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University of Aberdeen
School of Law

Centre for Constitutional and Public International Law
Working Paper Series

Number 008/20

Risks versus Rewards:

Utilising International Water Law in the Omo Turkana Basin

By

Julie Gibson

&

Zeray Yihdego

Risks versus Rewards

Utilising International Water Law in the Omo Turkana Basin

Significant developments have taken place within the Omo-Turkana Basin (OTB) in recent years, inciting widespread criticism by scholars and civil society organisations on one hand, and vigorous rejection to such extreme views by those who support Ethiopia's developmental goals on the other. Many of the developments which have taken place have the potential to cause transboundary impacts, both positively and negatively. While the relationship between Kenya and Ethiopia has historically been cooperative, no legal framework on water governance exists at basin level. This article will enquire into the potential reasons for this lack of cooperation, examining perceived risks which may exist within the basin and illustrating how a framework built on international water law (IWL) may help to alleviate such risks.

Keywords: International water law, transboundary watercourses, Ethiopia, Kenya, Sustainable Development, Omo River, Lake Turkana, Omo-Turkana River Basin, River Basin, Africa

Basin Background and Key Characteristics

The OTB is comprised of two main water bodies: the Omo River in Ethiopia and Lake Turkana which it drains into. The Omo River is located entirely within Ethiopian territory, while Lake Turkana is located mostly within Kenyan territory. Three rivers flow into Lake Turkana; the Omo which contributes around 80% of the inflow and the Turkwel and Kerio rivers which make up the remainder. The lake does not have an outflow making it sensitive to climatic and seasonal fluctuations and its main source of water loss is evaporation. In addition to Kenya and Ethiopia who are the key stakeholders, small parts of the basin also enter the territories of South Sudan and Uganda. The OTB holds high cultural, social, geological and environmental importance, with the Lower Omo Valley and Lake Turkana both listed as UNESCO World Heritage Sites. The importance of the basin with relation to natural and historical characteristics has the potential to conflict with recent developments and use of the basin as a vital economic resource stemming from hydropower, irrigation, wind power and oil reserves.

Kenya and Ethiopia are facing a myriad of changes, including population growth, increased urbanisation and climate change.¹ Access to electricity in both countries remains low, particularly in Ethiopia where less than 50 percent of the population have access.² Large portions of the population in both countries continue to live in conditions of extreme and relative poverty, with many suffering from food insecurity.³ In order to address some of these challenges, both countries have created impressive national development plans (NDP). Ethiopia's plans are particularly ambitious and are contained within the Growth and Transformation Plan II (GTP II, 2015-2020).⁴ Part of this plan includes becoming a regional power hub and key player within the

¹ These changes are not only limited to Kenya and Ethiopia, but can be seen across the Horn of Africa, see Florian Krampe et al., 'Water Security and Governance in the Horn of Africa' (2020) 54 SIPRI Policy Paper https://www.sipri.org/sites/default/files/2020-03/sipripp54_o.pdf.

² World Bank, Access to Electricity (% of Population) 2018 - Ethiopia <https://data.worldbank.org/indicator/EG.ELC.ACCS.ZS?locations=ET>; World Bank, Access to Electricity (% of Population) 2018 - Kenya.

³ 'World Bank, Prevalence of Moderate or Severe Food Insecurity in the Population (%) - Ethiopia <https://data.worldbank.org/indicator/SN.ITK.MSFI.ZS?locations=ET>; World Bank, Prevalence of Moderate or Severe Food Insecurity in the Population (%) - Kenya <<https://data.worldbank.org/indicator/SN.ITK.MSFI.ZS?end=2017&locations=KE&start=2017&view=bar>>.

⁴ Federal Democratic Republic of Ethiopia, Growth and Transformation Plan II (Volume II) <https://www.greengrowthknowledge.org/sites/default/files/downloads/policy-database/ETHIOPIA%29%20Growth%20and%20Transformation%20Plan%20II%20Vol%20I.%202015%20C16-2019%20C20%29.pdf>. With relation to Kenya both Vision 2030 and the Third Medium Term Plan (2018-2022) are relevant, see Government of the Republic of Kenya, Kenya Vision 2030 (2007) http://www.vision2030.go.ke/cms/vds/Popular_Version.pdf; Republic of Kenya, Kenya Vision 2030: Third Medium Term Plan

Eastern African Power Pool (EAPP). Key to achieving these plans is the series of dam developments on the Omo, Gibe I, II and III and Koysha. The power generated from these developments is also set to benefit Kenya through the provision of (relatively) cheap access to electricity. Yet, the same developments may also impact both the quality and quantity of water available to downstream regions and cause various impacts with relation to fisheries, biological diversity and displacement. It is anticipated that the impacts of the developments will be felt most by indigenous populations in the Lower Omo (Ethiopia) and around Lake Turkana (Kenya).

Although it is the hydropower developments in the basin which have been subject to greatest criticism, the changes taking place within the basin do not end with hydropower. Oil reserves have been discovered in the Lokichar region of Southern Turkana, estimated between 75mm and 1630m barrels, leading to drilling operations. Further, the Lake Turkana Wind Power Project also lies within the basin which is a key part of energy security for Kenya. The complexity of each of these developments brings the potential for transboundary impacts and rising tension over vital resources such as water and land.

Many of the developments which have taken place have been the subject of international scrutiny⁵ and discussed in a growing body of literature examining potential impacts and consequences. This research has included *inter alia* social and economic impact⁶ and implications for cultural diversity.⁷ In some cases the existing literature has failed to provide a balanced and evidence-based analysis, instead creating a narrative which mainly focuses on the negative impacts of development within the basin. While water can certainly be a source of tension (an idea fueled by use of phrases such as ‘water wars’) history dictates that when increasing strain is placed on water resources, countries tend to move towards cooperation, not conflict. As noted by Subramanian et al. ‘[s]uch statements distort the current reality in which small-scale disputes persist but widespread conflicts over water have rarely, if ever, occurred’.⁸ In the OTB cooperation has been taking place between Kenya and Ethiopia for decades through a series of agreements,⁹ the latest of which focuses on the sharing of hydropower from the recent dam developments. These agreements can be seen as indicative of a shift taking place within the basin towards more formal mechanisms for cooperation. Further, at a regional level, through the Intergovernmental Authority on Development (IGAD) progress is being made towards the formation of a water policy and subsequent protocol which will adopt key principles of international watercourses law (IWL) and will build on structures which have been established in other regional instruments such as those in place through the Southern African Development Community (SADC).¹⁰

(2018-2022) (2018) Transforming Lives: Advancing socio-economic development through the ‘Big Four’ <https://vision2030.go.ke/publication/third-medium-term-plan-2018-2022/>

⁵ See for example, Human Rights Watch, ‘Ethiopia: Dams, Plantations a Threat to Kenyans’ <<https://www.hrw.org/news/2017/02/14/ethiopia-dams-plantations-threat-kenyans>> and Tom Gardner, ‘State Projects Leave Tens of Thousands of Lives in the Balance in Ethiopia - study’ (*The Guardian*, 13 June 2019) <<https://www.theguardian.com/global-development/2019/jun/13/state-projects-leave-tens-of-thousands-of-lives-in-the-balance-in-ethiopia-study>>

⁶ See David Turton, ‘Hydropower and Irrigation Development in the Omo Valley: Development for Whom?’ (2018) 4 *Antropologia Publica: La cooperazione internazionale allo sviluppo* 51. See also Claudia J Carr, ‘Components of Catastrophe: Social and Environmental Consequences of Omo River Basin Development’, *River Basin Development and Human Rights in Eastern Africa --- A Policy Crossroads* (Springer International Publishing, 2017) 75-84

⁷ Mark Angelo, ‘Damming the Omo River Could Stop the Flow of Ethiopia’s Cultural Diversity’ (*National Geographic*, date unknown) <https://www.nationalgeographic.com/environment/freshwater/lessons-from-the-field-omo-river-ethiopia/>

⁸ Ashok Subramanian, Bridget Brown and Aaron Wolf, ‘Reaching Across the Waters: Facing the Risks of Cooperation in International Waters’, *Directions in Development: Environment and Sustainable Development* (World Bank, 2012) 11

⁹ See Section 4. See also Meles Alem, ‘Ethiopia-Kenya: 55 Years of Strategic Partnerships’ (*The Star*, 26 June 2019) <https://www.the-star.co.ke/opinion/star-blogs/2019-06-26-ethiopia-kenya-55-years-of-strategic-partnerships/>

¹⁰ Revised Protocol on Shared Watercourses in the Southern African Development Community (signed 7 August 2000; in force 22 September 2003).

