Transfrontier Conservation Areas of southern Africa and international law in the context of community involvement

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TRANSFRONTIER CONSERVATION AREAS OF SOUTHERN AFRICA AND INTERNATIONAL LAW IN THE CONTEXT OF COMMUNITY INVOLVEMENT

by

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B.S. Southern Illinois University, 2001

A thesis submitted in partial fulfillment of the requirements for the degree of

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Approved by:

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4-27-04

Date
Transfrontier Conservation Areas (TFCAs) can be defined as large, contiguous protected areas spanning international boundaries. Over the past decade, interest in TFCAs in southern Africa has exploded. Much of this interest can be attributed to the plethora of benefits touted by proponents, a number of which are community-based. The realization of community-based benefits requires local communities to be intimately involved in the TFCA management and planning process. In addition to being a desired requisite for TFCA initiatives, community involvement may also be a mandate of international law.

Recognizing that TFCAs are international entities and - in theory - subject to international law, this study seeks to assess the current and potential role of international law in TFCA-based community involvement. At present, there are treaties and conventions in place that suggest community involvement in TFCA initiatives is a mandate of international law (e.g., the Treaty of the Southern African Development Community). This study assessed how the mandate of international law to involve local communities in TFCA initiatives has been recognized and/or implemented and identified the necessary conditions and institutions needed to insure that it is recognized and/or implemented.
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Chapter 1

INTRODUCTION

In areas where it is hard to separate land, wildlife, and communities, it may seem that substantial participation from local communities in environmental decision-making processes is a foregone conclusion. Nevertheless, many pieces of international law\(^1\) that recognize communities as a stakeholder and encourage community involvement in carrying out the law do not clearly define the role of communities in the implementation of the agreement. Even if the role of communities is clearly defined, nation-states still may not involve them in the implementation process. Transfrontier conservation areas of southern Africa provide one such venue to investigate this phenomenon.

Transfrontier conservation areas (TFCAs) are ecological areas of protection that straddle the boundaries of two or more countries, encompassing one or more protected areas, as well as multiple resource areas (South African Govt. Dept. of Environmental Affairs and Tourism 2002). Transfrontier conservation areas are also known as international peace parks (Carroll 1979), transfrontier conservation and development areas (PPF 2002), transfrontier parks (PPF 2002), transfrontier nature reserves (Thorsell and Harrison 1990), transboundary parks (Kenney 1990), and cross-border parks (McNeely 1993), all of which depend on the popular terminology of the time and the TFCA’s intended purpose. For example, the Great Limpopo Transfrontier Park\(^2\) is

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\(^1\) International law is the body of rules and agreements that nation states consider to be binding in their mutual relations.

\(^2\) A transfrontier park is a TFCA where the primary purpose is wildlife conservation (South African Govt. Dept. of Environmental Affairs and Tourism 2002).
composed of Kruger National Park of South Africa, Gonarezhou National Park of Zimbabwe, and the Limpopo National Park of Mozambique (see Fig. 1).

Upon their establishment, TFCAs are managed as a single ecological province for multiple purposes including wildlife conservation, increased biodiversity, restoration of wildlife migration routes, economic benefit through eco-tourism, creation of buffer zones between countries (particularly those with disputed borders), and as a symbolic gesture of peace and re-establishment of societal cross-border relationships. They are, however, no panacea for natural resource management. As a relatively young approach to international protected area management, TFCAs have experienced difficulties, particularly in their interface with local communities. For instance, concerns have been raised regarding the legal basis for community involvement, the scale of community
involvement, and how power is devolved to communities (Metcalfe 1999). The purpose of this research is to investigate these concerns in the context of international law.

**Communities Defined**

For the purposes of this study, a *community* is defined as a group of people residing in the same geographic locality and under the same government. Communities are complex and heterogeneous systems composed of individuals differentiated by many qualities such as status, political and economic power, religion, social prestige, and intentions (Barrow and Murphree 2001). As such, communities will be comprised of individuals with differing principles and, in turn, different opinions of how TFCA(s) should be managed. These differences can potentially complicate the process of community involvement in TFCA management (Bell 1999). Nevertheless, the role of communities in ensuring conservation and sound TFCA management has been championed by many (e.g., see Danby 1997, Linde et al. 2001, and Metcalfe 1999). In this spirit, international law has recognized the important role communities can play in implementing international environmental agreements such as TFCA initiatives.

**Transfrontier conservation areas and international law as a basis for community involvement**

Transfrontier conservation areas are established through multilateral treaties between nation-states agreeing to manage the areas for the variety of purposes outlined above. These treaties carry the force of international law, which, in theory, binds the nation-states to abide by the stipulations of the agreement. One of the stipulations outlined in many TFCA agreements in southern Africa is that local communities are to
play an active role in TFCA management. The inclusion of this stipulation is consistent with the objectives of the Treaty of the Southern African Development Community (the Treaty of SADC), a piece of international law observed by virtually all of southern Africa. The Treaty of SADC states that SADC Member States are to cooperate in the areas of “natural resources and the environment” and “encourage the people of the Region and their institutions to undertake initiatives to develop economic, social and cultural ties across the Region and to participate fully in the implementation of the programs and projects of SADC.” [Emphasis added] (Article 21 § 3(e), Article 5 § 2(b)). Transfrontier conservation area initiatives are an example of cooperation among Member States in the area of natural resources and the environment that strive to develop “economic, social, and cultural ties” across the region. Thus, Member States are essentially mandated to encourage community involvement in TFCA initiatives. The Treaty of SADC further declares that Member States “shall take all necessary steps to accord this Treaty the force of national law” and “take all steps to ensure the uniform application of this treaty.” (Article 6 § 4 and § 5). Therefore, it becomes international and national policy of all Member States to encourage the full involvement of local communities in the implementation of TFCA initiatives. It is this principle that shaped the four fundamental goals of the study:

1. To determine the legal and cooperative structure for TFCAs within southern Africa (e.g., informal vs. formal agreements)⁴;

2. To assess whether or not the relevant treaties and agreements are viewed by participating nation-states as a mandate of international law (e.g., do nation-states view the Treaty of SADC as a mandate to encourage community involvement?);

³ Member States are states that have signed the Treaty. Presently, all nation-states in southern Africa participating in TFCA initiatives are also SADC Member States.

⁴ Formal agreements are written rules that are considered legally binding.
3. To ascertain why these treaties and agreements might not be viewed as a mandate;

4. and, to determine what circumstances would make treaty/agreement formalization desirable or undesirable.

Transfrontier conservation areas of southern Africa have pioneered a means of large-scale conservation across international boundaries. There have been obstacles, though, in their establishment and development, and some of these obstacles relate to the role of local communities in their establishment and management. Through this study, a better understanding of the complex relationship between TFCAs, international law, and community involvement will be gained. This assessment then might serve as both a descriptive and prescriptive analysis of the implications of international law for TFCAs and provide guidance for the roles and behavior of communities toward TFCAs worldwide.
Chapter 2

FRAMEWORKS OF STUDY

The study of TFCAs and the role of local communities in the context of international law is neither rich in history nor elementary. Nevertheless, this chapter is designed to provide a basic understanding of TFCAs, local community involvement in TFCA initiatives, and international law (as related to community involvement in TFCA initiatives). The chapter begins with a brief overview of TFCA history, mechanics of establishment, purposes and objectives, and the challenges they face. Next, local community involvement in TFCA initiatives is discussed; this discussion includes the various roles local communities may have in TFCA initiatives, the motives underlying local community involvement, and the principle constraints preventing the realization of desired benefits. Following this analysis, the chapter continues with an analysis of relevant international law, with particular attention paid to the Treaty of SADC and its resulting protocols and policies. Finally, the chapter concludes with a discussion of research objectives that were shaped through the literature review. In essence, this chapter lays the foundation upon which the remainder of the study is based.

Transfrontier Conservation Areas

While interest in TFCA initiatives has grown exponentially in the past decade, they are not entirely a product of contemporary thought. The first protected area to cross international boundaries in Africa (and arguably in the world) was Albert National Park,
established in 1925, between Rwanda and Burundi. The Park was formed by the Belgian colonial regime for the purpose of conserving transboundary natural resources (Linde et. al. 2001). After both countries’ independence in the early 1960’s, the Rwandan portion became Parc des Volcans (Volcanoes National Park) and the Urundi portion became Virunga National Park (Wilkie et al. 2001). Following these designations, Albert National Park ceased to exist and the area was no longer managed as a single unit. While it existed for only a few decades, Albert National Park was the forerunner of what would become a significant movement in transboundary natural resource cooperation in Africa, particularly southern Africa.

On April 7, 1999 the first post-colonial TFCA was established in Africa when Botswana and South Africa signed a bilateral agreement creating the Kgalagadi Transfrontier Park. The Kgalagadi Transfrontier Park, composed of the Kalahari-Gemsbok National Park of South Africa and the Gemsbok National Park of Botswana, has been a de facto TFCA since 1948, operating through a verbal agreement between the South African and Botswanan conservation authorities (National Parks Board – South Africa and Dept. of Wildlife and National Parks – Botswana 1997). Since the 1999 establishment of The Kgalagadi Transfrontier Park, major movements have been underway in South Africa, Mozambique, Zimbabwe, Lesotho, Malawi, Namibia, Botswana, Tanzania, and Swaziland to formally establish large TFCAs for a multitude of purposes related to natural resource management. Much of the success of the modern TFCA movement can be attributed to earnest work and financial support from non-governmental organizations (NGOs) such as the Peace Parks Foundation, World Wildlife
On May 27, 1990, the President of the Peace Parks Foundation - Dr. Anton Rupert, met with Mozambique’s President Joaquim Chissano to discuss the possibility of establishing permanent links between protected areas in southern Mozambique and their adjacent counterparts in South Africa, Swaziland, and Zimbabwe (Masterson 1999). Rupert’s meeting resulted in Chissano’s request for the World Wildlife Fund of South Africa to conduct a feasibility study, which was completed and submitted to the government of Mozambique in September of 1991 (Tinley 1991). The complexity of establishing these links was soon realized and the Mozambiquan Council of Ministers recommended further studies to assess the political, social, economic, and ecological dimensions of the potential links (Jones 2001). This particular study, funded by the Global Environment Facility, through the World Bank, suggested an important shift away from the idea of protected national parks towards more emphasis on multiple use by indigenous people and communities (Jones 2001 and PPF 2003). In the latter part of 1996, when the studies were finalized, it also became evident that there was an increasing interest in southern Africa as a tourist destination, and development of TFCA initiatives would be integral in creating an economic driving force that would result in new jobs (PPF 2003). Following the release of the study, three TFCA - Gaza-Kruger-Gonarezhou (currently known as the Great Limpopo Transfrontier Conservation and Development Area), Lubombo, and Chimanimani – were recommended for establishment. The major TFCA projects currently underway in southern Africa are listed in Table 1.
Table 1. – Current Major Transfrontier Conservation Area Projects in Southern Africa

<table>
<thead>
<tr>
<th>Transfrontier Conservation Area</th>
<th>Participating Nation-states</th>
</tr>
</thead>
<tbody>
<tr>
<td>Ai-Ais/Richtersveld Transfrontier Conservation Park</td>
<td>South Africa and Namibia</td>
</tr>
<tr>
<td>The Great Limpopo Transfrontier Park *</td>
<td>South Africa, Mozambique, and Zimbabwe</td>
</tr>
<tr>
<td>Kgalagadi</td>
<td>South Africa and Botswana</td>
</tr>
<tr>
<td>Lake Malawi/Nyasa/Niassa Transfrontier Conservation Area</td>
<td>Malawi, Mozambique, and Tanzania</td>
</tr>
<tr>
<td>Limpopo/Shashe Transfrontier Conservation Area</td>
<td>Botswana, South Africa, and Zimbabwe</td>
</tr>
<tr>
<td>Lubombo Transfrontier Conservation Area</td>
<td>South Africa, Mozambique, and Swaziland</td>
</tr>
<tr>
<td>Maloti-Drakensberg Transfrontier Conservation and Development Area</td>
<td>South Africa and Lesotho</td>
</tr>
</tbody>
</table>

*The Great Limpopo Transfrontier Park was formerly known as the Gaza-Kruger-Gonarezhou Transfrontier Park

**Mechanics of Establishment**

Due to the multilateral nature of the initiatives, transfrontier conservation area establishment is inherently a complex process. Nevertheless, patterns in actions and events leading to the establishment of TFCAs can be observed (Danby 1997, Jones et al. 2001, Linde et al. 2001, Metcalfe et. al. 1999, Sing et al. 1999, and Mohammed-Katerere 2001). The process has begun with two or more land managing authorities (e.g., South Africa National Parks or The Department of Wildlife and National Parks of Botswana) establishing a dialogue and informally cooperating on the cross-border management of natural resources. Depending on the objectives of the areas, nation-states then decide if
they would like to continue to informally cooperate or enter into a formalized agreement that provides a framework for substantial cooperation.

**Purposes and Objectives of TFCAs**

Transfrontier conservation areas have and are being established for the realization of benefits that can be classified as political, ecological, economic, socio-cultural, or a combination thereof (see Fig. 2) (Danby 1997 and Fakir 2001). Ideally, TFCAs will promote benefits in all four areas. Often, though, this is not the case and TFCAs are established primarily for the realization of a smaller subset of benefits (Fakir 2001).

Political benefits were among the first to be recognized by TFCA planners. By establishing TFCAs, a greater sense of neighborliness between participating nation-states is hoped to be achieved. Transfrontier conservation areas also have been established to ease tensions between nation-states in border disputes through the creation of a buffer zone. For example, several transboundary parks in Germany and her neighbors were established during post-war periods in an attempt to improve border relations (McNeil 1990).

Establishment of TFCAs also has become a centerpiece of the Central American peace process. Here, TFCAs have been described as “icebreakers” whereby more controversial border issues are introduced following an agreement upon the establishment of TFCAs as a symbol of peace (Weed 1994).

Ecological benefits are among the most frequently cited and may be, along with political benefits, considered the primary reason for the establishment of many TFCAs in southern Africa. Transfrontier conservation areas, as large protected areas, have been
shown to dramatically increase biodiversity and ecological health in comparison to smaller protected areas (Diamond 1975 and Katerere et al. 2001). The promotion of ecological

![Venn Diagram showing the benefits of TFCA Establishment](image)

**Fig. 2 – Summary of Benefits Associated With TFCA Establishment**

health and re-establishment of elephant migration routes was fundamental in creating the Great Limpopo Transfrontier Park of South Africa, Zimbabwe, and Mozambique (South African Government Department of Environmental Affairs and Tourism 2000).

