

Memorial on Behalf of The African Union (AU)

INTERNATIONAL COURT OF JUSTICE

REQUEST FOR AN ADVISORY OPINION CONCERNING FRESHWATER RIGHTS
UNDER INTERNATIONAL LAW IN RELATION TO THE POTENTIAL LEGAL
PERSONALITY OF RIVERS AND THE CLIMATE CRISIS



MEMORIAL FOR THE AFRICAN UNION

THE 1st WCEL INTERNATIONAL WATER JUSTICE MOOT COURT AT THE
CONFERENCE OF JUDGES AND PROSECUTORS ON WATER JUSTICE DURING THE
8th WORLD WATER FORUM IN BRASÍLIA, BRAZIL

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AGENT FOR THE AFRICAN UNION:

MS KASYOKA PHYLLIS MUTUNGA, STRATHMORE UNIVERSITY

TEAM ADVISOR: EMMAH SENGE

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I. STATEMENT OF JURISDICTION

The United Nations General Assembly adopted resolution A/RES/72/Water, requesting an advisory opinion from the International Court of Justice (“The Court”) pursuant to Article 65 of the Statute of The Court. In accordance with Article 66, the Court invited all interested State parties entitled to appear before the Court to submit memorials through regional intergovernmental organizations as an efficient way to represent the multiplicity of State interests in the proceedings. Therefore, The African Union submits this memorial in answer to the question presented.

II. PROBLEM PRESENTED

A changing environment necessitates an innovative and coordinated legal response. Africa is particularly vulnerable to these changes. Reports of growing water scarcity, increasing populations, degradation of vulnerable ecosystems, and competing demands for shrinking supplies represent major threats to trans-boundary water bodies across the continent.¹ The added pressure from climate change has become more apparent over time and experts have recognized the aggravated risk in water conflicts within and between African states.²

The African Union is conscious of its responsibility to harness the natural and human resources of the continent for the total advancement of our peoples in all spheres of human endeavor³. It also takes cognizance of the scourge of conflicts in Africa that constitute a major impediment to the socio-economic development of the continent and of the need to promote peace, security and stability as a prerequisite for the implementation of our development and integration agenda.⁴

These submissions examine whether state practice could be said to recognise the rights of rivers as having international personality as a response to the various challenges acutely facing the continent's watercourses as a result of climate change. They also study the capacity of a body of international water law to provide a streamlined framework that can resolve foreseeable disputes over the non-navigational uses of watercourses in Africa.

¹ Africa's Minister's Council on Water (AMCOW) Executive Committee (EXCO) Meeting, The 1997 United Nations Convention on the Law of the Non-navigational Uses of International Watercourses, 9

² Africa's Minister's Council on Water (AMCOW) Executive Committee (EXCO) Meeting, The 1997 United Nations Convention on the Law of the Non-navigational Uses of International Watercourses, 9

³ Preamble, Charter of the Organisation of African Unity, adopted 25th May 1963

⁴ Preamble, Constitutive Act of the African Union, adopted 11th July 2000.

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III. IN CONTEXT: THE AFRICAN UNION

1. The African Union (AU) is a continental union composed of fifty-five countries on the African continent, extending slightly into Asia through the Sinai Peninsula in Egypt. It was established on 26th May 2001 in Addis Ababa, Ethiopia with the aim of replacing its predecessor, the Organisation of African Unity (OAU), established on the 25th of May 1963.
2. The Constitutive Act of the African Union identifies, among the AU's main objectives:
 - To encourage international cooperation, taking due account of the Charter of the United Nations and the Universal Declaration of Human Rights⁵
 - To achieve greater unity and solidarity between the African countries and Africans.⁶
 - To promote peace, security, and stability on the continent⁷
 - To establish the necessary conditions which enable the continent to play its rightful role in the global economy and in international negotiations⁸
 - To promote sustainable development at the economic, social and cultural levels as well as the integration of African economies⁹
 - To promote co-operation in all fields of human activity to raise the living standards of African peoples¹⁰
 - To coordinate and harmonize the policies between the existing and future Regional Economic Communities for the gradual attainment of the objectives of the Union¹¹
3. It is in keeping with these objectives, the AU tenders before the International Court of Justice, these submissions as regards the question presented as a representative of its member states.

⁵ The Constitutive Act of the African Union, (2000), article 3(e)

⁶ Constitutive Act, article 3(a)

⁷ Constitutive Act, article 3(f)

⁸ Constitutive Act, article 3(i)

⁹ Constitutive Act, article 3(j)

¹⁰ Constitutive Act, article 3(k)

¹¹ Constitutive Act, article 3(k)

IV. QUESTION 1

Under what circumstances does international law of non-navigational uses of water-bodies recognize the rights of rivers as having legal personality?

The African Union submits that international law of non-navigational uses of water-bodies does not yet recognise the legal personality of rivers. There have been various pronouncements from national jurisdictions that could lend credence to the concept of legal personality of rivers, but such occurrences do not amount to generalised practice under international water law. The African continent has developed no such innovation on the concept of legal personality to include rivers. However, the recognition of indigenous peoples' legal personality and rights before African national and international courts introduces an eco-centric view of nature in African jurisprudence that could lead to a legal personality for rivers.

The African Union demonstrates this by:

- Examining customary international law on the non-navigational uses of international watercourses
- Outlining African international law practice on the non-navigational uses of international watercourses
- Demonstrating that regardless of the absence of customary international law (CIL) supporting a legal personality of rivers, legal development in the law on indigenous peoples' rights has afforded rivers legal protection.
- Concluding that regardless of the absence of legal recognition of rivers, the law, as influenced by indigenous peoples' rights, could potentially develop to recognise legal standing for rivers.

