

Journal of Conflict Management & Sustainable Development



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in Kenya

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Environmental Law Jurisprudence

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Editors' Note

Welcome to the latest edition of the journal of Conflict Management and Sustainable Development. The journal provides a platform where scholars engage in discourse on topics relating to conflict management and sustainable development. The journal is peer reviewed and refereed so as to ensure that it adheres to the highest academic standards.

This issue, Volume. 4 No. 2, comes amidst a global health pandemic (The Corona Virus Disease, Covid-19) that is posing unprecedented health, economic and human rights concerns across the world.

The issue carries articles dealing with themes such as: Africa's Regional Co-Operation and Integration against the backdrop of the Corona Virus pandemic, The Law and Ethics of Corona Virus Disease in Kenya, The Prevalence of Corruption in Wildlife Crimes in Kenya, Africa's Agenda 2063 and The Role of Courts and Tribunals in Developing Environmental Law Jurisprudence.

The journal contributes to the debate touching on how to make the world a better place to live in by combating the covid 19 pandemic and addressing other pressing concerns such as regional integration, corruption and sustainable development.

We are grateful to our reviewers, editorial team and contributors who have made publication of this journal possible.

Dr. Kariuki Muigua, PhD, FCIArb (Chartered Arbitrator), Accredited Mediator.

Managing Editor,

April, 2020

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The Law and Ethics of Coronavirus Disease (Covid-19) in Kenya

**By: Paul Ogendi, Peter Munyi, Akunga Momanyi, Maurice Oduor,
Naomi Njuguna & Vincent Mutai***

Abstract

The COVID-19 pandemic is a public health emergency that raises many ethical and legal issues. Of significance is that the pandemic requires emergency public health measures to be put in place by the government significantly disrupting the lives of many. Governments should however remember that emergency public health measures must be legally sound in accordance with their right to health obligations under international law, national constitution and legislation. Suffice to note, the international community has an obligation to assist and cooperate with each other towards fighting the disease. The health providers who are currently at the forefront in fighting the pandemic are being faced with numerous challenges especially in developing countries due to lack of adequate resources. This however should not be an excuse for violating ethical principles put in place including respecting the confidentiality, privacy, and autonomy of the patients. Lastly, the community has a role to play in making sure that they follow lawful orders and guidelines put in place including social distancing, washing hands and staying at home.

(Key words: coronavirus/COVID-19; right to health; public health; Kenya;
law and ethics)

1. Introduction

On 30 January 2020, the World Health Organization (WHO) declared the COVID-19 outbreak a public health emergency of international concern.¹

** The authors herein are health law and ethics professionals and are members of academic staff of the School of Law, University of Nairobi and School of Law, Moi University. The email for the corresponding author is pogendi@uonbi.ac.ke*

¹ World Health Organization ‘Statement of the Second Meeting of the International Health Regulations (2005) Emergency Committee Regarding the Outbreak of Novel Coronavirus (2019-nCoV)’ (30 January 2020), <<https://www.who.int/news->

Coronavirus disease (COVID-19) is a respiratory disease caused by the severe acute respiratory syndrome coronavirus 2 (SARS-CoV-2) pathogen. Coronaviruses (HCoVs) were long considered “inconsequential pathogens,” as they cause the “common cold” in otherwise healthy people.² Most of the coronaviruses “are endemic globally and account for 10% to 30% of upper respiratory tract infections in adults.”³ The onset of SARS (Severe Acute Respiratory Syndrome) in 2002, and MERS (Middle East Respiratory Syndrome) in 2012 shattered the myth of coronaviruses as inconsequential pathogens, and brought the reality that coronaviruses are a pandemic threat. COVID-19 is a highly contagious disease⁴ that is transmitted quite efficiently, albeit clumsily.⁵

The first COVID-19 case in Kenya was reported on 12 March 2020 after a Kenyan citizen returned back into the country on 5 March 2020.⁶ The numbers have risen steadily since then, prompting the government to announce various emergency public health measures.⁷ A range of stringent emergency public health measures continue to be imposed by the government all in an effort to curb the spread of the COVID-19 virus pandemic, starting with the imposition

room/detail/30-01-2020-statement-on-the-second-meeting-of-the-international-health-regulations-(2005)-emergency-committee-regarding-the-outbreak-of-novel-coronavirus-(2019-ncov)> (accessed 23 March 2020).

²Catharine I. Paules Hilary D. Marston, and Anthony S. Fauci., ‘Coronavirus Infections—More Than Just the Common Cold’ (23 January 2020), <doi:10.1001/jama.2020.0757 > accessed 19 March 2020.

³ Ibid

⁴Wendy E. Parmet and Michael S. Sinha, ‘Covid-19— The Law and Limits of Quarantine,’ (18 March 2020)

<DOI: 10.1056/NEJMp2004211> visited 19 March 2020

⁵Bill Gates, ‘Responding to Covid-19 — A Once-in-a-Century Pandemic?’ (28 February 2020) <DOI: 10.1056/NEJMp2003762> accessed 19 March 2020

⁶Ministry of Health, ‘First Case of Coronavirus Disease Confirmed in Kenya’ (13 March 2020), <<http://www.health.go.ke/first-case-of-coronavirus-disease-confirmed-in-kenya/>> (accessed 23 March 2020).

⁷Nasibo Kabale, ‘Coronavirus: Kenya takes bold steps after cases rise to three’ (*Daily Nation*, 15 March 2020) <<https://www.nation.co.ke/news/Coronavirus-Kenya-confirms-2-more-cases/1056-5492028-4817d7z/index.html>> accessed 19 March 2020.

of a 7pm to 5am curfew, which has been ruthlessly enforced by the police amidst claims of numerous police brutality and human rights violations.⁸

In other countries, very extreme public health measures have been taken which include national lockdowns as is the case in India, Italy, France, United Kingdom, South Africa among others.⁹ As the cases continue to rise, Kenya may also be forced to impose a national lockdown unless the virus is contained, which option is looking increasingly unlikely.

The County Governments have also responded to the COVID-19 pandemic by announcing a raft of emergency public health measures including closure of markets, restaurants and other social places.¹⁰ According to the Constitution of Kenya, health is a devolved function and county governments are expected to play an important role in dealing with the current pandemic including the provision of the needed health services and health personnel.¹¹

According to the WHO, the strategy to control the current pandemic should have the following objectives:¹²

- a) Interrupt human-to-human transmission including reducing secondary infections among close contacts and health care workers, preventing

⁸‘Chaos, teargas as Kenyans rush home to beat curfew’ (*The East African*, 27 March 2020), <<https://www.theeastafrican.co.ke/news/ea/Chaos--teargas-as-Kenyans-rush-home-to-beat-curfew/4552908-5506712-fbc1sx/index.html>> (accessed 31 March 2020).

⁹Emily Czachor, ‘Which Countries are on Nationwide Lockdown Because of Coronavirus?’ (*Newsweek*, 24 March 2020), <<https://www.newsweek.com/which-countries-are-nationwide-lockdown-because-coronavirus-1494017>> (accessed 23 March 2020).

¹⁰‘How counties are responding to COVID-19’ (*The Star*, 18 March 2020) <<https://www.the-star.co.ke/news/2020-03-18-how-counties-are-responding-to-covid-19/>> accessed 30 March 2020.

¹¹ Constitution of Kenya, 2010, Schedule Four.

¹²World Health Organization, ‘Coronavirus Disease 2019 (COVID-19) Situation Report -58’ (18 March 2020), <https://www.who.int/docs/default-source/coronaviruse/situation-reports/20200318-sitrep-58-covid-19.pdf?sfvrsn=20876712_2> (accessed 23 March 2020).

- transmission amplification events, and preventing further international spread;
- b) Identify, isolate and care for patients early, including providing optimized care for infected patients;
 - c) Identify and reduce transmission from the animal source;
 - d) Address crucial unknowns regarding clinical severity, extent of transmission and infection, treatment options, and accelerate the development of diagnostics, therapeutics and vaccines;
 - e) Communicate critical risk and event information to all communities and counter misinformation;
 - f) Minimize social and economic impact through multisectoral partnerships.

The COVID-19 virus pandemic is indeed a game changer, and has brought with it many challenges in the public health sector. The pandemic has also revived the discourse concerning the necessity of respecting human rights in implementing measures taken by governments during public health emergencies.¹³ Of particular concern is that the measures taken by the government during public health emergencies are extraordinary and may sometimes go beyond the ‘normal use’ of government power or authority.¹⁴ What is clear is that all public health measures should be ethically and legally grounded.¹⁵ Governments must negotiate the delicate balance between the prevention and control of risk and damage to public health and the respect for human rights enshrined in many international instruments and national constitutions.¹⁶ The WHO has not yet issued ‘any substantive guidance on how countries can take public health measures that achieve health protection while respecting human rights.’¹⁷ Consequently, governments have been able

¹³Paula Lobato de Faria & Joao V. Cordeiro ‘Public Health: Current and Emergent Legal and Ethical Issues in a Nutshell’ in Yann Joly & Bartha Maria Knoppers (eds) *Routledge Handbook of Medical Law and Ethics* (Routledge New York 2015) 371.

¹⁴ Ibid.

¹⁵ Ibid.

¹⁶ Ibid, 371-2.

¹⁷Alicia Ely Yamin & Roojin Habibi, ‘Human Rights and Coronavirus: What’s at Stake for Truth, Trust, and Democracy?’ (*Health and Human Rights Journal*, 1 March 2020),

to assert that they are doing what is necessary or effective.¹⁸ It appears as though respect for human rights is an afterthought during this pandemic.¹⁹

This paper examines the health law and ethics in the context of COVID-19 pandemic response measures and proposes guidelines that are ethically and legally grounded. The structure of this article is as follows. The first part addresses the international legal framework for dealing with public health pandemics. The second part addresses the ethical and legal issues arising from the COVID-19 pandemic. The third part discusses the right to health obligations of the government in the context of public health emergencies. The fourth part looks at the responsibility of patients and communities in responding to the present pandemic. The fifth part expounds on the issue of health professionals and the ethics of prevention, treatment and care. Drawing from the preceding parts of this paper, the penultimate part lays out some guidelines on ethical and legal issues that could aid in balancing the many competing interests and values that are presented by the COVID-19 pandemic. The last part is the conclusion.

2. The International Legal Framework for dealing with Public Health Pandemics

The most prominent international legal framework for dealing with public health emergencies is the International Health Regulations (2005) (IHR). The IHR are a regulatory framework ‘to manage and prevent public health risks from arising from the international spread of disease, while avoiding unnecessary interference with international traffic and trade.’²⁰ They are ‘a legally binding set of regulations adopted under the auspices of the WHO, focusing on global surveillance for communicable diseases.’²¹ Article 2 of the

<https://www.hhrjournal.org/2020/03/human-rights-and-coronavirus-whats-at-stake-for-truth-trust-and-democracy/> (accessed 23 March 2020).

¹⁸ Ibid.

¹⁹ Ibid.

²⁰ World Health Organization, International Health Regulations (2005), adopted by the Fifty Eighth World Health Assembly on 23rd May 2005 – Resolution WHA 58.3. They entered into force on 15th June 2007.

²¹ V. K. Agarwal, ‘Pandemic Response and International Health Regulations’ (2007) 63(4) *Med J Armed Forces India* 366

IHR set out their purpose as to “prevent, protect against, control and provide public health response to the international spread of disease in ways that are commensurate with and restricted to public health risks, and which avoid unnecessary interference with international traffic and trade.”

The IHR were first adopted by the World Health Assembly in 1969,²² following the 1951 International Sanitary Regulations (ISR). The 1969 Regulations covered six diseases that were subject to quarantine, but subsequent revisions reduced the number to three (yellow fever, the plague and cholera). The 2005 revision replaced the previous adoption of a list approach to quarantine diseases with an open ended approach to the reporting of new and emergent diseases which pose an international risk, such as COVID-19.

The IHR place the WHO as the focal point of providing transnational health governance leadership on the formulation and implementation of a legal and ethical normative frameworks dealing with global responses to Public Health Emergencies of International Concern (PHEIC). The WHO is responsible under the regulations for raising awareness, information sharing, coordinating national responses and measures, providing and mobilizing assistance as well as organizing technical meetings to discuss solutions to these public health emergencies.

The IHR impose various obligations on Member States. State parties are required to designate or establish national focal points within their respective jurisdictions for the implementation of health measures that are set out under the IHR.²³ They are also to develop capacities to detect, notify and report events in accordance with the set out and prescribed procedures and processes in the IHR.²⁴ Each state party shall assess events within their territories using

²² These were amended in 1973 and 1981

²³ Article 4, IHR 2005

²⁴ Article 5, IHR 2005; see also Nirmal Kandel, *et. al.* ‘Health Security Capacities in the Context of COVID -19 outbreak: An Analysis of International Health Regulations Annual Report Data from 182 Countries,’ [2020] (395) (10229) *The Lancet* 1047 where five indices were developed to check capacity of countries: Prevent, Detect, Respond, Enable, Function.

the decision instrument set out in the IHR, and communicate to the WHO timely, accurate and sufficiently detailed public health information.²⁵ If the Member State has evidence of an unexpected or unusual public health event within its territory, which may constitute a public health emergency of international concern, it shall provide to the WHO all the necessary information.²⁶

Apart from placing obligations on member states on surveillance, notification and reporting of PHEIC, the IHR provide an opportunity and avenue for examining the interface between public health and public security, as questions are raised on the restrictive measures that governments put in place in a bid to curb the spread of the disease. As Burci puts it:

These restrictive measures have raised questions about the extent of national emergency powers and the relevance of human rights considerations to ensure a measure of due process, proportionality of measures to the actual risk as well as to generate domestic and international accountability.²⁷

The challenges of implementing the IHR are felt in different ways. Firstly, the approach of the WHO Director General (DG) in declaring COVID-19 a public health emergency of international concern and the recommendations given therein have been criticized as being very “soft.” The DG acts in accordance with recommendations given by an Emergency Committee that is constituted with every event, and as such, there is no permanent emergency committee. Therefore, no common approach is adopted. Common principles have not been formulated. Each event attracts its own experts who form different opinion. The WHO has declared 6 pandemics from 2009 to 2020. Each has had its own approach which weakens the implementation of the IHR.

²⁵ Article 6, IHR 2005

²⁶ Article 7, IHR 2005

²⁷Gian Luca Burci, ‘The Outbreak of COVID 19 Coronavirus: Are the International Health Regulations Fit for Purpose?’ (27 February 2020), <<https://www.ejiltalk.org/the-outbreak-of-covid-19-coronavirus-are-the-international-health-regulations-fit-for-purpose/>> accessed 19 March 2020

Secondly, the deliberations of the Emergency Committee are done in private, raising issues of the legitimacy and transparency of the measures that they come up with. This approach of conducting deliberations is also in danger of politicization. Other inadequacies of the IHR include, the lack of a global coordinated support for the regulations, the challenge of implementation for developing countries, the ease with which countries can easily put in measures that violate human rights, the interpretation of what constitutes a public health emergency of international concern, the lack of a global fund for pandemic support, as well as a lack of formal mechanism for ensuring compliance with the IHR. The approach of the WHO is that states will comply with these regulations on a voluntary basis.

In light of these challenges to the recognition and implementation of the IHR as a legally binding instrument, there is need for other measures to enable the compliance by member states with obligations for public health emergency surveillance, assessment, reporting and response. There are proposals to use the UN Security Council mechanisms where public health emergencies are seen as an extreme security threat. On the other hand, international cooperation and assistance would be seen as a good compromise where states comply with their obligations and undertakings under international instruments, such as the United Nations Charter,²⁸ International Covenant on Economic, Social and Cultural Rights (ICESCR),²⁹ and the Sustainable Development Goals, particularly Goal 3 on health. The ICESCR in particular provides that:³⁰

Each State party to the present Covenant undertakes to take steps, individually and through international assistance and cooperation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realisation of the rights.