A systematic review of the legal frameworks which cover the OTB is currently absent from existing literature. This article will review not only the legal frameworks, but also the characteristics of the basin and the current status of cooperation within the OTB more broadly. While it is not possible to say in any concrete terms why a specific framework on water governance has not been put in place at a basin level, it is possible to discuss a number of the underlying reasons for the lack of cooperation on transboundary watercourses more generally, particularly those which relate to the perception of risk on behalf of riparian states. By using the risk framework established by Subramanian et al.¹¹ this article will look at both the risks and the benefits of cooperation, aiming to demonstrate potential reasons why a framework may not yet be in place and suggest potential 'triggers' which may catalyse greater cooperation on the OTB in the future. It will begin by providing an overview of the key principles of IWL and the extent to which each principle can be found within the national frameworks of Kenya and Ethiopia. Details of the relationship between Kenya and Ethiopia will then be discussed, highlighting both historical and recent cooperation. Subsequently, the key risks identified by Subramanian et al. will be provided and discussed with relation to the OTB and beginning to look towards ways of reconciling such risks using the principles of IWL. Finally, a number of developments which could be viewed as 'key triggers' to cooperation will be discussed, arguing that the time to increase cooperation within the OTB is now.

Relevance of International Water Law

The key principles of IWL have featured heavily within most agreements covering transboundary watercourses on the African continent,¹² primarily drawn from the United Nations Watercourses Convention (UNWC)¹³. The Convention on the Protection and Use of Transboundary Watercourses and International Lakes (UNECE)¹⁴, which also operates at international level, was only opened to all United Nations members in 2013. As a result, regional and basin agreements which predate the amendment have adopted provisions from the UNWC. It is however likely that with time and with more African nations acceding to the UNECE¹⁵, both Conventions will begin to hold influence in the region.

Both global Conventions have a slightly different focus which can broadly be described as emphasis on water quantity in the UNWC and water quality within the UNECE.¹⁶ However, the key principles within each Convention are the same: the right to make an equitable and reasonable use of an international watercourse (Article 5, UNWC); the obligation to prevent causing significant harm to other watercourse states (Article 7, UNWC); and the general duty to cooperate (Article 8, UNWC). Many of the key principles of IWL are also considered to be customary international law.¹⁷ While this status may be controversial with relation to some rules, the customary status of equitable and reasonable use and no significant harm is widely agreed upon.¹⁸

¹¹ Ashok Subramanian, Bridget Brown and Aaron Wolf, 'Understanding and Overcoming Risks to Cooperation along Transboundary Rivers' (2014) 16 *Water Policy* 824.

¹² See for example, Musa M Abseno, 'The Influence of the UN Watercourses Convention on the Development of a Treaty Regime in the Nile River Basin' (2013) 38 *Water International: The 1997 UN Watercourses Convention - What Relevance in the 21st Century?* 192.

¹³ Convention on the Law of the Non-Navigational Uses of International Watercourses (adopted 21 May 1997, entered into force 17 August 2014) UN Doc A/51/869 (hereinafter UNWC)

¹⁴ Convention on the Protection and Use of Transboundary Watercourses and International Lakes (adopted 17 March 1992, entered into force 6 October 1996) 1936 UNTS 269 (hereinafter UNECE)

¹⁵ As of September 2020 this includes Senegal (2018), Chad (2018) and Ghana (2020).

¹⁶ Historically, regulation of water resources at a European level (as embodied within the UNECE Convention) has focused on water quality, while the UNWC has focused on water quantity. As a result, the body of law in Africa largely also places emphasis on quantity and apportionment of shared water resources.

¹⁷ See Stephen C McCaffrey, 'The Customary Law of International Watercourses' in Mara Tignino and Christian Bréthaut, *Research Handbook on Freshwater Law and International Relations* (Cheltenham, Gloucestershire: Edward Elgar Publishing Limited 2018) at 147. See also Alistair Rieu-Clarke and Rémy Kinna, 'Can Two Global UN Water Conventions Effectively Co-exist? Making the Case for a "Package Approach" to Support Institutional Coordination' (2014) 23 *Review of European, Comparative & International Environmental Law* 15.

¹⁸ See McCaffrey in Tignino and Bréthaut (n 17).

Neither of the OTB states have signed or ratified the UNWC or the UNECE and are therefore not bound by either Convention. Kenya did, however, vote in favour of the adoption of the UNWC at the UN General Assembly during its inception,¹⁹ while Ethiopia was recorded as abstaining. It is possible that Ethiopia's abstention relates to perceived risks regarding the obligations which may be imposed by the Convention, particularly due to its geographical position as an upstream state. Ethiopia's position is also likely to have been shaped by previous experiences of injustices over transboundary resources, namely in the case of the Nile.²⁰ This perceived risk was also illustrated through the reservations made by Ethiopia on some of the provisions of the UNWC during drafting stage, including the perception that the scope of the no significant harm principle could inhibit its ability to use its water resources.²¹ Despite its reservations, Ethiopia did vote in favour of the UNWC when it was finally adopted by the Working Group of the Convention.²² Further support for the key principles of IWL can also be illustrated through Ethiopia's agreement to the CFA²³ which incorporates both equitable and reasonable use (Article 4) and no significant harm (Article 5). In addition, the Declaration of Principles (DoPs)²⁴ signed by Egypt, Sudan and Ethiopia for the governance of the construction and filling of the Grand Ethiopian Renaissance Dam (GERD), also contains the key principles of IWL, illustrating Ethiopia's commitment to the key rules.²⁵ Thus, while neither country is party to the UNECE or UNWC, both Kenya and Ethiopia have illustrated their support for the key principles of IWL through their willingness to sign agreements containing the rules. Further, as previously mentioned, it is widely recognised that the key principles of IWL, including equitable and reasonable use and no significant harm are customary international law, making them binding upon all states.²⁶

Each of the key principles of IWL can provide riparian states with a framework on which to build cooperative mechanisms for the sustainable use of shared watercourses. Further, in addition to the aforementioned substantive rules, a number of procedural rules guide states through the process of implementation which can provide a greater understanding of developments taking place on each side of the border, opening space for dialogue and potential for benefit sharing.²⁷ The implementation of these principles may also serve to alleviate some of the risks of cooperation, as will be further discussed in subsequent sections. In order to fully understand how each of these rules may be applied and operationalised within the OTB, the following sections will provide an overview of each principle.

Equitable and Reasonable Use

¹⁹ UN General Assembly Official Records, 99th Plenary Meeting, 21 May 1997, UN Doc/A/51/PV.99 <http://www.un.org/ga/search/view_doc.asp?symbol=a/51/pv.99>.

²⁰ Tadesse Kassa Woldetsadik, *International Watercourses Law in the Nile River Basin: Three States at a Crossroads* (Routledge 2013) 250-253

²¹ Draft Articles on the Law of the Non-Navigational Uses of International Watercourses and Resolution on Confined Transboundary Groundwater, Report of the Secretary-General, UN Doc A/51/275, General Assembly, Fifty-First Session, 6 August 1996 at 275 - discussing the Nile in particular.

²² Report of the Sixth Committee to the General Assembly, 11 April 1997, UN Doc. A/C.6/51/NUW /L.3Add.1/CRP.94

²³ 'Agreement on the Nile River Basin Cooperative Framework (CFA) (signed 14 May 2010; not yet in force)'. Note that the CFA has added additional factors such as water contribution of riparian countries as a factor to applying equitable utilization.

²⁴ Agreement on Declaration of Principles between The Arab Republic of Egypt, The Federal Democratic Republic of Ethiopia and The Republic of the Sudan on The Grand Ethiopian Renaissance Dam Project (signed 23 March 2015).

²⁵ Opinions on the GERD, as is the case with developments on the OTB, particularly the Gibe dam series, have been divided. While some have argued against the dam, others have noted its potential to act as a symbol of regional integration see John Mukum Mbaku, 'The Controversy over the Grand Ethiopian Renaissance Dam' (*Brookings*, 5 August 2020). See also 'The Grand Ethiopian Renaissance Dam - A Symbol of Regional Integration' (*Ventures Africa*, 4 March 2014). For further information on the GERD the controversy surrounding it see Zeray Yihdego, 'The Fairness "Dilemma" in Sharing the Nile Waters: What Lessons from the Grand Ethiopian Renaissance Dam for International Law?' (2017) 2 Brill Research Perspectives in International Water Law 1.

