IN THE PURSUIT OF BIODIVERSITY, ECOSYSTEM & HABITAT INTEGRITY: KENYA'S IMPLEMENTATION MECHANISMS

BY

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ABSTRACT OF STUDY

The thesis addresses the state of implementation of Multilateral Environmental Agreements (MEAs) in the realm of biological diversity, ecosystem and habitat conservation which have been ratified by Kenya. The importance of the study is evident from the increasing environmental challenges facing the country despite the proliferation of MEAs, a phenomenon that is referred to in international law circles as 'treaty congestion.'The study is undertaken to determine the efficacy of Kenya's efforts in implementing the commitment it has assumed upon ratifying MEAs in the field of biological diversity, ecosystem and habitat conservation. While the study points out to the fact that Kenya is party to over fifty seven MEAs, for purposes of its critique, it focuses on the treaties relating to biodiversity conservation and the related areas of ecosystems and habitats.

The study responds to four basic research questions, namely: (i) What has been Kenya's ratification practice since independence and to what extent has this impacted on the implementation of her MEA obligations in the field of the present study? (ii) How effective in have been Kenya's existing policy, legal and institutional frameworks in implementing her MEA obligations in the field of biodiversity, ecology and habitat conservation? (iii) Has Kenya prioritized environmental management and sustainable development in her national socio-economic agenda? (iv) Has Kenya fulfilled her MEA obligations in accordance with the principle of *pactasuntservanda*?

The study responds to the above questions within the context of the country's changed Constitution, especially the implications of Article 2(5) and 2(6) addressing the relationship between international and national law. The conclusion drawn in the study is that despite the adoption of several policies and law to implement the MEA provisions within Kenya, the same has been undertaken in a piecemeal and uncoordinated manner and results in gaps in the implementation process in Kenya.

MASIKA ELIAS – G62/64254/2010 **NOVEMBER 2012**

DECLARATION

I, MASIKA ELIAS do hereby declare that this project report is my original work and that it has not been submitted either in part or in whole and is not being currently submitted for a degree in any other University.

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I wish to dedicate this thesis to my dear wife, Gloria for her perseverance and support during the many hours I spent in class studying for this course and for the many evenings I retired to bed late while undertaking this study.

And to my lovely children, Bianca and Quinn who had to learn too early to keep their distance whenever ‘dad was at it again’.

Thanks for your love, support and understanding.

LIST OF CONVENTIONS/TREATIES

1. 1994 Bamako Convention on the Ban of the Import into Africa and the Control of Transboundary Movement and the Management of Hazardous Waste Within Africa
2. 2000 Cartagena Protocol on Biosafety to the Convention on Biological Diversity.
3. 1945 Charter of the United Nations
4. 1992 Convention on Biological Diversity (CBD).
5. 1994 Convention to Combat Desertification in those Countries Experiencing Serious Drought and/or Desertification, particularly in Africa (UNCCD).
6. 1979 Convention on the Conservation of Migratory Species of Wild Animals (CMS or Bonn Convention).
7. 1989 Convention on the Control of Transboundary Movements of Hazardous Waste and their Disposal (Basel Convention).
8. 1973 Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES).
9. 1971 Convention on Wetlands of International Importance Especially as Waterfowl Habitat (Ramsar Convention).
10. 1919 Covenant of the League of Nations.
11. 1999 East African Community Treaty.
12. 1949 International Committee of the Red Sea (ICRC), Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (First Geneva Convention).
13. 1949 International Committee of the Red Cross (ICRC), Geneva Convention for the Amelioration of the Condition of Wounded Sick and Shipwrecked Members of the Armed Forces at Sea.
14. 1949 International Committee of the Red Cross (ICRC), Geneva Convention Relative to the Protection of Civilian Persons in Time of War (Fourth Geneva Convention).
15. 1949 International Committee of the Red Cross (ICRC), Geneva Convention Relative to the Treatment of Prisoners of War (Third Geneva Convention).
16. 1949 International Convention for the Regulation of Whaling.
17. 1997 Kyoto Protocol to the United Nations Framework Convention on Climate Change.

18. 1994 Lusaka Agreement Concerning Co-operative Enforcement Operations Directed at Illegal Trade in Wild Fauna and Flora
19. 1987 Montreal Protocol on Substances that Deplete the Ozone Layer.
20. 1998 Rotterdam Convention on the Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade
21. 2001 Stockholm Convention on Persistent Organic Pollutants.
22. 1967 Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, Including the Moon and Other Celestial Bodies.
23. 1982 United Nations Convention on the Law of the Sea.
24. 1992 United Nations Framework Convention on Climate Change (UNFCCC).
25. 1961Vienna Convention on Diplomatic Relations.
26. 1969 Vienna Convention on the Law of Treaties.
27. 1987 Vienna Convention for the Protection of the Ozone Layer.

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1. Agriculture Act (Cap. 318), Laws of Kenya, came into force 01 July 1955.
2. Antiquities and Monuments Act (Cap. 215), Laws of Kenya (Revised Edition, 1984).
3. Bretton Woods Agreements Act (Cap. 464), Laws of Kenya (Revised Edition, 1991).
4. The Constitution of Kenya (Repealed).
5. The Constitution of Kenya, 2010.
6. Diplomatic Privileges and Immunities Act (Cap. 179), Laws of Kenya (Revised Edition, 1984).
7. Energy Act (Act No. 12 of 2006).
8. Environmental Management and Co-ordination Act (No. 8 of 1999),Geneva Conventions Act (Cap. 198), Laws of Kenya (Revised Edition, 1970).
9. Fisheries Act (Cap. 378), Laws of Kenya (Revised Edition, 1991).
10. Forests Act (Cap. 385), Laws of Kenya (repealed by section 64 of the Forests Act (Cap 7 of 2005).
11. Forests Act (Cap. 7 of 2005), Laws of Kenya.
12. Geneva Conventions Act (Cap. 198), Laws of Kenya (Revised Edition, 1970).
13. Investments Disputes Act (Cap. 522), Laws of Kenya (Revised Edition, 1967).
14. Land Act (Act No. 6 of 2012), came into force on 2 May 2012.
15. Local Government Act (Cap. 265), Laws of Kenya (Revised Edition, 2010 (1998).
16. Mining Act (Chapter 306), Laws of Kenya (Revised Edition, 1987).
17. Petroleum Act (Chapter 116), Laws of Kenya (repealed by Energy Act, No. 12 of 2006).
18. Petroleum (Exploration & Production) Act (Chapter 308), Laws of Kenya (Revised Edition, 1986).
19. Plant Protection Act (Cap. 324), Laws of Kenya (Revised edition, 1979).
20. Public Health Act (Cap. 242), Laws of Kenya (Revised Edition, 1986).
21. Seeds and Plant Varieties Act (Cap. 326), Laws of Kenya (Revised edition, 1991).
22. Timber Act (Cap. 386), Laws of Kenya (Revised Edition 2009 (1972).
23. The Treaty for the Establishment of the East African Community Act (Act No. 2 of 2000).
24. Water Act (No. 8 of 2002) (Revised Edition 2009 (2008).
25. Wildlife (Conservation and Management) Act (Cap. 376), Laws of Kenya (Revised edition, 2009 (1985).

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1. *Beatrice Wanjiku& Another v Attorney General and Another* - Petition No. 190 of 2012 [2012] eKLR, pp.6-8.
2. *East African Community v Republic* [1970] E.A. 457.
3. *Exchange of Greek and Turkish Populations Case*, (1925) PCIJ, Series B, No. 10.
4. *Finnish Ships Arbitration*, 3 R.I.A.A., p. 1484.
5. *Mixed Oxide Fuel Plant Case* (Ireland v United Kingdom)(Provisional Measures) (2003) ILM 1187.
6. *Okunda and Another v Republic* [1970] E.A. 453.
7. *Pattni& Another v Republic* [1970] EA 512.
8. *Philippine Admiral* [1976] 2 W.L.R. 214.
9. *Rono v Rono*[2008] eKLR
10. *Southern Bluefin Tuna Cases (New Zealand v Japan; Australia v Japan),* 38 ILM 1624-1656 (1999).
11. *Spanish Zone of Morocco Claims* (Spain v U.K.), 2 R.I.A.A. 615, 641 (1923).
12. *The Corfu Channel Case* (U.K. v Albania) (1949) ICJ Rep 22.
13. *The Kenya Section of the International Commission of Jurists v Attorney General and Another* [2011] eKLR.
14. *The Pacific Fur Seals Arbitration* (1893) 1 *International Arbitrations* 755.
15. *Trail Smelter Arbitration* (1939) 33 *AJIL* 182; & (1941) 35 *AJIL* 684.
16. *Trendtex Trading Corporation v Central Bank of Nigeria* [1977] 2 W.L.R. 356.
17. *U.S. v Mid West Oil Co*. 236 U.S. 459 (1959).
18. *WangariMaathai v Kenya Times Media Trust* (High Court Civil Case No 5403 of 1989) KLR (E&L) 1.

LIST OF ABBREVIATIONS

1. AJIL – American Journal of International Law.
2. ASAL – Arid and Semi Arid Lands
3. CBD - Convention on Biological Diversity.
4. COP – Conference of Parties.
5. CITES - Convention on International Trade in Endangered Species of Wild Fauna and Flora CMS – Convention on Migratory Species of Wild Animals.
6. ECR – European Courts Report
7. EJIL – European Journal of International Law.
8. EEC – European Economic Community.
9. EMCA – Environmental Management and Co-ordination Act.
10. G.A. – General Assembly.
11. GAOR – General Assembly Official Records.
12. GDP – Gross Domestic Product.
13. ILM – International Legal Materials
14. KFS- Kenya Forest Service.
15. KNCHR – Kenya National Commission on Human Rights
16. KWS – Kenya Wildlife Service.
17. MEA – Multilateral Environmental Agreement.
18. NBSAP – National Biodiversity Strategy and Action Plan.
19. NEMA – National Environment Management Authority.
20. R.I.A.A.- Reports of International Arbitral Awards.
21. TIAS - Treaties and Other International Acts Series.
22. UKTS – United Kingdom Treaty Series.
23. U.N. – United Nations.
24. UNCCD – United Nations Convention to Combat Desertification in those Countries Experiencing Serious Drought and/or Desertification Particularly in Africa
25. UNEP – United Nations Environmental Programme.
26. UNESCO –United Nations Educational, Scientific and Cultural Organization.
27. UNFCCC – United Nations Framework Convention on Climate Change.
28. UNTS – United Nations Treaty Series.
29. UST – United States Treaties

TABLE OF CONTENTS

CHAPTER TWO: MONISM AND DUALISM: THE PLACE OF INTERNATIONAL LAW AND TREATY RATIFICATION PRACTICE IN KENYA SINCE INDEPENDENCE

CHAPTER THREE: KENYA'S IMPLEMENTATION OF BIOLOGICAL DIVERSITY, ECOSYSTEM & HABITAT CONSERVATION MEAs

IN THE PURSUIT OF BIODIVERSITY, ECOSYSTEM AND HABITAT INTEGRITY: KENYA'S IMPLEMENTATION STRATEGIES

INTRODUCTION

1.1 Background

> It is a trite observation that environmental problems, though they closely affect municipal laws, are essentially international; and that the main structure of control can therefore be no other than that of international law.[1]

In an attempt to address sustainable development and to respond to the problem of environmental degradation and other developments in international environmental law issues, the United Nations convened a global environmental conference known as the United Nations Conference on the Human Environment at Stockholm in 1972 which resulted inthe adoption of the Stockholm Declaration on the Human Environment.[2] This represented the first major global gathering to address issues regarding the rapidly deteriorating state of the human environment.

The Opening Statement by the Secretary General of the Conference highlighted the seriousness of the discourse when he stated:

> Our purpose here is to reconcile man's legitimate, immediate ambitions with the rights of others, with respect for all life supporting systems, and with the rights of generations yet unborn. Our purpose is the enrichment of mankind in every sense, of that phrase. We wish to advance-not recklessly, ignorantly, selfishly and perilously, as we have done in the past – but with greater understanding, wisdom and vision. We are anxious and rightly so, to eliminate poverty, hunger, disease, racial prejudice and the glaring economic inequalities between human beings.[3]

The United Nations Environment Programme (UNEP) is one of the important institutional frameworks that came out of the 1972 Stockholm Conference and which was established to

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[1] Robert Jennings, *Principles of International Environmental Law*, 2nd ed., (Cambridge: Cambridge University Press, 2003).

[2] Declaration of the United Nations on the Human Environment, (Stockholm, 1972), U.N. Doc. A.CONF/48/14/REV.1; *reprinted* in 11 ILM 1417 (1972) [hereinafter referred to as *'The Stockholm Declaration*'].

[3]Maurice Strong, Secretary General of the 1972 Stockholm Conference, full text of speech available at http://www.mauricestrong.net/200806264/speeches2/speeches2/stockholm.html (accessed 15 April, 2011).

perform the role of promoting the development and implementation of environmental law at global, regional and national levels and under which States and non-governmental organizations alike, were tasked to formulate programmes to implement the said policies and principles.[4] Acting on the basis of Principle 24 of the Stockholm Declaration,[5] the international community began to work in earnest towards negotiating and concluding environmental treaties that established international frameworks for tackling environmental problems.[6]

A treaty is defined under the Vienna Convention as 'an agreement concluded between states in written form and governed by international law, whether embodied in a single document or in two or more related instruments and whatever its particular designation.'[7]The operative basis for treaties is founded on the customary international law rule, *pactasuntservanda*, which means that treaties are binding upon their parties and their obligations should be performed *bona fides*.[8]Treaty obligations lie only to parties who have signed and ratified such treaties.

1.2 Multilateral Environmental Agreements

A Multilateral Environmental Agreement (MEA) has been defined as "an intergovernmental document intended as legally binding with a primary stated purpose of preventing or managing human impacts on natural resources.[9]For the purposes of this study, though, it is proposed to adopt the definition UNEP's definition of a MEA as "a legally binding instrument between two or more nation states that deals with some aspect of the environment."[10] Thus, being legally

[4] G.A. Res. 2997 (XXVII), 15 December 1972.
[5]Ibid., Art. II, Principle 24: "International matters concerning the protection and improvement of the environment should be handled in a co-operative spirit by all countries…Co-operation though multilateral or bilateral arrangements or other appropriate means is essential to effectively control, prevent, reduce and eliminate adverse environmental effects.
[6]Andronico O. Adede, 'The Treaty System from Stockholm (1972) to Rio de Janeiro (1992)', (1995) 13 *Pace Environmental Law Review* 33.
[7]1969 Convention on the Law of Treaties, (Vienna, 22 May 1969), UN Doc. A/Conf.39/27; 1155 UNTS 331; 63 AJIL 875 (1969); *reprinted* in 8 ILM 679 (1969), (entered into force 27 January 1980).
[8]Ibid., Art. 26
[9] Robert B. Michell, International Environmental Agreements Website, 2003, available at http://www.uoregon.edu/~iea/ (Accessed 19 November 2012); also described in Ronald B. Mitchell, "International Environmental Agreements: A Survey of Their Features, Formation, and Effects," Annual Review of Environment and Resources 28 (November, 2003).
[10] UNEP, 'Manual for Compliance With and Enforcement of Multilateral Environmental Agreements', available at: http://www.acpmeas.info/publications/Manual_on_Compliance_with_and_Enforcement_of_MEAs.pdf (accessed 16 November 2012).

binding upon being ratified or acceded to by States, MEAs have the same force as rules of law and are, to this extent, extremely important for implementing environmental conservation policies and other principles for achieving sustainable development.

As a principle of international law, MEAs (as with other international agreements) usually bind only those States who have agreed to be bound by the MEA, although they may also affect non-Parties, for example by prohibiting or restricting trade by Parties with non- Parties.[11]

The fundamental basis for the existence of MEAs is set out under Principle 12 of the Rio Declaration which states as follows:

> States should co-operate to promote a supportive and open international economic system that would lead to economic growth and sustainable development in all countries, to better address the problems of environmental degradation. Trade policy measures for environmental purposes should not constitute a means of arbitrary or unjustifiable discrimination or a disguised restriction on international trade. Unilateral actions to deal with environmental challenges outside the jurisdiction of the importing country should be avoided. Environmental measures addressing transboundary or global environmental problems should, as far as possible, be based on an international consensus.

The primary purpose of MEAs, from the above Principle, is, therefore, to fashion a common approach to environmental challenges through consensus in order to ensure compliance with MEA obligations by states at the international, regional and national levels. The focus of the MEAs has been to safeguard global environmental integrity through promoting sustainable development. For instance, the focus of the MEAs concluded during the 1970s was on the so-called 'first generation' environmental problems which involved air, water and soil pollution arising from human activities.[12] In the 1980s, the so-called "second generation" environmental problems, such as global warming, the depletion of the ozone layer, climate change, desertification, protection of habitat and environment in times of armed conflict, and trans-boundary movement of hazardous wastes gained prominence.[13]

To the extent, therefore, that MEAs are intended to be legally binding in order to serve the purpose of preventing or managing human impacts on natural resources, they play a fundamental

[11]Ibid., p.51.
[12] Lynton K. Caldwell, *International Environmental Policy: Emergence & Dimensions*, 2nd ed., (Duke University Press, Durham, N.C. 1990), pp 83-85.
[13]Ibid., at p. 85.

role as "national and international efforts to promote sustainable and environmentally sound development in all countries" within the intendment of the Rio Conference.

1.3 The Proliferation of MEAs

At the Rio Conference, the Convention on Biological Diversity (CBD)[14] and the United Nations Framework Convention on Climate Change (UNFCCC)[15] were opened for signature. These MEAs sought, generally, pursued the realisation of 'sustainable development' which has been defined in *Our Common Future* as 'the development that meets the needs of the present generation without compromising the ability of future generations to meet theirs as well.'[16]

The post Rio Conference period witnessed the emergence of a plethora of MEAs, each dealing with different aspects of the environment.The existence of these MEAs is justified on the growing understanding that environmental issues are often not only local in nature but also regional and global; and that, therefore, solutions and tools to deal with them should also be regional and global.[17]

The proliferation of MEAs has not, nonetheless, necessarily resulted into uniform, co-ordinated international policies to safeguard environmental integrity. As NorichikaKanie says, most of the MEAs are regional in scope or nested within a hierarchical structure of agreements, and while a large number of them are defunct, majority operate at a global level.[18]Thus, Kanie argues that the proliferation of MEAs, with little authority to co-ordinate activities, leads to what he terms

[14]1992 Convention on Biological Diversity, (Rio de Janeiro, 05 June 1992), G.A. Res. 117, U.N. GAOR, 49th Sess., Supp. No. 49, at 143; U.N. Doc. A/RES/49/117 (1994); *reprinted* in 31 ILM 818 (1992), (entered into force 29 December 1993) [hereinafter referred to as 'CBD'].

[15] 1992 Framework Convention on Climate Change, (Rio de Janeiro 09 May 1992), G.A. Res. 189; U.N. GAOR, 48th Sess., Supp. No. 49, at 167, U.N. Doc. A/RES/48/189 (1989); *reprinted* in 31 ILM 851 (1992), (entered into force 21 March 1994) [hereinafter referred to as UNFCC].

[16]Supra, note 14, Chapter 2.

[17]UNEP, 'Environment and Development.' Available at : http://www.unep.org/geo/geo4/report/01_Environment_for_Development.pdf (accessed 16 November 2012).

[18]NorichikaKanie, 'Governance with Multilateral Environmental Agreements: A Healthy or Ill-equipped Fragmentaion?' Available online at http://www.centerforunreform.org/system/files/GEG+Kanie.pdf (Accessed 19 November 2012).

'treaty congestion' as well as institutional and policy incoherence, confusion, and duplication of work since redundancy leads to inefficiency.[19]

While reflecting on the apparent contradiction between the treaty obligations on the part of States and actual practice within StatesAlexander Gillespie in the following words:

> The gap between the burgeoning hundreds of international environmental laws and the actual condition of the environment is perhaps one of the largest contradictions of our time.[20]

Geoffrey Palmer has also commented that there is a strong argument that despite the proliferation of MEAs, the environmental situation in the world became worse and is deteriorating further.[21] Yet, despite all the concerns raised regarding the efficacy of the many existing MEAs in addressing global environmental challenges, the current environmental governance centredaround MEAs is credited with achieving a relatively high level of performance in a wide range of dimensions where it has focused on issue-specific regimes.[22] The Convention on Trade in Endangered Species,[23] for instance, has induced behavioral change by focusing on trade.[24] Similarly, scientific understanding of climate change and its solutions have also improved dramatically as a consequence of the performance of the UNFCC.[25] Furthermore, due to the influence of MEAs, norms have changed to take into account environmental consideration, such as the frequent use and application of the term 'sustainable development' in Constitutions and domestic legislations of many countries such as Kenya.[26]

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[19]Ibid., p. 74.
[20] Alexander Gillespie, International Environmental Law and Policy, (Oxford University Press, Oxford).
[21]Geoffrey Palmer, New Ways to Make Environmental Law, 86 *AJIL* 259, 263 (1992).
[22] Supra, note 20, p. 73.
[23] 1973 Convention on International Trade in Endangered Species of Wild Fauna and Flora (Washington, Mar 3, 1973); 27 UST 1087; 993 UNTS 243; UKTS 101 (1976); *reprinted* in 12 ILM 1085 (1973), (entered into force 1 July 1975) [hereinafter referred to as *'CITES'*].
[24] Supra, note 20, p.73.
[25] Ibid.
[26] For instance, under Article 10(1)(d) of the Constitution of Kenya, 2010, sustainable development has been elevated to the status of a national value; Article 69 (2), every person has a duty to cooperate with State organs and other persons to protect and conserve the environment and ensure ecologically sustainable development and use of natural resources; the Environmental Management and Co-ordination Act (EMCA) also recognizes sustainable development and adopts the definition thereof as contained in Agenda 21 under section 2 as "development that meets the needs of the present generations without compromising the ability of the future generations to meet their needs by maintaining the carrying capacity of the supporting ecosystems;

1.4 The Implementation of MEAs

Upon a state ratifying a MEA, it is obliged to establish mechanisms to ensure the fulfillment of her obligations thereunder. The UNEP Guidelines on Compliance with and Enforcement of Multilateral Environmental Agreements define the term 'implementation' as:

> Implementation" refers to, *inter alia,* all relevant laws, regulations, policies, and other measures and initiatives, that contracting parties adopt and/or take to meet their obligations under a multilateral environmental agreement and its amendments if any.[27]

The obligation of a State to implement her MEA obligations, therefore, makes it imperative that a State takes appropriate measures to assess and address its preparedness to comply with the obligations under the MEAs it intends to ratify before actually ratifying them.[28]

To achieve the implementation of MEAs, therefore, States adopt various mechanisms in their domestic jurisdictions. These mechanisms include:

1.4.1 Enacting Laws and Regulations for Implementing MEAs

States can enact domestic laws incorporating what has been agreed in MEAs which they have ratified at a multilateral level. The importance of the enactment of laws is that the international obligations States have bound themselves to uphold through signing MEAs become legally binding on the States within their domestic jurisdictions. The enactment of laws that seek to give effect to MEA obligations, therefore, is a strong indicator of a State's commitment to implementing those obligations. For instance, Kenya has enacted the Plant Protection Act[29] and the Seeds and Plant Varieties Act[30] to domesticate her obligations under the 1951 International

[27] Supra, note 10, p.662.
[28] Supra, note 10, p.666.
[29] Plant Protection Act (Cap. 324), Laws of Kenya (Revised edition, 1979).
[30] Seeds and Plant Varieties Act (Cap. 326), Laws of Kenya (Revised edition, 1991).

Plant Protection Convention (as amended)[31] and the 1961 International Convention for the Protection of New Varieties of Plants[32] respectively.

1.4.2 Incorporating Provisions of MEAs in Domestic Policy

This entails the incorporation of provisions of MEAs in national policy so as to make international obligations part of domestic policy. This ensures that a State's MEA obligations are incorporated in her national plans and priorities to facilitate their implementation. This mechanism avoids some of the pitfalls associated with the implementation of laws, such as lengthy legal procedures to enforce these agreements.

1.4.3 Institutional Frameworks

This involves the creation of institutions with the mandate to implement a State's MEA obligations. The efficacy of such institutions depends on enhancing their capacity to ensure compliance. Such capacity may entail granting them more enforcement/prosecutorial powers, increasing funding to enable them meet their budgetary demands as well as enhance their human resource capabilities.

1.5 MEAs Constituting the Principal Focus of this Study

According to the UNEP Register of International Treaties and other Agreements, Kenya has ratified 57 MEAs to date.[33] These are set out in full in the Annex appearing at the end of this study. These MEAs cover various thematic areas which include biological diversity and wildlife, climate change and atmospheric protection, marine environment, drought and desertification, and waste management and pollution control.

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[31] 1951 International Plant Protection Convention, (Rome, 6 December 1951), 23 UST 2767, 150 UNTS 67 (Revised Nov. 28, 1979). It entered into force for Kenya on 7 May 1974.

[32] 1961 International Convention for the Protection of New Varieties of Plants, as revised in 1972, 1978 and 1991, (Paris, 02 December 1961), [2000] ATS 6; 33 UST 2703; 815 UNTS 89 (entered into force 24 April 1998).

[33] UNEP, Register of International Treaties and Other Agreements in the Field of the Environment, available at http://hqweb.unep.org/law/PDF/register_Int_treaties_contents.pdf (accessed 5 October 2012).

Kenya's ratification of these numerous MEAs has not necessarily mitigated against massive environmental degradation that has been widely reported. For instance, the Project Concept on the Rehabilitation of the Mau Forest Ecosystem notes that the continued destruction of the Mau forests is leading to a water crisis, global concerns resulting from loss of biodiversity, and increased carbon dioxide emissions as a result of forest cover loss.[34] Poor soil and water resources conservation practices of the deforested land is causing soil erosion and decreasing crop yields in an area of high agricultural potential thus adversely affecting the Kenyan economy that is still, by and large, substantially dependent on agriculture.[35]Considered as one of the most important of the five water towers in Kenya, and being part of the Lake Victoria catchment as well as that of the Mara River, it has a hugetransboundary significance in terms of providing water to the whole of the Nile basin and the neighboring Tanzania.[36]

As concluded by the Interim Committee for the Rehabilitation of the Mau Complex, the importance of the Mau is related to the ecosystem services it provides, such as river flow regulation, flood mitigation, water storage, water purification, recharge of groundwater, reduced soil erosion and siltation, protection of biodiversity, carbon sequestration, carbon reservoir and regulation of microclimate which provides favourable conditions for optimum crop production.[37]

The cross-cutting issues arising from the destruction of the Mau Complex as well as other ecosystems such as the Mount Kenya forest have the potential of causing climate change in arid and semi-arid lands due to deforestation as well as loss of biodiversity. The effects of these can be felt not only in the areas surrounding Mau, but also in far off places in the country.