The socioeconomic right that is of concern and is relevant here is the right to the highest attainable standard of health. Certain principles are relevant in

²⁸ UN Charter, Articles 55 and 56

²⁹ ICESCR, Article 2(1)

³⁰ Ibid

considering the provision of international assistance; transparency and accountability, non – discrimination and participation. There is the argument for the Optional Protocol to the ICESCR to be used as an enforcement mechanism for the obligation to assist and cooperate.³¹

The current COVID -19 Pandemic has raised serious concerns as to whether the obligation to assist and cooperate can be effectively met, with many developed countries facing their own challenges in dealing with the outbreak. Developing countries thus have to rely on their own resources, or assistance from well-wishers and philanthropists. The recently concluded Virtual G20 Summit has been criticised as being vague with empty promises being given.³² The International Executive Director of Oxfam has stated in this regard that:³³

...we need those with broader shoulders to bear most of the cost. The G20 as a group of the richest countries can give billions of dollars in support to developing countries. The richest people and corporations – through greater taxation – can help pay for this.

The kind of assistance that would be needed is emergency funding, vaccine collaboration and financial reform for example increasing multilateral bank contributions to assist in strengthening the international health systems,

³¹Magdalena Sepulveda Carmona, ‘The Obligations of International Assistance and Cooperation under the International Covenant on Economic, Social and Cultural Rights: A Possible Entry Point to a Human Rights Based Approach to the Millennium Development Goal 8’ (2009) 13(1) *The International Journal of Human Rights* 86

³²Jake Johnson, “‘World Leaders Seem in Denial’: Demands for Radical Global Action on Coronavirus as Virtual G20 Summit Ends With Vague Promises’, (*Common Dreams*, 26 March 2020) <<https://www.commondreams.org/news/2020/03/26/world-leaders-seem-denial-demands-radical-global-action-coronavirus-virtual-g20>> accessed 28th March 2020

³³Oxfam International, ‘Never in Our Lifetimes Has There Been a Call for Compassion Like This’ (26 March 2020) <<https://medium.com/@Oxfam/never-in-our-lifetimes-has-there-been-a-call-for-compassion-like-this-26505a473b4f>> accessed 28th March 2020

particularly for the poorer nations.³⁴ International assistance and cooperation remains a challenge, particularly with respect to economic assistance. Blame shifting has already begun, with a lawsuit filed against China, seeking to have it bear the cost of the pandemic.³⁵ The fact that countries have different political, social and cultural norms and practices, may pose challenges to a common approach to international assistance.³⁶

The cooperation within research and scientific fields may yield better fruits at the moment, allowing scientists, virologists and immunologists to work round the clock to develop diagnostic kits, vaccines and treatments for the COVID - 19 disease. In addition, the Bretton Woods institutions should be prepared to play a bigger role in helping poor countries overcome the economic burden of the current and future pandemics. International assistance and cooperation is the silver-bullet in the context of COVID-19 pandemic.

3. Ethical and Legal Issues Arising from the COVID – 19 Pandemic in Kenya

The COVID–19 disease has raised global panic and has led to desperate, and in many cases, extreme measures being put in place by governments in order to curb the spread of the disease. On March 11th, 2020, the WHO declared

³⁴Global Fund, 'Global Fund Issues New Guidance in Response to COVID-19' 4 March 2020, <<https://www.theglobalfund.org/en/news/2020-03-04-global-fund-issues-new-guidance-in-response-to-covid-19/>> accessed 26th March 2020. The Global Fund asking states to rechannel their grants for Malaria, HIV and TB to the fight against the Coronavirus

³⁵Anwasha Madhukalya, '\$20 trillion lawsuit against China! US group says coronavirus is bioweapon,' (2 April 2020) <<https://www.businessday.in/current/world/usd-20-trillion-lawsuit-against-china-us-group-says-coronavirus-bioweapon/story/399071.html>> accessed 28th March 2020

³⁶Chen Dongxiao, Zhang Haibing 'International Cooperation for the Coronavirus Combat: Results, Lessons and Way Ahead,'(Shanghai Institute for International Studies, March 2020) <https://www.fmprc.gov.cn/mfa_eng/topics_665678/kjgzbdffyq/P020200310355462655277.pdf> accessed 28 March 2020

that the outbreak of COVID – 19 a global pandemic, required aggressive and urgent steps by governments to curb the spread of the disease.³⁷

The measures that are being taken by states beg the question as to whether, in adopting measures to deal with citizens and those suspected of having the disease or who already have been diagnosed with the disease, there is room for the rule of law, and medical and public health ethics. Has the state of global public health emergency rendered ethical and legal considerations useless? Is there time and mental space to consider the law and ethics? These questions are particularly pertinent from a developing country perspective, where preventative measures taken to curb the spread of the disease will likely infringe on the rights and freedoms of citizens, and will cause unprecedented economic and social damage.

To answer this question, we need to consider the ethical and legal dilemmas and issues that states like Kenya are facing, and what frameworks need to be put in place to deal with these issues and dilemmas. This section maps out the ethical and legal considerations that need to be considered by Kenya, in light of its constitutional obligation to ensure that its citizens enjoy the highest attainable standard of health. The major question is: what is the place of health law and ethics in the face of pandemics? What is clear is that a country preparedness for a pandemic such as what has been presented by COVID – 19, means more than just infrastructural and resource based preparedness. It also means preparedness to deal with the moral, ethical and legal issues that are bound to arise.

3.1 Ethical Issues and Dilemmas in the Context of COVID-19 Pandemic

3.1.1 Allocation and Utilisation of Scarce Resources

A pandemic such as COVID – 19 tests the ability of many countries to allocate, distribute and utilise their scarce healthcare resources in a manner that is

³⁷World Health Organization Regional Office for Europe, ‘WHO announces COVID-19 outbreak a pandemic’ (12 March 2020)

<<http://www.euro.who.int/en/health-topics/health-emergencies/coronavirus-covid-19/news/news/2020/3/who-announces-covid-19-outbreak-a-pandemic>>
accessed 28th March 2020

equitable and respectful of the dignity and human rights of patients. This conversation is not new however, as there have been other epidemics that have tested this issue – SARS, H1N1, Ebola, etc

The questions raised are in the context of scarce resources are the following: who is to be given priority in testing and treatment? Who will be given priority in vaccination? Who is to get admitted and who is to be treated from home? Who would receive life-saving treatment, if available? The high rates of infection amongst the populace imply that there needs to be rationing and rationalisation of the available scarce resources. If the statistics from other countries that have been hardest hit by COVID – 19 are anything to go by, there is a very real risk that there will be a crisis of resources if the number of those exposed and infected rise. Resource allocation decisions therefore, will essentially determine who lives and who dies. These decisions are also being faced in the developed world where health care systems are more advanced than those of Kenya. For example, Italy, which is the hardest hit country in terms of COVID–19 deaths, has had to develop guidelines on the criteria that nurses and doctors will use in allocating their scarce resources among those who need intensive care. The principle used is utilitarianism, where factors such as age, the presence of comorbidities and those with the highest chances of benefiting from intensive care, are taken into account.³⁸

What resources are currently available in Kenya? Already, there is a scarcity of supplies, commodities, equipment, medication and health personnel. Are there enough testing kits? What is the bed capacity? Are there enough ICU units?³⁹ Is there preparedness at the county level? Can samples be collected and stored safely? Can patients be transported to testing facilities from the counties in good time? Are there enough health personnel? What happens to patients with other conditions? Policy and decision makers should urgently

³⁸Marco Vergano, et al ‘Clinical Ethics Recommendations for the Allocation of Intensive Care Treatments in Exceptional, Resource – Limited Circumstances’ (SAARTI, 16th March 2020)

³⁹Betty Njeru, ‘Covid-19: List of Counties with ICU beds,’ *The East African Standard* (Nairobi, 28th Mar 2020)

<<https://www.standardmedia.co.ke/article/2001366028/covid-19-number-of-icu-beds-in-kenya>> accessed 30th March 2020

provide advice on how to allocate the available scarce resources, both at the national and county levels. This advice must necessarily be influenced by ethical considerations in order to be justifiable amongst the citizens. Choices have to be made. A good example is that on the 24th of March 2020, over 60 cancer patients who were admitted at the Kenyatta National Hospital had their treatment suspended and were sent home. The hospital is to come up with a rationing policy on who gets radiotherapy treatment.⁴⁰

The rationing of the scarce resources requires choosing among patients. In Italy, doctors had to withhold treatment from the elderly who are more sick and unlikely to recover, and divert resources towards younger patients who are likely to recover.⁴¹ This is a utilitarian approach of making choices rather than the egalitarian approach which is favoured by human rights advocates. Patients are not treated the same. Patients who are vulnerable such as those who are living with disabilities, or those living with HIV, or those with other underlying conditions, or with suppressed or compromised immune systems such as those with Cancers, would also have to face the same kind of rationing decisions based on utility. This utilitarian approach to decision making may cause injustices, including the practice of profiling based on age, disability, ethnicity, etc. All these grounds are prohibited grounds of discrimination in the Constitution of Kenya.⁴²

It is therefore incumbent on the government, through the Ministry of Health, to come up with guidelines which will be acceptable and accepted by the public on how to ration and rationalise the existing scarce resources. These guidelines would have to produce the best results, and be justifiable on the basis of transparency and justice.

3.1.2 Veracity, Information Sharing, Publicity and Public Engagement

Transparent sharing of information vis a vis public security and the protection of the public from alarm is a challenge that would be faced by the government

⁴⁰John Muchangi, 'Kenyatta Hospital Stops Cancer Treatment over Corona virus,' *The Star* (Nairobi, 24th March 2020) 10

⁴¹ Ibid

⁴² Constitution of Kenya, Article 27(4)

in Kenya. Transparency and openness are important in the fight against pandemics. They inform the health seeking behaviours of citizens, and their preventative and protective behaviours. Truth telling and transparency on the part of a government promotes public trust in the administrative processes of that government.⁴³ This trust in governments will likely lead to better responses to governmental directives given to curb the spread of an epidemic.

During the SARS and the MERS epidemics, there was clear reluctance on the part of the Chinese government to give information. The current COVID-19 pandemic seems to have evoked the same kind of reluctance on the part of the Chinese government. The Chinese government prioritised secrecy above what they perceived to be alarmism. Indeed, the whistle blowing doctor, together with other healthcare workers who raised the alarm about the Wuhan Pneumonia, were criminalised and following, the doctor died from the disease.⁴⁴ The information that the government chose to share when the disease was noticed in December 2019 was that it was not transferrable amongst humans, and that it was not an epidemic.⁴⁵ In essence, the severity of the disease was downplayed. This information contributed to the spread of the disease beyond Wuhan in China, to other countries in the world. Outside China, in the USA, the prioritisation of economic and public relations over openness and transparency concerning the disease, is likely to have contributed to its rapid spread. In Kenya, a Kenya Airways employee was

⁴³World Health Organization, 'Managing Epidemics: Key facts about major deadly diseases,' (2018) <<https://www.who.int/emergencies/diseases/managing-epidemics-interactive.pdf>> accessed 1st April 2020; see also Human Rights Watch, 'Human Rights Dimensions of COVID-19 Response,' (19 March 2020) <https://www.hrw.org/news/2020/03/19/human-rights-dimensions-covid-19-response#_Toc35446579> accessed 1st April 2020

⁴⁴ Helen Davidson, Chinese inquiry exonerates coronavirus whistleblower doctor, *The Guardian* (Hong Kong, 20 March 2020) <<https://www.theguardian.com/world/2020/mar/20/chinese-inquiry-exonerates-coronavirus-whistleblower-doctor-li-wenliang>> accessed 2nd April 2020

⁴⁵ BBC, 'Coronavirus: China admits "shortcomings and deficiencies"' (4 February 2020) <<https://www.bbc.com/news/world-asia-china-51362336>> accessed 29th March 2020; see also Chris Buckley and Steven Lee Myers, 'As New Coronavirus Spread, China's Old Habits Delayed Fight,' *New York Times*, (New York, 1 February 2020) <<https://www.nytimes.com/2020/02/01/world/asia/china-coronavirus.html>> accessed 30th March 2020

suspended from employment after he shared a video on social media, showing a passenger plane from China landing at the Jomo Kenyatta International Airport in February 2020. The plane had 239 passengers of Chinese descent on board.⁴⁶ The video revealed serious gaps in the screening process of passengers for COVID-19 at the airport.

O'Malley, Rainford and Thompson⁴⁷ have noted that the challenges that undermine transparency in times of epidemics are three fold. Firstly, there is a reluctance to announce health threats until their nature and source have been scientifically confirmed. Secondly, there is also a reluctance to acknowledge health threats that have a potential to cause social, economic and political damage. Finally, information is usually very strictly controlled among those who have it.

The announcement of the first COVID – 19 case in Kenya, raised a public alarm with many people rushing to supermarkets to stock up on basic supplies. Despite the Presidential directive for suppliers not to hike their prices, many small traders across the counties were still able to hike their prices and make a profit from the panic buying of Kenyans.⁴⁸ Actual statistics that have come to the knowledge of public officials should be reported, even though they may reveal weaknesses in the healthcare structures and systems, the social and behavioural preventative measures adopted, and the implementation measures. The quality of the information also matters. It should be factual and accurate and reflect the actual state of affairs. Fortunately, risk

⁴⁶ The Employment and Labour Relations Court has blocked the pending arrest of Mr Gire Ali and ordered his reinstatement.

⁴⁷ P. O'Malley, J. Rainford and A. Thompson, 'Transparency during Public Health Emergencies: From Rhetoric to Reality,' [2009] 87 Bulletin of the World Health Organization 614 - 618 <<http://dx.doi.org/10.2471/BLT.08.056689>> accessed 6 April 2020.

⁴⁸ Business Today, 'Coronavirus no Excuse for Cooking Gas Price Hikes,' (27 March 2020)

<<https://businesstoday.co.ke/coronavirus-cooking-gas-price-hikes-kenya-illegal-epra-covid-19/>> accessed 30 March 2020; see also Collins Omulo, Uhuru warns traders against hiking prices, *The Daily Nation* (Nairobi, 18 March 2020) <<https://www.nation.co.ke/business/Uhuru-warns-traders-against-hiking-prices/996-5495452-992p4wz/index.html>> accessed 30 March 2020

communication is a core component within the implementation framework under the IHR.

The right to information is not only a stand-alone right within the Constitution of Kenya, it is also an essential component of the right to health.⁴⁹ Perhaps it is with this in mind that the Law Society of Kenya, two doctors and an NGO petitioned the High Court to summon the Cabinet Secretary (CS) of Health to present a report on the plans that the government has made for surveillance, control and response to the COVID-19 pandemic and Kenya's preparedness. Justice Weldon Korir refused to summon the CS, demonstrating the deference that the judiciary has towards the Executive when it comes to matters dealing with information, policy and decision making during times of a public health emergency. The Honourable Judge stated:

I decline to summon the CS...We must all appreciate that we are now at war with an enemy unknown to man...Although what the petitioners are trying to achieve through this case is also important in the fight against the virus, I do not find it reasonable to call a soldier or a general at the war front to come to court and present a report which can be prepared and filed by his staff.⁵⁰

In spite of this deference, an interdict should then have been granted where a timeline is given for the submission of this report so that Kenyans are aware of the measures that the government is taking in response to this pandemic.

3.1.3 The Ethics of Confidentiality during Pandemics

Confidentiality and privacy should be viewed from both the clinical perspective (between doctor and patient) and from a public health perspective. The sensitivity of health data, no doubt, should be subject to greater protection than normal data. However, during a pandemic or an epidemic, serious questions are raised about privacy and confidentiality and whether they should

⁴⁹ Article 35(1) of the Constitution of Kenya 2010

⁵⁰ Bernice Mbugua, 'COVID-19: Court declines to summon health CS,' *The People Daily*, (Nairobi, March 19th, 2020) <<https://www.pd.co.ke/news/national/covid-19-court-declines-to-summon-health-cs-29093/>> accessed 5 April 2020

still be respected. Maintaining confidentiality and privacy of patients promotes their human dignity. From a utilitarian point of view, protecting confidentiality and privacy promotes health seeking behaviours of patients, as they have trust and confidence that their health information will not be shared to others who do not have a legitimate interest in receiving that information.⁵¹ The question of who has a legitimate interest to receive information or to know who is suffering from the disease is a pertinent one in a public health emergency. This is because, information may be needed for tracing, screening and testing purposes particularly when there has been exposure, whether deliberately or inadvertently, to a person who has tested positive for COVID-19. In some jurisdictions such as the US, during the polio epidemic, the names of people who had polio were published.

The balancing act is in the maintenance of the human rights of the individual to privacy, protection from stigmatisation and the protection of the vulnerable and already marginalized groups, and in the protection of community and public health. Needless to say, the right to confidentiality and privacy is not an absolute right and there are exceptions to its protection.

