



The Virunga Volcanoes and the Bwindi Impenetrable National Park:

Cooperation in the management of shared
natural resources and the concept of
Transboundary Protected Areas

Prototype EnviroSecurity Assessments

Great Lakes region of Africa
Part 2: Legal Analysis

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Prototype EnviroSecurity Assessments

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Bronkhorst International Law Services (BILS), The Netherlands
EnviroSense, The Netherlands
Fundación Gaia Amazonas, Colombia
International Gorilla Conservation Programme, Rwanda, Uganda and the DRC
SarVision, The Netherlands
UNEP / GRID-Arendal, Norway



Additional research and materials provided by:

Amsterdam International Law Clinic, The Netherlands

Consolidación Amazónica – Colombia (COAMA)

EuroCampus Institute, The Netherlands

Instituto de Investigaciones Biológicas Alexander von Humboldt, Colombia



The project is supported by **The Netherlands Ministry of Foreign Affairs**

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**Legal Analysis by
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Commissioned by the Institute for Environmental Security**

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Research Method & Introduction

This case study will address – from legal point of view – the problems currently occurring in the Virunga Volcanoes and the Bwindi Impenetrable National Park: the natural habitat of the Mountain Gorilla's. Its objective is to explore whether and how public international law could contribute to a more effective protection of the natural habitat of the Mountain Gorilla.

The Virunga Volcanoes and the Bwindi Impenetrable National Park which comprises the natural habitat of the Mountain Gorilla is not located in one single State. This Virunga-Bwindi Region is situated in the border area of three different countries: Democratic Republic of Congo, Uganda and Rwanda. The Virunga-Bwindi region includes two separate forest blocks, or ecological units within one overall ecosystem. The Virunga chain of volcanoes includes three national parks and the second forest block comprises the Bwindi Impenetrable Forest, also a national park (IGCP, 2004).

The region's ecological importance is mainly but not only due to the fact that it contains the habitat of the Mountain Gorilla. Their habitat is under severe pressure today, because of the high human population density, human encroachment, poaching, deforestation and last but unfortunately not least the civil unrest still going on after the 1994 genocides. Refugee camps are still located in the region. Most of the threats to the natural resources are from people living in and around the shared ecosystems concerned.¹

The research method that will be used for this case study involves an approach that takes account of the transboundary characteristics of the problem in question. This study cannot be focussed on a single State since the object of this study is a transboundary ecosystem which crosses the borders of three different States. This does by no means implies that the study must then be concentrated on a legal examination of three separate countries. Ecosystems do not take account of artificial borders between different states and plants and animals do not recognize national boundaries, nor do many of the forces that threaten them.² Therefore, instead of a state specific research it is much more interesting to study the existing problems and threats in the Virunga-Bwindi region in a more comprehensive way, by approaching the research area as an indivisible ecosystem. Not only is the region in question located in the border area of three individual States, the threats that effect the ecosystem come from any of these countries. Threats coming from one country will not only affect the part of the ecosystem situated in that country but will impact the entire ecosystem. Effective protection and conservation of transboundary ecosystems such as the habitat area of the mountain gorilla calls for transboundary cooperation between the countries sharing that ecosystem. This paper briefly explores – with a view to a more effective protection of the natural habitat of the Mountain Gorilla – the desirability and the possibility of setting up an international legal regime for a transboundary protected area in the Virunga-Bwindi region.

¹ For more information on the ecological value of the Virunga-Bwindi region and its current threats, see Jeanna Hyde Hecker, "Promoting Environmental Security and Poverty Alleviation in Virunga-Bwindi, Great Lakes Africa"; see also IGCP, 2004 p. 7- 11.

² WCPA, 2001

I. Sovereignty over Natural Resources

From a legal point of view, it has first to be noted that each state has sovereign power within its own borders and its jurisdiction is limited to its own territory. Thus, each of the three states of which the ecosystem of the Virunga-Bwindi region is part of, has no authority other than over that part of the ecosystem falling within the limits of its own jurisdiction. Environmental legislation, conservation and management policies, monitoring and enforcement measures can only be applied to areas within the state's territories. Consequently, without any form of cooperation none of the three states involved can protect the entire ecosystem on its own, since no single state has the exclusive rights of sovereignty over the Virunga-Bwindi ecosystem as a whole.

Secondly, it is important to note that every state has the sovereign right to exploit its natural resources pursuant to its own environmental and developmental policies. However, under international customary law, each state has the responsibility not to cause harm to other states. Thus, on the one hand, it is true that each of the three neighbouring countries has the exclusive right to deal with its part of the shared ecosystem. Without any bilateral, regional or international agreement, each state is free to use and manage its natural resources in conformity with their own preferences. Nevertheless, one could argue that if one state's part of the shared ecosystem is harmed by illegal activities of another neighbouring state, that neighbouring state can – under certain conditions – be held responsible for breaching the international customary obligation not to cause harm to the environment of another state. If the neighbouring states are unable to find agreement over such a claim, the dispute may even be brought before an international dispute settlement body such as the International Court of Justice. In my view, in the long run this type of state behaviour is not very beneficial for the effective conservation of a shared ecosystem. This doesn't mean that we don't need hard legal obligations and corresponding mechanisms to enforce these obligations. The question is really, whether this attitude towards international law serves the effective conservation of shared natural resources. This paper takes the position that, in order to protect and preserve a joint ecosystem, collaboration between the states involved leads to more effective and sustainable results than 'suing' each other.

II. Negotiation versus Adjudication or Co-operation versus Unilateralism

In his book 'Sharing Transboundary Resources', Eyal Benvenisti notices, by tracing the evolution of the relevant norms of international law, a clash between two philosophies: "the philosophy of disengagement" and "the philosophy of integration". In the context of what I described above, it may be interesting to take a brief look at Benvenisti's remark, that these two contradictory philosophies influenced the way international ecosystem law has been codified. According to Benvenisti, the philosophy of disengagement strives to limit common ownership among riparian states to the lowest possible minimum while the integration philosophy suggests that common ownership and inclusive management is not only an inescapable outcome, but also a beneficial one. The two philosophies resemble two different views on international law. The disengagers look to international law as a system of rules that could minimize friction among neighbouring states and which resolve interstate disputes through adjudication and inflexible arm's length agreements in which rights and obligations are assigned as clear as possible. In contrast, the integratives seek, in the words of Benvenisti, more, rather than less, friction as the preferred alternative and opt for the management of

disputes through negotiations leading to flexible agreements that establish joint management institutions.³