Massive logging and charcoal burning in gazetted forests with little or no supervision by the concerned government agencies have become a daily occurrence thus effectively reducing the available forest cover and, destroying the rich biological diversity that hitherto reposed in these forests.[38]The United Nations Development Programme's*Kenya National Disaster Program* lists

[34] Interim Co-ordinating Secretariat, 'Rehabilitation of the Mau Forest Ecosystem'. Available at http://www.kws.org/export/sites/kws/info/maurestoration/maupublications/Mau_Forest_Complex_Concept_paper.pdf (accessed 19 November 2012).
[35] Ibid.
[36]Ibid, p.5.
[37] Ibid.
[38]Wafula Nabutola, The Mau Forest in the Rift Valley: Kenya's Largest Water Tower: a Perfect Model for the Challenges and Opportunities of a Sustainable Development Project? Article available at http://www.fig.net/pub/fig2010/papers/ts02e%5Cts02e_nabutola_4755.pdf, (Accessed 24 June 2012).

the increasing destruction of forests due to charcoal burning, clearing forests for agriculture, logging without replacing trees, frequent forest fires, poor management of catchments areas, which includes destruction of forests, bushes, and plants that retain water in the soil without using appropriate soil conservation measures, cultivation on stream banks and steep slopes causing erosion of the topsoil, which silts up dams and pans usually, used as dry weather water reservoirs and lack of policy for managing water and drought, as among the factors contributing to the severity of drought in Kenya.[39]

Kenyan wildlife is in strong decline due to the expansion of subsistence and commercial agriculture, in wetter areas, the expansion of settlements, increased fencing, drought and poaching, all these being a direct result of inadequate natural resources control infrastructure, inadequate human capital skills for system planning and management, few appropriate and empowered institutions and inappropriate land use planning and management, and endemic institutional corruption.[40]

The adverse environmental issues referred to in this account are a subject of the biological diversity, ecosystem and habitat conservation. Since the most overt case of environmental degradation in Kenya has been witnessed in the realm of biological diversity, ecosystem and habitat conservation, this study shall focus on Kenya's policy, legal and institutional frameworks vis-à-vis these areas. As regards the MEAs that will be cited in the study, therefore, the principal focus shall be on those MEAs ratified by Kenya in the field of biological diversity, ecosystem and habitat conservation.

1.6 Problem Statement

Whereas Kenya has ratified a number of MEAs in the realm of biological diversity, ecosystem and habitat conservation, her effective implementation of the obligations arising from these MEAs has encountered a number of challenges. As a result, cases of the integrity of Kenya's

[39] UNDP, 'Kenya National Disaster Program', available at http://mirror.undp.org/kenya/KenyaDisasterProfile.pdf, (accessed 24 June 2012).

[40] Brian Harding &TahiaDevisscher, Review of Economic Impacts of Climate Change in Kenya, Rwanda and Burundi, available at http://static.weadapt.org/knowledge-base/files/758/4e25a62e6948c2D-DFIDKenya_Ecosystems_Final.pdf, (accessed 24 June 2012).

biological diversity and ecosystem has been compromised in numerous instances such as the following:

a) There have been reported 'Boardroom wars' between Kenya Forest Service and Kenya Wildlife Service over the management of forests which has undermined conservation efforts in key water towers.[41]
b) Many other institutions created to manage the environment have ended up with overlapping mandates, thus resulting into incessant battles on jurisdiction, battles which have, at times, ended up in court and whose effect has been to militate against the effective implementation of their respective mandates.[42]
c) Massive logging and charcoal burning in gazetted forests with little or no supervision by the concerned government agencies have massively reduced the available forest cover and, destroyed the rich biological diversity that hitherto reposed in these forests.[43]
d) The United Nations Development Programme's*Kenya National Disaster Program* has listed the increasing destruction of forests and poor management of catchments areas as among the factors contributing to the severity of drought in Kenya.[44]
e) Kenyan wildlife is in strong decline as a direct result of inadequate natural resources control infrastructure, inadequate human capital skills for system planning and management, few appropriate and empowered institutions and inappropriate land use planning and management, and endemic institutional corruption.[45]

Having ratified MEAs in the thematic area of biological diversity, ecosystem and habitat conservation, Kenya is obliged to enact relevant laws, regulations and policies, and to take other measures and initiatives to effectively implement her obligations under these MEAs. Nonetheless, from some of the instances enumerated above, it appears that Kenya has not

[41]*The Standard:* 'KFS, KWS Fight Over Control of Forests', available at http://www.standardmedia.co.ke/?articleID=2000060144&story_title=KFS,-KWS-fight-over-control-of-forests, (accessed 24 June 2012).
[42] NEMA and Kisumu CDF in War Over River Bank, available at http://www.the-star.co.ke/local/western--nyanza/37931-nema-and-kisumu-cdf-in-war-over-river-bank, (accessed 24 June 2012).
[43]Supra, note 39.
[44] UNDP, 'Kenya National Disaster Program', available at http://mirror.undp.org/kenya/KenyaDisasterProfile.pdf, (accessed 24 June 2012).
[45] Brian Harding &TahiaDevisscher, Review of Economic Impacts of Climate Change in Kenya, Rwanda and Burundi, available at http://static.weadapt.org/knowledge-base/files/758/4e25a62e6948c2D-DFIDKenya_Ecosystems_Final.pdf, (accessed 24 June 2012).

effectively implemented her MEA obligations in the field of biological diversity, ecology and habitat conservation.

1.7 Research Hypotheses

This study is guided by the followingthreehypotheses:

a) Kenya's treaty ratification practice has had a significant influence on the implementation of her MEA obligations
b) Kenya has not prioritized environmental management and sustainable development;
c) Kenya lacks effective policy, legal and institutional frameworks to effectively implement her MEA obligations in the field of this study; and
d) Kenya has not fulfilled her MEA obligations in accordance with the principle of *pactasuntservanda*.

1.8 Research Questions

In the light of the Statement of the Problem and the hypotheses posited, the study addresses the following basic questions:

(i) What has been Kenya's ratification practice since independence and to what extent has this impacted on the implementation of her MEA obligations in the field of the present study?
(ii) How effective in have been Kenya's existing policy, legal and institutional frameworks in implementing her MEA obligations in the field of biodiversity, ecology and habitat conservation?
(iii) Has Kenya prioritized environmental management and sustainable development in her national socio-economic agenda?
(iv) Has Kenya fulfilled her MEA obligations in accordance with the principle of *pactasuntservanda*?

1.9 Significance of the Study

The degradation of Kenya's environment has mainly been felt in the field of biological diversity, ecosystem and habitat conservation. As a result, safeguarding the integrity of Kenya's biological diversity, ecosystem and habitat conservation requires a re-assessment of Kenya's laws, regulations, policies, and other measures and initiatives dealing with biological diversity, ecology and habitat conservation. The nature, extent and effect of these implementation measures will determine whether or not Kenya can be said to have fulfilled her MEA obligations pursuant to the principle of *pactasuntservanda*.

1.10 Theoretical Framework

This study is guided by the economic analysis of the law theory of jurisprudence by which it is sought to rationalize the need for domesticating MEAs with the end result of achieving effective implementation. As a theory, the underlying rationale for implementing MEA obligations is based on the fact that the benefits Kenya stands to reap from implementing these obligations far outweigh the disadvantages arising from non-implementation; that the cost for implementing the MEAs justifies the outcome from such an implementation in terms of the gains and benefits that arise from enforcing proper sustainable development objectives that underpin all MEAs which Kenya has ratified.

The economic analysis of law is a jurisprudential school of thought that is rooted partly in utilitarianism (a school of thought steeped in ethics and which was described by John Stuart Mill and by Jeremy Bentham as *'the greatest happiness principle'*[46] and *'the pleasure*

[46] Jeremy Bentham, An Introduction to the Principle of Morals and Legislation, (Oxford, Clarendon, 1907). According to Bentham, the *principle of utility* recognizes mankind's subjection to two sovereign masters: *pain* and *pleasure*, and, assumes it for the foundation of that system, the object of which is to rear the fabric of felicity by the hands of reason and of law. He therefore posits that by the principle of utility is meant that principle which approves or disapproves of every action whatsoever, according to the tendency it appears to have to augment or diminish the happiness of the party whose interest is in question: or, what is the same thing in other words, to promote or to oppose that happiness, available at http://www.econlib.org/library/Bentham/bnthPML1.html (accessed 14 April 2012).

principle' respectively,[47] economic theories about inter-personal relationships and the works of Ronald Coarse[48] and Richard Posner.[49]

Utilitarianism posits that it is in the human nature to seek pleasure and avoid pain as much as possible. Bentham's jurisprudence that legal sanctions discourage ill behaviour and that they should be employed when they will serve as an effective deterrence is a manifestation of the interplay between law and economics.Inter-generational equity,[50] precautionary principle[51] and polluter pays principle[52] and other principles that underpin MEAs are deeply rooted in utilitarian philosophy and, thus, manifest an interrelationship between law and economic that underpins the economic analysis of law school of thought.

This utilitarian philosophy has seen its application in many cases decided in the realm of environmental law. In the *Southern Bluefin Tuna Cases*[53], for instance, Australia and New Zealand contended that, by taking unilateral experimental measures in the high seas, Japan had failed to take the required measures for the conservation and management of the south bluefin tuna and had thereby breached the provisions of Articles 64, 116-119 and 300 of the United Nations Law of the Sea Convention and, further, that Japan had also failed, in doing so, to uphold the precautionary principle which had become a norm of customary international law.[54] The International Tribunal for the Law of the Sea (ITLOS) upheld the arguments of Australia and New Zealand by granting provisional measures of relief in order to prevent serious harm and avert further deterioration of the south bluefin tuna stock.[55] Although ITLOS did not expressly state so, the order for provisional measures was a clear application of the precautionary principle whose utilitarian underpinning lay in its intended consequence of conserving the bluefin tuna

[47] John Stuart Mill, Utilitarianism, 4th Ed., (London, Longman's, Green, Reader, and Dyer, 1871). Under Chapter 2, Mill states that 'the creed which accepts as the foundation of morals, Utility, or the Greatest Happiness Principle, holds that actions are right in proportion as they tend to promote happiness, wrong as they tend to produce the reverse of happiness. By happiness is intended pleasure, and the absence of pain; by unhappiness, pain, and the privation of pleasure." Available at http://www.utilitarianism.com/mill2.htm (accessed 14 April 2012).
[48] Ronald Coase, 'The Problem of Social Cost', (1960) 3 *Journal of Law and Economics* 1-14.
[49] Richard A Posner, *Economic Analysis of Law*, 7th ed., (Wolters Kluwer Law & Business, 2007).
[50] Supra note 15, Principle 3..
[51] Supra, note 15, Principle 15.
[52] Supra, note 15, Principle 16.
[53] *Southern Bluefin Tuna Cases (New Zealand v Japan; Australia v Japan),* 38 ILM 1624-1656 (1999), available at www.un.org./Depts/los/ITLOS/tuna_cases.htm (accessed 20 September 2012).
[54] Simon Marr, 'Southern Bluefin Tuna Cases: The Precautionary Approach and the Conservation and Management of Fish Resource', 11 (No. 4) *EJIL* (2000) 815-831.
[55] Supra, note 67, *Southern Bluefin Tuna Cases (Provisional Measures),*para. 40.

from possible over-exploitation by Japan. The same proposition is to be inferred in the *Mixed Oxide Fuel (MOX)Plant Case*[56] in which, nonetheless, ITLOS declined to grant Ireland's request for Provisional Measures to stop the United Kingdom from releasing radioactive matter into the Irish Sea on the basis that the harm sought to be prevented could not be merely general but had to be identifiable and clear.[57]

Similarly, the *sic uteretuoutalienum non laedas*principle[58] enunciated in *Trail Smelter Case*[59]crystallized important international environmental law principles on transboundary air pollution and has been relied upon in many legal instruments including MEAs on the subject.[60] The findings in the *Trail Smelter Case* were as a result of striking a balance between law and economics.

Coase's thesis has had a particularly important influence on the economic analysis of law as he posited that costs are a consequence of competition for scarce resources, such that the rationale for the economic analysis of law is to establish a sort of 'trade-off' between the costs for undertaking an activity as against the benefits likely to arise from it.[61] To achieve sustainable development whose very definition as "development that meets the needs of the present without compromising the ability of the future generations to meet their own needs,"[62] there has to be an acknowledgement of the finite nature of environmental resources and the putting into place of policies to ensure their sustenance to achieve social welfare.

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[56]*Mixed Oxide Fuel Plant Case* (Ireland v United Kingdom)(Provisional Measures) (2003) ILM 1187.
[57]Yoona Cho, 'Precautionary Principle in the International Tribunal for the Law of the Sea', *Sustainable Development Law and Policy* (2009) 64.
[58]*The Corfu Channel Case (U.K. v Albania)* (1949) ICJ Rep 22 – The general principle that a state is obliged not to use its territory contrary to the rights of other states was enshrined by the ICJ. The s*ic uteretuo* principle was expressed as follows "No state has a right to use or permit its territory to be used in such a manner as to cause injury on, or to the territory of another or the properties of persons therein."
[59]*Trail Smelter Arbitration* (1939) 33 *AJIL* 182; & (1941) 35 *AJIL* 684. It rose out of a dispute between the United States and Canada over pollution through the emission of sulphur dioxide fumes arising from a smelter situated on Canadian territory of British Columbia and which caused damage in the State of Washington, culminated into the holding that under the principles of international law, no State has the right to use or permit the use of its territory in such a manner as to cause injury by fumes in or to the territory of another or the properties or persons therein, when the case is of serious consequence and the injury is established by clear and convincing evidence.
[60]Supra, note 66..'
[61] Richard Nobles, 'Economic Analysis of Law', in Pennar, Schiff and Nobles (eds), *Jurisprudence & Legal Theory* (2002), p. 192.
[62] Supra, note 21.

A well-crafted law or policy instrument should, therefore, be one that helps in the prevention of the misuse of scarce societal resources through a fair and flexible and expeditious process as this will, ultimately reduce costs that conservation entails which, in turn, leads to a realization of utility that sees many more benefitting from conservation. In *The Pacific Fur Seals Arbitration*which concerned a dispute between the United Kingdom and the United States of America as to the circumstances in which the United States could interfere with British fishing activities on the high seas,[63]for instance, the adoption of regulations for the better protection and preservation of fur seals outside jurisdictional limits and the establishment of closed seasons and limited methods and means for hunting of fur seals at any time within a zone of sixty miles around the *Pribilof*Islands was aimed at achieving a sustainable exploitation of the fur seals to prevent over-exploitation. The benefits arising from such a protectionist measure outweighed the cost for enforcing the same as it would guarantee a sustainable supply of fur seals while discouraging their wanton destruction for ensuring inter and intra-generational equity.

Thus, benefits a State is likely to derive from undertaking environmental conservation through upholding principles of sustainable development exceed the cost for putting in place the legal, policy and institutional frameworks in the pursuit of sustainable development, then such policies will be deemed cost-effective, the pursuit whereof is rational. In other words, pursuing such policies will be socially desirable due to their inherent 'utility'; the adoption of a framework of welfare economics is critical to assess their social desirability.[64]

The relevance of international environmental law consists in its ability to maximize the advantages arising from environmental conservation as opposed to the harm or pain that pollution causes. This explains why the economic analysis of law rather than other jurisprudential schools of thought like positivism and natural school of thought are more in tune with environmental law matters hence the relevance of the economic analysis of law in this discourse.

[63]*Pacific Fur Seal Arbitration*, Regulations, articles 1, 2 in John Bassett Moore, (1893) 1 *International Arbitrations* 755.

[64] Louis Kaplow& Steven Shavell, Economic Analysis of Law, Harvard Law School and National Bureau of Economic Research (1999), available at http://www.law-economics.cn/ook/69.pdf (accessed 24 January 2012).

This study therefore adopts the economic analysis of law school of thought in its approach to the topic under study.

1.11 Literature Review

The following Texts and Material have been utilized in this study:

Patricia Birnie, Alan Boyle & Catherine Redgwell emphasize the importance of good faith in the conduct of states as regards their obligations of due diligence and co-operation in environmental matters.[65] They discuss the consequences of breach of treaty provisions (or non-compliance) and by which a state in breach needs to furnish reparations pursuant to the law of state responsibility.[66] The non-compliance mechanisms that the authors discuss such as Trusteeship such as happened under the covenant of the League of Nations,[67]reporting and monitoring (such as under Article 13 of the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes, fact-finding and research (for instance as provided for under Article 8 of the Kyoto Protocol), inspection such as are mostly to be found in the International Atomic Energy Agency's powers with regard to non-proliferation of nuclear arms[68]will guide the recommendations that this study will make regarding how Kenya can put in place effective policies and principles which ensure compliance with MEA obligations.

FDP Situma discusses implementation of international environmental law by analysing various landmark cases that have greatly influenced the path of many MEAs and International Environmental Law such as the *Trail Smelter Arbitration*[69]and the *Pacific Fur Seal Arbitration*[70]and concludes that Africa lacks the capacity for a systematic and a coordinated

[65] Patricia Birnie, Alan Boyle & Catherine Redgwell, *International Law & Environment*, 3rd ed., (Oxford: Oxford University Press, 2009).

[66]Ibid., at pp. 237-238.
[67]Covenant of the League of Nations, Article 22. See also Ridgewell, *International Trusts and Environmental Protection* (Manchester, 1999) 146-166.
[68]UN Security Council Resolution 687 (8 April 1991), available at http://www.fas.org/news/un/iraq/sres/sres0687.htm (accessed 07 May 2012).
[69] Supra, note 73.
[70] Supra, note 77.

approach to implementing environmental protection measures through judicious planning and project implementation.[71] This study seeks to prove this hypothesis.

UNEP refocuses the international attention on the issue of compliance and enforcement of MEA obligations through the adoption of non-binding Guidelines intended to provide a set of approaches and considerations for countries as they negotiate, implement, and enforce MEAs at the national, regional and global levels.[72] It outlines actions and measures for strengthening national enforcement andinternational cooperation in combating violations of laws implementing MEAs and emphasizes the need for the enactment of laws and the setting up of institutions necessary to support the effective enforcement and pursuit of actions to deter and respond to environmental law violations and crimes.[73] The Guidelines provide useful material that will inform the recommendations this study shall make regarding instituting proper legal, policy and institutional frameworks.

FDP Situma also discusses various Environmental Dispute Avoidance and Settlement mechanisms with particular emphasis on Treaty provisions as well as the implementation of Environmental treaties[74] and makes the following critical observation:

> The adoption of a treaty is only the beginning of an often long process of state interaction. The adoption of a treaty does not automatically solve the problem addressed. Unless the treaty is self-executing, it has to be implemented by the states in order to discharge the international obligations thereby assumed for the protection of the environment…However, *pactasuntservanda* is not a practically reliable principle for implementation of certain treaty obligations. In the absence of an international enforcement agency, parties to a treaty will only take implementation measures when it is in their own interests to do so. States are represented by elected officials who answer to their local constituents rather than the international community.[75]

As far as implementation of MEAs are concerned, he also addresses strategies which should be adopted within these instruments to ensure that states uphold their obligations within their territories and, consequently, in case of breach of such obligations, the international legal order

[71]FDP Situma, Africa's Potential Contribution to the Implementation of International Environmental Law (2000) (10(2) *Transnational Law and Contemporary Problems* 385-421.
[72] UNEP, 'Manual on Compliance with and Enforcement of Multilateral Environmental Agreements', available at: http://www.unep.org/dec/docs/UNEP_Manual.pdf (accessed 07 May 2012).
[73]See page 32 of the Guidelines
[74]Francis D.P. Situma, Efficacy of International Environmental Law: A Personal Reflection, 2 *ILSA Journal of International & Comparative Law* 61 (1995-1996)
[75]Supra, note 88, pp. 70-71

has ascribed state responsibility for any actions within the states' territorial jurisdiction or limits that cause harm to other states or the interests of other states which is the necessary corollary of a state's sovereignty and territorial integrity which was ably demonstrated in the *Spanish Zone of Morocco Claims* thus: "All rights of an international character involve international responsibility. This responsibility entails a duty to make reparation if an obligation is not satisfied…"[76]

As this study is centered on implementation and a discourse on Kenya's fidelity to the *pactasuntservanda* rule, the Article provides invaluable raw material for this study. Expanding on the discourse by Prof. Situma, this study focuses on the area of implementation of MEAs within the domestic setting of Kenya. It is specific on the manner in which the non-implementation of MEAs has contributed to lack of proper legal institutional and policy frameworks to deal with the challenges posed by environmental damage and other conservation issues and which issues have a huge impact on the issue of sustainable development. By addressing the problems and challenges that are peculiarly within Kenya, the study provides a useful tool for effecting radical legal, policy and institutional measures to achieve sustainable development.

NorichikaKanie addresses the issue of the proliferation of MEAs. He discusses the MEA system by tracing its historical development and analyses the strengths and weaknesses of the MEA system. His study concludes that the proliferation of MEAs increases administrative and institutional costs for member states, because it leads to an increased number of meetings, international negotiations and reporting.[77] The analysis of the MEA system by Kanie provides important raw material for this study. This is because the subject of implementation of MEAs which this study addresses is dealt with quite substantively by Kanie.

[76]Spanish Zone of Morocco Claims (Spain v U.K.), 2 R.I.A.A. 615, 641 (1923).
[77]NorichikaKanie, 'Governance with Multilateral Environmental Agreements: A Healthy or Ill-equipped Fragmentaion?' Available online at http://www.centerforunreform.org/system/files/GEG+Kanie.pdf (Accessed 19 November 2012).

Wafula Nabutola discusses the ecological and environmental ramifications of the destruction of the Mau Forest ecosystem through massive deforestation.[78] He deals with the ecological and biodiversity importance of this fragile ecosystem and makes important recommendations regarding the need for more community participation in the conservation of the Mau ecosystem. He also makes the case for enhanced capacity building to check on those who violate the integrity of the Mau ecosystem through engaging in acts that defeat the purpose of sustainable development. The writer's focus on the Mau ecosystem provides important material for this study. This is because of the focus on aspects related to biological diversity, ecosystem and habitat conservation.

OsogoAmbani addresses the dualist doctrine and makes the case for progressive jurisprudence on the application of international human rights norms in Kenya.[79] As his case study is centred on Kenya, Osogo's study particularly as regards the implication of Articles 2(5) and 2(6) of the Constitution of Kenya and the place of treaties in Kenya is important to this study, particularly in Chapter 2 where the study has focused on the monist/dualist discourse.

David MuganduIsabiyre addresses the subject of treaty making and ratification in Kenya, especially under the independence Constitution.[80] Like Osogo's works, he focuses on the issue of ratification, albeit under the independence and repealed constitution. He critiques the fact that under the independence Constitution, treaty-making and ratification in Kenya was the exclusive domain, although this position was tested 1964 when a motion was moved in Parliamentwhich sought the participation of Parliament in the formulation of policies to guide negotiations leading to the conclusion of treaties. The discourse on treaty ratification is a key issue in this study since the study advances the position that the process is an essential ingredient in the effective implementation of MEA obligations in Kenya. As this study is being conducted after the repeal of the Constitution which constituted the primary subject of Isabirye's study, this study fills in the gaps that have been left in Isabirye's work especially in view of Articles 2(5) and 2(6) of the

[78]Wafula Nabutola, The Mau Forest in the Rift Valley: Kenya's Largest Water Tower: a Perfect Model for the Challenges and Opportunities of a Sustainable Development Project? Article available at http://www.fig.net/pub/fig2010/papers/ts02e%5Cts02e_nabutola_4755.pdf, (accessed 24 June 2012).

[79]AmbaniOsogo, 'Navigating Past the "Dualist Doctrine": The Case for Progressive Jurisprudence in the Application of International Human Rights Norms in Kenya' in *International Law and Domestic Human Rights Litigation in Africa*, Pretoria University Law Press (2010) pp. 25-36.

[80]David MuganduIsabirye, 'The Status of Treaties in Kenya', *20 The Indian Journal of International Law*, January-March 1980, pp. 67-8.

Constitution of Kenya, 2010 and the ongoing discourse surrounding the Ratification of Treaties Bill, 2011.

1.12 Research Methodology

The study was based on secondary sources of data contained in text books, journals, reports and selected internet sources. Since the study primarily dealt with selected MEAs in the realm of biological diversity and drought and desertification, reference was made to specific provisions ofMEAs and assessing whether or not those MEA obligations have been domesticated locally or what policy or institutional framework exists in the country to give effect to those obligations.

The analysis of the data obtained from these sources was directed at proving the hypotheses of this study and for answering the stated research questions and to, ultimately, leading to the conclusion and recommendations on how best to achieve an effective implementation of MEAs in Kenya.

1.13 Chapter Breakdown

The Introduction to the study provides a background to the topic under study. It traces the evolution of MEAs and pertinent issues that this research seeks to address. Of greater significance, this Chapter introduces the problem statement, the hypothesis that the research seeks to prove, the questions that the study will answer, and the significance thereof.

Chapter Two traces the history of treaty-ratification process and the manner in which this has influenced Kenya's policy, legal and institutional frameworks *vis-à-vis* environmental conservation in Kenya.

Chapter Three analyses the existing policy, legal and institutional frameworks that Kenya has put in place in an attempt to implement her MEA obligations with respect to MEAs ratified in the field of biological diversity, ecology and habitat conservation.

Having established Kenya's policy, legal and institutional frameworks for implementing her MEA obligations, Chapter 4 then assesses the extent to which these frameworks have fallen short

in implementing Kenya's MEA obligations falling under the biodiversity, ecosystem and habitat conservation.

Finally, Chapter Five contains the concluding remarks as well as recommendations on how Kenya can improve her existing policy, legal and institutional frameworks for implementing her MEA obligations generally.

CHAPTER TWO

TREATY RATIFICATION PRACTICE IN KENYA: THE IMPACT ON THE IMPLEMENTATION OF MEAs

2.1 Introduction

Principle 11 of the Rio Declaration on the Environment requires States to enact effective national environmental legislation to fulfill their pursuit of sound environmental principles for sustainable development.[81] As these principles are, on the international plane, contained in the various MEAs Kenya has ratified, she is obliged to formulate polices and enact enabling legislation with a view to domesticating the relevant MEA obligations. Due to the binding nature of MEAs, it is necessary that they be accorded the force of law within the municipal sphereto give them legal force. To achieve this, it is necessary that the international law principles contained in the MEAs that a State has ratified are transformed into the municipal system of laws.

As noted in Chapter One of this study, the implementation of MEAs seeks to ensure that they have been clothed with legal force within the municipal sphere. To do this, it is necessary to briefly analyze the relationship between international and municipal law in Kenya. This is critical because the applicability of international law rules in a state's municipal law system is explained by the theories of dualism and monism.[82]

2.2 Monism

Monismis a theory that regards international and municipal (domestic) legal systems as being *jus cogens*interlinked into a unitary system (monism) and, hence, international obligations which satisfy the 'justiciability' tests may be invoked in domestic courts and may thereby take precedence over conflicting national law.[83] Being thus interconnected, under monism,

[81] United Nations Conference on Environment and Development, G.A. Res. 228, U.N. GAOR, 44th Sess., 85thMtg, at 228; U.N. Doc. A/RES/44/228 (1989).
[82]Ian Brownlie, *Principles of Public International Law*, 5th ed., (Oxford University Press, Oxford, 1998), p. 515.
[83] R.M. Wallace, *International Law*, (3rd ed., Sweet & Maxwell, London, 1997), at P. 36.

international law is deemed to be a superior source of domestic law so much so that any domestic law that is at variance with international law is thereby overruled.