The Health Act 2017 provides for user information confidentiality, unless it is disclosed by order of the court or informed consent for health research and policy planning purposes and non – disclosure of the information represents a serious threat to public health.⁵² The Public Health Act similarly contains provisions for the Notification of Infectious Diseases.⁵³ Data protection and disclosure may also be viewed from a national security point of view, where certain information is needed for the promotion of public security concerns. Indeed, COVID-19 raises serious issues on the interface and interrelationship

⁵¹C. Jones, 'The Utilitarian Argument for Patient Confidentiality: A Pilot Study of Patients' Views,' (2003) 29 Journal of Medical Ethics 348

⁵² Health Act 2017, section 11(1) and (2)(c)

⁵³ Public Health Act (Cap 242, Laws of Kenya) Parts III and IV of the Act; see also *W. v. Egddell* (1990) 1 All ER 835; See also UN Commission on Human Rights, 'The Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights,' 28 September 1984, E/CN.4/1985/4, <<https://www.refworld.org/docid/4672bc122.html>> accessed 6 April 2020.

between national health and national security. The criminalisation of those who do not self – isolate or self – quarantine after being exposed or being found positive for the virus, demonstrates this interface well. The government recently issued a statement that the National Police Service as well as the Administration apparatus would be deployed to implement its directives. The stigma attached to identification as a potentially exposed person, may cause people to go into hiding and not go for testing. A framework which recognises the rights of the human being more than the threat of the disease should be formulated. There should be a balancing act where the human rights of the individual should be protected hand in hand with public health.

3.1.4 The ethics of autonomy vis a vis communitarianism

The principlism approach of ethicists such as Beauchamp and Childress emphasizes that medical principles and ethics like autonomy are the cornerstone of healthcare practice and policy. Autonomy denotes the concept of self-determination, and this in turn will influence a number of things. First, whether a person will voluntarily submit for testing when they have been exposed or when they begin to exhibit symptoms. Second, whether after testing they will want to be treated. Third, can a person have the freedom to be treated from home? In other words, can they refuse to be admitted in a health facility choosing instead to be an outpatient? Can a patient refuse treatment for a potentially deadly and highly infectious disease? Whilst movement may be restricted as a result of the quarantine requirements, can patients be forced to take medication? Can patient autonomy still be respect in a public health emergency?

Public health regulations may restrict the rights of the individual who is infectious. But these restrictions are not without limit. In *Daniel Ng'etich & 2 Others v. Attorney General & Others*⁵⁴ the court reiterated that the restriction of freedom was in the community interest, and is not to punish the patient and remove their dignity. It declared that the petitioners' confinement in prison was against the intentions of the Public Health Act. This case suggests that restrictions on autonomy (particularly the freedom of movement), can and should be done in a manner that still respects the dignity of the patient or

⁵⁴ (2016) eKLR

person affected. This principle can be applied during the current COVID-19 crisis.⁵⁵

Whereas restriction of movement can be done without the patient's consent, the question remains as to whether treatment can be done without their consent. The Health Act 2017 suggests that even if a patient (who is also referred to as a "user") has the right to informed consent before treatment is administered; there are exceptions to this general rule. One exception is where "the failure to treat the user, or a group of people which includes the user, will result in a serious risk to public health."⁵⁶ Therefore, legally, and perhaps ethically, a patient can be treated without their express or implied consent, without going into the complex arguments as to whether they have the mental capacity to consent to treatment or not.

4. The Right to Health Obligations of the Government in the Context of Public Health Emergencies

4.1 General Obligations of the Government under Human Rights Law

The state has a general obligation to respect, protect and fulfil human rights.⁵⁷ According to Langford and King, the typology is useful to reaffirm the emerging consensus that civil and political rights, as well as the economic, social and cultural rights are similar and attract the same duties from the state, namely, 'respect (refrain from impeding), protect (ensure others do not impede), and fulfil (actually provide) the conditions necessary for realizing

⁵⁵ Angela Oketch, 'Covid-19: Uproar over extension of quarantine period,' *The Daily Nation* (Nairobi, 5 April 2020) <<https://www.nation.co.ke/news/Covid-19--Uproar-over-extension-of-quarantine-period--/1056-5514482-4d92ra/index.html>> accessed 5 April 2020 – the extension of the mandatory quarantine period by another 14 days for foreigners and Kenyans who came into the country raises issues about the dignity with which they are being handled. The danger of being infected when one is not positive, the frustrations of no contact with family and the concern about who will bear the costs of the extended quarantine period, are all issues to think about in the public health regulations regarding COVID -19.

⁵⁶ Health Act 2017, Section 9(1)(e)

⁵⁷ United Nations Committee on Economic, Social and Cultural Rights, 'General Comment No. 12, Right to Adequate Food' (Twentieth Session, 1999), U.N. Doc. E/C.12/1999/5 (1999) para. 5.

human rights.⁵⁸ The government therefore has to ensure that the right to health is not only respected but also protected and fulfilled including in relation to public health emergencies. Failure to do so will lead to violations and may expose the government to right to health litigation.

4.2 The Right to Health Obligations

The General Comment No. 14,⁵⁹ which is an elaboration of the Article 12 of the ICESCR on the right to health, provides the most useful guidance in the context of right to health and specifically public health emergencies. ICESCR Article 12.2 (c) deals with the right to prevention, treatment and control of diseases. The issue of control of diseases is usually more nuanced during public health emergencies than prevention and treatment. In this regard, General Comment No 14 provides that the control of diseases refers to

States' individual and joint efforts to, inter alia, make available relevant technologies, using and improving epidemiological surveillance and data collection on a disaggregated basis, the implementation or enhancement of immunization programmes and other strategies for infectious disease control.

From the above, the government in line with the right to health obligations can take measures such as providing relevant technologies, surveillance and collection of data, and immunization. However, the list is not exhaustive as the government may also pursue 'other strategies for infectious disease control.' Challenges arise when governments sometimes take drastic measures that may be illegal or in contravention of human rights.

⁵⁸ Malcolm Langford and Jeff A. King, 'Committee on Economic, Social and Cultural Rights: Past, Present and Future' in Malcolm Langford (ed) *Social Rights Jurisprudence: Emerging Trends in International and Comparative Law* (Cambridge University Press 2008) 484.

⁵⁹ United Nations Committee on Economic, Social and Cultural Rights, 'General Comment No. 14: The Right to the Highest Attainable Standard of Health (Art. 12),' UN Doc E/C.12/2000/4, 11 August 2000, <<https://www.refworld.org/pdfid/4538838d0.pdf>>, accessed on 25 March 2020.

Legislation on public health and other public health regulations, guidelines and policies impose restrictions to arbitrariness of governmental measures, and perhaps ensure compliance with the right to health requirements. In Kenya, Part IV of the Public Health Act on prevention and suppression of infectious diseases, provides for, *inter alia*, removal to hospital of infected persons and isolation of persons who have been exposed to infection.⁶⁰ This issue arose in the case of *Daniele Ng'etich & 2 Others v Attorney General & 3 Others*⁶¹ where the High Court determined that arresting and detaining TB patients in prisons for failing to adhere to TB medication courses was unconstitutional in Kenya.⁶² It therefore appears that even isolation of persons who have been exposed to infection must be conducted in a manner that respects human rights. Isolating people in prison is according to this case, not permissible. It may also be plausible to suggest that quarantining passengers entering the country in a dirty hotel without basic amenities as was recently the case in Gambia may also be found to be unacceptable.⁶³

Kenya also has in place a national infection prevention and control guidelines for health care services in Kenya which outlines the measures that may be taken to control pandemics.⁶⁴ The guidelines aims at ensuring standard practices and activities in preventing, identifying, monitoring and control of infections by among others: using scientifically sound measures for preventing

⁶⁰ See Public Health Act, Sections 26 and 27.

⁶¹ (2016) eKLR.

⁶² Allan Maleche & Nerima Were, 'Petition 329: A Legal Challenge to the Involuntary Confinement of TB Patients in Kenyan Prisons' (*Health and Human Rights Journal*, 21 June 2016), <<https://www.hhrjournal.org/2016/06/petition-329-a-legal-challenge-to-the-involuntary-confinement-of-tb-patients-in-kenyan-prisons/>> (accessed 25 March 2020).

⁶³ Freedom Newspaper, 'Breaking News: Quarantined Gambia Experience Passengers Flee from the Golden Beach Hotel after Breaking the Hotel Gate!' (*Freedom Newspaper*, 18 March 2020) <<https://www.freedomnewspaper.com/2020/03/18/breaking-news-quarantined-gambia-experience-passengers-flee-from-the-golden-beach-hotel-after-breaking-the-hotel-door/>> (accessed 26 March 2020).

⁶⁴ Ministry of Public Health and Sanitation, *National Infection Prevention and Control Guidelines for Health Care Services in Kenya* (Nairobi, December 2010), <http://www.ashcott.com/images/IPC_GUIDELINES.pdf> (accessed 26 March 2020).

and controlling infections; monitoring health care practices; surveillance of infection in health care facilities; reporting infection prevention and control (IPC) activities; providing adequate infrastructure, such as sinks and ventilation and appropriate supplies and equipment; educating and training staff about IPC principles; educating patients, families and members of the community in disease causation, prevention, and control; effectively managing IPC programmes; and, periodically evaluating IPC policies and guidelines. Following these guidelines to the letter will therefore assist the state to comply with its right to health obligations in the context of COVID-19 pandemic. More guidelines however should be developed to deal with COVID-19 and related diseases specifically to be fully compliant with the right to health.

4.3 Provision of Relevant Technologies and Other Personal Protective Equipment

The government has an obligation to make available relevant technologies to deal with the virus. In Italy, there is a reported case involving a group of volunteers using 3D printer to create unofficial copies of a patented valve for life-saving coronavirus treatments without authorization from the patent owner.⁶⁵ The government should ensure that these volunteers are not exposed to legal suits which will in turn interfere with the supply of needed technology and therefore lead to loss of lives. Government should also make available personal protective equipment (PPEs) such as masks and protective clothings. In Kakamega, it was reported that nurses and doctors had flee the hospital when they encountered a patient with symptoms of COVID-19 because they did not have PPEs to handle the patient.⁶⁶

A similar case can be made in relation to medicines and vaccines of COVID-19 when they are discovered. In light of the COVID-19 experience, it is argued

⁶⁵Jay Peters, 'Volunteers produce 3D-printed valves for life-saving coronavirus treatments' (*The Verge*, 17 March 2020), <<https://www.theverge.com/2020/3/17/21184308/coronavirus-italy-medical-3d-print-valves-treatments>> accessed 26 March 2020.

⁶⁶Racheal Nyaguthie, 'Kakamega: Doctors flee from patient with coronavirus-like symptoms' (*Tuko*, 18 March 2020), <<https://www.tuko.co.ke/346799-kakamega-doctors-flee-patient-coronavirus-symptoms.html>> accessed 26 March 2020.

that there should be no overreliance henceforth on private sector to provide the medicine that is required and instead proposed system should prioritize public health needs in the wake of industry failure.⁶⁷

4.4 Health-related education, access to information and public participation

Transparency, access to information and public participation is also important in dealing with a pandemic crisis as has already been discussed. Some individuals have deliberately disobeyed measures imposed by the government in dealing with COVID-19. In Gauteng, South Africa, the health department was forced to obtain a court order to quarantine a family that had tested positive.⁶⁸ In Kenya, a patient who was in isolation left the hospital and was later confirmed to have tested positive of the virus.⁶⁹ Another case involved a Deputy Governor who failed to quarantine himself as advised by the government and attended official functions upon returning from a foreign trip, and subsequently exposed many people to infection.⁷⁰ Ignorance, lack of access to information, and public participation can be reasons for a failure to obey or implement government measures. Indeed, the right to health extends to among others ‘access to health-related information’ and ‘participation of

⁶⁷Zain Rizvi, ‘Blind Spot: How the COVID-19 Outbreak Shows the Limits of Pharma’s Monopoly Model’ (19 February 2020), <<https://www.citizen.org/article/blind-spot/>> accessed on 31 March 2020.

⁶⁸Ntaagae Seleka, ‘Coronavirus: Gauteng health tracks down family that refused to be quarantined after testing positive’ (News24, 17 March 2020), <<https://m.news24.com/SouthAfrica/News/coronavirus-gauteng-health-tracks-down-family-that-refused-to-be-quarantined-after-testing-positive-20200317>> accessed 29 March 2020.

⁶⁹Noni Ileri, ‘Coronavirus: Woman who escaped Mbagathi isolation ward tests positive’ (Kenyans, 18 March 2020) <<https://www.kenyans.co.ke/news/50976-coronavirus-woman-who-escaped-mbagathi-isolation-ward-tests-positive>> accessed 29 March 2020.

⁷⁰Benard Sanga, Patrick Beja, Weldon Kipkemai and Cyrus Ombati, ‘How reckless Kilifi Deputy Governor Gideon Saburi put you and I in Coronavirus danger,’ (The Standard, 23 March 2020)

<<https://www.standardmedia.co.ke/article/2001365251/covid-19-agents-of-death>> accessed 30 March 2020.

the population in all health-related decision-making at the community, national and international levels.’⁷¹

The government should further understand that⁷²

We are not passive targets either of an oncoming virus, or of governmental programs. Governments must be able to provide adequate and transparent justification for the measures being taken (and those not taken) to contain the virus and protect public health. And contrary to views that people’s active participation would slow down command-and-control decisions regarding the virus, every experience with past outbreaks, everywhere in the world demonstrates that the agency and meaningful (not tokenistic) engagement of individuals and communities is essential for effectively managing the spread of disease.

The government therefore needs the people to be part of the solution as much as possible. The General Comment No 14 in fact sanctions a participatory and transparent process of implementing a national public health strategy and plan as replicated below:⁷³

To adopt and implement a national public health strategy and plan of action, on the basis of epidemiological evidence, addressing the health concerns of the whole population; the strategy and plan of action shall be devised, and periodically reviewed, on the basis of a participatory and transparent process; they shall include methods, such as right to health indicators and benchmarks, by which progress can be closely monitored; the process by which the strategy and plan of action are devised as well as their content, shall give particular attention to all vulnerable or marginalized groups.

⁷¹ CESCR General Comment No. 14, para. 11(n 59 above).

⁷² Alicia Ely Yamin & Roojin Habibi, *supra* note 17.

⁷³ CESCR General Comment No. 14 (n59 above), para. 43(f).

5. Responsibility of Patients and Communities in Relation to Public Health Pandemics

The COVID-19 pandemic,⁷⁴ raises interesting and intriguing questions about the responsibility of patients and communities in responding to pandemics generally, and the COVID-19 in particular. From a public health legal-ethical and policy perspective, critical questions include: what responsibilities, if any does a supposed or actual patient have to himself or herself, family and associates, and the general population? Do these include self-disclosure of status, self-reporting, self-isolation or self-quarantine, self-restraint in social and commercial interaction, social distancing, and the like? At whose cost are these responsibilities? Could there be penalties for breach of these responsibilities? Are such responsibilities enforceable legally against the patient? Moreover, does the community in which the actual or supposed patient(s) exist have reciprocal responsibilities and what would they be? Could they possibly include care and concern, reporting, prevention of contagion and spread, mitigating loss and providing support to affected individuals and families, and other proactive community action? How should community responsibility be enforced? Overall, which legal, ethical and policy frameworks govern patient and community responsibility in case of pandemics or major public health emergencies, and are they adequate in the COVID-19 pandemic?

A few preliminary comments are in order. First, the COVID-19 pandemic is highly unusual in its scale and reach. It is global, has spread so fast and is afflicting so many people, communities and nations simultaneously. Not since the 1918 post World War I “Spanish flu” has the world experienced anything like this. If anything, there has never been such a global pandemic and public health crisis, and COVID-19 is therefore unprecedented. It is both nobody’s and everyone’s disease and problem. Patient and community responses are therefore not well understood and developed. Academic and scientific literature and knowledge, including on legal-ethical and policy aspects, on COVID-19 is neither abundant nor conclusive.

⁷⁴ The new corona virus which causes an illness known as COVID-19 has spread to more than 150 countries and territories since it was first identified in the Chinese city of Wuhan in December.