Benvenisti explains furthermore, that there are two important benefits of direct negotiations over litigation as means of settling international disputes over shared natural resources. The first benefit is the increased likelihood of reaching an efficient result. Through negotiations the parties have the opportunity to exchange information about their domestic constraints and explore their differences in valuation, preference, risk aversion, and in other dimensions. The neighbouring countries that are party to a dispute over shared natural resources are in a much better position to discuss the problems and to exchange information than third parties such as judges or arbitrators. The second, and in my view an even more important benefit of direct negotiations over litigation by a third party, is the potential establishment of long-term relationships between the countries involved, based on mutual respect. According to Benvenisti, in negotiations, the parties embark on an additional process of building up relationships that may culminate in multi-level cooperation.⁴

Such an outcome is hardly conceivable when two countries decide to bring claims against each other before a judge or even an arbitrator. In most cases the countries become opponents instead of partners seeking a solution for a joint problem. Especially when the preservation of shared natural resources is at stake, it is crucial that the countries involved remain in contact with each other in seeking joint solutions. This is even more true, when the states involved have a history of conflict. Negotiation and co-operation between these states, although initiated for the purpose of finding solutions for maintaining a shared ecosystem, may additionally develop into a dialogue on peace building.

Thus, since it is almost impossible for one country to protect and preserve its own part of the ecosystem – let alone the entire ecosystem – all by itself, and since enforcing potential norms of international environmental law by inter-state litigation will hardly lead to sustainable solutions, negotiation and collaboration with a view to establish long-term partnerships is a much more feasible way of dealing with sustainable management of shared natural resources such as the transboundary ecosystem of the Virunga-Bwindi region.

III. The Concept of Transboundary Protected Area's (TBPA)

A. What is a Transboundary Protected Area?

In the long term, cooperation between states sharing natural resources is very likely the most effective way to protect and preserve a shared ecosystem in a sustainable manner. Common ownership and inclusive management is not only an inescapable outcome, but also a beneficial one, Benvenisti argued. However, the question remains how such a common ownership and inclusive management can be provided for. Here, the concept of 'transboundary protected area' can be of assistance.

In explaining the concept of transboundary protected area, the definition of the International Union for the Conservation of Nature (IUCN) is commonly referred to, since the IUCN is regarded one of the leading organizations in the field of conservation of protected areas and transboundary co-operation. The IUCN defines the concept as follows. 'A Transboundary

³ Benvenisti, 2002, p 157

⁴ Ibid, p. 159, 160

Protected Area is an area of land and/or sea that straddles one or more boundaries between states, sub-national units such as provinces and regions, autonomous areas and/or areas beyond the limits of national sovereignty or jurisdiction, whose constituent parts are especially dedicated to the protection and maintenance of biological diversity, and of natural and associated cultural resources, and managed co-operatively through legal or other effective means.’⁵

With respect to the area in question – the Virunga-Bwindi region, which crosses the international borders of three states – the definition can be limited as follows. ‘A Transboundary Protected Area is an area of land that straddles one or more boundaries between states, whose constituent parts are especially dedicated to the protection and maintenance of biological diversity, and of natural and associated cultural resources, and managed co-operatively through legal or other effective means.’

When applying this definition to the Virunga-Bwindi region, one could very well argue that this shared ecosystem does already have some of the characteristics of an TBPA, since it first of all straddles one or more boundaries between states. Furthermore, the constituent parts are all (part of) national parks and these parks are more or less dedicated to the protection and maintenance of biological diversity, and of natural and associated cultural resources.⁶ What still has to be accomplished is the establishment of a joint management system which enables the states involved to effectively cooperate in the management of their shared ecosystem through legal or other effective means.

One should however notice that the IUCN’s description of a TBPA is not a legal definition. In other words, a TBPA is not a legally defined concept. It therefore remains quite open to what extent the constituent parts must indeed officially be ‘dedicated to the protection and maintenance of biological diversity (...)’. The same holds true for the requirement of cooperative management ‘through legal or other effective means’. Yet, the bottom line is, as stated earlier, that cooperation between states sharing natural resources is the best feasible way to protect and preserve the shared ecosystem in a sustainable way. And indeed, such a cooperation can hardly operate in a sufficient and effective way without the establishment of some kind of formal structure.

B. The current situation and the work of the International Gorilla Conservation Programme.

In its very solid case study on transboundary natural resource management, the International Gorilla Conservation Programme describes the forms of cooperation currently in place in the Virunga-Bwindi region (IGCP, 2004). Due to their efforts, the time has ended in which the three protected area authorities sharing the management responsibility of the Virunga national parks, each managed the parks in their country separately. This does not mean that there is a formally established interstate framework in place. Currently, the existing form of cooperation is confined to collaboration between the park authorities of Rwanda, Uganda and DRC. The focus of the International Gorilla Conservation Programme has been primarily on the park authorities in the three countries. The emphasis has been on developing informal mechanisms for field level collaboration and on strengthening the capacity of each of the three authorities to effectively manage the forested parks as a regional ecosystem. The work and collaboration with local communities and other interest groups has been channelled through these park

⁵ IUCN, 1994

⁶ The Virunga chain of volcanoes includes three national parks and the Bwindi Impenetrable Forest is also a national park. (IGCP, 2004)

authorities, and is developed by IGCP together with other conservation and development partners in the region.⁷

The transboundary approach of the IGCP is explained as follows. The IGCP sees regional conservation as a process along a continuum, and although regional conservation is the central philosophy of their approach, in their opinion it can be addressed from various points along the continuum. At one end of the continuum is the management of three completely separate entities with no communication or consultation. One step along the continuum ensures that management approaches are not conflicting with each other. At the other end of the continuum is fully effective collaborative management of one shared ecosystem. In the view of the IGCP, the transboundary ecosystem could, potentially, be effectively protected at any point along that continuum, as long as the management strategies of the three countries concerned do not conflict with each other. Effective conservation (as opposed to mere protection) of the ecosystem, however, frequently does require cooperation and coordination of certain activities. The IGCP argues that the further the three countries move along the continuum towards collaborative management (or ‘common ownership and inclusive management’ as Benvenisti called it above), the greater the likelihood of effective conservation.