Flowing from this monist thesis is the practice under international law that a state cannot rely upon its municipal law to avoid international law obligations,[84] particularly where such practice is a matter that has assumed the form of, defined as peremptory rules of international law from which no derogation is permitted.[85]By their very nature, rules of *jus cogens* concern all states and 'all states can be held to have a legal interest in their protection; they are obligations *ergaomnes.*'[86]

Thus, upon a state's acceptance of an international obligation through such means as ratifying treaties embodying such obligations, it will need to enact relevant national legislation or adopt certain specified measures in order to give effect to the said obligations. States are under an obligation to act in conformity with the rules of international law and will bear responsibility for breaches of it, whether committed by the legislative, executive or judicial organs and irrespective of domestic law.[87]

2.3 The Doctrine of Incorporation in Monist Systems

Essentially, the monist theory posits that international law can be directly applied by a judge in the municipal courts, and the judge can declare as invalid a national law, that contradicts an international law rule. Thus, there is no need for international law to be expressly translated into municipal law but the act of ratifying an international treaty automatically incorporates the international law principles enshrined in such a treaty into the domestic legal system.

State practice adopts different approaches in doing this in the sense that, in some, direct incorporation of international obligations into domestic law occurs on ratification, whereas in

[84]1969 Vienna Convention on the Law of Treaties, (Adopted 23 May 1969), UN Doc. A/Conf.39/27; 1155 UNTS 331; 63 *AJIL* 875 (1969); *reprinted* in 8 ILM 679 (1969), (Came into force 27 January 1980); Art. 27.
[85]*Supra*, note 2; T. Meron, 'On a Hierarchy of International Human Rights', 80 *AJIL* (1986) p.1, at p. 14.
[86] Malcolm N Shaw, *International Law*, 6th Edition, (Cambridge University Press, Cambridge, 2008), p. 124-5.
[87]*Exchange of Greek and Turkish Populations Case*, (1925) PCIJ, Series B, No. 10 &*Finnish Ships Arbitration*, 3 R.I.A.A., p. 1484.

others, direct incorporation occurs only in respect of self-executing treaties (those that become judicially recognizable upon ratification and not through the implementation of legislation).

Thus, the methodology of how states deal with treaty obligation in a monist system is referred to as incorporation, which meansthe act of ratifying international law automatically and immediately incorporates the international law into municipal law. This doctrine posits that international law automatically becomes part of the municipal law without the need of subjecting it to the constitutional ratification process so long as such provisions of international law are consistent with the provisions of municipal law.[88]

The theory of incorporation was given recognition in the judgment of Lord Denning in the case of *Trendtex Trading Corporation v the Central Bank of Nigeria*[89] when he quoted part of the Privy Council's decision in *The Philippine Admiral*[90]in holding thus:

> "The two schools of thought
>
> A fundamental question arises for decision. What is the place of international law in our English law? One school of thought holds to the doctrine of incorporation. It says that the rules of international law are incorporated into English law automatically and considered to be part of English law unless they are in conflict with an Act of Parliament. The other school of thought holds to the doctrine of transformation. It says that the rules of international law are not to be considered as part of English law except in so far as they have been already adopted and made part of our law by the decisions of the judges, or by Act of Parliament, or long established custom. The difference is vital when you are faced with a change in the rules of international law. Under the doctrine of incorporation, when the rules of international law change, our English law changes with them. But, under the doctrine of transformation, the English law does not change. It is bound by precedent. It is bound down to those rules of international law which have been accepted and adopted in the past. It cannot develop as international law develops…Seeing that the rules of international law have changed – and do change – and that the courts have given effect to the changes without any Act of Parliament, it follows to my mind inexorably that the

[88]Supra, note 3, p. 140
[89]*Trendtex Trading Corporation v Central Bank of Nigeria* [1977] 2 W.L.R. 356
[90]*Philippine Admiral* [1976] 2 W.L.R. 214.

rules of international law, as existing from time to time, do form part of our English law. It follows, too, that a decision of this court – as to what was the ruling of international law 50 or 60 years ago – is not binding on this court today. International law knows no rule of *stare decisis*. If this court today is satisfied that the rule of international law on a subject has changed from what it was 50 or 60 years ago, it can give effect to that change – and apply the change in our English law – without waiting for the House of Lords to do it."

2.4 Dualism

Dualists, unlike monists, depict international law and domestic law as two independent and separate legal systems, existing independently of each other, but with some shared interrelationships. The source of international legal authority is, to dualists, predicated on the principle of sovereign equality of states by which states freely make legal commitments between themselves or, in some cases, delegate their powers to international organizations.[91] Thus dualism stresses role of the state in international law since its relevance in the international legal discourse is anchored on the principle of sovereignty. This is so because legal authority necessarily flows with the capacity to enforce it which can only be achieved with the co-operation of a state.

They thus emphasize the supremacy of the state and the existing difference between national and international law which, consequently, require the transformation of the latter into the former.

2.5 The Doctrine of Transformation in Dualist Systems

The doctrine of transformation is hinged upon the perception of two distinct systems of law operating separately and posits that before any rule or principle of international law can have application within the municipal jurisdiction, it must be expressly 'transformed' into the

[91]Charter of the United Nations, 59 Stat. 1031; T.S. No. 993; 3 Bevans 1153; Article 2.

municipal system via the appropriate constitutional mechanism, such as by an Act of Parliament.[92]

The doctrine of transformation arose from the procedure where international agreements become operative in the municipal system through the process of ratification by the sovereign and from which has developed the idea that any rule of international law must first be transformed or specifically adopted in order to be valid within the internal legal order.[93]Many jurisdictions require the intervention of their nations' legislature for a treaty to be transformed into domestic law. Such an intervention by the legislature usually takes the following two forms, that is, the requirement for the prior approval of a treaty by the legislature before it enters into force within the municipal system of laws, and the requirement that the legislature enacts implementing legislation.[94]

By the application of the doctrine of transformation, therefore, MEAs are accorded legal force within the municipal sphere. This is one of the mechanisms for implementing MEAs. This fact is well captured in the following passage by Brandl and Bungert:

> Constitutional implementation enables environmental protection to achieve the highest rank among legal norms, a level at which a given value trumps every statute, administrative rule or court decisions. For instance, environmental protection might be considered a fundamental right retained by the individual and thus might enjoy the protected status accorded to other fundamental rights. In addition, addressing environmental concerns at the constitutional level means that environmental protection is more firmly rooted in the legal order because constitutional provisions ordinarily may be altered only pursuant to elaborate procedures by a special majority, if at all.
>
> In addition, as the supreme law of the land, constitutional provisions promote a model character for the citizenry to follow, and they influence and guide public discourse and behavior. On a practical level, the public tends to be more familiar with constitutional provisions than specific statutory laws. Citizens tend to identify with, and in turn are identified by, the form of their national constitution. Thus, establishing some form of

[92]*Supra*, note 6, p.139.
[93]*Ibid.*
[94]*Supra*, note 10, at page 6

environmental protection in a national constitution results in the identification of environmental protection with expressions of national pride and character. The establishment process itself further informs the nation's consciousness.

Thus, constitutional enactment of environmental goals offers an opportunity to promote environmental concerns at the highest and most visible level of a legal order, where the impact on laws and the public could prove to be quite dramatic.[95]

2.6 Treaty Ratification Practice Generally

According to McDougal[96], the conclusion of treaties is not a single act but a complex process that entails a series of functions by the participating states such as the formulation of national policies to guide the conduct of negotiations, the actual conduct of the negotiations, ratification[97] and implementation for internal or domestic application.

The role of the Executive Arm of Government in treaty-making and ratification is rooted in practice and in the words of Lord Mcnair:

> In every state enjoying treaty-making capacity some provisions must exist either as [art of a written constitution or as rules of customary law and practice which indicate the organ or organs possessing power to conclude treaties and defining the mode of exercising that power.[98]

Similarly, in the case of *U.S. v Mid West Oil Co.*[99], the court made the following observations regarding treaty practice:

> It may be argued that while these facts and rulings prove a usage, they do not establish its validity. But government is a practical affair intended for practical men. Both officers, law

[95] Ernst Brandl&HartwinBungert, Constitutional Entrenchment of Environmental Protection: A Comparative Analysis of Experiences Abroad, 16 *Harvard Law Review* 1 (1992).
[96]Myres S. McDougal and Associates, 'Studies in World Public Order', *Yale University Press, 1960*, p. 431.
[97] Convention on the Law of Treaties, (Vienna, 23 May 1969), 1155 UNTS 331; *reprinted* in 8 ILM 679 (1969), (Entered into force 27 January 1980) where ratification is defined under Article 2 as 'ratification, "ratification", "acceptance", "approval" and "accession" mean in each case the international act so named whereby a State establishes on the international plane its consent to be bound by a treaty".

[98] Lord McNair, *The Law of Treaties* (Oxford University Press, Oxford, 1960), p. 60.
[99]236 U.S. 459 (1959).

makers, and citizens naturally adjust themselves to any long continued action of the executive department, on the presumption that unauthorised acts would not have been allowed to be so often repeated as to crystallize into a regular practice. That presumption is not reasoning in a circle but a basis of wise and quieting rule that in determining the meaning of a statute or existence of a power, weight shall be given to usage itself.

Thus, for a practice to amount to a rule of law, two ingredients are necessary: corpus or the existence of a usage embodying the rule of conduct, and *opiniojuris* or the conviction on the part of the community that the rule embodied in the usage is binding.[100] Perhaps the problematic nature of the conviction, by way of *opiniojuris*, that treaty-making and ratification is the exclusive domain of the executive was tested in 1964 when the late Ronald Ngala moved a motion by which he sought the participation of Parliament in the formulation of policies to guide negotiations leading to the conclusion of treaties.[101] He stated thus

> That, in view of the National importance of pacts and agreements between our country and foreign countries, this House urges the Government to ascertain that proposals for agreements are first fully debated in this House with a view to getting the mandate of the House before signing such agreements. It is very important that for important agreements, this House, which is the supreme authority in this country, must be fully informed of the intentions, of the need and of the necessity for coming to such agreements.[102]

2.7 Treaty Ratification Practice under the Repealed Constitution

On 27th August, 2010, a new Constitution was promulgated in Kenya.[103] The promulgation of the new Constitution also resulted into the repeal of the then Constitution (hereinafter referred to as 'the Repealed Constitution'.[104]Under the repealed Constitution, no specific reference was made to the treaty-ratification process as well as the place of international law, generally, in Kenya. In practice it was the President or the Executive Arm of Government that concluded treaties to the exclusion of the legislature.[105]Nonetheless, by vesting executive authority of the Government of

[100]David MuganduIsabirye, 'The Status of Treaties in Kenya', *20 The Indian Journal of International Law*, January-March 1980, pp. 67-8.
[101]Ibid., p.68.
[102] National Assembly Official Report, Vol. 3, part I, 1964, col. 2214.
[103]Constitution of Kenya, 2010.
[104]Constitution of Kenya (Revised Edition, 2009).
[105]Supra, note 20, p. 63.

Kenya in the President, treaty-making remained firmly rooted within the realm of Executive.[106] The Executive had the prerogative to negotiate and execute treaties on behalf of Kenya as well as the residual power to ratify such treaties.

Furthermore, the constitution was silent on how treaties would be transformed into national legislation. The role of Parliament, being purely legislative, was reduced to passing legislation that would give effect to treaties, such legislative power being exercisable through Bills passed by the National Assembly into Acts of Parliament.[107] The President, even then, retained the veto power insofar as the Acts were concerned, as he needed to assent to the Acts before they became operationalized as law.

Similarly, courts played an oversight role, but in accordance with the jurisdiction conferred either by the Constitution or by any other law.[108]Nonetheless, 'any other law' as used within the context of section 60, meant 'a law that is not inconsistent with the constitution.' Thus, the role of the judiciary was clearly circumscribed and it was for this reason that, for a long time, courts were reluctant to apply provisions of treaties that had not been domesticated as we shall see below regarding matters of the environment.

The effect of treaty making and the effect of treaties signed and ratified by Kenya was the subject of litigation in thecase of*Okunda and Another v Republic****[109]*** in which it was held that an "Act of Parliament" under section 10(3) of the Treaty for East African Co-operation Act did not include the Constitution and that the laws of the East African Community constituted 'other laws' within the meaning of section 3 of the Constitution and were, to this extent, inconsistent with the Constitution, hence void to the extent to their inconsistency. The judicial authority in the case of *Okunda v Republic* is, therefore, an early manifestation of dualism in Kenya.[110] In this

[106]*Supra* note 17; Section 23 provided thus: "The executive authority of the Government of Kenya shall vest in the President and, subject to this Constitution, may be exercised by him either directly or through officers subordinate to him."
[107]*Supra,* note 19, section 46.
[108] Ibid., Under Section 60, for instance, the High Court was established as a superior court of record and with, subject to section 60A, unlimited original jurisdiction in civil and criminal matters and such other jurisdiction and powers as may be conferred on it by the Constitution or any other law. See also Section 64 regarding the scope of the jurisdiction conferred on the Court of Appeal.
[109][1970] E.A. 453
[110]AmbaniOsogo, 'Navigating Past the "Dualist Doctrine": The Case for Progressive Jurisprudence in the Application of International Human Rights Norms in Kenya' in *International Law and Domestic Human Rights Litigation in Africa,* Pretoria University Law Press (2010) pp. 25-36.

case, the Court derived its reasoning from applying the reception clause under the Judicature Act which provided thus:

> The jurisdiction of the High Court, the Court of Appeal and of all subordinate courts shall be exercised in conformity with –
>
> (*a*) the Constitution;
>
> (*b*) subject thereto, all other written laws, including the Acts of Parliament of the United Kingdom cited in Part I of the Schedule to this Act, modified in accordance with Part II of that Schedule;
>
> (*c*) subject thereto and so far as those written laws do not extend or apply, the substance of the common law, the doctrines of equity and the statutes of general application in force in England on the 12th August,1897, and the procedure and practice observed in courts of justice in England at that date;
>
> but the common law, doctrines of equity and statutes of general application shall apply so far only as the circumstances of Kenya and its inhabitants permit and subject to such qualifications as those circumstances may render necessary.
>
> (2) The High Court, the Court of Appeal and all subordinate courts shall be guided by African customary law in civil cases in which one or more of the parties is subject to it or affected by it, so far as it is applicable and is not repugnant to justice and morality or inconsistent with any written law, and shall decide all such cases according to substantial justice without undue regard to technicalities of procedure and without undue delay. [111]

Consequently, the court held that international law, not being one of the listed sources [under the Judicature Act], was not an independent force of law and, therefore, unless domesticated through either a constitutional amendment or an Act of Parliament, international law had no legal effect in Kenya.[112]

The decision in the case of *East African Community v Republic*[113] which was decided the same year as *Okunda v Republic* also reiterated the prevailing position that the Constitution of Kenya was paramount and that the laws of the East African Community that conflicted with it were void. Most importantly, though, it was held that treaties do not become part of the law of Kenya until made so by the law of Kenya and, having thus become part of the law of Kenya, any such treaty that was in conflict with the Constitution of Kenya was void.

[111] Judicature Act (Cap. 8), Laws of Kenya, Revised Edition, 1988.
[112] Supra, note 30, p.28.
[113] *East African Community v Republic* [1970] E.A. 457.

Over the years, nonetheless, despite the rigid provisions of the Independence Constitution regarding the place of and the application of international treaties, courts began to affirm their readiness to apply rights and obligations created in treaties that had been ratified without reservations, although Parliament had not domesticated such treaties. For instance, in the case of *Rono v Rono,*[114]the Court of Appeal had to determine the question whether international law was relevant in Kenya while considering the question of the unequal allocation of property among male and female heirs, and stated that although the traditional view had been that international obligations are applied domestically only when they had been incorporated into domestic law, "the current thinking on the common law theory is that both international customary law and treaty law can be applied by state courts where there is no conflict with existing state law, even in the absence of implementing legislation. Consequently, the court based its decision on a number of human rights treaties which Kenya hadratified, but not implemented domestically.

It is noted, though, that the court's main justification for arriving at its decision in this case was that there was no conflict between the customary international and treaty law in question with any existing Kenyan law on the same question. It is doubtful that it would have arrived at such a decision had there been in existence a conflicting Kenyan law. The position above was accorded further judicial recognition in the case of *Pattni& Another v Republic*[115] where, again, the High Court established that international norms, much as they could be of persuasive value, are not binding in Kenya unless and until they have been incorporated into the Constitution if Kenya or other written laws.[116]

The court's decision in the *Rono v Rono* is particularly important as regards MEAs which, though ratified by Kenya, have not been domesticated by her. This is because, by asserting that both international customary law and treaty law can be applied by state courts where there is no conflict with existing state law even in the absence of implementing legislation, the obligations of Kenya under the MEAs which Kenya has ratified but has not domesticated can still be enforced in Kenya.

[114]*Rono v Rono& Another* [2008] eKLR.
[115]*Pattni& Another v Republic* [1970] EA 512.
[116] Supra, note 30, p. 28.

2.8 Treaty Ratification Under the Constitution of Kenya, 2010

In contradistinction with the Repealed Constitution, the Constitution of Kenya, 2010 (hereinafter referred to as 'the current Constitution") expressly provides for the place of international law and the effect of treaties which have been ratified by Kenya under its Articles 2(5) and (6). These provide that the general rules of international law shall form part of the law of Kenya, and that any treaty or convention ratified by Kenya shall form part of the law of Kenya under this Constitution respectively.

As regards Article 2(5) above, the position in the current Constitution is a direct opposite to the one contained in Section 3 of the repealed Constitution inasmuch as its true interpretation would, essentially, be that international law can be directly applied by a judge in the municipal courts and can declare as invalid a national law that contradicts an international law rule. The plain and obvious meaning of Article 2(5) is that international law, including customary international law, shall be a source of law in Kenya.[117]

The general proposition under Article 2(5) is not as clear-cut as it appears.Can the non-binding resolutions of the United Nations General Assembly, for instance, become law of Kenya insofar as they embody general rules of international law?[118] Article 2(5) of the new Constitution is ambiguous to the extent that it leaves room for further interpretation to ascertain which general rules of international law will pass the test thereunder and, perhaps most significantly, how to ascertain such rules. Obviously, this is an area with a real huge scope for developing jurisprudence in this country particularly in the face of the ever-increasing challenges posed by the environment and the multiplicity of international legal instruments on the environment.

Similarly, Article 2(6) has now set down the legal position regarding the place of treaties in Kenya. The operation of Article 2(6) of the Constitution was recently applied in the case of *The Kenya Section of the International Commission of Jurists v Attorney General and Another* where Justice Nicholas Ombija, a judge of the High Court of Kenya held as follows:

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[117] KNCHR, 'Making the Bill of Rights Operational: Policy, Legal and Administrative Priorities and Considerations'. Available at: http://www.knchr.org/Portals/0/Reports/MAKING_THE_BILL_OF_RIGHTS.pdf (accessed 17 November 2012).
[118] Ibid., pp. 10-11.

> It is axiomatic that the Kenyan State has no autonomous existence outside the framework of the community of nations, and that on this account, its regime of law and constitutional order inter-face with the other states under the auspices of international law. That one of the beacons of international law is multilateral treaties, to which Kenya and other states are parties. The Rome Statute [ICC] is one such treaty. It establishes the International Criminal Court [ICC], which prosecutes and judge, (sic) in the event of the commission of certain named categories of offences referred to in Article 5 thereof. These are crimes of genocide, crimes against humanity, war crimes, and crime of aggression…
>
> "Applying International Law principles to the facts of this case, the High Court in Kenya clearly has jurisdiction not only to issue warrant of arrest against any person, irrespective of his status, if he has committed a crime under the Rome Statute, under the principle of universal jurisdiction, but also to enforce the warrants should the Registrar of the International Criminal Court issue one….
>
> In respect of this particular case, two warrants of arrest were issued against President Omar Ahmad Hassan Al Bashir [Omar Al Bashir], the sitting President of the sovereign Republic of Sudan on 4th March 2009 with five counts of crime against humanity and two of war crimes on 12th July, 2010 with three counts of genocide for allegedly orchestrating atrocities in the Western Province of Darfur in Sudan*(sic).* It is in evidence, that subsequent to the issuance, the Registrar of the International Criminal Court [ICC] sent a supplementary request to ask the State parties to the Rome Statute to effect the arrest and surrender of President Omar Ahmad Hassan Al Bashir [Omar Al Bashir] should he come to the respective territory. It is common ground that Kenya is a State party to the Rome Statute……State parties are under a duty to execute or extradite the perpetrators of International Crimes to the ICC for prosecution*(sic)*… "[119]

In a recent decision on the subject, Justice Majanja addressed the legal effect of the provisions of Articles 2(5) and 2(6) of the Constitution in the case of *Beatrice Wanjiku & Another v Attorney General and Another* when he held thus:

> Before the promulgation of the Constitution, Kenya took a dualist approach to the application of international law. A treaty or international convention which Kenya had ratified would only apply nationally if Parliament domesticated the particular treaty or convention by passing the relevant legislation. The Constitution and in particular **Article 2(5)** and **2(6)** gave new colour to the relationship between international law and international instruments and national law. **Article 2(5)** provides, ***—The general rules of international law shall form part of the law of Kenya‖***and **Article 2(6)** provides that ***—Any treaty or convention ratified by Kenya shall form part of the law of Kenya under this Constitution…*** **Article 2(5)** and **(6)** regulates the relationship between international law and national law in two ways. First, by placing the issue of international law within the supremacy clause, the supremacy of the Constitution is emphasized in relation to international law. Second, the application of international law in Kenya is clarified to the

[119] The Kenya Section of the International Commission of Jurists v Attorney General and Another [2011] eKLR (available at http://kenyalaw.org/Downloads_FreeCases/84203.pdf (accessed 1 May 2012).

> extent that it not left in doubt that international law is applicable in Kenya… The nature and extent of application of treaties must be determined on the basis of the subject matter and whether there is domestic legislation dealing with the specific issue at hand bearing in mind that legislative authority, which is derived from the people of Kenya, is conferred by Parliament under **Article 94** and when dealing with matters of fundamental rights and freedoms, the duty to the court, when applying a provision of the Bill of Rights, to adopt the interpretation that most favours the enforcement of a right or fundamental freedom as provided in **Article 20(3)(b)**. The issue then, is not necessarily one of hierarchy but of application of treaties and conventions.[120]

By virtue of this provision Article 2(6), therefore, it would appear that Kenya is converted from a dualist into a monist State as treaties and conventions do not now have to be domesticated for them to have the force of law in Kenya.[121] However, the opinion has also been expressed that these provisions do not convert Kenya into a strictly monist State because Article 21(4) of the new Constitution requires the State to enact and implement legislation to fulfil its international obligations in respect of human rights and fundamental freedoms.[122] Furthermore, there is a departure from the strict monist perspective in the new Constitution at Article 21(4) which enjoins the state to enact and implement legislation to fulfill its international obligations in respect of human rights and fundamental freedoms.

The legal effect of a ratified treaty under Article 2(6) of the Constitution of Kenya as promulgated in 2010 is that it becomes part of the law of Kenya. Nonetheless, despite the provision aforesaid, the authority of Parliament as the sole law-making organ in the country is emphasized under Article 94(5) of the Constitution of Kenya 2010 by the provision that no person or body, other than Parliament, has the power to make a provision having the force of law in Kenya except under the authority conferred by the Constitution or by legislation. This provision would, therefore, seem to mean that to the extent that the treaties ratified by Kenya prior to the promulgation of the new Constitution lacked any express legislative or constitutional foundation, they have no binding effect in Kenya despite the provisions of Article 2(6).

It would appear that the treaties which, though ratified by Kenya prior to August 27, 2010, had not been domesticated through an Act of Parliament can only become operative as Kenyan law

[120] *Beatrice Wanjiku & Another v Attorney General and Another* - Petition No. 190 of 2012 [2012] eKLR, pp.6-8.
[121] Supra, note 37, p. 7.
[122] Ibid., p.8.

upon the enactment of some enabling legislation to 'ratify' or clothe them with the requisite Parliamentary authority that they presently lack.Beyond this debate, however, the significance of ratification of any treaty will vary widely, with diverse impacts on compliance by different State agencies with the ratified instrument.[123]For instance, enforcement of some treaty obligations may have budgetary implications, while some may need policy change or development, yet others may require national plans of action.[124]

2.9 The Ratification of Treaties Bill 2011

The Ratification of Treaties Bill 2011 (hereinafter referred to as 'the Proposed Bill") is, under its preamble, "A Bill for an Act of Parliament to provide for the ratification of treaties and connected purposes". The proposed Bill is intended to give effect to the provisions of Article 2(6) of the Constitution which applies to treaties which are concluded by Kenya after the commencement of the Act.[125] Under the Memorandum of Objects and Reasons Clause of the Proposed Bill, 2011, the principal object of the Bill is expressed in the following terms:

> The principal object of this Bill is to provide for a standardised procedure for ratification of international treaties *(sic)*by the Government of the Republic of Kenya. Although this procedure has been lacking in Kenya for several years now leading to lack of clarity as to the exact number and identity of the international instruments which have a binding effect on the citizens of this country, the need for a law to regulate this area has been aggravated by article 2(6) of the new Constitution which requires that any treaty or convention ratified by Kenya shall form part of the laws of Kenya under the Constitution.

Under clause 2, ratification is defined as "the international act by which the State signifies its consent to be bound by a treaty and includes accession". The proposed Bill adopts the definition of a treaty as set out under Article 1(a) of the *Vienna Convention on the Law of Treaties*[126], that

[123] Supra, note 37, p.10.
[124] Ibid.
[125]Ratification of Treaties Bill, 2011 (available at https://docs.google.com/a/tripleolaw.com/viewer?a=v&q=cache:uQO7ElyWnIJ:www.kenyalaw.org/klr/fileadmin/pdfdownloads/bills/2011/RATIFICATIONOFTREATIESBILL2011.doc+&hl=sw&gl=ke&pid=bl&srcid=ADGEESisGxp23O2FaT2aIaGiJpb21F97yXdUH3zDsspxGCwqNvM1M0DTa0yPMybut9WqVlLaYLevgBJDunKc5R0hwApDAbmoRPwNzTnXDKu81lOE3zkB4yM_7TGt3S1Te3PrOlrNDW&sig=AHIEtbRDYWpPYrB0CJUuY15tOs7VsA4Oug&pli=1 (accessed 01 May 2012), Clause 3.
[126] Supra, note 4.

is, "treaty" means an international agreement concluded between States in written form and governed by international law, whether embodied in a single document or in two or more related instruments and whatever its particular designation and includes a convention."

The proposed Bill is intended, under clause 3, to apply to treaties concluded by Kenya after the commencement of the Act.