Second, the actual and potential impacts of the COVID-19 pandemic are only at the formative and evolutionary stages, it may take months or years to properly size up the impacts. However, it is clear that the most dramatic impacts would include high mortality rates and widespread disease burden, global and national lock downs, and debilitating socio-economic and other knock-on consequences of global scale. Clearly millions of jobs and livelihoods are at stake, as are entire national and regional economies. These unprecedented negative impacts would arguably make it difficult to prescribe or even predict patient and community responses to the pandemic at this stage.

Third, even assuming full understanding of scientific and technical aspects of COVID-19 and its full impact, there are legal-ethical and policy dilemmas about prescribing or predicting the appropriate patient and community responsibilities in the face of a global pandemic in which they bear no primary responsibility and where they are largely and primarily victims thereof. It would arguably amount to a double jeopardy situation where the victims of a global pandemic are required to bear consequences at law and to have penalties or sanctions imposed or enforced against them.

5.1 Patient and Community Responsibilities

There are no codes of conduct which define duties and responsibilities for patients and communities in times of pandemics, unlike healthcare professionals or health care workers and entities.⁷⁵ However, patients and communities in the context of COVID-19 are expected to regularly and thoroughly wash hands with soap or alcohol based sanitizers, create social distance with others, especially those who are coughing or sneezing, avoid to touch their faces, noses, eyes or mouth, avoid hugs, and to stay at home or self-quarantine especially if feeling unwell.

⁷⁵D. Orentlicher, 'The Physician's Duty to Treat during Pandemics,' [2018] 108 *AJPH* 1459, C. Ruderman *et al.*, 'On Pandemics and the duty to care: whose duty? Who cares?' [2006] 7 *BMC Med Ethics* <<https://doi.org/10.1186/1472-6939-7-5>> accessed 6 April 2020, H. Mahm *et al.*, 'Ethics, Pandemics and the Duty to Treat' [2008] 8 *The American Journal of Bioethics* 4, DOI: <10.1080/15265160802317974> accessed 6 April 2020, A. K. Simonds and D. K. Sokol, 'Lives on the Line? Ethics and Practicalities of Duty of Care in Pandemics,' [2009] 34 *European Respiratory Journal* 303, DOI: <10.1183/09031936.00041609> accessed 6 April 2020

It appears that as the COVID-19 pandemic evolves, some of the key responsibilities of the patient include self-quarantine, self-isolation and self-disclosure. A person who has travelled to or from places where the outbreak has occurred, especially across international boundaries, is duty bound to self-quarantine for a period up to 14 days.⁷⁶ In Kenya the legal primary basis for this requirement is the Public Health Act.⁷⁷ Apparently, there are legal consequences or penalties for breach of the requirement for self-quarantine.

The following case illustrates this point: a Deputy Governor of a coastal county in Kenya was forced to a government institution for quarantine after a public furore for apparently refusing to self-quarantine after travelling back into Kenya from Germany. He tested positive for COVID-19 and the government placed him in quarantine and treatment. He was thereafter charged with committing an offence under the Public Health Act. The Deputy Governor came into contact with numerous people at the county offices, in burials, social and entertainment places, and in his other movements, and these included police officers, political leaders and government officials.⁷⁸ Some of the affected people developed symptomatic complications and were admitted to testing and treatment while many went into self-quarantine.⁷⁹

On its part, the Government of Kenya embarked on a plan to quarantine all passengers arriving at the Jomo Kenyatta International Airport on

⁷⁶China imposed near total lockdown of its corona virus epicentre Wuhan province; most European countries and notably Italy, Spain, France and United Kingdom, as well as Australia, New Zealand, United States and Canada, imposed near lockdown guidelines; India, United Arab Emirates, and most African states have blends of lockdown, curfew and other strict control measures

⁷⁷The Public Health Act, the primary legislation applicable to matters of public health crises, authorizes public health authorities, particularly the Minister of Health, to take various actions during public health crises, including declaring an infectious disease a “notifiable infectious disease” or a “formidable epidemic, endemic or infectious disease,” and taking the necessary prevention and suppression measures to fight the disease. Specific powers accorded to health authorities for the purpose of prevention and suppression of an infectious disease include search, seizure, and detention powers; the power to designate any place as a quarantine area, including ships and aircraft; and the power to restrict or ban immigration into the country.

⁷⁸ Ibid, p 3

⁷⁹ Ibid

international flights following revelations that most of the confirmed cases were imported into the country through the international airport. The Government announced that henceforth all international flights would be suspended to stem the tide of infections, and that either the passengers would be quarantined at designated hotels at their cost or at government health or residential facilities.⁸⁰ This decision has been criticized as hasty, without adequate preparations and without taking into account the passengers' welfare.⁸¹ The mandatory quarantine and the attendant inconveniences to passengers, including young students is understandable. Government had apparently noted that the voluntary self-quarantine, which had relied on the goodwill of individuals, did not guarantee compliance.

It is well established under Kenyan law that the government may confine people against their will if those individuals present a danger to themselves or others, even if the person or persons are confined has not committed an offence. Under the Public Health Act, an individual who is forcefully quarantined does have a right to be released from that quarantine but also has a right to demand some sort of adjudicative process to determine whether the quarantine is justified. The Act states that person can be placed in a place of isolation and detained until, in the opinion of the medical officer of health he or she is free from infection or is able to be discharged without danger to public health. Penalties for breach of self-quarantine or isolation include a maximum fine of KES. 30,000/- or imprisonment for a period of up to three years or both.

The above case scenarios highlight issues of law, ethics and public policy in respect of public health emergencies. First, should a public health crisis such as the COVID-19 be the basis of abrogation of civil rights, including movement and association, and especially of those who are directly afflicted as patients or even as communities? Why should a person or communities suffer both the disease and legal liabilities for failing to self-quarantine, or such other "breach"? Is it not the case that a patient's first duty is to themselves, rather than to the community or undisclosed public? Is it the duty of the individual patient or even international airline passenger to submit

⁸⁰ Ibid

⁸¹ Ibid

themselves to testing for the disease, or does this duty belong to public health authorities to undertake structured and targeted testing and management of cases.

Second, where a public health pandemic such as COVID-19 occurs, who should bear the cost of testing, treatment and quarantine or isolation? In our view, public health authorities should bear the primary burden of the financial and logistical costs especially for the poor and vulnerable groups. It would be unfair and unconscionable to demand, as authorities in Kenya have done, that all patients or arriving passengers on international flights, and by extension their families and communities, should pay for themselves in mandatory quarantine in government designated hotels or other accommodation facilities. After all quarantine measures are ordinarily designed to benefit the wider public as opposed to the individual patient or arriving passenger. Public health law and policy should be aligned accordingly.

Third, the communities have a responsibility to observe all directives legally issued by the government including those relating to curfew and/or national lockdown. These directives are usually enforced by the police or law enforcement agencies and it would be in the best interest of the community to observe them to avoid conflict. Contingency plans however should be put in place to deal with arising issues on a regular basis.

Finally, while it is important that the rights and responsibilities of health care professionals and entities be clarified and settled, especially during pandemics such as COVID-19, it is also important to address the duties and responsibilities of patients and communities.

6. Health professionals and the ethics of prevention, treatment and care

Ethical dilemmas are common stay encounters amongst health professional in their daily practice.⁸² Ethical dilemma encounters and the corresponding challenges posed in decision making for health professionals are exacerbated

⁸²D. Gracia, 'The Intellectual Basis of Bioethics in Southern European Countries,' [1993] 7 Bioethics 97

during pandemics due to among others, the stresses that pandemics place on health systems. As the pipeline of COVID-19 patients in need of critical care and the number of health professionals who are becoming infected in the process of providing care to patients in many countries demonstrate, pandemics are not only likely to overrun the best of the health systems available (in Lombardy, Italy for example) but also present ethical challenges to health providers at unprecedented scale. Hospitals and associations of health professionals are re-writing guidelines on who gets care amid COVID-19 surge in many countries including developed ones.⁸³ Movement and transfer of health professionals from one jurisdiction to support another in need during times of pandemics suggest that the principles of ethics in the prevention of outbreaks, treatment and care of patients that apply to health professionals are universal.⁸⁴ In any event, the Hippocratic Oath, itself an oath of ethics is universal. It is therefore necessary to examine the ethics of prevention, treatment and care, how these principles get tested in pandemics and whether any legislative measure could exist to aid in the application of these principles.

It is broadly accepted that there are four basic principles of healthcare ethics that health professionals must follow in order to ensure optimal patient safety.⁸⁵ These are autonomy, beneficence, non-maleficence and, justice. Each of these principles is put into practice differently by each health professional depending on the circumstances and the patient case they face. In this section, these guiding principles are explored in brief, and the challenges that obtain in pandemic situations such as that presented by COVID-19. Further, a survey of the legal instruments that are available particularly in the Kenyan context to provide support to these ethical principles is made.

⁸³Sacha Pfeiffer, 'U.S. Hospitals Prepare Guidelines For Who Gets Care Amid Coronavirus Surge,' (21 March 2020), <<https://www.npr.org/2020/03/21/819645036/u-s-hospitals-prepare-guidelines-for-who-gets-care-amid-coronavirus-surge>> accessed on 23rd March 2020.

⁸⁴'Cuban doctors travel to Italy to help fight Covid-19,' (*MR Online*, 23 March 2020), <<https://mronline.org/2020/03/23/cuban-doctors-travel-to-italy-to-help-fight-covid-19/>> accessed on 23rd March 2020.

⁸⁵T.L. Beauchamp and J.F. Childress, *Principles of Biomedical Ethics*, (Fourth Edition, Oxford University Press 1994).

As an ethical principle, autonomy refers to the ability of a patient to retain control over his or her body. A health professional must determine the wishes of the patient in order to protect his or her autonomy.⁸⁶ The relationship between a patient and a health professional is based on trust, as the patient relies on the expertise of the professional.⁸⁷ Autonomy forms the basis of the doctrine of informed consent.⁸⁸ In healthcare setting, informed consent requires that patients must be informed of the medical interventions they are to be subjected to and must consent to it. A patient's refusal to treatment forms part of this rubric. An extension of the autonomy strand is that where a patient is not capable due to the illness to give consent, then this responsibility is delegated to the next of kin. The contagious nature of COVID-19 tests this principle as patient isolation is part of the treatment protocol. As such where medical procedures have to be made and the patient is not capable of giving consent, the next of kin can only give consent based not on their own assessment of the condition of the patient, but rather on the explanation given by the health professional. Furthermore, given that there is no cure yet for COVID-19, and health care systems do get overwhelmed such that opportunities for second medical opinions may not be available, the consent giver even where it is the patient, has to exclusively rely on the opinion of the health professional.

The beneficence and non-maleficence principles are related. Beneficence requires a health professional to do all they can to benefit a patient, with all recommended procedures and treatments intended to achieve the best outcome to a patient. Non-maleficence on the other hand is about a health professional's decision concerning a patient "doing no harm" to another individual or society even if such a decision may benefit the patient.⁸⁹ These two principles are

⁸⁶ Erlanger Medical Ethics Orientation Manual, 2000,
<<http://www.utcomchatt.org/docs/biomedethics.pdf>> on 23rd March 2020.

⁸⁷Helen Senderovich, 'The Ethical Responsibility of Health Care Providers to Provide Treatment to Smokers,' (2015) 23 Annals of Long-Term Care: Clinical Care and Aging 37.

⁸⁸ Jonathan Breslin, Susan MacRae, Jennifer Bell & Peter Singer, 'Top 10 Health Care Ethics Challenges Facing the Public: Views of Toronto Bioethicists,' (2005), 6 BMC Medical Ethics E5, DOI: <10.1186/1472-6939-6-5> (accessed 23 March 2020).

⁸⁹ Beauchamp and Childress, Supra note 87.

centered around patient interest with beneficence being a positive requirement and non-maleficence requires restraint from action that may damage a patient's interest.⁹⁰ The distinction between the two principles lies in the character of the avoidance of positive harm and the demand for positive benefit.⁹¹ Doing nothing may constitute non-maleficence or a violation of the principle of beneficence depending on the circumstances.

The principles of beneficence and non-maleficence operate all other things being equal. Presumably then, a health professional will do all they can to benefit a patient when all the health commodities and products necessary to enable the professional execute the medical protocols necessary are available. Being a contagion, treatment of COVID-19 patients demands a lot from a health system: from personal protection equipment (PPEs) for the health professionals, ICU beds and ventilators for the patients. Cases have been reported in China, Spain and Italy of high incidences of health professional infections courtesy of unavailability of PPEs in health systems suggesting health professional putting their lives at risk in the quest to do all they can to benefit a patient. Unavailability of adequate numbers of ventilators in hospitals is compromising COVID-19 patient care⁹² and as such the health professional has to make life and death decisions which in some circumstances may be seen to be a violation of the principle of non-maleficence, e.g., which patient to put on a ventilator and which one not to.

Justice, as a principle of healthcare ethics, demands that medical goods and services including benefits and burdens of care be distributed fairly across society.⁹³ Thus, two patients with the same medical need ought to be in general, treated equally.⁹⁴ Criteria such as race, citizenship, and celebrity

⁹⁰Erlanger Medical Ethics Orientation Manual, 2000, supra note 88

⁹¹Ibid

⁹² Noah Higgins-Dunn and William Feuer, 'Gov. Cuomo says New York needs ventilators now, help from GM and Ford "does us no good"' <<https://www.cnn.com/2020/03/24/gov-cuomo-says-new-york-needs-ventilators-now-help-from-gm-ford-does-us-no-good.html>>, accessed 23 March 2020.

⁹³ Erlanger Medical Ethics Orientation Manual, 2000, supra note 88

⁹⁴ Beauchamp and Childress, supra note 87.

status are not permitted to play a role in organ allocation listing decisions.⁹⁵ Furthermore, it is also argued that excluding patients based on ability to pay may lead to erosion of public trust in a health system.⁹⁶ Ultimately, justice in the context of healthcare ethics requires that some groups should not succumb to death and disease disproportionately while advantages protect others, due to disparities in health care provision among the population (Patel, 2015). Obviously, this responsibility runs beyond the scope of a health professional, notwithstanding being at the penultimate end of attainment of social justice with regard to healthcare. COVID-19 has exposed the soft underbelly of what were hitherto considered to be strong health systems. In the US for example, claims have been made that National Basketball Association (NBA) players got ahead of the line for COVID-19 tests and high-profile citizens were tested despite being asymptomatic.⁹⁷ Incidences of diversion or blockade of material shipments to countries ostensibly based on trade rules, and the idea to direct supplies to those in need rather than those with the ability to pay have been reported.⁹⁸ While these examples are only indicative, it is apparent that parity and equality of access to health care will remain tested in the course of prevention, treatment and care of COVID-19 patients.

Does the law come in aid in any way to complement the ethical principles in place especially in a country such as Kenya? The Constitution, by providing for the right to health as a social economic right (article 43), must be seen as forming a solid foundation for supplementary application of these ethical

⁹⁵ Nikhil A. Patel, 'Health and Social Justice: The Role of Today's Physician,' [2015] 17 AMA J Ethics 894 doi: <10.1001/journalofethics.2015.17.10.fred1-1510> accessed 6 April 2020.

⁹⁶ Aaron Wightman and Douglas Diekema, Should an Undocumented Immigrant Receive a Heart Transplant? [2015] 17 AMA J Ethics 909, doi: <10.1001/journalofethics.2015.17.10.peer1-1510> accessed 6 April 2020.

⁹⁷ Juliet Eilperin and Ben Golliver, 'VIPs go to the head of the line for coronavirus tests,' *Washington Post*, (Washington, DC, 19 March 2020) <<https://www.washingtonpost.com/health/2020/03/19/nba-players-celebrities-coronavirus-test-access/>> accessed on 23rd March 2020.

