

HUMAN RIGHTS AND THE ENVIRONMENT IN AFRICA

A RESEARCH COMPANION

Edited by

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First published 2024
by Routledge
4 Park Square, Milton Park, Abingdon, Oxon OX14 4RN

and by Routledge
605 Third Avenue, New York, NY 10158

Routledge is an imprint of the Taylor & Francis Group, an informa business

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British Library Cataloguing-in-Publication Data

A catalogue record for this book is available from the British Library

ISBN: 978-1-032-45907-3 (hbk)

ISBN: 978-1-032-46551-7 (pbk)

ISBN: 978-1-003-38224-9 (cbk)

DOI: 10.4324/9781003382249

Typeset in Galliard
by Apex CoVantage, LLC

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17 Reflections on the re-orientation of the methods of shared waters governance in African river basin organisations

François Bokona

17.1 Introduction

Water is one of the most vital resources on Earth. Although it is also the most abundant resource on the planet, fresh water is an exhaustible resource. It is also one of the most demanding to the point of becoming a source of tensions and even conflicts between different states or communities within the same state, especially in Africa where the situation is alarming.¹ Fluidity and fragility are the two essential characteristics of water. These characteristics contribute to the determination of its legal regime, both at domestic and international levels. While the fluidity allows water to freely move over state boundaries irrespective of the nature of friendly or conflictual relations that might exist between states involved. Fragility exposes it to the risks of drying up, alteration, and even degradation along its course. These characteristics explain why riparian states of transboundary water basins² have always shown an interest in setting up joint management agencies for these water areas. Africa has about twenty international river basin organisations (RBOs) out of the sixty-eight basins located on its territory,³ ten⁴ of these are examined in this chapter.

- 1 Africa is the second driest continent after Oceania. It has only about 9% of the world's water resources but with more than 18% of the world's population in 2022. It is estimated that by 2025, water availability in many African countries will be between 1000 and 1700 m³ per person each year. With its rapidly growing and almost unchecked population, Africa will face an increase in water scarcity from 47% in 2000 to 65% in 2025 (UNEP, *Africa. Water Atlas* (UNEP 2010) 14; IPCC, *Climate Change and Water* (Technical document, June 2008) 93).
- 2 Understood here to mean the geographical area of water collection from a main watercourse and its tributaries which can be hierarchised and subdivided into a certain number of lower-level basins (sub-basins) and which flow towards the sea or the ocean through a single mouth.
- 3 See Simona Brofferio, *Conventions Relatives à la Gestion des Bassins Versants Internationaux. Principes et Modalités* (ENGRF 2001) 1; Moïse Makane Mbengue, 'Le Statut du Fleuve Sénégal: Visages Actuels' in Laurence Boisson de Chazournes and Salman A. Salman (eds), *Les Ressources en Eau et Le Droit International* (The Hague Academy of International Law/Martinus Nijhoff Publisher 2005) 473.
- 4 These are the Lake Kivu and Ruzizi River Basin Authority (ABAKIR), the Niger River Basin Authority (NBA), the Volta Basin Authority (VBA), the Lake Tanganyika Authority (LTA),

Generally, these RBOs, which are formally guided by the objective of “sustainable development,”⁵ are mandated to foster “cooperation between riparian states.”⁶ This cooperative approach aims to promote an “integrated, concerted and peaceful management”⁷ of shared waters. The aim of establishing basin agencies is to ensure effective water management to reduce hydrological conflicts. This objective can only be achieved if these intergovernmental bodies develop effective legal frameworks to support measures that address social and economic needs as well as the sustainability of available water resources,⁸ while guaranteeing a climate of peace and security between riparian states of the basin. This objective is, however, far from being achieved, at least optimally, in several African river basins because of the many pitfalls and constraints of water management.⁹ Some examples are the failure to develop mechanisms of resilience to climate change, the inappropriate management of demographic change¹⁰ and potentially dangerous substances to water resources, the resurgence of conflicts around hydrological activities,¹¹ the poor appropriation of RBO agencies’ decisions due to the exclusion of the public and the population from the decision-making process,¹² funding models which are not adapted

The Lake Chad Basin Commission (LCBC), The Nile River Basin Commission (NBC), The International Commission of the Congo-Oubangui-Sangha Basin (CICOS), The Gambia River Basin Development Organization (OMVG), the Organization for the Development of the Senegal River (OMVS) and the Zambezi Watercourse Commission (ZAMCOM).