²⁶ Stephen C McCaffrey, 'The Customary Law of International Watercourses' in Tignino and Br  thaut (n 17) at 147.

²⁷ Claudia W Sadoff and David Grey, 'Cooperation on International Rivers: A Continuum for Securing and Sharing Benefits' (2005) 30 *Water International* 420

Equitable and reasonable use is widely viewed as the cardinal rule of IWL. The principle itself is contained within Article 5, while Article 6 contains a number of ‘factors’ to be considered when determining whether a use is equitable or reasonable. The factors are wide-ranging but are not exhaustive. They include matters from socio-economic need to geographical and hydrographical characteristics, as well as existing and potential use of the watercourse. No guidance is given with relation to how these factors should be interpreted or applied, rather, this is left open to allow room for interpretation across the varying circumstances within which international watercourses exist. No factor is more heavily weighted than another either; Article 6(3) notes that ‘each factor is to be determined by its importance in comparison with that of other relevance factors’. The only additional guidance provided is for use in the event of a conflict of uses, in which case Article 10(2) notes that ‘special regard’ should be given to ‘vital human needs’.

Thus, equitable and reasonable use relies on a deliberative process being taken by states in order to establish the importance and weight of factors within any given set of circumstances. It is for this reason that the principle has been subject to criticism, accused of providing little guidance for interpretation, leading states towards a process of water equalisation rather than equitability. It is possible that the developments taking place along the Omo River, particularly with relation to irrigation developments, have the potential to be inequitable towards Kenya, specifically with relation to impacts on Lake Turkana. There is, however, potential for this water use to be rebalanced through a process of benefit sharing.²⁸ To some extent, this is already occurring within the basin with relation to the power sharing agreements which are in place, although any occurrence of benefit sharing is largely passive in nature and is not a direct and intentional agreement to share benefits pertaining to the river.

At national level, the principle of equitable and reasonable use is not strongly in place within either Kenya or Ethiopia. The Constitution of Kenya states in Article 174(g) that there should be ‘equitable sharing of national and local resources throughout Kenya’ and Article 27(j) of the 2016 Water Act sets out the power and function of a basin water resources committee to advise government on ‘equitable water sharing within the basin area throughout water allocation plans’. Neither of the two provisions go as far as to define what is meant by ‘equitable’ or provide any further measures for implementation. The principle of equity is also present within Ethiopian legislation which notes that a river basin plan should aim to guarantee equity and sustainability in water resource use.²⁹ Ethiopia’s 1999 Water Policy further states that there should be meaningful and mutually fair regional cooperation and agreements on the joint and efficient use of transboundary water within riparian countries based on ‘equitable and reasonable’ use principles.³⁰ While this is notable, as it goes some way to acknowledging the need to implement equitable and reasonable use on transboundary watercourses, it still takes the form of a relatively vague provision. Nonetheless, despite the principle of equitable and reasonable use not being strongly in place within the OTB, it can still be enforced as an international customary law obligation. The principle is also included within provisions of the ACCNRR, which both countries are party to.³¹ In addition, the obligation is likely to become much stronger in future with the formation of regional arrangements through IGAD, as will be detailed in subsequent sections, assuming that both Kenya and Ethiopia ratify the agreements.

Duty to Prevent Significant Harm

²⁸ While there are many advocates of benefit sharing on transboundary watercourses, risks of quantifying benefits from a watercourse must also be considered, see A Dan Tarlock, ‘Are Shared Benefits of International Waters an Equitable Apportionment?’ (2007) 18 Colorado Journal of International Environmental Law & Policy 523.

²⁹ 2007 River Basin Councils and Authorities Proclamation (No. 534 of 2007), Article 2(1)(8)

³⁰ 1999 Ethiopian Water Resources Management Policy (Federal Democratic Republic of Ethiopia, Ministry of Water Resources 1999)

³¹ Revised African Convention on The Conservation of Nature and Natural Resources (adopted 11 July 2003; in force 23 July 2016), Article III(3) which states the duty ‘to ensure that developmental and environmental needs are met in a sustainable, fair and equitable manner’.

The no significant harm principle is one of due diligence, thus it is a duty of conduct, rather than result. The principle requires states to 'take all appropriate measures' which it could reasonably be expected to take in order to prevent harm.³² The principle is flexible, allowing the specific circumstances of the state to be considered; for instance, two states with very different levels of development would not necessarily be expected to undertake the same measures, but rather what is within their capacity. For harm to be deemed to be 'significant harm' it must be more than 'trivial' and result in a 'real impairment of use, i.e. a detrimental impact of some consequence'.³³ Harm caused is not limited to the watercourse itself, but could also relate to measures taking place in other sectors which have an adverse impact on the watercourse.

Thus, the principle of no significant harm is like that of equitable and reasonable use in the sense that it is a flexible rule which is open to interpretation and application with relation to the particular states in question. Both principles are evolutionary in that their interpretation requires constant reassessment and revision in line with the developments taking place on the watercourse. With relation to equitable and reasonable use the factors which should be considered will likely change over time, as will the weight which should be afforded to them. For the application of no significant harm it is likely that measures which are considered to be diligent by one point in time may not be diligent enough at another, particularly as the developmental stage of the country changes.

No explicit mention is made of the principle of no significant harm within the national legislation of Kenya or Ethiopia. However, Article 3 of the Ethiopian Water Resources Management Proclamation states that it must be ensured that 'harmful effects of water are prevented'. In Kenya, Article 70(2)(a) states with regard to the enforcement of environmental rights that the court may make an order to 'prevent, stop or discontinue any act or omission that is harmful to the environment'. Both states do therefore make some reference to the prevention of harmful conduct, but neither provision is testament to the principle of no significant harm.

Duty to Cooperate

The duty to cooperate is contained within Article 8 of the UNWC and obliges States to cooperate on the basis of sovereign equality, territorial integrity, mutual benefit and good faith in order to attain optimal utilisation and adequate protection of an international watercourse. Once again, the principle is a flexible one, providing no specific obligations. However, as explained by Leb, it is possible for states to comply with the duty in a number of different ways such as 'through compliance with customary obligations that arise from the general duty and through other unilateral acts of cooperative nature and mutual engagement in negotiations, consultations, planning and joint management'.³⁴

The previous three sections have made clear that the substantive rules of IWL, namely equitable and reasonable use, the duty to prevent significant harm and the duty to cooperate have a number of ambiguities. For this reason, each of the principles have to be clarified and interpreted on a case by case basis, allowing for the individual characteristics of the watercourse and the wider basin to be taken into consideration. Thus, the principles themselves only provide limited guidance for states when it comes to the resolution of international water conflicts. Their use is, however, more significant with relation to the prevention of such conflicts and the sustainable management of a transboundary basin due to their usefulness in creating a framework for cooperation and equitable use. Yet, these principles may not be seen as relevant in the stages before a legal framework on a transboundary basin is formed. Instead, focus may be placed on the 'risks'

³²Convention on the Law of the Non-Navigational Uses of International Watercourses (adopted 21 May 1997, entered into force 17 August 2014) UN Doc A/51/869., Article 7

³³ UN Watercourses Convention User's Guide, Fact Sheet Series: Number 5, No Significant Harm Rule <https://www.unwatercoursesconvention.org/documents/UNWC-Fact-Sheet-5-No-Significant-Harm-Rule.pdf>; Stephen C McCaffrey, *The Law of International Watercourses* (Third edit, Oxford : Oxford University Press 2019) at 470

³⁴ Christina Leb, *Cooperation in the Law of Transboundary Water Resources* (Cambridge, United Kingdom : Cambridge University Press 2013) at 81

which cooperation could bring. Identification of the perceived risks to cooperation and the formation of strategies to alleviate such risks through IWL could make the principles appear more relevant to states and encourage their implementation. Nonetheless, cooperation has taken place in the OTB both historically and in recent years. Further, the developments which are taking place at a regional level illustrate movement towards more formalised methods of cooperation as seen within other regions of Africa. The specifics of this cooperative relationship will be discussed next.