⁹⁸ Jan Dahinten and Matthias Wabl, 'Germany Faces Backlash From Neighbors Over Mask Export Ban,' *Bloomberg*, (New York, 9 March 2020) <<https://www.bloomberg.com/news/articles/2020-03-09/germany-faces-backlash-from-neighbors-over-mask-export-ban>> accessed on 24th March 2020.

principles. While health law in Kenya is still at infancy courtesy of a myriad factors- weak health research and development capacity, poor health delivery infrastructure, fragmentation in hierarchy of health care to name a few, a number of legislation further cement these ethical principles into Kenya's health system and provide a basis for decision making in treatment of pandemics. For example, the Consumer Protection Act⁹⁹ provides legislative basis for furtherance of the autonomy principle, which is not only grounded in the constitutional provisions but also in the Medical Practitioners and Dentists Act.¹⁰⁰ The Public Health Act¹⁰¹ and the Occupational Safety and Health Act¹⁰² provide for the occupational and hygienic conditions for places, such as where health professionals work, should meet. A health professional therefore in trying to provide the best care possible to a patient must bear in mind that legislation requires that in the first place, the professional must be properly equipped for personal safety. The dilemma whether a specific medical procedure should be undertaken, i.e. that the health professional should do nothing because PPEs are not available is not foreseen by the law. Finally, Article 27 of the Constitution is broadly expressive on equality and freedom from non-discrimination. Equality in enjoyment of all rights and fundamental freedoms is guaranteed. Discrimination on all grounds is chastised. As such it behooves the State to ensure that healthcare services are accessible in an equal and non-discriminatory manner. This is particularly critical with COVID-19, a disease whose mode of transmission is disobedient to economic and social status and is overwhelming health systems in unprecedented manner. Finally, the Code of Professional Conduct and Discipline promulgated by the Medical Practitioners and Dentists Board fortifies the ethical principles of medical ethics and gives them a force of law.

7. Guidelines on ethical and legal issues presented by the COVID 19 pandemic

Effective responses to COVID-19 will require that a delicate balance be struck between the many competing interests and values that the pandemic has

⁹⁹ No. 46 of 2012

¹⁰⁰ Cap. 253.

¹⁰¹ Cap. 242.

¹⁰² No. 15 of 2007.

thrown up for Kenya. It is proposed that Kenya's interventions be structured around respect, protection, promotion and fulfilment of human rights. A rights-based approach increases the likelihood that COVID-19 measures are less likely to be inordinately burdensome to certain individuals or groups and that the inherent dignity of all is held paramount. A rights-based approach also lessens the specter of discrimination both in the context of allocation of health related goods, facilities and services and in the removal of stigma that may be directed against those perceived to be afflicted by COVID-19. While the Constitution may provide general principles, there are specific ethical and legal guidelines that should be at the forefront of measures taken to deal with COVID-19.

7.1 Equitable allocation of health goods, facilities and services and underlying determinants of health

Government must prioritise its resource allocation so that no section of the population is unable to access and utilize health resources such as hospitals, personnel, medicines and other relevant primary health needs. As such, both National and County Governments must ensure that facilities are erected or improved and made accessible to the population in an equitable manner. Facilities must have the relevant health personnel in sufficient numbers and who must be properly equipped. In the long run, the Government must assess the state of underlying determinants of health such food, sanitation, water and shelter with a view to establishing how shortages can be ameliorated so as to improve the general health of the population. This means that investment in preventive health care must also be enhanced.

7.2 Confidentiality, privacy and human dignity

The virulent nature of COVID-19 and the public danger it poses must not be excuses to undermine the very core of rights that define a human being. In all instances, confidentiality must be promoted and health information that should be held private should remain so. Disclosure must be absolutely justified and be within the bounds of the Constitution. Disclosure only meant to expose patients or their family is a violation because it will likely be followed by stigmatization and discrimination. Known patients must be accorded full dignity and be treated as patients and not threats. If information is required

for public purposes such as stating morbidity and mortality, such information must be verified. Sensationalised reporting or opinions should be discouraged.

7.3 Public health responsibilities for members of the public

The risk that COVID-19 represents requires that members of the public be responsible for slowing down and eliminating the spread of the pandemic. Personal hygiene measures such as washing hands at regular intervals must be taken seriously. Directives and or recommendations such as social distancing must be adhered to. Citizens must respect self-isolation and self-reporting measures imposed or recommended by the Government. Moreover, citizens must ultimately realise that the right to health does not entail the right to be healthy meaning that many steps for health are self-driven. Citizens also have the responsibility to look out for their neighbours. While they must be vigilant on the risks posed by infected neighbours, they must not violate the rights of others in the guise of vigilance. They must not spread false and alarmist information because this is not only dangerous but it also diverts resources which would otherwise be spent more efficiently.

7.4 Health professionals and the ethics of prevention, treatment and care

Because, health professionals are in the front line in the fight against COVID-19, they are at a higher risk of infection than the general population. They must be properly trained and equipped. The Government must provide not only personal protective equipment, but also other tools (such as testing kits) that enable health professionals provide effective care for patients. Properly equipped healthcare workers will have no excuse to refuse to attend to persons suspected of being COVID-19 positive (or patients). Refusal to render care where no risk is posed to the carer must attract appropriate sanctions as contemplated under law.

7.5 Public participation and responsibility

COVID-19 is a communal threat that requires concerted responses. Infection of one individual may mean infection of all. Therefore, communities in Kenya, regardless of how constituted should be encouraged to take part in the formulation and implementation of measures meant to temper the spread of

COVID-19. The ethics of public participation in decision-making inherent in the Constitution must be tailored to enable the community be part of the solution.

7.6 Restriction of rights such as freedom of movement and freedom of association

Increasingly, the Government is having to impose restrictions on certain individual rights as a way of stemming the spread of COVID-19. It may be necessary that the freedom of movement and the freedom of association be limited as a response to the pandemic. In such situation, it is important that the limitations be done in full compliance with Constitutional clauses on limitation of rights, that is to say, the limitation must be specified in law in addition to it being necessary in an open and democratic society. Enforcement of the restrictions must also comply with the law and be reasonable. Arbitrary arrests and beating of citizens must not be allowed and where it so happens appropriate sanctions ought to be imposed.

7.7 Access to justice

Since responses to COVID-19 are likely to be extra-ordinary, there is increased potential of official overreach. It is important that courts and other institutions are available to provide an opportunity for redress of possible government excesses. While court operations can be structured around the public health concerns, tools that enable citizens to seek justice need not be placed completely out of reach.

7.8 International responsibility

COVID-19 having been declared an international pandemic, the international community must work together to rid the world of COVID 19 by providing resources to improve access to health goods, facilities and services. Global health organisations must allocate available resources equitably and pay special regard to countries that are especially vulnerable.

8. Conclusion

COVID-19 is a pandemic of international concern. The WHO relying on international instruments public health pandemics such as the IHR has been

coordinating efforts to deal with COVID-19 at the international level. The crisis will be handled if international cooperation and assistance is also emphasized. The virus has hit many countries including Kenya. As expected, the authorities have declared various emergency public health measures whose challenges are addressed in this paper. The main question addressed how to protect public health in a legally and ethically sound manner. There is a need to put in place proper guidelines to manage available resources, and this should not be based on utilitarian but egalitarian understanding of the crisis especially in the context of developing countries where resources to fight the virus are constrained. It also appears that criminalizing self-quarantine may achieve poor outcomes since many people will hide as opposed to presenting themselves for testing as a result of stigma. Individual autonomy is also usually restricted in the interest of public health and isolation and treatment may be made without consent of the patient. The authorities however should be prepared to bear the primary economic burden of all the public health measures put in place including cost of quarantine where necessary. In the context of extreme measures such as curfews and national lockdowns, contingency measures should be put in place to deal with emerging situations on a case by case basis. Lastly, there should be developed a comprehensive guideline covering the rights, duties and/or responsibilities of the government, health professionals, (international) community, and patients. The existence of such a guideline in the country will help achieve right to health ends than is currently being realized.

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Africa's Regional Co-Operation and Integration: The Corona Virus Litmus Test

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Abstract

Corona Virus Disease (COVID-19) pandemic is taking no prisoners. It has deeply tested and pierced the fabric of the concept of African integration which is greatly championed by the African Union (AU) and sub-regional economic communities (RECs). The reactions by African states to COVID-19 expose the fallacious presupposition of collective good will in regional integration instruments and structures, widely supported by collective security idealists. COVID-19 has shown the inherent reflex towards the national interest concept of realism as backed by sovereignty, which is widely supported by nationalists and interested external actors. The paper focuses on cross-country human movement, a core component of integration. For a closer, deliberate and focused illustration of the responses, the paper maps out a three dimension tabular analysis, looking at: a regional (AU), sub-regional (8 Regional Economic Blocs (RECs) and national levels. Additionally, the paper briefly looks at China's and United Kingdom's response as states that have had significant influence over Africa's domestic, regional and international relationships. The paper seeks to enrich discussions, evaluations, moulding and implementation of practical models of integration.

Key words: *African regional cooperation and integration, Cooperation, Coronavirus, Covid-19, Economic Communities, Cross-border.*

1. Introduction

Initial cases of Covid-19 were identified in hospitalized patients in Wuhan, China, between December 2019 and January 2020.

¹ Human-to-human transmission was indicated as a core way through which the virus was spreading.² The virus had therefore been gradually spreading.³ It was however reported that outbreaks were successfully controlled by isolation of patients.⁴ One of the main challenges identified was the apparent presence of many mild infections which impairs the ability to immediately detect presence of virus.⁵ Effectively, this meant that infected people could unknowingly transmit the virus at any point, both domestically and externally during movement. By mid-January 2020, several countries had reported sporadic cases of infected people, which were reportedly among travellers returning from other jurisdictions.⁶ The reported transmission scenarios aroused great concerns. As the reported cases of infections and deaths increased and with most infected people being external returnees, countries started putting in place measures on how to handle arrivals so as to minimise

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The views expressed in this article are the authors' own and not a representation of the views of their affiliated institutions.

¹ Na Zhu and others, 'A Novel Coronavirus from Patients with Pneumonia in China, 2019' [2020] New England Journal of Medicine.

² Qun Li and others, 'Early Transmission Dynamics in Wuhan, China, of Novel Coronavirus-Infected Pneumonia' (2020) 382 New England Journal of Medicine 1199.

³ Ibid.

⁴ Ibid.

⁵ Ibid.

⁶ Lan T Phan and others, 'Importation and Human-to-Human Transmission of a Novel Coronavirus in Vietnam' [2020] The new england journal of medicine 3.

the spread. On 30 January 2020, the World Health Organisation (WHO) declared COVID-19 outbreak a Public Health Emergency of International Concern. These developments have exposed the fluid and constantly evolving architecture of international peace and security.⁷ Table 1 below shows that most countries declared high levels of cross-country border restrictions between 13th to 22nd March 2020, as further discussed below. One of the immediate issues for consideration in imposing the various measures by states was their effect on their domestic, regional and global obligations under the various international law principles and agreements. This paper focuses mainly on the effect relating to regional integration.

Having established the relevance of COVID-19 in this discussion, the paper next examines various conceptual underpinnings in terms of which any reactions would be formulated, primarily focusing on the subject of African regional cooperation and integration. It then analyses countries' immediate reactions to COVID-19 within the context of integration. The paper hypothesises that even when states are willing to commune, when confronted with hurdles, the first reflex is to recoil and make all adjustments necessary to save the sovereign. While there are various aspects and forms of integration, this paper focuses on movement of people and physical goods.

2. Nature and Ramifications of the Cross-Country Border Restrictions

Most countries quarantined known cases of confirmed COVID-19 within their borders, including nationals of other countries. Other forms of restrictions included imposition of full or partial lockdowns on movement, shutting down airports, imposing travel restrictions and completely sealing of land, international air and maritime borders.⁸ These restrictions effectively left

⁷ H Njoki Mboce, 'India–Africa Co-Operation on Maritime Security: Need for Deeper Engagement' [2019] Strategic Analysis 1.

⁸ 'Coronavirus: Travel Restrictions, Border Shutdowns by Country'

<<https://www.aljazeera.com/news/2020/03/coronavirus-travel-restrictions-border-shutdowns-country-200318091505922.html>> accessed 31 March 2020; Andrea Salcedo and Gina Cherus, 'Coronavirus Travel Restrictions, Across the Globe' *The New York Times* (1 April 2020) <<https://www.nytimes.com/article/coronavirus-travel-restrictions.html>> accessed 4 April 2020.

travellers stranded, those with expiring visas further experienced great panic.⁹ They also threatened threaten lines of commodity supply.¹⁰

3. Conceptual and Theoretical Factors Affecting Integration

3.1 Nationalism vs Pan-Africanism

Africa's integration, as with other regional integration efforts, faces various challenges.¹¹ These militating factors include conflicting national identities of legal, political and economic systems, social elites and migration challenge.¹² Often, politicians mobilise, whip public opinion as well as influence and shape legislation based on populist forces disguised under nationalist arguments.¹³ Nationalists argue that national interests trump any other external agreements while integrationists argue that national interests would be best secured if more states adopt a collective approach.¹⁴ Elites often develop identity narratives based on their experience and biases, which they are then able to influence and condition using their financial and social capital.¹⁵ It is however important to note that there are genuine ideology based proponents of both nationalism and integration.

3.2 Post-colonial Hang-Over and Global Geo-political Dynamics

Africa also faces extra-regional influences mainly from China, the United States of America and United Kingdom, which are shaped by both historical and current global geo-politics and economic dynamics.¹⁶ Idealists further argue that even without agreements, circumstances exist that would require countries to generously apply their positions of advantage in favour of their

⁹ 'Coronavirus and Aid: What We're Watching, 2-8 April' (*The New Humanitarian*, 2 April 2020) <<https://www.thenewhumanitarian.org/news/2020/04/02/coronavirus-humanitarian-aid-response>> accessed 4 April 2020.

¹⁰ Ibid.

¹¹ Tanja A Börzel and Thomas Risse, 'Identity Politics, Core State Powers and Regional Integration: Europe and Beyond' (2020) 58 JCMS: Journal of Common Market Studies 21.

¹² Ibid.

¹³ Ibid.

¹⁴ H Njoki Mboce, 'India–Africa Co-Operation on Maritime Security: Need for Deeper Engagement' (2019) 43 Strategic Analysis 261.

¹⁵ Börzel and Risse (n 11).

¹⁶ Rawson W Rawson, 'The Territorial Partition of the Coast of Africa', *Proceedings of the Royal Geographical Society and Monthly Record of Geography* (JSTOR 1884).

disadvantaged neighbours (state behaviour vs neighbour's principle). The idealists have been challenged by the analogy that during flights, passengers are advised to wear their masks first before assisting others, in the event of emergencies. Covid-19 has presented a rude conceptualisation of these debates.

Nonetheless, Africa has demonstrated increasing commitment towards integration.¹⁷ Most recent regionally documented efforts have been through Africa's agenda strategic blue print, that seeks to achieve an inclusive and sustainable pan-African development through Pan-Africanism and African Renaissance, which was adopted on 31 January 2015 at the 24th Ordinary Assembly of the Heads of State and Governments of the African Union in Addis Ababa (**Agenda 2063**); and the Agreement Establishing the African Continental Free Trade Area which entered into force on 30 May 2019 for the 24 countries that had deposited their instruments of ratification (**AfCFTA**).¹⁸

4. Methodology, Scope

One of the effects of Covid-19 as discussed in this paper is introduction of governments' limitations on physical movement. In this regard this research is mainly informed by desktop qualitative research as well as online interview. It focuses on cross-border movement as a core aspect of integration, it therefore examines government interventions on border operations. In order to provide a succinct context, the paper looks mainly at African countries at three levels: regional, sub-regional and domestic, the implementation of the various substantive agreements is therefore effectively tested.

5. Beyond Theory: Testing National Commitments

As at 30th March 2020, the East African Community (**EAC**) is the only sub-regional community that appeared to have adopted an extensive formal collective approach to the Covid-19 response, including relating cross-

¹⁷ 'Agreement Establishing the African Continental Free Trade Area | African Union' <<https://au.int/en/treaties/agreement-establishing-african-continental-free-trade-area>> accessed 20 November 2019.

¹⁸ 'Agenda 2063 | African Union' <<https://au.int/en/agenda2063>> accessed 20 December 2018; 'Agreement Establishing the African Continental Free Trade Area | African Union' (n 18).

national boundary movements.¹⁹ Other RECs such as Economic Community of Central African States (**ECCAS**), Southern Africa Development Community (**SADC**) and Inter-Governmental Authority on Development (**IGAD**) spoke generally and even then mainly focused on direct monetary issues.²⁰ The other four RECs were yet to jointly substantively speak to these issues. This position is based on a survey of the official websites of all the RECs.