2.10 Salient Features of the Proposed Bill

Part II of the proposed Bill requires the approval, by Cabinet, of a Memorandum prepared and submitted to it by the relevant State Department (in consultation with the Attorney General), outlining the objects of the treaty in respect of which approval for ratification is sought as well as other arising constitutional issues and national interests which may be adversely affected.[127]

Upon the Cabinet's approval of such a Memorandum as may have been submitted to it, the relevant Cabinet Secretary shall, again in consultation with the Attorney General, within a period of three months of the date of approval, publish a Bill containing a schedule setting out in full the provisions of the treaty proposed to be ratified for consideration by Parliament. This requires to be accompanied by a detailed explanation on how joining the treaty advances or threatens the interests of Kenya, any constitutional implications of ratifying the treaty, such as whether it will be necessary to amend the Constitution to give effect to the provisions of the treaty, an affirmation that ratification by Kenya of the treaty would be in keeping with, or otherwise advances, constitutional values and objectives, whether the treaty sought to be ratified permits any reservations and the proposed text of any reservations that should be entered when ratifying the treaty, in order to protect or advance national interests or ensure conformity with the Constitution.

Under clause 5 of the proposed Act, in deciding whether or not to approve the ratification of a treaty, Parliament is not required to give approval if such treaty or part thereof is contrary to the Constitution. This applies also to a reservation whose purpose would be to introduce an act which is expressly proscribed by the Constitution. The justification for this would seem to be that

[127]Supra, note 39, clause 4.

since immediately upon ratification, a treaty automatically becomes part of the law of Kenya, it will be superfluous to ratify a provision which automatically becomes inoperable by being unconstitutional.

So that treaties should not, upon ratification, be rendered otiose by lack of effective means of compliance and implementation, clause 13 provides for compliance, particularly where a treaty provides for the submission of periodic reports as part of its monitoring mechanisms. In such a case, the Cabinet Secretary shall, in conjunction with the relevant State Department, facilitate the preparation and submission of such report within the prescribed period.

As regards treaties which had been ratified by Kenya before 27th August, 2010, but are yet to be domesticated, clause 16(2) of the proposed Bill sets out transitional provisions by which, within eighteen months from the date of commencement of the Act, the Cabinet Secretary, in consultation with the relevant Cabinet Secretaries, have to ensure that relevant Bills are published for consideration by Parliament so as to domesticate all such treaties.

The combined effect of Article 2(6) of the Constitution of Kenya, 2010 and the proposed Bill, 2011, therefore, is that, save for the MEAs that were ratified before the 27th day of August, 2010 which will require the enactment of an Act of Parliament to transform domesticate them, there shall be no need for the enactment of implementing legislation in respect of MEAs Constitution of Kenya, 2010.

2.12 Conclusion

The manner in which international law and treaty ratification is treated under the Constitution has a direct bearing on how the obligations from a treaty shall become operative in the domestic sphere.The relationship between national law and international law, therefore, offers a fundamental discussion on the implementation of international law obligations contained in MEAs within the municipal context. This is because it is only by ensuring that MEAs have force on the domestic front that the implementation of their obligations will be given effect to. Kenya's position regarding the implementation of MEAs has been influenced, to a great extent, by its

constitutional position regarding the place of international law and treaty ratification practice generally.

CHAPTER THREE

KENYA'S IMPLEMENTATIONOF BIOLOGICAL DIVERSITY, ECOSYSTEM & HABITAT CONSERVATION MEAs

3.1 Introduction

In an effort to implement her treaty obligations, Kenya has enacted several statutes and put in place various institutions to give treaties the force of law locally. For instance, statutes such as the Geneva Conventions Act,[128] the Diplomatic Privileges and Immunities Act,[129] the Investment Disputes Convention Act,[130] the Bretton Woods Agreements Act,[131] and the Treaty for the Establishment of the East African Community Act[132] expressly domesticate the respective Conventions from which they derive their names.

Unfortunately, though, in the realm of environmental law, this local implementation of treaties has been undertaken in an inconsistent and piecemeal manner and there is not a single Act of Parliament that wholly incorporates the provisions of any single MEA. As will be seen below, provisions of one MEA may be found in several Acts of Parliament. For instance, it is possible, as will be seen below, that aspects of the CBD are found incorporated in more than one statute.

3.2 MEAs Ratified in the Field of Biodiversity

In the field of biological diversity, Kenya has ratified a number of global and regional MEAs. These include the 1951 International Plant Protection Convention (as amended),[133] the 1946

[128]Chapter 198, Laws of Kenya (Revised Edition, 1970).
[129]Chapter 179, Laws of Kenya (Revised Edition, 1984).
[130]Chapter 522, Laws of Kenya (Revised Edition, 1967).
[131]Chapter 464, Laws of Kenya (Revised Edition, 1991).
[132]Act No. 2 of 2000.
[133]1951 International Plant Protection Convention (as amended) 150 UNTS 67. It entered into force for Kenya on 7 May 1974.

International Convention for the Regulation of Whaling (as amended),[134] the 1961 International Convention for the Protection of New Varieties of Plants,[135] the 1985 Nairobi Convention for the Protection, Management and Development of the Marine and Coastal Environment of the Eastern African Region,[136] the 1985 Nairobi Protocol Concerning Protected Areas and Wild Fauna and Flora in the Eastern African Region,[137] the 1992 Convention on Biological Diversity (CBD),[138] the 2000 Cartagena Protocol on Biosafety to the Convention on Biological Diversity,[139] and the International Treaty on Plant Genetic Resources for Food and Agriculture.[140]

A survey of the implementation of these Conventions in Kenya reveals mixed results. Whereas the International Convention for the Regulation of Whaling establishes a system of international regulation for the whale fisheries to ensure proper conservation and development of whale stocks, Kenya's fisheries legislation makes no specific reference to whaling within its maritime zones. Yet, under this Convention, Kenya is obliged to adopt and enforce regulations on conservation and utilization of whale stocks, protected and unprotected species, open and closed seasons, types of gear and apparatus to be used etc.

As regards plant protection and the protection of new varieties of plants, the Plant Protection Act[141] and the Seeds and Plant Varieties Act[142] that seek to domesticate the two international legal instruments do so without making specific reference to the Convention. It is only after one reads the objectives of the Conventions and compares them with the texts of these statutes that it can be deduced that they are the legislation manifest an attempt to domesticate the obligations

[134] 161 UNTS 72 (as amended, 19 November 19556, 338 UNTS 336). It entered into force for Kenya on 2 December 1981.
[135] Supra, note 11, p.65.
[136]IwonaRummel-Bulska&Anor (eds.), 'Selected Multilateral Treaties in the Field of Environment, Vol. 2 (UNEP, Nairobi, 1991) p.324.
[137]Ibid., p.331.
[138]Convention on Biological Diversity, (Rio de Janeiro, 05 June 1992), G.A. Res. 117, U.N. GAOR, 49th Sess., Supp. No. 49, at 143; U.N. Doc. A/RES/49/117 (1994); *reprinted* in 31 ILM 818 (1992), (entered into force 29 December 1993).
[139]Protocol on Biosafety to the Convention on Biological Diversity (Cartagena 29 January 2000), *reprinted* in 39 ILM, 1027 (2000).
[140] Supra, note 11, p.730.
[141]Plant Protection Act (Cap. 324), Laws of Kenya (Revised edition, 1979).
[142]Seeds and Plant Varieties Act (Cap. 326), Laws of Kenya (Revised edition, 1991).

under the 1951 International Plant Protection Convention (as amended)[143] and the 1961 International Convention for the Protection of New Varieties of Plants[144] respectively. The 1992 CBD and its Protocol, the Cartagena Protocol, as well as the1985Nairobi Convention and its Protocol have provisions that are referred to in the Environmental Management and Co-ordination Act[145] and the Forests Act.[146]

Insofar as the International Treaty on Plant Genetic Resources for Food and Agriculture is concerned, its aim is to, in harmony with the CBD, achieve the conservation and sustainable use of plant genetic resources for food and agriculture and the fair and equitable sharing of the benefits arising out of their use.[147] It places obligations on States Parties to take measures to promote an integrated approach to the exploration, conservation and sustainable use of plant genetic resources, food and agriculture, and to develop and maintain appropriate policy and legal measures that promote the sustainable use of plant genetic resources for food and agriculture.[148] Yet, despite Kenya having acceded to this Treaty in 2003, it is yet to adopt any policy or legal measure to implement its provisions.

3.3 MEAs Ratified by Kenya in the Field of Ecosystem and Habitat Conservation

Several MEAs have been adopted by the international community for the protection of certain resources by conserving their habitats or ecosystems in which they live. These may be areas where they hibernate, breed and feed, or their migratory routes or range territories. Kenya has ratified a number of MEAs in this thematic area. These include the 1971 Ramsar Convention on Wetlands of International Important Especially as Waterfowl Habitat,[149] (hereinafter referred to as 'the Ramsar Convention') the 1972 UNESCO Convention for the Protection of the World

[143]1951 International Plant Protection Convention, (Rome, 6 December 1951), 23 UST 2767, 150 UNTS 67 (Revised Nov. 28, 1979). It entered into force for Kenya on 7 May 1974.
[144] 1961 International Convention for the Protection of New Varieties of Plants, as revised in 1972, 1978 and 1991, (Paris, 02 December 1961), [2000] ATS 6; 33 UST 2703; 815 UNTS 89 (entered into force 24 April 1998).
[145] Act No. 8 of 1999, sections 50-53.
[146] Act No. 7 of 2005, sections 26, 28, 36, 41, 46 and 47.
[147]UNEP, Register of International Treaties and other Agreements of Environment (UNEP, Nairobi, 2005), p.730..
[148]Ibid., Articles 5 and 6.
[149] 1971 Convention on Wetlands of International Importance Especially as Waterfowl Habitat (Ramsar, 11 February 1971), Vol. 996, I-I-1583, 996 UNTS 245 (Entered into force 21 December 1975).

Cultural and National Heritage,[150] the 1979 Bonn Convention on the Conservation of Migratory Species of Wild Animals,[151] the 1994 UN Convention on Drought and Desertification[152] and the regional Algiers Convention on the Conservation of Nature and Natural Resources.[153]

The Ramsar Convention was adopted with the objective of stopping the loss wetlands through national and international co-operation with the view to achieving sustainable development.[154] It required Parties to formulate and implement planning and to promote the wise use of wetlands within their jurisdiction.[155] Upon acceding to the Convention on 5th June, 1990, Kenya designated the Kenya Wildlife Service which was established pursuant to the Wildlife (Conservation and Management) Act[156] to be the focal point for all matters related to wetlands. Despite this, Kenya has, to date, not created a policy or legal framework for the conservation and wise use of her wetlands, although section 42 of EMCA[157] provides for the protection of wetlands. This may well explain the uncontrolled encroachment and drainage of wetlands for agriculture and other commercial purposes in Kenya.

The World Cultural and Natural Heritage Convention establishes a system of collective protection of cultural and national heritage of outstanding universal value and requires States Parties to take the necessary legal, scientific and administrative measures to protect their heritage and to transmit the same to future generations.[158] Prior to Kenya's acceptance of the Convention on 5th June, 1991, she had, in 1983, enacted the Antiquities and Monuments Act to provide for the preservation of antiquities and monuments.[159] As defined under the Act, antiquities and monuments, bear the same meaning as ascribed to them under the Convention which raises the

[150]1972 UNESCO Convention for the Protection of the World Cultural and National Heritage1037 UNTS 151; 27 UST 37 [1975]; ATS 4711 *reprinted* in ILM 1358 (1972).
[151]1979 Convention on the Conservation of Migratory Species of Wild Animals (Bonn, June 23, 1979), *reprinted* in 19 ILM. 15 (1980), (Entered into force 1 November 1983).
[152] 1994 Convention to Combat Desertification in those Countries Experiencing Serious Drought and/or Desertification, particularly in Africa (Paris, 17 June 1994), 1954 UNTS 3; ATS 18 (2000); *reprinted* in 33 ILM 1328 (1994), (Entered into force 26 December 1996).
[153]Algiers Convention on the Conservation of Nature and Natural Resources 1001 UNTS 4.
[154] Supra, note 22, Articles 4 and 5.
[155]Ibid., Article 2.
[156] Wildlife (Conservation and Management) Act (Cap. 376), Laws of Kenya (Revised edition, 2009 (1985). Kenya Wildlife Service is established pursuant to s. 3 of the Act to perform the functions set out at s. 3A.
[157] Supra, note 18.
[158] Supra, note 23, Articles 4 and 5.
[159]Antiquities and Monuments Act (Cap. 215), Laws of Kenya (Revised Edition, 1984).

possibility that the enactment of the Act was influenced by the Convention notwithstanding that the legislation makes no express reference to the Convention.

The Bonn Convention requires range states to take measures for the conservation and efficient management of wild animals which spend part of their lives within the jurisdiction of those states or transiting through the range states.[160]Such steps include controlling excessive hunting along migratory routes which could lead to the extinction of these migratory species as well as addressing other threats to their habitats. To this end, the Convention enjoins range states to adopt strict protection measures for the endangered species, to conclude multilateral agreements for the conservation and management of species that have an unfavorable conservation status or would benefit significantly from international co-operation and to undertake joint research activities. Despite the foregoing, Kenya Wildlife Service has, to date, not taken any measures for the joint management of migratory species such as the annual migratory route for wildebeest, gazelle and zebras between Masai Mara and Amboseli game reserves which are shared between Kenya and Tanzania. Whereas Kenya has wholly banned the hunting of game, Tanzania allows game hunting, a situation that creates disharmony in the conservation and management of the migratory species between these two range states.

The 1994 UN Convention on Desertification and Drought seeks to combat desertification and mitigate the effects thereof in countries affected through effective action at all levels, supported by international co-operation and partnership agreements in the framework of an integrated approach, with a view to contributing to the achievement of sustainable development.[161] To this end, the Convention provides for specific obligations for affected States Parties.[162] Affected Parties are required to, inter alia, prepare, publicize, implement and update national action programmes for combating desertification and mitigating the effects of drought.[163] Kenya participated in the negotiation, adoption and signature of this Convention which it, eventually, ratified in June, 1997.

The 1968 African Convention of Nature and Natural Resources, adopted under the aegis of the then Organization of African Unity, was the first conservation treaty adopted by independent

[160] Supra, note 24, Article II.
[161] Supra, note 25, Article 5.
[162]Ibid., Article 6.
[163]Ibid., Articles 9 & 10.

Africa.[164] The Convention was ratified by Kenya on May 12, 1969 and entered into force on June 16, 1969. The parties to the Convention were under the obligation to adopt measures necessary to ensure conservation, utilization and development of soil, water, flora and fauna resources in accordance with scientific principles and with due regard to the best interests of the people.[165] Besides, conservation areas were to be established and maintained, and protected species of fauna and flora to be fully protected whereas others were to be exploited only with authorization.[166] Kenya's legal regime on wildlife management, the Wildlife (Conservation and Management) Act[167]that provided for the environmental management of species and their habitats was largely fashioned on the Convention.

3.4 Kenya's Policy Frameworks for Implementing Her MEA Obligations

Until recently when the Ministry of Environment and Mineral Resources in 2012 began working on the Draft National Environment Policy,[168] there had not been an integrated environmental policy in Kenya, with the result that the existing policy frameworks are scattered in several sessional papers.These are highlighted below.

3.4.1The Draft Sessional Paper No. 6 of 1999 on Environment and Development[169]

The draft Sessional Paper No. 6 of 1999 on Environment and Development has the overall goal to integrate environmental concerns into the national planning and management processes and provide guidelines for environmentally sustainable development.[170]It lists its specific goals as, among others, the incorporation of environmental management and economic development as

[164] Supra, note 26.
[165]Ibid., Article II.
[166]Ibid., Articles VII & X.
[167] Chapter 367, Laws of Kenya, as amended by the Wildlife (Conservation and Management) Act, 1989.
[168]Government of Kenya, Ministry of Environment and Mineral Resources, National Environment Policy, Revised Draft 4 (April, 2012), available at http://pelum.net/wp-content/uploads/2012/06/National-Environment-Policy-May-2012.pdf (accessed 10 August 2012).
[169]Government of Kenya, Ministry of Environmental Conservation, Sessional Paper No. 6 of 1999 on Environment and Development, available at http://www.fankenya.org/downloads/Kenya%27sDraftEnvironmentPolicy.pdf (accessed 7 August 2012).
[170]Ibid.

integral aspects of the process of sustainable development, the promotion of the maintenance of a quality environment that permits a life of dignity and well-being for all, of ecosystems and ecological processes essential for the functioning of the biosphere, the preservation of genetic resources, biological diversity, their cultural values and their natural heritage, and the incorporation of indigenous knowledge, skills, and interests for effective participation of local communities in environmental management and sustainable development."[171]

It also sets out its objectives as being, inter alia, the conservation and managementof Kenya's natural resources, the promotion of environmental conservation with regard to soil fertility, soil conservation, biodiversity and afforestation and the protection of water catchment areas the realization of which will entail the implementation and enforcement of laws for the management, sustainable utilization, and conservation of Kenya's natural resources and the support for a coordinated approach to policy formulation on environmental matters.[172]

The draft Policy identifies the key environmental challenges facing Kenya to include uncoordinated policy and institutional arrangements for biodiversity conservation and management, inadequate incentives to stimulate local community participation in biodiversity conservation and development, absence of a system to measure the economic value of biological resources,inadequate inventories of plants and animals, especially those with social, spiritual, aesthetic, economic and cultural values, absence of a comprehensive policy on research and development in biotechnology and absence of regulatory mechanisms and guidelines on biotechnology."[173]

Based on the environmental challenges identified in this draft Policy and the proposals it makes at pages 14-15 as regards addressing these challenges, it is quite clear that the draft seeks to develop policies for implementing the Convention on Biological Diversity (CBD)[174] as well as the Cartagena Protocol.[175] through its focus on bio-safety, biological diversity and genetic resources generallywith the main objective of conserving biological diversity,[176] the sustainable

[171]Ibid., p.12.
[172]Ibid., pages 12-13.
[173]Ibid., page 15.
[174]Supra, note 11.
[175] Supra, note 12.
[176] Supra, note 11. Article 2 provides that: "Biological diversity" means the variability among living organisms from all sources including, *inter alia*, terrestrial, marine and other aquatic ecosystems and the ecological complexes of which they are part; this includes diversity within species, between species and of ecosystems.

utilization of its components and the fair and equitable sharing of the benefits arising from the utilization of genetic resources.[177]

The CBD places obligations on the Contracting Parties to put in place measures to conserve and sustainably use their biological diversity,[178]to develop national strategies, plans or programmes for the conservation and sustainable use of biological diversity and to integrate the conservation and sustainable use of biological diversity into relevant sectoral or cross-sectoral plans, programmes and policies.[179]These are among the specific goals and objectives contained in this draft policy. Whereas Sessional Paper No. 6 of 1999 has never been adopted, its recommendations appear to have influenced the enactment of the EMCA[180]which established the National Environmental Management Authority (NEMA) as the principal agent to coordinate environmental management in Kenya.[181] The Policy also recommended the formulation of the Kenya National Biodiversity Strategy and Action Plan (NBSAP).[182]

3.4.2 The Kenya National Biodiversity Strategy and Action Plan (NBSAP)[183]

The overall objective of the NBSAP is to implement Article 6 of the CBD which enjoins Member States to develop national strategies, plans or programmes for theconservation and sustainable use of biological diversity and to integrate, as far as possible and as appropriate, theconservation and sustainable use of biological diversity into their relevantsectoral or cross-sectoral plans, programmes and policies.

The formulation of the NBSAP appears to have been derived from the recommendations in Draft Sessional Paper No. 6 of 1999 upon the recognition of the need to have an integrated national strategy and action plan for biodiversity. The draft Sessional Paper No. 6 of 1999 has, nonetheless, not been adopted to date. It is, as such, essential that this process be guided by the

[177]Ibid., Article 1.
[178]Ibid., Article 5.
[179]Ibid., Article 6.
[180]Supra, note 18.
[181]Ibid., p.33.
[182]Government of Kenya, Ministry of Environment and Natural Resources, Kenya National Biodiversity Strategy and Action Plan (March, 2000), available at www.cbd.int/doc/world/ke/ke-nbsap-01-en.pdf (accessed 11 October 2012).
[183] Ibid.

principles already established by Agenda 21[184] and the CDB. It is for this reason that, in developing national strategies for the conservation and sustainable utilization of Kenya's biodiversity, the NBSAP would be guided by a number of principles[185] such as:

a) The conservation and sustainable utilization of biodiversity needed to go hand in hand with the conservation of Kenya's physical environment and her living organisms.
b) Kenya's biodiversity is best achieved *in-situ* although Kenya needed to increase its capacity for *ex-situ* conservation as well.[186]
c) The utilization of Kenya's biodiversity should be transparent, equitable and efficient.[187]

The NBSAP identified goals and objectives and analysed the gaps that existed between Kenya's biodiversity position at the time of the formulation of the Strategy and the aspirations espoused in its goals and objectives.[188] Most importantly, though, it systematically addressed each Article of the CBD, stating what needed to be done and how it had to be done.

In terms of strategies for addressing biological diversity issues, the NBSAPproposed the inclusion of conservation and sustainable development as one of the pillars of the Constitution of Kenya.[189] This proposal appears to have been actualized under Article 10(2)(d) of the Constitution of Kenya, 2010 which identifies sustainable development as one of the Kenya's national values and principle of governance. The NBSAP also had other influences on the provisions of the Constitution regarding sustainable development and conservation, especially in the realm of biological diversity as manifested in the following specific provisions:

a) The recognition and protection of the ownership of indigenous seeds and plant varieties, their genetic and diverse characteristics and their use by the communities of Kenya.[190]

[184] Agenda 21, 'Chapter 39: International Legal Instruments and Mechanisms', available at http://habitat.igc.org/agenda21/a21-39.htm (accessed 13 October 2012).
[185] Supra, note 55, pp. 3-4.
[186] These provisions are in tandem with the obligations under Articles 8 and 9 respectively of the CBD.
[187] This incorporates within the NBSAP Article 1 of the CBD regarding the purpose of the CBD.
[188] Supra, note 55, p.10.
[189]Ibid., p.12.
[190] Constitution of Kenya, 2010, Article 11(3)(b).

b) The right of every person to a clean and healthy environment which includes the right to have the environment protected for the benefit of present and future generations through legislative and other measuresand to have obligations relating to the environment fulfilled.[191]

c) The sound conservation and protection of ecologically sensitive areas by holding, using and management of land in an equitable, efficient, productive and sustainable.[192]

d) The protection and enhancement of intellectual property in, and indigenous knowledge of, biodiversity and the genetic resources of the communities, the encouragement of public participation in the management, protection and conservation of the environment and the protection of genetic resources and biological diversity.[193]

Further, the NBSAP proposed the enactment of new legislation to specifically address sustainable wildlife management and equitable sharing of benefits for local communities. This, nonetheless, is yet to be done.

The strategy also addresses *in-situ* and *ex-situ* conservation in an attempt to implement the relevant CBD obligations both within protected areas by, *inter alia*, calling for the strengthening of the capacity of the Kenya Wildlife Service and strengthening the marketing of wildlife tourism while developing modalities for sharing of accruing benefits and assisting local communities to develop economically friendly income generating projects.[194]In doing this, it specifically addresses measures to be taken to protect aquatic and wetlands ecosystems, Arid and Semi-Arid Lands (ASAL), forests and other ecosystems such as those which shelter endemic birds and diverse plants. It also addresses the rehabilitation of degraded ecosystems and the recovery of threatened species, the management of alien species and genetically modified organisms, and other related matters.[195] Thus, besides addressing the implementation of the

[191]Ibid., Article 42.
[192]Ibid., Article 60(1)(e).
[193]Ibid., Article 69(1)(c), (d) and (e).
[194] Supra, note 55, pp.15-16.
[195] Supra, note 55, pp. 14-22.

CBD, the NBSAP also addresses the implementation of the Ramsar Convention,[196] the Bonn Convention,[197]and the Convention on Convention to Combat Desertification in those Countries Experiencing Serious Drought and/or Desertification, particularly in Africa.[198]

3.4.3 Sessional Paper No. 4 of 2004 (The Energy Policy)[199]

Kenya's energy policy is contained in Sessional Paper No. 4 of 2004 on Energy. The Policy lays down the framework upon which cost-effective, affordable and adequate quality energy services will be made available to the domestic economy on a sustainable basis over the period 2004-2023.[200]

The adoption of the policy follows the recognition that energy production and consumption can result or massively contribute to atmospheric pollution, deforestation, climate change, soil erosion and siltation of hydropower reservoirs and river systems, among others. The Government therefore, recognizes the crucial need to protect the environment and sustain its carrying capacity while pursuing the development goals of the country.[201]

Whereas the Energy Policy is predominantly centered on the generation of energy for development, its utility as a tool for implementing Kenya's MEA obligations lies in the fact that the construction and operation of electric power projects have direct impacts on the quality of the environment either by the emission of pollutants or by changing the ecological systems.[202]Consequently, there is emphasis on the need to enhance environmental, health and safety regulations through comprehensive environmental impact assessments prior to establishing energy generation plants and to shift into renewable sources of energy such as

[196] Supra, note 22.
[197] Supra, note 24.
[198] Supra, note 25.
[199]Government of Kenya, Ministry of Energy, Sessional Paper No. 4 of 2004 on Energy (May, 2004), available at http://www.erc.go.ke/erc/Regulations/SESSIONAL%20PAPER%204%20ON%20ENERGY%202004.pdf, accessed (12 August 2012).
[200]Ibid., p. VIII.
[201]Ibid., p.36.
[202]Ibid., p;10.

geothermal and hydroelectric power projects which are known for their relatively less adverse environmental impacts than, say, fossil fired plants.[203]

Byadvocating for the integrating considerations of the conservation and sustainable use of biological resources into national decision-making and the adoption of measures relating to the use of biological resources,the Policy attempts to implement the provisions of the CBD.[204]It also implements the provisions of Article 11 of the CBD by seeking toadopt economically and socially sound measures that act as incentives for the conservation and sustainable use of the components of biological diversity. To achieve this, the Energy Policy requires that the Government ensures the availability of land to investors in the energy sector and to oversee resettlement of any persons who may be displaced during such an investment exercise. It further compels the Government to undertake environmental impact mitigation and encourages the private sector to develop potential sites to generate electricity for their own consumption and for export of surplus electrical power to the national grid.[205]

Further, incentives which are consistent with Article 11 of the CBD are also to be found in the provision that in recognition of any efforts expended, the Government will, vide the Energy Policy, provide letters of intent to serious investors to appropriately guarantee purchase of their electric power on more favourable terms than for investors in fossil fuel fired stations, including a better fiscal regime for hydropower developers. The idea behind this measure is to fulfill Kenya's obligations under the Kyoto Protocol for promoting and encouraging investments in technologies that do emit excessive amounts of greenhouse gases into the atmosphere.[206]

The Policy, nonetheless, is inadequate addressing the measures that the Government has to put in place to fulfill her obligations as regards environmental conservation measures in the event of a significant discovery of fossil fuels such as the recent discovery of oil in North Western Turkana region.[207] Although the discovery of this oil came well over fifteen years since the Policy was

[203]Op.Cit.
[204]Supra, note 11, Article 10.
[205]Supra, note 72, p.37.
[206] Protocol to the United Nations Framework Convention on Climate Change (Kyoto, 11 December 1997), U.N. Doc FCCC/CP/1997/7/Add.1; reprinted in 37 ILM 22 (1998), (Entered into force 16 February 2005), Article 2.
[207]'Kenya Oil Discovery after Tullow Drilling', *BBC News* (26 March 2012), available at http://www.bbc.co.uk/news/world-africa-17513488, accessed 5 October 2012; Beatrice Obwocha, 'Oil Discovered

formulated, it is instructive to note that the prospection for oil has been ongoing and it can be argued that the Policy needed to be proactive in addressing the relevant issues in the likelihood of a significant discovery being made.