Cooperation in the OTB

While there is no formal agreement on water governance in place within the OTB, cooperation has been occurring between Kenya and Ethiopia for many years. In 1907 an imperial era treaty between Ethiopia and Britain defined the border between Kenya and Ethiopia establishing a boundary which passes through the Omo River Delta and the Northern End of Lake Turkana. This border was reaffirmed by a newly independent Kenya and Ethiopia in 1970.³⁵ The agreement stated that

Kenya Government personnel in the Namoruputh area shall have access through Ethiopia territory to the Omo River for the purpose of obtaining fresh water” and that “other Kenya inhabitants and duly authorised government agents in the Namoruputh area may, from time to time, have access to the Omo River for fresh water under and subject to administrative arrangements made by the two governments and according to security conditions in the area.

This provision demonstrates the positive spirit of cooperation between the two countries and the issues related to dividing water resources at the border alongside poor infrastructure, poor service provision and high poverty, which is somewhat confirmed by reports of conflicts among pastoralist communities at the border over water and grazing land. In addition, the Kenya-Ethiopia Joint Technical Boundary Committee was established in 1950 for boundary demarcation and now serves the purpose of joint inspections.³⁶ Subsequent agreements largely revolved around trade,³⁷ with no treaty addressing the governance of the OTB at a basin level.

In recent years, hydropower developments which have taken place on the Omo have spurred a new era of cooperation over energy sharing. In December 2016, an agreement was signed with relation to the Kenya-Ethiopia Highway project³⁸ and subsequently in June 2017, the Cross-Border Programme for Sustainable Peace and Socio-Economic Development (SUPSED) agreement was signed. The process towards this agreement began a decade beforehand with the signing of a Memorandum of Understanding (MoU) in 2006 between the Ethiopian Electric Power Corporation and the Kenya Electricity Transmission Company for the joint development of the project.³⁹ The SUPSED Agreement covers the northern Marsabit county of Kenya

³⁵ Kenya and Ethiopia Treaty respecting the boundary between the two countries (with maps, schedules and protocol) (signed at Mombasa on 9 June 1970).

³⁶ Government Notice No. 7, Kenya-Ethiopia Boundary Commission, S/A XAF 3/2 IV, 22 December 1950; See also Ian Brownlie and Ian Burns, *African Boundaries: A Legal and Diplomatic Encyclopaedia* (C. Hurst & Co. Publishers, Royal Institute of International Affairs 1979).p.821

³⁷Kenya and Ethiopia Sign Cross-Border Agreement' (BBC News, 7 December 2015) <http://www.bbc.com/news/world-africa-35025943>; 'Ethiopia, Kenya Ink Cross-Border Trade Agreement' (Tralac.Org, 18 December 2014) <https://www.tralac.org/news/article/6811-ethiopia-kenya-ink-cross-border-trade-agree-ment.htm>.; 'Ethiopia, Kenya Sign Agreement to Build Major Road Linking the Two Countries' (Ezega News, 9 November 2011) <https://www.ezega.com/news/newsdetails?page=heads&newsid=3116>.

³⁸ 'Ethiopia, Kenya to Enhance Cooperation on Energy Sector (Business Insights: Global, 24 June 2016) <http://bi.galegroup.com/global/article/gale%7ca456075249/7f08136ab678381b204f382d03d2fa50?u=ustrath>'.

³⁹ See 'Kenya-Ethiopia Electricity Highway' (Power Technology) <https://www.power-technology.com/projects/kenya-ethiopia-electricity-highway/>. See also 'The Roadmap to a Fully Integrated and Operational East African Power Pool' (Deloitte, 2015) https://www2.deloitte.com/content/dam/deloitte/ke/documents/energy-resources/er_power%20tl.pdf.

and the southern Borana Zone in Ethiopia where the OTB is situated and aims for ‘environmental protection, trade, development and peaceful coexistence in their border regions’.⁴⁰

The 2016 power sharing agreement provides a mandate for the Kenya-Ethiopia Highway Project (or the Eastern Electricity Highway Project) which will see the construction of a 1,000km power line run from Ethiopia to Kenya. An environmental and social impact assessment was conducted with relation to the project and its subsequent report approved in 2012. However, the process has received criticism with relation to the timing and the failure to allow time for any objections to be made.⁴¹ Construction began in June 2016. While the exact details of the power sharing agreement between Kenya and Ethiopia are not public, it is believed that it will allow Ethiopia to supply Kenya with 400 megawatts of hydropower at 1 US-cent/kwh.

The first field office bordering Ethiopia and Kenya was subsequently opened in 2019 to facilitate ‘Cross-border cooperation between Ethiopia and Kenya for conflict prevention and peace building in the Marsabit-Moyale Cluster’ and for a project which aims to provide ‘Support for Effective Cooperation and Coordination of Cross-border initiatives in Southwest Ethiopia-Northwest Kenya, Marsabit-Borana & Dawa and Kenya-Somalia-Ethiopia’ (SECCCI). The objective of the SECCCI Project is to address drivers of conflict and instability, irregular migration and displacement in the cross-border areas of the Horn of Africa by improving cross-border cooperation and coordination.⁴² There are also plans to open an additional two field offices, one of which will be on the Turkana-Omo border.⁴³ Ethiopia and Kenya have also both invested in the Lamu Port Southern Sudan-Ethiopia Transport Corridor⁴⁴ and have agreed to establish a free trade zone in order to enhance infrastructural development.⁴⁵

Thus, a number of different projects and initiatives are underway within the OTB and the surrounding area which could provide fertile ground for more formalised cooperation in the years to come. Significantly, progress towards a regional water policy and protocol is also well underway, as will be discussed in the following section.

Regional Developments through IGAD

In recent years, the number of developments which have taken place within the IGAD in relation to water resources is significant. Transboundary water resources were placed on the IGAD agenda in 2000 and the Inland Water Resources Management Programme (INWRMP) was formed in 2012. The INWRMP has a number of different facets, but overall aims to work towards the formation of a common approach for the governance of shared water resources in the IGAD region, with the view to creating a regional water policy and protocol. One of the key results of the INWRMP has been the formation of the IGAD Water Dialogue Forum (WDF). The first WDF meeting was held in 2014 in Nairobi, Kenya under the theme ‘Water for Regional Cooperation’ and was attended by almost 500 delegates from all over the region. The hope is that the WDF will create space for the formation of a shared regional vision for water management as well as the prevention, diffusion, mitigation and resolution of water related conflicts. A WDF Secretariat has also been set up within IGAD in order to manage water dialogue events.

⁴⁰ The agreement is not yet made available to the public or the authors

⁴¹ Jon Abbink, ‘Dam Controversies: Contested Governance and Developmental Discourse on the Ethiopian Omo River Dam’ (2012) 20 *Social Anthropology* 125.

⁴² For details of the SECCCI project see ‘Collaboration in Cross-Border Areas of the Horn of Africa’ (European Union) https://ec.europa.eu/trustfundforafrica/sites/euetfa/files/brochure-final-web_1.pdf.

⁴³ ‘First Field Office Bordering Ethiopia, Kenya Opens in Moyale City; Office Aimed at Improving Regional Cross-Border Cooperation’ (Addis Standard, 3 April 2019) <https://addisstandard.com/news-first-field-office-bordering-ethiopia-kenya-opens-in-moyale-city-o>.

⁴⁴ Krampe and others (n 1) at 5. See also ‘Lamu Port Southern Sudan-Ethiopia Transport Corridor’ (AUDA-NEPAD) <https://www.nepad.org/lamu-port-southern-sudan-ethiopia-transport-corridor>’.

⁴⁵ Seleshi Tessema Mulata, ‘Lamu Port Southern Sudan-Ethiopia Transport Corridor’ (Anadolu Agency, 1 March 2019) <https://www.aa.com.tr/en/africa/ethiopia-kenya-agree-to-establish-free-trade-zone/1406645>.