- 5 See CICOS, Article 2, Addendum; NBC, paragraph 2 of the preamble and Article 3 (1) and (2) of the Framework Agreement; Articles 2 (2) and 5 (2) of the Convention; NBA, Article 3 of the Convention and paragraph 18 of the Preamble of the Charter; OMVS, Article 1(2) of the Convention and paragraph 22 and 23 of the Preamble of the Charter; LCBC, Article 1 of the Convention and paragraph 16 of the Charter.
- 6 See CICOS, Article 2 of the Agreement (1999); NBC, Article 3 (3) of Framework Agreement (2010); I.T.A, Articles 2 (2) and (4) of the Convention (2003); ABAKIR, Articles 2 (2) and (7) of the Convention (2014); NBA, Article 3 of the revised Convention (1987) and Article 2, Water Charter (2008); OMVS, Article 1 (2) of the Convention (1972) and the Preamble of the Water Charter (2002); LCBC, Article 1 of the Convention (1964).
- 7 See CICOS, Article 2, 2007 Addendum; VBA, Article 4 (c), 2019 Water Charter; LCBC, Article 3 (1), 2012 Water Charter; OMVS, Article 5 (2) of the Charter.
- 8 Madioso Niasse, Alejandro Izra, Amidou Garane et Olli Varis (eds), *La Gouvernance de l'Eau en Afrique de l'Ouest. Aspects Juridiques et Institutionnels* (UITCN, Gland et Cambridge 2004) 110.
- 9 The water resources management is understood here to mean all legal and political mechanisms to promote water resources protection, their use and control under rational and optimal conditions by all the riparian states through the establishment of joint, efficient and organised management bodies.
- 10 See Mbaye Dieng, *Eau en Afrique, les paradoxes d'une ressource très convoitée* (Icr4d 2011) 2.
- 11 We can cite among the various conflicts or international tensions related to water in Africa today, that of the Nile, that of Niger and the transaqua project. But we also note the existence of social conflicts for drinking water. See Christian Bouquet, ‘Conflits et risques de conflits liés à l'eau en Afrique’ in *Les Cahiers d'Outre-mer* (Presses Universitaires de Bordeaux 2011) 341–362.
- 12 For more information on the need to organize public participation in the management of OIBs, see in particular RIOB, *La participation des acteurs et de la société civile dans les bassins de rivières, de lacs et d'aquifères* (RIOB 2018) 4.

to the real needs of RBOs, limited and disorganised legal commitments, and the inefficiency of monitoring mechanisms for the implementation of mutual commitments by member states.¹³

Addressing these challenges requires a heuristic approach consisting in seeking and mastering the substance of the current management components of African RBOs, and confronting them with a set of principles, standards, and objectives guided by international law or deriving from the experiences of other international institutions. This approach would help outline proposals which can contribute to the collective work of building an efficient and solid shared water management framework¹⁴ at the African level, both in theory and in practice.

Using a triple critical,¹⁵ comparative,¹⁶ and dialectical¹⁷ approach, the reflection in this chapter is organised around two main points. The first analyses the more factual and more general aspects related to the protection and use of water resources, and the second addresses the organic and functional dimensions of the management agencies of the river basins studied.

17.2 The need for RBOs to review certain approaches to the protection and use of water resources

To better ensure the protection and use of water resources, African RBOs must overcome, among others, four challenges to achieve the sustainable management of African inland waters. They must effectively ensure that there is

13 In order to prevent states from being tempted to evade their obligations in the field of environmental law in general and that of water resource management in particular, or from complying with them only partially or at least, the only way is to establish the control which is of paramount importance but often ignored. See about it Gilbert Guillaume, 'Mot d'ouverture à la table ronde sur quel contrôle' in *Société française de Droit international, Colloque d'Aix-en-Provence, Le droit international face aux enjeux environnementaux* (A. Pedone 2010) 431; Jean-Pierre Beurrier, *Droit international de l'environnement* (A. Pedone 2010) 556.

14 This governance framework, which is adapted to African realities and to the specificities of each river basin, would be based on international water law understood to mean all the rules of international, conventional, or customary law, applicable to rivers or, preferably, shared continental water resources. Maurice Kamto, 'L'Entrée en Viguer de la Convention sur le Droit Relatif à L'Utilisation des Cours D'Eau Internationaux à des fins autres que la Navigation' (2017) 42(1) *Revue Juridique de L'Environnement* 15.

15 Legal criticism is used here as an approach consisting in the desire to go beyond legal formalism by relating legal phenomenon to social reality, especially given the contradictions of the former. See Olivier Corten, *Méthodologie du droit international public* (ULB Bruxelles 2009) 57 and 59.

16 Comparative law, which is the appropriate approach for this study, makes it possible to compare the legal and institutional frameworks established within the ten RBOs studied with each other on the one hand, and between them and other foreign systems on the other.

17 As suggested by Chaumont, the analysis will attempt to develop syntheses from contradictory propositions that need to be reconciled and resolved. Charles Chaumont, 'Méthode D'Analyse du Droit International' (1975) 1 *Revue belge de droit international* 35.

resilience to the effects of climate change and prevent an uncontrolled increase in the population given the inadequacy of availability and access to water. They are also required to prevent and effectively fight against water pollution by waste and prevent or resolve conflicts arising from individual states' use of shared waters for domestic activities. Each of these measures is examined below.

17.2.1 Aligning the legal framework of RBOs to resilience to the effects of climate change

There is no gainsaying that Africa has already been hit hard by climate change. The effects have aggravated the decline in water resources, thereby making it difficult for a large portion of the African population to access fresh water,¹⁸ and even more difficult for the "sustainable management of water resources"¹⁹ to be achieved. The continent is finding it difficult to cope with this phenomenon²⁰ which leads to drought. The majority of the ten RBOs in this chapter affirm the need to fight against this scourge.²¹ Acknowledging the vulnerability of waters in the face of climate change, is, however, not enough to safeguard their availability. To optimally manage their water resources, African RBOs need to undertake measures that most of them are still unaware of,²² to mitigate or adapt to this phenomenon,²³ as outlined by the United Nations Framework Convention on Climate Change (UNFCCC). These measures should be accompanied by concrete actions, time frames, and sanctions to guarantee the effectiveness of the system.