3.4.4 Sessional Paper No. 9 of 2005[208]

Sessional Paper No. 9 of 2005 (hereinafter referred to as 'the Forest Policy') was formulated with the objectives of, inter alia, contributing to poverty reduction, employment creation and improvement of livelihoods through sustainable use, conservation and management of forests and trees, sustainable land use through soil, water and biodiversity conservation, and tree planting through the sustainable management of forests and trees in order to conserve water catchment areas, create employment, reduce poverty and ensure the sustainability of the forest sector.[209]

Chapter One of the Forest Policy addresses the challenges to the sustainable management of forests and trees with a view to ensuring, among others, the sustainable management of forests for climate amelioration, soil, water and biodiversity conservation and promoting good governance in the forest sector for climate amelioration, soil, water and biodiversity conservation**.**

As far as Kenya's MEA obligations in the field of biodiversity are concerned, the Forest Policy implements the provisions of the CBD[210], by proposing that the Government shall undertake the following activities and measures:

(i) Promote tree planting and land rehabilitation for carbon sequestration;[211]

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in Kenya's Turkana County', *The Standard* (26 March 2012), available at http://www.standardmedia.co.ke/?articleID=2000054938&pageNo=1, accessed 5 October 2012.

[208]Republic of Kenya, Ministry of Environment and Mineral Resources, (Forest Policy), available at http://www.nema.go.ke/index.php?option=com_phocadownload&view=category&download=17:forestry-policy&id=15:forestry-policy&Itemid=594 (accessed 23 September 2012).

[209]Ibid., p.3.

[210]Supra, note 11.

[211] Implements the provisions of Articles 6 of the CBD regarding the obligation to develop and integrate national strategies, plans and programmes for the sustainable use of biological diversity and Article 10 and integrating consideration for sustainable use of biological resources in decision making and to adopt measures to minimize or avoid adverse impacts on biodiversity.

(ii) Explore opportunities available in carbon trade for conservation and management of forests;[212]

(iii) Endeavour to domesticate as appropriate international forestry related instruments and agreements;[213]

(iv) Foster close collaboration with neighbouring countries to ensure sustainable management of cross-border forests.[214]

3.4.5 Draft National Land Reclamation Policy[215]

This Draft Policy has been formulated in recognition of the fact that land degradation, which was as a result of inappropriate human activities coupled with natural processes, climate change and subsequent change in rainfall patterns, was a serious environmental and socio-economic problem in Kenya.[216]

The Draft Policy identifies the human activities that drive degradation in the country to include clearing trees for agricultural expansion, logging, firewood gathering, charcoal production, mining, human settlement, infrastructural and industrial development, uncontrolled fires, livestock overstocking and overgrazing. It further notes that Government efforts to mitigate and reclaim degraded land and improve productivity of arid lands have fallen short of desired results and impacts because implementation efforts have been minimal, coupled with weak institutional linkages and coordination, resources wastage and inefficient utilization, duplication of efforts, budgetary constraints and lack of ownership of intervention measures by beneficiaries.[217]

The rationale of land reclamation, therefore, includes enhancing a sustainable increase in productivity of arid and marginal lands, to ease pressure on high rainfall areas, the restoration of

[212] Implements Article 11of the CBD regarding the obligation to adopt economically and socially sound measures that act as incentives for the conservation and sustainable use of components of biological diversity.
[213]Gives effect to Article 22 of the CBD.
[214]Implements the *sic uteretuoutalienam non laedas* principle under Article 3 of the CBD and the obligation to co-operate with other States as regards shared components of biological diversity under Article 5 of the CBD.
[215]Republic of Kenya, Ministry of Water and Irrigation, *National Land Reclamation Policy* (29 April 2011), available at www.water.go.ke/index.php?option=com_docman&task=doc_download&gid=39&Itemid=125 (accessed 23 September 2012).
[216]Ibid., p.1.
[217]Ibid., p.2.

the health and fertility of degraded land in order for it to respond to climatic changes and the effects of frequent droughts, the removal or prevention of water and land pollution and the creation of space for wildlife conservancy in a balanced ecosystem.[218] As such, the Policy seeks to achieve various objectives among which are the institutionalization of measures to mitigate and adopt/cope with the effects of climate change, the creation of the necessary legal, institutional and regulatory framework for land, the provision of mechanisms for continuous monitoring and evaluation for degradation and reclamation status and implementation and the promotion of the adoption of sustainable and integrated approaches to land use systems.

TheDraft Policy attempts to implement Kenya's obligations under the United Nations Convention to Combat Desertification (hereinafter referred to as 'UNCCD)[219]by its focus on productivity of arid and marginal lands and the reclamation of lands adversely affected by droughts. This focus is in tune with the UNCCD obligations upon Statesto adopt an integrated approach addressing the physical, biological and socio-economic aspects of the processes of desertification and drought, to integrate strategies for poverty eradication into efforts to combatdesertification and to mitigate the effects of drought.[220] Further, by giving priority to combating desertification and mitigating the effects of drought as well as address the underlying causes of desertification, the Draft Policy implements the provisions of Article 5 ofUNCCD regarding the obligations imposed on affected States Parties.

Whereas the Draft Policy rightly identifies the main problems for implementing Kenya's obligations under the UNCCD to include lack of co-ordination and a regulatory framework and limited capacity and resources on the part of the existing institutions, it fails to effectively address the same. Its publication was not followed with either the enactment of a legal or regulatory framework to co-ordinate efforts to implement Kenya's obligations under the UNCCD or to reclaim arid lands. These attempts have been done in an uncoordinated manner, often at the whims of the Minister in charge of the Ministry for the development of arid, semi-arid and waste lands and/or water and irrigation.

[218]Ibid., pp. 2-3.
[219]Supra, note 25.
[220]Ibid., Article 4.

3.4.6 Sessional Paper No. 3 of 2009 on National Land Policy[221]

This Sessional Paper was formulated to provide an overall framework and define the key measures required to address the critical issues of land administration such as access to land, land use planning and environmental degradation.[222]

The Policy was formulated upon an the recognition that the existing policies and laws on land in Kenya pursue economic productivity at the expense of other equally important values such as the need to ensure equity, sustainability and the preservation of culture in the utilization of land. It therefore, seeks to facilitate the protection of the values of economic productivity, equity, environmental sustainability and the conservation of culture.[223]

Under the Policy, in order to ensure the sustainable use of land, the Government is required to create an effective institutional framework and capacity to implement international conventions especially those touching on access to land based natural resources. Some of the ways in which the Policy seeks to compel the government to implement these MEAs include:

(i) Requiring the Government to facilitate the preparation of participatory environmental action plans by communities and individuals living near environmentally sensitive areas.[224]

This is a provision that seeks to implement the obligations under Article 3 of the Ramsar Conventionwhich requires Contracting Parties to formulate and implement their planning so as to promote the conservation of the wetlands included in the list, and as far as possible the wise use of wetlands in their territory;[225]

(ii) The Government's commitment under the Policy to identify, map and gazette critical wildlife migration and dispersal areas and corridors in consultation with the local communities and individual land owners implements the obligations

[221]Republic of Kenya, Ministry of Lands, Sessional Paper No. 3 of 2009 on National Land Policy (August, 2009), available at www.lands.go.ke/index.php?option=com_docman&task=doc_download&gid=Itemid=46 (accessed 23 September 2012).
[222]Ibid., p. ix.
[223]Ibid., p. 9.
[224]Ibid, at page 31.
[225]Supra, note 22.

under Articles II, III and IV of the Bonn Convention on the Conservation of Migratory Species of Wild Animals.[226]Under these Articles, range states bind themselves to pay special attention to migratory species the conservation status of which is unfavourable, and to take appropriate and necessary steps to conserve such species and their habitat.

(iii) By seeking to encourage the development of wildlife sanctuaries and conservancies by involving local communities and individuals living contiguous to the parks and protected areas in the co-management of such areas, the Policy implements Kenya's obligations under the Bonn Convention by which range states are obliged to conserve and, where feasible and appropriate, restore the habitats of the species which are in danger of extinction and to prevent, remove, compensate for or minimize the adverse effects of activities or obstacles that seriously impede or prevent the migration of such species.

3.5 Legal and Institutional Frameworks for Implementing MEAs

3.5.1 The Constitution of Kenya[227]

Unlike the Independence Constitution, the 2010 Constitution recognizes the primacy of environmental matters by providing that every person has the right to a clean and healthy environment, which includes the right to have the environment protected for the benefit of present and future generations through legislative and other measures to have obligations relating to the environment fulfilled.[228]As far as sustainable development is concerned, the 2010 Constitution recognizes it as one of the pillars of our national values and principles of governance; sustainable development being a principle that underpins all MEAs which Kenya

[226]Supra, note 24.

[227]The Constitution of Kenya, 2010, available at http://www.kenyalaw.org/klr/fileadmin/pdfdownloads/Acts/ConstitutionofKenya2010.pdf, accessed 7 August 2012.

[228]Ibid., Article 42 provides that legislative and other measures be taken to give fulfill environmental obligations is an express acknowledgement of Principle 11 of the Rio Declaration on the Environment that provides that States shall enact effective environmental legislation. Environmental standards, management objectives and priorities should reflect the environmental and developmental context to which they apply. Standards applied by some countries may be inappropriate and of unwarranted economic and social cost to other countries, in particular developing countries.

has ratified and which she binds herself to implement in her domestic environmental policies and laws.[229]

Specific obligations are placed on the State by Article 69 of the Constitution to ensure that Kenya implements her obligations under the various MEAs she has signed and ratified in the filed of biological diversity. These principles have been set out under Article 69 and include ensuring the sustainable exploitation, utilization, management and conservation of the environment and natural resources and equitable sharing of the accruing benefits such as is required of Member States under the CBD; working to achieve and maintain a tree cover of at least ten per cent of the land area of Kenya; protecting and enhancing intellectual property in, and indigenous knowledge of, biodiversity and the genetic resources of the communities; encouraging public participation in the management, protection and conservation of the protecting genetic resources and biological diversity.Of critical importance also is that the Constitution now provides for enhanced access to justice and enforcement of the right to a clean and healthy environment under Article 70 by granting*locus standi* toany person whose right to a clean and healthy environment is alleged to have been denied, violated, infringed or threatened.

3.5.2 Environmental Management and Co-ordination Act[230]

The Environmental Management and Co-ordination Actwas enacted with a view to providing for the establishment of an appropriate legal and institutional framework for the management of the environment and for matters connected therewith and incidental thereto.[231]It seeks to co-ordinate the activities in the various institutions called lead agencies[232]which are tasked to regulate various environmental sectors. The National Environment Management Authority (NEMA), one of the lead agencies established under EMCA,is given the powers to, in consultation with relevant lead agencies,initiate legislative proposals for purposes of giving effect to such a MEA in Kenya or for enabling Kenya to perform her obligations or exercise her rights under such

[229]Ibid., Article 10(2)(d).
[230]Supra, note 18.
[231]Ibid., Preamble.
[232]Ibid., 'Lead agency' is defined under s. 2 as any government ministry, department, parastatal, state corporation or local authority in which any law vests functions of control or management of any element of o the environment or natural resource."

MEA andto identify other appropriate measuresnecessary for the national implementation ofsuch MEA.

Section 42 provides for the protection of rivers, lakes and wetlands by providing that no persons shall carry out any of the activities enumerated thereunder without prior written approval of the Director-General given after an environmental impact assessment. To give effect to these statutory provisions is the subsidiary legislation enacted pursuant thereto and known as the Environmental Management and Co-ordination (Wetlands, River Banks, Lake Shores and Sea Shore Management) Regulations, 2009.[233]

These provisions partly implement Kenya's obligations under Article 2 of the Ramsar Convention[234] by which each Contracting Party is obliged to designate suitable wetlands the boundaries of which shall be precisely described and delimited within its territory for inclusion in a List of Wetlands of International Importance. They also implement the provisions of the Ramsar Convention regarding the obligation on Contracting Parties to formulate and implement their planning so as to promote the conservation and the wise use of wetlands[235], as well as the obligation to promote the conservation of wetlands and waterfowl by establishing nature reserves on wetlands and providing adequately for their wardening.[236]The provisions of section 55 of EMCA regarding the protection of the coastal zone,together with the Environmental (Prevention of Pollution in Coastal Zone and Other Segments of the Environment) Regulation, 2003[237] made pursuant thereto also implement the aforesaid provisions of the Ramsar Convention.

Sections 48-52 of EMCA deal with the protection of forests and the conservation of biological diversity. These provisions are supplemented by the regulations made under the subsidiary legislation known as the Environmental Management and Co-ordination (Conservation of Biological Diversity and Resources, Access to Genetic Resources and Benefit Sharing)

[233]Legal Notice No. 29 of 2009, available at http://www.kenyalaw.org/kenyalaw/klr_app/frames.php (accessed 13 September 2012).
[234]Supra, note 22.
[235]Ibid., Article 3.
[236]Ibid., Article 4.
[237]Legal Notice No. 159 of 2003, available at http://www.kenyalaw.org/kenyalaw/klr_app/frames.php, accessed 13 September 2012.

Regulations, 2006.[238]These provisions implement the following provisions of Articles 5 of the CBD by which each Contracting Party is obliged to develop national strategies, plans or programmes for the conservation and sustainable use of biological diversity and to integrate the conservation and sustainable use of biological diversity into relevant sectoral or cross-sectoral plans, programmes and policies.

They, further, implement Article 7 of the CBD by which each Contracting Party is obliged to identify components of biological diversity important for its conservation and sustainable use and to monitor the components of biological so diversity in order to measure and establish their utility for sustainable use.

Section 56 of requires the National Environment Authority (NEMA) to, inter alia, undertake or commission national studies and to give due recognition to developments in scientific knowledge relating to substances that deplete the ozone layer. NEMA is also mandated to take such measures as may lead to the elimination, control, reduction and minimization of risks to human health and phasing out ozone depleting substances. The provisions under this section implement Kenya's obligations under Articles 2 and 3 of the Vienna Convention for the Protection of the Ozone Layer.[239]

EMCA's provisions on hazardous wastes implement the general obligations on States parties under Article 4 of the Bamako Convention on the Ban of the Import to Africa and the Control of the Transboundary Movement and Management of Hazardous Wastes within Africa.[240] By this Article, all Parties are obliged to take appropriate legal, administrative and other measures within the area under their jurisdiction to prohibit the import of all hazardous wastes and by to declare all such import illegal and criminal.

[238]Legal Notice No. 160 of 2006, available at http://www.kenyalaw.org/kenyalaw/klr_app/frames.php, accessed 13 September 2012.
[239]1985 Convention for the Protection of the Ozone Layer, (Vienna, 22 March, 1985), UKTS 1 (1990); TIAS No. 11,097; 1513 UNTS 293, 324; *reprinted* in 26 ILM 1529 (1987), (entered into force 22 September1988).
[240]1991 Bamako Convention on the Ban of the Import to Africa and the Control of the Transboundary Movement and Management of Hazardous Wastes Within Africa (Adopted 30 January 1991), reprinted in 30 ILM 775, (Entered into force 22 April 1998).

3.5.3 The Land Act[241]

This is an Act of Parliament that was enacted to give effect to Article 68 of the Constitution, to revise, consolidate and rationalize land laws; to provide for the sustainable administration and management of land and land based resources, and for connected purposes.[242] It seeks to harmonize the land sector in the country, which had been characterized by a multiplicity of statutes and which it has since repealed.[243]

The National Land Commission, created under Article 67 of the Constitution, is mandated under the Land Act with the responsibility of taking appropriate action to maintain public land that has endangered or endemic species of flora and fauna, critical habitats or protected areas. This seeks to implement the provisions of Article 2 of the Convention on International Trade in Endangered Species[244]as well as Article 2 of the Ramsar Convention insofar as it deals with sensitive and critical habitats. The setting up of protected areas is a means of biodiversity conservation recognized under Articles 8 and 9 of the CBD, as regards *in-situ* and *ex-situ* conservation, respectively.

In undertaking its functions, the National Land Commission is mandated under the Act to identify ecologically sensitive areas that are within public lands and demarcate or take any other justified action on those areas and act to prevent environmental degradation and climate change.[245]In doing these, it further implements Kenya's MEA obligations under Articles 2 and 3 of the United Nations Convention to Combat Drought and Desertification which requires States Parties to undertake the following commitments and obligations:

> (a) adopt the combating of desertification and/or the mitigation of the effects of drought as a central strategy in their efforts to eradicate poverty;

[241]Land Act (Act No. 6 of 2012), came into force on 2 May 2012
[242]Ibid.,Preamble.
[243]Some of the land statutes that it repeals include the Government Lands Act (Cap. 280), Laws of Kenya, the Registration of Titles Act (Cap. 281), Laws of Kenya, Land Titles Act (Cap. 282), Laws of Kenya, Land Acquisition Act (Cap. 295), Laws of Kenya, Registered Land Act (Cap. 300), Laws of Kenya, Land Planning Act, (Cap. 302), Laws of Kenya,
[244]1973 Convention on International Trade in Endangered Species of Wild Fauna and Flora (Washington, Mar 3, 1973); 27 UST 1087; 993 UNTS 243; UKTS 101 (1976); *reprinted* in 12 ILM 1085 (1973), (entered into force 1 July 1975).
[245]Supra, note 114, Section 11.

(b) promote regional cooperation and integration, in a spirit of solidarity and partnership based on mutual interest, in programmes and activities to combat desertification and/or mitigate the effects of drought;

(c) rationalize and strengthen existing institutions concerned with desertification and drought and involve other existing institutions, as appropriate, in order to make them more effective and to ensure more efficient use of resources;

(d) promote the exchange of information on appropriate technology, knowledge, know-how and practices between and among them; and

(e) develop contingency plans for mitigating the effects of drought in areas degraded by desertification and/or drought.[246]

It, further, implements Articles 3 and 4 of the United Nations Framework Convention on Climate Change[247] by which States Parties are obliged to, among other things, formulate, implement, publish and regularly update national and, where appropriate, regional programmes containing measures to mitigate climate change by addressing anthropogenic emissions by sources and removals by sinks of all greenhouse gases not controlled by the Montreal Protocol,[248] and measures to facilitate adequate adaptation to climate change.

The Act addresses the specific concerns under the MEAs mentioned above through addressing measures aimed at protecting critical ecosystems and habitats. These measures include incentives for communities and individuals to invest in income generating natural resource conservation programmes, measures to facilitate the access, use and co-management of forests, water and other resources by communities who have customary rights to these recourses, procedures on the involvement of stakeholders in the management and utilization of land based natural resources and measures to ensure benefit sharing by the affected communities.[249]

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[246]Supra, note 25, Article 4.
[247]1992 Framework Convention on Climate Change, (Rio de Janeiro 09 May 1992), G.A. Res. 189; U.N. GAOR, 48th Sess., Supp. No. 49, at 167, U.N. Doc. A/RES/48/189 (1989); *reprinted* in 31 ILM 851 (1992), (entered into force 21 March 1994).
[248] 1987 Montreal Protocol on Substances That Deplete the Ozone Layer (Montreal, 16 September 1987); *reprinted* in 26 ILM, 1541.
[249]Supra, note 114, Section 19.

3.5.4 The Forests Act[250]

This is an Act of Parliament enacted with the purpose of providing for the establishment, development and sustainable management, including conservation and rational utilization of forest resources for the socio-economic development of Kenya. At its preamble, the Act expresses Kenya's commitment under international conventions and other agreements (MEAs) to promote the sustainable management, conservation and utilization of forests and biological diversity. The Act establishes the Kenya Forest Service (KFS)[251]to, inter alia, perform such functions as formulating for approval of the Board[252] that manages the KFS, policies and guidelines regarding the management, conservation and utilization of all types of forest areas in the country, collaborating with other organizations and communities in the management and conservation of forests and for the utilization of the biodiversity therein and managing forests on water catchment areas primarily for purposes of water and soil conservation, carbon sequestration and other environmental services and, most importantly, promoting national interests in relation to international forest related conventions and principles.[253]

The Act also establishes a Forest Management and Conservation Fund (FMCF) to be used for, *inter alia*, the development of forests, the maintenance and conservation of indigenous forests, the maintenance and protection of sacred trees and groves and other areas of cultural, ethno-botanical or scientific significance, the protection and management of unique trees for biodiversity conservation, the establishment of nurseries and production of seedlings and the management and protection of protected trees.[254] These measures under the Forests Act appear to strive to give effect to Kenya's obligations under the implementation of Kenya's obligations under Article 6 of the CBD by which each Contracting Party is required to, in accordance with its particular conditions and capabilities, develop national strategies, plans or programmes for the conservation and sustainable use of biological diversity and to integrate, as far as possible and as

[250]Forests Act (Act No. 7 of 2005), came into force 1 February 2007.
[251]Ibid., section 4.
[252]Ibid., section 6.
[253]Ibid., Section 5.
[254]Ibid., Section 27.

appropriate, the conservation and sustainable use of biological diversity into relevant sectoral or cross-sectoral plans, programmes and policies.

Under section 61 of the Act, the provisions of the Act have to be carried out in accordance with any treaties, conventions or international agreements concerning forests or forest resources to which Kenya is a party. In this way, the Forests Act sets the stage for the implementation of Kenya's MEA obligations in the biological diversity sector. Under section 34(1), for instance, the President may declare any tree, species or family of tree species to be protected in the whole country or in specific areas thereof. It makes it an offence for any person to fell, cut, damage or remove, trade in or export or attempt to export any such protected tree, species or family of trees or regeneration thereof. These are measures which would appear aimed at implementing Article 8 of the CBD regarding *in-situ* conservation of biological diversity.

Section 62 provides for the management of trans-boundary forest resources by providing for the development of management plans and joint management arrangements for the purposes of the proper management of cross-border forests and forest produce. This implements Article 3 of the CBD which recognizes the fact that, though States have, in accordance with the Charter of the United Nations and the principles of international law, the sovereign right to exploit their own resources pursuant to their own environmental policies, and the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction.

Because of the critical role forests play both as water towers as well as playing host to a multiplicity biological diversity, the Forests Act seems to have, partly been enacted to domesticate the provisions of Article 14 of the CBD regarding Kenya's obligations to take measures to prevent any damage or threatened damage to the ecosystem and biological diversity in the Kenya. It also ensures that proper measures are taken to safeguard the ecosystem and conserve biological diversity to achieve intra and inter-generational equity as well as sustainable development.

3.5.5 The Wildlife (Conservation & Management) Act[255]

This is an Act of Parliament that was enacted to consolidate and amend the law relating to the protection, conservation and management of wildlife in Kenya.[256]

Under section 3, it establishes an institution known as the Kenya Wildlife Service (KWS) to perform various functions as regards sustaining and conserving biodiversity. Of particular significance to this study is KWS's role in administering and coordinating international protocols, conventions and treaties regarding wildlife in all its aspects in consultation with the Minister.[257]

Although it was enacted before the adoption of the CBD, it contains provisions that ensure both the *in-situ*and *ex-situ* conservation of biodiversity by granting the Minister for the time being in charge of matters related to Wildlife the power to declare an area to be a Protected Area for the purposes of ensuring the security of the animal or vegetable life in a National Park or in a National Reserve or in a local sanctuary or for preserving the habitat and ecology thereof.[258]For instance, in implementing biodiversity measures under the CBD to protect the aloe plant, the Minister has promulgated the Wildlife (Conservation and Management) (Aloe Species) Regulations, 2007[259]through subsidiary legislation.

The Minister's powers to declare areas to be national parks,[260] national reserves,[261]and local sanctuaries[262] also aim at protecting wildlife and the biological diversity within the National Parks and Reserves so declared and thereby ensure that Kenya does not engage in activities that defeat the object and purpose of the CBD.

The Provisions of Part IV and V of the Act regarding the control of game hunting and the regulations regarding trophies and game hunting implement Kenya's obligations under Articles

[255]Supra, note 29.
[256]Ibid., Preamble.
[257]Ibid., Section 3A.
[258]Ibid., Section 15.
[259]Legal Notice No. 403 of 2007; available at http://www.kenyalaw.org/kenyalaw/klr_app/frames.php (accessed 13 September 2012).
[260]Supra, note 29, Section 6.
[261]Ibid.,Section 18.
[262]Ibid., Section 19.

II-V of CITES.[263] Various subsidiary legislations have been enacted pursuant to the powers granted under the Act in a bid to effectively implement Kenya's obligations under CITES. These include the Wildlife (conservation and Management) (Control of Raw Ivory) Regulations, 1976[264] which declare the importation and exportation of raw ivory illegal. Similarly, the Wildlife (Conservation and Management) (Prohibition on Hunting of Game Animals) Regulations[265]prohibits the hunting of game animals in Kenya.

3.6 Conclusion

The efficacy of the international environmental legal order consists not in the number of MEAs a country is party to, but in her effective implementation of her MEA obligations. The next Chapter, therefore, analyses the manner in which Kenya has implemented her MEA obligations in the field of biological diversity and ecosystem and habitat conservation.

[263] Supra, note 117.
[264]Legal Notice No. 57 of 1976; available at http://www.kenyalaw.org/kenyalaw/klr_app/frames.php, accessed 13 September 2012.
[265]Legal Notice No. 120 of 1977; available at http://www.kenyalaw.org/kenyalaw/klr_app/frames.php, accessed 13 September 2012.

CHAPTER FOUR

A CRITIQUE OF KENYA'S LEGAL, POLICY & INSTITUTIONAL FRAMEWORKS FOR IMPLEMENTING MEAs

4.1. Introduction

The 1969 Vienna Convention on the Law of Treaties recognizes the fundamental role of treaties in the history of international relations, and their ever-increasing importance as a source of international law and as a means of developing peaceful cooperation among nations.[266] It, further, provides that the consent of a State to be bound by a treaty may be expressed by signature, exchange of instruments constituting a treaty, ratification, acceptance, approval or accession, or by any other means if so agreed.[267]

By expressing its consent to be bound by a treaty, a State is, thereby, obliged to refrain from acts which would defeat the object and purpose of the treaty.[268]The rationale of this is that once the treaty is in force, it is binding upon the parties to it and must be performed by them in good faith by dint of the application of the doctrine of pactasuntservanda.[269]The State Party that has signified her intention to be bound by the terms of a treaty may not, therefore, whilst she remains a Party thereto, invoke the provisions of its internal law as justification for its failure to perform her obligations under such a treaty.[270]

Following the conclusion of the Stockholm and Rio Conferences, a plethora of MEAs were signed and ratified to give effect to the environmental principles enunciated during these Conferences. These MEAs imposed on States Parties the duty to implement various environmental obligations domestically. The implementation of these obligations entailed the adoption of policies as well as the enactment of laws or the amendment of existing laws to make them in harmony with the purport and intent of the MEAs. Kenya, being one of the countries

[266]1969 Convention on the Law of Treaties, (Vienna, 23 May 1969), UN Doc. A/Conf.39/27; 1155 UNTS 331; 63 AJIL 875 (1969); *reprinted* in 8 ILM 679 (1969), (came into force 27 January 1980); Preamble, paragraph 2.
[267]Ibid., Article 11.
[268]Ibid., Article 18.
[269]Ibid., Article 27.
[270]Ibid., Article 28.

which signed many of these MEAs, thereby bound herself to implement them domestically in order to fulfill her international environmental law obligations. As such, she is under an obligation not to do anything that would defeat the object and purpose of such MEAs as she has ratified.