Progress has also been made towards the formation of the water Policy and Protocol. The Regional Water Resources Policy was endorsed by water ministers of IGAD Member States, including both Kenya and Ethiopia, on the 21st of January 2015. The policy is based on a synthesis of national legal frameworks and takes lessons and key principles from IWL as well as other basin agreements including equitable and reasonable utilisation, the duty not to cause significant harm and the general obligation to cooperate.⁴⁶ The policy also puts in place provision for a number of regional and national workshops to ensure stakeholder participation. Significantly, IGAD Member States are now also working towards the finalisation of a Draft Regional Water Resources Protocol which is to be informed by the policy and based on existing IWL principles. As per the current draft of the Protocol, it will aim:

(a) to promote and facilitate the establishment of agreements on, and institutional arrangements for, the management of international river basins and transboundary aquifers and aquifer systems; (b) to promote the harmonization of policies and legislation on the use, development, protection, conservation and management of international river basins and transboundary aquifers and aquifer systems, and of the resources related thereto, and; (c) to promote research, technology development and capacity building so as to facilitate the use, development, protection, conservation and management of international river basins and transboundary aquifers and aquifer systems, and of the resources related thereto.⁴⁷

It is expected that many of the provisions of the protocol will be taken from the UNWC and the CFA.⁴⁸ The current draft contains all of the core principles of IWL including *inter alia* equitable and reasonable use, no significant harm, general obligation to cooperate, information sharing, notification and consultation and transboundary impact assessments.⁴⁹

In addition, a draft policy and protocol on data sharing has also been formed focusing on seven key areas; 1) strengthening of regional policy and legal framework; b) strengthening of regional institutional framework for data management; c) national level data collection and processing; d) national level sharing and exchange of water related data and information; e) sharing and exchange of water related data and information at a regional level amongst member states; f) public access to water related data and information and knowledge products. Similarities can therefore be seen between the steps being taken within IGAD and the frameworks which have previously been put in place within basins in Southern Africa. For instance, through ZAMCOM the Zambezi River Basin also has a number of supplementary guidance documents relating to the implementation of key rules of IWL including *inter alia* Rules and Procedures for Data Sharing (2016)⁵⁰ and Procedures for Notification of Planned Measures (2017).⁵¹

Notably, a Ministerial Meeting took place in November 2018 between Ministers in charge of water resources from all IGAD Member States.⁵² The purpose which was to discuss the progress of the IGAD Regional Water Protocol and for further guidance to be given on moving the negotiations forward. The meeting closed with

⁴⁶ Marcella Nanni, 'Water Challenges in the IGAD Region: Towards New Legal Frameworks for Cooperation' (2016) 41 *Water International: The Grand Ethiopian Renaissance Dam: Legal, Political and Scientific Challenges* 635.

⁴⁷ *ibid.*

⁴⁸ *ibid.*

⁴⁹ It should be noted that it was not possible to obtain a copy of the Regional Water Policy or the draft Regional Water Resources Protocol within the course of this research. For this reason, analysis has relied upon secondary resources, namely *ibid.*

⁵⁰ ZAMCOM, Rules and Procedures for Data Sharing, Adopted by Council February 2016 <http://www.zambezicommission.org/publication/rules-and-procedures-data-sharing-adopted-council-february-2016>.

⁵¹ ZAMCOM, Procedures for Notification of Planned Measures (2017) <http://www.zambezicommission.org/publication/zamcom-procedures-notification-planned-measures-2017>.

⁵² IGAD Ministers of Water Convene in Nairobi, 15th November 2018 <https://igad.int/divisions/agriculture-and-environment/1993-igadministers-of-water-convene-in-nairobi>.

the signing of a Communique which reaffirmed commitment to the formation of the Water Protocol.⁵³ The document reiterates the endorsement of the IGAD Regional Water Resources Policy and recognised the importance of water as a 'basic necessity' for human survival and development. It was also recognised that the problems faced by Member States are 'common problems and challenges' which therefore require 'joint actions'. The document provides an overview of the difficulties faced by the region including the increasing demand placed on water to meet human and socio-economic development, as well as the need to ensure conservation and protection of these key resources, particularly in light of vulnerability to climate change and pollution. The wide-ranging impacts of the sustainable management of water resources are also highlighted including poverty eradication, peace, socioeconomic development, regional cooperation, environmental sustenance and water security. Significantly, the Communique also recalls the principles enshrined in the UNWC and the Draft Articles for Transboundary Aquifers,⁵⁴ referring explicitly to equitable and reasonable use and the sustainable management of water resources without causing significant harm. The final sections of the document reaffirm the commitment of Member States to the finalisation of the Regional Water Resources Protocol and the need to 'promote closer cooperation in the equitable, sustainable and coordinated utilisation, protection, conservation and management of the Transboundary/Shared water resources in the IGAD region'. The Communique was signed by both Ethiopia and Kenya.⁵⁵ While the document is, of course, not legally binding, it is a further demonstration of the intent to advance cooperation over shared watercourses in the region and agreement with the core principles of IWL.

The previous sections have demonstrated that a number of different cooperative agreements and initiatives have taken place both within the OTB itself and at a wider regional level. However, the question of why no such cooperative framework with relation to the shared transboundary watercourse of the Omo-Turkana remains. The following section will use the risk framework developed by Subramanian et al. to assess the extent to which each of these risks may be present within the OTB and whether it may be responsible for the relatively slow pace towards the formation of a legal framework on water governance. In doing so, it will also discuss how each of the key principles of IWL could serve to alleviate these risks and work towards the formation of a cooperative framework and increased benefit sharing.

Reconciling Risk through IWL

Perceptions of why countries sharing transboundary waters cooperate generally revolve around the idea that cooperation will occur if the benefits of doing so outweigh the costs.⁵⁶ However, as noted by Subramanian et al. demonstration of potential benefits have been shown not to be enough to result in cooperation.⁵⁷ As stated by Subramanian et al.

⁵³ 'Communique of the Meeting of Ministers Responsible for Water Resources of the IGAD Region, 14th November 2018 <https://Igad.Int/Attachments/Article/1993/Communique%27%20of%20the%20Meeting%20of%20Ministers%20Responsible%20for%20Water%20Resources%20in%20the%20>

⁵⁴ ILC, 'Draft Articles on the Law of Transboundary Aquifers' UN DOC A/RES/63/124 (11 December 2008).

⁵⁵ Communique of the Meeting of Ministers Responsible for Water Resources of the IGAD Region (n 53).

⁵⁶ See Halla Qaddumi, 'Practical Approaches to Transboundary Water Benefit Sharing, Working Paper 292 (Overseas Development Institute, 2008) <https://www.odi.org/sites/odi.org.uk/files/odi-assets/publications-opinion-files/2576.pdf>.

⁵⁷ Subramanian, Brown and Wolf (n 8); Subramanian, Brown and Wolf (n 11).

Perceived risks are actually a core consideration for decision makers in a country. If a country cannot find a way to compensate for or control risk, it may choose not to enter into a cooperative agreement. Hesitation, or even resistance, observed on the part of the countries regarding cooperation with other riparian countries can be better understood by evaluating perceived risks to their engagement. Perceived risks are defined as the perception that an act of cooperation will expose the country to harm, will jeopardize something of value to the country, or will threaten the political future of individual policy makers.

Box 1: Five perceived risks to cooperation over shared rivers

1. Capacity and Knowledge

Confidence in ability to negotiate a fair deal; having enough and the correct information and knowledge to do so.

2. Accountability and Voice

Deliverability of benefits by the regional entity and co-riparians, often related to trust; having a say in decision making in the governing structures of the regional entity.

3. Sovereignty and Autonomy

Ability to act in best interest of the country without constraints; making decisions independently.

4. Equity and Access

Fairness of (relative) benefits to country, including timing of benefits and costs and obtaining/retaining fair access to river.

5. Stability and Support

Longevity of potential of agreement; in-country support of agreement, including ratification likelihood.

Subramanian et al. developed an analytical framework for risks and opportunities in a transboundary water context. The framework focuses on perceived risks and opportunities by decision makers in countries that are responding to potential cooperation. It is based on the assumption that when states enter into such discussions, they are already aware of the potential benefits which could be gained. Thus, the crucial factor for cooperation is not the benefits which may be derived, but rather, the perceived risks to that cooperation.

The risks perceived by states are defined in five categories, as detailed in *Box 1*. The authors note that all risks are not equal, but that equity and access and sovereignty and autonomy are persistent and continue to be present even after deals are made and benefits are gained.⁵⁸ As a result, the remaining risks, namely capacity and knowledge, accountability and voice and stability and support are considered operational risks which can more easily be used as leverage points to trigger cooperation.

