. Nevertheless, the favour that public participation finds with the South African legal framework is exceptional in the context of the SADC region, where participatory mechanisms are sometimes foreseen in national laws, but are not operational in many countries, especially those under authoritarian regimes, or recently pacified and undergoing a democratic transition. Despite the fact that participatory rights are missing in the SADC legal framework, this regional organisation could provide the platform for legal harmonisation among its member states and, in this context, South African participatory standards could guide the harmonisation process. Although legal harmonisation is not specifically foreseen by the SADC Treaty, it can be considered as both functional to achieve its objectives and connected to policy harmonisation that is required in Article 5(1)(a). Therefore, despite the absence of effective regional participatory standards, the presence of a regional organisation not only can foster a legal harmonisation process that enables the development of public participation at national level in its member states, but also favours its extraterritorial dimension in a successive phase.

The extraterritorial dimension of participatory rights can also be conceived in the context of cross-border conservation initiatives, like SADC transfrontier conservation areas (TFCAs). The Protocol on Wildlife and Law Enforcement[29] has established TFCAs[30] to frame cooperation among SADC states over transboundary natural resources.[31] In the framework of TFCAs, partner countries are adapting their legislation and policy on key issues in order to move closer to

29 Adopted in Maputo, Mozambique, 18 August 1999. Hereinafter, SADC Wildlife Protocol.

30 SADC Wildlife Protocol, Article 4(2)(f). Article 1 of the same Protocol defines a Transfrontier conservation area as 'the area or the component of a large ecological region that straddles the boundaries of two or more countries, encompassing one or more protected areas, as well as multiple resources use areas'; therefore, TFCAs can be seen as a declination of TBPAs and are meant to encompass both core conservation areas and buffer zones. Currently, there are eighteen TFCAs in the SADC region and they are categorised depending on their legal status and development stage: Category A – Established TFCAs include those established through a Treaty or any other form of legal agreement between the partner countries; Category B – Emerging TFCAs are based on a memorandum of understanding that formally initiates the cooperative process; and Category C – Conceptual TFCAs are those proposed by SADC member states as potential TFCAs, but without an official mandate from the partner countries. For further information refer to the dedicated page www.sadc.int/themes/natural-resources/transfrontier-conservation-areas/ [accessed 08 April 2017].

31 Defining shared or transboundary natural resources is a difficult task since they can be interpreted as embracing diverse terrestrial and aquatic ecosystem units (e.g., wetland, forest, lagoon, coral reef) as well as terrestrial and marine species that move across boundaries. I conceive them in a broad sense, thus including any element coming from nature that can be used by people and is shared by two or more countries for geographical or ecological reasons. Usually, the possibility to both utilise a resource and benefit from it is a strong engine for cooperation which is traditionally conceived in terms of intergovernmental cooperation. Nevertheless, sub-national authorities and local communities have an important role to play due to their direct connection with the natural resources. Transboundary natural resources are usually shared by a limited number of countries and can be effectively governed through

each other and achieve precise cooperative objectives. For example, in the Great Limpopo TFCA[32], Mozambique has been improving biodiversity conservation standards over the last years inspired by South African legislation. For this purpose, in 2014, it signed an *ad hoc* Memorandum of Understanding (MOU) with the Republic of South Africa and increased penalties for wildlife crimes, including poaching of endangered species, in the bill on conservation areas. Arguably, a TFCA can foster a similar harmonisation process in relation to public participation: for instance, a transboundary conservation or development project may require the consultation and involvement of communities across the borders, thus creating the need to frame their participation and replicate, at the TFCA level, participatory mechanisms existing in partner countries. Potentially, such a process would lead to several results: first, the development of national legislation on public participation and appropriate participatory mechanisms in the partner state(s) that are not endowed with them; second, the design of participatory mechanisms that can be used in a transboundary context, for example that of the TFCA; and third, the overall strengthening of public participation both at national and TFCA levels. Moreover, the harmonisation process initiated at the TFCA level can have positive repercussion at regional/SADC level by advancing the participatory standards of other SADC member states and, eventually, leading to the adoption of regional instruments[33] dedicated to public participation. Therefore, in addition to their importance for conserving biodiversity, TFCAs or similar cooperative frameworks can be valued for their role in advancing public participation and empowering local communities that, in this context, can be defined as 'public concerned'.

3. PARTICIPATION OF LOCAL COMMUNITIES AS 'PUBLIC CONCERNED' IN PROTECTED AREAS

In the context of public participation, it is possible to distinguish the public and the 'public concerned'. The former includes all actors outside the governmental administration – namely, individuals, groups, civil society organisations, indigenous people, and local communities –[34], while the latter refers to a more

collective actions. See *E. Benvenisti*, Sharing Transboundary Resources: International Law and Optimal Resource Use, 2004, p. 33.

32 The Great Limpopo TFCA (GLTFCA) has developed as the second phase of cooperation between Mozambique, South Africa, and Zimbabwe that signed an agreement in 2002 to create the Great Limpopo Transfrontier Park (GLTP). For further information see www.greatlimpopo.org/ [accessed 29 December 2016].