Additionally, with respect to endangered species, TFCAss have a greater possibility of sustaining *minimum viable populations* - the population large enough to avoid inbreeding and withstand losses resulting from environmental processes (Burkey 1995 and Danby 1997).
It also has been suggested that indigenous communities will benefit from TFCAs (Ramutsindela 2002). National boundaries and lines on maps are a product of colonial southern Africa (Omer-Cooper 1997), and prior to the arrival of the Dutch and British in the late fifteenth and sixteenth centuries, indigenous communities lived pastoral and hunter-gatherer lifestyles that, in most cases, were void of definitive territorial boundaries (Shillington 1993). Where definitive territorial boundaries did exist, they were often transected by the provincial demarcation of European colonists (Omer-Cooper 1997). It has been proposed that through the creation of TFCAs, many estranged indigenous communities will be able to reunite (Reid 2001). Transfrontier conservation areas also could help surrounding communities experience improved social security and welfare through stronger community-based property rights; improved livelihoods through diversified, income-generating, land-use options; and improved collaboration with government and private sectors (Metcalfe 1999).

In terms of economic benefits, TFCAs can foster significant growth for participating nation-states and local communities through eco-tourism. According to the World Bank, tourism is second only to oil in generating the world’s largest income (World Bank 1996). Transfrontier conservation areas can prove to be more desirable to tourists than other protected areas in that opportunities are expanded and human concentrations are allowed to diffuse, which will purportedly lead to “high quality experiences” (Singh 1999). Hamilton (1997) notes:

“It is more cost-effective and satisfying for the tourist to be able to visit more than one park from his or her base, and even pay one admission fee (e.g., boat trips across the border on Waterton lake for Waterton-Glacier International Peace Park; river rafting between Kluane/Tatshenshini-Alsek/Glacier Bay crossing three jurisdictions and two countries; boat tours down the river border in the bilateral Bohemian-Saxonian Switzerland in Germany and the Czech Republic)”
Other, more consumptive, economic benefits may include increased agriculture, forestry, fisheries, hunting, and game farming, all of which are multi-million dollar industries in southern Africa (Reid 1994, Singh 1999, and World Bank 1996).

**Challenges**

While the potential benefits of TFCAs are profound, they have presented many challenges to participating governments, land management authorities, and local communities, which have both impeded their establishment and provoked skepticism of their worth (Fakir 2001 and Wels and Draper 2002). As with the benefits, the apparent challenges facing TFCAs are generally social, political, or economic in nature. Challenges might manifest before the establishment of a TFCA, following the establishment of a TFCA, or both.

Given southern Africa’s colonial history, the relinquishment of a certain level of national sovereignty to establish and manage a TFCA has presented political challenges (Duffy 1997, Mohammed-Katerere 2001, and Rosenberg and Korsmo 2001). Throughout its colonial history, “ownership” of lands in southern Africa was tossed between Britain, the Netherlands, Portugal, France, and Germany creating inconsistent governmental regimes and institutional practices (Shillington 1993). Post-colonial southern Africa places a significant emphasis on maintaining national sovereignty and nation-states are quick to protect it. In some cases, the cross-border and collaborative governance of TFCAs has been perceived as a threat to national sovereignty (Danby 1997). This challenge is not peculiar to southern Africa, though. Political leaders in Central America have expressed a
hesitancy to promote national parks crossing international borders “for fear that they are somehow relinquishing control of national territory” (Arias and Nation-states 1992).

Aside from challenges related to sovereignty, perhaps the most salient political challenge facing TFCA s is a lack of effective agreements. “Effective,” as used here, is not synonymous with “legally binding,” where “legally binding” implies the presence of systems of accountability. All TFCA agreements are considered legally binding under international law, but transfrontier conservation area initiatives must also have appropriate institutional structures and compatible legislation between participating countries in place before they can be considered reasonably effective (Danby 1997, McNeely 1993, and Von Malchus 1982).

Unlike the political challenges, the economic challenges faced by TFCA s have generally only been experienced following their establishment (Fakir 2001). International NGOs have been quick to fund start up costs and initial activities in southern African TFCA initiatives; thus, financial cost is not typically a problem until after TFCA s are set in place and funding from external sources fades (Richardson 2002 and World Bank 1996). The poor cost-effectiveness of TFCA s is partly a product of the narrow base upon which they depend for income. TFCA s and other protected areas are heavily dependent on tourism and eco-tourism as a source of post-NGO revenue (Belsky 1999 and Linde 2001). While tourism might, in fact, be the second greatest global source of income, it has long been recognized as a fickle and risky industry that experiences tremendous fluctuations and is subject to global and national recessions as well as dominant interests of the time (World Bank 1996). Such fluctuations can lead to unstable sources of revenue that can dramatically affect the sustainability of a TFCA.
As with political challenges, social challenges can manifest both before and following the establishment of TFCAs. However, unlike political and economic challenges, social challenges are difficult to identify, due to the fact that they may be a result of several factors (including political and economic). For example, issues related to the equal sharing and realization of economic benefits among local communities has surfaced as a serious threat of an amiable relationship between local communities and TFCAs. According to Neumann (2000), African communities tend, in the perception of international NGOs dominated by western capital, to be divided into “good” and “bad natives,” depending on how primitive they are. The more primitive they are, the “better” they are and the more voice they have concerning TFCA issues and the more right they have to stay in the area and reap the financial privileges of western donor attention.

While equal sharing and realization of benefits is certainly an important concern among communities situated in and around TFCAs, many have argued that the greatest threat to local communities and their rights is the failure to establish systems by which nation-states protect community interests and involve local communities in the planning and management of TFCAs (e.g. Metcalfe 1999, Mohammed-Katerere 2001, Murphree 1991). As a result, local communities develop resentment and mistrust toward participating nation-states and a lost sense of ownership with respect to the areas (Agrawal and Gibson 1999 and Linde 2001). While many TFCA agreements have recognized the important role local communities could play in the implementation of TFCA initiatives, rarely are systems of accountability in place that bind nation-states to execute this recognition (Metcalf 1999). Notwithstanding international law that requires nation-states to engage in a collaborative dialogue with local communities concerning transboundary initiatives such as
the establishment of TFCAs (i.e., the Treaty of SADC), follow through is not universal

It is this interface of TFCAs, the community, and international law that this study
addressed. However, before examining the dynamics of international law as applied to
community rights, we first proceed with an examination of the crucial, but often
questionable and contested, relationship between local communities and TFCAs of southern
Africa.

Transfrontier Conservation Areas of Southern Africa and Local Communities

The potential benefits of TFCAs to local communities have spawned a close
examination of the interface between the two. While past research identified
communities as a hindrance to conservation and preservation ideals, current authors
herald them as an important venue for implementing wise conservation practices
Food and Agriculture Organization survey, more than fifty countries (including many in
southern Africa) report that they “actively” involve local communities in managing their
protected areas. Current conservation projects, including TFCA initiatives, are focused
not only on protecting lands and resources, but also on protecting community rights and
concerns (Mayoral-Phillips 2002).

The growth of community involvement in conservation projects can be attributed
to several factors. One factor is that international agencies including the World Bank,
Worldwide Fund for Nature, Conservation International, the Nature Conservancy, the
Ford Foundation, the MacArthur Foundation, and USAID have all directed enormous
sums of money and effort toward community-based conservation and resource management. A second factor is that in areas where communities are engaged in subsistence lifestyles, the capacity of nation-states to coerce their citizens into unpopular development and conservation programs that affect the resources upon which they are dependent is limited (Agrawal and Gibson 1999). The weakness of state-centric policy in this instance leaves few options other than community-based conservation (Wels and Brandon 1992). The proliferation of democratic political structures in southern Africa also has lead to an increasing demand for community participation, while unrepresentative development and conservation projects have become not only unattractive, but impractical as well.

An Operating Definition of Local Communities

Research concerned with the interface of local communities and the environment has shown that one of the first challenges is to develop an operational definition of “local community” (Berkes 1989). There are several ways that “local community” has been defined, and each is appropriate for different interests and research questions (Agrawal and Gibson 1999, Barret 1999, Belsky 1999, and Corbet and Jones 2000). In this study, local community is defined as a group of people residing in the same locality and under the same government. This definition is in contrast to definitions of the local community as a homogenous social structure or a group of people having common interests and shared norms (e.g., Agrawal 1998). The definition used here is necessary since issues of

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5 Community-based conservation and resource management is broadly defined in this study as natural resource management that places a special and significant emphasis on community involvement and participation.
international law and nation-state policy deal with local communities defined by territorial boundaries. This definition permits two critical assumptions:

- Communities are complex and heterogeneous systems composed of individuals differentiated by many qualities such as status, political and economic power, religion, social prestige, and intentions (Chambers and McBeth 1992)
- Local communities may be composed of individuals with differing and, possibly, polarized views of TFCAs and their management (Chitere 1994, Etzioni 1996, and Metcalfe 1999).

These characteristics may either enable or limit the ability of collaborative management of TFCAs to succeed. Provided a diverse representation from the community participates in the TFCA planning and management processes, the potential exists that the presentation of many viewpoints and perspectives will be presented. Alternatively, community diversity can hinder planning and management processes when systems for conflict resolution are not in place (Weed 1994).

In addition to the global assumptions regarding local communities, historical factors have lead to specific assumptions regarding local communities of southern Africa. For example,

- Indigenous peoples were not active participants in the colonial discourse related to conservation (Crosby 1986 and Anderson and Grove 1987).
- Nearly all communities have a rich and diverse heritage of indigenous knowledge (Metcalfe 1999).

Both of these factors contribute to interesting and sometimes unpredictable responses by local communities to TFCA initiatives. Wels and Draper (2002) noted that some local
communities have perceived TFCA initiatives as a mechanism by which post-colonial whites legitimize (vis-à-vis environmental protection) the taking of lands and rights of local communities. Despite the complexity of communities and the relationships between local communities and surrounding TFCAs, exploration of the challenges and opportunities facing local communities and their role in TFCA initiatives has been rare.

The Role of Local Communities in TFCA Initiatives

The role of local communities in southern African conservation has been marginal at best (Anderson and Groves 1987, Crosby 1986, and Omer-Cooper 1997). This has been particularly evident in South Africa where, before the fall of the apartheid\(^6\) regime in 1994, local communities (particularly indigenous ones) had no voice whatsoever in conservation practices (Omer-Cooper 1997 and Shillington 1993). Furthermore, British and Dutch colonists regularly dislocated indigenous communities to reserves to make way for larger plantation style farms and colonial development (Omer-Cooper 1997 and Shillington 1993). With the fall of apartheid in South Africa and the rise of democracy, indigenous communities became more sessile and began to speak with a louder and more influential voice in conservation matters. Given that the institutionalization of democracy in South Africa and the establishment of the Kgalagadi Transfrontier Park in 1999 occurred within a relatively short period of time, The Kgalagadi Transfrontier Park is one of the first conservation initiatives in South Africa to actively involve and seek participation from local communities.

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\(^6\) The apartheid government was a legal framework, introduced by Dutch Colonists, which instituted white supremacy and was the dominant political ideology in South Africa from 1948-1994.
The capacity to which community participation occurs and the mechanisms by which it occurs varies across TFCA (Metcalfe 1999). Metcalfe (1999) has identified 3 mutually exclusive approaches to community involvement in TFCA initiatives: TFCA outreach (management for/with local communities), collaborative management (management with/by local communities), and community-based management (management by local communities). As Barrow and Murphree (2001) suggest, these roles can be imagined as a continuum. The three roles identified above are merely points along the continuum where a marked change in objectives occurs. The dynamics of each approach are quite complex (see Table 2). It should be noted that each approach might be appropriate in some places for specific purposes, and each has its own set of opportunities and challenges that must be considered before implementation.

As indicated above, each possible role that local communities may play in TFCA initiatives has dramatically different implications for the TFCA itself. For instance, the dominant objective of “TFCA outreach” is “enhanced conservation and integrity of protected areas and TFCA.” This objective may often be sought by TFCA officials with little or no involvement of local communities in the decision-making process. On the other hand, the principles of “community-based conservation” stipulate that the needs of rural livelihoods must be met first, with conservation integrated as an important secondary objective. This approach recognizes that where resources for living are insufficient, protected area resources might be lost. In the absence of external control, the TFCA is maintained only when it is economically or culturally viable.

While “collaborative management” is a middle-ground compromise, it presents a special set of challenges. Under collaborative management, planning is done jointly and under the
assumption that the TFCA will be used for multiple purposes. In the case where TFCA officials and local communities share an equivalent level of power, this approach is highly conducive to stalemates. Transfrontier conservation area officials might wish to protect particular species of flora and fauna, while local communities might wish to harvest or extract those same species for subsistence purposes (Danby 1997). With an equivalent level of power held between the TFCA officials and local communities, there exists no ultimate authority to resolve such a dispute if both parties refuse to compromise.

To resolve this issue, in most situations the traditional role of the community in TFCA initiatives is a combination of TFCA outreach and collaborative management where collaborative management is practiced unless both parties are locked in an irreconcilable dispute, in which case the views and wishes of TFCA officials would trump that of local communities (Adams and Hulme 2001, Bell 1999, Ezemvelo Kwa-Zulu-Natal Wildlife 2001, Griffin et. al. 1999, Kellert et. al. 2000, Metcalfe 1999, and Wels and Draper 2002).