A. Customary International Law on the non-navigational uses of international watercourses recognises a legal personality for rivers

1. International law on non-navigational uses of international watercourses has been codified in various international legal instruments. The first full and most detailed elicitation of principles for the cooperation of states in developing shared water resources was spelled out in the International Law Association's Helsinki Rules, adopted at its 1966

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conference.¹² Another international instrument codifying international water law as pertains to non-navigational uses is the Draft Articles on the Law of Trans-boundary Aquifers, which deals with sub-surface or ground waters.¹³

2. The law on non-navigational uses of water-bodies is, however, codified with an intention to be binding, in the Convention on the Law of Non-navigational uses of International Watercourses.¹⁴ The Convention is widely held to codify existing customary international law (CIL) relating to the practice of states as regards to non-navigational uses of international watercourses with respect to at least three of the main obligations it embodies.¹⁵ These are: equitable and reasonable utilization and participation,¹⁶ prevention of significant harm,¹⁷ and prior notification of planned measures.¹⁸ The same principles are found in the texts of the Helsinki Rules¹⁹ and the Draft Articles on Trans-boundary Aquifers.²⁰
3. States have an onus to ensure the effective utilization of international watercourses while placing on them the duty to cooperate in the protection and development of these watercourses.²¹ In discussing the factors relevant to equitable and reasonable utilization, the Convention requires Watercourse States to take into account the social and economic needs of the watercourse States concerned,²² the population dependent on the watercourse in each watercourse State,²³ the existing and potential uses of the watercourse,²⁴ and the conservation, protection, development and economy of the use of the water resources of the watercourse and the costs of measures taken to that effect.²⁵

¹² Helsinki Rules on the Uses of the Waters of International Rivers, 1967

¹³ Draft Articles on the Law of Trans-boundary Aquifers, 2008.

¹⁴ Convention on the Law of Non-navigational Uses of International Watercourses, 21 May 1997

¹⁵ McCafferey S, 'Convention on the Law of the Non-navigational Uses of International Watercourses,' *United Nations Audiovisual Library of International Law*, accessed at http://legal.un.org/avl/pdf/ha/clnuiw/clnuiw_e.pdf, 2008,3

¹⁶ Article 5, Convention on the Law of Non-navigational Uses of International Watercourses

¹⁷ Article 7, Convention on the Law of Non-navigational Uses of International Watercourses

¹⁸ Article 11, Convention on the Law of Non-navigational Uses of International Watercourses

¹⁹ Article IV, Helsinki Rules on the Uses of the Waters of International Rivers, 1967. The obligation to not cause significant harm is read into the sections on pollution, (Article IX-XI).

²⁰ Article 5, 6 and 15, Draft Articles on the Law of Trans-boundary Aquifers, 2008

²¹ Article 5 (2), Convention on the Law of Non-navigational Uses of International Watercourses

²² Article 6(b), Convention on the Law of Non-navigational Uses of International Watercourses

²³ Article 6(c), Convention on the Law of Non-navigational Uses of International Watercourses

²⁴ Article 6(e), Convention on the Law of Non-navigational Uses of International Watercourses

²⁵ Article 6(f), Convention on the Law of Non-navigational Uses of International Watercourses

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4. Under article 7, States are obligated to ‘take all appropriate measures’ to prevent causing significant harm to other watercourse States. The International Law Commission (ILC) has interpreted ‘significant harm’ to mean something more than ‘detectable’ but that need not be at the level of ‘serious’ or ‘substantial’.²⁶ The ILC has held that the threshold of ‘significant harm’ is a flexible and relative concept, necessitating, that factual considerations rather than legal determinations have to be taken into account in each case. In the eventuality of such harm, the ILC has found that appropriate measures to be taken by the offending state also include measures of restoration.²⁷
5. Keeping with articles 5 and 7 of the Convention, States are mandated to collaborate by exchanging information, consulting each other, and where necessary, negotiating on the possible effects of planned measures on the condition of an international watercourse.²⁸ They are obligated to make an assessment of the impact of the planned measure and communicate the results of such assessment to the other Watercourse States.²⁹ This obligation for assessment has acquired customary international law status as evidenced by the practice of States; elucidated in ILC commentaries.³⁰ The procedure provided for when dealing with planned measures is based on the criterion that the measure might have significant adverse effect upon the other watercourse States. This, according to the

²⁶ See commentaries to the draft articles on the Law on the Non-navigational uses of International Watercourses, Yearbook ... 1994, vol. II (Part Two), para. 222, Commentaries to the draft articles on Prevention of Trans-boundary Harm from Hazardous Activities, Yearbook ... 2001, vol. II (Part Two), para. 98; and Commentaries to the draft articles on the Law on Trans-boundary aquifers, Yearbook of the International Law Commission, 2008, vol. II, Part Two

²⁷ See commentaries to the draft articles on the Law on the Non-navigational uses of International Watercourses, Yearbook ... 1994, vol. II (Part Two)

²⁸ Article 11, Convention on the Law of Non-navigational Uses of International Watercourses

²⁹ Article 12, Convention on the Law of Non-navigational Uses of International Watercourses