33 These could range from policy guidelines to a Protocol on public participation, thus having different degrees of legal force.

34 Article 2(4) of the Aarhus Convention defines 'the public' as 'one or more natural or legal persons, and, in accordance with national legislation or practice, their associations, organizations, or groups'.

restricted group of subjects that are 'affected or likely to be affected by, or have an interest in, the environmental decision-making'.[35] The Aarhus Convention reiterates these conditions in several provisions and, in Article 9(2)[36], clearly demands the access to administrative and judicial review procedures for members of the concerned public. Therefore, depending on the context considered, it is necessary to identify who is concerned in order to ensure effective participatory mechanisms to these subjects. For instance, in the case of protected areas, local communities can be identified as public concerned due to the repercussions that these areas have on their survival and subsistence.

In fact, these communities have often developed physical and cultural connections with their surrounding environment over the time.[37] Aware of the significance of natural resources and the surrounding natural space for their survival and concerned with their preservation, these communities conceived conservation regimes long before national governments created protected areas.[38] Most of the times, the latter have privileged pure conservation objectives leading to the displacement of local communities that had inhabited or used certain territories for centuries.[39] Nevertheless, the perception of protected areas has evolved over time and benefitted from the innovative approaches developed since the 1972 Stockholm Conference and even more in 1992 in Rio. Since then, biodiversity conservation has to be pursued together with the sustainable use of natural resources, the preservation of ecosystem services, and the realisation of socio-economic developmental objectives. This evolution was guided by lessons learned in the field

35 According to Article 2(5) of the Aarhus Convention, this definition extends to 'non-governmental organizations promoting environmental protection and meeting any requirements under national law [that] shall be deemed to have an interest'.

36 The conditions are: '(a) having a sufficient interest or, alternatively, (b) maintaining impairment of a right, where the administrative procedural law of a Party requires this as a precondition'.

37 Local communities could be permanently settled or mobile, they usually 'have extended residence in a given environment, a rich tradition in their relationship with the land and the natural resources, well-established customary tenure and use practices, effective management institutions and a direct dependence on the resources for their livelihoods and cultural identity. They too claim "rights" to their land and natural resources' *G. Borrini-Feyerabend et al*, Indigenous and Local Communities and Protected Areas: Towards Equity and Enhanced Conservation, 2004, p. 8.

38 *G. Borrini-Feyerabend*, Indigenous and local communities and protected areas: rethinking the relationship, Parks 2002 (12), p. 5. It is worth noticing that traditional practices might not be in line with international environmental standards, as in the case of hunting protected or threatened species. Moreover, the access of local communities/indigenous peoples to natural resources could be restricted for preserving biodiversity, as in the case of some protected areas. There is an emerging literature on reconciling indigenous rights and biodiversity conservation, see *E. Desmet*, Indigenous Rights Entwined with Nature Conservation, 2011. See also *F. Cittadino*, Indigenous Rights and the Protection of Biodiversity: A Study of Conflict and Reconciliation in International Law (Doctoral Dissertation, University of Trento), 2017.

39 The history of conservation has also been a history of exclusion in South Africa; see *J. Carruthers*, National Parks in South Africa, in H. Suich, B. Child and A. Spenceley (eds), Evolution and Innovation in Wildlife Conservation: Parks and Game Ranches to Transfrontier Conservation Areas, 2009, pp. 35–49.

that demonstrated the need to both integrate the specific protected territory and resources in the surrounding context, and engage with indigenous peoples and local communities in order to establish successful conservation regimes.[40]

The connection between local communities and natural resources is entrenched in international environmental law. The Rio Declaration includes public participation in its Principle 10[41] and specifically acknowledges the role of local communities and their strong connection with nature in Principle 22.[42] In line with these principles, the primary role of indigenous people and local communities in the conservation and management of natural resources was recognised by several international conventions or acknowledged by their governing bodies. For instance, Articles 6 and 15 of the 1989 ILO Convention Concerning Indigenous and Tribal Peoples in Independent Countries[43] require state parties to ensure the participation of these people through consultation or other appropriate means to enable their involvement in decision-making as well as in the use, management and conservation of natural resources. In its Resolution VII.8 on Local Communities and Indigenous People[44], the Conference of the Parties to the Ramsar Convention[45] reiterates the traditional rights, values, knowledge, and institutions of these communities related to the management of wetlands; it also includes a set of guidelines aimed to ensure their participation in the management of wetlands. The Convention on Biological Diversity[46] not only highlights the importance of 'indigenous and local communities embodying traditional lifestyle relevant for the conservation and sustainable use of biological diversity' in its Article 8(j), but also recognises the strong link between conservation and sustainable use by including both of them among its goals together with compelling a fair sharing of benefits deriving from the utilisation of genetic resources.[47] Therefore, sustainable use and conservation are not alternative objectives; rather, sustainable use through appropriate management can be instrumental to conservation. In addition,

40 *Supra*, note 34 at p. 8.