Opportunities for Community Involvement in TFCA Initiatives

The objective of this study was to examine the roles outlined above in the context of international law and the legal obligation to actively involve local communities in TFCA initiatives. To understand why so many have advocated a legal mandate for community involvement, it is first necessary to understand why communities wish to be involved in the first place. Without the realization of benefits through either of the roles discussed above, there is little incentive for communities to actively participate in TFCA initiatives.
<table>
<thead>
<tr>
<th>Approach</th>
<th>TFCA Outreach</th>
<th>Collaborative Management</th>
<th>Community-Based Conservation</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Conservation for/with local communities</td>
<td>Conservation with/by local communities</td>
<td>Conservation by local communities</td>
</tr>
<tr>
<td>Whose agenda</td>
<td>TFCA development dominated TFCA officials. Local communities are subsidiary partners to achieve TFCA conservation objectives</td>
<td>TFCA dominated by TFCA officials with communities slowly moving toward some joint management responsibilities.</td>
<td>Local community as legal land entities join protected area authorities as full and equal partners</td>
</tr>
<tr>
<td>Dominant objective</td>
<td>Enhanced conservation and integrity of protected areas and TFCA s</td>
<td>Conservation of TFCA s through managed access to multiple-use resources</td>
<td>Rural livelihoods: needs met but conservation needs to be integrated</td>
</tr>
<tr>
<td>Ownership/tenure status</td>
<td>State-owned land and resources (e.g. national parks, forest and game reserves)</td>
<td>State-owned land with mechanisms for collaborative management of certain resources with the community. Complex tenure and ownership arrangements.</td>
<td>Local resource users own land and resources either de jure or de facto. State may have some control of last resort.</td>
</tr>
<tr>
<td>Who owns the process</td>
<td>TFCA officials with conditional benefit flow to local communities.</td>
<td>The state with concessions toward joint management and multiple use</td>
<td>Local community has legal rights of control</td>
</tr>
<tr>
<td>Who plans</td>
<td>Joint planning only on outreach activities</td>
<td>Joint planning of multiple-use control</td>
<td>Local community often assisted by advisors/administrators</td>
</tr>
<tr>
<td>Who controls</td>
<td>TFCA authority</td>
<td>Joint authority</td>
<td>Community authority (democratic/traditional)</td>
</tr>
<tr>
<td>Fate of conservation resource</td>
<td>TFCA core maintained for national heritage and benefit, but wider TFCA manifests land-use conflicts and fragmentation</td>
<td>TFCA core maintained for national heritage. Benefits shared with local community groups and individuals. Use may not be sustainable and species may be affected.</td>
<td>Where resource is insignificant to rural economics or culture, it may be lost. Resource maintained when culturally/economically viable.</td>
</tr>
</tbody>
</table>

Source: (Metcalfe 1999)

Table 2. Summary of the Roles of Local Communities in TFCA Initiatives
With that in mind, promoters of TFCAs in southern Africa have enumerated the benefits of TFCAs for local communities. Four principle benefits have been described by researchers and policy-makers (Adams and Hulme 2001, Hulme and Inamdar et al. 1999, Linde et al. 2001, Murphree 1999, Metcalfe 1999, and PPF 2002):

1. Improved economic health through diversified, income-generating, land-use options and eco-tourism
2. Re-establishment of community relationships severed by colonial boundaries
3. Stronger community-based property rights
4. Improved collaboration and relations with governments, businesses, and other communities (all of which includes those of other nation-states)

Challenges and Constraints to Community Involvement in TFCA Initiatives

As promising as local community involvement is in TFCA initiatives, the challenges it presents are equally foreboding. In a broader context, the challenges facing community-based conservation have been widely discussed (e.g. Barret and Arcese 1995, Oates 1951, Ite 1996, Noss 1997, and Wels and Draper 2002). As with the benefits associated with local community involvement in TFCA initiatives, the challenges and constraints preventing the realization of benefits are economic, social, and political in nature. Listed below are the primary challenges and constraints.

Economic challenges and constraints:

1. Economic viability of TFCAs
2. Equity in disbursement of benefits and costs

Social challenges and constraints:

3. Capacity of communities to effectively participate in TFCA decisions
4. Conflicts between cultural heritage and conservation priorities
5. Apathy of local community members toward participation

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7 Metcalfe (1999), Mohammed-Katerere (2001), and Wels and Draper (2002) give a more complete treatment of challenges and constraints related to communities and TFCAs
Political challenges and constraints:

6. Tense relationships between stakeholders
7. Inadequate systems of conflict resolution
8. Questionable community property rights
9. Complexity of TFCA initiatives
10. Lack of international law implementation regarding local community participation in TFCA initiatives

While arguments for local community involvement in TFCA initiatives are important and relevant, current evidence suggests that the reality may fall short of the rhetoric and promise decreed by framers of TFCA initiatives (Linde et al. 2001, Sandwith 2001, Singh 1999, Wels and Draper 2002, and Westing 1998). Compounding the difficulty in enabling local communities to realize the benefits associated with TFCA initiatives, solutions for community participation might be as complex as the problems themselves (Metcalf 1999). For instance, a fundamental challenge facing local communities is that nation-states may choose to ignore the mandate of international law to encourage community involvement in TFCA initiatives. Such a challenge exacerbates problems surrounding protection of sovereignty, state accountability, and the power of international law.

Transfrontier Conservation Areas, Local Communities, and International Law

Transfrontier conservation areas of southern Africa present land managers, government officials, and local communities with unique challenges, particularly within the realm of international law. While domestic protected areas are governed by the laws and regulations of one nation-state, TFCAs are governed by multiple nation-states. The multilateral nature of TFCA initiatives challenges fundamental principles of international
law such as nation-state sovereignty, nation-state responsibility, and good neighborliness (Singh 1999).

One aspect of good neighborliness is the mutual observance of treaties by participating nation-states. Observance of treaties is important to local communities because virtually all nation-states in southern Africa are mandated by international law, vis-à-vis the Treaty of SADC, to actively involve local communities in TFCA initiatives (Metcalfe 1999 and Mohammed-Katerere 2001). However, in some cases, nation-states have either chosen to not implement or have simply failed to recognize the mandate. The Kgalagadi Transfrontier Park has been well documented for its lack of involvement and consultation with local San communities (Mayoral-Phillips 2002). Conversely, nation-states may implement the mandate of community involvement, but the involvement may not be to the extent to which international law mandates. In either case, communities are marginalized when nation-states fail to recognize the binding responsibilities outlined in international law (Metcalfe 1999). An assessment of the interface between international law, local communities, and TFCAs is needed to insure current concerns are addressed and to serve as a guide for future regional policy related to TFCAs.

*The Foundation of International Law*

*International law* is the body of rules that nation-states consider to be binding in their mutual relations (Slomanson 2003). It is a construct of norms, standards, principles, institutions, and procedures of a “society” that is composed not of individual human beings, but of sovereign nation-states (Henkin 1989). On account of the sovereignty of nation-states, the observance of international law is dependent on the consent of nation-
states and is a law of coordination rather than subordination. Absent state consent then, a supposed rule of international law is not binding to that particular state. In essence, international law is a “voluntary” legal system where the governed govern in order to preserve the integrity of their respective sovereignties (Slomanson 2003).

The sources of international law have been heavily debated; nevertheless, the international community has agreed to the following list of sources for establishing the corpus of international law. According to Article 38.1 of the Statute of the International Court of Justice:

The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply:

a. international conventions, whether general or particular, establishing rules expressly recognized by the contesting states;
b. international custom, as evidence of a general practice accepted as law;
c. the general principles of law recognized by civilized nation-states;
d. ... judicial decisions and the teachings of the most highly qualified publicists of the various nation-states, as subsidiary means for the determination of rules of law.

Scholars have interpreted this list as implying six major sources of international law: (1) treaties, (2) custom, (3) general principles, (4) judicial decisions, (5) scholarly writings, and (6) UN resolutions. Furthermore, it has been suggested that the ordered listing of these sources reflects a hierarchy among sources, treaties and customs being the most important sources, while scholarly writings and UN resolutions are of least importance

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8 While the completeness of this list has been debated (see, e.g., Brownlie 1998; Brierly 1976), the UN Secretary General heralded this list as a building block of international law, which has been considered definitive by various international arbitral tribunals (UN 1949).

9 The International Court of Justice is the UN’s judicial branch.
(Brownlie 1998; Slomanson 2003). Of particular importance to TFCAs in southern Africa are the first three.

*Treaties*

The 1969 Vienna Convention on the Law of Treaties declared that a *treaty* is

"an international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation."\(^{10}\)

Treaties are fundamentally the most convenient and effective way of securing and identifying international law (Brownlie 1998). They serve as direct proof of the rights and responsibilities that parties to the treaty have accepted and are the fundamental source of international law (Bodansky 1995).

Treaties can be classified in a number of different ways. First, they are either oral or written; while most treaties are written, oral treaties can be just as binding (see, e.g., Denmark v. Norway 1933). Secondly, they can be classified as unilateral, bilateral, or multilateral. *Unilateral treaties* are agreements where a nation-state imposes responsibilities on another nation-state without assuming any rights or obligations of its own (e.g., some treaties that occur as a result of war). *Bilateral treaties*, on the other hand, are agreements between two nation-states where mutual rights and obligations are established. In this instance, both participating nation-states assume responsibility and accountability for the terms of the treaty. *Multilateral treaties* are similar in principle to bilateral treaties, but they involve three or more participating nation-states rather than two. Next, treaties can be classified as either lawmaking or contractual. A *lawmaking*

\(^{10}\) Modern international law has also recognized oral agreements as binding treaties (Cassese 2002).
treaty creates a new rule of international law designed to replace or modify existing nation-state practices (Slomanson 2003). For example, the Treaty of SADC asserts many new practices concerning natural resources in southern Africa, such as a binding mandate for transboundary cooperation. *Contractual* treaties merely set forth the terms of a contract to which participating nation states agree (Brownlie 1998). This might include import-export taxes and tariffs (e.g. the General Agreement on Tariffs and Trade). Finally, a treaty is classified as either self-executing or as a declaration of intent. *Self-executing* treaties expressly impose immediate obligations upon a nation-state and require no further action to impose these obligations (Slomanson 2003). Alternatively nation-states might enter into a *declaration of intent*, which would contain general principles that require actions by each nation-state’s legislative and/or executive branch to fully implement the treaty (Slomanson 2003).

A necessary first step in the analysis of a treaty is to differentiate between implementation, compliance, and effectiveness (Weiss and Jacobson 1999). *Implementation*, which occurs after ratification by participating nation-states, refers to the mechanisms by which nation-states enact and incorporate international agreements into their domestic law (Weiss and Jacobson 1999). Implementation can then be further analyzed with respect to the *method of implementation* and the *avenue of implementation*. The *avenue of implementation* refers to the legal mechanisms by which provisions of international law are implemented. Figure 3 displays the avenues of implementation over which this study is concerned. They can be described as follows:

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11 *Ratification* is the process by which nation-states consult public opinion, debate the conditions of the treaty in a domestic governmental setting, and publicly adopt the provisions of the treaty. Generally, while states might sign a treaty, it does not enter into force until it has been ratified.
• The International Law/Nation-State Policies/Community-Policies/Community Members implementation (solid line) – This avenue of implementation occurs when international law concerning communities grants authority to the nation-state to draft policies which, in turn, grants local communities authority to draft policy which implements the international law in question.

• The International Law/Nation-State Policies/Community Members implementation (dashed line) – This avenue of implementation occurs when international law concerning communities grants authority to the nation state to draft policies that implement the international law in question.

• The International Law/Community Members interaction (dotted line) – This avenue of implementation occurs when International Law is self-implementing.

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The method of implementation refers to the means by which objectives of treaties are implemented. To illustrate, consider the Treaty of SADC’s mandate for community involvement in TFCA initiatives. The avenue of implementation may involve nation-states
recognizing the mandate for community involvement and then developing binding national policies that require collaboration between land managing agencies, such as South Africa National Parks, and local communities. With respect to the method of implementation, South Africa National Parks may engage in community-based conservation projects with local communities and actively promote participation of local community members in planning and management committees.

Compliance, the second component of treaty analysis, goes beyond implementation and refers to a nation-states’ adherence to the guidelines and provisions instituted by a treaty (Weiss 1999). Several factors, which might be economic, socio-cultural, or political in nature, influence a nation-state’s compliance with a treaty (Flaherty 1999). Weiss and Jacobson (1999) note that nation-states are in different positions on two dimensions when they enter into an agreement: the intention to comply and the capacity to comply. It has been widely noted that many developing nations-states, such as those found in southern Africa, intend to comply with treaties, but they may lack the capacity to comply (e.g., see Clapham 1996 and Cleaver 2001). Nation-states may often not have the capacity to comply due to inadequate resources such as funding, personnel, or appropriate institutions in place to carry out treaty provisions (Mastny and French 2002).

Ultimately, the success of a treaty is measured by its effectiveness. Effectiveness refers to whether or not the objectives of a treaty have been or are being achieved (Weiss and Jacobson 1999). It is important to note that compliance does not necessarily imply effectiveness. This may often be the case with respect to community involvement in TFCA initiatives (Metcalfe 1999). For example, nation-states may implement and
comply with the provisions of the Treaty of SADC, which require community involvement in TFCA initiatives, by opening planning and management meetings to local community members; however, if no one from the local community attends the meetings, then the Treaty has not been effective in actively engaging community involvement. Implementation and compliance are merely a means to an end, that end being treaty effectiveness.

*Customary International Law*

As Article 38.1 of the Statute of the International Court of Justice suggests, treaties are only one source of international law. International law can also be found in custom, general principles, judicial decisions, scholarly writings, and UN resolutions. Aside from treaties, the primary source of international environmental law is custom (Victor 1999). According to the standard account, *customary international law* is the empirical manifestation of the ways in which states consistently and uniformly behave (*Columbia v. Peru* 1950). The challenge of customary international law is to figure out what constitutes "consistent and uniform behavior among states." Brownlie (1998) posits four elements for determining whether or not such a behavior is customary international law: (1) duration of behavior, (2) substantial uniformity and consistency in behavior among all affected states, (3) generality of practice, and (4) international consensus about, and recognition of the particular behavior as binding. For instance, the prevention of transboundary harm (e.g., transboundary pollution) is considered to be a precautionary example of customary international law (Mohammed-Katerere 2001).
Customary international law may also manifest through multilateral treaties. In general, treaties bind only those nation-states that are parties to the treaty; however, if a sufficient number of nation-states are parties to a multilateral treaty, then that may serve as evidence of a “consistent and uniform behavior.” (Carr and Scott 1999). Carr and Scott (1999) argue that there are three criteria that must be met that would enable a multilateral treaty to be considered customary law:

1. A sufficient number of nation-states in the international system accept the treaty.
2. A significant number of those states whose interests are substantially affected by the treaty are parties to the treaty.
3. The treaty does not allow reservations on the part of the treaty (i.e. any provision that a party to the treaty can treat as not applying to itself can hardly become customary international law that obligates states which do not have a similar opportunity to reject).

It is important to note that multilateral treaties manifesting customary international law are both global and regional in scope (Devine 1994). In the case of regional multilateral treaties, the first criterion would read “A sufficient number of nation-states in the regional international system accept the treaty.” Provided the other two criteria are met, a regional multilateral treaty would manifest customary international law specific to that particular region. For example, suppose all but one nation-state in sub-Saharan Africa is a party to a particular agreement; then, provided the above criteria are met, the non-participating nation-state could be bound by the treaty, despite it not being a signatory.
Determining what constitutes customary international law is inherently difficult due to the imprecise nature of the above conditions (Car and Scott 1999 and Goldsmith and Posner 1999). How many nation-states are needed to constitute an international consensus? What makes the practice of a behavior “general”? How long must a behavior have occurred before it can be considered custom? The rampant ambiguity makes it much easier for nation-states to ignore customary international law. As Bodansky (1995) argues, the principal importance of customary international law rests not in its ability to legally resolve disputes, but to set the terms of international discussions and serve as a framework for negotiations and treaties.

Regionalism in southern Africa

Regionalism refers to the consenting regional organization of nation-states where the primary objective of such organization is to foster nation-state integration and cooperation (Robson 1993). Integration, whether social, political, or economic in nature, is solidified by nation-states signing and ratifying treaties that contain provisions promoting integration. The European Union is an example of regionalism where European nation-states have agreed to integrate economically by accepting a uniform currency, the Euro, and to integrate politically by conferring and cooperating with one another to create a uniform political voice in international matters (e.g., the international opinion of the European Union in response to the United States-Iraq conflicts of the early 21st century). Like Europe, southern Africa is no stranger to regionalism. The Southern African Customs Union (SACU) and SADC are modern attempts at regionalism where nation-states integrate politically, socially, and economically. The regionalism efforts of
SADC are especially relevant to TFCA initiatives and serve as an example of southern Africa’s attempt to regionalize and integrate in an environmental context.