Capacity and Knowledge

This risk, as described by Subramanian et al. relates to the confidence (or lack thereof) of a country to be able to negotiate an agreement and have enough technical knowledge to do so. The authors cite as an example the fact that Ethiopia and a several other Equatorial Nile countries have requested help to upgrade their transboundary departments and basin analysis skills in order to 'level the playing field'.⁵⁹ This finding can also be backed up by the general status in the region, as noted by Krampe et al. there is a 'need for more solid, shared and jointly accepted information' within the Horn of Africa.⁶⁰ One factor behind this perceived risk may be access to finance as the basin has not received the same degree of international (donor) financial support, as has been the case with other international basins. Thus, as it currently stands, there is a lack of existing and reliable data available. An increase in available data and information would provide greater

⁵⁸ Subramanian, Brown and Wolf (n 8) at 3

⁵⁹ Subramanian, Brown and Wolf (n 11).

⁶⁰ Krampe and others (n 1) at p.viii

understanding of the OTB as a shared resource, thus strengthening management and planning within the basin and increasing the potential for benefit sharing.

As a framework for information sharing, knowledge can be generated through increased cooperation and sharing of information as is required under the procedural rules of IWL. Article 9 of the UNWC requires regular exchange of data and information, particularly requiring that states shall

on a regular basis exchange available data and information on the condition of the watercourse, in particular that of a hydrological, meteorological, hydrogeological and ecological nature and related to the water quality as well as related forecasts⁶¹

Article 9(2) notes that if information is requested by another watercourse state which is not readily available, it 'shall employ its best efforts to comply with the request but may condition its compliance upon payment by the requesting state of the reasonable costs of collection and, where appropriate, processing such data or information'. This provision therefore goes some way to recognise the differences in capacity between states and their ability to gather data. The collection and sharing of data is a key precondition for further cooperation and links to additional procedural rules of the UNWC such as notification of planned measures.⁶² The IGAD regional water resources policy also requires IGAD member states to exchange data and information and consult each other on the conditions of their transboundary water and related resources.⁶³ The policy also calls for the establishment of an institutional framework to facilitate implementation of its provisions and encourages member states to establish joint institutions for specific river basins or aquifers, wherever necessary.⁶⁴

It should also be noted the formation of an 'operational arrangement' is one of the indicators of Sustainable Development Goal 6, the water goal. For an arrangement to be deemed 'operational', the following criteria must be met: 1) there is a joint body or mechanism in place; 2) there are at least annual meetings between riparian countries; 3) a joint or cooperating water management plan has been established or joint objectives have been set; and 4) at least annual exchanges of data and information take place.⁶⁵ Thus, the creation of a joint institution and the process of exchanging data and information can also contribute to Ethiopia and Kenya's achievement of SDG 6.

It should, however, also be noted that for the risk of capacity and knowledge to be alleviated, capacity building and knowledge building must go beyond the basin scale. Education and awareness raising on the importance of water-related issues must be conducted at a local level, without which, lack of awareness of water-related issues can cause problems to perpetuate. Further, one of the main criticisms of the developments on the OTB has been the lack of stakeholder participation, increased capacity is therefore necessary in order to ensure there are appropriate mechanisms for this process to take place. This need also links to ensuring that each country and all stakeholders feel there is appropriate accountability and voice, which is the next risk identified.

Importantly for the OTB, negotiating a deal with outdated or missing information will be difficult. Neither Kenya nor Ethiopia are likely to be able to raise pertinent questions about projected costs and benefits without appropriate information. Any perception that one country may have access to more information than another is also likely to lead to beliefs that one country is more 'powerful' when it comes to the formation of a deal.

⁶¹ Art 9(1)

⁶² *ibid* Art 12

⁶³ Nanni (n 47) at 643

⁶⁴ *ibid*

⁶⁵ Transforming Our World: The 2030 Agenda for Sustainable Development, UNGA Res. A/RES/70/1, 21 October 2015 (The Sustainable Development Goals), Indicator 6.5.2. See also Progress on Transboundary Water Cooperation: Global Baseline for SDG Indicator 6.5.2 (UN and UNESCO [on Behalf of UN Water] 2018) <https://www.unwater.org/publications/progress-on-transboundary-water-cooperation-652/>.

Thus, at this stage, capacity and knowledge is likely one of the perceived risks slowing progress towards cooperation within the OTB.

Accountability and Voice

Poor levels of accountability and inclusivity can result in scepticism with relation to both regional entitled and basin institutions. In the formation of a regional level protocol – as is intended through IGAD – countries may be concerned that governance arrangements of the regional entity will not allow for appropriate inclusive levels and systems of decision-making, approval, monitoring, dispute settlement and enforcement of obligations. These concerns may be born from a lack of faith in the political process and bureaucratic decision making. In order to alleviate such risks clear steps must be agreed upon for decision making and operating procedures which can help to improve transparency and build confidence among riparian states.

Power dynamics on international watercourses have long been recognised as one of the key perceived risks when it comes to cooperation, giving rise to terms such as ‘hydro-hegemony’.⁶⁶ In the relationship between Kenya and Ethiopia, Ethiopia has been depicted as the ‘dominant’ player due to its recent developments and its geographical position upstream. However, the economic position of Kenya is greater, while Ethiopia is a low-income country, Kenya is middle income.⁶⁷ Thus, there are many different factors and contextual circumstances at play which may have impacted the willingness of each country to enter formal cooperation on water governance.

To alleviate this risk, accountability can be enhanced through the creation of frameworks for notifying and consulting states regarding developments on a watercourse. Articles 11-19 of the UNWC cover prior notification, consultation and (where relevant) negotiation with relation to any planned measures on an international watercourse. Following this process can open space for dialogue between riparian States and ensure that parties have an equal voice. Further, it is also possible for states to require regular meetings through an institutional framework (as is required within the UNECE and for the achievement of SDG 6.5.2, as noted above), ensuring there is a regular forum for communication. There are many advantages to the establishment of institutional cooperation including the ability to increase benefit sharing and build economies of scale, such as lower cost power production from hydropower, or enhanced food security from irrigation. Benefit sharing through an institutional and cooperative framework also allows recognition of the comparative advantage of each country based on factors such as geographical location. Utilising legal frameworks such as the UNWC also means that if a dispute on a shared watercourse should arise, there is a dispute settlement process in place (Article 33).

As was briefly referred to with regards to capacity and knowledge, local stakeholder participation is also essential for the reducing the risk of a perceived lack of accountability and voice. The IGAD regional water resources policy highlights the need for stakeholder participation in the development and management of transboundary water resources, both at the highest level of decision making, and within project design.⁶⁸ It is therefore likely that stakeholder participation could be a part of a future agreement on the OTB.

The nature of the OTB, with the Omo River lying entirely within Ethiopia, while Lake Turkana sits within Kenya, as well as the different stage of economic development within the two countries is likely to raise fears over accountability and voice. Therefore, this too can be viewed as a risk which may be perceived within the basin.

Sovereignty and Autonomy

⁶⁶ See Rebecca L. Farnum, Stephanie Hawkins and Mia Tamarin, ‘Hydro-Hegemons and International Water Law’ in Alistair Rieu-Clarke, Andrew Allan and Sarah Hendry, *Routledge Handbook of Water Law and Policy* (Taylor and Francis 2017), 297-310

⁶⁷ In fact, Kenya has the richest economy in East and Central Africa.

⁶⁸ Nanni (n 47) at 643

As noted by Subramanian et al., like equity and access, sovereignty and autonomy is one of the deep-rooted risks perceived by riparian states. States fear losing the ability to make decisions in the best interest of their country with no constraints. This risk is particularly notable with relation to the OTB due to expressed disagreement on what constitutes an ‘international watercourse’ for the purposes of the UNWC, as was illustrated during the drafting process of the Convention.⁶⁹

In the UNWC negotiation process, many different definitions of an international watercourse were discussed. One term, an ‘international drainage basin’ was included in the 1966 Helsinki Rules and was defined to mean ‘a geographical area extending over two or more states determined by the watershed limits of the system of waters, including surface and underground waters, flowing into a common terminus’. While there was some support for the use of this definition, others, mainly upstream countries, opposed its use.⁷⁰ Reaching agreement on the definition took many rounds of negotiation and left some states still unhappy with the final definition.⁷¹

The final agreed scope of the UNWC applies only to ‘international watercourses’ whereby a ‘watercourse’ is defined as a ‘system of surface waters and groundwaters constituting by virtue of their physical relationship a unitary whole and normally flowing into a common terminus’ and an ‘international watercourse’ meaning ‘a watercourse, parts of which are situated in different states’.⁷² Ethiopia demonstrated reservations on this point in the initial drafting stage, insisting that an ‘international watercourse should be treated as a system only in the limited sense of its uses causing significant harm or material injury to co-riparian States’ and that the current definition ‘could result in excessive interference by States in each other’s legitimate internal affairs’.⁷³ Thus, the concern expressed by Ethiopia clearly resonates with the sovereignty and autonomy risk defined by Subramanian.