Mitigation measures should include the protection and improvement of greenhouse gas sinks and reservoirs through sustainable forest management and reforestation; the rehabilitation of areas affected by drought and desertification, and the sustainable management and preservation of coastal ecosystems, wetlands, natural areas, and other river basin ecosystems.²⁴ In this context, RBOs must take into account "the sources of anthropogenic emissions."²⁵ Concerning adaptation measures, RBOs should, among other

18 IPCC (n 1) 153.

19 UNESCO, *UN-Water, L'Eau et les Changements Climatiques. Rapport Mondial des Nations Unies sur la Mise en Valeur des Ressources en Eau, Résumé* (UNESCO 2020) 2.

20 According to the IPCC, Africa is one of the most vulnerable continents to climate change. See SH Schneider et al., *Assessing Key Vulnerabilities and the Risk from Climate Change* (CUP 2007).

21 Point 3 of the Preamble of the VBA Convention; Article 12, NBA Water Charter; article 4 (2) (a), NBC Framework Agreement; Preamble, Addendum to the Founding Agreement of the CICOS; Article 5 (1), OMVS Water Charter; Article 13(3) (a), ZAMCOM Agreement; Preamble of the LCBC Charter. ABAKIR, OMVG and LTA do not clearly declare it.

22 Except for VBA which is seen as an example to follow.

23 Article 4 (1) point (f) (UNFCCC), 1992.

24 VBA Charter, Article 54. Also see Article 4 (1) (c) of the UNFCCC.

25 Article 4 (1) (b), UNFCCC.

things, assess the vulnerability of river basin natural resources to the impacts of climate change to promote awareness of the ecosystems of river basins, including their capacities to store carbon and how they respond or will respond to climate change. There is also the need to identify appropriate responses to the impacts of climate change on the natural resources of river basins, especially through the promotion of mechanisms of adaptation to the scourge and integrate the management of its hazardous effects into programmes, projects, and strategies of the sustainable management of the river basins under their mandates.²⁶ To meet the cost of member states' adaptation to the effects of climate change on their waters, the RBOs need to work towards collectively seeking financial assistance from developed countries which are committed to fighting climate change.²⁷ These are the only conditions to ensure that the challenge is overcome.

17.2.2 Manage demographic growth in anticipation of the increasing unavailability of water resources

Population growth exacerbates the vitality of water resources.²⁸ This situation is prevalent in Africa where the demographic situation is more than precarious. African countries must therefore make efforts, if not drastic changes, to address the situation.²⁹ With the highest population growth of all continents,³⁰ Africa is the second driest continent after Oceania. The continent has only about 9 per cent of the world's water resources, but more than 18 per cent of the world's population according to 2022 figures. This highlights two problems with the "water-population" equation: the problem of volume and that of quality. With its rapidly growing and almost uncontrolled population, Africa will face an increase in water scarcity from 47 per cent in 2000 to 65 per cent in 2025,³¹ a forecast which validates "Malthusian theory."³²

26 See article 55 the VBA Charter.

27 Article 4 (4), UNFCCC.

28 Laurence Boisson De Chazournes, 'Le Droit International de L'Eau: Tendances Récentes' (2008) 2 Anuário Brasileiro de Direito Internacional 138.

29 Pierre-Alain Roche, 'L'Eau, Enjeu Vital Pour L'Afrique' (2003) *Afrique contemporaine* 39–40.

30 Patrice Vimard and Raïmi Fassassi, 'Démographie et Développement en Afrique: Eléments Rétrospectifs et Prospectifs' (2011) 40(2) *Cahiers Québécois de Démographie* 332.

31 UNEP (n 1) 14; IPCC (n 1) 93; IPCC, *Le changement climatique et l'eau* (Document technique, juin 2008) 93. By 2025, water availability in many African countries will be between 1000 and 1700 m3 per person each year.

32 Thomas-Robert MALTHUS' theory on population is summarised by the equation between the population's natural tendency to grow according to a rapid geometric progression, and the irregular, random and arithmetic growth of resources or means of subsistence such as water (*Essai sur le Principe de Population*, Translated by d'Eric Vilquin, Jean-Marc Rohrbasser and Jacques Veron (INED 2017)).

Of all the RBOs targeted in this chapter, only the Volta Basin Authority (VBA) recognises that high demographic growth and the resulting increase in water needs, especially for domestic, agricultural and energy purposes, constitute one of the major cross-border challenges of water and environmental management in the river basin.³³ This is even though the recognition does not go beyond mere declaration. In addition to the pressure on water quantity, overpopulation also leads to the overproduction of waste, which is another vector of the pollution of water resources.³⁴ Given the high cost of water purification, the decrease of good quality water is almost equivalent to the absence of it, especially for countries with weak economies such as those on the African continent.

The reluctance of the other RBOs to recognise this problem can be explained by the fact that it is a problem that falls within the responsibilities of the states.³⁵ However, as long as this sector is negatively impacting shared waters, RBOs need to show more interest by adopting measures and strategies such as setting five-year, ten-year, or multi-decade ceilings of population growth, that member states must implement to address the problem.

In this regard, several factors have to be prioritised and this requires RBOs to adopt relevant conventions and make them effective, by the wishes of the United Nations.³⁶ Among these factors, is the free access for all, especially for the younger generations, to information on the methods of reducing reproduction, especially those which do not undermine the cultural values of each riparian state.

17.2.3 *Strengthen the prevention and fight against pollution of shared waters*

Water pollution has been one of the major problems faced by human societies over time. Africa is struggling with this problem, especially with increasing industrialisation which is causing the multiplication of hazardous waste³⁷ as well as other water pollution factors prevalent in different river basins.³⁸

33 Preamble of the Charter.

34 Garbology experts believe that in sub-Saharan Africa, population growth will triple the production of waste. See Hugo Le Picard, *Gestion des Déchets et Production D'Électricité en Afrique. L'Incinération au Service de la Ville Durable* (IIRI 2019) 5.