³⁰ The ILC notes the ASEAN Agreement on the Conservation of Nature and Natural Resources (1985) mandates its member states to endeavour to make environmental impact assessment before engaging in any activity that may create a risk of significantly affecting the environment or the natural resources of another Contracting Party or the environment or natural resources beyond national jurisdiction” The same is required in the African Convention on the Conservation of Nature and Natural Resources (2003) and in The Agreement on Cooperation for the Protection and Sustainable Use of the Waters of the Spanish-Portuguese Hydrographic Basins (1998). The Charter on Groundwater management (1989) prepared by the United Nations Economic Commission for Europe, provides for the same and Chapter 18, in the Protection of the Quality and Supply of Freshwater Resources: Application of Integrated Approaches to the Development, Management and Use of Water Resources (1992) of the Agenda 21 suggests that all States should implement “Mandatory environmental impact assessment of all major water resource development projects potentially impairing water quality and aquatic ecosystems.” See, Commentaries to the draft articles on Prevention of Trans-boundary Harm from Hazardous Activities, Yearbook ... 2001, vol. II (Part Two),

ILC is contingent and anticipatory, and lower than that of ‘significant harm’ under article 7 of the Convention.³¹

B. African International Law on the non-navigational uses of international watercourses

6. The above-codified provisions inform the other obligations of watercourse States throughout the Convention and the other codifications of international water law. States need not have ratified the Convention to be bound by the provisions discussed above as they bind all states by virtue of their attaining the status of customary international law norms of watercourse States.³² Consequently, this means that African States are bound by these principles, regardless of the fact that only ten out of the fifty-five countries have ratified the Convention.³³
7. Other regional-wide law on water in Africa is found inspired by the African Charter’s provisions on the right to a general satisfactory environment.³⁴ The article reads: All peoples shall have the right to a general satisfactory environment favourable to their development. The African Charter accords this right to be enjoyed collectively as a people.
8. The African Convention on the Conservation of Nature and Natural Resources elaborates on the right to environment provided for under article 24.³⁵ The Convention recognises that the natural environment of Africa and the natural resources with which Africa is endowed are an irreplaceable part of the African heritage and constitute a capital of vital importance to the continent and to humankind as a whole.³⁶ It takes cognizance of the obligation of States to protect and conserve the environment through sustainable use of it, in a manner satisfying human needs according to the carrying capacity of the

³¹ See commentaries to the draft articles on the Law on the Non-navigational uses of International Watercourses, Yearbook ... 1994, vol. II (Part Two)

³² Teclaff L, ‘Evolution of the river basin concept in national and international water law, *36 Natural Resources Journal*, 2, 1996, 168.

³³ Teclaff L, ‘Evolution of the river basin concept in national and international water law, 168

³⁴ Article 24, African Charter on Human and Peoples’ Rights, 27th June 1981.

³⁵ African Convention on the Conservation of Nature and Natural Resources, 2003

³⁶ Preamble, African Convention on the Conservation of Nature and Natural Resources, 2003

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environment.³⁷ The African Convention stresses the need for joint action among States to ensure the conservation, utilisation and development of natural resources.³⁸

9. The African Convention emphasises the need to harmonise and coordinate policies in the environmental legal sphere with a view to achieving ecologically rational, economically sound and socially acceptable policies and programmes.³⁹ To achieve this, article 4 provides for the fundamental obligation of States to achieve the objectives of the Convention, in particular through the adoption of preventive measures and the application of International Environmental law's accepted precautionary principle.⁴⁰ It goes on to provide that this is to be done with due regard to ethical and traditional values as well as scientific knowledge in the interest of present and future generations.⁴¹
10. Article 7 gives a general provision for water law in Africa, stressing the need for States to ensure that they maintain their water resources at the highest possible quantitative and qualitative levels.⁴² To do so, it provides that States have an obligation to protect human health from pollutants and water-borne diseases,⁴³ maintain water-based ecological processes and prevent excessive abstraction, to the benefit of downstream communities and states.⁴⁴ The provision echoes customary international law (CIL) principles of preventing significant harm and equitable and reasonable utilization. It also mandates States to ensure that policies, plans, programmes, strategies, projects, and activities likely to affect natural resources, ecosystems and the environment in general are the subject of adequate impact assessment at the earliest possible stage, echoing the provision on planned measures found in the UN Convention.
11. African regional water law agreements further elaborate on the provisions of the African Convention on the Conservation of Nature. They provide for, albeit indirectly, the obligations of States to prevent significant harm, the duty to inform watercourse states in

³⁷ Preamble, African Convention on the Conservation of Nature and Natural Resources, 2003

³⁸ Preamble, African Convention on the Conservation of Nature and Natural Resources, 2003

³⁹ Article 2 (3), African Convention on the Conservation of Nature and Natural Resources, 2003

⁴⁰ Article 4, African Convention on the Conservation of Nature and Natural Resources, 2003

⁴¹ Article 4, African Convention on the Conservation of Nature and Natural Resources, 2003

⁴² Article 7, African Convention on the Conservation of Nature and Natural Resources, 2003

⁴³ Article 7a), African Convention on the Conservation of Nature and Natural Resources, 2003

⁴⁴ Article 7(c), African Convention on the Conservation of Nature and Natural Resources, 2003

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the case of planned measures and the sustainable and reasonable utilization of watercourses.⁴⁵

C. Whether there is generalised African states' practice points to the existence of legal personality for rivers

1. Inasmuch as state practice in some parts of the world coalesces towards the possibility of 'legal personality' for rivers⁴⁶, a reading of the UN Convention and the African Convention on the Conservation of Nature does not espouse a generalized practice amounting to developing customary international law (CIL) practice recognising the legal personality of rivers in Africa.
2. The language employed in African rights' instruments reflects a anthropocentric view of nature. The African Charter on Human and Peoples' Rights states that: 'All peoples shall have the right to a general satisfactory environment favourable to their development.'⁴⁷ This has been interpreted to mean that the environment is nothing other than an element submitted to man and to his necessities and no full rights may be recognised to nature itself.⁴⁸ Consequently, it is that people have the right to an environment favourable to their development and not that nature itself enjoys that particular right.⁴⁹ Considering that the Charter provides for both the right to development and the right to a healthy and favourable environment, both of which fall under the ambit of 'peoples' rights', achieving the right to a favourable environment hence requires balance to be struck between it and the right to development.⁵⁰

⁴⁵ Africa's Minister's Council on Water (AMCOW) Executive Committee (EXCO) Meeting, The 1997 United Nations Convention on the Law of the Non-navigational Uses of International Watercourses: Role and Relevance in Africa, Cape Town, South Africa, 26-30 July, 2010.