41 Principle 10 starts by affirming that 'environmental issues are best handled with the participation of all concerned citizens, at the relevant level' and follows by mentioning the three pillars of public participation.

42 'Indigenous people and their communities, and other local communities, have a vital role in environmental management and development because of their knowledge and traditional practices. States should recognize and duly support their identity, culture and interests and enable their effective participation in the achievement of sustainable development'.

43 ILO Convention Concerning Indigenous and Tribal Peoples in Independent Countries (No. 169), Geneva, 27 June 1989 – in force 5 September 1991, 1650 UNTS 383.

44 Ramsar Convention, COP 7 Resolution VII.8 'Guidelines for establishing and strengthening local communities' and indigenous people's participation in the management of wetlands'.

45 Convention on Wetlands of International Importance especially as Waterfowl Habitat, Ramsar, 2 February 1971 – in force 21 December 1975, 996 UNTS 245. Hereinafter Ramsar Convention.

46 Convention on Biological Diversity, Rio de Janeiro, 5 June 1992 – in force 29 December 1993, 1760 UNTS 79. Hereinafter CBD.

47 CBD, Article 1.

Ebbesson highlights that the 2010 Nagoya Protocol on Access Benefit-Sharing[48] does not only foresee the participation and involvement of indigenous and local communities through procedures of prior informed consent and approval for accessing genetic resources, but directly 'addresses participatory processes across state borders: [hence,] the parties must cooperate in transboundary contexts with the involvement of indigenous and local communities concerned'.[49] All the more reason for ensuring the preferential relation between communities and natural resources in the context of protected areas, as exemplified in Goal 2.2 of the CBD Programme of Work on Protected Areas.[50]

The role of communities in these areas has been enhanced by international organisations, such as the International Union for Conservation of Nature (IUCN), which advanced the conceptual development and practice of protected areas. With the aim to help standardise descriptions of existing conservation experiences, IUCN developed, at first, a PA categories system, that reflects the main management objectives of the areas, and then, identified the different governance approaches for PAs indicating who owns, controls, and has responsibility for management.[51] These two elements have been integrated in the so called IUCN protected areas matrix that is a classification system comprising both management categories and governance types. For instance, Category V 'Protected Landscape/ Seascape' identifies 'a protected area where *the interaction of people and nature* over time has produced an area of distinct character with significant ecological, biological, cultural and scenic value: and where *safeguarding the integrity of this interaction is vital* to protecting and sustaining the areas and its associated nature conservation and other values [emphasis added]'.[52] This Category focuses on the connection between nature and people and aims to preserve it since it is vital for both community livelihood and nature conservation. Hence, whoever is responsible for decision-making and management in PAs belonging to Category V has to take into consideration the need of people inhabiting the area and

48 Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from Their Utilization to the Convention on Biological Diversity (Nagoya, 29 October 2010 - in force 12 October 2014), in CBD Decision 10/1, 'Access to genetic resources and the fair and equitable sharing of benefits arising from their utilization' U.N. Doc. UNEP/ CBD/COP/10/27 (2011). In particular, see Articles 6 and 21.

49 *J. Ebbesson*, *supra*, note 4 at pp. 296-297.

50 The CBD Programme of Work on Protected Areas was adopted by the Conference of the Parties to the CBD Convention and included in COP Decision VII.28. Hereinafter CBD PoWPA. Goal 2.2 requires 'to enhance and secure involvement of indigenous and local communities and relevant stakeholders' and poses as its target 'the full and effective participation by 2008, of indigenous and local communities, in full respect of their rights and recognition of their responsibilities, consistent with national law and applicable international obligations, and the participation of relevant stakeholders, in the management of existing, and the establishment of new protected areas'. UN Doc UNEP/CBD/COP/DEC/VII/28 (2004).

51 For an exploratory review of IUCN work on protected areas see *B. Lausche*, *supra*, note 2; *N. Dudley* (ed.), Guidelines for Applying Protected Areas Management Categories, 2008.

52 Dudley, *supra*, note 45 at p. 20.

involve them actively in its management. To this end, management authorities have to foresee mechanisms for the meaningful participation of communities. Therefore, communities can be considered as public concerned, and procedural environmental rights apply to them with a reinforced character.[53]

Moreover, among IUCN governance approaches, Type D corresponds to 'Governance by indigenous people and local communities', which represents a step forward in empowering communities in the framework of conservation since, in these PAs, 'the management authority and responsibility rest with indigenous people and/or local communities through various forms of customary or legal, formal or informal, institutions and rule'.[54] In this case, procedural environmental rights should find their maximum expression in terms of decision-making and direct participation in managing natural resources, nevertheless, access to information and access to justice might still be hindered since they imply the involvement of other actors, and depend on the legislative framework applicable in the relevant jurisdiction. When other governance approaches apply – i.e., Type (A) governance by government, Type (B) shared governance, or Type (C) Private Governance[55] – procedural environmental rights have to be recognised to local communities to ensure good governance.