The preceding Chapter discussed the manner in which Kenya has attempted to implement some of her MEA obligations in the realm of biodiversity and ecosystem and habitat conservation. The chapter focused on some of the policies that have been formulated as well as the laws that have been enacted to implement some of the MEAs that have been ratified by Kenya in the field of biodiversity and ecosystem and habitat conservation.This Chapter, therefore, analyses some critical issues regarding Kenya's implementation of her MEA obligations.

4.2 Lack of Public Participation & Prioritization of MEA Implementation

The implementation of MEAs is intended to ensure that they have legal force within the domestic sphere. Without such a force of law, it is impossible for violations of environmental obligations to be corrected. The treaty ratification practice discussed under Chapter 2 and the manner in which international legal obligations became subsumed in the domestic law made compromised the ability of Kenyan courts to effectively enforce the violation of MEA obligations in the field of biodiversity, ecosystem and habitat conservation. This was, partly because courts only exercise jurisdiction over matters which are defined by law.

The lack of a clearly defined place of international legal obligations and MEAs under the Repealed Constitutionis what may have partly prompted the enactment of Articles 2(5) and 2(6) in the Constitution of Kenya. In an attempt to address this situation, the Ratification of Treaties Bill, 2011 requires, *inter alia*, that a memorandum outlining the objects of the treaty in respect of which approval for ratification is sought as well as any arising constitutional issues and national interests which may be adversely affected be presented to the cabinet.[271] The Memorandum shall

[271] Ratification of Treaties Bill, 2011 (available at https://docs.google.com/a/tripleolaw.com/viewer?a=v&q=cache:uQO7ElyWnIJ:www.kenyalaw.org/klr/fileadmin/pdfdownloads/bills/2011/RATIFICATIONOFTREATIESBILL2011.doc+&hl=sw&gl=ke&pid=bl&srcid=ADGEESisGxp23O2FaT2aIaGiJpb21F97yXdUH3zDsspxGCwqNvM1M0DTa0yPMybut9WqVlLaYLevgBJDunKc5R0hwAp

contain a detailed explanation on how joining the treaty advances or threatens the interests of Kenya in the short-term or long term as well as any constitutional implications. This requirement is important because it will help in prioritizing the treaties that Kenya needs to ratify.

For instance, Kenya ratified the Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, Including the Moon and Other Celestial Bodies (hereinafter referred to as 'the Outer Space Treaty')[272] on 19th January, 1984.[273]The Outer Space Treaty provides, *inter alia*, that the exploration and use of outer space, including the moon and other celestial bodies, shall be carried out for the benefit and in the interests of all countries, and shall be the province of all mankind.[274]It also provides that outer space, including the moon and other celestial bodies, is not subject to national appropriation by claim of sovereignty, by means of use or occupation, or by any other means.[275]Further, it requires States Parties to undertake not to place in orbit around the Earth any objects carrying nuclear weapons or any other kinds of weapons of mass destruction.[276]

Kenya's priority, given her level of development then, was to battle endemic food insecurity arising from prolonged drought and a rapidly increasing population particularly in the wake of the prolonged drought in 1984/5.[277]The main challenge then was how to battle environmental degradation and come up with policies for enhancing proper land use, among other challenges. Space exploration was not a priority for the country in as much as it had not sufficiently developed industrially to undertake any space exploration; it did not even have means to massively invest in space research.

DAbmoRPwNzTnXDKu81lOE3zkB4yM_7TGt3S1Te3PrOlrNDW&sig=AHIEtbRDYWpPYrB0CJUuY15tOs7VsA4Oug&pli=1 (Accessed 18 November 2012); clause 4.

[272] 1967 Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, Including the Moon and Other Celestial Bodies, (adopted 27 January 1967), 18 UST 2410; TIAS No. 6347; 610 UNTS 205

[273]Information available at http://www.kenyalaw.org/treaties/treaties/67/Treaty-on-Principles-Governing-the-Activities-of-States (accessed 13 September 2012).

[274]Supra, note 7, Article I.

[275]Ibid., Article II.

[276]Ibid., Article IV.

[277]Monica Nyamwange, 'Famine Mitigation in Kenya: Some Practices, Impact and Lessons', (1995) 28 *Middle States Geographer 37-44.*

On the contrary, despite the Convention on the Conservation of Migratory Species of Wild Animals (hereinafter referred to as 'the Bonn Convention')[278]having been adopted in 1979, it was not until 1st May, 1999 that Kenya ratified it.[279] In its preamble, the Bonn Convention recognizes, *inter alia*, "the ever-growing value of wild animals and is "concerned particularly with those species of wild animals that migrate across or outside national jurisdictional boundaries." For this reason, the Convention recognizes that "the States are and must be the protectors of the migratory species of wild animals that live within or pass through their national jurisdictional boundaries."

Among the world's most famous and probably the most visited game reserve in this country is the Maasai Mara Game Reserve which is characterized by breath-taking sights due to the huge variety of wild animals to be found there, including the so-called "Big Five".[280] One of the 'annual spectacles' at the Maasai Mara National Reserve is "the annual migration of wildebeest, zebra and gazelle from the plains of the Serengeti that cross the Tanzanian border and rivers to reach the Mara's lush grassland from late June, hunted by the predators, the lion, leopard, cheetah, hyena and circled by vultures as the journey unfolds."[281]This annual wildebeest migration has been so spectacular as to be referred to as 'the Eighth Wonder of the World.'[282] Thousands of tourists come to the country to view this 'annual spectacle' every year in July/August when it occurs and, in the process, earn this country quite a tidy sum in foreign exchange.

The provisions of the Bonn Convention address this transboundary movement of wildlife between MaasaiMara in Kenya and Serengeti in Tanzania. This is because the wildebeest, zebra and gazelle that are involved in this annual migration constitute "migratory species" by virtue of

[278]1979 Convention on the Conservation of Migratory Species of Wild Animals, (Bonn, 23 June 1979), 1651 UNTS 333; *reprinted* in 19 ILM 15 (1980), (Entered into force 1 November 1983).
[279] The information on Kenya's ratification of the Bonn Convention is available at http://www.kenyalaw.org/treaties/treaties/76/Convention-on-the-Conservation-of-Migratory-Species (accessed 13 September 2012).
[280]Zijlma, Anouk. "The Big Five: Index", *Africa for Visitors;* article available at http://goafrica.about.com/od/africanwildlife/ss/The-Big-5-Images-Facts-And-Information-About-Africas-Big-Five.htm (accessed 13 September 2012).
[281]Government of Kenya, Ministry of Tourism and Wildlife, 'Masai Mara National Reserve', available at http://www.tourism.go.ke/wildlife_ministry.nsf/ministryparks/603833AF447C644543256AF6002F5A1A?opendocument&l=1&Count=5 (accessed 13 September 2012).
[282] Tracy Nnanwubar, 'The 8th Wonder of the World: Kenya's Wildebeest Migration', available at http://www.worldwinder.com/2011/11/24/the-8th-wonder-of-the-world-kenyas-wildebeest-migration/ (accessed 13 September 2012).

being 'cyclically and predictably cross one or more national jurisdictional boundaries' as contemplated under Article I of the Bonn Convention.

Under the Bonn Convention, the States Parties acknowledge the importance of migratory species being conserved and of range states agreeing to take action to this end, paying special attention to migratory species the conservation status of which is unfavourable.[283] Range States have the obligation, therefore, to promote, co-operate in and support research relating to migratory species, to provide immediate protection for migratory species included in Appendix I and to conclude agreements covering the conservation and management of migratory species.[284]

Under Article V of the Bonn Convention, the object of an agreement under Article II (3) shall be to restore the migratory species concerned to a favourable conservation status or to maintain it in such a status. Each such agreement should cover the whole of the range of the migratory species concerned and should be open to accession by all range states of that species. The agreement should, wherever possible, deal with more than one migratory species; it should, *inter alia*, identify the migratory species covered, describe the range and migration route of the migratory species and provide for each party to designate its national authority concerned with the implementation of the agreement and establish, if necessary, appropriate machinery to assist in carrying out the aims of the agreement.

This account of the '8th Wonder of the World' poses a couple of issues which impact adversely on Kenya's implementation of her MEA obligations. To begin with, 'in terms of national interests, the ratification of the Bonn Convention and Kenya's implementation of her obligations there under would have taken precedence over her ratification of the Outer Space Treaty. This is simply because the tourism sector is a major contributor to Kenya's Gross Domestic Product (GDP) by being one of the country's leading foreign-exchange-earner.

[283]Supra, note 13, Article II (1). Migratory species that have been categorized as being in danger of extinction throughout all or a significant proportion of their range are listed on Appendix I of the Convention. States strive towards strictly protecting these animals, conserving or restoring the habitats in which they live, mitigating obstacles to migration and controlling other factors that might endanger them. Additional migratory species can be listed on Appendix I if a Party considers that they are endangered, and submits a proposal, which meets the requirements of Resolution 1.5 (Bonn, 1985). Upon the recommendation of the Scientific Council, the Conference of the Parties (COP) would then decide whether to adopt the proposed in accordance with Art. XI. Migratory species can be removed from Appendix I when the Conference of the Parties (COP) determines that there is either reliable evidence, including the best scientific evidence available, that the species is no longer endangered and that it is not likely to become endangered again.

[284]Ibid., Article II (3).

For instance, from the Statistical Analysis of Tourism Trends carried out by the Ministry of Tourism and Wildlife, the sector's contribution to the Kenya's GDB averaged about 12% in2004.[285]Such growth has a multiplier effect on other sectors of the economy since the income so earned goes into improving infrastructural and other developments in the country. Before signing a MEA, it is necessary that a country assesses whether or not the MEA advances her national interests and whether she is able to, in good faith, perform her obligations. This is possible in an environment where there is transparency in the treaty ratification process such as has been proposed under clauses 4 and 5 of the Ratification of Treaties Bill, 2011 by which ratification follows the publication of a Bill setting out pertinent matters that the treaty under consideration addresses for consideration and approval by Parliament.

4.3 Absence of a Time-frame Within Which to Enact Implementing Legislation upon the Ratification of a MEA

There is a lacuna in Kenya's treaty practice by way of the absence of a timeframe within which the Executive, upon ratification or adoption of a treaty, should present the treaty to Parliament for debate and enactment of an enabling domestic legislation to implement its obligations. For instance, whereas Kenya ratified the Vienna Convention on Diplomatic Relations in 1965,[286] it did not enact the domestic implementing law, the Diplomatic Privileges and Immunities Act[287] until 1970.

Kenya also took part in the negotiations and the adoption of the United Nations Convention on the Law of the Sea in 1982[288] but it was not until 1989, almost seven years later, that it ratified it. The same situation happened as regards the 1998 Rotterdam Convention on the Prior Informed

[285]Republic of Kenya, Ministry of Tourism and Wildlife, Statistical Analysis of Tourism Trends (Globally and Locally), (November, 2006); available at http://www.tourism.go.ke/ministry.nsf/doc/Tourism_Trends_OCT2006_Revised.pdf/$file/Tourism_Trends_OCT2006_Revised.pdf (accessed 13 September 2012).
[286]1965 Convention on Diplomatic Relations (Vienna, 18 April 1961), 500 UNTS 95; UST 3227; 55 AJIL 1064 (1961); TIAS No. 7502 (Entered into Force 24 April 1964).
[287] Diplomatic Privileges and Immunities Act (Cap. 179), Laws of Kenya (Revised Edition, 1984).
[288] 1982 United Nations Convention on the Law of the Sea, (Montego Bay, December 10, 1982), G.A. res. 65/37, U.N. Doc A/65/L.20; 1833 UNTS 3, 397;*reprinted* in 21 ILM 1261 (1982), (Entered into force 14 November 1994).

Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade[289] which, though signed by Kenya on 11th September, 1998, it was not until February 2005 that Kenya finally ratified it.Similarly, whereas Kenya took part in the negotiations and adoption of the Lusaka Agreement Concerning Co-operative Enforcement Operations Directed at Illegal Trade in Wild Fauna and Flora in 1994, it was not until 1997 that it ratified it.[290]

Under these circumstances, there is the danger of people being engaged in acts that may defeat the objects and purposes of the treaty which, though signed, is yet to be ratified. This is so because whilst a treaty imposes obligations on the ratifying state, the discharge of those implications is not possible if the same have not been brought into Parliament for approval before they become effective domestically, as legislation. Without enabling legislation being in place, the fulfillment of treaty obligations on the domestic front may be problematic.

4.4 The Case of Lack of Good Faith

As regards the 'Eighth Wonder of the World', despite the extreme importance of the 'annual wildebeest migration' to Kenya's tourism sector and economy in general, and the importance of Kenya implementing her obligations under the Bonn Convention with a view to safeguarding this, Kenya has not implemented this Convention. She has not signed any agreement under Articles IV and V with Tanzania, a range State as far as the 'annual wildebeest migration' is concerned.

Kenya has also not implemented her obligations under the Bonn Convention as regards taking steps to prevent, reduce or control factors that are endangering or are likely to further endanger the migratory species [wildebeest, zebra and gazelle] once they are beyond her borders. Under the Wildlife (Conservation and Management) (Prohibition of Hunting of Game Animals)

[289] 1998 Convention on the Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade (Rotterdam 10 September 1998), 2244 UNTS 337; *reprinted* in 38 ILM 1 (1999), (Entered into force 24 February 2004).
[290] 1994 Lusaka Agreement Concerning Co-operative Enforcement Operations Directed at Illegal Trade in Wild Fauna and Flora, "About Us," *available* at http://www.lusakaagreement.org/about.html, (accessed 19 November 2012).

Regulations 1976,[291]hunting of game animals was prohibited in Kenya. These Regulations were made pursuant to the Wildlife (Conservation and Management) Act.[292]On the other hand, since land and wildlife in Tanzania is owned by the Tanzanian government, the government of Tanzania has the power, through the Wildlife Division in the Ministry of Natural Resources and Tourism under it relevant law governing wildlife, to grant hunting licences to hunters upon fulfilling prescribed conditions and, as such, hunting of game animals is not prohibited.[293]This means that while the range animals that are a subject of the 'annual wildebeest migration' are protected from hunters by Kenyan laws, they are not so protected the moment they are on Tanzanian territory. Kenya has failed to take any measures to ensure the joint management between Kenya and Tanzania of these migratory species of wild animals.

Consequently, the failure by the Government of Kenya to implement the obligations under the Bonn Convention, particularly as regards entering into an agreement with her range state counterpart, Tanzania, as regards the protection of wildebeest, zebras and gazelles upon their migration to Tanzania is likely to defeat the objects and purpose of the Convention since the animals are free to be hunted while in Tanzania. This poses a serious threat on the survival of these migratory species and their future sustainability. Given the danger posed to the survival of these migratory species by Kenya's failure to act in the face of Tanzania's game-hunting policies, it cannot be said that Kenya has upheld her obligations under the Bonn Convention in good faith.

It is open for Kenya, in the event that Tanzania refuses to negotiate agreements such as are contemplated under the Bonn Convention to declare a dispute and, in terms of Article XIII of the Convention, seek the available mechanisms to handle the situation. The failure by a range state to perform MEA obligations regarding the conservation and management of shared resources is a

[291]Legal Notice No. 120 of 1977, available at http://www.kenyalaw.org/kenyalaw/klr_app/frames.php, accessed 23 September 2012.
[292] Wildlife (Conservation and Management) Act (Cap. 376), Laws of Kenya (Revised edition, 2009 (1985).
[293]'Hunting for Sustainability: Research on the Wider Meaning of Hunting', available at http://fp7hunt.net/Portals/HUNT/Publikasjoner/factsheets/Hunting%20in%20tanzania.pdf (accessed 13 September 2012); See also International Union for Conservation of Nature (IUCN), 'Big Hunting in West Africa: What is its Contribution to Conservation?', available at http://www.wildlifeextra.com/resources/doc/misc/big_game_hunting.pdf (accessed 13 September 2012).

breach of the customary international law rule of *sicuteretuoutalienam non laedas*[294] as was aptly laid down in the *Trail Smelter Arbitration*.[295]

4.5 Inadequacy of Legislation to Implement MEAs

The environmental obligations in most treaties are usually domesticated into municipal legislation by enactment in statutes, usually by having the relevant MEA identified by name in the definition section of the Act. Alternatively, this is achieved by having a statute lay down rules that are in conformity with the treaty requirements, such as, for instance, the establishment substantive rules of environmental standards.[296]

Kenya has enacted several enabling statutes and put in place various institutions to implement her treaty obligations in order to give them the force of law domestically. For instance, she enacted the Geneva Conventions Act,[297] the Diplomatic Privileges and Immunities Act,[298] the Bretton Woods Agreements Act,[299]the Investments Disputes Convention Act,[300] the Treaty for the Establishment of the East African Community Act,[301]were enacted to implement substantial provisions of the respective treaties as schedules to the domesticating legislation. The Preamble to the Geneva Conventions Act, for instance, defines it as "an Act of Parliament to enable effect to be given to certain international conventions done at Geneva on the 12th August, 1949 and for purposes incidental thereto." The Conventions under reference are set out in full under the Schedules to the Geneva Conventions Act as follows:

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[294]*The Corfu Channel Case (U.K. v Albania)* (1949) ICJ Rep 22 – The general principle that a state is obliged not to use its territory contrary to the rights of other states was enshrined by the ICJ. The s*ic uteretuo* principle was expressed as follows "No state has a right to use or permit its territory to be used in such a manner as to cause injury on, or to the territory of another or the properties of persons therein."

[295]*Trail Smelter Arbitration* (1939) 33 *AJIL* 182; & (1941) 35 *AJIL* 684. It rose out of a dispute between the United States and Canada over pollution through the emission of sulphur dioxide fumes arising from a smelter situated on Canadian territory of British Columbia and which caused damage in the State of Washington, culminated into the holding that under the principles of international law, no State has the right to use or permit the use of its territory in such a manner as to cause injury by fumes in or to the territory of another or the properties or persons therein, when the case is of serious consequence and the injury is established by clear and convincing evidence.

[296]UNEP: Multilateral Environmental Agreements (MEA) Implementation in the Caribbean: Report and Guidelines, (Mexico City, Mexico, July, 2000), available at http://www.pnuma.org/deramb/publicaciones/amafinal.pdf, accessed 20 August 2012, p. 15.

[297] Geneva Conventions Act (Cap. 198), Laws of Kenya (Revised Edition, 1970).

[298] Supra, note 22.

[299] Bretton Woods Agreements Act (Cap. 464), Laws of Kenya (Revised Edition, 1991).

[300]Investments Disputes Act (Cap. 522), Laws of Kenya (Revised Edition, 1967).

[301]The Treaty for the Establishment of the East African Community Act (Act No. 2 of 2000).

a) First Schedule - Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field;[302]
b) Second Schedule – Geneva Convention for the Amelioration of the Condition of Wounded Sick and Shipwrecked Members of the Armed Forces;[303]
c) Third Schedule – Geneva Convention Relative to the Treatment of Prisoners of War;[304]
d) Fourth Schedule – Geneva Convention Relative to the Protection of Civilian Persons in Time of War.[305]

A different scenario obtains in the in the realm of environmental law where the domesticto implementation of treaties has been undertaken in an inconsistent and piecemeal manner; there is a scarcity of Acts of Parliament that wholly incorporate the provisions of MEA to which Kenya is a party. The Plant Protection Act[306]seeks to domesticate the obligations under the 1951 International Plant Protection Convention (as amended).[307]The Seeds and Plant Varieties Act[308]also attempts to implementthe 1961 International Convention for the Protection of New Varieties of Plants.[309] Nonetheless, it is only after one reads the objectives of the Conventions and compares them with the texts of these statutes that it can be deduced that these legislation make an attempt to domesticate those respective MEA obligations. The 1992 CBD and its Protocol, the Cartagena Protocol, as well as the1985 Nairobi Convention and its Protocol have

[302]1949 International Committee of the Red Sea (ICRC), Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (First Geneva Convention), 12 August 1949, 75 UNTS 31, available at: http://www.unhcr.org/refworld/docid/3ae6b3694.html (accessed 24 October 2012).
[303]1949 International Committee of the Red Cross (ICRC), Geneva Convention for the Amelioration of the Condition of Wounded Sick and Shipwrecked Members of the Armed Forces at Sea,12 August 1949, 75 UNTS 85, available at:
http://www.unhcr.org/refworld/docid/3ae6b37927.html (accessed 24 October 2012).
[304]1949 International Committee of the Red Cross (ICRC), Geneva Convention Relative to the Treatment of Prisoners of War (Third Geneva Convention), 12 August 1949, 75 UNTS 135, available at: http://www.unhcr.org/refworld/docid/3ae6b36c8.html (accessed 24 October 2012).
[305]1949 International Committee of the Red Cross (ICRC), Geneva Convention Relative to the Protection of Civilian Persons in Time of War (Fourth Geneva Convention), 12 August 1949, 75 UNTS 287, available at:
http://www.unhcr.org/refworld/docid/3ae6b36d2.html (accessed 24 October 2012).
[306]Plant Protection Act (Cap. 324), Laws of Kenya (Revised edition, 1979).
[307]1951 International Plant Protection Convention, (Rome, 6 December 1951), 23 UST 2767, 150 UNTS 67 (Revised Nov. 28, 1979). It entered into force for Kenya on 7 May 1974.
[308]Seeds and Plant Varieties Act (Cap. 326), Laws of Kenya (Revised edition, 1991).
[309] 1961 International Convention for the Protection of New Varieties of Plants, as revised in 1972, 1978 and 1991, (Paris, 02 December 1961), [2000] ATS 6; 33 UST 2703; 815 UNTS 89 (entered into force 24 April 1998).

provisions that are referred to in the Environmental Management and Co-ordination Act[310] and the Forests Act.[311]

In many cases, the obligations of some MEAs which Kenya has ratified have not been implemented at all. For instance, the International Treaty on Plant Genetic Resources for Food and Agriculture aims to, in harmony with the Convention on Biological Diversity,[312] achieve the conservation and sustainable use of plant genetic resources for food and agriculture and the fair and equitable sharing of the benefits arising out of their use.[313] It, thus, places obligations on States Parties to take measures to promote an integrated approach to the exploration, conservation and sustainable use of plant genetic resources, food and agriculture, and to develop and maintain appropriate policy and legal measures that promote the sustainable use of plant genetic resources for food and agriculture.[314] Yet, despite Kenya having acceded to this Treaty in 2003, it is yet to adopt any policy or legal measure to implement its provisions.

In most cases in Kenya, provisions of a single MEA may be found in more than one piece of legislation, often dealing with different subject matters. The downside of this scenario is that it is very possible, as it often is, that the subject matter of a MEA is not covered in its entirety. Such a state of affairs raises the important concern regarding the extent to which the country is committed to the MEA obligations it has agreed to be bound by and hence its fidelity to the principle, *pactasuntservanda*.

For example, Kenya has ratified the 1946 International Convention for the Regulation of Whaling,[315]which, under Article IX obliges States Parties to, inter alia, take appropriate measures to ensure the application of the provisions of the Convention and to prosecute infractions against the Convention. The Convention also, under Article V, obliges Kenya to adopt regulations with respect to the conservation and utilization of whale resources by, among other things, fixing open and closed seasons and prescribing the time, method and intensity of whaling. Nonetheless,

[310] Act No. 8 of 1999, sections 50-53.
[311] Act No. 7 of 2005, sections 26, 28, 36, 41, 46 and 47.
[312]1992 Convention on Biological Diversity, (Rio de Janeiro, 05 June 1992), G.A. Res. 117, U.N. GAOR, 49th Sess., Supp. No. 49, at 143; U.N. Doc. A/RES/49/117 (1994); *reprinted* in 31 ILM 818 (1992), (entered into force 29 December 1993).
[313]UNEP, Register of International Treaties and other Agreements of Environment (UNEP, Nairobi, 2005), p.730..
[314]Ibid., Articles 5 and 6.
[315]1946 International Convention for the Regulation of Whaling, 2 December 1946, 62 Stat. 1716; 161 UNTS 72 (as amended, 19 November 1956, 338 UNTS 336). The Convention entered into force for Kenya on 2 December 1981.

Kenya's fisheries legislation, the Fisheries Act,[316] makes no specific mention of whaling within its maritime zones.

Similarly, although Kenya acceded to the International Treaty on Plant and Genetic Resources for Food and Agriculture,[317]to date, it has not adopted any policy or legal framework to implement its obligations under this MEA.

The Wildlife (Management and Conservation) Act,[318], for instance, which is enacted to consolidate and amend the law relating to the protection, conservation and management of wildlife in Kenya, does not contain provisions requiring the sharing of benefits arising from access to and utilization of wildlife resources, and is also silent on the participation of local populations in the area within which national parks, national reserves and other protected areas for wildlife conservation are situated.[319] Although the CBD was adopted long after the Wildlife (Conservation and Management) Act, at the very least, these provisions should have been incorporated in the Act by way of amendments or through subsidiary legislation so as to have them applied domestically. Indeed, this failure is a marked departure from Principle 1 of the Rio Declaration that posits that human beings are at the centre of concerns for sustainable development and are, to this extent, entitled to a healthy and productive life in harmony with nature. Even though both the 1972 Stockhom Declaration and the 1992 Rio Declaration are no more than Statement of political consensus arrived at by the attending state and thereby lack any binding effect upon member states, to the extent that they have largely informed the principles contained in various MEAs, good faith on the part of States that have ratified these MEAs demands that the principles be given effect to.