On the one hand the IGCP seems to admit that the establishment of a Transboundary Protected Area is not only an inescapable outcome but also a beneficial one, on the other hand the IGCP observes that a “formally gazetted Transboundary Protected Area is [not] always the ideal goal: Each case involving transboundary natural resources will have a different context, as well as a realistically achievable point on the continuum as goal”. Although I agree in general with this point of view, I suggest to add the element of time to this observation. It is very well possible that today’s best achievable result in cooperative management is somewhere halfway on the IGCP’s continuum, but that does not exclude the establishment of a more advanced and intense cooperation in the future when certain economical or political obstacles have been overcome.⁸

IV. The Benefits of a Transboundary Protected Area

The establishment of a TBPA by two or more countries creates opportunities for enhanced transboundary co-operation in their management. Where protected areas in neighbouring countries are located along the international border, this border forms the jurisdictional boundary between the management authorities of the areas concerned. (Shine, 1997). This international border is also the line where a state’s laws and regulations cease to be applicable. Shine explains that different parts of one ecosystem unit will therefore be managed by different institutions in accordance with different legal rules.⁹ In the Virunga-Bwindi region the differences in legislation and policy have indeed contributed to the differences in conservation approaches in the three countries involved (IGCP, 2004). The IGCP agrees with Shine that these differences can have potentially negative repercussions on efforts at harmonising management approaches in the three protected areas included in a transfrontier area. It is therefore essential to bring together both the legal and policy

⁷ For more information on the establishment of informal mechanisms by the IGCP, see IGCP 2004, p.21-25

⁸ In the case study of the International Gorilla Conservation Programme one can read more on existing problems in the area that currently seems to obstruct a more intensive collaborative management of the shared ecosystem. (IGCP 2004, p 17 and p 38-40)

⁹ See also *supra* p. 3

approaches in the three countries concerned. (IGCP, 2004) This is one important issue a TBPA can provide for. But the benefits of an TBPA are manifold.¹⁰

Important benefits of TBPA's are:

- promoting international cooperation at different levels and in different fora;
- more effective management of the shared natural resources;
- enhancing environmental protection across ecosystems;
- facilitating more effective research;
- promotion of the economic welfare of a region's communities;
- ensuring better cross-border control of problems such as fire, pests, poaching, pollution and smuggling;
- reduction of political tension and/or the promotion of peace.

Box 1 below lists more examples of benefits of TBPA's.

- | | |
|--|--|
| <ul style="list-style-type: none"> • A larger contiguous area will better safeguard biodiversity since very large areas are needed to maintain minimum viable populations of many fauna species, particularly large carnivores. • Where populations of flora or fauna cross a political or administrative boundary, TBC promotes ecosystem or bioregional management. • Reintroduction or natural recolonization of large-range species is facilitated by TBC. • Pest species (pathogens, insects) or alien invasives that adversely affect native biodiversity are more easily controlled if joint control is exercised rather than having a source of infection across the boundary. • For rare plant species needing <i>ex situ</i> bank and nursery facilities, one facility for both parks will be cheaper to set up. • Joint research programs can eliminate duplication, enlarge perspectives and the skills pool, standardize methodologies, and share expensive equipment. • Wildfires cross boundaries, and better surveillance and management is possible through joint management. • Poaching and illegal trade across boundaries are better controlled by TBC. Cooperation is needed for effective law enforcement. Joint patrols in border areas become possible. • Nature-based tourism is enhanced because of a greater attraction for visitors, the possibilities of joint approaches to marketing and tour operator training, and the possibility of agreements on fees, visitor management, etc. | <ul style="list-style-type: none"> • More cost-effective and compelling education materials can be produced, and joint interpretation is stronger concerning shared natural or cultural resources. • Joint training of park staff is more cost effective and usually benefits from greater diversity of staff with different experiences. • TBC improves staff morale and reduces feeling of isolation. Contact with cultural differences enriches both partners. • TBC makes staff exchanges easier, and staff exchange programs have shown their worth. • A cross-boundary pool of different expertise is available for problem solving. • Expenses for infrequently used heavy equipment, aircraft rental for patrols, etc., may be shared. • TBC in priority actions can carry more weight with authorities in each country. • The ministry level may feel greater obligation to honor commitments of support when another jurisdiction or another country is involved. • International donors and assistance agencies are more attracted to an international joint proposal. • Outside threats (e.g., air pollution, inappropriate development) may be more easily met when there is an international or interstate response. • Customs and immigration officials are more easily encouraged to cooperate if parks are cooperating. • Search and rescue is often more efficient and economical. |
|--|--|

Box I: Benefits of transboundary protected area cooperation (based on Hamilton, 1996).

¹⁰ See Shine, 1997; WCPA, 2001

As is stated in the introduction, the Virunga-Bwindi region is the habitat of the Mountain Gorilla. This habitat is under severe pressure because of a number of environmental threats such as the high human population density, human encroachment, poaching, deforestation and last but unfortunately not least the civil unrest still going on after the 1994 genocides. Since threats coming from one country have a negative impact on the entire ecosystem, they can not be effectively dealt with by one single country. Therefore, in view of the many benefits it can provide for, the solution is to be found in the strengthening of inter-state cooperation through a formal established Transboundary Protected Area.

V. International Legal Regime applicable to Transboundary Protected Area's

A. *The international legal context of TBPA's*

As already stated above, the term Transboundary Protected Areas is not a legally defined concept. This does not mean that the concept of a TBPA is without any legal context or significance. TBPA's are for instance a very useful tool for the coordinated implementation of treaty obligations. In relation to the Convention on Biological Diversity it must be noted that although the DRC, Uganda and Rwanda are State Parties, the implementation of treaty obligations in their respective national legal systems may differ in such a way that the applicable legislation and policies contribute to differences in conservation approaches which adversely affects the joint ecosystem. Within the framework of a TBPA States are facilitated to negotiate and consult each other with regard to the coordinated implementation of multilateral environmental treaties. Moreover, in some conservation treaties parties are required to consult with each other where one party intends to establish a protected area close to the border of another party. Or the parties are required to cooperate after such a protected area is created¹¹ (Shine, 1997).