⁴⁶ See A/RES/65/164 General Assembly Resolution 63/278, International Mother Earth Day, 15th March 2011, A/RES/70/208, General Assembly Resolution 07/208, 14th December 2012, A/68/948, General Assembly Resolution, Sustainable Development and Sustainable Development Goals, 7th July 2014, Article 13, Mexican City Constitution, Chapter V, Legal Text of the Bolivian Constitution of 2008, Chapter VII, Legal Text of the Ecuadorian Constitution of 2009, Article 71, Legal Text of the Bolivian Constitution of 2008, and Ecuadorian Constitutional Court Ruling Number 017-12-SIN-CC Case Number 0033-10-IN

⁴⁷ Article 24, African Charter on Human and Peoples' Rights (ACHPR), 1520 UNTS 217, 27th June 1981

⁴⁸ Wondalem H, 'The right to environment under the African Charter on Human and Peoples' Rights' 2 *International Journal of International Law*, 1, 208.

⁴⁹ Wondalem H, 'The right to environment under the African Charter on Human and Peoples' Rights' 2 *International Journal of International Law*, 1, 208.

⁵⁰ Viljoen F, *International human rights law in Africa*, 2ed Oxford University Press, 2012

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3. The African Conservation Convention adopts the same understanding of the relationship between human development and nature.⁵¹ The Convention notes the sovereign right of states to exploit their own resources while ensuring that their activities do not cause harm to the environment. It also takes cognizance of the obligation of these states to ensure that they properly conserve the environment and natural resources and use them in a sustainable way with the aim to satisfy human needs according to the carrying capacity of the environment.⁵²
4. The provision on water in the African Conservation Convention echoes the same anthropocentric view. Article 7 pronounces on the duty of states to protect human health against pollutants and water-borne diseases.⁵³ It also emphasises the need for states to prevent damage that could affect human health or natural resources in another state by the discharge of pollutants⁵⁴ and notes a duty to prevent excessive abstraction for the benefit of downstream communities and states.⁵⁵
5. The UN Convention on the Law of Non-navigational Uses of International Watercourses speaks to an awareness of the special situation and needs for developing countries.⁵⁶ This anthropocentric view refers us back to the special developmental needs borne by developing countries to exploit the environment for economic development. It is the same thought that finds actualisation in both the African Conservation Convention and the African Charter on Human and Peoples' Rights. Rather than view nature as a subject of rights, these instruments view nature as a means to human development.

D. Protection of the rights of rivers through various legal developments in Africa

Despite the fact that there is no evidence of recognition of the legal personality of rivers, rivers have been afforded protection through the legal recognition of indigenous peoples whose

⁵¹ Viljoen F, *International human rights law in Africa*, 2ed Oxford University Press, 2012

⁵² Preamble, African Convention on the Conservation of Nature and Natural Resources, 2003

⁵³ Article 7(1)(a), African Convention on the Conservation of Nature and Natural Resources, 2003

⁵⁴ Article 79(1)(b), African Convention on the Conservation of Nature and Natural Resources, 2003

⁵⁵ Article 79(1)(c), African Convention on the Conservation of Nature and Natural Resources, 2003

⁵⁶ Preamble, Convention on the Law of Non-navigational Uses of International Watercourses, 21 May 1997

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view of nature is eco-centric. The concept of indigenous peoples' rights is a judicial extension of the concept of peoples' rights provided for in the Charter. The African Union demonstrates:

- That the concept of peoples' rights has been extended to include indigenous peoples' rights,
- Indigenous peoples' rights have paved the way for legal protection of nature in an eco-centric manner.

1. The African Charter's understanding of Peoples' Rights

1. The Katanganese secession case⁵⁷ before the African Commission on Human and Peoples' Rights judicialised the concept of peoples' rights.⁵⁸ The Katanga people sought their right to self-determination from the African Commission. Though the African Commission did not rule favourably for the Katanga people, it considered that there are certain circumstances in which a claim for a right to self-determination would succeed. The later Nigerian⁵⁹ and Kenyan cases,⁶⁰ involving the social and economic rights of Ogoni and Endorois people respectively, further entrenched the concept of peoples' rights before the African Commission.⁶¹ These cases developed the law on peoples' rights and paved the way for a development in the jurisprudential understanding of indigenous peoples' rights.

a) The African Charter's understanding of Indigenous Peoples' Rights

2. The African Court on Human and Peoples' Rights recently asserted itself on the legal personality of indigenous peoples. Building on previous jurisprudence, the African Court unequivocally found that the Ogiek people from Kenya constituted an indigenous

⁵⁷ Communication 75/92, *Katanganese Peoples' Congress v Zaire*, ACmHPR, 1992

⁵⁸ International Work Group for Indigenous Affairs, *Indigenous Peoples in Africa: The forgotten peoples? The African Commission's work on indigenous peoples in Africa*, 2006, 21

⁵⁹ Communication 155/96, *Social and Economic Rights Action Center and the Center for Social and Economic Rights v Nigeria*, ACmHPR, 2001

⁶⁰ Communication 276/2003, *Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v Kenya*, ACmHPR, 2003.