While many consider regionalism in southern Africa to be a noble goal, it is not without challenges (e.g., see Tlou 1997 and Gibb 1997). Challenges to regionalism can include discordant cultures of participating nation-states, which might lead to an inability to communicate effectively and understand the circumstances surrounding other participating nation-states’ positions on particular matters. Challenges might also include dissonant long-term goals, which could result in conflicting perceptions of direction of the organization.

Inequity among participating nation-states, which can be economic or political in nature, is also a limiting factor to the success of regionalism. This is of particular importance to nation-states in southern Africa. For example, the South African component of the Great Limpopo Transfrontier Park – Kruger National Park – is one of the most popular protected areas in the world and is visited by a considerably larger number of tourists than the parks of Mozambique and Zimbabwe (Duffy 1997). The result is that South Africa reaps a larger share of the economic benefits associated with the TFCA than Mozambique or Zimbabwe (Fakir 2001). Other examples of regional inequity are pandemic, but it is this challenge that provides the greatest threat to successful regionalism in southern Africa (Tlou 1997).

The Treaty of SADC and the Mandate to Involve Local Communities in TFCA Initiatives

The Southern African Development Community is a culmination of regionalism movements that called for solidarity and independence for peoples of African descent
The underlying premise of the movements was that unity would insure real independence from colonial and neo-colonial forces in Africa (Omer-Cooper 1994 and Clapham 1996). The Southern African Development Community has formally stated that “[its] ultimate objective is to build a region in which there will be a high degree of harmonization and rationalization to enable the pooling of resources to achieve collective self-reliance in order to improve the living standards of the people of the region” (SADC 2003).

The provisions of the Treaty are carried out through various protocols and policies drafted by SADC, which are then signed and ratified by the Member States. The protocols and policies of SADC reflect the general concerns shared by the Member States and offer more specific direction and guidelines for cooperation than what is set forth in the Treaty. For instance, there are policies and protocols addressing tourism, energy, trade, drug trafficking, and wildlife conservation. The importance of the protocols is addressed in Article 22 of the Treaty: “each protocol shall be approved by [the Heads of State or Government] and shall thereafter become an integral part of this Treaty” [emphasis added].

A recurring theme in SADC protocols and policies is that SADC is particularly interested in accomplishing its objectives while fostering community participation in the process. In fact, not only is the participation of communities encouraged, but, in many cases, it is mandated.

Article 5 sections 1(g) and 2(b) of the Treaty form the foundation for the mandate to encourage community involvement in TFCA initiatives: “the sustainable utilization of natural resources and effective protection of the environment” is an objective of SADC which, in addition to other means, shall be achieved by “encourag[ing] the people of the
Region and their institutions to take initiatives to develop economic, social, and cultural ties across the Region, and to participate fully in the implementation of the programmes and projects of SADC” [emphasis added]. According to Article 4(f) of the Protocol on Wildlife Conservation and Law Enforcement, a specific objective of the protocol is to “promote the conservation of shared wildlife resources through the establishment of transfrontier conservation areas” [emphasis added]. Thus, TFCA initiatives are to be considered a legitimate program or project of SADC, and, hence, the people of the region (i.e., local communities) and their institutions are to participate fully in the implementation of TFCA initiatives.

The failure of nation-states to recognize this mandate is not without consequence. Article 6 sections 4 and 5 suggest that Member States are to accord this Treaty as having the force of not only international law, but of national law, as well. Furthermore, Article 33 of the Treaty states that sanctions may be imposed against nation-states who fail to recognize this and repeatedly fail to meet the objectives and obligations assumed under the Treaty.

While Member States might sign a treaty, it does not imply that they will comply with, implement, or achieve its objectives. International law is fraught with examples of treaties that are routinely ignored by participating nation-states. The Treaty of SADC has proven to be such an example for a number of reasons. First, while the Treaty is strong in developmental integration, it is weak in the area of economic integration, which has led to a general expression of apathy towards the Treaty by many members of SADC (Clapham 1996, Holland 1995, and Tlou 1997). As with the European Union, economic integration truly solidifies regionalism and is a necessary condition to insure the uniform recognition
and acceptance of the Treaty as a whole (Holland 1995). Secondly, many Member States simply do not have the resources (financial or human) to carry out the objectives of the Treaty (Boyle 2001, Cummings 2001, and Mohammed-Katerere 2001). Non-governmental organizations such as the World Bank and World Wildlife Fund have contributed substantially to the start-up costs of SADC sanctioned projects and programs, but the long-term financial support needed to maintain them is unstable at best (Fakir 2001 and Wels and Draper 2002). Thirdly, when South Africa joined SADC in 1994, following the fall of apartheid, the balance of power shifted tremendously toward the newly democratized state (Worden 2000). South Africa's status makes it somewhat difficult for the Community to engage in intensely conflictual debates with the region's economic hegemon (Tlou 1997). Finally, Member States must address issues surrounding sovereignty and equity. By doing so, the remaining challenges could be abated to a certain extent (Clapham 1996). Economic integration, for instance, cannot truly exist until nation-states become secure in their sovereignty and yield to cooperation in the areas of trade and standardization of economic practices (Page 1999). Member States must be viewed as equal partners in integration despite the economic superiority of some nation-states (e.g. South Africa) over others (e.g. Namibia). While SADC certainly faces formidable challenges concerning the implementation of its objectives, it remains the most successful regional program in southern Africa (Tlou 1997) and carries the force, responsibility, and accountability associated with international law.
The African Union

While SADC might currently be the most successful attempt at regionalism in southern Africa, some have heralded the African Union (AU) as the true mechanism to bring about an “African Renaissance” (Schoeman 2002). The African Union, established in 2002, grew from the Organization of African Unity (OAU), founded in 1963 to unite the nation-states of Africa against colonial subjugation and racism and promote cooperation that would improve the lives of African people (OAU 1963). By its fiftieth anniversary, OAU had virtually accomplished its goal of eradicating colonization in Africa. Nevertheless, the organization was seen as having failed to respond to serious intra-African conflicts and economic crises plaguing much of the continent (Packer and Rukare 2002). Recognizing that the contemporary challenges facing Africa could not be addressed by OAU, the AU was formed to economically integrate Africa through a common market and to provide the continent with a unified voice in international matters (Udombana 2002). Draft protocols have been circulated outlining the establishment of a Pan-African Parliament, a African Court of Justice, and three financial institutions (consisting of the African Central Bank, the African Monetary Fund, and the African Investment Bank) (Packer and Rukare 2002). At present, though, the AU resembles little more than an empty shell whose organs and institutions must be further specified and defined. This is to be done through protocols that, in most cases, have not been drafted, let alone adopted. The diversity of nation-states in Africa and the weak African economy provide critical challenges to the effectiveness of the AU, but the organization provides guidance as to how Africa envisages its future (Schoeman 2002).
Considering the AU's potential as a highly influential international organization, policies related to community participation in conservation efforts, such as TFCA initiatives, will be pivotal. The African Union is still young and has yet to formulate definitive policies related to community involvement in conservation efforts. However, given the growing importance of TFCA initiatives in southern Africa, such policies are inevitable. Lessons learned from SADC and its policies toward community involvement in TFCA initiatives could prove to be invaluable to the framers of an AU policy.

*Indigenous Peoples in International Law*

One of the shared norms driving regionalism in southern Africa is the protection of indigenous peoples' and communities' rights. Historically, states have been the only entities directly affected by international law. In the past few decades, though, the scope of international law has broadened to include the consideration of indigenous peoples' rights. The foundation for the recognition of human rights in international law can be found in the United Nations' Charter, adopted on June 26, 1945, which established among the organization's purpose the promotion of "equal rights and self-determination of peoples." The promulgation of this objective marked a distinct shift from the European-centered international law that fostered colonialism and considered it to be a mechanism by which indigenous peoples were protected (Anaya 2000). While there was a shift in certain objectives of international law, many years followed before the objectives were effectuated in southern Africa. For instance, the apartheid regime of South Africa remained in power until nearly 50 years after the adoption of the UN

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12 Self-determination is identified as a universe of human rights precepts concerned broadly with peoples, including indigenous peoples, and grounded in the idea that all are equally entitled to control their own destinies (Scott 1996).
Charter. As illustrated by the fall of the apartheid regime, the contemporary treatment of indigenous peoples and communities has been substantially driven by indigenous peoples themselves (Peang-Meth 2002).

The past few decades has produced numerous conventions and international agreements that seek to recognize the legitimacy of indigenous peoples’ and communities’ rights and to redress injustices incurred by colonization. Some of the more prominent conventions and agreements include the African Charter on Human and Peoples’ Rights (1981), the United Nation-states Conference on Environmental Development (1992), the Rio Declaration and the more detailed environmental policy statement known as Agenda 21 (1992), the Treaty of SADC (1992), and the Draft United Nation-states Declaration on the Rights of Indigenous Peoples (1993) (for a more detailed treatment of conventions and agreements regarding indigenous peoples’ rights, see Anaya 2000). All of the above conventions and agreements acknowledge a moral and legal obligation to insure the self-determination of indigenous peoples and communities, which includes their participation and consultation in matters directly affecting them. Given the broad acceptance of such principles, self-determination is widely acknowledged as a principle of customary international law (Anaya 2000, Perret 1998, and Slomanson 2003). Notwithstanding its status as law, self-determination of indigenous peoples is often not observed by nation-states in the absence of a binding treaty (Peang-Meth 2002 and Scott 1996). This amplifies the importance of including provisions in treaties that acknowledge the self-determination of indigenous peoples and their communities. Considering southern Africa’s history of colonization and marginalization, nation-states in the region have intransigently incorporated the principle of self-determination into
many regional treaties concerning the environment and development, the Treaty of SADC being one such example.

*The Framework of Self-Determination*

Rights afforded to indigenous peoples and their communities, including those found in the Treaty of SADC, are typically done so under a framework of self-determination. Self-determination "entails a universe of human rights precepts extending from core values of freedom and equality and applying in favor of human beings in relation to the institutions of government under which they live." (Anaya 2000). As a corollary, the self-determination framework further acknowledges that indigenous peoples are entitled to control their own destinies and participate in projects, programs, and initiatives which might directly and indirectly affect them (Scott 1996). This normative framework is widely recognized as being within the corpus of customary international law and has been incorporated into numerous treaties, conventions, and agreements.

The self-determination framework consists of two normative strains: the *constitutive aspect* and the *ongoing aspect*. The *constitutive aspect* requires that the creation of the governing institutional body be substantially guided by the will of the people, or peoples, governed. The *ongoing aspect* requires that the governing institutional body be one under which people may live and develop freely on a continuous basis. (Anaya 2000, Kingsbury 1998, Lynch 1996, Peang-Meth 2002, Perret 1998, and Scott 1996)
When institutions are born or merged with others, when their constitutions are altered, or when they endeavor to extend the scope of their authority, they are within the sphere of constitutive self-determination (Anaya 2000). Constitutive self-determination does not dictate the outcome of such phenomena; rather, it imposes requirements of participation, consultation, and consent of indigenous peoples. The violation of this principle leads to the international illegitimacy of colonization, which represented impermissible territorial expansion of governmental authorities (due to a lack of indigenous consent) (Peang-Meth 2002). In the context of TFCAs of southern Africa, constitutive self-determination mandates the involvement and consent of local communities in the establishment and institution of TFCAs.

Ongoing self-determination continually enjoins the governing institutional body to maintain a dialogue with indigenous communities (Perret 1998). In essence, it requires a governing body to make thoughtful and meaningful choices in all matters concerned with indigenous peoples and their communities (Anaya 2000 and Kingsbury 1998). Furthermore, this necessarily requires continual participation, consultation and consent in decision-making processes with which indigenous peoples are concerned (Lynch 1996). As identified in the UN Friendly Relations Declaration (1970), indigenous peoples are to “freely pursue their economic, social and cultural development.”


- Nondiscrimination – the UN Charter provides for “respect of human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion.”
• Respect for cultural integrity – indigenous peoples reserve the right to maintain and freely develop their cultural identity in coexistence with other sectors of humanity.

• Recognition of land and natural resource rights – according to the International Labour Organization Convention Number 169, “governments shall respect the special importance for the cultures and spiritual values of the peoples concerned of their relationship with the lands or territories, or both, as applicable, which they occupy or otherwise use, and in particular the collective aspects of this relationship.” The convention adds that indigenous peoples “shall not be removed from the lands which they occupy” unless under prescribed conditions where necessary as an “exceptional measure.”

• The right to social welfare and development – the UN Charter promulgates that governments shall promote economic and social progress and development among indigenous peoples.

• Self government – as the overarching political dimension of ongoing self-determination, self-government consists of the idea that government is to function according to the will of the people governed.

These normative precepts are necessary conditions to insure the self-determination of indigenous peoples and provide indicators as to the health of functioning systems of self-determination (Anaya 2000, Kingsbury 1998, and Peang-Meth 2002).

International agreements in southern Africa, such as the Treaty of SADC and the Constitutive Act of the African Union, have taken great strides to insure that constitutive and ongoing self-determination are recognized as objectives of the agreements. However, for a number of reasons, the objectives may not be complied with, implemented, or effectuated, creating feelings of distrust and cynicism, toward the nation-state, among indigenous communities. Transfrontier conservation area initiatives of southern Africa provide an excellent venue through which the interface of international law and local indigenous communities can be assessed, under the framework of self-determination. Through this assessment, emerging attempts at regionalism, such as the
AU, might recognize the legal obligation to facilitate self-determination of indigenous communities in TFCA initiatives and endeavor to promote it as an objective of regional integration.

**Research Objectives**

Despite the widely shared norms and beliefs, such as self-determination outlined above, there has been a relatively small amount of research dedicated to investigating the disconnect between codifying these values into law and then implementing the law. This is particularly true in the case of TFCAs in southern Africa where, according to the Treaty of SADC, nation-states are mandated to encourage community involvement in TFCA initiatives. Prior to this research, studies had not been conducted to assess whether or not nation-states actually view this provision as a mandate of international law. Furthermore, in the context of the existing literature, the motivations for nation-states’ formalization (or lack thereof) of international law and agreements related to TFCAs is not clear. These apparent gaps in research shaped the four fundamental objectives of this study:

1. To determine the legal and cooperative structure for TFCAs within southern Africa (e.g., informal vs. formal agreements);

2. To assess whether or not the relevant treaties and agreements are viewed by participating nation-states as a mandate of international law (e.g., do nation-states view the Treaty of SADC as a mandate to encourage community involvement?);

3. To ascertain why these treaties and agreements might not be viewed as a mandate;

4. and, to determine what circumstances would make treaty/agreement formalization desirable or undesirable.
Transfrontier conservation areas will continue to be an important venue for bioregionalism and conservation initiatives throughout southern Africa and the world. Given their importance, it’s imperative to understand the mechanisms by which management decisions and policy are made. International law is an important component of this understanding since, as international entities, TFCA policy are or could be significantly shaped by agreements between participating nation-states. The following chapter illustrates how the four objectives listed above were operationalized to adequately investigate TFCAs, international law, and their implications for community involvement within southern Africa.
Chapter 3

METHODS OF STUDY

This investigation assessed the complex interface between international law, TFCAs, and local communities in two settings: Kgalagadi Transfrontier Park (KTP) and the Maloti-Drakensberg Transfrontier Conservation and Development Area (MDTCDA). Each study site was chosen on the basis of four principles:

1. Length of establishment
2. Objectives and purpose of the TFCA
3. Political stability of participating nation-states
4. Availability of data and sources of information.