In her outstanding article on legal mechanisms for TBPA's, Clare Shine discusses a number of interesting treaty regimes that relate to shared natural resources and/or common management initiatives. The 1971 Ramsar Convention has adopted a proactive role in encouraging Parties to take joint conservation measures in respect to transboundary wetlands. This role has been based on article 5 of the Convention: "The Contracting Parties shall consult with each other about implementing obligations arising from the Convention especially in the case of a wetland extending over the territories of more than one Contracting Party or where a water system is shared by Contracting Parties. They shall at the same time endeavour to coordinate and support present and future policies and regulations concerning the conservation of wetlands and their flora and fauna." In the Ramsar Strategic Plan 1997-2000 the state parties to the Convention are called upon to improve their international cooperation, to identify *transfrontier* wetlands, to encourage the preparation and implementation of *joint plans* for such sites and to support the twinning of transfrontier wetlands and use of successful cases to illustrate *the benefits of international cooperation*. By way of illustration, in 1996 the Conference of the Parties (COP) called on the Governments of Bolivia and Peru to consider the possibility of designating Lake Titicaca as a *transfrontier* Ramsar Site. There are several examples of contiguous Ramsar Sites that form part of TBPA's, such as the Sundarbans mangrove swamps (India/Bangladesh) and the Parc National du "W" (Benin/Burkina Faso, and Niger), (WCPA, 2001).

¹¹ See for instance the 1933 Convention relative to the Preservation of Fauna and Flora in their Natural State

The 1972 Convention for the protection of the World's Cultural and Natural Heritage is also important as a legal context for TBPA's. Under this Convention there are a number of adjacent protected areas considered to be transboundary World Heritage Sites. Under this Convention states are encouraged to nominate their protected areas jointly as one single transboundary protected area, when these areas are located next to each other, along site the international border.

Another relevant intergovernmental programme for transboundary protected areas is the Man and the Biosphere Programme of UNESCO. Under this Programme, an international network of biosphere reserves has been established to promote a balanced relationship between humans and the biosphere. It is a voluntary network and each reserve remains under the sovereignty of the State concerned and is subject to national jurisdiction. Nevertheless, there are examples of biosphere reserves that are part of more one country. An example of such a shared biosphere reserve is the Trifinio Conservation and Development Zone situated in El Salvador, Guatemala and Honduras. It is a trilateral biosphere reserve and although the three states remain in charge of their respective parts of the joint biosphere reserve, the Trifinio Conservation and Development Zone is regulated by a joint management plan (Shine, 1997).

B. Legal mechanisms for establishing transboundary cooperation.

As indicated by the case study of the International Gorilla Conservation Programme, arrangements for transboundary cooperation in the field of protected areas can range from informal cooperation through local consultation arrangements and field level collaboration to high-level government declarations or bilateral treaties. (Hamilton, 1996) Of course there is no correct model since conditions, circumstances, customs and priorities vary between countries and between regions. But there are some general observations to be made. Taking the "continuum" approach of the IGCP as a starting point, it is fair to say that at one end of the continuum there does not exist any joint management of the shared ecosystem and there is no communication or consultation. The IGCP argues that one step along the continuum ensures that management approaches are not conflicting with each other, while at the other end of the continuum there is fully effective collaborative management of one shared ecosystem.¹² With regard to the first stages of cooperation between neighbouring countries, Clare Shine contends that the informal or "grass-roots" liaison is always essential to effective transboundary cooperation. It can build familiarity and mutual trust, promote close contact with local communities and support flexible and innovative approaches to local development. It can create the basis – and the incentive – for "upgrading" cooperation at a later date.

A next step along the IGCP's continuum would be some form of cooperation between different administrative authorities such as the Park Authorities in the Virunga-Bwindi region. The focus of the International Gorilla Conservation Programme has been primarily on the park authorities in the three countries. The emphasis has been on developing informal mechanisms for field level collaboration and on strengthening the capacity of each of the three authorities to effectively manage the forested parks as a regional ecosystem. Shine supports the IGCP's approach in that administrative authorities responsible for managing the protected areas concerned can develop wide-ranging consultation agreements or other forms of cooperation. On the other hand, Shine observes that the administrative authorities' ability to address planning and strategic matters or to carry out staff exchanges will often be restricted without a clear legal basis or at least a political decision at Government level.

¹² See para III.B above.

Although IGCP's emphasis has been on developing informal mechanisms for field level collaboration efforts in the Virunga-Bwindi region, the IGCP agrees that the further the three countries move along the continuum towards collaborative management the greater the likelihood of effective conservation. Also Shine underlines that formal agreements provide the strongest legal basis for long-term transboundary cooperation and the harmonised implementation of treaty obligations. These agreements can take the form of joint declarations, memoranda of understanding, letters of intention etc. between heads of state of the countries involved.

On this point it is important to note that very recently the three countries sharing the Virunga-Bwindi region have taken an important step towards the formal establishment of a Transboundary protected Area. On October 14th 2005, the Ministers of DRC, Rwanda and Uganda signed a "Tripartite Declaration on the Transboundary Natural Resources Management of the Transfrontier Protected Area of the Central Albertine Rift"¹³ which aims to establish a strategic transboundary collaborative management system that enables sustainable conservation of the biodiversity of the Central Albertine Rift, for a long-term socio-economic development. Although the Tripartite Declaration does not contain a normative legal framework, it does recognize the Albertine Rift – which comprises the Virunga-Bwindi region – as a transboundary ecosystem shared by the three countries. Furthermore, it 'appreciates' and 'notes' the efforts to coordinate and collaboratively manage these protected areas as one ecosystem and especially the development of a Transboundary Strategic Plan. In the declaration it is stated in rather mandatory language that the States involved 'shall' make efforts to initiate the development of a collaborative protocol amongst the three governments to 'ensure' formal agreement of management of transboundary protected area network. According to the Declaration, this formal agreement of management of the transboundary protected area must contribute to the conservation of biodiversity and subsequently to the common goal of poverty reduction in the three countries.

Indeed, it will generally be necessary to conclude a formal agreement in the form of a true bilateral or trilateral treaty in which the states concerned agree to be bound by a normative framework containing detailed rights and obligations regarding a joint management regime or in the words of the Tripartite Declaration: Transboundary Strategic Plan.

C. A Legal Framework for a Transboundary Protected Area

Formal cooperation between countries for creating and conserving a TBPA can be institutionalized in a legal framework containing e.g. applicable legal norms, joint conservation policies and management plans. Such a legal regime containing agreements between the state parties involved can be included in a binding treaty. As a result, the parties to such an formal agreement probably need to amend their national laws and regulations to incorporate the norms, principles and objectives of the agreement and to harmonise the rules and policies regarding conservation, illegal trade, illegal logging, fire prevention, park procedures, security measures and so on. The new established Transboundary Protected Area should be governed by a common management plan or else at least by clear and agreed management guidelines (Shine, 1997).