35 For example, Article 41 of the Egyptian Constitution is mindful of this problem by providing that: "The State will implement a demographic programme which aims to achieve a balance between the rate of population growth and available resources. [. . .]."

36 UN, *Rapport de la Conférence Internationale sur la Population et le Développement. Le Caire, 5-13 septembre 1994* (UN 1995) 200 <www.un.org>, accessed February 26, 2023.

37 Waste "by [its] nature [or] elimination," poses a risk "to human health and environmental quality." (Jean Salmon (ed), *Dictionnaire de Droit International Public* (Bruylant 2001) 295.

38 Ibrahim Baba Goni, 'Qualité de L'Eau et Pollution' in Jacques Lemoalle et Géraud Magrin (eds), *Le Développement du Lac Tchad: Situation Actuelle et Futurs Possibles* (IRD 2014) 130; Jerome Maric, Pierre Morand, and Hamady N'djim, *Avenir du Fleuve Niger* (IRD 2007) 61;

The legal regime for pollution should be guided by principles, which for the most part come from customary international law. Cooperation³⁹ (exchange of data and information, and warning) should be strengthened to ensure the success of their application, the prevention of pollution⁴⁰ or the mitigation of its effects. RBOs should prohibit activities which take place within the territory of one state, but cause significant harm⁴¹ to the waters, human health, or ecosystems of other states. This involves making every effort to ensure that resources in state territories, especially water resources located within their borders, are used in a reasonable and non-destructive way for other riparian residents. To facilitate the application of this principle, the RBOs should insist on transparency from the states, and the obligation to always carry out environmental impact studies.⁴²

Lists of harmful substances or activities likely to pollute water resources should also be established and compliance with the rules should be enforced. Of the RBOs studied, only five (LTA, CICOS, OMVS, LCBC and VBA)⁴³ have instituted this obligation of drawing up lists, but the rule has only been implemented by LTA.⁴⁴ The non-application of the rule is due to the recurrence of pollution from hazardous waste.⁴⁵ RBOs, therefore, need to adopt the principles of specifying the people responsible for the disposal of waste in each country, and for the rules regulating hazardous waste to be determined by the person or entity in charge of the disposal. They also need to agree on the rules, conditions, and modalities for establishing state responsibility.⁴⁶ It is apposite that this regime can only be effective if incentives and coercion are used. In this case, incentive measures would, for example, consist of the application of the "polluter pays" rule, which has become a

Jean Noël Poda, *Les Maladies Liées à l'Eau Dans le Bassin de la Volta: État des Lieux et Perspectives, Ouagadougou* (IRD 2007) 66–67; CRREBaC, *Pollution des Rivières Tshikapa et Kasai Identifiée dans l'Outil CB-CIS: Appel à l'Action du CRREBaC* (Kinshasa, August 13, 2021) 1; Business and Human Rights Resource Center, 'Soudan: Les Marais du Nil Blanc Menacés par la Production Pétrolière' <www.business-humanrights.org> accessed February 24, 2023.

39 See Article 5 (2) of the 1997 Convention on the Law of Non-Navigational Uses of International Watercourses; Article 4 of the UN Convention (1994) to Combat Desertification. Also see *The Corfu Channel Case* (1949) and the military and paramilitary activities in Nicaragua (1986).

40 Especially by applying the principles of reducing waste production to the minimum, their environmentally sound management as well as the prohibition and control of their intra-state and inter-state movements.

41 *The Trail Smelter Case* (arbitration 1941) and the *Lake Lanoux Case* (arbitration 1957).

42 *The Pulp Mills Case* (ICJ 2010).

43 Article 14 (5), Addendum; article 16 (4), OMVS Charter; article 22, LCBC Charter; article 24 (2) (b), VBA Charter.

44 Annexure II of the Convention.

45 IWACU, 'La Pollution du Lac Tanganyika ne Fléchit Pas' <www.iwaku-burundi.org> accessed February 14, 2023.

46 Of the RBOs studied, only LTA (Article 31 of the Convention), CICOS (Article 16, Addendum), OMVS (Article 18 of the Charter) and NBC (Article 5 of the Framework Agreement) mentions, in one way or another, the state's liability for damage caused by pollution created on its territory. Due to the fluidity of environmental rules and the diffuse character of damage, this liability is unfortunately usually *soft*. It therefore needs to be toughened.

customary rule.⁴⁷ Coercive measures may consist of the RBO creating, in agreement with the states, a “[mixed] water police system.” The role of this mixed system would be to “compel polluters to treat their waste and to respect relevant standards,” and the adoption of other “appropriate coercive measures” as well as the identification and location of “entities likely to cause pollution.”⁴⁸

17.2.4 Promote the establishment of common projects or projects of common interest

For their socioeconomic development, riparian countries use shared waters for hydroelectric, hydro-industrial, or hydro-agricultural activities. Every riparian state on an international watercourse has the right to freely modify the course of the water, widen or transform it and even increase its flow with new adductions, provided the diversion of water and its flow are not modified. This principle of non-modification of the water regime has become a general rule as a result of international case law.⁴⁹ However, there is always a climate of suspicion and rivalry between the state carrying out activity on shared waters and other riparian states.⁵⁰ In practice, it is delicate, if not difficult, to establish a faulty modification of the water regime in a context of climate change with wide and unpredictable effects, and where anthropogenic and natural causes are intertwined. In such an environment, it would be beneficial for RBOs to encourage joint projects⁵¹ or projects of common interest⁵² such as hydro-integrating projects that would benefit a wider circle of riparian states. This would symbolise an expression of sub-regional solidarity⁵³ or the concretisation of the community of interests⁵⁴ between riparian states.