⁶¹ International Work Group for Indigenous Affairs, *Indigenous Peoples in Africa: The forgotten peoples? The African Commission's work on indigenous peoples in Africa*, 2006, 21

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population and were hence legal subjects before the African Court of Human and Peoples' Rights.⁶²

3. The Court noted that one of the most salient features of indigenous populations is their strong attachment with nature, particularly land and the natural environment.⁶³ It noted that the survival of these communities depended on their unhindered access to and use of their traditional land and the natural resources thereon.⁶⁴ They were, as a result, entitled to the use of their lands and the enjoyment of their culture unless the government justified encroachment from a public interest perspective. Even so, the Court emphasised that the government had a mandate to ensure free, prior and informed consent and provide compensation for annexed lands.⁶⁵
4. The Court particularly noted that the alienation of the Ogiek people from the forest violated their right to freedom of religion and conscience. This right, the Court held, was inextricably connected to their access to land and environment. Dr Liz Alden Wily in her expert testimony, reasoning which the Court adopted, stated that access to the forest for indigenous peoples impacted their whole spiritual life and that their entire existence was dependent on the forest and its intactness.⁶⁶ They hence contemplate within their norms the denomination of a custodian that takes care of the sacred territories and development of livelihoods ingrained, dependent and respectful of nature.⁶⁷
5. Crosscutting the horizontal ecological zones and central to the Ogiek way of life, are streams, which run parallel to each other, draining the Mau escarpment.⁶⁸ Since these are permanent water sources, animals and humans can remain permanently in restricted areas without the need to migrate. These streams delineate Ogiek lineages, they inform culture

⁶² Application 006/2012, *African Commission on Human and Peoples' Rights v The Republic of Kenya*, ACtHPR 26th May 2017, 33

⁶³ Application 006/2012, *African Commission on Human and Peoples' Rights v The Republic of Kenya*, ACtHPR 26th May 2017, 31

⁶⁴ Application 006/2012, *African Commission on Human and Peoples' Rights v The Republic of Kenya*, ACtHPR 26th May 2017, 32

⁶⁵ Application 006/2012, *African Commission on Human and Peoples' Rights v The Republic of Kenya*, ACtHPR 26th May 2017, 38

⁶⁶ Application 006/2012, *African Commission on Human and Peoples' Rights v The Republic of Kenya*, ACtHPR 26th May 2017, 47

⁶⁷ Kamau J, Ogiek: History of a forgotten tribe, An in-depth report by John Kamau, Rights Feature Services, accessed at www.ogiek.org/report/ogiek-ch1.htm

⁶⁸ Kamau J, Ogiek: History of a forgotten tribe, An in-depth report by John Kamau, Rights Feature Services, accessed at www.ogiek.org/report/ogiek-ch1.htm

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and tradition, and are central to the spiritual life of the Ogiek community.⁶⁹ The Ogiek conceive these streams as sacred, and conceive the use of their resources as long as nature can regenerate.⁷⁰

6. In recognising their claim to ancestral land in the forest and its elements, the Court enabled them to serve as custodians of nature while protecting their view of nature as a being formed by the harmonious interactions of beings and the natural systems on Earth.⁷¹ Such protection in law, effectively, though only minutely in the grand scheme of things, shifts the appreciation of nature from an anthropocentric view to an eco-centric one. Taking cognizance of the African Commission's (with the input of nature's custodians) resolution acknowledging the critical role of sacred sites, an eco-centric view of nature and hence, a legal personality for rivers could develop in African international law on the non-navigational uses of watercourses.

E. Conclusion

Despite the fact that there is no evidence as to the development of CIL in international water law to include the legal recognition of rivers in the African continent, there have been developments that afford and will continue to afford legal protection to watercourses in the continent. The right to a safe, clean and satisfactory environment is balanced against the right to development in most African international forums. This caters to the development of indigenous people in the continent. Their understanding of nature, and the protection of that understanding and way of life by African courts, creates a more eco-centric view of nature that could develop into a legal recognition for rivers in African international water law.

⁶⁹ Kamau J, Ogiek: History of a forgotten tribe, An in-depth report by John Kamau, Rights Feature Services, accessed at www.ogiek.org/report/ogiek-ch1.htm

⁷⁰ Pecharroman L, *'Rights of nature: Rivers that can stand in court'*, Earth Institute, Columbia University, New York, 2018

⁷¹ Pecharroman L, *'Rights of nature: Rivers that can stand in court'*, Earth Institute, Columbia University, New York, 2018

V. Question 2

Is international water law adequate to respond to the global climate crisis, which causes significant disruption in the hydrologic cycle, by providing a framework for preventing and resolving disputes among states over the protection from pollution and sharing of water quantities from trans-boundary rivers, lakes, and aquifers?