The institutional framework could preferably involve the establishment of a single TBPA authority with legal and financial autonomy. But this may be politically unacceptable or premature in the earlier stages of transboundary cooperation. In the Virunga-Bwindi area the

¹³ See Annex

park authorities of Rwanda, Uganda and the DRC already established a scheme of regular coordination at defined intervals and more recently the above mentioned Tripartite Declaration was signed between the three countries in which the Albertine Rift has been recognized as a transboundary ecosystem, and in which it is declared that efforts shall be made to establish a formal management agreement for the transboundary protected area.

D. Draft Code for Transboundary Protected Areas in Times of Peace and Armed Conflict.

IUCN, the International Union for the Conservation of Nature, has prepared a Draft Code for Transboundary Protected Areas in Times of Peace and Armed Conflict.¹⁴ The Draft Code aims to contribute to the progressive development of legal and institutional frameworks for the establishment and management of Transboundary protected Areas in times of peace and armed conflict. It proposes an enabling framework to promote transboundary cooperation through the establishment and management of TBPA's in order to:

- a) conserve biological and cultural diversity in major transboundary ecosystems, promote a culture of peace and enhance opportunities for sustainable development, particularly for local communities, indigenous peoples and women;
- b) promote the conservation and environmentally sound management of transboundary water catchment areas;
- c) promote the sustainable and equitable utilisation of natural resources in and around TBPA's;
- d) contribute to the development of equitable mechanisms for co-operation and benefit-sharing;
- e) contribute to conflict prevention and the building of trust, confidence and security;
- f) prevent or minimise any adverse impacts of military activities on TBPA's; and
- g) provide a tool for the peaceful settlement of disputes affecting TBPA's and the re-establishment of peaceful conditions and restoration of damaged ecosystems after armed conflict.¹⁵

This is not the place to review this Draft Code. The Draft Code basically speaks for itself. There are however a few important provisions that deal with legal aspects of TBPA's which have been addressed above and which require some extra attention in this paragraph.

(Part III. Establishment and management of TBPA's)

10. Basic legal and institutional framework

Each State should establish or, where necessary, strengthen its legal and institutional framework for the creation and effective management of a representative system of protected areas. Such a system should specifically provide for:

- a) the conservation of areas containing major ecosystems, endangered habitat types, high biodiversity and high endemism, through a range of protected area management categories providing for different conservation objectives;
- b) the linking of protected areas via natural habitat corridors into bioregional networks to encourage natural animal movements, the connection of populations and gene pools and rational conservation and management of biodiversity;
- c) the establishment of buffer zones around protected areas to promote environmentally sound and sustainable development, including wildlife-based forms of land-use and low-impact tourism; and

¹⁴ For the text of the IUCN Draft Code for Transboundary Protected Areas in Times of Peace and Armed Conflict, see: <http://www.tbpa.net/docs/pdfs/SecMan/SecManDraftCode.pdf>. The Draft Code is also published in WCPA, 2001

¹⁵ IUCN Draft Code, article 1

d) the incorporation of measures to safeguard the integrity of protected areas into regional land-use planning and sectoral programmes and policies.

12. Legal basis for co-operative management of TBPA

1. States should use their best endeavours to remove legal and institutional obstacles to co-operation, harmonise relevant legal measures and establish a positive framework for co-operative management of the TBPA concerned.

2. Appropriate frameworks will vary for each TBPA. They may be strengthened over time to reflect changes in circumstances, capacity and political and public awareness.

The range of options includes:

a) formal agreements between neighbouring States to consult and co-operate with each other, ranging from a bilateral treaty to a joint declaration, memorandum of agreement or letter of intention;

b) delegation by each State of powers to a designated authority to coordinate the management of the protected area with that of the contiguous protected area, to implement agreed conservation and management objectives and to enter into further agreements for this purpose;

c) administrative agreements between counterpart environment, resource management and/or planning agencies, such as memoranda of understanding or cooperation;

d) creation of a single management authority for the TBPA;

e) customary or vernacular resource management agreements that provide a basis for establishing collaborative management processes with indigenous peoples, local communities and local governing bodies;

f) contractual agreements between relevant stakeholders, including private sector interests and non-governmental organisations; and

g) the designation of focal points or programme coordinators for the TBPA as a whole, or for each of its constituent parts.

3. States and other stakeholders shall carry out exchange of information, notification, timely consultation and other forms of co-operation regarding the TBPA in the spirit of good neighbourliness.

(Part IV. TBPA in times of armed conflict)

18. General obligations

All armed forces, whether regular or irregular, should continue to observe the principles and rules of international environmental and humanitarian law to which the parties to the conflict are bound in times of peace. Natural and cultural resources shall not be pillaged under any circumstances.

(Part VI. Measures to promote and enhance compliance)

26. Compliance and dispute avoidance

States and other actors involved in managing TBPA shall co-operate to ensure compliance with this Draft Code and to avoid disputes. Procedures and mechanisms to enhance compliance should be simple, transparent and non-confrontational and may include joint or impartial third-party fact-finding missions and the provision, to the extent possible, of technical and financial assistance.

27. Peaceful approaches to settlement of disputes

If a dispute over the interpretation and application of this Draft Code does arise, States and other actors should seek resolution through peaceful means, such as:

a) negotiation and enquiry;

- b) mediation and conciliation, where appropriate through the good offices of neutral countries, regional agencies or arrangements, or appropriate organisations;
- c) arbitration or judicial settlement.

28. *Relationship between the Draft Code and international conventions*

The provisions of this Draft Code should be read consistently with the rights and obligations established under existing international agreements, except where the exercise of such rights and obligations would seriously threaten a TBPA. Parties shall implement this Draft Code with regard to the marine environment consistently with the rights and obligations under the 1982 United Nations Convention on the Law of the Sea.