There is no single definition of governance nor of 'good governance'.[56] Generally speaking governance refers to how society defines and achieves its goals and priorities: the processes used to take decision and implement them, the actors involved, and the structures set in place to this end. Governance embraces multiple aspects and public participation is one of them since it contributes to evaluate its quality – i.e., how one governs – in a specific context. Good governance is strongly linked to human rights principles and is essential for sustainable development, including in the context of protected areas.[57] Meaningful involvement of the (concerned) public in environmental matters represents a manifestation of good governance and Lausche confirms that the Aarhus Convention is 'the leading international instrument for defining and elaborating a good governance framework of principles for governments'.[58] In protected areas, local communities embody the notion of public concerned, hence, their meaningful involvement in PA-related decision-making and management contributes to good governance.

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53 Ebbesson explains 'by providing for participation for the public concerned, a broader range of burdens and benefits may be taken into account'. *Supra*, note 11 at para. 11.

54 Dudley, *supra*, note 45 at p. 26.

55 *Id*. at pp. 26–27.

56 For IUCN it consists in 'the interaction among political and social structures, processes and traditions that determine how power and responsibilities are exercised, how decision are taken, and how citizens or other stakeholders have their say'. *Supra*, note 2 at p. 40. See also the different definitions of governance used by international organisations and collected by Lausche at p. 41.

57 See Element 2 of the CBD PoWPA, and, in particular, activities 2.1.3 and 2.1.5 as well as Goal 2.2 and the connected activities. *Supra*, note 44.

58 *Supra* note 2, p. 44.

Moreover, public participation contributes to the fulfilment of citizens' environmental rights that are human rights illustrating 'the integrated interrelationship between humans and the environment and the claim of people to an environment of a particular quality'.[59] Protected areas are purposely established to conserve valuable natural resources and, under certain circumstances, allow for their sustainable use – i.e., to maintain an environment of a particular quality – thus motivating public participation in this context. Nevertheless, these areas are experiencing several threats generated inside, such as inappropriate management and poaching, and outside their boundaries, like off-site pollution and climate change-related events,[60] with serious repercussion on biodiversity conservation.

It has been argued that the provisions of the Aarhus Convention apply to all projects supported by state parties in other countries, including financial and technical assistance for the development of (transboundary) PAs.[61] Moreover, although the Aarhus Convention has been negotiated and adopted in the framework of the United Nations Economic Commission for Europe, it is open to all UN Member States upon approval by the Meeting of the Parties by virtue of Article 19(3), therefore, virtually any States can become party to this Convention. In the context of PAs, the three participatory pillars acquire a specific connotation:

(1) The right of the public to access environmental information implies two types of duties on the government: a proactive duty and a reactive duty.[62] In the first case, government agencies collect, compile, and actively disseminate information without request. In relation to PAs, the relevant information to be made public include draft and final PA system plans, proposals to declare an area as protected, draft and final management plans as well as monitoring, evaluation, and financial reports to detail the expenditure of public money. Furthermore, PA legislation has to identify the government agencies or other bodies responsible for providing access and distribution of relevant information, where and how this can be accessed, and the process and timeframe for commenting.[63] The reactive duty of the government consists in the obligation to provide information upon request of the public. Again, PA legislation will define the details on how to obtain the information, the agencies responsible, timeframe, etc., as well as clarify the conditions to respect when information is refused.[64] The sound application of this right results, on the one hand, in enhanced transparency, legitimacy, and accountability of governmental actions and PA authorities, on the other hand, in an increased environmental education of the public (Principle 19 of

59 *Supra*, note 24 at pp. 3–4.
60 *Supra*, note 2 at p. 1.
61 *Supra*, note 2 at p. 44.
62 *G. (Rock) Pring & S. Y. Noé*, *supra*, note 14 at p. 29–30.
63 *Supra*, note 2 at p. 44.
64 *Supra*, note 2 at p. 45.

Stockholm Declaration) and strengthens their capacity to exercise the other two participatory rights.

According to Verschuuren, the government has a proactive duty of information in relation to the public concerned, while it exercises a reactive duty towards the general public.[65]

(2) Public participation in decision-making consists in contributing to important decisions by providing written comments or participating to meetings and expressing opinions in these contexts. In order to be appropriate and well-informed, such a contribution presupposes the access to accurate, relevant, and clear information. Nevertheless, competent agencies need to take into consideration people's comments accurately, otherwise the effort of the public would be vain. In the case of PAs, crucial decisions relate to the spatial delineation of a protected area, the identification of management authorities, the development of management plans as well as strategies for a PA system or an MPA network, the revision of draft environmental and social impact assessment of proposed actions.[66]

(3) Accessing administrative and judicial remedies has several applications: to appeal the refusal of access to information, to gain review of decisions made by PA authorities under the law, to seek redress for inappropriate environmental governance in the context of PAs, to seek damages for environmentally harmful activities carried out within the protected space as well as to prevent such activities, and to directly enforce protected areas law and environmental law more generally.[67] Rules and procedures for accessing justice and appealing administrative decisions authorised by law have to be foreseen in PA legislation if are not already provided at national level. Hence, access to justice is a means to reinforce the exercise of the other two participatory rights; moreover, it gives people the power to monitor the action of PA authorities, thus making these authorities accountable to people.