1. The African Union submits that a streamlined system of binding international water law is adequate to respond to the global climate crisis, which has caused significant disruption to hydrologic cycles.
2. Africa is one of the regions most affected by water scarcity and climate change. This compounded by challenges of governance and funding place the continent in a particularly vulnerable position regarding water resource management.⁷² The sound management of Africa's 63 trans-boundary river basins, which cover 64% of the continent's surface area and store slightly more than 93% of its total surface water resources, is vital in ensuring that Africa is capable of addressing the increasing water challenge effectively.⁷³
3. African governments have noted that underutilization and uneven sharing of water resources presents a growing challenge in the achievement of food and energy securities. Collaboration as a tool to prevent conflict among watercourse states, civil society and businesses has featured prominently in the regional development agenda.⁷⁴ A binding international agreement that creates structure for cooperation among watercourse states, while codifying existing customary international rules and norms, will afford the Continent the chance to prevent and mitigate conflict and promote cooperation.⁷⁵

⁷² Africa's Minister's Council on Water (AMCOW) Executive Committee (EXCO) Meeting, *The 1997 United Nations Convention on the Law of the Non-navigational Uses of International Watercourses: Role and Relevance in Africa*, Cape Town, South Africa, 26-30 July, 2010. See also, Climate Home News, 'Climate change is testing Southern Africa water agreements,' accessed at <http://www.climatechangenews.com/2016/12/02/climate-change-is-testing-southern-africa-water-agreements/>

⁷³ Garane A, 'UN watercourses convention: Applicability and relevance in west Africa', 2008, accessed at https://www.internationalwaterlaw.org/bibliography/WWF/RA_West_Africa.pdf

⁷⁴ Africa's Minister's Council on Water (AMCOW) Executive Committee (EXCO) Meeting, *The 1997 United Nations Convention on the Law of the Non-navigational Uses of International Watercourses*

⁷⁵ Stoa R, 'The United Nations watercourses convention on the dawn of entry into force', 47 *Vanderbilt Journal of Transnational law*, 1321, 2014, 1323

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4. This section will demonstrate the capacity for international water law to prevent and mitigate conflict arising from conflict over protection from pollution and sharing of water quantities through the provision of streamlined rules on dispute resolution mechanisms.
5. To achieve this, the African Union makes submissions that international water rules will:
 - Provide a better procedural and substantive framework for the management, conservation and sharing of trans-boundary waters
 - Streamline the rules on dispute resolution to lend predictability to the recourse of conflicting states
 - Ensure inclusion of all states within a watershed for the prevention of conflict among watercourse states
 - Guide the creation of much needed watercourse agreements
 - Ensure the inclusion of third party watershed states to water agreements they are not party to, to prevent conflict among them and contracting states.

A. Provide a better procedural and substantive framework for the management, conservation and sharing of trans-boundary waters for the prevention and resolution of conflict

1. The existing procedural and substantive framework does not adequately cater for the complexities that arise as a result of watercourse conflict.⁷⁶ Most trans-boundary water agreements in Africa rely on the peaceful settlement mechanisms provided for under or through the Charter of the Organisation of African Unity (OAU).⁷⁷ These mechanisms are not efficient for the resolution of watercourse conflicts, which are nuanced and demand a more particularized response that a streamlined body of international water law would be capable of availing.
2. The Charter of the Organisation of African Unity provided that member states should ensure the peaceful settlement of disputes by negotiation, mediation, and conciliation.⁷⁸ Various

⁷⁶ Africa's Minister's Council on Water (AMCOW) Executive Committee (EXCO) Meeting, The 1997 United Nations Convention on the Law of the Non-navigational Uses of International Watercourses

⁷⁷ Charter of the Organisation of African Unity, adopted 24 October 1945

⁷⁸ Article III, Charter of Organisation of African Unity, The requirement for peaceful settlement of disputes is reiterated by the African Union Non-Aggression and Common Defence Pact, which provides that state parties undertake, pursuant to the provisions of the Constitutive Act, to resolve any differences, by peaceful means, in order

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institutions were established under the OAU to ensure this. They include: The Commission of Mediation, Conciliation and Arbitration,⁷⁹ Mechanism for Conflict Prevention,⁸⁰ and Ad-hoc commissions.⁸¹ Moreover, the Charter provided for the creation of a Peace and Security Council whose mandate was to promote peace, security and stability in Africa and to anticipate and prevent conflicts.⁸² One of the mechanisms devised by the PSC is the Continental Early Warning System (CEWS), which allows for identification, monitoring and evaluation of conflict sensitive areas in the continent.⁸³

3. These mechanisms allow for the prevention and resolution of inter-state conflict. The various African trans-boundary agreements mention their employment to ensure the peaceful settlement of watercourse disputes.⁸⁴
4. Despite this, the substantive framework provided for in most of these trans-boundary water agreements does not promise the early resolution of conflict among watercourse states.⁸⁵ Provisions on the obligation to avoid significant harm,⁸⁶ on the prevention of pollution,⁸⁷ on water allocation among various users,⁸⁸ on reasonable and equitable participation as a framework for benefit sharing, and on environmental protection⁸⁹ are missing from most of these agreements.

to avoid endangering peace and security. See Senge E, African Union and Conflict Resolution in Africa, Unpublished dissertation.

⁷⁹ Article XIX, Charter of Organisation of African Unity

⁸⁰ Decision AHG/Dec. 160 (XXXVII) 37th Ordinary Session of the Heads of State and Government of the OAU, 11 July 2001 Also see Senge E, African Union and Conflict Resolution in Africa, Unpublished dissertation.

⁸¹ See Senge E, African Union and Conflict Resolution in Africa, Unpublished dissertation.

⁸² Protocol relating to the establishment of the Peace and Security Council of the African Union, 9th July 2002. See, <https://au.int/en/treaties/protocol-relating-establishment-peace-and-security-council-african-union>

⁸³ Article 12, Protocol relating to the establishment of the Peace and Security Council of the African Union

⁸⁴ Africa's Minister's Council on Water (AMCOW) Executive Committee (EXCO) Meeting, The 1997 United Nations Convention on the Law of the Non-navigational Uses of International Watercourses

⁸⁵ Africa's Minister's Council on Water (AMCOW) Executive Committee (EXCO) Meeting, The 1997 United Nations Convention on the Law of the Non-navigational Uses of International Watercourses

⁸⁶ The Revised Convention Pertaining to the Creation of the Niger Basin Authority, the Niger Basin Water Charter, The 2002 Charter of Water of the Senegal River, the 1978 Conventions Relating to the Status of the Gambia River and to the Creation of the Gambia River Basin Development Organisation, the 2007 Convention on the Statute of the Volta River and Setting up the Volta Basin Authority fail to include this provision.