On 25th March 2020 respective member states' ministers responsible for Health and East African Community Affairs issued a joint statement by Video Conference, on Covid-19 Preparedness and Response in East African Community Region.²¹ All member states were represented. It is reported in the joint statement that the meeting sought to have member states share existing knowledge and information on the COVID-19 pandemic, map up containment strategies to stem out any further spread of the disease in the region and develop a clear plan to mitigate against its impacts in the region.²² It was reported that as at 24th March 2020, the region had reported a total of 91 confirmed cases (Uganda: 14; Kenya: 25; Rwanda: 40; and Tanzania: 12) in 4

¹⁹ 'Joint Statement by the Ministers Responsible for Health and East African Community Affairs Issued on 25th March 2020 on COVID-19 Preparedness and Response in East African Community Region' <<https://www.eac.int/statements/1705-joint-statement-by-the-ministers-responsible-for-health-and-east-african-community-affairs-issued-on-25th-march-2020-on-covid-19-preparedness-and-response-in-east-african-community-region>> accessed 3 April 2020; 'ECCAS - Economic Community of Central African States | United Nations Economic Commission for Africa' <<https://www.uneca.org/oria/pages/eccas-economic-community-central-african-states>> accessed 18 November 2019.

²⁰ 'ECCAS - Economic Community of Central African States | United Nations Economic Commission for Africa' (n 20); 'Southern African Development Community :: Extra-Ordinary Meeting of SADC Ministers of Health on Covid-19' <<https://www.sadc.int/news-events/news/extra-ordinary-meeting-sadc-ministers-health-covid-19/>> accessed 4 April 2020; Webmaster, 'IGAD - IGAD Executive Secretary Message on COVID-19' <<https://igad.int/coronavirus/2396-igad-executive-secretary-message-on-covid-19>> accessed 4 April 2020.

²¹ 'Joint Statement by the Ministers Responsible for Health and East African Community Affairs Issued on 25th March 2020 on COVID-19 Preparedness and Response in East African Community Region' (n 20).

²² Ibid.

out of the 6 Partner States. There were no confirmed cases from Republic of South Sudan and Republic of Burundi.²³

Several directives were issued and resolutions made by the EAC. The summary below relating to cross border movement across member states shows that the community adopted a more collective approach as opposed to a closure of borders. This common statement and approach notwithstanding, the table below shows that a significant level of contradiction in the statements and/ or measures indicated/ adopted by the member states, with most of them announcing lock down measures. While it would have been interesting to examine the effect of these positions on the ground, this however is not the scope of this current discussion. The Ministers, inter alia:

- Directed all member states to:
 - i. Continue implementing mandatory quarantine for 14 days for all travellers to the region;
 - ii. Implement strict screening procedures at all border points in order to avoid imported cases;
 - iii. Implement 100% exit and entry screenings by applying the multilayer mechanism to avoid some loopholes, such as transit Passengers;
 - iv. Establish a surveillance system to monitor crew health and enable contact tracing;
 - v. Have the respective embassies and high commissions coordinate their citizens who may have been affected by the closure of borders and to enable them move to their final destination in the EAC region;
 - vi. Support local companies, to ensure the local production and availability of key consumables / products used in COVID -19 response including hand sanitizers, medical products, soap, among others; and
 - vii. Provide additional contingency and emergency funds to address gaps in prevention, impact mitigation and other interventions to mitigate impact of COVID -19 and further urged EAC Secretariat

²³ Ibid.

- and each Partner State to mobilize resources, and invest in public health systems to ensure resilience and health security
- viii. Directed the EAHRC to synthesize and conduct research on COVID-19 and inform the Partner states on new technologies, advances in care and treatment, vaccines, behavior of the virus, diagnostic among others, to inform policy and practice in the region;
 - ix. Ensure that trucks / vehicles carrying goods:
 - a) Have only 2 - 3 crew members per vehicle to facilitate smooth border crossing in the region;
 - b) Crew members are in good health, crew are screened and found to be at high risk or positive for COVID-19, the truck will be decontaminated before it is allowed to continue to its final destination and the crew members will be quarantined for 14 days according to the set national guidelines;
 - c) In the event that the crew are quarantined while in transit, truck owners / operators make necessary arrangements to backup crew to ensure that goods are delivered to the intended destination;
 - d) Truck drivers are required to declare their final destination and are urged to stop only at designated points along the transport corridors so as to limit chances of spread of COVID-19 during transit;
 - e) The crew for cargo planes and vessels will be determined by the specifications of the aircraft or ship and set international guidelines. The crew will be quarantined at a government designated hotel for the period of their stay;
- Resolved to:
 - i. Facilitate free movements of goods and services in the region;
 - ii. Strengthen information sharing through press conferences and linkage of national task forces to facilitate quick response, continuous reporting and to facilitate contact tracing for potential COVID-19 exposed persons;
 - At a country level, Benin stands out with regard to the restrictions. Notably, the country has been among the last to effect movement

restrictions, with quarantine and suspension of public transportation starting on March 30 2020 and even then, only in specific cities.²⁴ Reportedly, as at March 30 2020 Benin's land border crossings were only limited, implementation of strict control measures at border checkpoints declared and air travels not banned, even though travellers entering Benin by air were required to undergo a 14-days quarantine.²⁵

Table: Specific regional and country analysis of reactions to Covid -19, in relation to border operations is contained in the table below.

Regional Economic Communities	Member State	Reaction in Relation to Border Operations
AMU (Arab Maghreb Union)*	<u>Algeria</u>	On March 17, Algerian President Tebboune announced immediate closure of all land borders and the suspension of non-cargo international air and maritime travel. ²⁶ Effectively, all commercial international flights were immediately suspended. ²⁷ Suspension of domestic flights was effective March 22 2020. ²⁸
	<u>Libya</u>	Borders have been closed and flights prevented from traveling in/out. ²⁹

²⁴ 'Benin: Authorities Enact Restrictive Measures Due to COVID-19 /Update 1' (*GardaWorld*)

<<https://www.garda.com/crisis24/news-alerts/326306/benin-authorities-enact-restrictive-measures-due-to-covid-19-update-1>> accessed 4 April 2020.

²⁵ Ibid.

²⁶ 'COVID-19 Information' (*U.S. Embassy in Algeria*, 30 March 2020)

<<https://dz.usembassy.gov/covid-19-information/>> accessed 31 March 2020.

²⁷ Ibid.

²⁸ Ibid.

²⁹ 'Libyan Gov't Suspends Flights in Wake of COVID-19'

	<u>Mauritania</u>	On March 15 all international and local flights were suspended. ³⁰ On March 22, government closed all land and sea borders, and air space. ³¹
	Morocco	Morocco initially adopted a country to country staggered approach to closure of borders and suspension of flights starting with Spain on March 13 2020. ³² It subsequently suspended all flights into the country. ³³
	Tunisia	On March 16, suspended all international flights and closed its borders. ³⁴
CEN-SAD - The Community of Sahel-Saharan States*	Benin	No reported reaction
	Burkina Faso	In mid-March, the government closed its air and land borders to

<<https://www.aa.com.tr/en/middle-east/libyan-govt-suspends-flights-in-wake-of-covid-19/1768168>> accessed 31 March 2020.

³⁰ 'COVID-19 Information' (*U.S. Embassy in Mauritania*, 24 February 2020) <<https://mr.usembassy.gov/covid-19-information-2/>> accessed 4 April 2020.

³¹ 'COVID-19 Information' (n 27).

³² 'COVID-19 Alert: Morocco Closes Border with Spain March 13 to Stem Spread of COVID-19' (*WorldAware*, 13 March 2020) <<https://www.worldaware.com/covid-19-alert-morocco-closes-border-spain-march-13-stem-spread-covid-19>> accessed 4 April 2020; AfricaNews, 'Border Closures: Morocco "isolates" Itself to Control Coronavirus Spread' (*Africanews*, 15 March 2020) <<https://www.africanews.com/2020/03/15/border-closures-morocco-isolates-itself-to-control-coronavirus-spread/>> accessed 4 April 2020.

³³ 'Coronavirus: Travel Restrictions, Border Shutdowns by Country' (n 8).

³⁴ 'Coronavirus: Tunisia Suspends International Flights to Help Combat Virus Spread' (*Middle East Eye*)

<<http://www.middleeasteye.net/news/coronavirus-tunisia-close-borders-combat-virus-spread>> accessed 31 March 2020.

		all but military personnel and cargo. ³⁵
	Central African Republic	No reported reaction
	Chad	No reported reaction
	Comoros	As discussed under COMESA
	Côte d'Ivoire	As discussed under ECOWAS
	Djibouti	As discussed under IGAD
	Egypt	The Egyptian government closed all borders since March 19, 2020. ³⁶
	Eritrea	As discussed under IGAD
	Gambia	Closed its borders and airspace on March 26, 2020. ³⁷
	Ghana	The country closed all borders from 22 nd March, 2020 and ordered a mandatory quarantine for anyone who entered the country before midnight that day. ³⁸
	Guinea-Bissau	As discussed under ECOWAS
	Libya	As discussed under AMU

³⁵ 'Coronavirus and Aid: What We're Watching' (*The New Humanitarian*, 26 March 2020)

<<https://www.thenewhumanitarian.org/news/2020/03/26/coronavirus-humanitarian-aid-response>> accessed 31 March 2020.

³⁶ 'News Roundup: The MENA Region in the Time of COVID-19 | Wilson Center' <<https://www.wilsoncenter.org/article/news-roundup-mena-region-time-covid-19>> accessed 31 March 2020.

³⁷ 'Health Alert: The Gambia, Government Closes Borders and Airspace and Implements Quarantine Measures'

<<https://www.osac.gov/Country/Gambia/Content/Detail/Report/d2fab26-4755-4287-8986-184ab14cd1a6>> accessed 31 March 2020.

³⁸ 'Coronavirus: Travel Restrictions, Border Shutdowns by Country' (n 8).

	Mali	As discussed under ECOWAS
	Mauritania	As discussed under AMU
	Morocco	As discussed under AMU
	Niger	Closed its land borders and international airports in Niamey and Zinder. ³⁹
	Nigeria	All of Nigeria's land borders, which had been under partial closure, was completely closed for human traffic for four weeks effective 23 rd March, 2020. ⁴⁰
	Senegal	The Government of Senegal has suspended all international air travel (with limited exceptions). The restriction came into effect on March 20 and will last until April 17, 2020. Land borders are closed. ⁴¹
	Sierra Leone	On March 27, 2020, it closed its borders for a period of 30 days. ⁴²
	Somalia	As discussed under IGAD
	Sudan	On 16 th March, 2020, it closed all airports, ports and land crossings. Only humanitarian, commercial and technical support shipments

³⁹ 'Niger Reports First Confirmed COVID-19 Case'

<<https://www.aa.com.tr/en/africa/niger-reports-first-confirmed-covid-19-case/1772561>> accessed 31 March 2020.

⁴⁰ 'Coronavirus: Buhari Signs Lockdown Regulations, Cases Hit 131, 2 Deaths | Africanews'

<<https://www.africanews.com/2020/03/31/nigeria-confirms-third-coronavirus-case-index-patient-fully-recovers/>> accessed 31 March 2020.

⁴¹ 'COVID-19 Information' (n 27).

⁴² AfricaNews, 'Sierra Leone Confirms Index Case of Coronavirus' (*Africanews*, 31 March 2020)

<<https://www.africanews.com/2020/03/31/virus-free-sierra-leone-records-covid-19-scuffles-over-quarantine-at-airport/>> accessed 31 March 2020.

		were excluded from the restrictions. ⁴³
	Togo	On 21 st March, 2020, it shut down its land borders. ⁴⁴
	Tunisia	As discussed under AMU
COMESA - Common Market for Eastern and Southern Africa*	Burundi	No reported reaction
	Comoros	No reported reaction
	DRC	It has shut down national borders in a bid to stop the potential spread of the coronavirus pandemic. ⁴⁵
	Djibouti	As discussed under IGAD
	Egypt	As discussed under CEN-SAD
	Eritrea	As discussed under IGAD
	Ethiopia	On 22 nd March, 2020 it closed down all land borders, with the exception of incoming essential goods to the country. ⁴⁶
	Kenya	As discussed under EAC
	Libya	As discussed under CEN-SAD
	Madagascar	No reported reaction

⁴³ 'Sudan: Government Closes Borders Due to COVID-19 on March 16 /Update 1' (*GardaWorld*)

<<https://www.garda.com/crisis24/news-alerts/323581/sudan-government-closes-borders-due-to-covid-19-on-march-16-update-1>> accessed 31 March 2020.

⁴⁴ FAAPA, 'Togo Closes Borders over Coronavirus – FAAPA FR'

<<http://www.faapa.info/blog/togo-closes-borders-over-coronavirus/>> accessed 31 March 2020.

⁴⁵ 'DRC Shuts Borders over Coronavirus' (*Daily Nation*)

<<https://www.nation.co.ke/news/africa/DRC-shuts-borders-over-coronavirus/1066-5503982-bej0liz/index.html>> accessed 31 March 2020.

⁴⁶ 'Ethiopia's Coronavirus Tally Hits 35 amid Race to Bolster Ventilator Stockpile | Africanews'

<<https://www.africanews.com/2020/04/03/ethiopia-s-coronavirus-rules-crowd-ban-free-transport-regulate-essentials-etc/>> accessed 3 April 2020.

	Malawi	As discussed under SADC
	Mauritius	Mauritius has closed its borders to all foreign nationals, including South Africans, effective from 19 March at 20:00. ⁴⁷
	Rwanda	As discussed under EAC
	Sudan	As discussed under CEN-SAD
	Swaziland	As discussed under SADC
	Seychelles	All cruise and leisure ships are not allowed entry into Seychelles waters until further notice. Any passenger arriving from ANY country (except returning Seychellois citizens) will NOT be allowed to enter Seychelles. ⁴⁸
	Uganda	As discussed under EAC
	Zambia	As discussed under SADC
	Zimbabwe	As discussed under SADC
EAC – East African Community	Kenya	As of March 25th, The Government of Kenya suspended all international flights in and out of Kenya. ⁴⁹
	Uganda	President Museveni on Saturday 21 st March, 2020 evening ordered the closure of all Ugandan borders for both exits and entries on grounds. ⁵⁰

⁴⁷ 'UPDATE: Kulula and British Airways to Suspend All Flights in SA for Lockdown | Traveller24'

<<https://www.traveller24.com/News/Alerts/all-the-airlines-that-have-cancelled-flights-to-affected-countries-due-to-covid-19-20200305-2>> accessed 3 April 2020.

⁴⁸ 'COVID-19 - Seychelles' (*U.S. Embassy in Mauritius & Seychelles*, 17 March 2020)

<<https://mu.usembassy.gov/covid-19-seychelles/>> accessed 3 April 2020.

⁴⁹ 'COVID-19 Information' (n 27).

⁵⁰ 'COVID-19: Travellers Stranded at Katuna as Uganda, Rwanda Close' (*Daily Monitor*)

	United Republic of Tanzania	No reported reaction
	Burundi	As discussed under COMESA
	Rwanda	On 21 st March, 2020, it closed its borders completely, except for goods and cargo and returning citizens, authorities said. ⁵¹
	South Sudan	As discussed under IGAD
ECCAS - Economic Community of Central African States (It has come up with policy guideline on trade for Africa to tackle covid-19) ⁵²	Angola	As discussed under SADC
	Burundi	As discussed under COMESA
	Cameroon	On March 17, the government said it shut down land, air and sea borders indefinitely, starting from March 18. All international flights are suspended, except for cargo planes, until April 17. ⁵³
	Central African Republic	As discussed under CEN-SAD
	Chad	As discussed under CEN-SAD
	Congo	<u>No reported reaction</u>
	DRC	As discussed under COMESA
	Equatorial Guinea	On Friday, March 13, Equatorial Guinea announced the closure of its land borders with Cameroon

<<https://www.monitor.co.ug/News/National/Coronavirus-stranded-Katuna-Uganda-Rwanda-close-borders/688334-5500126-4gc3w5/index.html>> accessed 3 April 2020.

⁵¹ Deutsche Welle (www.dw.com), 'Coronavirus: Rwanda Imposes Africa's First Lockdown | DW | 22.03.2020' (DW.COM) <<https://www.dw.com/en/coronavirus-rwanda-imposes-africas-first-lockdown/a-52878787>> accessed 3 April 2020.

⁵² 'Trade Policies for Africa to Tackle Covid-19 | United Nations Economic Commission for Africa'

<<https://www.uneca.org/publications/trade-policies-africa-tackle-covid-19>> accessed 3 April 2020.