47 Mathias Forteau, Alina Miron, and Alain Pellet, *Droit International Public* (LGDJ 2022) 1777.

48 Alain Bernard and Christophe Brachet, *Bilan des Expériences D’Organismes de Bassins Transfrontaliers en Afrique* (2014) 90 <www.riob.org> accessed February 25, 2023.

49 The Diversion of Water from the Meuse Case (PCIJ 1937); the Lake Lanoux Case (Arbitration 1957).

50 See Audrey Auclair and Frédéric Lasserre, ‘Aménagements, politiques et conflits sur l’eau en Afrique de l’Ouest’ (2013) 13(2) *Revue Électronique en Sciences de L’Environnement* 9. *ibid* 14; Agathe Maupin, ‘Le bassin transfrontalier du fleuve Zambèze en Afrique australe des eaux conflictuelles?’ (2011) 255 *Les cahiers d’Outre-mer* 377.

51 A project for which member states of an RBO have decided by a legal act to be the joint and indivisible property of all the member states or a group of the member states. (See Article 2 of the LCBC Charter; Article 3. (36) of the VBA Charter; Articles 1, 2 and 3 of the 1978 OMVS Convention on the legal status of joint projects; Article 1 of the 1985 OMVG Convention on the legal status of joint projects; Article 1 (21), NBA Charter).

52 A project belonging to a member state, but affecting two or more member states of the organization, and which they have agreed to manage together. (See Article 3 (37) of the VBA Charter; Article 2 of the LCBC Charter; Article 1 (22) of the NBA Charter).

53 Amidou Garane, *Le Cadre Juridique International du Bassin de la Volta* (IUCN 2009) 161.

54 Mara Tignino et Komlan Sangbana, *Le Statut D’Ouvrages Communs et Le Partage des Bénéfices dans Les Bassins du Fleuve Sénégal et du Fleuve Niger*, Note Politique n°5 (University of Geneva 2016) 1.

To date, only the Niger River Basin Authority (NBA), the Volta Basin Authority (VBA), the Lake Chad Basin Commission (LCBC), the Gambia River Basin Development Organization (OMVG) and the Organization for the Development of the Senegal River OMVS have developed these mechanisms, but only OMVS has implemented the common project system.⁵⁵ This has made it to be widely recognised as a successful model, though some experts contend that its success has been largely due to the small number of states involved.⁵⁶ Other RBOs need to adopt these effective methods of shared water use. Whatever the case may be, while preventing conflicts, these projects should also be designed in such a way as to ensure the protection of the resource to foster sustainable and shared development between the riparian states of the river basin.

17.3 Recommended solutions to the organisational and operational constraints of RBOs

Several structural and functional obstacles are making it difficult for RBOs to efficiently fulfil their mandates. The solutions proposed in this chapter include the democratisation of agencies, the need for all river basin states to adhere to a set of rules applicable to shared waters, sourcing substantial African funding, and strengthening the mechanisms for monitoring the execution of commitments made by states.

17.3.1 Ensure the democratisation of RBO governance

The democratisation of the governance of shared water resources management organisations contributes to improved management. This is achieved through the direct or indirect positive effects of pressure from the population and relevant organisations advocating for sustainable management practices. This can be achieved through public participation in the activities of certain agencies of the international organisation, and the institution of a parliamentary system, be it participative or representative.

Public participation in the activities of RBOs is nowadays one of the major principles or an indicator of good governance in the management of shared water resources.⁵⁷ The public in this case includes natural persons, including women and young people, and also legal persons, especially NGOs,⁵⁸ which

55 The case with the Manantali and Dama dams managed by OMVS agencies; Article 3 of the Convention on the status of joint projects.

56 GARANE (n 49)162.

57 See Carlo Previl, 'Participation du Public dans la Gouvernance de L'Environnement et du Territoire: Pour Améliorer L'Instrumentation' (2009) 9(1) *Revue Électronique en Sciences de L'Environnement* 1 <<https://doi.org/10.4000/vertigo.8580>> accessed February 20, 2023.

58 ECE/UNEP, *Water Management: Guidance on Public Participation and Compliance with Agreements. Network of Experts on Public Participation and Compliance* (ECE/UNEP 2000).

have observer status. In some cases, representatives of riparian communities take part in the deliberations. Although each RBO determines the agencies in which this participation may take place, deliberative and plenary organs seem more appropriate because of their key role in the functioning of the organisation, especially in decision-making and the monitoring of their implementation.

Among the RBOs studied, only the LTA, the OMVS, the LCBC, the CICOS and the VBA⁵⁹ have complied with this requirement. To avoid public participation becoming just a simple formality or institutional routine, it is important to adopt measures to prevent corruption and fraud in the selection of public participants by highlighting, in full transparency and rigour, objective eligibility criteria such as the mastery of issues related to water resources, interest in the resource, and visibility at the national level. Selection could also be made through elections by peers within a national forum of participants in the river basin organisation operating in each of the member states. In order not to be subjugated by the states, these organisations should only interact with the river basin organisation. It is undoubtedly for these reasons that some RBOs have had parliamentary (or quasi-parliamentary) bodies for some time now.