VI. TBPA's and Environmental Security

In Chapter IV the benefits of TBPA's were discussed. One special benefit of TBPA's is the reduction of political tension and the promotion of peace. The minimization of political tension and the promotion of peace are indispensable factors for the potential success of initiatives regarding sustainable development.¹⁶ The establishment of a TBPA will provide for intensified cooperation between neighbouring states with regard to the sustainable management of their shared natural resources. These forms of cooperation may pave the way for negotiations and dialogues between the states involved on matters beyond the management of their joint ecosystem including matters of national security and peace in regions with a history of intra- and/or inter-state conflicts. Although these regular TBPA's are not formally established to promote peace, in reality they do promote international cooperation at different levels and in different fora. However, in area's with a history of violence and armed conflict, such as the Virunga-Bwindi area, it may be useful to develop a TBPA which takes special account of and is dedicated to the maintenance or restoration of peace and security in the area.¹⁷ Such a TBPA, which formally promotes peace and cooperation, is called a Peace Park or Park for Peace.

A. *Parks for Peace*

The IUCN specifies several types of protected areas of which the transboundary protected area has been the heart of this paper. With regard to the IUCN definitions, whereas TBPA's are special types of protected areas, Parks for Peace are special types of TBPA's. Parks for Peace are defined by the IUCN as "transboundary protected areas that are formally dedicated to the protection and maintenance of biological diversity, and of natural and associated cultural resources, *and to the promotion of peace and co-operation.*" (WCPA, 2001) It more or less depends on the extent to which a TBPA is dedicated to and designed for the promotion of peace and cooperation, whether it would be regarded as a 'regular' TBPA or as a Park for Peace. Although these different terms are no legally defined concepts and although the labelling itself does not by itself have to have any affects on the results in the field, the categorisation can be very helpful for identifying a certain protected areas. At the national

¹⁶ See Principle 25 of the Rio Declaration on Environment and Development: 'Peace, development and environmental protection are interdependent and indivisible.'

¹⁷ For more information on the impact of armed conflict in the Virunga-Bwindi region, see: José Kalpers, *Volcanoes under Siege: Impact of a Decade of Armed Conflict in the Virungas* (2001) <http://www.worldwildlife.org/bsp/publications/africa/144/titlepage.htm>; Terese Hart, Robert Mwinyahali, *Armed Conflict and Biodiversity in Sub-Saharan Africa: The Case of the Democratic Republic of Congo (DRC)* (2001) <http://www.worldwildlife.org/bsp/publications/africa/143/titlepage.htm>; Andrew J. Plumpre, Michel Masozera, Amy Vedder, *The Impact of Civil War on the Conservation of Protected Areas in Rwanda* (2001) <http://www.worldwildlife.org/bsp/publications/africa/145/Rwanda-English.htm>

level, widely varying approaches have been taken to the labelling of sites as “peace parks”, where they commemorate a history of conflict, or promote peace. Also a number of regular TBPA’s have been named as “International Peace Parks”. The IUCN believes that it may be helpful to develop an international certification process to guide designation, consistent with the definitions and objectives of Parks for Peace. The IUCN drafted a series of criteria for designating Parks for Peace. (WCPA, 2001) To name just a few important criteria:¹⁸

- a) There should be at least two protected areas sharing a common national or sub-national boundary.
- b) In addition to biodiversity and any cultural objectives, there should be an explicit purpose to promote peace and cooperation (...)
- c) Parties should be guided by, and adhere to, the elements of the Draft Code for Transboundary Protected Areas in Times of Peace and Armed Conflict.

In general it can be said that Parks for Peace should be founded on the recognition that human security, good governance, equitable development and respect for human rights are interdependent and indivisible. Peace is best developed by addressing the root causes of conflict and by promoting sustainable development, the rule of law and adherence to human rights.

In this respect the following objectives of Parks for Peace can be identified. (WCPA, 2001)

- a) Supporting long-term cooperative conservation of biodiversity, ecosystem services, and natural and cultural values across boundaries;
- b) Promoting landscape-level ecosystem management through integrated bio-regional land-use planning and management;
- c) Building trust, understanding, reconciliation and cooperation between and among countries, communities, agencies and other stakeholders;
- d) Preventing and/or resolving tension, including tension over access to natural resources;
- e) Promoting the resolution of armed conflict and/or reconciliation following armed conflict;
- f) Sharing biodiversity and cultural resource management skills and experience, including cooperative research and information management;
- g) Promoting more efficient and effective cooperative management programmes;
- h) Promoting access to, and equitable and sustainable use of natural resources, consistent with national sovereignty, and
- i) Enhancing the benefits of conservation and promoting benefit-sharing across boundaries among stakeholders.

Being a special type of TBPA, Parks for Peace would have at least the same benefits as regular TBPA’s. In this regard, chapters III, VI and V of this paper are equally applicable to Parks of Peace. The additional benefits of Parks for Peace are due to the additional objective of Parks for Peace to *promote peace and co-operation*. In his paper ‘Peace through Parks’, Prof. Gerardo Budowski of the University for Peace in Costa Rica, summarizes the benefits of TBPA’s and Parks for Peace as follows. TBPAs enhance environmental protection across ecosystems, and there are often significantly more of these than each country possessed individually. And they facilitate a more effective exchange of information and research and, often, joint management. They also bring economic benefits through tourism. The visits of ecotourists are enhanced by providing them with a larger territory and, possibly, with an

¹⁸ For the complete list of criteria, see WCPA, 2001 p. 5

understanding of past conflicts in the area. TBPA's ensure better cross-border control of problems such as illegal exploitation of timber, fire, pests, poaching, pollution and smuggling. Parks for Peace bring many benefits to the people living in or close to them – and to society at large. They promote peace and international cooperation between countries by creating a protected area on their borders.¹⁹

In sum, we have seen in the previous chapters that the establishment of a transboundary protected area would be an important mechanism for the effective preservation and conservation of the shared ecosystem of the Virunga-Bwindi region. Baring in mind the history of armed conflict and the ongoing hostility in this area, it is of crucial importance that these circumstances would be adequately addressed when a framework for cooperation for the management of shared natural resources will be established. Instead of creating a regular TBPA it would be more accurate to establish a Park for Peace which is by definition not only dedicated to the protection and maintenance of biological diversity but which is also formally dedicated to the promotion of peace and co-operation.

B. Legal rules for TBPA's in times of armed conflict.

In relation to the idea of environmental security in transboundary protected areas, it is important to note that international law comprises a special field of law which contains rules on warfare. This part of international law is called the law of war or humanitarian law. It is about how states and individuals are required to behave during armed conflict, whether this conflict takes place between two or more states (inter-state conflict) or within the boundaries of a single state (intra-state conflict). Although there are some rules which requires states to respect the environment in time of armed conflict,²⁰ most of these rules are non-binding and hardly complied with in practice.²¹ Nevertheless, the 1977 Additional Protocol I to the Geneva Conventions of 1949 is worth mentioning here.²² With over 120 Parties, Protocol I is an significant development in international humanitarian law as it incorporates important provisions relating to environmental protection. The Protocol includes two provisions which deal directly with the dangers that modern warfare represents for the environment. They protect the environment as such, although they do so in relation to human beings, who are the principal concern of international humanitarian law. These rules are article 35(3), and article 55.