When the definition of an ‘international watercourse’ as per the UNWC is applied to the OTB, which effectively forms two sub-basins, one of which resides entirely within Ethiopia, contention arises. More specifically, more than 90% of the basin’s waters come from the Omo and Gibe rivers that stem from Ethiopian highlands and end within Ethiopia by joining Lake Turkana within Ethiopian territory. Given that Ethiopia is not a party to the UNWC or any other water treaty governing the OTB, it may be that the water resources within the Ethiopian territory are seen as not shared with Kenya or any other neighbour. From this perspective, Ethiopia only shares Lake Turkana, and not the river systems that exist ‘within its territory’. This perspective may be strengthened if one applies the UNECE definition of a river basin which refers to drainage to the sea as a factor to define a shared water body. Furthermore, the CFA to which Ethiopia has championed and ratified avoids using the UNWC terms and defines the Nile as ‘Nile River Basin’ and ‘Nile River System’. Article 2 (b) defines the latter to mean ‘the Nile River and the surface waters and groundwaters which are related to the Nile River’. Broadly speaking, the CFA appears to have adopted the Helsinki rules approach to defining water systems.⁷⁴

Nonetheless, the UNWC definition of an international watercourse is widely used in water treaty arrangements, although small adjustments or additions are usually made to tailor the text to the specific

⁶⁹ UNGA, Draft Articles on the Law of the Non-Navigational Uses of International Watercourses and Resolution on Confined Transboundary Groundwater, Report of the Secretary-General, UN Doc A/51/275 (Fifty-First Session, 6 August 1996).

⁷⁰ ILC, First report on the law of the non-navigational uses of international watercourses, by Mr Stephen Schwebel, Special Rapporteur, II:I YBILC (2979) at 153

⁷¹ For full details on the process which led to the definition see Alistair Rieu-Clarke, ‘Definitions and Use of Terms (Article 2)’ in Laurence Boisson de Chazournes and others (eds), *The UN Convention on the Law of the Non-Navigational Uses of International Watercourses: a commentary* (Oxford : Oxford University Press 2018).

⁷² UNWC, Art 2

⁷³ Draft Articles on the Law of the Non-Navigational Uses of International Watercourses and Resolution on Confined Transboundary Groundwater (n 69).

⁷⁴ Rieu-Clarke (n 71) at 46

watercourse.⁷⁵ To-date, no judgement has been made by an international tribunal with relation to the definition of an international watercourse, or indeed, whether the definition could be considered as customary international law.⁷⁶ If we apply the definition contained within the UNWC, the OTB fits within the scope of an 'international watercourse' since the combined Omo River and Lake Turkana comprise a unitary whole of separate surface water bodies, that is, a system of surface water flowing into a common terminus (Lake Turkana), with parts of this system situated in different States. The argument that the Omo river and Lake Turkana are two separate sub-basins (and therefore not a contiguous international watercourse) is tenuous, as they are undoubtedly hydrologically connected with each other with both upstream and downstream implications on the use of water within either basin. The UNWC deliberately uses the language of 'watercourse' comprising a 'system' of water bodies and not 'river basin' in order to clarify this potential ambiguity. The disagreement does, however, clearly demonstrate the role of sovereignty and autonomy with relation to the OTB, identifying it as a clear risk from the Ethiopian perspective.

Equity and Access

This risk relates to concern as to whether there would be any limitations placed on access to water resources after an agreement was formed, potential curtailment of development opportunities, the inability to enact national development plans or potential costs of obtaining fair access to the river. Risks relating to 'equity' are often born from a lack of understanding of what the concept may mean in practice.⁷⁷ While IWL does not define equity, its cardinal principle of equitable and reasonable use and its factors of interpretation provide some degree of guidance, albeit in a vague manner which must be applied on a case-by-case basis.⁷⁸

The contribution of water by each riparian State is not one of the factors of equitable and reasonable use, however Ethiopia considers water contribution to a shared water system as one of the factors of equity. This is evident from the fact that the CFA and the Declaration of Principles for the GERD included this factor as part of the factors to be used for applying equity. With this comes additional risks or regrets; firstly and generally, Ethiopia is endowed with huge freshwater resources, mostly transboundary; it has the potential to generate up to 45,000 megawatt in electricity; however, due to several external and internal reasons the country has not been able to harness its resources and address extreme poverty of its people; and secondly, there are 2.5 million Ethiopians who live within the OTB; they live under extreme poverty with no access to potable water, electricity, healthcare, education and exposure to the world (other than tourism); and finally, the external pressure which comes in different forms and modalities ranging from denying it access to funds to that of the negative campaign targeted against its development projects are seen as interventions and impediments its development and sovereign endeavour.

However, each of these issues also presents risks and concerns to Kenya and its people who live in the Turkana basin. Approximately 250,000 people from the Kenyan side depend on Lake Turkana for their lives; any qualitative and quantitative changes to the waterflow may well affect their access to freshwater, fisheries, tourism and the ecosystem of the basin which may raise questions of equity. As a downstream riparian, hence, Kenya can be vulnerable to the major interventions by Ethiopia on the basin system; although the impact of the Omo projects is not yet fully known, a cooperative approach to governing the OTB is clearly beneficial to Kenya. However, as Lake Turkana itself is a shared lake between Ethiopia and Kenya, and major interventions into the Lake from the Kenyan side can have negative impacts for both riparian's and their people, the oil

⁷⁵ *ibid.*

⁷⁶ There is, however, an on-going case taking place at the International Court of Justice on the definition of an international watercourse between Bolivia and Chile, see ICJ Press Release, *Chile institutes proceedings against Bolivia with regard to a dispute concerning the status and use of the waters of the Silala*, 5 June 2016 <https://www.icj-cj.org/files/case-related/162/19018.pdf>.

⁷⁷ Jonathan Lautze and Mark Giordano, 'Does 'Equity' Really Matter in International Water Law? Evidence from Africa' (2006) 17 *Colorado Journal of International Environmental Law and Policy* 89.

⁷⁸ Ximena Fuentes, 'The Criteria for the Equitable Utilization of International Rivers' (1997) 67 *The British Year Book of International Law* 337.

exploration activity and other concerns arising from activities undertaken from the Kenyan side must also be taken as risks (or opportunities) for cooperation in the basin.

While it will always be difficult to determine what can be defined as 'equitable', the use of IWL can provide a robust framework for interpretation. The factors of Article 6, while vague, still provide some degree of guidance to States. Further, Ethiopia and Kenya have already endorsed the key principles of IWL in their endeavour to correct the injustice that has prevailed in the Nile basin and have therefore recognised the utility of the rules.

Given the lack of precise criteria for equity, decisions regarding water and benefit sharing are generally negotiated based on both economic and political criteria. The (intentional) lack of precision within international frameworks allows flexibility in the formation of both regional and basin agreements in order to elaborate on or strengthen provisions which are of greater importance within the basin. Once again, an example can be drawn from the ZAMCOM Agreement, whereby a greater number of general international environmental law principles were included, when compared to the regional level SADC Protocol, or indeed to the IWL frameworks.⁷⁹ Thus, an agreement formed at basin scale does not have to mirror the principles of IWL exactly, but can (and should) be adapted to suit the needs and priorities of the basin.

Equity and access are undoubtedly a risk perceived by the OTB states, as it would be within the majority of shared natural resources. The framework of IWL can, however, go some way to alleviating this risk and provide a starting point for the formation of an agreement which can be flexible and adaptive with future use of the basin, while ensuring that any development taking place is sustainable.

Stability and Support

The final risk defined by Subramanian et al. relates to the likelihood of there being in-country support for the agreement, covering not only the water sector, but also those that are impacted by water governance such as energy and food. It is possible to gauge the level of support for a cooperative framework in the OTB based, not only on the participation of both Kenya and Ethiopia in other regional frameworks and basin-level agreements, but also based on national level frameworks.