Of the sample studied, the LCBC and the VBA are the only RBOs⁶⁰ to have introduced a parliamentary system in the management of water resources, thus promoting the representation of the peoples of the riparian states, even if it is indirect. Considering the importance of such an institution, it is hoped that other African RBOs will adopt it, with each RBO determining in its way and according to its laws, the modalities which would suit its specific context. Although affirmed in the texts of the RBOs, it has unfortunately been observed that both methods of democratisation have been almost or completely ineffective where they have been envisaged, given that the implementation has been challenging.

17.3.2 Promote a water-related "legal community" for river basin states

The legal community is understood here to mean a situation in which the member states of a given group, in this case, those bordering a river basin, have the same rights and meet the same international obligations, especially in terms of the protection and management of water resources. This requirement contains two measures: the need to equate co-riparianship with co-contractuality, and the need for all riparian states to subscribe to universal, regional, and sub-regional international conventions on water.

59 Article 24 (6) of the LTA Convention; Article 23 of the OMVS Charter; Article 93 (2) of the LCBC Charter; Article 18 (3), Addendum, CICOS; Article 147 of the VBA Charter.

60 Articles 82 (2) (b) of the LCBC Charter and 23, Annexure 2 of the VBA Charter on relative attributions, composition, organization and functioning of specific organs.

Co-riparianship, a purely geographical, material, or hydrological concept, refers to a situation of hydro-solidarity or hydrological interdependence of states. Co-contractuality, on the other hand, falls within the field of law and refers to the idea of subjects of the law being bound by the same legal instrument regulating rights and obligations. In this regard, for the sake of the community of interests and rights, all riparian states of a river basin are not only subjected to the same obligations but also participate in its management as a member of the common body.

However, the reality is that it is not everywhere that the geographical configuration of African river basins is taken into consideration, and there are river basins whose riparian states are not all members of the relevant RBOs. This implies that the common standards for the protection and use of water in the river basin are not enforceable against non-member riparian states. This situation does not promote the efficient management of shared waters which function as a system with different interrelated components (surface waters, underground waters, etc.) that constitute a unitary whole. The non-application of river basin water management standards to a section of the system is likely to considerably weaken the objective of optimal protection, and sustainable and rational use of water.

It is therefore important for the “legal jurisdiction” to correspond to the “hydrological jurisdiction” (or hydrological region) or, better, to the geographical area of the river basin, to ensure enhanced cooperation and the enforceability of water protection and use rules to all states that naturally share the river basin.

Some African RBOs are confronted with the dichotomy between jurisdiction and geography. This is the case with the NBA⁶¹ and the LCBC,⁶² of which Algeria is not a member although it is situated on the borders of the Niger River and Lake Chad basins, at “161,300 km² and 90,000 km²”⁶³ respectively. It should be noted that Sudan, which borders the Lake Chad basin, is also not a member of the LCBC. This also applies to the Congo basin, which is managed by three RBOs (the CICOS, the LTA and the ABAKIR), but of which only the DRC is a member of all three, especially as there has been no legal harmonisation mechanism (such as a mixed commission) developed to date. This fragmentation of the regional regulatory framework leads to differentiated, uneven and even disorderly legal management⁶⁴ of water resources by

61 Only the following are members: Benin, Burkina Faso, Cameroon, Ivory Coast, Guinea, Mali, Niger, Nigeria, Chad.

62 Only the following are members: Cameroon, CAR, Libya, Niger, Nigeria and Chad.

63 See table presented by Madioso Niassé, ‘Prévenir les Conflits et Promouvoir la Coopération dans la Région des Fleuves Transfrontaliers en Afrique de l’Ouest’ (2004) 5(1) *Vertig* O7 <www.vertigO.revues.org/3979> accessed January 8, 2023.

64 See François Bokona, ‘Désordre des Ordres Normatifs sur les Eaux du Bassin du Congo. Esquisse D’un Mode D’Intégration Juridique’ (2022) 101 *Revue de Droit Africain* 31.

the different states because they are not subjected to the same rules.⁶⁵ This is not good for the protection of water resources, which are nevertheless, inter-dependent throughout the river basin.

The dispersion and fragmentation of the regulatory systems of RBOs can also be seen in the ratification, or absence thereof, of the relevant conventions, both universal and regional. The ratification of a treaty requires the consent of a state to be bound by it⁶⁶ and a commitment to have it applied in its legal order. This implies that the state accepts all the commitments in the treaty, except for any reservations that might apply according to the specific terms provided for each treaty. In almost all the RBOs mentioned in this chapter, some member states have not ratified the relevant international conventions, even though certain conventions are cited in the preambles of the texts of the RBOs.⁶⁷ This is the case with the 1997 New York Convention,⁶⁸ the 1992 Helsinki Convention on the Protection and Use of Transboundary Watercourses and International Lakes,⁶⁹ the 2003 Maputo Convention on the Conservation of Nature and Natural Resources,⁷⁰ and the 1991 Bamako Convention on Waste,⁷¹ as revealed by their ratification documents.⁷² This is also most likely the case with other water resources conventions such as the Ramsar Convention on Wetlands of International Importance (1971), the Paris Convention to Combat Desertification (1994), the Rio Convention on Biological

65 Subject to provisions having acquired the status of customary rules without their insertion in a convention, i.e., “declaratory norms of customary international law” (Kamto (n 14) 20). This is the case of the rules of the non-damaging use of the territory, the prohibition to cause significant damage, the polluter pays, the obligations of environmental impact studies, cooperation, non-modification of the shared water regime, etc.