National PAs legislation has to encompass all the aforementioned provisions or complement existing laws that are adequate for participation purposes.

When people hold or claim rights over existing or proposed protected areas as well as place spiritual and cultural values on these areas or natural features located therein[68], they can be identified as public concerned. It is often the case

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65 *J. Verschuuren*, Public Participation regarding the Elaboration and Approval of Projects in the EU after the Aarhus Convention, in T.F.M. Etty & H. Somsen (eds.), Yearbook of European Environmental Law, 2004, pp. 29–48.

66 *Supra*, note 2 at p. 44.

67 *Supra*, note 10 at p. 56.

68 The linkages between local communities, especially indigenous people, and nature or natural elements can be related to religious beliefs and traditional practices like in the case of sacred sites. Their importance can be appreciated also by people with a different value system, and transcend biodiversity and ecological considerations. These 'cultural heritages' can benefit from transboundary conservation. On this point see *M. Vasilijević et al.*, Transboundary Conservation: A Systematic and Integrated Approach, 2015, p. 29 et seq.

that local communities live within or adjacent to PAs,[69] hence, they are always entitled to procedural environmental rights as public concerned since they are 'affected or likely to be affected by, or having and interest in, the environmental decision-making'[70] related to these PAs. Such a situation requires a proactive attitude of PA authorities and governments towards local communities.

4. COMMUNITY PARTICIPATION IN TRANSBOUNDARY PROTECTED AREAS

When ecological and political boundaries do not coincide, cross-border conservation efforts can be conceived and implemented through the creation of a TBPA, which can be established in several ways, the most common and simple to visualise being the linkage of two or more contiguous PAs across a national boundary. The creation of TBPAs responds to the recent trend of expanding conservation areas and integrating them with the surrounding environment since they often encompass intervening land or operate as a means to foster sympathetic sustainable use across the borders.

The effective governance of transboundary natural resources is a key issue in international environmental law. To this end, international environmental regimes support a stronger development of TBPAs: for instance, Goal 1.3 of the CBD PoWPA is specifically dedicated to it. Also the World Heritage Convention foresees the possibility to recognise world heritage sites that cross national boundaries[71], and the Ramsar Convention demands consultation and coordination between relevant parties for the designation and management of transboundary wetlands.[72] In the context of TBPAs, the role of local communities is as important as it is in the national context.[73] Besides, it would be illogical to think that the conditions for good governance and the procedural environmental rights applicable to local communities in a PA – hence, within the domestic jurisdiction – fade out in the context of a TBPA. Moreover, the principle of non-discrimination and equal access allows for the extraterritorial application of procedural environmental rights, including in the context of TBPAs, in line with the expanded application of participatory rights at multiple governance levels as foreseen in the Rio+20 outcome document The Future We Want.[74]

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69 *Id*.

70 Aarhus Convention, Article 2(5).

71 For more information on transboundary world heritage sites see http://whc.unesco.org/en/list/?&&transboundary=1 [accessed 12 January 2017].

72 Article 5 of the Ramsar Convention and Ramsar COP 1999 Resolution VII.19, paragraph 2.1.1.

73 In this regard see *M. Vasilijević et al.*, *supra* note 62 at p. 26 et seq.; and *T. Sandwith et al.*, Transboundary Protected Areas for Peace and Co-operation, 2001, p. 19 et seq.

74 UN General Assembly, 'The Future We Want', U.N. Doc. A/RES/66/288 (2012), para. 99. On this point see *J. Ebbesson, supra*, note 4 at p. 294.

In TBPAs, cross-border cooperation is meaningful in ecological as well as social terms. Among the key management principles that guide the design and management of a TBPA, two confirm the relevance for participatory rights: (1) bring communities together across political boundaries; and (2) involve and benefit local communities in policy formation, PA planning and management.[75] Moreover, Article 3(7) of the Aarhus Convention requires contracting parties to apply procedural environmental rights in international environmental decision-making processes and within the framework of international organisations in matters relating to the environment. Regardless of membership to the Aarhus Convention, the rationale behind this article can be extended to the application of participatory rights in TBPAs. In fact, TBPAs can be conceived within a broader cooperative framework such as an international organisation, as is the case of TFCAs in the SADC region, or are international organisation themselves.[76] Furthermore, the design, management and, more generally, governance of a TBPA result from international environmental decision-making processes, hence, the states or authorities involved in these processes have to respect participatory rights at all levels.

Partner states have established cross-border conservation initiatives, like SADC TFCAs, in order to conserve and manage shared natural resources as a unit and, for this purpose, joint management institutions are usually created. The cooperative process automatically qualifies local communities as concerned public since they are both affected by the creation of the cross-border cooperative framework and interested in the conservation and management of the shared natural spaces and resources included therein. Therefore, mechanisms for their participation have to be foreseen in the context of TBPAs, as it is happening in the case of the Kavango Zambezi Transfrontier Conservation Area (KAZA TFCA).[77]

This is the world's largest TFCA, spanning approximately 520,000 km^2, and the only one having a Secretariat with coordinating functions.[78] The application of procedural environmental rights can be directly and indirectly derived by the provisions of its founding Treaty. Among the principles guiding the Partner States in pursuing the cooperation objectives, Article 5(1)(g) requires to 'create forums and facilitate consultation and *effective participation of Stakeholders in decision making* with respect to the development of policies and strategies related to the management and development of the KAZA TFCA [emphasis added]'. The definition of 'Stakeholders' in Article 1[79] includes individual or group of

75 *Supra*, note 2 at p. 271.