National level frameworks within Ethiopia and Kenya implement a number of the key legal principles of IWL. However, others, such as the principle of notification, are absent. Further, while the Kenyan and Ethiopian laws and policies have some similarities, there are also a number of inconsistencies. At a regional level, IGAD is also limited in both its political and financial capacity and its ability to follow through on issues and, as is the case within many transboundary basins, has dependence on donors.⁸⁰ Nonetheless, the conclusion of a regional arrangement may alleviate the lack of confidence among countries in the region which has served to be an obstacle for regional cooperation. As the SUPSED Agreement is not available, its principles cannot be identified. However, other regional agreements such as IGAD and ACCNRR, as well as the aforementioned CFA and DoPs demonstrate commitment to many aspects of water governance and therefore create a framework for support for future negotiations.

Given the level of economic development in many of the IGAD states, there is unlikely to be funds available to support a large river basin organisation. Steps will need to be taken to ensure the institution formed maximises functionality and efficiency without driving up cost. It is essential that the mandate of any institution formed is clear. While no basin or regional level organisation is currently in place with relation to water resources, other regional institutions such as the East African Community (EAC) and other basin

⁷⁹ See Agreement on the Establishment of the Zambezi Watercourse Commission (ZAMCOM) (signed 13 August 2004, in force June 19 2011). Article 12 which refers to the principle of sustainable development, sustainable utilisation and the precautionary principle.

⁸⁰ Krampe and others (n 1).

organisations may result in some degree of overlap. IGAD must ensure there is awareness of any overlaps and cohesion in approaches.

Further, evidence shows that river basins which receive the greatest share of donor funding are those with the well-developed institutional frameworks, as they provide the lowest risk for donors. It is, of course, easier to enhance and develop an existing framework than to work towards fostering a process of cooperation from scratch. Thus, the creation of a framework could assist the future stability and sustainability of the basin by enhancing opportunities for greater funding, allowing research and data gathering to be increased and supporting use of the basin for both riparian States. Further, as was previously mentioned, the establishment of a cooperative framework will also contribute positively towards the attainment of SDG 6. Framing the development of frameworks in such a way is likely to positively impact the contribution of international finance to the development of the basin.

Key Triggers to Cooperation

In addition to detailing the potential risks perceived by riparian states, Subramanian et al. also identify a number of categories of 'risk reduction'. Many of these categories relate clearly to IWL, particularly that of agreement and institutional design. Yet, it should be noted that there is a general consensus in the international water community that treaties, particularly those within developing countries, do not always provide the robustness needed for the governance of complex transboundary watercourses.⁸¹ The formation of treaty agreements often results in the creation of relatively vague provisions, as can be seen within the IWL framework; more specific and detailed rules are unlikely to receive support from basin states due to concerns over sovereignty. Thus, River Basin Organisations (RBOs) are viewed by many to offer a more permanent and functional means of basin management, providing appropriate space for cooperation and adaptation to the changes taking place within the basin. Treaties, once in place, are unlikely to be amended. However, institutions are able to adapt as needed. Of course, both the agreement and the institution are essential for the governance of a joint resource; the agreement provides the underlying principles for governance, while the institution provides a mechanism for implementation. Both the agreement and the institution are also vital to each of the other risk reduction strategies detailed by Subramanian. For instance, 'design legitimacy' can be alleviated by a clearly detailed process of consultation and notification with relation to any developments which are planned within the basin.

⁸¹ A Dan Tarlock, 'Water Security, Fear Mitigation and International Water Law' (2008) 31 Hamline law review 704.

Box 2: Seven Categories of Risk Reduction (Subramanian, 2012)

1. Knowledge and Skill Expansion

Training and studies to meet gaps in capacity and knowledge, and support for developing new skills

2. Institutional Design

Tailoring the institutional arrangement to be a 'fit for purpose' cooperative arrangement for dialogue and action among riparians.

3. Agreement Design

Tailoring the agreement to the preferences of political leaders involved in terms of its formality, scope, goals, obligations, etc.

4. Program Design

Shaping the program to address country interests and goals – sectoral linkages, long- vs. short-term benefits, review and monitoring, etc.

5. Financing and/or Guarantee

Meeting financing needs and gaps identified by countries, including third party guarantee of financial obligations

6. Facilitation (Third Party)

Unbiased, third party assistance in dialogues among riparians, including clarifications and interpretations

7. Decision Legitimacy

Use of consultation and discussion forums and other avenues for ensuring widespread domestic and regional support of decisions.

The financing of an RBO or other institutional mechanism is a difficulty faced by many such institutions.⁸² The source of finance also links clearly to a number of the other risk reduction categories identified by Subramanian. Knowledge and skill expansion will require financial support to enable capacity building, as well as expertise and training, potentially from outside of the basin countries. If the basin organisation is funded by both national governments alone then complete freedom can be maintained over programme design and the formation of a clear vision for the future of the basin. However, should finance be gained from external sources such as international donors, it is likely that programme design will be influenced by the focus of the donor.

Most of the categories of risk reduction identified by Subramanian et al. are easily relatable to the principles of IWL mechanisms of risk alleviation as previously discussed. However, what will be essential for the formation of any future agreements and institutions to take place is that there is clear drive both internally and externally towards cooperation, the beginnings of which can already be seen.

Internally, the need to fulfil developmental goals stemming from the increasing demand for food and energy security can be more easily fulfilled by using regional production hubs such as the EAPP. Externally, both regional and global influences could add political momentum as well as providing guidance and insights into good practice for the development of institutions. The establishment of regional institutional frameworks through IGAD could establish regional thinking on norms and concepts such as equitable and reasonable use. As has been mentioned throughout this article, the influence of regional frameworks can already be seen clearly through bodies such as the SADC.

⁸² See 'UNECE, High-Level Workshop on Financing Transboundary Basin Development, Background Document (9 October 2018)

https://www.unece.org/fileadmin/dam/env/documents/2018/wat/10oct_9_hlws_astana/final_background_document_workshop_on_financingtbcoop_15_11_2018.p

Conclusion

It is clear that the OTB has reached a stage of pivotal importance for future development. The changes taking place within the basin represent great opportunity and risk for both of the basin countries. Now is the crucial time for the formation of a consensual and mutually beneficial joint governance arrangement which alleviates the risks that may be felt by the riparian countries and paves the way for a more transparent and accountable future for the basin.

This article has reviewed transboundary water cooperation as it currently exists within the OTB. It has identified the potential risks which may be slowing down progress towards the creation of a legal framework, has demonstrated the use of IWL in mitigating such risks and has provided an overview of some of the key benefits which could be gained from such cooperation. As has been noted, transboundary water governance within the Horn of Africa more generally may have had some impact on the reluctance of States to enter into binding legal agreements. However, some progress is now being made at a regional level through IGAD, utilising the frameworks already established in the SADC and at an international level in the creation of a water policy and subsequent protocol. It can be expected that once these frameworks are in place enhanced cooperation will begin to filter through the region at a basin-level, including within the OTB, helping to shape attitudes within the region from one of risk to opportunity. This progression at regional level through IGAD in the creation of a water protocol, also illustrates political opportunity for water governance, meaning that the time may now be appropriate for the formation of an agreement at a basin-level.

Any risks or doubts towards cooperation can be resolved by an elaborative institutional framework. The number of risks which are present when no cooperation takes place should also be highlighted, in particular the widespread scepticism against major projects which has taken place within the OTB. Both countries must show leadership to enhance their cooperation in accordance with established principles and concepts such as benefit sharing in a transparent and responsible manner to make the best out of the water resource they share in an equitable, reciprocal and sustainable manner. The perceived risks identified in this article can be alleviated through increased knowledge and education of the benefits which can be brought from establishing cooperative frameworks. It would be a misconception that a legalised arrangement or close cooperation on a shared or connected water system inhibits any riparian state to make its equitable use of water resources as cooperative legal frameworks can be designed by mutual consent and implemented to foster benefit sharing and conservation of the resource.

Most importantly, it should be recognised that countries may often start with a fairly narrow mandate for a basin level organisation when trust is low and sovereignty concerns are acute. With time and increase trust and confidence, this mandate may be widened, broadening the scope of action. What is critical for the OTB now is that some steps are taken in the direction of enhanced cooperation while the political environment is fertile for such developments.