Article 35 - Basic rule 3.

It is prohibited to employ methods or means of warfare which are intended, or may be expected, to cause widespread, long-term and severe damage to the natural environment.

Article 55 - Protection of the natural environment 1.

Care shall be taken in warfare to protect the natural environment against widespread, long-term and severe damage. This protection includes a prohibition of the use of methods or means of warfare which are intended or may be expected to cause such damage to the natural environment and thereby to prejudice the health or survival of the population.

¹⁹ Prof. Gerardo Budowski, Peace through Parks, in: Water, Sanitation, People.

<http://www.ourplanet.com/imgversn/144/content.html>

²⁰ See for instance Principle 24 of the 1992 Rio Declaration on Environment and Development: 'Warfare is inherently destructive of sustainable development. States shall therefore respect international law providing protection for the environment in times of armed conflict and cooperate in its further development, as necessary.'

²¹ Well known example is the burning of numerous oil wells during Gulf War I

²² Protocol additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I): <http://www.unhcr.ch/html/menu3/b/93.htm>

2. *Attacks against the natural environment by way of reprisals are prohibited.* Article 35 sets out the general rule applicable to all acts of warfare, whereas Article 55 is intended to protect the civilian population from the effects of warfare on the environment. In both cases the following are prohibited: (a) attacks on the environment as such, and (b) using the environment as an instrument of warfare. Although these norms are not specifically directed to protected areas or even transboundary protected areas, they do apply to situations of armed conflict in these areas as well.²³

In respect of the observation that currently no international norms apply directly to armed conflict in protected areas, an important initiative needs some consideration here which is the proposal of the IUCN regarding a *Draft for a Convention on the Prohibition of Hostile Military Activities in Protected Areas*. The IUCN and the International Council of Environmental Law (ICEL) have produced a draft treaty aimed at safeguarding natural or cultural areas of "outstanding international significance". The Draft Convention on the Prohibition of Hostile Military Activities in Protected Areas is based on ideas expressed at meetings of experts convened in previous years by IUCN, the International Council of Environmental Law, and the International Committee of the Red Cross. Building on existing customary and treaty law, which already affords general protection of these areas, the aim of this instrument is to establish an operational mechanism for ensuring that such areas are protected. The Draft Convention requires that the UN Security Council include in each resolution it adopts under Chapter VII of the Charter in response to armed conflict, a list of relevant internationally protected areas. The Draft Convention stipulates that these designated areas shall be "non-target" areas in which all hostile military activities are prohibited. The same rule applies to regional arrangements or agencies acting both under Chapter VIII of the UN Charter and in conformity with the Declaration on the Enhancement of Cooperation between the United Nations and Regional Arrangements or Agencies in the Maintenance of International Peace and Security, annexed to General Assembly Resolution 49/57.

The Draft Convention provides for sending expert missions, composed of competent UN bodies or non-governmental organizations, to monitor compliance with the Convention.²⁴

A second IUCN initiative that needs attention here is the already discussed IUCN *Draft Code for Transboundary Protected Areas in Times of Peace and Armed Conflict*²⁵, which includes important provisions on TBPA's and conduct in times of armed conflict. Articles 18 and 19 of this Draft Code can be seen as a contribution to the progressive development of international law in this area:

(Part IV. TBPA's in times of armed conflict)

18. General obligations

All armed forces, whether regular or irregular, should continue to observe the principles and rules of international environmental and humanitarian law to which the parties to the conflict are bound in times of peace. Natural and cultural resources shall not be pillaged under any circumstances.

²³ For more information see Shine, 1997 p.42-44; or see Daniel Bodansky, Legal regulation of the effects of military activity on the environment: Study for the German Federal Environmental Agency – Excerpts (The full text of the study is published in the series BERICHTE des Umweltbundesamtes (vol. 5/03) Erich Schmidt Verlag, Berlin)

²⁴ Richard Tarasofsky, Mechanisms for establishing safe havens for important environmental sites (<http://www.eli.org/ecw/tarwar.htm>) See also Shine, 1997 p. 44, 45

²⁵ See also Chapter V(D). Supra, footnote 13

19. Rules specific to TBPA

1. Parties to the armed conflict shall not take action to turn the TBPA into a military objective or use it for any strategic advantage.
2. The parties shall take all practicable steps to protect the TBPA from attack and, if attacked, to minimise any damage to the area.
3. The parties shall take all feasible precautions in their choice of means and methods of attack with a view to avoiding or minimising incidental damage to TBPA.
4. If a party to the armed conflict moves military installations, equipment or personnel into the TBPA, or otherwise takes action that converts the TBPA into a military objective, the TBPA may lose its immunity from attack while it remains a military objective. However, any military response measures shall:
 - a) be decided upon only by the highest operational level of command
 - i) on the basis of exercising the legitimate right of self-defence,
 - ii) only if the attack is the sole militarily feasible option,
 - iii) taking all feasible precautions in the choice of means and methods of attack, with a view to avoiding or minimising direct and incidental damage to the area, and
 - iv) only after advance warning is issued to opposing forces allowing reasonable time for those forces to redress the situation;
 - b) be proportionate to the military objectives involved, with a view to minimising direct and incidental damage to the TBPA; and
 - c) be cancelled or suspended if it becomes apparent that the damage to the TBPA will be excessive or disproportionate.
5. If a single armed force occupies the TBPA, those with authority for that force shall comply with the objectives and rules applicable to the TBPA.

Obviously, this field of international law is quite new and not very well developed. Although the IUCN initiates important studies and conferences on the protection of the environment in protected areas during armed conflict, much more research in this field is needed both regarding the protection of the environment in armed conflict in general, and more specific on the subject of armed conflict in protected areas.

VII. Concluding Remarks

The main conclusion of this study must be that cooperation is the key to successful conservation of shared natural resources. The more neighbouring states intensify their cooperation the more effective the protection and preservation of their shared ecosystem.