⁵³ 'African Countries See "Rapid Evolution" of Pandemic: WHO | Time' <<https://time.com/5806476/coronavirus-cases-africa/>> accessed 3 April 2020.

		and Gabon, the suspension of all commercial international flights. ⁵⁴
	Gabon	As of March 21, all land, sea, and air borders are closed, with the exception of freight shipments, which are still permitted. ⁵⁵
	Rwanda	As discussed under EAC
	Sao Tome and Principe.	Non-resident foreign nationals are prohibited from entering the country as of March 20. ⁵⁶
ECOWAS - Economic Community of West African States*	Benin	As discussed under CEN-SAD
	Burkina Faso	As discussed under CEN-SAD
	Cape Verde	All sea borders closed and restricted flights from 18 March. ⁵⁷
	Côte d'Ivoire	All borders are closed in Ivory Coast until further notice. ⁵⁸
	Gambia	As discussed under CEN-SAD
	Ghana	As discussed under CEN-SAD

⁵⁴ 'Equatorial Guinea: Government Implements Travel Restrictions Due to COVID-19 March 13' (*GardaWorld*)
<<https://www.garda.com/crisis24/news-alerts/323826/equatorial-guinea-government-implements-travel-restrictions-due-to-covid-19-march-13>> accessed 3 April 2020.

⁵⁵ 'COVID-19 Information' (*U.S. Embassy in Gabon*)
<<https://ga.usembassy.gov/u-s-citizen-services/coronavirus-update/>> accessed 3 April 2020.

⁵⁶ 'Coronavirus Travel Updates: Which Countries Have Restrictions and FCO Warnings in Place? | Travel | The Guardian'
<<https://www.theguardian.com/travel/2020/mar/24/coronavirus-travel-updates-which-countries-have-restrictions-and-fco-warnings-in-place>> accessed 3 April 2020.

⁵⁷ Antonia Wilson, 'Coronavirus Travel Updates: Which Countries Have Restrictions and FCO Warnings in Place?' *The Guardian* (3 April 2020)
<<https://www.theguardian.com/travel/2020/mar/24/coronavirus-travel-updates-which-countries-have-restrictions-and-fco-warnings-in-place>> accessed 3 April 2020.

⁵⁸ 'Coronavirus: Travel Restrictions, Border Shutdowns by Country | Coronavirus Pandemic News | Al Jazeera'
<<https://www.aljazeera.com/news/2020/03/coronavirus-travel-restrictions-border-shutdowns-country-200318091505922.html>> accessed 31 March 2020.

	Guinea	No reported reaction
	Guinea Bissau	On March 17, authorities in Guinea-Bissau announced the closure of land borders and a ban on all flights landing at Osvaldo Viera International Airport beginning on Wednesday, March 18, 2020. ⁵⁹
	Liberia	No reported reaction
	Mali	No reported reaction
	Niger	As discussed under CEN-SAD
	Nigeria	As discussed under CEN-SAD
	Senegal	As discussed under CEN-SAD
	Sierra Leone	As discussed under CEN-SAD
	Togo	As discussed under CEN-SAD
IGAD – Intergovernmental Authority on Development*	Djibouti	On March 15, 2020 suspended all international flights. ⁶⁰
	Ethiopia	As discussed under COMESA
	Eritrea	No reported reaction
	Kenya	As discussed under EAC
	Somalia	Somaliland government has already closed its border with Djibouti, Ethiopia and Somalia due to fears of the spread of COVID-19.

⁵⁹ 'COVID-19 Information | U.S. Virtual Consulate in Guinea-Bissau'

<<https://gw.usmission.gov/covid-19-information/>> accessed 3 April 2020.

⁶⁰ 'African Nations Close Borders, Cancel Flights to Contain Coronavirus Spread' *Reuters* (15 March 2020) <<https://www.reuters.com/article/us-health-coronavirus-africa-idUSKBN2120YR>> accessed 4 April 2020.

		The border closure took effect on the 26th of March, 2020 and will last for three weeks. ⁶¹
	Sudan	As discussed under CEN-SAD
	South Sudan	South Sudan's government on March 23, 2020 closed all airports and land crossings. ⁶²
	Uganda	As discussed under EAC
<u>SADC - Southern African Development Community</u>	Angola	Closed its air, land and sea borders on March 20, 2020 for 15 days ⁶³
	Botswana	Botswana's government announced Tuesday 24 th March, 2020 that it was closing all border crossing points with immediate effect.
	DRC	As discussed under COMESA
	Lesotho	No reported reaction
	Madagascar	As discussed under COMESA
	Malawi	No reported reaction
	Mauritius	As discussed under COMESA
	Mozambique	No reported reaction

⁶¹ 'Somaliland's Tight Measures to Curb Deadly Coronavirus' (*East African Business Week*, 27 March 2020) <<https://www.busiweek.com/somalilands-tight-measures-to-curb-deadly-coronavirus/>> accessed 4 April 2020.

⁶² 'South Sudan Closes Airports and Borders over Coronavirus Fears' (*Radio Tamazuj*) <<https://radiotamazuj.org/en/news/article/south-sudan-closes-airports-and-borders-over-coronavirus-fears>> accessed 4 April 2020.

⁶³ 'Angola Closes Borders from 20 March – Macauhub' <<https://macauhub.com.mo/2020/03/19/pt-angola-encerra-fronteiras-a-partir-de-20-de-marco/>> accessed 4 April 2020; 'African Countries See "Rapid Evolution" of Pandemic: WHO | Time' (n 54).

	Namibia	Closed its borders on 24 th March, 2020. ⁶⁴
	Seychelles	As discussed under COMESA
	South Africa	<p>Cross-Border Road Transport</p> <ul style="list-style-type: none"> • All cross-border road passenger movements will be prohibited for the duration of the lockdown. (From midnight on Thursday 26 March until midnight on Thursday 16 April).⁶⁵ • Cross-border freight movement for essential goods will continue to and from our neighbouring countries <p>Aviation</p> <ul style="list-style-type: none"> • All international and domestic flights are prohibited, irrespective of the risk category of the country of origin. • Only essential air cargo will be allowed. However, cargo from high risk country must be sanitized.⁶⁶ <p>Maritime</p>

⁶⁴ 'Namibia: Authorities Ban Entry of All Foreign Nationals Due to COVID-19 March 24 /Update 1' (*GardaWorld*)

<<https://www.garda.com/crisis24/news-alerts/326116/namibia-authorities-ban-entry-of-all-foreign-nationals-due-to-covid-19-march-24-update-1>> accessed 4 April 2020.

⁶⁵ 'Travel - Coronavirus Covid-19 | South African Government'

<<https://www.gov.za/Coronavirus/travel>> accessed 4 April 2020.

⁶⁶ Ibid.

		<ul style="list-style-type: none"> • The ban on cruise ships calling at any of our Sea Ports will be strictly enforced. • Essential cargo will be allowed at our 8 Sea Ports. However, cargo from high risk countries must be sanitized.⁶⁷
	Swaziland	Borders closed on March 28, 2020. ⁶⁸
	Tanzania	No reported reaction
	Zambia	No reported reaction
	Zimbabwe	As from March 23 rd , 2020, it closed its borders to non-essential human traffic. ⁶⁹
NON-AFRICAN COUNTRIES/ REGIONAL BLOCS		
	China	China's foreign ministry announced on March 26 that it was suspending practically all entry to the country by foreigners and was halting almost all international passenger flights as well. ⁷⁰ Foreign residents of China and foreigners with previously

⁶⁷ Ibid.

⁶⁸ 'Eswatini, Formerly Swaziland Closes Borders and Locks down the Kingdom' (*eTurboNews / Trends / Travel News*, 28 March 2020) <<https://www.eturbonews.com/568625/eswatini-former-swaziland-closes-borders-and-locks-down-the-kingdom/>> accessed 4 April 2020.

⁶⁹ 'Zimbabwe's Doctors Call For Action After First COVID-19 Death | Voice of America - English' <<https://www.voanews.com/science-health/coronavirus-outbreak/zimbabwes-doctors-call-action-after-first-covid-19-death>> accessed 4 April 2020.

⁷⁰ Keith Bradsher, 'To Slow Virus, China Bars Entry by Almost All Foreigners' *The New York Times* (26 March 2020) <<https://www.nytimes.com/2020/03/26/world/asia/china-virus-travel-ban.html>> accessed 31 March 2020.

		issued visas would no longer be allowed to enter the country as of midnight March 27.
	New Zealand	Its government has strengthened travel restrictions, by closing their border to almost all travelers as from Thursday 19 March 2020. ⁷¹
	Jordan (Asia)	As of March 17, all flights, excluding commercial airfreight traffic, were suspended, according to officials. The country's land and sea borders are also closed to travelers.
	United Kingdom	The United Kingdom has not implemented any entry restrictions, but it is "advising against "all but essential travel to some countries, cities and regions," the country's Foreign and Commonwealth Office said. ⁷² Officials in the United Kingdom are also monitoring direct flights into the country from certain areas, according to the U.S. Embassy, and informing incoming passengers about how to report any symptoms. ⁷³

⁷¹ 'COVID-19: Alert Level 4 | Immigration New Zealand'
<<https://www.immigration.govt.nz/about-us/covid-19/coronavirus-update-inz-response>> accessed 4 April 2020.

⁷² 'Travel Advice: Coronavirus (COVID-19)' (GOV.UK)
<<https://www.gov.uk/guidance/travel-advice-novel-coronavirus>> accessed 4 April 2020.

⁷³ 'Information for U.S. Citizens in the UK (Coronavirus - COVID-19)' (U.S. Embassy & Consulates in the United Kingdom, 2 April 2020) <<https://uk.usembassy.gov/covid-19-coronavirus-information/>> accessed 4 April 2020.

	<p>United States</p> <p>The State Department on Thursday raised its global travel advisory to a Level 4, a recommendation — not a requirement — that United States citizens either remain in place or return home. This is the agency's top warning.⁷⁴</p> <p>On March 20, the White House Coronavirus Task Force said it was closing the border with Mexico to any nonessential travel, beginning March 21. The measure comes days after President Trump announced that the United States and Canada were closing their border by mutual decision. The border with Canada is also expected to close on March 21.⁷⁵</p> <p>The measure allows trade to continue but restricts non-essential travel, such as tourism, from Canada. Canadian nationals who daily commute to the United States for work would still be allowed in.⁷⁶</p> <p>On March 11 the United States barred the entry of all foreign nationals who had visited China, Iran and a group of European</p>
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⁷⁴ Salcedo and Cherelus (n 8).

⁷⁵ Ibid.

⁷⁶ Ibid

		countries during the previous 14 days. ⁷⁷
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Table compiled by: H. Njoki Mboce and Dr. Kariuki Muigua. (March, 2020)

*** The authors wish to acknowledge research assistance by Shadrack Pasaka Kuyoh with respect to the table

*Shows that the community's official website contains no indication of responses on this.

It is important to note that the information contained in this table is primarily based on analysis conducted as at 30th March 2020. The table also contains a further brief analysis conducted between 30th March 2020 and 3rd April 2020. Further, the nature and scope of the Covid-19 pandemic continues to change and coupled with a growing familiarity with the situation, this could potentially influence further reactions by countries, regional communities and the AU.

6. Conclusion and Recommendations

Through the Covid -19 litmus test, the paper has shown the shifting global architecture and climate of peace and security which calls for a robust examination of our tools of dealing. It would be negligent to rely on obsolete tools and strategies to deal with fluid problems. In this regard, the need to review cross-border relationships with a view to striking a balance between strengthening domestic and neighbouring countries' capacities cannot be gainsaid. The logic underpinning integration is its collective approach and capacities to crisis management.

Additionally, Covid-19 has provided an unfortunate yet relevant exogenous metre upon which the integration ringing tone can be measured. The diagnosis discussed in this paper is that while ideally the functional demands and ideological justifications for cooperation and integration would be sufficient to anchor, implement and sustain it, the reality is different. The reality as

⁷⁷ 'Fact Sheet: DHS Notice of Arrival Restrictions on China, Iran and Certain Countries of Europe' (Department of Homeland Security, 17 March 2020) <<https://www.dhs.gov/news/2020/03/17/fact-sheet-dhs-notice-arrival-restrictions-china-iran-and-certain-countries-europe>> accessed 4 April 2020.

illustrated through the table showing countries' and regional responses is that the degree to which the values of cooperation and integration are engrained in national DNA is a focal component, because this informs and sustains the initial assessment and reflex to any threats or needs.

There is therefore great need for Africa to domestically strengthen her integration fabric with the lessons learnt through the Covid-19 litmus test. More particularly, there is great need for a deeper Africa-centred synergy in the area of cross-border activities and security.

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Who is Paying the Piper? Examining the Prevalence of Corruption in Wildlife Crime in Kenya

By: Paul Mwaniki Gachoka * and Sunday Memba *

Abstract

The legal realm which discusses corruption vis-à-vis wildlife crime is extremely limited in scope and depth. Yet, a myriad of politico-legal issues increasingly arise and remain unaddressed by the day. At the heart of this intellectual voyage is a quest to discover the manner in which the corruption mammoth affects wildlife.

There is no doubt that the current unprecedented Illegal Wildlife Trade (IWT) has greatly been aided by corruption and corruption-related activities. With more beneficiaries and consumers of Illegal Wildlife Trade, corruption has been utilised as a tool by perpetrators of this crime to facilitate wildlife crime. As a result of corruption, significant profits soaring to billions of dollars are easily actualised by players in Illegal Wildlife Trade. Indeed, the prevailing exponential corruption levels and institutionalized wildlife trafficking pose an existential threat to flora and fauna globally.

It is the disposition of this paper to analyse the corruption and wildlife predicament as it is. This discussion shall thoroughly assess the existing legal framework, both internationally and municipally, the regulatory mechanisms, corruptions risks among other appurtenant themes. This discussion will also aim to provide wings to the future of wildlife protection and the curbing of Illegal Wildlife Trade.

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The interests of non-humans, that of wild trees and animals, can only have humans as legal guardians to protect and subsequently ensure that generations to come to enjoy nature's beauty. Hence, it is extremely important that man disembarasses himself of selfish short term perspectives and takes wings into the future.

1. Introduction

We live in interesting as well as dangerous times. Interesting in the sense that novel technologies are shaping unforeseen ways of human interaction and dangerous that the world is still ravaged by epidemics and pandemics. On 11th March 2020, the World Health Organisation Director-General, Tedros Adhanom Ghebreyesus, categorized the coronavirus (COVID-19)¹ disease a global pandemic.² The genesis of this pandemic, at the writing of this paper, was believed to be the pangolin³, the most illegally trafficked mammal in the planet⁴. The genome composition of the coronavirus had a 99% composition with a virus associated with only pangolins.⁵ The stark question is how the wild and endangered pangolin proximity to mankind became so close to the extent of causing a global pandemic.⁶ It is even perplexing to consider the thought that an endangered species, at one time in history, endangered the magnanimity of humanity.

¹ The coronavirus disease is an infectious disease caused by the corona virus (Severe Acute Respiratory Syndrome CoV-2 virus). Corona viruses are mainly found in animals and are rarely infectious to humans. However, some strains of the corona virus can spread from animal to animal, then, from person to person.

² <https://www.who.int/dg/speeches/detail/who-director-general-s-opening-remarks-at-the-media-briefing-on-covid-19---11-march-2020> accessed on March 27, 2020.

³ The pangolin, also known as the scaly anteater is a mammal whose body is covered by ketanin scales. Pangolins are poached and killed for their ketanin scales which are used in Chinese traditional medicine and meals.

⁴ Heinrich, Sarah, *The global trafficking of pangolins: A comprehensive summary of seizures and trafficking routes from 2010–2015*

⁵ <https://www.weforum.org/agenda/2020/03/coronavirus-origins-genome-analysis-covid19-data-science-bats-pangolins/> accessed on March 28, 2020.

⁶ S. Steingruber(2020) *Corruption in the time of Covid-19 :A double threat for low income countries* CHR Mischlsen Institute

Kenya's history is awash with many incidents of corruption cases in wildlife crime. The most notable is the conservation efforts by the late Wangari Mathai who shed her blood, sweat and tears to protect the Karura Forest. Karura Forest is one of the biggest forests within a city in the world.⁷ The forest which has a size of over 1,000 hectares, is home to indigenous trees and rare wildlife species such as the ginets, eupallates among others.⁸

In the year 1990, land grabbers secretly began clearing huge parts of the forest in order to set up residential properties. To hide their activities from the public eye, the land grabbers began clearing the bushes from the middle of the forest but it was realized by the locals. Pleas from the locals and other environmental enthusiasts to have the land grabbers flushed out of the forest were not heeded by the state. In light of this, Wangari Mathai alongside others fought fearlessly against the land grabbers who facilitated their actions by bribing high ranking officials in government. The forest was eventually saved and the rich biodiversity allowed to flourish. To this end, it is clear that it is important to continue the preservation efforts started by men and women of previous generations and resist any forces to destroy flora and fauna.