As a result, the Act has not adequately addressed the causes of the many human-wildlife conflicts which have been cited to include weakened traditional governance in pastoral areas, socio-economic and political marginalization, inadequate land tenure policies and competition

[316]Fisheries Act (Cap. 378), Laws of Kenya (Revised Edition, 1991).
[317]Gerstetter, Christiane, Benjamin Gorlach, Kirsten Neumann and Dora Schaffrin 2007: 'The International Treaty on Plant and Genetic Resources for Food and Agriculture Within the Current Legal Regime Complex on Plant Genetic Resources" Vol, 10, No. 3-4 Journal of World Intellectual Property 259-283.
[318]Supra, note 27.
[319]Patricia KameriMbote& Philippe Cullet, Biological Diversity Management in Africa: Policy Perspectives, available at http://www.ielrc.org/content/w9902.pdf (accessed 20 August 2012).

between humans and wildlife for grazing lands.[320]By failing to adequately put in place a proper legal framework that incorporates important international environmental law principles, the Wildlife (Management and Conservation) Act[321] has not fully played its role in the conservation of wildlife as local populations who have been at the centre of the incessant wildlife-human conflicts have not been sufficiently convinced to identify any utility in conserving wildlife. The numerous reported cases of bloody encounters between wildlife and local populations living in close proximity to protected areas such as national parks and game reserves is ample testimony of the inadequate attention the Act has placed on the issue of wildlife conservation as well as biological diversity.[322]

Secondly, land use is one of the areas that has a direct impact on the environment, either positively or negatively particularly in a country whose economy depends a great deal on agriculture. Proper regulations, policies and laws to ensure sustainable use of agricultural land have to be enacted since the major impacts on the environment by agriculture are as a result of poor land management and agricultural practices.[323]

According to the Draft Sessional Paper No. 6 of 1999 on Environment and Development,[324] population pressure in the medium and high potential areas induced migration into the fragile arid and semi-arid ecosystems. This opened up these lands to arable agriculture, a process that entailed the clearing of the vegetation cover thus exposing the soils to erosion processes with the result that where arable agriculture substituted livestock rearing and wildlife in these zones. Eventually, it led to low level production and the shifting of livestock to more arid zones where

[320]Roselyne N Okech, Wildlife-Community Conflicts in Conservation Areas in Kenya, available at http://www.ajol.info/index.php/ajcr/article/viewFile/63311/51194 (accessed 21 August 2012).
[321] Supra, note 27.
[322]See 'Living With Elephants: Human-Wildlife Conflict in the Mt. Kenya Area, article available athttp://www.ruralpovertyportal.org/web/rural-poverty-portal/country/voice/tags/kenya/elephants (accessed 20 August, 2012); Capital FM News, 'Six Lions Killed in Kenya Capital's Urban Jungle, available at http://www.capitalfm.co.ke/news/2012/06/six-lions-killed-in-kenya-capitals-urban-jungle/ (accessed 21 August 2012).
[323] Government of Kenya, Ministry of Environmental Conservation, Sessional Paper No. 6 of 1999 on Environment and Development, available at http://www.fankenya.org/downloads/Kenya%27sDraftEnvironmentPolicy.pdf (accessed 20 August 2012).
[324] Government of Kenya, Ministry of Environmental Conservation, Sessional Paper No. 6 of 1999 on Environment and Development, available at http://www.fankenya.org/downloads/Kenya%27sDraftEnvironmentPolicy.pdf (accessed 19 November 2012).

the resultant overstocking led to serious degradation.[325]Besides, land tenure system and the cultural norms relating to the land ownership, coupled with the growing population, have led to the uneconomic sub-division of land in some areas and this has, in turn, led to unsuitable land management practices that have resulted into environmental degradation.[326]

The principal legislation regulating land use and agriculture is the Agriculture Act which was enacted to promote and maintain a stable agriculture, to provide for the conservation of the soil and its fertility and to stimulate the development of agricultural land in accordance with the accepted practices of good land management and good husbandry.[327] The Act empowers the minister responsible for agriculture to make land preservation rules to regulate, control, and prohibit the firing, clearing or destruction of vegetation including stubble for the purposes of cultivation, grazing, or watering of livestock with a view to protecting the land against floods, landslides, formation of gullies, soil erosion, or destruction from roads or other infrastructural developments, requiring the afforestation or re-afforestation of land and prohibiting, restricting or controlling the use of land for any agricultural purpose including the de-pasturing of stock.[328]

Considering that the Agriculture Act was enacted in 1955 way before most MEAs relating to environmental conservation were adopted, its unique role in environmental conservation and sustainable development, at the very least, merited amendments to enable it effectively implement the MEA obligations that Kenya bound herself to undertake by signing the various biodiversity conventions. The Draft Sessional Paper No. 6 of 1999 on the Environment and Development, for instance, identifies some of the failures on the part of the Agriculture Act to effectively implement Kenya's MEA obligations particularly in the realm of biological diversity. These include inadequate environmental considerations in the existing policies or legislation (the Agriculture Act), overlaps in some existing legislation thus creating conflicts in law enforcement, land uses and agricultural practices which have little environment and resource sustainability, particularly in the Arid and Semi-Arid Lands (ASALs), inadequate policies on public participation and involvement in development and implementation of environmental

[325]Ibid., p.18.
[326]Ibid.
[327]Agriculture Act (Cap. 318), Laws of Kenya (Revised Edition, 2009 (1984), Preamble.
[328]Ibid., section 48.

programmes for land use and agricultural activities in the ASALs, over-reliance on agro-chemicals that are potentially harmful to the soil and water and apathy with regard to the environment and land use zoning policy, implementation and law enforcement.[329]

It is due to the foregoing reasons that the Draft Sessional Paper No. 6 of 1999 on the Environment and Development concludes that the existing legislations and policies on land use and management have, in a nutshell, failed to, *inter alia*, promote land tenure systems that enhance agricultural production and sustainable land use, incorporate environmental concerns in the promotion of land use and agricultural programmes and practices, involve the public in the development and implementation of environmental policies and programmes for land use and agricultural practices, particularly in ASALs, wetlands, and in ecologically fragile areas, promote research into and adoption of appropriate land use systems and technology, establish mechanisms to monitor and assess the rate and extent of land degradation, review land use policies with a view to enhancing existing policies relating to conservation and management of soil and to institute land law reform to support sustainable development.[330]

MEAs, such as the CBD and the Ramsar Convention, oblige States Parties to take steps within their domestic legal systems to give effect to the treaty. In situations such as have been highlighted above, there is a failure by Kenya to take effective steps to implement her MEA obligations.

4.6 The Government's Failure to Take Timely Steps to Avert the Destruction of the Ecosystem

As regards forests, cases of massive destruction of forests with the attendant threats to their ecological functions, such as the prevention of soil erosion, protection of water catchments, wildlife habitat and conservation of valuable gene pools of flora and fauna, have now become an almost daily occurrence in Kenya.[331] The Forests Act[332] is the main statute that deals with

[329]Supra, note 59, pages 19-20.
[330]Ibid., pp.20-21.
[331]Ibid., p.22.
[332]Act No. 7 of 2005.

matters related to forests and forest products. It provides for the establishment, development and sustainable management, including conservation and rational utilization, of forest resources for the socio-economic development of the country. Its preamble recognizes, inter alia, that forests provide the main locus of Kenya's biological diversity by being a major habitat for wildlife. The Timber Act[333]similarly, provides for the more effective control of the sale and export of timber, for the grading inspection and marking of timber, for control of the handling of timber in transit and for incidental purposes.

Excessive deforestation and forest degradation, among other things, deprive wildlife of habitat and make them more vulnerable to hunting by causing loss of biodiversity since about 80% of the world's documented species can be found in tropical rainforests.[334] Deforestation also upsets the carbon dioxide balance in the atmosphere thereby resulting into adverse climatic changes such as global warming, a disruption of water cycles since trees no longer effectively evaporate ground water.[335] It also increases soil erosion by increasing runoff and reducing the protection of the soil from tree litter, and disrupts livelihoods since millions of people rely directly on forests through agriculture, hunting and gathering and harvesting forest products, such as rubber and, in many cases, deforestation has resulted into violent conflicts due to competition for ever-shrinking resources.[336]

The Interim Co-ordinating Secretariat on the Rehabilitation of the Mau Forest Ecosystem, for instance, notes in its Report that most of the forest areas at Mau which are under the management and responsibility of the Kenya Forest Service, with the exception of the Mau forest which is a Trust Land Forest under the management of the Narok County, is under increasing threat from irregular and ill-planned settlements, encroachments and illegal forest resource exploitation which has resulted into the loss of approximately 25% of Mau forest to excisions and encroachment.[337]

[333]Timber Act (Cap. 386), Laws of Kenya (Revised Edition 2009 (1972).
[334]WWF Global, *'Deforestation'*, available at http://wwf.panda.org/about_our_earth/about_forests/deforestation/ (accessed 20 August 2012).
[335]Ibid.
[336]Ibid.
[337] A Project Concept prepared by the Interim Coordinating Secretariat, Office of the Prime Minister, 'Rehabilitation of the Mau Forest Ecosystem, available at:

The Secretariat further notes with concern the pace and severity of destruction and degradation of Kenya's forests and the increasing publicity it has generated which is caused by the change of land use from forest to agriculture, and change in ownership from public to private resulting in extensive encroachment as well as irregular forest land allocation that has exacerbated an already serious situation.[338] The Reports lists further adverse impacts of the continued destruction of the forests to include the fact that perennial rivers are becoming seasonal and there is an increase in storm flow and downstream flooding, the drop of the aquifer by some 100 meters in some places and the drying up of wells and springs, in addition to global concerns resulting from loss of biodiversity, and increased carbon dioxide emissions due to loss of forest cover loss.[339]

Similar cases of forest destruction have been reported in Mount Kenya which plays a critical role in water catchment for the country as well as its rich biodiversity.[340] Also, because of its natural beauty and unique ecosystems, Mt. Kenya was designated as a UNESCO World Heritage Site in 1997.[341] About 67,000 hectares of forestland was excised from Mt. Kenya in or around the year 2001 through Gazette Notices published by the Minister for Agriculture.[342]

Despite its critical role in sustaining current economic development, the Mt. Kenya forest and Mau Complex's degraded state as a key water towers is testimony of the systematic failure by the institutions charged with regulating forestry activities in and around the complex to deal with ill-planned settlements, encroachments and illegal extraction of forest resources and the abuse of powers to de-gazette forest reserves which have been used to alienate forest land through excisions and continuous widespread encroachments which have led to the destruction of over 107,000 hectares over the last two decades, representing over 25 percent of the Mau.[343]The excised areas are the critical upper catchments areas for the rivers and lakes that are fed by the

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http:/23
/www.kws.org/export/sites/kws/info/maurestoration/maupublications/Mau_Forest_Complex_Concept_paper.pdf (accessed 23 August 2012).

[338]Supra, note 43.

[339]Ibid.

[340]KWS, Aerial Survey of the Destruction of Mount Kenya, Imenti and Ngare-Ndare Forest Reserves (February-June, 1999), available at http://www.unep.org/expeditions/docs/Mt-Kenya-report_Aerial%20survey%201999.pdf, accessed 18 September 2012.

[341]UNEP, Mount Kenya National Park/Natural Forest Kenya, available at http://www.unep-wcmc.org/medialibrary/2011/06/28/af4ab5ef/Mount%20Kenya.pdf, accessed 18 September 2012.

[342]East African Wildlife Society, 'Kenya Forests Working Group', 10 October 2012, available at http://www.eawildlife.org/projects/forests/kfwg, accessed 18 September 2012.

[343]Ibid.

Mau and included both the bamboo forests with high catchment values and biodiversity-rich areas.[344]

The systematic degradation of the Mau Complex and the Mt. Kenya forest was undertaken following the de-gazettement of large areas of forest land by the Government of Kenya to grant titles thereto to private individuals. Some of these notices are annexed to this Chapter.

The excision of these forests was effected through invoking powers that reposed in the Minister under the Forests Act (repealed) which allowed him, from time to time and upon gazettement, to declare that a forest area would cease being a forest area.[345]Despite being signatory to various MEAs that enjoin the government to take steps to conserve its biodiversity and ecosystem, the government excised all these lands and issued titles thereto to private individuals. By these titles, the private individuals who had been allocated these lands that were previously forest lands became the absolute and indefeasible proprietors thereof as the lands ceased being under the protection of the Government.[346]

The new proprietors of these excised lands then had a free hand to cut down the trees then growing on those former forest lands and to convert the lands for agricultural purposes. The rich biological diversity that reposed in the forest lands so allocated was effectively destroyed and, with this destruction, as has been seen from the Reports on the destruction of Mau Forest, the wetlands suffered immeasurable harm. These and many other instances of the alteration of forest land shows that the government which was tasked with the obligation of not doing anything that would defeat the object and purpose of the MEAs she has ratified was actively engaged in activities that did the exact opposite of what was expected of her under the MEAs.

Under the new Forests Act,[347]in a departure from the position in the repealed Forests Act, the proposal to vary the boundaries of a forest area cannot be undertaken without the approval of the forest conservation committees in the area where the forest in question is situated and the Kenya Forest Service upon being satisfied that the proposed excision does not endanger any rare or

[344]Ibid.
[345]Forests Act (Cap. 385), Laws of Kenya (repealed by section 64 of the Forests Act (Cap 7 of 2005), section 4.
[346]For instance, under the Registered Lands Act (Cap. 300), Laws of Kenya [now repealed], section 23 conferred the holder of a certificate of Title thereunder the absolute and indefeasible proprietor thereof with the powers to use and dispose of such land as he deemed fit.
[347]Forests Act (Act No. 7 of 2005), section 28.

endangered species, does not affect its value as a water catchment area and does not prejudice biodiversity conservation. There is also the important requirement for prior adequate public consultation, coupled with an environmental impact assessment of the area before a de-gazettement of a forest area is undertaken. The Act thereafter requires that the proposal which has been subjected to all the stipulated conditions be referred to the Minister in charge of Forestry and Wildlife who shall have it published in a Gazette Notice and then forward it to Parliament to have it ratified by a resolution of Parliament.

Whereas the Environmental Management and Co-ordination Act [hereinafter referred to as 'EMCA'] was in force while the excisions referred to above were going on, no attempts were made by the relevant government institutions to observe, particularly the provisions of Part V of EMCA regarding the protection and conservation of the environment. For instance, no environmental impact assessment (EIA) was carried out despite the requirements for such EIAs in accordance with Part VI of EMCA.

Having ratified a number of MEAs, Kenya has obligations under international law *vis-à-vis* the conservation and sustainable management of the Mau Complex and other forests and water catchment areas. For instance, under the 1971 Ramsar Convention on Wetlands of International Importance Especially as Waterfowl Habitat,[348]Lake Nakuru National Park was recognized as a wetland of international importance in 1990, especially as waterfowl habitat and listed as a Ramsar Site Number 476.[349] By virtue of this listing, Kenya is obliged to "formulate and implement its planning so as to promote the conservation of the wetlands included in the List."[350]

In the same way, under the 1992 Convention on Biological Diversity,[351] Kenya has the obligation to, among others, "establish a system of protected areas or areas where special measures need to be taken to conserve biological diversity"; "promote the protection of ecosystems, natural habitats and the maintenance of viable populations of species in natural

[348]1971 Convention on Wetlands of International Importance Especially as Waterfowl Habitat (Ramsar, 11 February 1971), Vol. 996, I-I-1583, 996 UNTS 245 (Entered into force 21 December 1975).
[349]Eric O. Odada, Jackson Raini and Robert Ndetei, 'Experience and Lesson Learnt Brief', available at http://www.ilec.or.jp/eg/lbmi/pdf/18_Lake_Nakuru_27February2006.pdf, accessed 23 September 2012. The Listing was done in fulfilment of the obligations under Article 2 of the Ramsar Convention.
[350]Supra, note 73, Article 3.
[351]1992 Convention on Biological Diversity, (Rio de Janeiro, 05 June 1992), G.A. Res. 117, U.N. GAOR, 49th Sess., Supp. No. 49, at 143, U.N. Doc. A/RES/49/117 (1994); 1760 UNTS 79, 143; *reprinted* in 31 ILM. 818 (1992), (entered into force 29 December 1993)

surroundings"; "promote environmentally sound and sustainable development in areas adjacent to protected areas with a view to furthering protection of these areas; and "rehabilitate and restore degraded ecosystems."[352]

As discussed above, the exercise of the powers vested in the Minister for Environment and Natural Resources under the repealed Forests Act had the effect of shifting the stewardship of forests which constituted 'protected areas' as contemplated under the CBD into privately owned entities which lacked such 'protected status'. This resulted into the destruction of rich biodiversity in the formerly forested lands and thereby defeated the very objects and purposes of the CBD which Kenya had, by ratifying, bound herself to uphold.

Under the1992 United Nations Framework Convention on Climate Change,[353]Kenya commits herself to, inter alia, "formulate, implement, publish and regularly update national and, where appropriate, regional programmes containing measures to mitigate climate change by addressing anthropogenic emissions by sources and removals by sinks of all greenhouse gases not controlled by the Montreal Protocol, and measures to facilitate adequate adaptation to climate change…promote and cooperate in the conservation and enhancement, as appropriate, of sinks and reservoirs of all greenhouse gases […], including biomass, forests and oceans, as well as other terrestrial, coastal and marine ecosystems."[354]

The de-gazettement of hitherto forested areas which has occurred upon the exercise of the Minister's powers referred to herein, has the effect of decimating the available forest cover and does not fulfill the function of conserving or enhancing sinks and reservoirs of greenhouse gases. It therefore defeats the objects and purposes of the CBD.

The 1999 East African Treaty[355] requires States Parties, including Kenya, to commit themselves to "taking concerted measures to foster co-operation in the joint and efficient management and the sustainable utilization of natural resources within the Community for the mutual benefit of the Partner States by taking necessary measures to conserve their natural resources, co-operating

[352]Ibid., Articles 8 and 9 on *in-situ* and *ex-situ* conservation obligations respectively.
[353]1982 United Nations Convention on the Law of the Sea, (Montego Bay, December 10, 1982), G.A. res. 65/37, U.N. Doc A/65/L.20; 1833 UNTS 3, 397; *reprinted* in 21 ILM 1261 (1982), (Entered into force 14 November 1994).
[354]Ibid., Article 4 on commitments from Member States.
[355]1999 East African Community Treaty, (adopted 30 November 1999), (entered into force 7 July 2000), full text of treaty available at http://www.eacj.org/docs/Treaty-as%20amended.pdf (accessed 19 September 2012).

in the management of their natural resources for the conservation of the eco-systems and the arrest of environmental degradation, and by adopting common regulations for the protection of shared aquatic and terrestrial resources."[356]

The Mara River originates from the Mau Forest in Kenya and flows through Maasai Mara National Reserve in Kenya and Serengeti National Park in Tanzania before draining into Lake Victoria in Tanzania.[357] The Mara River Basin is rich in biodiversity and is at the centre of the 'annual wildebeest migration' between Kenya and Tanzania. The Mara River Basin is, however, threatened by habitat modification and fragmentation, a reduction in vegetation cover and species diversity, and over-exploitation and competition from invasive species, mainly as a consequence of human population growth and it is necessary, therefore, that by virtue of their membership of both the Bonn Convention and the East African Community (EAC), Kenya and Tanzania take steps to curtail continued destruction. The destruction of the water catchment areas around the Mau Forest as shown by the preceding account, shows the level at which Kenya has been culpable in what can amount to a failure to uphold her environmental obligations under Article 114 of the EAC Treaty as well as the CBD and the Bonn Convention.

On another note, the recent plans by the Government of Tanzania to construct a highway through the northern Serengeti to link the Mara region next to Lake Victoria with regions in the east that have access to the coast has been determined by environmental experts to have a potential adverse impact on the environment.[358]Some of the environmental problems associated with this proposed development include the fact that the northern Serengeti and the adjacent Maasai Mara in Kenya is the only refuge area for the migrating herds of wildebeest, gazelle and zebra during the difficult time of year when food and water is limited elsewhere.[359] This being so, since the animals reside in this area for four to six months, the highway is likely to prevent or disturb their migration to some parts of Tanzania and thereby potentially lead to the collapse of the migratory populations.[360] Besides, the construction of a commercial route usually attracts human

[356]Ibid., Article 111.
[357] '*Biodiversity Strategy and Action Plan for Sustainable Management of Mara River Basin'*, available at http://www.eflownet.org/downloads/documents/biodiverstiy_strategy_action_plan_mara_1%5B1%5D.pdf (accessed 19 November 2012).
[358] Anthony R.E. Sinclair & Rene Beyers, *'Road Proposal Threatens Existence of Serengeti'*, available at http://www.savetheserengeti.org/materials/Sereng_Biodiversity_Program.pdf (accessed 18 September 2012).
[359]Supra note 64, page 1.
[360]Ibid.

settlements which have the potential of further escalating human-animal conflict as was witnessed recently in the Kitengela area of Athi River.[361]

As a member of the EAC, Kenya has the obligation under Article 114 of the EAC Treaty to take necessary measures to conserve these shared natural resources. In this regard, it is open to Kenya to, in view of the danger posed by Tanzania's project, either call on the Tanzanian government to stop the project or take steps to institute proceedings in the East African Court of Justice, the judicial body established pursuant to the EAC Treaty with jurisdiction to ensure the adherence to law in the interpretation and application of and compliance with the Treaty.[362]Such a step will also be in keeping with Kenya's obligations under the CBD as well as her obligation under Article II of the Bonn Convention to "take action to avoid any migratory species becoming endangered."

The degradation of the Mau Complex and the Mt. Kenya Forest provide an example of both the institutional and legislative failures to give effect to Kenya's MEA obligations and underscores the point that Kenya, despite having ratified the various biodiversity MEAs, did not observe the principle,pactasuntservanda.The systematic excisions of the forested land which was backed by the invocation of the relevant statutory powers by the concerned public officials, had the effect of defeating the object and purpose of the MEAs which Kenya had ratified in the field of biodiversity.

4.7 Uncoordinated Policyand Institutional Frameworks for the Conservation and Management of Biodiversity

Before the enactment of the Environmental Management and Co-ordination Act[363] (hereinafter referred to as 'EMCA'),Kenya addressed her MEA obligations in a piecemeal manner through sectoral legislations such as the Agriculture Act,[364] Water Act,[365]and the Public Health

[361] KWS, 'Killing of Six Lions in Kitengela Area of Kajiado County (20 June 2012), available at http://www.kws.org/info/news/2012/20_06_kitengela.html, (accessed 18 september 2012).
[362]Supra, note 83, Article 23.
[363]Act No. 8 of 1999.
[364]Supra, note 55.
[365]Water Act (No. 8 of 2002) (Revised Edition 2009 (2008).

Act,[366]bye-laws and an assortment of regulations. Through these sectoral statutes, the environment was divided into various media, such as land, soil, water and air and matters of pollution were dealt with in a piecemeal manner. This mode of operation had its inherent weaknesses.

This division of modes of environmental pollution into various media, however, failed to recognize that pollutants move from one medium to another so much so that a successful air emissions programme, for example, may only lead to a transfer of pollutants to another medium.[367]Successful measures to treat water discharges could simply result in the creation of land-fills causing air contamination and underground water pollution in addition to health and safety hazards.[368]This lack of a coordinated approach to environmental management has created 'turf wars' between various institutions charged with overseeing the performance of environmental conservation functions. These 'wars', in most cases, have impeded the proper realisation of the sustainable development goals that underpin the MEAs.

EMCA is the statute that is fundamentally concerned with the implementation of obligations related to biodiversity, particularly insofar as environmental management and sustainable development are concerned. The importance of EMCA in this regard is that even whilst the repealed Constitution was still silent on matters related to the environment, EMCA contained most of the international environmental law principles contained in the various biodiversity-related MEAs that Kenya had ratified. Among the most critical of the provisions of EMCA that can play a critical role in pursuing effective implementation of MEA obligations is the provision related to *locus standi* which is re-enacts as:

> If a person alleges that the entitlement conferred under subsection (1) has been, is being or is likely to be contravened in relation to him, then without prejudice to any other action with respect to the same matter which is lawfully available, that person may apply

[366]Public Health Act (Cap. 242), Laws of Kenya (Revised Edition, 1986).
[367]UNEP, 'Report on the Development and Harmonization of Environmental Standards in East Africa, available at http://www.unep.org/padelia/publications/VOLUME2K10.htm, accessed 20 August 2012.
[368]Ibid.

to the high court for redress and the High Court may make such orders, issue such writs or give such directions as it may be deem appropriate to:

a) Prevent, stop or discontinue any act or omission deleterious to the environment;
b) Compel any public officer to take measures to prevent or discontinue any act or omission deleterious to the environment;
c) require that any ongoing activity be subjected to an environment audit in accordance with the provisions of this Act;
d) compel the persons responsible for the environmental degradation to restore the degraded environment as far as practicable to its immediate condition prior to the damage; and
e) provide compensation for any victim of pollution and the cost of beneficial uses lost as a result of an act of pollution and other losses that are connected with or incidental to the foregoing.[369]

Nonetheless, the said provision as regards *locus standi* is not an absolute right under EMCA since it is limited by the requirement for a contemplated action not being frivolous or vexatious or an abuse of the court process.[370]Thus, in a very limited sense, EMCA, whilst re-enacting the well-known and recognized international environmental law principle of *locus standi*, also places fetters on the same through subjecting the right to an evaluation of whether or not it meets the 'frivolous or vexatious test', and leaving the right to be a subject of determination by the court as to whether or not it is an abuse of the court process.

Furthermore, the mandates of various Government institutions charged with ensuring the integrity of the environment and for implementing MEA obligations are often uncoordinated and overlap thus creating a situation of competition rather than co-operation amongst institutions. For instance, pursuant to section 147 of EMCA, the Minister for Environment promulgated the Environmental Management and Coordination (Water Quality) Regulations, 2006[371] to deal with

[369]Supra, note 91, section 3(3).
[370]Ibid., section 3(4).
[371] Legal Notice No. 120 of 2006, *The Environmental Management and Co-ordination (water Quality) Regulations, 2006*, available at http://www.kenyalaw.org/kenyalaw/klr_app/frames.php (accessed 19 September 2012).

water pollution. On the other hand, the Local Government Act[372] empowers local authorities "to make by-laws in respect of all such matters as are necessary or desirable for the maintenance of the health, safety and well- being of the inhabitants…and for the prevention and suppression of nuisance."[373]Yet, in relation to water again, the Water Act[374] establishes the Water Resources Management Authority,[375]inter alia, "to develop principles, guidelines and procedures for the allocation of water resources, monitor, and from time to time reassess, the national water resources management strategy, receive and determine applications for permits for water use, monitor and enforce conditions attached to permits for water use, regulate and protect water resources quality from adverse impacts, manage and protect water catchments, in accordance with guidelines in the national water resources management strategy, to determine charges to be imposed for the use of water from any water resource, gather and maintain information on water resources and from time to time publish forecasts, projections and information on water resources, liaise with other bodies for the better regulation and management of water resources, and advise the Minister concerning any matter in connection with water resources."[376]

The Public Health Act, on the other hand, provides that no person shall cause nuisance or cause to exist on any land or premises any condition liable to be injurious or dangerous to human health[377] and authorizes local authorities to take all lawful, necessary and reasonably practicable measures to maintain their jurisdiction clean and sanitary to prevent occurrence of nuisance or condition liable to be injurious or dangerous to human health.[378] Nuisances are defined under section 118 of the Act to include any stream, pool, ditch, gutter, watercourse, sink, water-tank, cistern, water-closet, earth-closet, privy, urinal, cesspool, soakaway pit, septic tank, cesspit, soil-pipe, waste-pipe, drain, sewer, garbage receptacle, dust-bin, dung pit, refuse-pit, slop-tank, ash-pit or manure heap so foul or in such a state or so situated or constructed as in the opinion of the medical officer of health to be offensive or to be injurious or dangerous to health.