These TFCAs were chosen based on their differences in the first two principles listed above, thus providing a more thorough examination. The fulfillment of the last two insured safety in gathering data and the thoroughness of the research.

The Kgalagadi Transfrontier Park has been a *de facto* TFCA since 1948, while MDTCDA was established in 2001. The objectives and purposes of KTP are geared towards protection of the land and resources, whereas the objectives and purposes of MDTCDA promote agriculture, settlement, and development in addition to land and resource protection. Differences such as these were designed to provide keen insight into how adherence to international law may be affected by variables such as length of establishment and the objectives and purposes of TFCAs. In the interest of safety, political stability was also considered in the selection process. For example, due to the political instability of Zimbabwe and the impending danger of entering the country, the
Great Limpopo Transfrontier Park was not selected as a study site. South Africa, Botswana, and Lesotho are all relatively stable and provided a safe environment for research. Finally, KTP and MDTCDA were selected partially on the basis that the University of Montana has well-established relationships with individuals involved in both TFCAs. These relationships promoted a richer study of the issue and helped foster relationships with other contacts.

**The Kgalagadi Transfrontier Park**

Situated in the sparsely populated Kalahari Desert of southwest Botswana and north-central South Africa, the Kgalagadi Transfrontier Park (see Fig. 4) is composed of South Africa’s Kalahari-Gemsbok National Park (9,591 km$^2$) and Botswana’s Gemsbok National Park (28,400 km$^2$). The Park is a harsh environment that is home to species of plants that must withstand up to ten months of drought. Despite the arid conditions, wildlife flourishes in the area. Antelope such as the eland, gemsbok, hartebeest, steenbok, and duiker all manage well without a large quantity of water. Large game animals such as lion, hyena, and jackals also call this Park home. However, wildlife often roam far distances in search of food and water. Inevitably, this has frequently required wildlife to roam across the South African and Botswanan borders. Recognizing this, land management agencies from South Africa and Botswana acknowledged the need to collaborate in management and work cooperatively to ensure that the Kalahari Desert and its natural resources were adequately protected.
In 1948, the governments of Botswana and South Africa informally agreed to collaborate in the management of the two parks. The two parks functioned as a single ecological unit where wildlife was allowed to move between the parks without the impediment of fences. This agreement was formalized 51 years later in 1999 when South Africa and Botswana signed a bilateral agreement establishing the Transfrontier Park. Since its formalization, various activities have been undertaken to help insure the successful consolidation of the two parks. These activities are outlined in the joint management plan and include research, management, communication, tourism management and development, problem-animal control, and infrastructure development (PPF 2003).
While several diverse cooperative projects are underway, most are centered on the protection and conservation of the land and natural resources. According to its management plan, KTP is to be managed in accordance with five principle objectives:

1. To preserve the diversity of organisms indigenous to the southern Kalahari as functional elements of the ecosystem, with predators receiving priority.
2. To maintain in particular the ecological processes that characterize the Kalahari ecosystem.
3. To provide facilities and opportunities for research and monitoring to further understanding of the physical and biological processes of the Kalahari ecosystem.
4. To mitigate the less desirable impacts of existing and potential land-use conflicts between the Kgalagadi Transfrontier Park and neighboring communities.
5. To realize economic returns from tourism associated with the Kgalagadi Transfrontier Park, while safeguarding its ecological integrity and pristine wilderness quality.  
(SANP and BDWP 1997)

While the management plan contains provisions aimed at ensuring that local communities will benefit economically, community development and participation in Park decisions are not specifically cited as an objective. However, on the South Africa side, a recent successful land claim by the indigenous San people has insured that local communities will play a vital role in the future of the park. Unfortunately, the establishment of national parks in southern Africa was, historically, not always done with the intention of protecting and conserving land and natural resources. Rather, parks were often established to legitimize the taking of land by colonists from indigenous peoples (Omer-Cooper 1997; Shillington 1993). In 1931, shortly after the establishment of the Kalahari-Gemsbok, the Khomani San were evicted from the land they occupied within the park and were dispersed across other parts of South Africa, Botswana, and Namibia. After the fall of apartheid in 1994, a new South Africa constitution was written, which allowed (and even encouraged) indigenous peoples who were removed from their land by
colonists to reclaim their land. Accordingly, the Khomani San filed a claim, which was awarded in 2002, entitling them to roughly 650 km$^2$ of the Kalahari-Gemsbok National Park and extensive land-use rights in KTP (Chennells 2002).

The most formidable challenges that KTP faces involve its interactions with local communities, such as the Khomani San, and their role in the management and planning of the Park (PPF 2003). While the management plan does not directly address development or community participation, communities have been afforded land-use rights, including participation in park decisions and development through other means such as land-claims. Additionally, as illustrated in the previous chapter, local communities are also afforded participatory rights vis-à-vis the Treaty of SADC. Nevertheless, the role of local communities in KTP is not clearly defined, thus magnifying the need for an assessment of the role they currently and could potentially have.

The Maloti-Drakensberg Transfrontier Conservation and Development Area

The Maloti-Drakensberg Transfrontier Conservation and Development Area provides a scenario in stark contrast with KTP. The Maloti-Drakensberg Transfrontier Conservation and Development Area is roughly 5,000 km$^2$ in size (approximately 13% of KTP’s size) and is situated in the Maloti-Drakensberg Mountains of South Africa and Lesotho. While KTP is composed of two national parks, MDTCD is composed of four national parks, several nature reserves, and a variety of privately protected areas. Also found within the border of MDTCD are numerous areas slated for development.

The Maloti-Drakensberg Mountains are known for their snowfalls, clear streams, and invaluable wetland and riparian areas that provide a significant portion of Lesotho’s
and South Africa’s water and hydroelectric power. Many of the ecosystems found within MDTCDA are unique to the area. The “Roof of Africa,” as it has come to be called, is also a World Heritage Site and a proposed Biosphere Reserve. In recognition of the unique qualities and characteristics of MDTCDA, the governments of South Africa and Lesotho signed a MOU on June 11, 2001 promulgating a framework for cooperation between the two countries. The objectives of the project are to (World Bank/GEF 2000):

1. conserve the globally significant biodiversity of the Maloti-Drakensberg mountains;

2. contribute to community development through income-generation from nature-based tourism.

The proposed cooperation between the two countries exists in several areas including managing ecological threats, community involvement, conservation planning, protected area planning, protected area management, tourism planning, and strengthening institutions (Ezemvelo Kwa-Zulu-Natal Wildlife 2001). While many of these areas are similar to those of KTP, on the surface, community involvement appears to play a more critical and important role in MDTCDA. Communities and conservation staff will jointly identify challenges and opportunities with the support of a team of social scientists and community extension workers (Sandwith 2003). Additionally, progress has been made in South Africa with the appointment of statutory boards for protected areas (Sandwith 2000). These boards represent sectoral and community interest in nature conservation and are appointed through a public nomination process. Vested in the board is the power to influence management of protected areas nation-wide (including MDTCDA) and to allocate funds that accrue to a community trust from levies imposed on visitors to the protected areas. All of these actions and plans could potentially make MDTCDA a
progressive example of community involvement in TFCA initiatives. The forward thought is best summarized in the MOU: “Peace, economic development, and environmental protection are interdependent and indivisible.”

Despite the emphasis on community involvement and empowerment, MDTCDA faces challenges with respect to local communities. In Lesotho, virtually no investment in eco-tourism has been made and there exists critical deficiencies in infrastructure. Without proper sharing systems in place, this might lead to inequitable distribution of benefits. It is also recognized by the framers of MDTCDA that the local communities are often isolated politically and marginalized in terms of infrastructure development. This has, in the past, led to weak government interaction and a general distrust for outside political entities. Through the initiative, MDTCDA planners hope to strengthen these relationships by involving local communities, especially those marginalized in the past, at the fundamental level of decision-making.

The Maloti-Drakensberg Transfrontier Conservation and Development Area provides a much different approach to community involvement than KTP. However, they both face similar fundamental challenges – gaining the trust of local communities and efficiently involving them in the decision-making process while, at the same time, empowering them economically, politically, and socially.

**Population Sampled**

In order to adequately assess TFCAs and the role of local communities in the context of international law, information was gathered from four principle populations:
national government officials, community officials (including land managers), academicians, and NGO officials.

The national government officials relevant to this study included the Ministers of Environment (or tourism) for South Africa, Botswana, and Lesotho and officials from agencies such as South Africa National Parks and Botswana Department of Wildlife and National Parks. Data were gathered from the Ministers to shed light on macro-level aspects of TFCAs, local communities, and international law. For example, the Ministers (or their staff) were best equipped to answer questions concerning who chooses to recognize SADC’s mandates and why they may not recognize it. They also were able to provide insight into the institutions or resources that might be helpful in ensuring the effectiveness of the mandate. Officials from land management agencies provided data based on first hand experience with communities. These agencies have and are engaging in active community participation and are well aware of the methods of implementation of the mandate and the necessary conditions for cooperative management to take place. Academics and NGO officials provided an external voice to the data. While national government officials and local community officials might consciously or subconsciously express inherent biases, academicians and NGO officials were able to shed light on the contextual nuances surrounding TFCAs and local communities from an “observer perspective.”

Data Sampling

Due to the relative newness of TFCAs in southern Africa, not all national government officials were familiar with TFCAs and their implications for local
communities. When a researcher is studying a population whose members may not all be suitable informants, or they are difficult to locate, Bernard (2002) argues that the best means of sampling is snowball sampling. Snowball sampling is the location of one or more key informants who will, in turn, provide the researcher with the names of other likely informants. The research of Richardson (1988), Kadushin (1968), and Ostrander (1980) are all classic examples of studies conducted using snowball sampling in situations similar to that used for research on TFCAs and communities in the context of international law.

Snowball sampling is also helpful in situations where informants know all of the other informants in a population. In general, this is the case in southern Africa, where national government officials that are familiar with TFCA initiatives are familiar with one another. However, community officials and leaders are not always able to provide the names of other community officials and leaders who were participating or interested in TFCA co-management. In this case, knowledgeable national government officials and academicians were able to provide the names of valuable community officials and leaders.

Snowball sampling is a popular means of sampling, particularly in anthropology and sociology (Bernard 2002); however, it is not without its pitfalls. If one is dealing with a relatively small population of people who are likely to be in contact with one another, then snowball sampling can be effective. In a large population, though, people who are well known tend to be on everyone’s list while lesser known, but still important, informants are less likely to be mentioned. In larger populations, then, snowball

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13 An informant is defined as a member of the studied population who is capable of providing the researcher with meaningful data.
sampling is risky since every person does not have the same chance of being included (Bernard 2002; Strauss and Corbin 1998). Given the relatively small population being sampled and the sophisticated networking of key informants, this challenge was not a problem.

**Data Collection Techniques**

Aside from the analysis of management plans, treaties, and other agreements, the primary source of data for this study was tape-recorded interviews. Interviews were semi-structured and based on the use of a formalized interview guide. The utility of semi-structured interviews is that they maintain a level of formality that promotes efficient use of time and collection of relevant data while allowing the interviewee to express tangential or corollary thoughts that might also be relevant (Bernard 2002). Semi-structured interviewing is the most popular method of interviewing among anthropologists and sociologists when the researcher has the opportunity to query the interviewee in-person (Glaser and Strauss 1999). Due to the efficient use of time, it also works very well in projects where the researcher is interviewing high-level bureaucrats, in which case it is often difficult to schedule interviews and scheduled interviews are often, by necessity, brief (Bernard 2002). The conditions of this research made semi-structured interviews the data collection method of choice.

The questions posed during the interview were based on an interview guide that centered around the four fundamental objectives of this study:
1. To determine the legal and cooperative structure for TFCAs within southern Africa (e.g., informal vs. formal agreements);

2. To assess whether or not the relevant treaties and agreements are viewed by participating nation-states as a mandate of international law (e.g., do nation-states view the Treaty of SADC as a mandate to encourage community involvement?);

3. To ascertain why these treaties and agreements might not be viewed as a mandate;

4. and, to determine what circumstances would make treaty/agreement formalization desirable or undesirable.

Depending on the professional position, familiarity with relevant issues, and language proficiency of the respondent being interviewed, the questions below required occasional modification or re-phrasing. Nevertheless, the integrity and intent of the questions were maintained despite this occasional modification. The interview guide was comprised of the following nine questions:

1. How much of the current community involvement in TFCA initiatives can be attributed to conscious efforts to implement SADC’s provisions? That is, how much of the current community involvement was pre-existing or a result of non-international law forces?

2. Are agreements governing TFCAs formal or informal? What are the advantages and disadvantages of each type?

3. Are adequate systems of accountability established through the agreements?

4. Do nation-states and local communities view SADC’s provisions as a mandate to encourage community involvement in TFCA initiatives?

5. Who chooses to recognize (or not to recognize) and/or implement SADC’s provisions (e.g., nation-states, national government agencies, or local communities)?

6. Why may nation-states choose to not recognize and/or implement SADC’s provisions?

7. What institutions or resources are missing which would allow SADC’s provisions to be effectuated?
8. What role do nation-states want SADC to play with respect to TFCAs in southern Africa?

9. Given the rising popularity of the African Union (AU), if AU desired to establish similar objectives of community involvement in TFCA initiatives, how might AU’s methods be different than SADC’s in effectuating those objectives?

This guide was thorough enough to adequately assess TFCAs and the role of the community in international law while being brief enough to not inconvenience the interviewee.