⁸⁷ The 2008 Niger Basin Water Charter fails to provide for an explicit duty to take joint measures on the prevention of pollution in addition to failing to provide for provisions on the duty to prevent significant trans-boundary harm.

⁸⁸ The 1987 Revised Convention Pertaining to the Creation of the Niger Basin Authority fails to take into account rules on water allocation among various users

⁸⁹ The 1972 Conventions Relating to the Statute of the Senegal River and Pertaining to the Creation of the Organisation for the Management of the Senegal River, the 2002 Charter of Water of the Senegal River, the 1978 Conventions Relating to the Status of the Gambia River and to the Creation of the Gambia River Basin Development Organisation, the 1964 Convention and Statutes relating to the development of the Chad Basin and the 1st WCEL International Water Justice Moot Court – 8th World Water Forum – Brasília

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5. The absence of these crucial substantial rules negates the effectiveness of the various dispute settlement mechanisms provided for in the Charter for the OAU. Taking into account climate change, which has severely depleted water resources, questions of pollution, trans-boundary harm, water quantity and quality and environmental protection have become dire.⁹⁰ The existence of fragmented water agreements in the absence of an overarching agreement that caters to these questions aggravates the risk for water conflicts within and between African states.⁹¹
6. In furtherance, existing watercourse agreements in the region fail to provide for crucial procedural measures. The agreements fail to provide for procedures for the inclusion of third party intervention, procedures as relates to planned measures, data-sharing procedures, fact-finding measures, and procedures in the case of emergency situations and harmful conditions.⁹² These watercourse specific procedures ensure the identification of conflict situations and their resolution or effective management. Climate change has made it impossible to foreshadow emergency situations in watercourses due to flooding, silting, dam and levee failures among others.⁹³ The sensitivity of international watercourses to such events has made these procedural measures vital in the prevention and management of conflict. In their absence, the risk for conflict among watershed states increases.⁹⁴
7. The codification of the UN Convention, which does not enjoy wide ratification in Africa, has enshrined these provisions in it. Such an agreement would ease conflict identification and

2007 Convention on the Statute of the Volta River and Setting up of the Volta Basin Authority all fail to provide for provisions to ensure the principles of reasonable and equitable participation

⁹⁰ Climate change is testing Southern Africa water agreements,' accessed at

<http://www.climatechangenews.com/2016/12/02/climate-change-is-testing-southern-africa-water-agreements/>

⁹¹ Africa's Minister's Council on Water (AMCOW) Executive Committee (EXCO) Meeting, The 1997 United Nations Convention on the Law of the Non-navigational Uses of International Watercourses

⁹² The 1987 Revised Convention Pertaining to the Creation of the Niger Basin Authority fails to account for the clear and detailed prevention procedures as regards intervention by third parties. The same Convention, the 1972 Convention relating to the Statute of the Senegal River, the 1978 Conventions relating to the Status of the Gambia River, and the 1964 Convention and Statute on the Development of the Chad Basin, Convention on the Statute of the Volta River fail to provide for procedural guidelines in the case of planned measures among watercourse states. Most of these statutes also fail to provide for procedures on fact finding. See Africa's Minister's Council on Water (AMCOW) Executive Committee (EXCO) Meeting, The 1997 United Nations Convention on the Law of the Non-navigational Uses of International Watercourses

⁹³ Africa's Minister's Council on Water (AMCOW) Executive Committee (EXCO) Meeting, The 1997 United Nations Convention on the Law of the Non-navigational Uses of International Watercourses

⁹⁴ Africa's Minister's Council on Water (AMCOW) Executive Committee (EXCO) Meeting, The 1997 United Nations Convention on the Law of the Non-navigational Uses of International Watercourses

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resolution.⁹⁵ Working in tandem with the peaceful dispute settlement mechanisms in the Charter of the OAU, African states will be well equipped to handle, manage and alleviate the challenges of a changing environment.

B. Streamline the rules on dispute resolution to lend predictability to the recourse of conflicting states

1. Despite the fact that the various trans-boundary water agreements in Africa provide for conciliatory means of dispute resolution, considering that most water resources are shared among water-basin states,⁹⁶ the difference in the measures provided between agreements does not promise ease in conflict management. A cure for the fragmentation of rules on dispute resolution governing the various international watercourse agreements in Africa will afford predictability to the recourse of conflicting states.
2. Agreements shared among West African states, which enjoy the most trans-boundary water agreements, reveal a difference in obligations among watercourse states that share waters.⁹⁷ The Charter of Water for the Senegal River does not include aquifers in its definition of “catchment area of the river”, while the rest of the agreements where Senegal is a member do.⁹⁸ The differences in the obligations to share information and obligations regarding planned measures differ from agreement to agreement, regardless of a similarity in its members.⁹⁹
3. This identifiable lack of unity in substantive law among sharing watercourse states complicates the process of conflict management and resolution. In relation to such important matters as the duty to regularly exchange information and data, the duty to inform in the case of planned measures, clarity of the principle to avoid causing significant harm, the definition of watercourses, provisions on environmental protection, and the obligation of states to address emergency situations and harmful conditions, there is need for uniformity that would

⁹⁵ Chote A, ‘The resolution of international watercourse disputes: How should states approach the matter?’ Published LLM Thesis, Faculty of Law, University of Wellington, 2013.