Thus, EMCA, the Public Health Act and the Water Act contain provisions related to water pollution and establish distinct institutions to deal with these. The penalties prescribed under

[372] Local Government Act (Cap. 265), Laws of Kenya (Revised Edition, 2010 (1998).
[373]Ibid.,Section 201.
[374]Supra, note 93.
[375]Supra, note 93, section 7.
[376]Ibid., section 8.
[377]Supra, note 94, section 115.
[378]Ibid., section 116.

these systems established under the three statutes are distinct. A possible clash is therefore inevitable where water pollution happens within the jurisdictional limits of a local authority: Will it be governed by the provisions of EMCA [spearheaded by NEMA] or the Public Health Act under the auspices of the local authority? Or, suppose water pollution is happening within a water catchment area located within the local limits of the jurisdiction of a particular local authority, will the Water Resources Management Authority, which has powers under section 7 of the Water Act to manage and regulate water catchment areas, be justified to take up the dispute? Such uncoordinated legal and institutional frameworks pose a huge challenge in terms of implementing MEA obligations.

The same clash of legal and institutional frameworks has been witnessed in the area of waste disposal. Pursuant to the relevant provisions of EMCA, the Minister promulgated the Environmental Management and Co-ordination (Waste Management) Regulations, 2006[379]which regulate the handling and disposal of hazardous wastes in an attempt to implement the Basel Convention on the Control of Transboundary Movements of Hazardous Waste and their Disposal[380]and the regionalBamako Convention on the Ban of the Import to Africa and the Control of the Transboundary Movement and Management of Hazardous Wastes Within Africa.[381]Yet, again, the Public Health Act also gives local authorities similar jurisdiction to deal with "any noxious matter…any accumulation or deposit of refuse…or other matter whatsoever which is offensive or which is injurious or dangerous to health."[382] Indeed, there have been reported rows between the National Environment Management Authority (NEMA) and local authorities following attempts by NEMA to take over the supervision of solid waste in major towns.[383] The functions of the Water Resources Management Authority set above do, too, give

[379]Legal Notice No. 121 of 2006, *Environmental Management and Co-ordination (waste Management) Regulations, 2006*, available at http://www.kenyalaw.org/kenyalaw/klr_app/frames.php, accessed 17 September 2012.
[380]1989 Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal (Basel, 22 March 1989), 1673 UNTS 125; *reprinted* in 28 ILM 657 (1989), (Entered into force 5 May 1992).
[381]1991 Bamako Convention on the Ban of the Import to Africa and the Control of the Transboundary Movement and Management of Hazardous Wastes Within Africa (Adopted 30 January 1991), reprinted in 30 I.L.M. 775, (Entered into force 22 April 1998).

[382]Supra, note 91, section 118(1)(e), (h).
[383]*The Standard*, *NEMA. Local Authorities Clash Over Waste*, 17 April 2009, available at http://www.standardmedia.co.ke/?articleID=1144011796&story_title=Nema,-local-authorities-clash-over-waste (accessed 17 September 2012).

the authority jurisdiction "to regulate and protect water resources quality from adverse impacts" which, in effect, also includes water pollution.

Nonetheless, as the various clashes witnessed between various government agencies and NEMA regarding enforcement of environmental standards and other environmental matters have shown, a lack of operational coordination among institutions, the failure to involve key stakeholders such as non-governmental organizations (NGOs) and local communities and poor policy implementation, generally impede the effective implementation of MEAs in Kenya.

4.8 Lack of Institutional Capacity for Implementing MEA Obligations

The enactment of laws to give effect to MEA obligations does not, *per se*, determine the effectiveness of implementation mechanisms to fulfill the requirements of those MEAs. For instance, the Environmental Management and Co-ordination (controlled Substances) Regulations, 2007[384] were promulgated by the Minister for Environment and Natural Resources in an attempt to implement the provisions of the 1985 Vienna Convention for the Protection of the Ozone Layer Depletion[385] and the 1987 Montreal Protocol on Substances that Deplete the Ozone Layer.[386]

The lead agency for the implementation of these MEAs under EMCA is the National Environment Management Authority (NEMA) which his required to undertake monitoring, auditing and exchange of information regarding greenhouse gases emitted in Kenya to ensure compliance with the Vienna Convention and the Montreal Protocol on the Ozone layer.[387] The effective discharge of these monitoring and reporting obligations on the part of NEMA lies in Kenya's ability to co-operate by means of systematic observations, research and information exchange in order to better understand and assess the effects of human activities on the ozone layer and the effects on human health and the environment from modification of the ozone

[384]Legal Notice No. 73 of 2007, available at http://www.kenyalaw.org/kenyalaw/klr_app/frames.php, accessed 8 October 2012.
[385]1985 Convention for the Protection of the Ozone Layer, (Vienna, 22 March, 1985), UKTS. 1 (1990)*;reprinted* in 26 *I.L.M.* 1529 (1987), (entered into force 22 September1988).
[386]1987 Montreal Protocol on Substances That Deplete the Ozone Layer, 16 September 1987, *reprinted* in 26 ILM, 1541.
[387]Ibid., Article 2.

layer.[388] The obligations imposed on States Parties under the Vienna Convention and the Montreal Protocol regarding the protection of the ozone layer require highly technical expertise and huge investments in research and development. NEMA lacks the institutional capacity both in terms of trained personnel and adequate funding to effectively discharge these functions.

The Environmental Management and Coordination (Noise and Excessive Vibration Pollution) (Control) Regulations, 2009[389]have been promulgated in a bid to control noise pollution which, at certain levels, is injurious to human health. To enforce this, there has to be a mechanism and instruments to judge whether or not the noise level is of such a level as to be detrimental to health. Unfortunately, NEMA lacks the means to measure the degree of noise that is injurious to health in order to enforce these Regulations. The limitations aforesaid apply equally to the Environmental Management and Co-ordination (Fossil Fuel Emission Control) Regulations, 2006[390]and the other Regulations enacted under the auspices of EMCA.

The lack of institutional capacity adversely affects the ability of those institutions to effectively implement Kenya's MEA obligations and, thus, leads to a situation where, though MEAs have been ratified by Kenya, Kenya is unable to perform her obligations there under as dictated by the doctrine of *pactasuntservanda*.

5.0 Conclusion

Although EMCA has attempted to provide for the establishment of an appropriate legal and institutional framework for the management of the environment and for matters connected therewith the existence of many other institutions with overlapping jurisdictions poses a huge threat in the implementation of MEAs. It is not enough to domesticate MEAs locally through the enactment of enabling statutes; institutions charged with the implementation of the MEAs must have the requisite capacity to undertake their functions. The government, too, must be willing and committed to fully implement its obligations. As a starting point, though, at the point of

[388]Ibid., Articles 2 & 3.
[389]Legal Notice No. 61 of 2009, available at http://www.kenyalaw.org/kenyalaw/klr_app/frames.php (accessed 28 September 2012).
[390]Legal Notice No. 131 of 1999, available at http://www.kenyalaw.org/kenyalaw/klr_app/frames.php (accessed 28 September 2012).

negotiating and ratifying MEAs, the government needs to be satisfied that it has the capacity to implement the obligations it is binding itself to uphold lest it be deemed to have failed in its obligations to uphold the principle pactasuntservanda.

While EMCA provides a legal framework for the implementation of Kenya's MEA obligations, the institutions it sets up to perform these implementation functions lack the capacity to effectively discharge their mandate. Besides, some of the issues raised above render the effective implementation of MEAs ratified by Kenya under our present circumstances, unrealistic.

CHAPTER 5
CONCLUSION AND RECOMMENDATIONS

5.1 Conclusion

The effective implementation of Kenya's MEA obligations lies in Kenya's ability to enact relevant legislation, policies, regulations and institutions with the necessary capacity to handle the environmental concerns that informed their creation. Both the 1992 Rio Declaration on Environment and Development and Agenda 21 emphasized the need on the part of states to develop legal, policy and institutional frameworks for enhanced MEA implementation.

The enactment of the Environmental Management and Coordination Act (EMCA) as the main framework environment law, was among the steps in the country's commitment towards environmental sustenance and the implementation of her MEA obligations.[391] Nonetheless, the role in the implementation of Kenya's MEA obligations is limited in the sense that it is merely a framework piece of legislation; actual implementation still reposes in the various sectoral statutes that deal with specific MEAs or specific aspects of MEAs.

As regards the existing Policy framework as contained in Sessional Paper No. 6 of 1999 on Environment and Development,[392] as was seen in Chapter Three, calls for the integration of environmental concerns into the national planning and management processes and provides guidelines for environmental sustainable development.[393] The challenge of the document and guidelines is to critically link the implementation framework with various environmental institutions, such as the National Environmental Management Authority (NEMA), Kenya Wildlife Service, Kenya Forestry Service (KFS); the Public Complaints Committee (PCC) and the National Environmental Tribunal (NET).

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[391] Kenya Environmental and Political News Weblog, 'Kenya in Dire Need of a National Environmental Policy' (27 January 2009), available at http://kenvironews.wordpress.com/2009/01/27/kenya-in-dire-need-of-a-national-environmental-policy/ (accessed 30 September 2012).

[392] Republic of Kenya, Ministry of Environmental Conservation, Sessional Paper No. 6 of 1999 on Environment and Development, available at http://www.fankenya.org/downloads/Kenya%27sDraftEnvironmentPolicy.pdf (accessed 20 August 2012).

[393] Ibid.

This study identified various critical weaknesses in Kenya's legal, policy and institutional frameworks for implementing her MEA obligations. These includedweak or non-existent legal framework for implementing MEAs, the official aiding and/or abetting of activities that defeat the objects and purposes of some MEAs, opaque treaty-ratification process, weak institutional capacity, overlapping in institutional mandates that often leads to confusion regarding MEA-implementation-roles, delay in implementing MEAs, lack of prioritization as regards the ratification and implementation of MEAs and a general lack of incentives for the protection and conservation of the environment, as well as the lack of an effective structure to capture the cross-cutting environmental problems.

To address the weaknesses in Kenya's policy, legal and institutional frameworks for implementing her MEA obligations, this study makes the case for a number of recommendations.

5.2 Recommendations

A key obligation of membership to the MEAs by states is to take appropriate action at the national level to implement their responsibilities under the MEAs and to take further measures to improve the quality of standards set in the MEAs. This entails identifying the needs related to the provisions of these MEAs and to among others identify priorities related to implementation of provisions set out in the MEAs, identification of relevant needs related to improvement of effectiveness of activities aiming at implementation of those provisions and identification of specific tasks necessary to improve global environmental management and introducing action plans and projects that will eventually strengthen the general infrastructure of environmental management at the national level. Achieving these objectives by Kenya requires improvement of the present systems, providing institutional capacity, integrating the local communities and providing organizational, institutional and financial conditions for meeting these commitments.

The domestication of MEA obligations entails, in the first instance, the taking of steps within the domestic legal system to give effect to the MEA that has been ratified. The government, being the signatory to MEAs, has the main responsibility for ensuring the effective implementation of the MEAs she has signed and ratified. It is therefore necessary, to begin with, that stock be taken of all MEAs which have not been implemented domestically to enact enabling statutes to give

effect to the country's obligations under those MEAs. This is because at the moment, there is no single piece of legislation that reproduces substantive provisions of MEAs to which Kenya is a party

A review of all the relevant legal, policy and institutional frameworks is therefore necessary in order to develop an implementation strategy that will ensure cross-sectoral relations within the various government agencies and to inculcate favourable legal conditions for implementation of MEAs in the country.[394] In addition, while there have been positive efforts to date, there is an apparent lack of coordination, consultations, commitment and the political will to ensure that sectoral policies are implemented and adhered to.[395] Most importantly though, is to have the National Environmental Policy that will harmonize the sectoral policies.

Specific measures that need to be undertaken have been highlighted in Sessional Paper No. 6 of 1999 and include:[396]

(i) Need for the harmonization of sectoral policy instruments with EMCA and the Constitution:

There are several sectoral policies and laws relating to the environment which are not harmonized with both the EMCA and the Constitution. These include policies concerning agriculture, water, forests, trade and industry, which have significant implications for the environment. It is imperative that policy instrument in these sectors are harmonized with the EMCA and the Constitution and requirements made that they be subjected to strategic environmental assessment in order to promote sustainable development.

(ii) The implementation of the National Land Policy

Striking the right balance between land tenure and environmental imperatives is critical for sustainable development. The National Land Policy and the Constitution provide a critical basis

[394]Supra, note 1.
[395]Ibid.
[396]Ibid., pp.9-12.

for addressing the long-standing tensions around land tenure and use in Kenya. However, they need effective legislation to ensure implementation.

(iii) Valuation of environmental and natural resources

The value of environmental resources is hardly reflected in pricing of marketed goods and services. Environmental and natural resources are largely considered as public goods. This is symptomatic of market failure. Integrating environmental considerations into the behaviour of enterprises and consumers would reflect a change in consumption and production patterns. Prioritization of environment and natural resources remains low among policy makers partly due to inadequate appreciation of the total economic value of the sector. Thus there is less public investment in the sector.

(iv) Rehabilitation and restoration of environmentally degraded areas

There are several degraded areas in Kenya which require rehabilitation and restoration. These include wetlands, riverbanks, deforested areas, eroded shoreline, hilltops, and disused quarries and mines.

(v) Urgently Addressing the Loss of Kenya's biodiversity

Biodiversity plays a fundamental role in underpinning ecosystems and the services they provide. The most important causes of loss of biodiversity include habitat destruction, overgrazing, deforestation, pollution, unsustainable harvesting of natural resources, biopiracy and introduction of invasive and alien species. Indeed, research suggests that despite a variety of conservation efforts, Kenya's biodiversity continues to decline.

(vi) Concessions and incentives

Several policies particularly in the agricultural, trade and industrial sectors provide for concessions and incentives without the requisite safeguards, causing negative environmental impacts.

(vii) Enhancing Proper Urban Planning

Increasing levels of urbanization are caused by natural growth of the urban population and rural-urban migration. Urbanization often leads to destruction of sensitive ecosystems. In addition, poor waste management causes urban pollution and poor health. Thus many urban environmental problems are the result of poor management, planning and absence of coherent urban policies.

(viii) Increasing Investment in Renewable Sources of Energy

Energy consumption in the country is on the increase. However, the utilization of renewable energy sources exclusive of hydro-electricity is still relatively low.

(ix) Public participation, environmental education and awareness

Broad public participation in decision making processes is one of the fundamental preconditions for sustainable development. This presupposes access to timely and accurate information on the environment. Sound environmental management has to be based on openness and participation at all levels. Therefore, it is imperative that environmental education and public awareness is promoted.

(x) Enhancing Poverty Alleviation Programmes

Rising poverty levels have impacted negatively on the environment. Poverty is a major cause and consequence of environmental degradation and resources depletion because of lack of alternatives. The poor who represent 56% of the country's total population rely heavily on environment and natural resources for their livelihoods.

xi) The Enactment of the Ratification of Treaties Bill, 2011 into Legislation

The enactment of the Ratification of Treaties Bill, 2011 provides an opportunity for addressing the lacunae regarding the ratification of treaties which was so evident under the repealed Constitution. If enacted, the Act creates an avenue where there is public participation in treaty-making and where, for the first time, there is need for a Memorandum of Objects and Reasons under the proposed section 4 by which, *inter alia*, it is indicated how joining the treaty advances or threatens the interests of Kenya and the attendant constitutional implications of ratifying a treaty. This section is forward-looking in the sense that it indicates whether joining a treaty will

entail making any constitutional amendments, whether there is need for any reservations to such a proposed treaty and whether it advances the constitutional values and objectives. Besides, under the proposed section 13 of the Act, where a treaty provides for the submission of periodic reports as part of its monitoring mechanisms the Cabinet Secretary shall, in conjunction with the relevant State Department facilitate the preparation and submission of such report within the prescribed period.

As far as the weaknesses in our treaty-ratification process are concerned, the publishing of the Ratification of Treaties Bill, 2011 is a critical step in ensuring an effective implementation of MEA obligations. The Bill contains provisions that ensure that there is adequate public participation and that the constitutional implications of a proposed treaty are addressed first before the ratification to ensure an easy compliance with treaty obligations.

Nonetheless, the Ratification of Treaties Bill, 2011 does not address treaties or MEAs that had been ratified before the promulgation of the Constitution of Kenya 2010 on 27th August, 2010 since under Clause 16(2), it still requires that relevant Bills be published for consideration by Parliament so as to domesticate all treaties which Kenya had ratified but had not domesticated before the 27th of August, 2010. As the bulk of the existing MEAs were ratified before the 27th day of August, 2010 and have not been domesticated, it would have made sense had there be a specific provision automatically domesticating them by dint of the operation of Articles 2(5) and 2(6) of the present Constitution.

The limitations inherent in domestic arrangements for ensuring compliance with environmental obligations under the various MEAs Kenya has ratified require policy and legislative measures adverted to above to enhance their effectiveness.Fidelity to the constitutional safeguards as regards environmental integrity, transparency, good governance and national values will, in the end, determine whether or not Kenya implements her MEA obligations in strict compliance with the doctrine pactasuntservanda.

ANNEXE I[397]

NAME OF MEA	ADOPTION DATE	DATE RATIFIED BY KENYA	DATE SIGNED BY KENYA
1. International Convention for the Regulation of Whaling	2 December 1946	2 December 1981	
2. International Plant Protection Convention	6 December 1951	7 May 1974 (Adherence)	
3. International Convention for the Prevention of Pollution of Sea by Oil, London, 1954	12 May 1954	12 December 1975	
4. Convention on the Continental Shelf	29 April 1958	29 June 1969 (Accession)	
5. Convention on Fishing and Conservation of Living Resources of High Seas	29 April 1958	23 October 1973 (Succession)	
6. Convention on the High Seas	29 April 1958	20 June 1969 (Accession)	
7. International Convention for the Protection of New Varieties of Plants	2 December 1961	13 May 1999	
8. Convention on the African Migratory Locusts	29 May 1963	29 November 1963	
9. Treaty Banning Nuclear Weapons	5 August	10 June 1963	

[397]UNEP, Register of International Treaties and Other Agreements in the Field of the Environment (UNEP, Nairobi, 2005), available at http://hqweb.unep.org/law/PDF/register_Int_treaties_contents.pdf (accessed 5 October 2012).

Tests in the Atmosphere, in Outer Space and Under Water	1963	(Accession)	
10. Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space including the Moon and other Celestial Bodies	27 January 1967	19 January 1972 (Accession)	
11. African Convention on the Conservation of Nature and Natural Resources	15 September 1968	12 May 1969	15 Sept 1968
12. International Convention on Civil Liability for Oil Pollution Damage	29 November 1969	15 December 1992 (Accession)	Denounced 7 July 2001
13. Convention on Wetlands of International Importance especially as Waterfowl Habitat	18 February 1971	5 May 1990 (Accession)	
14. International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage	15 December 1971	15 December 1992 (Accession)	Denounced – 7 July 2001
15. Convention on the Prohibition of the Development, Production, Stockpiling of Bateriological and Toxin Weapons, and on their Destruction	10 April 1972	7 January 1976 (Accession)	
16. Convention Concerning the Protection of the World Cultural and Natural Heritage	16 November 1972	5 June 1991 (Acceptance)	
17. Convention on the Prevention of Marine Pollution by Dumping of	29 December	7 January 1976	

Wastes and Other Matter	1972		
18. Convention on International Trade in Endangered Species of Wild Fauna and Flora	3 March 1973	13 December 1978	
19. International Convention for Prevention of Pollution from Ships, 1973	2 November 1973	12 September 1975 (Accession)	
20. Protocol of 1978 Relating to the International Convention for the Prevention of Pollution from Ships, 1973	17 February 1978	13 March1993	
21. Convention on the Conservation of Migratory Species of Wild Animals	23 June 1979	1 May 1999 (Accession)	
22. Convention on the Physical Protection of Nuclear Material	20 October 1979	11 February 2002 (Accession)	
23. United Nations Convention on the Law of the Sea	10 December 1982	2 March 1989	10 December 1982
24. Protocol to amend the Convention on Wetlands of International Importance especially as Waterfowl Habitat	3 December 1982	5 June 1990	
25. Vienna Convention for the Protection of the Ozone Layer	22 March 1985	9 November 1988 (Accession)	
26. The Nairobi Convention for the Protection, Management and Development of the Marine and Coastal Environment	21 June 1985	11 September 1990 (Accession)	

27. The Nairobi Protocol Concerning Protected Areas and Wild Fauna and Flora in the Eastern African Region	21 June 1985	11 September 1990 (Accession)	
28. Montreal Protocol on Substances that Deplete the Ozone Layer	16 September 1987	9 November 1988 (Accession)	16 September 1987
29. The Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal	22 March 1989	1 June 2000 (Accession)	
30. International Convention on Salvage	28 April 1989	21 July 1999 (Accession)	
31. International Convention on Oil Pollution, Preparedness, Response and Co-operation	30 November 1990	27 September 1994 (Ratification)	
32. London Amendment to the Montreal Protocol on Substances that Deplete the Ozone Layer	29 June 1990	27 September 1994 (Ratification)	
33. Bamako Convention on the Ban of the Import into Africa and the Control of TransboundaryMovement and the Management of Hazardous Waste Within Africa	30 January 1971		17 September 2003
34. Treaty Establishing the African Economic Community	3 June 1991	22 June 1993 (Ratification)	3 June 1991
35. United Nations Framework Convention on Climate Change	9 May 1992	30 August 1994 (Ratification)	12 June 1992

36. Convention on Biological Diversity	22 May 1992	26 July 1994 (Ratification)	11 June 1992
37. Protocol of 1992 to amend the International Convention on Civil Liability for Oil Pollution Damage	27 November 1992	2 February 2000 (Accession)	
38. Protocol of 1992 to amend the International Convention on the Establishment of an International Fund for the Compensation for Oil Pollution Damage, 1971	27 November 1992	2 February 2000 (Accession)	
39. Copenhagen Amendment to the Montreal Protocol on Substances that Deplete the Ozone Layer	25 November 1992	27 September 1994 (Ratification)	
40. Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and their Destruction	3 September 1992	25 April 1997 (Ratification)	15 January 1993
41. Agreement for the Establishment of the Indian Ocean Tuna Commission	25 November 1993	29 September 2004 (Acceptance)	
42. United Nations Convention to Combat Desertification in Those Countries Experiencing Serious Drought and/or Desertification Particularly in Africa	17 June 1994	24 June 1997 (Ratification	14 October 1994
43. Convention on the Establishment of the Lake Victoria Fisheries Convention	30 June 1994	24 May 1996 (Ratification)	30 June 1994
44. Lusaka Agreement on Co-operative Enforcement Operations	8 September 1994	17 January 1997 (Ratification)	9 September

Directed at Illegal Trade in Wild Fauna and Flora			1994
45. Agreement Relating to the Implementation of Part XI of the United Nations Convention on the Law of the Sea of 10 December 1982	28 July 1994	29 July 1994 (Definitive Signature)	
46. Agreement on the Conservation of African Eurasian Migratory Water Birds	16 May 1995		
47. African Nuclear Free Zone Treaty (Treaty of Pelindaba)	28 June 1995	15 November 2000 (Ratification/Accession)	11 April 1996
48. Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 Relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks	4 August 1995	13 July 2004	
49. Comprehensive Nuclear test Ban Treaty	10 September 1996	30 November 2000 (Ratification)	14 November 1996
50. Kyoto Protocol to the United Nations Framework Convention on Climate Change	11 December 1997	25 February 2005 (Accession)	
51. Montreal Amendment to the Montreal Protocol on Substances that Deplete the Ozone Layer	17 September 1997		
52. Rotterdam Convention on the Prior	10 September	3 February 2005	11

	Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade	1998	(Ratification)	September 1998
53.	Cartagena Protocol on Biosafety to the Convention on Biological Diversity	29 January 2000	24 January 2002 (Ratification)	15 May 2000
54.	Stockholm Convention on Persistent Organic Pollutants	22 May 2001	24 September 2004 (Ratification)	23 May 2001
55.	International Treaty on Plant Genetic Resources for Food and Agriculture	3 November 2001	27 May 2003 (Accession)	
56.	World Health Organization Framework Convention on Tobacco Control	21 May 2003	25 June 2004 (Ratification)	25 June 2004
57.	African Convention on the Conservation of Nature and Natural Resources	11 July 2003	12 May 1969 (Ratification)	15 September 1968

ANNEXE II[398]

a) Gazette Notice No. 890 of 16th February, 2001 – 24,109.01 hectares excised off South Western Mau Forest and 712.5 hectares excised off Western Mau Forest;
b) Gazette Notice No. 891 of 16th February 2001 – 323.7 hectares excised off Western Mau Forest;
c) Gazette Notice No. 892 of 16th February 2001 – 270.5 hectares excised off Nakuru Forest;
d) Gazette Notice No. 893 of 16th February 2001 - 36.22 hectares excised off Nabkoi Forest;
e) Gazette Notice No. 894 of 16th February 2001 - 196.05 hectares excised off Mt. Kenya Forest;
f) Gazette Notice No. 895 of 16th February 2001 – 2,837.4 hectares excised off Marmanet Forest;
g) Gazette Notice No. 896 of 16th February 2001 – 717 hectares excised off Mt. Kenya Forest;
h) Gazette Notice No. 897 of 16th February 2001 - 912.1 hectares excised off Mt. Kenya Forest;
i) Gazette Notice No. 898 of 16th February 2001 -788.3 hectares excised off Northern Tinderet Forest;
j) Gazette Notice No. 899 of 16th February 2001 – 124.9 hectares excised off Mt. Londiani Forest;
k) Gazette Notice No. 900 of 16th February 2001 – 23.66 hectares excised off South Nandi Forest;
l) Gazette Notice No. 901 of 16th February 2001 – 901.62 excised off Molo Forest;
m) Gazette Notice No. 902 of 16th February 2001 – 1,194.2 hectares excised off Kapsaret Forest;
n) The Gazette Notice Number 889 of 16th February 2001 by which the Minister for Environment, acting pursuant to the powers conferred under section 4(1) of the Forests Act (Cap. 385), Laws of Kenya [repealed] declared the intention to excise an area of approximately 35,301.01 hectares adjoining the western, northern and eastern boundaries of eastern Mau Forest;[399]

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[398] Source: Kenya Gazette.
[399] Kenya Gazette, Vol. C-III – No. 12, Gazette Notice NO. 889, 16February 2001, available at http://books.google.co.ke/books?id=-P-5Im3bzJYC&pg=PA428&lpg=PA428&dq=Intention+to+alter+boundaries+mau+forest&source=bl&ots=5mVyYBXnv9&sig=o0cTWfzeqzAjGVQTQeOnXnSy_iY&hl=en&sa=X&ei=-_5fUMvaOdKGhQf-7YGQCg&ved=0CCMQ6AEwAQ#v=onepage&q=Intention%20to%20alter%20boundaries%20mau%20forest&f=false, accessed 12 September 2012.

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