**Data Analyses Used**

One of the most effective means of analyzing interviews is through “grounded-theory.” The *grounded-theory* approach, championed by Glaser and Strauss in the late 1960s, is a set of techniques for (1) identifying categories and concepts that emerge from the data, and (2) recognizing relationships between concepts and formulating those relationships into substantive and formal theories (Glaser and Strauss 1967; Russell 2002). Grounded-theory differs from other methods of text analysis, such as content analysis, in that it allows hypotheses and theories to emerge rather than only testing *a priori* assumptions. The use of grounded-theory is especially important in studying issues that have not been previously studied, as is the case with the proposed research. Using content analysis for nascent fields of research fundamentally constrains the theory and, often, the *a priori* assumptions are speculative at best (Glaser and Strauss 1967; Strauss and Corbin 1998). This is not to say that, with grounded theory, fundamental questions and assumptions are not postulated beforehand. Fundamental questions and assumptions are offered beforehand to serve as a guiding framework that sets the bounds
for the research. Without this framework, the researcher runs the risk of generalized and meaningless data. In essence, the value of grounded-theory is that it allows the researcher to test fundamental hypotheses while still permitting unforeseen theory to emerge.

The first component of the grounded-theory method is identifying categories and concepts that emerge from the text. The principle behind this identification is discovering patterns of behavior or thought in a set of texts. This usually begins with simply reading the texts and underlining or highlighting dominant ideas or themes as one goes along. The varieties of ideas or themes that are identified are termed categories. These categories are then briefly named. Bernard (1974) discusses his method for naming categories or emergent ideas:

“In my study of how ocean scientists interact with people in Washington D.C., who are responsible for ocean policy, I kept hearing the word ‘brokers.’ Scientists and policy makers alike used this word to describe people whom they trusted to act as go-betweens, so ‘broker’ became one of the [category names] for my work.”

As the researcher analyzes the texts, inherent properties of the categories will emerge. Properties refer to the describing elements of the categories (Glaser and Strauss 1967). For example, “brokers’ relationship with ocean scientists” and “brokers’ concern for the pursuit of oceanic research” might be two properties of the “broker” category described above. The establishment of categories and properties allows the researcher to develop concepts about the category. Concepts are the conclusions that can be reached given a category and its properties (Corbin and Strauss 1998). The critical component of grounded-theory is recognizing the relationships among the different concepts and formulating theories from those relationships. In the broker example above, a concept
may be that “brokers” are “concerned with the pursuit of oceanic research” and they actively maintain strong working “relationships with ocean scientists.”

Shaping the concepts into substantive and formal theories is the second and final component of the grounded-theory method. Substantive and formal theories differ only in the degree of generality, but each requires a unique analytic approach. Substantive theory is concerned with specific, or empirical, areas of inquiry, whereas formal theory is derived from generalizations from classes of substantive theories. The substantive area of this research is concerned with the interface between international law and communities situated in and around KTP and MDTCDA. The formal portion of the research is the implications of this substantive research to the broad field of international law. Several substantive areas and cases must be researched before formal theory can be established (Bernard 2002). The specific nature of this research does not lend itself to generating formal theory, but it can contribute to its formation.

In summary, the systematic approach to analyzing the data gathered for this research was as follows:

1. Produce transcripts of interviews and read through the texts.
2. Identify categories and properties that arise.
3. As the categories and properties emerge, formulate concepts and compare them.
4. Think about how the concepts are linked together.
5. Use the relations among concepts to build theory, constantly checking the theory against the data.
6. Present the results using quotes from interviews that illuminate the theory.
Grounded theory is a clear departure from the traditional deductive approach of hypothesis testing. The method offers the researcher the unique and creative opportunity to test fundamental \textit{a priori} hypotheses and propositions and to generate emergent theory that might lead to future research. The clear advantage of grounded-theory research is that, with respect to emergent theory, the theoretical hypotheses are tested through the already existing data (Strauss and Corbin 1998). Therefore, the researcher does not run the risk of having a weakly supported substantive theory. In general substantive theory “can usually not be completely refuted by more data or replaced by another theory.” (Glaser and Strauss 1967) Since the method is so intimately “grounded” in the data, the formulated theories are destined to last, despite inevitable modification.

\textbf{Evolution of data collection method}

The nature of grounded theory requires the interviewer to adapt to and accommodate emergent categories and concepts. As categories and concepts emerge, research questions evolve to further explore them. For instance, throughout the course of this research, the interview guide evolved to investigate the notion of formalization to a greater extent than was originally planned. While this notion was a fundamental focus from the beginning of the research, interviewees reinforced it as the principle category. The importance of formalization was corroborated in that nearly every emergent concept appeared to be related to the idea of agreement formalization.

Granted, the shift of formalization to a primary focus of the study is a fundamental one, the substance of the research questions were largely unchanged. The result was, in effect, that the findings evolved in a different manner than was anticipated. Rather than
being a question of community involvement, the research came to be an inquisition into the fundamental driving forces behind a nation-states decision to formalize agreements. Nevertheless, this paradigm shift substantially informed questions concerning community involvement in TFCAs in the context of international law.

The next chapter presents a discussion of research findings that illustrates the importance of agreement formalization and its implications for community involvement in TFCA initiatives. It also highlights the cooperative and legal structure of TFCAs.
ANALYSIS AND DISCUSSION

To better understand transfrontier conservation areas and the role of communities in the context of international law, three months of field research (June 2003-August 2003) was conducted in southern Africa that entailed interviews with several individuals from South Africa, Lesotho, Botswana, and Zimbabwe. While challenges were encountered in the process of collecting these data, the respondents shed valuable insight into nation-state awareness of international law (including the Treaty of SADC), the desire for agreement formalization, the Treaty of SADC as a mandate for community involvement in TFCA initiatives, and the potential role of SADC and the African Union in TFCA initiatives.

The chapter begins with a brief summary of the principle challenges encountered throughout the course of the field research. Following this summary is a discussion of the findings, which includes an outline of the concepts, categories, and theories that emerged from the data. The variability of findings between the study sites are then presented followed by a summary of key findings and insights.

Challenges encountered

In essence, the significant challenges encountered throughout the collection of data revolved around the nature of the population itself. For the purposes of this study, the population was defined as individuals familiar with the Kgalagadi Transfrontier Park or the Maloti-Drakensberg Transfrontier Conservation and Development Area who have
knowledge of both international law and transfrontier conservation areas. The sample set interviewed was chosen through snowball sampling and consisted of directors and staff of NGOs, government officials, retired individuals who have played a critical role in the establishment of TFCAs within the region, and academics.

Throughout the collection of data, three principle population-based challenges emerged:

- small population,
- bias among interviewees, and
- short fieldwork period, which led to the inability of many busy potential interviewees to be interviewed.

Small population

Transfrontier conservation is an emerging area of interest; as such, the number of individuals with expertise in both TFCAs and international law is small. Given that the population was small, though, the sample included a substantial portion of the population, as defined above. Notwithstanding a representative data set, the size of the population prevented saturation of the data itself.\(^{14}\)

Bias among interviewees

Of the 16 individuals interviewed, 12 (75%) were from South Africa, 2 (12.5%) were from Zimbabwe, 1 (6.25%) was from Botswana, and 1 (6.25%) was from Lesotho. This distribution is largely due to a more developed human resource infrastructure within

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\(^{14}\) According to the “grounded theory” methodology illustrated in Chapter 3, the researcher must continue to sample until the data are “saturated” (i.e., no new or relevant data would likely emerge from further sampling).
South Africa. The South African government is simply able to employ more individuals in transfrontier conservation than any other country within sub-Saharan Africa. Thus, responses are inherently biased towards South African perspectives. Furthermore, South Africa is a participating nation-state in both study sites. Finally, it is clear from the list of interviewees that a particular bias exists towards males with power.

*Short fieldwork period*

The population sampled included high-level government officials, NGO directors and employees, and academics – all of whom were extremely busy and had virtually inflexible schedules. While only one interviewee cancelled an appointment, there were four potential interviewees (2 from South Africa, 1 from Lesotho, and 1 from Botswana) who were unable to meet during the three-month period of fieldwork.

While there were challenges encountered, they were of an unavoidable nature. The integrity of the research, however, was largely maintained and provided an atmosphere conducive for emergent categories, concepts, and theories that served to clarify the research questions and facilitate the realization of the four objectives of this research. In short, while there were challenges in collecting the data, none were significant enough to warrant the data irrelevant or inapplicable; the results must simply be considered subject to the constraint of these challenges.

*Emergent categories, concepts, and theories*

Throughout the course of the research, a number of categories and concepts emerged which led to substantive theory concerning the relationship between international law and TFCAS as well as the implications of this relationship for community involvement
in TFCA initiatives. Below is a table delineating the categories, concepts, and theory that emerged throughout the course of analysis.

<table>
<thead>
<tr>
<th>Categories</th>
<th>Concepts</th>
<th>Theories</th>
</tr>
</thead>
</table>
| International law and institutional accountability | • Sanctions  
• Donors  
• Institutional structures  
• Progress reporting  
• Delegation of responsibility | International accountability is achieved principally through three different mechanisms: sanctions, institutional structures, and donors |
| Formalization                       | • Formalization may not always be necessary or desired.  
• Funding  
• Pre-existing cross-border management  
• Significant vs. insignificant management actions  
• Parties with a vested interest  
• Number of parties involved | Formalization of TFCA agreements might not always be necessary or desired. |
| The Treaty of SADC as a mandate     | • Diversity of views  
• Political will  
• Capacity  
• Necessity | The necessity of TFCA agreement formalization is based on:  
1. Donor funding  
2. Pre-existing cross-border management.  
3. The significance of management actions.  
4. The types of parties involved.  
5. The number of parties involved. | Viewing the Treaty of SADC as a mandate is largely based on a nation-state’s political will and capacity to implement the agreement as well as the necessity to view the agreement as a mandate. |
| Limiting factors of implementation  | • Political will  
• Capacity | The implementation of international agreements related to TFCAs is dependent upon a nation-state’s political will and |
The potential role of SADC

- Mediator
- Set regional TFCA standards
- Protecting community rights
- Coordinate donor funding
- Capacity
- Strong vs. weak role
- Peace Parks Foundation partnership

The Southern Africa Development Community could potentially fulfill several roles including:

- Mediator between participating nation-states.
- Setting regional standards for TFCA s.
- Protecting community rights through protocols and agreements.
- Coordinating donor funding.

While most nation-states would like to see SADC play some role in TFCA initiatives, most would like to see SADC play a secondary role.

SADC is planning to fulfill some of these roles through a partnership with the Peace Parks Foundation.

The potential role of African Union

- Continental charter
- Normalized values
- Human rights
- Political clout

Given the African Union's continental charter, it is not likely that they will address region-specific issues. Rather, they will focus on normalized issues such as human rights. They will however be a powerful organization given their political clout.

### Table 3 – Emergent categories, concepts, and theories

The following section is devoted to expanding the findings and results of each category. In the course of doing so, a number of quotes will be provided to support the formulation of theories. While the quotes highlighted below are not a complete list of relevant responses, they do represent the dominant responses and display the spectrum of concepts that emerged.
Discussion of emergent categories, concepts, and theories

International law and institutional accountability

The principle function of international agreements is to establish a formal system of international accountability. *International accountability*, as stated and understood by its architects, can be defined as liability or responsibility imposed upon a collection of nation-states to carry out a set of actions declared through international law (Slomanson 2003). In the case of international agreements relevant to TFCAs, this is achieved principally through three different mechanisms: sanctions, institutional structures, and donors. Each of these three mechanisms is dramatically different in terms of both effectiveness and evolution with respect to TFCAs in southern Africa.

The Treaty of SADC states that in any instance where the Treaty is violated, sanctions may be imposed upon the nation-state in violation. Nevertheless, as several respondents noted, sanctions are rarely imposed against any nation-state around the world for violating international law – particularly conservation-based violations (see Box 1). In essence, conservation based violations simply aren’t considered serious enough to justify sanctions.

Perhaps the best way to establish accountability is to embed it within the institutional structures surrounding TFCAs and to create chains of responsibility and reporting. Every TFCA memorandum of understanding (MOU) or treaty establishing and guiding TFCA management has created an organizational framework delineating the way in which conflicts are resolved and responsibility is delegated. The basic organizational
The model for TFCAs consists of several structures, including international donors, heads of state, a ministerial committee, a joint management board, nation-state management committees, and nation-state task forces (see Fig. 5).

"Granted, sanctions don’t occur often, but I’m sorry to say that I feel that if there were no sanctions, nothing would happen. In any case where a country is responsible for its actions, if that country doesn’t live up to the promises they’ve made, there needs to be consequences. Unfortunately, in the international arena, that doesn’t happen too often."

"I don’t think they would go that far... It’s not warranted first of all. In the case of environmental stuff, I think the priority for SADC is peace and security... These [TFCAs] are further on down the line."

"Sanctions are rarely imposed with any violations of international law. You may find that they exist with some instances of law such as significant human rights violations like in Zimbabwe, but in general, conservation issues are simply not seen as being important enough to merit the imposition of sanctions..."

Box 1 – TFCAs and Sanctions

Several respondents noted that accountability is established by (1) progress reporting that must take place between each connected structure and (2) delegation of responsibility through these channels (which gives rise to a traceable path of action).

Involvement of donors can be one of the most effective means of instituting accountability within a TFCA initiative. In every instance where a donor contributes funding to a TFCA initiative, a formal agreement is established between the donor and the participating nation-states. Given the pecuniary nature of the agreement, there is a high level of financial accountability expected through the agreement. Furthermore, since donor

\[15\] The name of each of these structures differs across TFCAs, but the fundamental model and mission of each remains the same.
International Organization(s)

Head of State A

Donor Community

Head of State B

Ministerial Committee

Joint Management Board

Management Committee
Nation-State A

Task Groups
Nation-State A

Management Committee
Nation-State B

Task Groups
Nation-State B

Fig. 5 – TFCA Organizational Structure
funding for TFCAs often requires specific management actions, implementing agencies are indirectly accountable to donors for those actions. Officials within Kwa-Zulu Natal Wildlife noted that the agreement between the Global Environment Facility and the countries of Lesotho and South Africa is the most detailed and accountable agreement governing the Maloti-Drakensberg Transfrontier Conservation and Development Area. Of equal importance, with respect to accountability, is the Ministerial Committee (composed of the Ministers of Environment, Tourism, and Development of each participating nation), which guides the overall mission of the TFCA.

Below the Ministerial Committee sits the Joint Management Board composed of high-ranking officials from land management agencies within each participating State and, in some TFCAs, a representative from the SADC Secretariat. The goal of this committee is to assess the principle challenges facing the TFCA and then delegate responsibility to the nation-state management committees that will act to mitigate those challenges and report their progress to the Joint Management Board.

The nation-state management committees and task groups carry out the commission of addressing specific problems facing the TFCA. In most cases, individual task groups exist for tourism, wildlife management, national security, foreign affairs, and community issues (Verhoef 2003). In fact, it is the community task force, to which members of surrounding communities are invited to send representatives, that serves as the community voice in TFCA matters (Verhoef 2003).

Formalization

Accountability is primarily a function of agreement formalization. For the purpose of this study, *formalization* is defined as the creation of written rules that are promulgated
through a treaty or international agreement and are considered legally binding. Like implementation of and recognition of agreements, formalization of agreements is dependent upon a nation-state’s political will and capacity to formalize agreements as well as its perceived necessity to do so.