66 Article 2 (b) of the 1969 Vienna Convention on the Law of Treaties.

67 See the Preambles of Charters of the following RBOs: VBA, LCBC, OMVS, NBA and the ZAMCOM Agreement.

68 NBA: out of the nine members, three (Cameroon, Guinea and Mali) have not ratified it; VBA: Out of the six members, two (Mali and Togo) have not ratified it; LCBC: Out of the six members, two (Cameroon and CAR) have not ratified it; OMVG: Out of the four members, only Guinea-Bissau has ratified it.

69 NBA: Only Cameroon and Chad have ratified it; VBA: only Ghana and Togo have ratified it; LCBC: only Cameroon and Chad have ratified it; CICOS: Out of the six members, only Cameroon has ratified it; OMVS: Out of the four members, only Guinea-Bissau and Senegal have ratified it.

70 ABAKIR: Out of the three members, only the DRC has ratified it; NBA: Cameroon, Guinea and Nigeria have not ratified it; ITA: Out of the four members, only Burundi has ratified it; LCBC: Cameroon, Nigeria and CAR have not ratified it; NBC/NBI: Out of eleven members, only Burundi and Rwanda have ratified it; CICOS: Only Angola and the Democratic Republic of Congo have ratified it; OMVS: Only Mali has ratified it; OMVG: Only Gambia has ratified it; ZAMCOM: Out of eight members, only Angola has ratified it.

71 NBA: Guinea and Nigeria have not ratified it; VBA: Ghana has not ratified it; ITA: Zambia has not ratified it; LCBC: Nigeria has not ratified it; NBC/NBI: Eritrea and Kenya have not ratified it; OMVS: Guinea and Mauritania have not ratified it; OMVG: Guinea and Guinea-Bissau have not ratified it; ZAMCOM: Botswana, Namibia and Zambia have not ratified it.

72 See <<https://treaties.un.org>>; <www.ecolese.org> accessed February 25, 2023.

Diversity (1992), the Basel Convention on Waste (1989), the Paris Climate Agreement (2015), etc.

The risk of this dichotomy that needs to be resolved, without prejudice to state sovereignty, is that certain RBO states may only be bound by obligations arising within the river basin or by customary rules, and not subjected to rules resulting from universal, regional, or sub-regional water conventions not ratified by them.

17.3.3 Strengthen and “tropicalise” RBO funding

Funding plays a very important role in the mandates assigned to RBOs. Research has highlighted several RBO⁷³ budget sources (contributions from member states, loans, donations, legacies, external support, and self-financing activities.). Two problems arise at this level – the insufficiency, and even absence of funding for the RBOs under investigation, and their extreme extraversion. As is the case with several basins around the world,⁷⁴ state allocation of financial resources to the RBOs remains largely insufficient. Given the low level of economic development of most of them, member states of these RBOs are not regularly fulfilling their financial obligations and have accumulated several arrears in contributions. A study of African RBOs indicates that “resources from member states [...] are characterised by a fairly high variability from one year to another.”⁷⁵ This “instability” in state contributions leads to “liquidity problems,”⁷⁶ which prevent some RBO activities from being carried out. In the Nile, for example, between 1999 and 2012, contributions from member states represented only 2 per cent of the financial resources of the management body.⁷⁷ This situation compels the RBOs to stretch their hands to external funding sources, thereby jeopardising their independence, compromising their effectiveness, and undermining their efforts to protect water resources.⁷⁸ Corrective measures are needed to resolve this problem, such as the need to reduce RBO dependence on the state and fiscal extraversion. By mutual agreement with member states, this can be done by ensuring that a percentage of the taxes⁷⁹ from the “user pays”-or “withdrawer pays” rules go to the RBOs, and by allowing the RBOs to benefit directly and regularly from the “use and

73 See Articles 28, CICOS Agreement; 10, NBA Convention; 28, LTA Convention; 13, ABA-KIR Convention; 24 (15), NBC Framework Agreement; 8 (c), ZAMCOM Agreement; 20, OMVG Convention; 21, OMVS Convention.

74 UNECE, *Etude de Fond sur le Financement de la Coopération dans le Domaine des Eaux Transfrontières et de la Mise en Valeur des Bassins* (2020) 13 <<https://unecce.org>> accessed February 27, 2023.

75 Bernard and Brachet (n 48) 81.

76 *ibid.*

77 UNECE (n 74) 25–28.

78 It is well known that donors are not always the most concerned about environmental and social requirements.

79 UNECE (n 74) 28.

pollution charges.”⁸⁰ RBOs can also be allowed to benefit from a share of the proceeds from hydroelectric power stations or other hydrological activities⁸¹ in agreement with member states.

17.3.4 Establish and strengthen mechanisms for monitoring the implementation of relevant commitments

Through supervision, international organisations monitor state implementation of international obligations contained in their constituent instruments or in subsequent acts, which the states have undertaken to implement.⁸² This supervision is, therefore, a mechanism that motivates performance and achievement of targeted objectives and expected results by the states. It should be noted that setting up legal frameworks for transboundary river basin management is one thing, but ensuring compliance is another. It is, therefore, recommended that RBOs be granted the authority to monitor the implementation of the commitments made by riparian states.