76 For instance, the KAZA TFCA is an international organisation according to Article 3 of its founding Treaty.

77 The Treaty on the Establishment of the Kavango Zambezi Transfrontier Conservation Area TFCA has been signed in Luanda (Angola) on 18 August 2011 by Angola, Botswana, Namibia, Zambia, and Zimbabwe. Hereinafter KAZA TFCA Treaty.

78 KAZA TFCA Treaty, Article 14.

79 According to Article 1 of the KAZA TFCA Treaty: '"Stakeholders" means individuals or groups of individuals or representative institution with a stake, direct or indirect interest in

individuals with a stake in the development and management of the KAZA TFCA and arguably encompasses 'Local Communities' that are defined in the same article as 'groups of people living in and adjacent to the area of Kavango Zambezi TFCA bound by cultural, social and economic relations based on shared interests and transboundary resources'.[80] Therefore, the Treaty recognises the multiple links between people across borders for cultural, social, and economic reasons as well as their connection to transboundary resources. Since local communities have a stake in the development and management of the KAZA TFCA, they can be defined as public concerned. Hence, the 'forums' mentioned in Article 5(1)(g) are participatory mechanisms operating at a transboundary level for the involvement of local communities that are public concerned.

The participation of local communities is also in line with one of the objectives of the KAZA TFCA acknowledging that the improved livelihood of local communities and poverty reduction pass through an improved governance of shared natural and cultural resources.[81] The idea that public participation and environmental protection are mutually reinforcing derives from the connection traced between human rights and the environment.[82] Furthermore, Article 8(1)(c) calls on states to ensure community participation[83] and this explicit obligation can be widely interpreted to encompass all the three participatory pillars. Moreover, partner countries have to ensure the respect of the rights of communities and other stakeholders provided in their domestic laws[84], arguably, Article 8(1)(e) applies to participatory rights foreseen in national provisions and determines their extraterritorial dimensions by requiring their respect in the context of the TFCA. Therefore, in so far as (community) participatory rights are foreseen in the legislation of KAZA partner states, they are extraterritorially applicable in the context of the TFCA.

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the development and management of the KAZA TFCA or a right recognized under the laws of the partner states in the areas comprising the KAZA TFCA'.

80 KAZA TFCA Treaty, Article 1.

81 Article 6(1)(e) requires to 'develop and implement programmes that shall enhance the Sustainable Use of Natural Resources and Cultural Heritage Resources to improve the livelihoods of Local Communities within and around the KAZA TFCA and thus contribute towards poverty reduction'.

82 In describing the reciprocal relationship between human rights and the environment, Pring and Noé note 'When the environment suffers, people suffer and when people suffer, the environment suffers. Another connection that has been observed is that governments that fail to respect and uphold human rights are also likely to fail to protect the environment. It is increasingly recognized that in order for the people to protect the environment, they must have political rights, inducting the right of public participation'. *Supra*, note 14 at p. 51. Ebbesson explains that participatory rights have been identified in human rights global and regional instruments and embodied in human rights jurisprudence, especially in Europe, the Americas, and Africa. See *J. Ebbesson, supra*, note 4, at p. 297 et seq.

83 According to Art. 8(1)(e) of the KAZA TFCA Treaty, partner states have the obligation to 'ensure stakeholder engagement at the national and local level with the involvement governmental authorities, communities, Non-Governmental Organization and Private Sector'.

84 KAZA TFCA Treaty, Article 8(1)(e).

In addition to state obligations, the Treaty requires the KAZA Secretariat to engage with relevant stakeholders in the process of drafting and implementing the KAZA TFCA action plan.[85] Although this provision seems to be limited to the decision-making processes resulting in the TFCA action plan, its scope is expanded by the expression 'full participation of relevant stakeholders' that arguably refers to the effectiveness of participatory processes. Participation is effective when the community, which can arguably be embraced within the notion of relevant stakeholders, is able to influence the outcome of the decisional process;[86] for this purpose, participation needs to be informed and culturally appropriate.[87] Therefore, Article 14(4)(c) can be interpreted as establishing the proactive duty of the Secretariat to provide culturally appropriate information to local communities for their full participation in decision-making processes.[88]

While community rights to access to information and participate in decision-making easily emerge from the text of the Treaty, access to remedies is needed to ensure the respect of the other two rights and make their implementation effective.[89] When explaining the difference between principles and rights, Verschuuren affirms that 'rights can be invoked in court, whereas principles can