⁹⁶ Africa’s Minister’s Council on Water (AMCOW) Executive Committee (EXCO) Meeting, The 1997 United Nations Convention on the Law of the Non-navigational Uses of International Watercourses

⁹⁷ Africa’s Minister’s Council on Water (AMCOW) Executive Committee (EXCO) Meeting, The 1997 United Nations Convention on the Law of the Non-navigational Uses of International Watercourses

⁹⁸ The 2002 Charter of Water of the Senegal River

⁹⁹ Africa’s Minister’s Council on Water (AMCOW) Executive Committee (EXCO) Meeting, The 1997 United Nations Convention on the Law of the Non-navigational Uses of International Watercourses

⁹⁹ Africa’s Minister’s Council on Water (AMCOW) Executive Committee (EXCO) Meeting

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engender predictability. Streamlined legal provisions would help assuage conflict in this unpredictable time of climate change.¹⁰⁰

C. Ensure inclusion of all states within a watershed for the prevention of conflict among watercourse states

1. Exclusion of third party states from regional watercourse agreements serves to compound the complexity of reaching a solution in case of conflict between watershed states. The fragmented nature of regional watercourse agreements in Africa conducted on a sub-regional basis potentially excludes some watershed states that do not belong in the regional bloc.¹⁰¹
2. International water law as codified in the UN Convention provides for recourse for third watercourse states where they are excluded from an agreement between other such watercourse states, and one contracting state plans a measure that could affect it.¹⁰² In order to alleviate the effects of a changing environment, it is vital to make provisions for all states within a watershed providing the basin-wide dialogue necessary for the optimal and sustainable development of freshwater systems and for the prevention of conflict among watercourse states.¹⁰³

D. Guide the creation of much needed watercourse agreements

1. There is a dearth of watercourse agreements in the Continent. Considering that Africa's existing watercourse agreements cover 20 of its 64 trans-boundary river basins,¹⁰⁴ it is necessary that there is an enunciation on the principles of international water law that will guide the making of much needed regional agreements.
2. The Nile River Basin's hydropolitics provide an illustration of this argument. The Nile's politics have eluded the creation of an international water agreement that could alleviate

¹⁰⁰ Africa's Minister's Council on Water (AMCOW) Executive Committee (EXCO) Meeting, The 1997 United Nations Convention on the Law of the Non-navigational Uses of International Watercourses

¹⁰⁰ Africa's Minister's Council on Water (AMCOW) Executive Committee (EXCO) Meeting, The 1997 United Nations Convention on the Law of the Non-navigational Uses of International Watercourses

¹⁰¹ Africa's Minister's Council on Water (AMCOW) Executive Committee (EXCO) Meeting, The 1997 United Nations Convention on the Law of the Non-navigational Uses of International Watercourses, 11

¹⁰² Article 18, Convention on the Law of Non-navigational Uses of International Watercourses

¹⁰³ Chote A, 'The resolution of international watercourse disputes: How should states approach the matter?', Published LLM Thesis, Faculty of Law, University of Wellington, 2013.

¹⁰⁴ Africa's Minister's Council on Water (AMCOW) Executive Committee (EXCO) Meeting, The 1997 United Nations Convention on the Law of the Non-navigational Uses of International Watercourses, 10

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gross watershed mismanagement in the area.¹⁰⁵ If the principle of reasonable and equitable utilization of resources were adhered to, it would transform the area's geopolitics, especially as regards upper riparian states.¹⁰⁶ Procedural measures catering to the prevention of significant trans-boundary harm, planned measures, data sharing procedures and environmental protection would assuage the fears of lower riparian states that have held onto power to protect their interests.¹⁰⁷ In an aggravated situation resulting from climate change, Nile basin states would be able to avoid conflict better if they adhered to the provisions of international water law rather than the controversial agreement today that only assures fragile peace.¹⁰⁸

3. International water law would advance the creation of more durable watercourse agreements in the Continent, while providing a guideline for the revision of existing ones based on its common, widely accepted principles, which would ultimately bring more stability to the treaty-making process.

E. Conclusion

International water law is capable of responding to the global climate crisis by providing durable, predictable and widely held dispute resolution rules to aid in the prevention and resolution of watercourse conflicts. The UN convention provides a procedural and substantive framework for the resolution of conflict. It also provides for streamlined rules that will help advance predictability in cases of conflict, include all watershed states, a principle in line with the basin-wide conservation dialogue, and provide a framework for the creation of more trans-boundary water agreements. Such a streamlined body of international water law is dire for the African continent, which faces a climate crisis amid an increase in population, necessitating clearer, more streamlined and structured responses to watercourse conflicts plaguing the Continent.

¹⁰⁵ Stoa R, 'The United Nations watercourses convention on the dawn of entry into force', 47 Vanderbilt Journal of Transnational law, 1321, 2014, 1355

¹⁰⁶ Stoa R, 'The United Nations watercourses convention on the dawn of entry into force', 47 Vanderbilt Journal of Transnational law, 1321, 2014, 1355

¹⁰⁷ Stoa R, 'The United Nations watercourses convention on the dawn of entry into force', 47 Vanderbilt Journal of Transnational law, 1321, 2014, 1356-1357

¹⁰⁸ Stoa R, 'The United Nations watercourses convention on the dawn of entry into force', 47 Vanderbilt Journal of Transnational law, 1321, 2014, 1357

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VI. CONCLUSION

In conclusion, the African Union notes that legal development in the region, though gradual and seemingly rigid in the inclusion of innovative concepts such as legal recognition of rivers, points to a greater appreciation for a coherent body of international water law.