Research has highlighted a set of control or monitoring mechanisms. On the one hand, there are those which are “rudimentary,”⁸³ “classical or marginal”⁸⁴ or limited in nature. This is the case with dispute resolution, international responsibilities of states and the exchange of information, which have been adopted by the majority of the RBOs studied.⁸⁵ On the other hand, there are new methods whose effectiveness is still being tested, such as “systematic and reactive inspections, advisory missions, non-compliance procedures and state periodic reports.”⁸⁶ These have been largely ignored by the majority of the RBOs studied. For example, the system of reports⁸⁷ (usually annual), which is of great importance⁸⁸ and which constitutes the main monitoring mechanism,

80 Only VBA (Articles 19, 20 et 31 of the Charter); Article 13(2) of the ABAKIR Convention) and Articles 18 and 26 of the LCBC Charter establish this principle of distribution. CICOS, for its part, benefits from the “community integration tax” instituted in 2000 by CEMAC, of which it is one of the specialised institutions. See Bernard and Brachet (n 48) 89.

81 Bernard and Brachet (n 48) 83.

82 Salmon (n 37) 263 and 264.

83 Sandrine Maljean-Dubois, ‘La Mise en œuvre du Droit International de L’Environnement’ (2002) (4) Notes de l’Idri 33.

84 Laurence Boisson de Chazournes, ‘La Mise en œuvre du Droit International dans le Domaine de la Protection de L’Environnement: Enjeux et Défis’ (1995) (1) RGDIP 40.

85 This is the case of the dispute settlement procedure provided for, among others, by Article 33 (1) of the NBC Framework Agreement; Article 23 of CICOS; Article 18 of the status of OMVG; Articles 29–31 of the NBA Charter as well as the exchange of information enshrined in Article 7(d) of the ABAKIR Convention; Article 19 of the NBA Charter; Article 7 of the OMVS Charter; Article 7 (1) of the NBC Framework Agreement; Article 15 of the ZAM COM Agreement.

86 Maljean-Dubois (n 83) 32.

87 Marcel Merle, ‘Le Contrôle Exercé par les Organisations Internationales sur les Activités des Etats Membres’ (1959) (5) AFDI 426.

88 Pierre-Marie Dupuy and Yann Kerbrat, *Droit International Public* (14th edn, Dalloz 2018) 184.

has only been adopted by the LTA, the VBA and the LCBC,⁸⁹ even if in practice the said reports are usually not produced. As for inspections, only the VBA and the LCBC⁹⁰ have institutionalised them even though they are not yet effective on the ground.

It is therefore recommended that all RBOs should adopt these latter mechanisms, which would strengthen both the preventive and reactive monitoring of the implementation of commitments made by member states. This is the case with mandatory reports, the effectiveness of which will be guaranteed by monitoring, followed by administrative, pecuniary, and disciplinary sanctions.⁹¹ These sanctions would be applied, for example, in cases of the failure to observe a rule, the failure to produce a report, and the inaccuracy of the content or the late filing of the report. The RBOs agencies that receive the reports should have the prerogatives to respond to each report with a "summary" report or "report on the report,"⁹² which provides a picture of the implementation or not of the commitments of the state submitting the report.

In addition, it would be beneficial for African RBOs to set up an independent monitoring observatory responsible for ad hoc or permanent consultation missions and inspections within the states when required. For greater efficiency, transparency and objectivity, the said observatory could be headed by an expert from a third country (not a member of the RBO or not even bordering the river basin). To ensure a minimum of independence, the observatory should be provided with a budget.

17.5 Conclusion

Recent developments have indicated that there is a need to strengthen, through further cooperation, the current models of river basin governance for their sustainable, orderly, and peaceful management. It is therefore important, if not urgent, that RBOs review their strategies. This chapter has recommended a management system that integrates current issues and challenges to guarantee the sustainability of water resources. The chapter further highlighted the effects of climate change, the demographic explosion, the multiplication of pollution, non-participatory management, the weakness of monitoring mechanisms, and the inadequacy and extroversion of RBO funding.

89 Article 22 of the LTA Convention; Article 146 (2) of the VBA Charter; Articles 82, 83 of the LCBC Charter. CICOS provides for an almost similar mechanism consisting in the transmission to the Commission of the various authorisations and declarations on the use of shared waters (Article 10 (4)).

90 Article 146 (3) of the VBA Charter; Article 84 (4) of the LCBC Charter.

91 These may consist in the suspension of the assistance provided by the organization (administrative), fines (pecuniary) and the deprivation of the exercise of the rights attached to a state's membership (disciplinary). Merle (n 87) 431.

92 Maljean-Dubois (n 83) 33-34.

The chapter recommends that state and sub-regional stakeholders can overcome these challenges by abandoning the current legal frameworks which are based on “state-centric” governance and prioritising the protection of the waters of river basins without ignoring those within the states. This approach would ensure the optimal protection and use of African inland waters. The approach is underpinned by sustainable development in the context of water stress, which is prevalent in many parts of the continent. It is worth stating that water “can become one of the challenges of the 21st century,”⁹³ a real “geopolitical challenge”⁹⁴ in a world where between two and seven billion people will suffer from a shortage of water by 2050.⁹⁵ The RBOs, therefore, need to redefine their roles in ensuring the peaceful and sustainable management of the continent’s water resources.

93 Suzanne Dionet-Grivet, *Géopolitique de l'Eau* (Ellipses 2011) 3.

94 Thomas Gomart, *Les Guerres Invisibles: Nos Prochains Défis Géopolitiques* (Tallandier 2021) 62.

95 Harald Welzer, *Les Guerres du Climat. Pourquoi on Tue au XXIe Siècle*, translated from German by Bernard Lortholary (Gallimard 2012) 165.

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