85 KAZA TFCA Treaty, Article 14(4)(c).

86 The Endorois case offers guidance on what 'effective participation' means. For a brief summary of the case, refer to para 1 'The complaint is filed by the Centre for Minority Rights Development (CEMIRIDE) and Minority Rights Group International (MRG), on behalf of the Endorois Community. (…)The Complainants allege violations resulting from the displacement of the Endorois community, an indigenous community, from their ancestral lands, the failure to adequately compensate them for the loss of their property, the disruption of the community's pastoral enterprise and violations of the right to practise their religion and culture, as well as the overall process of development of the Endorois people'. In paragraph 281, the African Commission maintained that informing the affected community of an impending project as a *fait accompli* does not leave any space for the community to influence the outcome. Illiteracy and a different understanding of property use and ownership affected the position of the Endorois community that failed to grasp the impact of permanent eviction from their land and behaved accordingly. The community attitude demonstrates the inadequacy of the consultation undertaken by the Kenyan State. According to paragraph 282, 'it was incumbent upon the Respondent State to conduct the consultation process in such a manner that allowed the representatives to be fully informed of the agreement, and participate in developing parts crucial to the life of the community'. 276/2003 – Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v Kenya.

87 For instance, Cittadino discusses the proactive role of human rights bodies in crafting legal criteria for the effective participation of indigenous people in environmental matters: informed participation and cultural appropriateness are key requirements in this sense. *Supra* note 3, p. 82 et seq.

88 As already said, meaningful participation in decision-making is based on sound knowledge of the environmental issues at stake: since local communities are public concerned, relevant authorities, both KAZA institutions and national authorities, have the proactive duty to provide communities with information useful to take informed decisions.

89 In this regard, Ebbesson stresses that the three components are closely-related and all crucial for effective public participation in environmental matters. In particular, 'access to justice is a means to having decisions and decision-making process reviewed'. See *J. Ebbesson, supra*, note 4, at p. 291.

only play a role in combination with a legal rule';[90] since the Treaty prescribes community participation in decision-making, which in turn presupposes access to information, local communities should have access to remedies to upheld their participatory rights against a non-compliant partner state or the KAZA TFCA itself. It has been argued that such accountability can be based on Article 3 of the founding Treaty that recognises the KAZA TFCA as an international organisation with legal personality, and consequently with the capacity to sue and be sued.[91]

Moreover, although stakeholders' participation in decision-making is said to be a guiding principle in Article 5(1)(g), the three pillars of participation can be conceived as rights in the framework of the KAZA TFCA Treaty because of their connection with the objectives contained in Article 6(1)(a) and (e): biodiversity conservation purposes and improved communities' livelihoods. Indeed, community participation is essential for the realisation of substantive right to environmental protection.

Therefore, the application of participatory rights stems from the KAZA TFCA Treaty regardless of their inclusion in the legislation of KAZA partner states. Hence, it can be argued that national legislative discrepancies are overcome by the supranational/TFCA framework since the Treaty imposes participation for the achievement of its cooperative obligations. In addition, since the development of this TFCA relies strongly on external funds coming from Aarhus member states (for example the German KfW[92]), it can also be argued that the Aarhus Convention is applicable in this context[93], and even more so by means of its Article 3(7) since the KAZA TFCA is specifically defined as an international organisation.[94]

Hence, local communities, regardless of their nationality, are entitled to participatory rights in the context of the KAZA TFCA. These communities can exercise such rights towards any of the partner states – whether national legislation includes participatory mechanisms or not – and the KAZA TFCA itself, on behalf of the Secretariat, for their failure in both effective community engagement and the achievement of transboundary biodiversity conservation.

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90 *Supra*, note 59 at p. 2.

91 *W. D. Lubbe*, Straddling Border and Legal Regimes: A Legal Framework for Transfrontier Biodiversity Conservation in SADC (PhD Thesis, North-West University, 2015), p. 231.

92 The KfW Development Bank provides financial and technical resources in developing and transition countries on behalf of the German Federal Ministry for Economic Cooperation and Development (BMZ).

93 Lausche argues that the provisions of the Aarhus Convention 'are fully applicable to all projects supported by the Convention Parties in other countries. This has implications for protected areas by bilateral and multilateral aid from countries which have ratified the Convention'. *Supra* note 2, p. 44.

94 KAZA TFCA Treaty, Article 3.

5. CONCLUSIONS

Community participation in environmental matters in general and PAs in particular is based on several grounds. From a human right perspective, it is a form of political participation[95] and a manifestation of the freedom of opinion and expression[96], and it is foreseen by international law concerning indigenous people.[97] It is included in relevant environmental regimes and conservation initiatives: not only the aforementioned CBD, Ramsar, and WHC, but also the UNESCO MAB Programme[98] and other instruments relating to marine protected areas.[99] It is reasonable in ecological terms since communities inhabiting valuable natural spaces for long time have developed traditional knowledge and management practices that preserved the surrounding environment and natural resources therein. It is in line with the principles for good governance in the context of PAs.[100] Although these areas were initially created as conservation fortresses, their understanding – in terms of conservation objectives – changed significantly with the introduction of the concept of sustainable development, thus adopting a more people-oriented focus. Moreover, it has been acknowledged that the fate of conservation initiatives strongly depends on the involvement of local communities.[101] Participatory rights are a powerful tool to ensure the involvement of local communities in conservation efforts, including in a transboundary context.