In theory, the greater the degree of formalization - the greater the degree of accountability (the contrapositive and converse being true, as well). Despite the benefits of accountability, formalization is not something that is always desired by nation-states. As noted by a respondent, cooperation in the Kgalagadi Transfrontier Park was “much smoother before there were any agreements.” Considering the context-specific nature of the desire for formalization, it may be wise to assess the need for agreement formalization prior to engaging in TFCA initiatives. Provided there is both the capacity and political will for formalization, below are some initial questions that nation-states might consider in assessing the need for formalization:

1. *Is the initiative heavily funded by donors (or could it be)?*

If the TFCA is heavily funded, then it might be wise to consider formalizing agreements to establish a system of financial accountability. If it is not funded, but could be, formalization will be attractive to potential donors.

“One of the main reasons why we have so many formal agreements is that they are necessary in order for us to receive funding; we have to have financial accountability. This is particularly true when multiple countries are involved and we need to track who bears the costs and receives the benefits.”

“There’s no way we would be able to get any money without an agreement. If a Transfrontier project wants to receive any sort of funding, they have to have [an agreement].”

**Box 2 – Formalization and donor funding**
2. What are the cross-border management initiatives?

If the management initiatives are substantial, then formalization might be necessary to establish an organizing framework and management accountability.

“Transfrontier conservation areas often involve very complex projects and programs. It’s desirable to have an organizing framework if we’re going to undertake complex actions. An organization needs to have some sort of framework to operate effectively.”

“A lot of times we hear complaints that agreements and plans create what you call ‘red-tape,’ and that it is a bad thing. One of the most important things that I’ve learned is that sometimes that ‘red-tape’ forces us to think about the actions we are taking. If there were no agreements for these initiatives, we could potentially make quick decisions, but they stand a better chance of being bad ones.”

“The Great Limpopo [TFCA] would never be able to implement an elephant re-location plan without an operational and written plan between the countries involved.”

“If you’re not going to do anything major, why would you need a formal agreement? I can see needing a formal agreement for major projects, but not for anything minor. A lot of that need for formal agreements can be taken care of by sharing or combining management plans.”

“Yes, it is true that when there are substantial management actions agreements and treaties can help, but what treaties and agreements must also do is consider the long-term goals of the area. For the most part, I don’t see that in any of the agreements. The result is that agreements must constantly be written and revised. We need some long-term goals.”

3. Is cross-border management already taking place?

If cross-border management is already taking place and (1) few parties are engaged, (2) no donors are funding the project, (3) no substantial management actions are taking place, and (4) local communities do not have a vested interest in the TFCA, then it might not be necessary to formalize agreements.
"We’ve been cooperating just fine for a very long time, why would we want to do anything to damage that now? Personally, I don’t see any need for international law governing [TFCAs] when everything is going fine."

“Sometimes cooperation is better when there aren’t treaties to get in the way. International law and other agreements tend to tie things up. Let me say, however, that if there were major management actions planned for a transfrontier project, you need some sort of plan. The question, then, is if that plan should be in the form of international law. Typically, what would happen in that case is that the law should maybe state broad principles and then each country develops a plan of action from those principles which is more specific.”

“As long as good cooperation is already taking place, I don’t think a treaty is necessary.”

Box 4 – Formalization and pre-existing cooperation

4. Do surrounding communities have a vested interest?

If surrounding communities have a vested interest in the TFCA project, then it might be necessary to formalize agreements to establish social accountability.

“If there are local communities in or around the [TFCA] area, how else are the countries going to be held accountable to them? Many of these communities have been in a bad situation for a long time and there’s a lot of mistrust between them and the government. Having some sort of agreement between them and the government would help to build trust.”

“The good thing about treaties and other agreements is that, theoretically, they establish a certain dimension of accountability to the communities. I think in big projects like these parks, it’s warranted.”

“I think we owe it to the communities to sit down and write up agreements, because often what happens if that agreement doesn’t exist is that they’ll never be involved. Also, communities will not tolerate not being involved anymore. So the government has to sit down with community leaders and come up with agreements.”

Box 5 – Formalization and community interests
5. How many parties (e.g., agencies and NGOs) are participating in the initiative?

The more parties involved, the more complex the TFCA initiative will be. Formalization might be required in order to provide an operational framework that exhibits how responsibility is delegated and establishes managerial and financial accountability.

"The more agencies and organizations involved, the more complex it gets, and the greater the need for some sort of organizing agreement… it’s as simple as that…"

"These projects involve a lot of different organizations, both national and international, a lot agencies, and communities. When you have so many different bodies involved, it’s useful to have something guiding you when you have a number of entities involved in these projects."

Box 6 – Formalization and multiple party involvement

Considering the above responses, the decision to formalize agreements is fraught with complexity. Nevertheless, it is a decision that must be either explicitly or implicitly made with any TFCA. By assessing each question, nation-states might better equip themselves to make appropriate decisions regarding formalization. In any case, formalization is still only one component in the policy process. Once agreements have been formalized, the question then becomes whether or not nation-states will actually view that formal agreement as a mandate.

The Treaty of SADC as a mandate

Despite formalization, international agreements and other pieces of international law still might not be recognized as a mandate. While a lack of recognition may be attributed to a number of factors, in general, it is a function of political will and capacity. Many agreements and treaties have been authored or ratified by nation-states within
southern Africa, but confusion surrounds a number of them regarding their status as a mandate. One such treaty is the Treaty of SADC.

To better assess the Treaty of SADC and its Wildlife Protocol as a mandate for community involvement in TFCA initiatives, perhaps it is best to first acknowledge the holistic attitudes towards the Treaty of SADC and international law. With the fall of apartheid in 1994, South Africa (and southern Africa) underwent a political transformation of massive proportions that eventually centered it as a significant global actor and re-centered and internationalized its political agendas. Inevitably, with increased international activity came participation in international agreements and subjectivity to international law. Participation in international agreements and awareness and implementation of international law, however, are two separate things (see Box 7). Furthermore, nearly all implementing agencies within southern Africa, such as South Africa National Parks or Botswana Department of Wildlife and National Parks are largely unaware of the implications of international law.

The unawareness or the lack of acknowledgement of the Treaty of SADC and international law relevant to TFCAAs might, in part, be a manifestation of the apparent delay in implementation following promulgation. As with virtually all pieces of international law, critical decisions regarding international law relevant to TFCAAs are made at the Presidential and Ministerial level. And, at both levels, the Treaty of SADC and its corresponding protocols are recognized by many nation-states in southern Africa as a mandate. Despite the recognition of the Treaty of SADC as a mandate, though, policy simply moves faster than implementation in southern Africa (see Box 8).
“Many countries within southern Africa are new democracies or will be soon. There’s a lot of good ideas and they want to form these into law. Countries within southern Africa, however, are much better at creating international law than implementing it. I would expect that someday, though, this could change when the capacity is there to implement it.”

“In working with TFCAs, I have never come across anything dealing with international law to speak of.”

“I’m not entirely sure how international law is connected to transfrontier parks. I’ve never encountered it. I mean I guess I could see how it would be relevant since were talking about international projects, but we’ve never needed it before.”

“When it comes to transboundary conservation initiatives, it [international law] is not even in our vocabulary. This is changing though, I think. I believe we’ll find that it’s [international law] necessary if these things [TFCAs] are going to work.”

Box 7 – TFCAs and the awareness of international law

“I think it is an inherent problem with any conservation initiative in southern Africa, that your community liaison processes are a lot slower than your political decision making processes. It can take as a long as a year to simply establish a recognizable community entity and liaison mechanism with which you can begin to talk.”

“You have to remember that many countries in southern Africa are new democracies. What this means is that we have a lot of good ideas, but we just might not have the capacity or means to implement them. I don’t think this will be the case forever, but for now it is.”

“I think in many governments the policy moves faster than the on the ground enactment of that policy. So I would say it is incorrect to say that we are not implementing any of the agreements. I think we are in the process of doing it; you just have to be patient.”

Box 8 – International law and implementation
Furthermore, recognition of the Treaty of SADC as a mandate does not automatically imply that the connection is made between the Treaty of SADC and the Wildlife protocol to imply that community involvement is mandated in TFCA initiatives. Officials from South Africa and Botswana, all of whom stated that their respective governments acknowledged the Treaty of SADC as international law, differed in their interpretation with respect to community involvement. All but one respondent claimed that community involvement in TFCA initiatives was considered a mandate of the Treaty of SADC and its Wildlife Protocol (see Box 9).

"No, I don't think that realization [of the Treaty of SADC and its Wildlife Protocol as a mandate for community involvement] exists. In actual fact, I was discussing with my peers this morning because they actually wanted to [send] legislation to the cabinet requesting blanket approval for TFCAs so that the concept is approved by Cabinet. And, I pointed out that it is already part of the Wildlife protocol, which has been approved by Cabinet, and ratified by parliament, and they said it was not a sufficient mandate."

Box 9– The Treaty of SADC as a mandate

The respondent continued by stating that he had “never heard of anyone within the ... government refer to the Wildlife Protocol or the Treaty of SADC as a mandate for community involvement.” Nevertheless, nearly all nation-states within the southern African region have national legislation that is well-recognized as mandating community involvement in all conservation initiatives, and according to one interviewee, “this makes it very difficult to measure the Treaty of SADC as a mandate – community involvement is already occurring in several instances and it is virtually impossible to determine what legislation was considered in implementing community involvement initiatives.”

While there may be discordance among nation-states with respect to the relationship between SADC and community involvement in transfrontier conservation
area initiatives, the SADC Secretariat's office adamantly maintains that a mandate exists (Enock 2003).

"[Community involvement] is one of [SADC's] areas of intervention in transfrontier conservation area initiatives, because the establishment of transfrontier conservation areas is [meant] to improve the life condition of the community, especially those involved."

Box 10 – The SADC secretariat and community involvement

Limiting factors of implementation

Despite the inherent difficulty of assessing the role of SADC in TFCAs and community involvement, it is evident that community involvement is being implemented in TFCAs as a result of an abstract corpus of international agreements and national law and policy including the Treaty of SADC, the Biodiversity Convention, TFCA MOUs and Treaties, and donor agreements (Verhoef 2003 and Zunckel 2003). However, implementation is variable across TFCAs in southern Africa and is a function of both political will and capacity.

As with many pieces of international law, a lack of political will can be the principal hindrance of implementation. According to one interviewee, "They [international agreements] started as quite bold statements, but that doesn't mean that they will be implemented." A lack of political will to implement international agreements relating to TFCAs can be attributed to a variety of reasons (see Box 11).

In addition to unwanted attention, a nation-state's political will is also a function of its perception of what it considers to be more pressing issues. As one respondent
noted, in southern Africa, the HIV/AIDS epidemic is currently receiving much more attention than conservation, and governments typically funnel resources to implement health and development programs rather than conservation-based programs.

Notwithstanding treaties and agreements relevant to TFCAs, southern Africa’s larger health and developmental problems must be resolved before implementation of those agreements can be expected to take place. When asked about the role of SADC and the African Union in TFCA initiatives, one interviewee responded, “don’t they have more important things to take care of first?”

A second limiting factor of implementation is a nation-state’s capacity (i.e., ability) to implement agreements. The consensus among the respondents was that southern Africa simply doesn’t have the resources or political consensus at both macro- and micro-levels to implement the agreements they have forged.

“There’s somewhat of a tension between the international community and the national community. For the Basotho people [of Lesotho], the cross-border movements are economically very important to them, or being able to rustle cattle and sell Marijuana at the borders is crucial, and I think that if that was closed off, it would create problems for their politicians back home. So, there seems to be political will for the transfrontier initiatives from what I understand, but there seems to be a reluctance to pass law that would effect these agreements... In many cases, nation-State compliance would be domestic suicide. So, they don’t go on with it. They’re called paper parks.”

“A lot of times these parks may sound good on paper, but government may still not buy into the idea. For example, do governments really want to involve communities in these [TFCA] projects? I think they should, but the government may not always think so. There’s a long history hear of communities and indigenous people not being involved. I think some traditionalists don’t want to see that changed. It is changing though, and it’s for the better ”

“Just because it is written down, it doesn’t mean our leaders like it.”

**Box 11 – Political will and implementation**
With respect to macro-level resources, donor funding and international assistance was the most frequently cited need (see Box 12).

"When the Americans were there, they helped greatly with the capacity building... it worked like a charm while they were there. But, what they were able to do was to put in place a demonstration project [the Lesotho Highlands Water Project] that worked extremely well for the period that they were around. They [Lesotho] cannot do it on their own, that is impossible. The same is true for the Maloti-Drakensberg TFCA."

"These programs require tremendous capacity. There is no way we can ... implement them without the assistance of the donor community. We hope to continue to receive funding because it will make these programs possible."

"We need money for TFCAs..."

**Box 12 – TFCAs and donor funding**

At the micro-level, training emerged as the principle capacity need, particularly within local communities. According to one respondent, community involvement in TFCA initiatives should appear in every dimension of the initiatives, including the acquisition of funds, but “there’s a tremendous amount of capacity that needs to be built to get them to understand the basic financial management principles to get them in a position where they are strong enough to write their own funding proposals, to write their own business plans, etc.”

The respondents comments suggest that implementation of international agreements relevant to TFCA initiatives is dependent on a nation-state’s political will to implement the agreements and its capacity to achieve the initiative’s objectives. Nevertheless, attempting to simultaneously maximize both political will and capacity might not be the best approach.
Before capacity can be built, political will that would perpetuate the building of that capacity and permit it to occur, must be present. Thus, implementation regarding international agreements related to southern Africa TFCAs can be perceived as a linear process beginning with the promulgation of international agreements occurring either simultaneously with or before a development of political will (see Fig. 6); the implementation process is then perpetuated by a development of capacity followed by explicit implementation.

Fig. 6 – The Implementation of International Agreements

*The potential role of SADC in TFCA initiatives*

While, in some instances, there is a lack of recognition and/or implementation of the Treaty of SADC as mandate, this does not preclude the desire for SADC to play a stronger role in transfrontier conservation. In most cases, nation-states would like to see SADC play the role of a third-party agent of TFCA initiatives. As a third-party agent, it could serve several functions (see Box 13). Many respondents noted, however, that they don’t see SADC as having an active and hands-on approach (see Box 14).
The Southern African Development Community is responding to all of these potential roles through two actions: the creation of a SADC TFCA sector and a potential partnership with the Peace Parks Foundation. The mission of the TFCA sector is to provide technical expertise to nation-states engaged in TFCA initiatives to serve as a catalyst for the development of basic standards for TFCAs within the region, and fulfill the mediator role when conflicts surrounding TFCAs arise. This action has been well received by nation-states in southern Africa, while the potential partnership with the Peace Parks Foundation has been inundated with controversy and skepticism.