The creation of a Transboundary Protected Area is the ideal instrument for long term coordinated cooperation in the management of a shared ecosystem. A formally established TBPA provides for many benefits, the most important of which is the opening of boundaries between the states involved. Jurisdictional boundaries are being lifted in the sense that national legislation and policies will be harmonized. Political boundaries are being removed as a result of intensified dialogue between the states. Boundaries regarding the consistency among treaty regimes can also be removed because the parties can establish a normative framework in which various relevant environmental norms – originating from different MEA's – are agreed upon. Furthermore, a formally established TBPA provides for a framework through which the parties can consult each other on implementing shared treaty obligations in a harmonized way. As a result, the parties to a formally established TBPA need to amend their national laws and regulations to incorporate the norms, principles and

objectives of the agreed normative framework and they are required to harmonise the rules and policies regarding conservation, illegal trade, illegal logging, fire prevention, park procedures, security measures and so on.

The countries sharing the Virunga-Bwindi ecosystem share also a history of violence and conflict. It is therefore even more essential to bring these countries together under a TBPA, since such a cooperative framework can provide for additional benefits beyond the mere conservation of their shared ecosystem. A TBPA provides for cooperation schemes between neighbouring states with regard to the sustainable management of their shared natural resources. These forms of cooperation may pave the way for negotiations and dialogues between the states involved on matters of national security and peace. The political difficulties of the states involved must be addressed by the TBPA. In addition to objectives relating to the effective and sustainable preservation of a shared ecosystem, and with a view to the interdependence of environmental protection, human security and peace, the TBPA needed for the Virunga-Bwindi area must include the promotion of peace and security as an extra objective. Such a TBPA, which is also formally dedicated to the promotion of peace and security, is referred to as Peace Park or Park for Peace.

Cooperation in the management of a shared ecosystem through the creation of a TBPA or even Park for Peace provides for the potential establishment of a long-term relationship between the countries involved. A formally established TBPA enables the parties to embark on an additional process of building up relationships that may culminate in multi-level cooperation in the future. In this manner cooperation in the management of shared natural resources may very well promote peace and security in the region. The “Tripartite Declaration on Transboundary Natural Resources management of the Transfrontier Protected Area Network of the Central Albertine Rift” that was recently signed by DRC, Rwanda and Uganda is a very hopeful and necessary step towards cooperation in the effective management of their shared natural resources in order to adequately protect and preserve their shared ecosystem which comprises the natural habitat of the Mountain Gorilla.

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Tripartite Declaration

On the Transboundary Natural Resources Management of the Transfrontier Protected Area Network of the Central Albertine Rift

The Democratic Republic of Congo

The Republic of Rwanda

The Republic of Uganda

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**RECOGNISING** the necessity to conserve the unique ecosystem of the Central Albertine Rift Transfrontier protected area network through the collaborative management of the Volcano National Park, Mgahinga Gorilla National Park, Bwindi Impenetrable National Park, Queen Elizabeth National Park, Semliki National Park, Ruwenzori Mountains National Park, Kibale National Park and Virunga National Parks for the benefit of the people of the Democratic Republic of Congo, Rwanda, Uganda, and the international community;

**ENVISIONING** the Central Albertine Rift transfrontier protected area network together with the surrounding landscape conserving endemic and high biodiversity values sustainably;

**TARGETING** the establishment of a strategic transboundary collaborative management system that enables sustainable conservation of the Central Albertin Rift biodiversity for long-term socio-economic development;

**CONSCIOUS** of the benefits to be derived from close co-operation;

**MINDFUL** of the principle of sovereign equality and territorial integrity of the three states; and thus

**ACCEPTING** that This Agreement shall in no way be construed as derogating from any provision of the domestic law in force in the countries of the Parties or any other agreement entered into between the Parties; and

Now therefore it is hereby declared that:

1. The Central Albertine Rift Transfrontier protected area network is recognized as a transboundary ecosystem shared by the Republic of Rwanda, the Republic of Uganda and the Democratic Republic of Congo hereby referred to as "DRC".
2. the efforts to coordinate and collaboratively manage these protected areas as one ecosystem, and especially the development of a Transboundary Strategic Plan are hereby appreciated and noted respecting the borders of the three countries.
3. The final Transboundary Strategic Plan for the Central Albertine Rift Transfrontier Protected Area Network shall be fully recognized and accepted by the three countries.
4. efforts shall be made to initiate the development of a collaborative protocol amongst the three governments to ensure formal agreement of management of





## IES EnviroSecurity Assessments

A major proportion of the world's ecosystems and the services they perform for society and nature is being degraded or used unsustainably. This process affects human wellbeing in several ways. The growing scarcity of natural resources creates a growing risk for human and political conflicts and hinders sustainable development and the poverty alleviation that depends on it. Situations involving resource abundance can also be related to serious environmental degradation, increased community health risks, crime and corruption, threats to human rights and violent conflicts – in short, to a decrease of security.

The overall objective of IES EnviroSecurity Assessments is to secure the natural resource livelihood basis on the local, regional and international level. IES pursues this objective along the following mutually related lines: (1) the conservation of ecosystems and their related services, (2) the implementation of the international legal order, (3) the provision of economic incentives for maintenance of ecosystem services, and (4) empowerment of relevant actors and dissemination of results.

## About the Institute

The **Institute for Environmental Security (IES)** is an international non-profit non-governmental organisation established in 2002 in The Hague, The Netherlands with liaison offices in Brussels and Washington, D.C.

The **Institute's** mission is: *"To advance global environmental security by promoting the maintenance of the regenerative capacity of life-supporting ecosystems."*

Our multidisciplinary work programme - **Horizon 21** - integrates the fields of science, diplomacy, law, finance and education and is designed to provide policy-makers with a methodology to tackle environmental security risks in time, in order to safeguard essential conditions for sustainable development.

Key objectives of the **Horizon 21** programme are:

- **Science:** Create enhanced decision tools for foreign policy makers, donors and their target groups on regional, national and local levels;
- **Diplomacy:** Promote effective linkages between environment, security and sustainable development policies.
- **Law & Governance:** Contribute to the development of a more effective system of international law and governance;
- **Finance:** Introduce new and innovative financial mechanisms for the maintenance of the globe's life supporting ecosystems; and
- **Education:** Build the environmental knowledge capital of people and organisations.

Our mission and programme should be seen in the context of promoting international sustainable development goals and as a contribution toward long-term poverty alleviation.

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