Local communities can be identified as public concerned when located within or in the vicinity of a TBPA, especially for their direct connection to natural resources and the impact that such a cooperative mechanism may have on their life and subsistence, and the surrounding environment. A meaningful participation of local communities in TBPAs is beneficial under serval points of view. First, it advances the democratisation of environmental processes; second, it contributes

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95 See, for instance, article 21 of the UN Declaration of Human Rights, *supra*, note 4; article 25 of the International Covenant on Civil and Political Rights, U.N. GAOR, 21ST Sess., Supp. No. 16, at 52, UN Doc. A/6316 (1966), as well as other regional conventions. Ebbesson, *supra*, note 11 para. 30.

96 Art. 19 of the UN Declaration of Human Rights, *supra* note 4.

97 Articles 6 and 15 of the ILO Convention No. 69, *supra*, note X.

98 The Man and the Biosphere Programme (MAB) was launched by UNESCO in 1971 as an Intergovernmental Scientific Programme dedicated to improve the relationship between people and their environments through the adoption of an interdisciplinary approach. Further information available at www.unesco.org/new/en/natural-sciences/environment/ecological-sciences/man-and-biosphere-programme/ [accessed 29 December 2016].

99 *A. Gillespie*, Protected Areas and International Environmental Law, 2007, pp. 171–172.

100 Dudley identifies nine principles to this end: legitimacy and voice, subsidiarity, fairness, do no harm, direction, performance, accountability, transparency, human rights. *Supra*, note 45 at p. 28.

101 See *A. Gillespie*, *supra*, note 91 at p. 168; *B. Lausche*, *supra*, note 2 at p. 16.; and *G. Borrini-Feyerabend*, *supra*, note 35. That public participation is crucial for the success of governmental decisions on environmental issues or development projects has been highlighted by several authors, see Verschuuren referring to Lee & Abbot, *supra* note 59, pp. 2–3. See also Pring & Noé, *supra*, note 14 at p. 25.

to the long-term success of TBPAs; third, it empowers communities and reinforces good governance of shared natural spaces; fourth, it helps preserving biodiversity at local level – as to say, within the TBPA and the cooperative space – as well as at global level since it contributes to conservation efforts implemented worldwide.

The extraterritorial dimension of participatory rights is guaranteed by the principle of non-discrimination and equal access, hence, states are required to ensure cross-border participation of the public (concerned) regardless of its nationality. The extraterritorial application of participatory rights is particularly beneficial when regional organisations are in place since they facilitate the emergence of higher participatory standards at national and supranational level. In fact, in order to achieve cooperative objectives, partner states are motivated or required (as in the case of the EU) to harmonise their national law in specific fields. In the case of public participation, more advanced participatory standards in one partner country can arguably guide the harmonisation process and be replicated in the other partner countries. The same dynamics exist in cross-border cooperative mechanisms that, at times, are established in the framework of regional organisations, as in the case of SADC TFCAs. These two cooperative frameworks – namely, SADC as a regional organisation and the TFCAs as cross-border mechanisms for cooperation over shared natural resources – interact with and can influence each other. On the one hand, the regional legal and policy framework can demand harmonisation of national systems and influences cooperation also in the context of TFCAs; on the other hand, specific TFCA objectives can lead partner states to harmonise their legislations and policies in a specific field and scale this harmonisation process up to the regional level. This reasoning can be applied to public participation in the context of SADC TFCAs: a stronger SADC framework on public participation would arguably reinforce participatory standards in SADC member states and in the context of TFCAs. Conversely, the enhancement of participatory standards at SADC level could derive from harmonisation processes initiated within TFCAs that foresee public participation in their founding Treaties, as in the case of the KAZA TFCA. Interestingly, cooperative dynamics can lead to fill up normative or policy gaps in member states, hence resulting in the development of national participatory standards.

Despite being considered a regional instrument, the Aarhus Convention has a global vocation by way of its Article 19(3). Moreover, its provisions are not only meant to guide participation in a national context, but apply also to international environmental decision-making processes and within the framework of international organisations,[102] thus being relevant for TBPAs. In the case of the KAZA TFCA, in addition to the numerous participatory provisions included in the Treaty and despite the fact that KAZA partner countries are not members of the Aarhus Convention, it can be argued that this Convention finds application

[102] Aarhus Convention, Article 3(7).

through the technical and financial support provided by Aarhus-partner countries. Therefore, the entitlement of local communities as public concerned and the extraterritorial dimension of their rights can be both derived from the KAZA Treaty and the Aarhus Convention.

In conclusion, cross-border conservation initiatives, like TBPAs, should be valued not only for their contribution in terms of biodiversity conservation, but also as functional to empower local communities by strengthening their participatory rights across borders with repercussions in terms of good environmental governance.

PROEF 2