“...our [SADC’s] role is to facilitate and coordinate in line with our protocols... So, we act as a depositor to all projects regarding the establishment of transfrontier conservation areas. This role will become stronger as more TFCAs are established and we want to be involved in an appropriate and helpful role.”

“Even though we may not view SADC as a mandate, we would still like to see them involved to a certain level... they could fulfill several roles...”

“It [SADC] could ensure there is a possibility of harmonizing the Treaty agreements and act as a mediator between countries. It could ensure that in the TFCAs there are certain regional development objectives being met. Thirdly, SADC could play a very important role in protecting the rights of communities and could have more influence than individual countries. It could also coordinate donor funding or other forms of investment. But, of course, SADC needs to develop the capacity to do that, which it doesn’t have.”

“When we get to the benefits of the project [The Maloti-Drakensberg Transfrontier Conservation and Development Area], there might be tensions about who gets what, which might lead to one party withdrawing. The involvement of such a body could be as a mediator for such things”

Box 13 – The potential role of SADC
"The more they [SADC] take on, the less they empower people and they will have bigger problems in sustaining themselves. Their best role is a light one. By taking on a light role, the countries can continue to work together but still get the benefits of having a body like SADC help them."

"Yes, we would like to see them [SADC] play a role, but it must be a secondary role. If it is a strong role, communities like we’ve been discussing, will not trust the process if it’s too centralized. So, I see SADC playing a role, but it has to be a minor one. But, just because it’s minor doesn’t mean it’s not important."

"I just don’t see SADC having a strong interest if they do in fact have one. I think having a real strong interest or role would be self-defeating. Countries must primarily make the decisions. Any interest that SADC has should be second to them [countries]."

Box 14 – SADC’s influence

Recognizing the Peace Park Foundation’s success in acquiring funds for TFCAs, SADC hopes to forge a partnership that would insure the financial viability of both current and future TFCAs throughout the region. Nevertheless, the partnership is not without criticism. The Peace Parks Foundation, a private organization and a major broker for TFCA initiatives, has been labeled as having neo-imperialistic interests. One respondent provided an example of the expert-driven philosophy they believed the Peace Parks Foundation embodied (see Box 15). When questioned about this, Werner Mhyburg, project coordinator for the Peace Parks Foundation noted, “we have been criticized, but we’re just here to assist where we can in the establishment of Peace Parks. If our critics want to talk, let them talk; we’re just here to help.”
“For community representatives to participate on the actual management of a national park is something unfair to the community themselves. In most cases the people that are appointed to manage a national park have gone and done years of studying to gain a tertiary education. They’re well qualified… I know a lot of critics are advocating for it [community involvement], but in my mind it is the same as having someone living next to an airport come and sit next to the air traffic controller… You can’t make them air traffic controllers.”

Box 15 – The Peace Parks and criticism regarding community involvement

The potential role of African Union

In addition to SADC, another international organization that has the potential to play a significant role in TFCA initiatives is the African Union (see Box 16). The key instrument by which it could play a role is its New Partnership for African Development Treaty (NEPAD), which is a promulgation of the continent’s desire to move forward with economic and developmental initiatives. One potential way in which this can be accomplished in an environmental setting is through TFCA initiatives (Hanks 2003).

Unlike SADC, though, the African Union has a continental constituency which implies that:

a) The African Union could address more normative issues, such as human rights, compared to the issue specific concerns of SADC.

b) The African Union could exercise significant political clout.

c) The African Union might define principles and practices which SADC might align itself with and implement.
"The African Union represents an entire continent where SADC’s jurisdiction is essentially sub-Saharan Africa. Given that, they can’t address very specific issues; they can only make broad proclamations. For example, I’m not sure if they will ever formally make provisions for TFCAs. I know there will be a presentation on the Great Limpopo at the upcoming [African Union] summit, but I don’t know if they’ll ever form a mission on them. I think they’re more likely to address normalized issues given their continental charter, rather than developing region-specific standards for TFCAs."

"The African Union has more exposure and more control mechanisms [than SADC] from the international community and other continents. So, from that point of view, they may have more influence than a regional group such as SADC. I think this is particularly true with NEPAD. There’s a lot of excitement surrounding [NEPAD] and if countries have the capacity to implement [NEPAD] it could be a great thing."

"The most critical role that they [the African Union] can play is that they have an impact on legislation pertaining to the rights of individuals within Africa. I don’t think it’s within their realm or responsibility to develop rules for TFCAs. But the rules they do develop could substantially effect [TFCAs]"

"I wouldn’t differentiate too much between SADC and the African Union. I see SADC as a subset of the African Union and it should be implementing the principles of the Union."

"What we want to do is to align SADC’s initiatives with the African Union’s and work with and through them."

**Box 16 – TFCAs and the African Union**

**Variability of results among study sites**

As is evident from the preceding discussion, there was very little distinction made between respondents who were associated with different study sites. One of the most interesting results from this study was the lack of variability of responses from individuals associated with the Kgalagadi Transfrontier Park as compared to those associated with the Maloti-Drakensberg Transfrontier Conservation and Development Area. In fact there was no significant difference among the respondents notwithstanding questions concerning formalization of agreements. With respect to formalization, it was clear that individuals
associated with or speaking in terms of the Kgalagadi Transfrontier Park desired formalization of agreements to a much lesser extent than those involved with the Maloti-Drakensberg Transfrontier Conservation and Development Area. This might be attributed to a number of factors including:

- The Kgalagadi Transfrontier Park has been a *de facto* TFCA since 1948, whereas the Maloti Drakensberg Transfrontier Conservation and Development Area was only established in 2001. Officials from the Kgalagadi Transfrontier Park feel that management of the TFCA has been going very well without formalized agreements and despite its formal establishment in 1999, they see no need to formalize agreements concerning the area.

- The Maloti-Drakensberg Transfrontier Conservation and Development Area appears to be receiving much more donor funding than the Kgalagadi Transfrontier Park and, thus, requires more formalization.

- There appears to be a greater number of parties involved with the Maloti-Drakensberg Transfrontier Conservation and Development Area than the Kgalagadi Transfrontier Park. The larger number of parties involved with the Maloti-Drakensberg Transfrontier Conservation and Development Area magnify the complexity of the initiative and necessitates formal agreements to guide the actions of those parties.

These differences provide interesting insight into the contextual circumstances for each TFCA. Based on the analysis of the data gathered for this study, the Maloti-Drakensberg Transfrontier Conservation Area is a TFCA that requires a high degree of formalization, whereas the Kgalagadi Transfrontier Park has thus far resisted efforts to formalize many agreements. As was anticipated in this study’s infancy, both TFCAs have provided for a thought-provoking and useful contrast.
**Key insights**

In summary, the data and discussion presented above reveal a number of key insights regarding the role of international law in TFCA initiatives and its role in community involvement within those areas:

1. The foundation for accountability in TFCA initiatives is established vis-à-vis international agreements and the required institutional structures established through those agreements, one of the strongest agreements being that between participating nation-states and the donor(s).

2. The need for formalization of international agreements related to TFCA initiatives is context specific and dependent upon:
   a. donor funding;
   b. the nature of cross-border management initiatives;
   c. local community interest in TFCA initiatives; and
   d. the number of parties involved in a TFCA initiative.

3. While most respondents within southern Africa recognize the Treaty of SADC as international law, it is questionable as to whether or not the Treaty, along with the Wildlife Protocol, are viewed as a mandate for community involvement in TFCA initiatives. Furthermore, it is virtually impossible to determine if existing community involvement is a result of national or international mandates.

4. Implementation and recognition of international law (or lack thereof) is principally a function of implementation capacity and political will.

5. Nation-states in southern Africa would like to see SADC play a role in TFCA initiatives. This role might include:
   a. Acting as a mediator between nation-states engaged in TFCA initiatives
   b. Protecting the rights of communities in and around TFCA initiatives
   c. Coordinating donor funding
   d. Setting regional standards for TFCA initiatives
6. In addition to SADC, the African Union also could play a role in TFCA initiatives. Unlike SADC, though, the African Union, as a continental organization, will be more inclined to address normalized issues rather than region-specific concerns.

The summary of findings above implies that the interface between international law and TFCA is both complex and substantially rooted in notions of political will and capacity. Furthermore, a nation-state's decision to recognize certain pieces of international law as a mandate are dependent upon their desire to formalize agreements that may or may not have previously existed. Responses from individuals associated with the Kgalagadi Transfrontier Park and the Maloti-Drakensberg Transfrontier Conservation and Development Area have illustrated the importance of looking beyond surface observations and deeper into the motivations for observing international law as a mandate and call to action. Through this study, perhaps a better understanding of these motivations can be reached that will lead to a greater appreciation of TFCA as a valuable tool for conservation world-wide.
CONCLUSION

Transfrontier conservation areas in southern Africa have pioneered a means of large-scale conservation that could potentially provide a number of benefits ranging from increased peace between nation-states within the region to the restoration of historic wildlife migration routes. Given that most of the benefits touted by proponents require significant management actions between sovereign entities, organizational frameworks establishing more accountability than a general management plan will be necessary to bind nation-states to action. In theory, international law establishes such a framework. While international law may be an appropriate venue for these needs, it is not without challenges.

As demonstrated through this study, the challenges of international law are particularly apparent with respect to community involvement in TFCA initiatives. Generally speaking, nation-states view international agreements – such as the Treaty of SADC – as international law, but disagreement exists among nation-states regarding the legitimacy of specific provisions related to community involvement in TFCA initiatives. As indicated by the respondents, the lack of recognition and implementation of provisions related to community involvement are, largely, a function of a nation-states desire to formalize agreements.

The desire for formalization, as an impetus for agreement recognition and implementation is further dependent upon a nation-states capacity and political will to formalize agreements as well as it’s perceived necessity to formalize. Assuming there is
both political will and capacity to formalize agreements, the five questions raised in the previous chapter regarding the necessity of formalization could potentially serve as the foundation for a useful model to assess the need for agreement formalization (see Figure 7).

Figure 7 – A model to assess the need for formalized agreements in TFCA initiatives

In implementing this model, nation-states must systematically consider each question and the implications of respective answers. While “Is the initiative heavily funded, or could it be?” serves as the starting point on this model, the ordering of the
questions is arbitrary and not important; the result will be the same under any ordering. While the ordering is not important, given that each question motivates a particular dimension of formalization, nation-states must consider all of the questions. For instance, if it is decided that formalization must occur on account of the potential for donor funding, nation-states may still want to consider other questions such as “Do communities or other parties have a vested interest in the initiative” since responses to these questions will shape the formalization of an agreement, as well.

Despite decisions to not formalize agreements and any lack of recognition and implementation of SADC’s provisions, nation-states envisage international governmental organizations, such as SADC and the African Union, playing a larger role in transfrontier conservation than they do at present. Possible expanded roles could include third-party mediation, conflict resolution, coordinating donor funding, setting regional TFCA standards, and protecting the rights of communities in and around TFCAs. An in-depth analysis of the logistics behind international governmental organization involvement in TFCA initiatives is among the needed TFCA-based research.

In addition to an in-depth analysis of the role of international governmental organizations in transfrontier conservation, the respondents cited several research needs concerning transfrontier conservation areas. Two of the most frequently mentioned research needs were:

1. an analysis of the necessary conditions and specific needs for cross-border community involvement in transfrontier conservation areas compared to that of domestic community involvement in national protected areas and
2. the implications of transfrontier conservation for national security (and vice versa).

The re-establishment of community relations severed by colonial boundaries has been one of the most vocalized benefits of TFCA initiatives. A component of the re-establishment of these relations is cross-border community involvement in the joint management of TFCAs. As opposed to domestic community involvement in conservation initiatives, cross-border community involvement requires communities from multiple nation-states to collectively organize their mutual interests and cooperatively participate in the management of a TFCA. Currently, little is being done by nation-states to actively engage cross-border community involvement. This is in part due to a lack of understanding concerning the different necessary conditions and specific needs for cross-border community involvement as compared to domestic community involvement. The respondents noted that a more thorough understanding of the nature of cross-border community involvement is necessary in order to understand why it is currently not being implemented to the desired extent.

The respondents also noted a need to assess the relationship between TFCAs and the idea of national security. Infringements on national security in TFCAs in southern Africa currently range from drug smuggling in the Maloti-Drakensberg Transfrontier Conservation and Development Area to illegal immigration in the Great Limpopo Transfrontier Conservation Area. Ironically, both national security and TFCA initiatives are designed to ensure, facilitate, and promote peace between nation-states (albeit through different means), but a more thorough understanding of the tradeoffs and conflicting
objectives associated with both frameworks is needed before either one can be considered a success in southern Africa.

The popularity of and interest in transfrontier conservation in southern Africa has surged during the past decade, primarily on account of the myriad benefits that they could potentially provide. Despite this recent attention, many of the conditions impeding the realization of those benefits have not been adequately identified. The uncertainty of the role of community involvement in TFCA initiatives in the context of international law presents only a subset of challenges facing these areas. This study has proposed that some of the important issues to consider with respect to TFCAs and international law are the desire for agreement formalization, the importance of political will and capacity, and determining the appropriate role for international organizations. Future research must also focus on broader socio-political and socio-cultural implications and how best to implement cross-border initiatives while preserving nation-state sovereignty. By doing so, TFCAs could be one of the most effective tools for conservation within the southern African region and they also might provide a conservation paradigm capable of being implemented worldwide.
Appendix

Interviewees

• Vupenyo Dzingirai; Cultural Anthropologist, IUCN; Zimbabwe

• Bill Bainbridge; Former employee of Kwa-Zulu Natal Wildlife intimately involved in the establishment of the Maloti-Drakensberg Transfrontier Conservation and Development Area; South Africa

• Malcom Draper, Professor, University of Natal; South Africa

• Kevan Zunckel; South African Coordinator, The Maloti-Drakensberg Transfrontier Conservation and Development Area, KZN Wildlife; South Africa

• Mike Kidd, Professor of Environmental Law, University of Natal School of Law; South Africa

• Derek Potter, Head of Conservation, KZN Wildlife; South Africa

• Johan Verhoef, Coordinator, The Great Limpopo Transfrontier Conservation Area, South Africa National Parks; South Africa

• Marind van Graan, Legal Specialist, South Africa National Parks; South Africa

• Ernest Mokganedi, Director, Transfrontier Conservation Areas, South Africa Department of Environmental Affairs and Tourism; South Africa

• Manuel Enock, Forestry and Wildlife Expert, SADC Secretariat; Zimbabwe

• Jan Broekhuis, Assistant Director, Botswana Department of Wildlife and National Parks; Botswana
• **Trevor Sandwith**, Director, CAPE Action and former South African Coordinator for the Maloti-Drakensberg Transfrontier Conservation and Development Area; South Africa

• **Werner Myburg**, Project Coordinator, Peace Parks Foundation; South Africa

• **Motsami Damane**, Director, Lesotho National Environment Secretariat; Lesotho

• **Saliem Fakir**, Director, IUCN – South Africa; South Africa


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