2. Terms and Concepts

Concepts play a key role in any academic manoeuvre. Proper functioning legal systems depend on well-defined concepts and terms for certainty and implementation⁹. Hence, to enable a coherent exposition of facts and issues, it is important that relevant terms and concepts are eloquently defined. For this discussion, we are aware that the definition of the term 'corruption' lacks universal acceptance, we, therefore, adopt the World Bank definition of corruption being, 'the abuse of public office for private gains'.¹⁰

⁷ <https://www.nation.co.ke/lifestyle/1190-147486-gifvujz/index.html> accessed on April 13, 2020.

⁸ <http://www.friendsofkarura.org/news-views/wangari-maathai/> accessed on April 13, 2020 .

⁹ Mccubbins, Mathew AU - Turner, Mark , *Concepts of Law*, 86JO Southern California Law Review 1997

¹⁰ World Bank, *"Helping Countries Combat Corruption: The Role of the World Bank,"* 1999

Closely connected to corruption is corruption risk which is the potential for a corrupt act to occur.¹¹ The United Nations Office on Drugs and Crime further defines wildlife crime as the taking, trading, (supplying, selling, trafficking or buying), importing, exporting, processing, possessing, obtaining and consumption of wild flora and fauna, including timber and other forest products, in contravention of national or international law.¹² Having laid down the blueprint of the paper, it is now behoving to consider the correlation between corruption and wildlife crime.

3. Corruption and Wildlife Crime.

Corruption is the key catalyst of illegal wildlife trade in the world. In the wildlife context, the most common type of corruption is the taking of bribes by wildlife protection and enforcement personnel.¹³ Sometimes, bribes are taken by top ranking-government officials at the echelons of power. Conspicuously though, wildlife corruption also occurs in the form of intimidation and coercion of wildlife protection and management staff and also through conflict of interests.¹⁴ In exchange for bribes, wildlife protection and enforcement personnel willingly accede to the poaching of protected species, facilitate illegal logging of endangered tree species and promote illegal fishing.¹⁵ In some instances, rangers and wardens furnish wildlife traffickers with information relating to patrol timelines and other measure taken to protect wildlife. Utilising this information, traffickers then orchestrate their plans.

On the higher corruption index, government officials sometimes participate in the actual scheme of things. The officials are the protectors and the traffickers in equal measure. Further, the government officers knowingly issue licences

¹¹ The United Nations Office on Drugs and Crime(UNODC), *Scaling Back Corruption, A guide for Adresing Corruption for Wildlife Management Authorities*(2019).

¹² Ibid.

¹³ Environmental Investigation Agency. *Vanishing point: criminality, corruption and the devastation of Tanzania's elephants*. (2014)

¹⁴ Holmes, L. *Rotten states? Corruption, post-communism, and neo-liberalism*. Durham: Duke University Press. (2006).

¹⁵ Supra Note 10

of permits to entities that lack proper documentation or clearances. At times, the documentation may be forged or include false information. These entities are sometimes shell organisations and companies used by wildlife traffickers to hoodwink their ill intent. In the midst of wanton corruption, there are international and local statutes that bar the same. Unfortunately, as the laws increase, the corruption levels still spiral exponentially.

4. The Legal Framework on Corruption and Wildlife Crime

In combating corruption and wildlife crime, laws have been legislated at the international and municipal levels. In Kenya, non-municipal law finds its force of law by virtue of Article 2(6) of the Constitution.¹⁶ The Legislature is further tasked with the duty of domesticating international law as a law-making body.¹⁷ The following international body of law constitutes the panoply of laws apropos to wildlife crime and corruption.

4.1 The International Legal Framework

4.1.1 The Convention on International Trade in Endangered Species of Wild Flora and Fauna (CITES)

CITES¹⁸ is a multilateral treaty agreement which regulates close to 36,000 endangered flora and fauna and provides measures to ensure wildlife trade does not threaten their survival. The convention lists the endangered species in three appendices according to the threat level and other factors. Appendix I enumerates the animal and plant species that are extremely threatened. Any trade on this species is prohibited except in exceptional circumstances provided in the treaty.

The species in Appendix II consists of the commonly traded species. Most of these species are not in danger of extinction but lack of regulation in their trade may risk their extinction. Appendix III species are species protected in at least a single state. States voluntarily include any species, that they deem to be in

¹⁶ The Constitution of Kenya 2010, Government Printer.

¹⁷ Article 21(4) of the Constitution of Kenya 2010. Government Printer.

¹⁸ The CITES treaty entered into force 1st July, 1975. Kenya ratified the convention on 13th December 2008.

need for protection, in order to alert other CITES parties of their trade. Implementation of CITES at the municipal level of each state party is by the CITES Management Authority¹⁹. States also have a designated Scientific Authority²⁰ and sometimes an Enforcement Focal Point to ensure compliance with the treaty provisions. In Kenya, the CITES Management Authority is the Kenya Wildlife Service (KWS)²¹ while the CITES Scientific Authority is the National Museums of Kenya (NMK)²². KWS being the CITES Management Authority, it is the only body allowed to issue permits and licences for the licit trade of wildlife.

4.1.2 The United Nations Convention Against Corruption (UNCAC)

The UNCAC²³, in the only anti-corruption treaty that has gained universal acceptance. Despite being the internationally recognized international convention, the treaty does not define corruption. Nonetheless, the instrument enumerates actions and omissions that can be deemed corrupt in form. One of these forms is the bribery of government official which is rampant in wildlife crime.²⁴ Further, the convention obliges state parties to adopt preventive measures, such as the designation of a special body, to tackle corruption.²⁵ To this end, Kenya established the Ethics and Anti-Corruption Commission (EACC)²⁶ as the anti-corruption czar to be compliant with the treaty provisions.

¹⁹ Article 9 of the Convention on International Trade in Endangered Species of Wild Flora and Fauna

²⁰ Ibid.

²¹ The Kenya Wildlife Service is a statutory body established under the Wildlife Conservation and Management Act (WCMA, 2013) with the mandate to protect and preserve wild flora and fauna.

²² The National Museums of Kenya is established under section 6 of the National Museums and Heritage Act as a national repository for scientific, cultural and traditional things of human interest.

²³ The United Nations Convention against Corruption was adopted by Member States in October 2003 and entered into force on 14th December 2005. Kenya ratified the convention on 9th December 2003.

²⁴ Article 16 of The United Nations Convention against Corruption.

²⁵ Article 5(1) of The United Nations Convention against Corruption.

²⁶ Article 79 of the Constitution of Kenya provides for the establishment of the Ethics and Anti-Corruption Commission. The same is established under section 3 of the Ethics and Anti-Corruption Commission Act Chapter 56 Laws of Kenya.

Another important treaty provision is the requirement for state parties to co-operate in the fight against corruption²⁷. International co-operation is paramount, especially where wildlife crime is transnational in nature. Finally, the state provides a fundamental principle, that of asset recovery, the right to recover the proceeds of corruption²⁸. This novel inclusion is considered as a radical shift of the underpinnings of criminal law such as punishment and deterrence.

4.1.3 The United Nations Convention against Transnational Organised Crime (UNTOC)

The UNTOC²⁹ treaty is aimed at addressing cross border organized crime. This treaty is particularly important in the curbing the menace of corruption and wildlife since most wildlife traffickers are organized in international or transnational criminal gangs.

4.2 Regional Framework

4.2.1 The African Union Convention on Preventing and Combating Corruption (AUCC)

The AUCC³⁰ is the African legislative tool that prohibits corruption and corruption-related activities. It mandates each state party to put in place appropriate domestic laws and bodies to combat corruption. Most importantly, it emphasises the need for regional co-operation and mutual assistance in corruption matters. Africa being one of the continents with rich and diverse wild biodiversity, it is indeed pertinent that states mutual assist each other in tackling wildlife crime and corruption.³¹

²⁷ Article 43 of The United Nations Convention against Corruption.

²⁸ Article 51 of The United Nations Convention against Corruption

²⁹ The United Nations Convention Against Transnational Organised Crime (UNTOC) entered into force on 29th September 2003. Kenya acceded to the instrument on 16th June 2004.

³⁰ This treaty was adopted in Maputo, Mozambique on 11th July 2003. It entered into force on 5th August 2006. Kenya ratified the treaty on 3rd February 2007.

³¹ Article 18 of the African Union Convention on Preventing and Combating Corruption

4.3 Domestic Legal Framework

4.3.1 The Constitution of Kenya 2010

The Constitution of Kenya 2010 is the supreme law in Kenya³². It binds all persons including state organs and other statutory bodies. The black letter of the constitution recognizes good governance, transparency, integrity and accountability as national values.³³ Indeed every officer, including officers clothed with the power and duty to protect wildlife are behoved to abide by these national values.³⁴

Further, the constitution details the required leadership and integrity standards to be observed by state officers.³⁵ Article 73(1) of the Constitution demands that every state officer performs their function in a manner that is consistent with the purposes and objects of the constitution, demonstrates respect for the people, brings honour to the nation and dignity of the office and promotes public confidence in the integrity of the officers. It further requires that state officers to solely perform their duties based on public interest.

Chapter 5 of the constitution extensively provides for measures to be taken to protect the environment and biodiversity. In an explicit fashion, the constitution mandates the state to ensure that there is sustainable exploitation, utilization and management and conservation of the environment and natural resources.³⁶ Further, the grundnorm provides that the state should protect generic resources and biological biodiversity. To curb environmental destruction and promote the protection of biological diversity, the constitution permits any person, legal or juristic, to apply the court for legal redress if the right to a healthy and clean environment³⁷ is threatened, denied, infringed or violated.³⁸ The right to a healthy environment includes in part to ensure that wildlife is protected.

³² Article 2 of the Constitution of Kenya 2010.

³³ Article 10(1) of the Constitution of Kenya 2010.

³⁴ Article 10 (2) of the Constitution of Kenya 2010.

³⁵ Chapter 5 of the Constitution of Kenya 2010.

³⁶ Article 69(1)(a) of the Constitution of Kenya 2010.

³⁷ Article 42 of the Constitution of Kenya 2010.

³⁸ Article 70 of the Constitution of Kenya 2010.

4.3.2 The Wildlife Conservation and Management Act, 2013

This is the principal legislation that is wholly concerned with the protection, conservation sustainable use and management of wildlife in Kenya. Of particular importance is the statute's recognition of the threatened biodiversity species as specified in the CITES appendices³⁹. As earlier stated, the Act establishes the Kenya Wildlife Service to implement its provisos.

In a bid to protect the rich biodiversity, the instrument stipulates a number of offences and sentences. For instance, section 91 of the Act prohibits persons from making false statements, knowingly or negligently when applying for a license or permit and imposes a fine of Kshs. 200, 000 and imprisonment for a period of one year. Further, the Act provides that an officer of KWS who participates in the commission of any of the offences under the Act is liable to conviction as stipulated in the Act⁴⁰

Further, in adopting the transformative spirit of the Constitution of Kenya 2010, the Act provides that a person may approach the High Court if he or she believes that provisions of the Act have been violated or suffer the threat of violation.⁴¹ The Environment and Land Court is also empowered to give redress if there is a violation or threat of any of the provisos of the said Act.⁴²

4.3.3. The Ethics and Anti-Corruption Commission Act No. 22 of 2011

As envisioned and required by Article 79 of the Constitution of Kenya 2010, the statute established the Ethics and Anti-Corruption Commission. This constitutional body is mandated to deal with all types and forms of corrupt practices in Kenya. It is made up of a Chairperson and four commissioners whose conduct is beyond reproach.⁴³

³⁹ The Act defines the term endangered species to include wildlife specified in the Fourth Schedule and those listed in the CITES appendices.

⁴⁰ Section 106 (1) of the Wildlife Conservation Management Act.

⁴¹ Section 106(2) of the Wildlife Conservation Management Act

⁴² Section 108 of the Wildlife Conservation and Management Act.

⁴³Section 4 of the Ethics and Anti- Corruption Act No. 22 of 2011.

The core functions of the Commission are to fulfil its constitutional mandate and give life to the Anti-Corruption and Economic Crimes Act.⁴⁴ As of April 1st 2020, the commission had recovered assets worth 26.65 Billion Shillings and averted the loss of another 135.5 Billion Kenya Shillings.⁴⁵ It is also worth noting that the annual EACC corruption surveys have addressed the issue of corruption in wildlife crime on a general note. In fighting this vice, it would be vital that the EACC focuses on this province of corruption more keenly.

4.3.4 The Leadership and Integrity Act No. 19 of 2012

This legislation breathes life to Chapter Six of the Constitution which provides for the axioms of leadership and integrity. It stipulates the procedures and mechanisms for the effective administration of the provisions of the said chapter. Provisions of Chapter six are adopted as part and parcel of the statute provisos.⁴⁶ Further, each state officer is mandated to carry out the duties of the respective office with efficiency, honesty, transparency and accuracy.⁴⁷ State officers are also obligated to keep accurate and records and documents and report truthfully to the matters of their organisation.

A high threshold of moral and ethical requirements are also set out in the Act. State officers are prohibited from engaging in activities such as corruption that amounts to an abuse of public office.

4.3.5 The Kenya Wildlife Service Code of Conduct

This is the administrative framework which governs the conduct of employees of the Kenya Wildlife Service. The guidelines were developed by the Kenya Wildlife Service in partnership with the United Nations Office on Drugs and Crime.⁴⁸ The *raison d'être* of the policy includes promoting discipline within the service, promotion of honesty, ensuring accountability of employees of their decisions, protection of the integrity of the service, providing

⁴⁴ Chapter 65 Laws of Kenya

⁴⁵ <http://eacc.go.ke/default/> accessed on April 1, 2020.

⁴⁶ Section 6(2) of the Leadership and Integrity Act No. 19 of 2012.

⁴⁷ Section 10 of the Leadership and Integrity Act No. 19 of 2012.

⁴⁸ The code was developed as part of the UNODC Global Programme for Combating Wildlife and Forest Crime.

mechanisms for management of conflict of interest and providing a framework for reporting employee misconduct.⁴⁹

5. Corrupt Practices in Wildlife Crime

A peculiar feature of corruption is that it is hydra-headed; it changes from one type of practice to another according to the circumstances. But the conductors of the corruption orchestra have over time adopted certain weak links to facilitate their ill motives. This section considers the corrupt practices that are rampant in corruption aided wildlife crime.

5.1 Illegal Procurement of Permits and Licences

In Kenya, issuance of permit and licences to engage in wildlife-related activities is mainly granted by the Cabinet Secretary in charge of wildlife.⁵⁰ The issuance of Non-consumption Wildlife User Rights⁵¹ is granted by the Cabinet Secretary and a County's Wildlife Conservation and Compensation Committee while a Trophy Dealer's Licence⁵² is granted by the Cabinet Secretary.

Despite the safeguards in place, it is the case that players in the illegal wildlife trade illegally acquire permits and licences. This occurs in a threefold manner. First, most permits and licences are granted by bribing government officials and committees for set up for the processing of permits and licence applications⁵³. Secondly, licence and grant applicants may give false information or falsify documents in their applications. Sometimes, persons procure fake permits and licences which sometimes are extremely concordant to the original ones⁵⁴. In some instances, participants in wildlife crime set up legal enterprises with proper documentation but end up integrating illegal

⁴⁹ Clause 3 of the Kenya Wildlife Service Code of Conduct 2019.

⁵⁰ Section 79 of the Wildlife Conservation and Management Act 2013

⁵¹ Section 80 of the Wildlife Conservation and Management Act 2013.

⁵² Section 84(2) of the Wildlife Conservation and Management Act 2013.

⁵³ The Kenya Wildlife Service Corruption and Experience Survey 2019

⁵⁴ Ibid.

wildlife products with legal products.⁵⁵ The legal business acts as a cover to their enterprise.

5.2 Embezzlement of Resources Allocated to Wildlife Management and Protection.

Financial resources are paramount in ensuring effective wildlife management and protection. Funding of KWS is statutorily acknowledged as constituting funds approved by the National Assembly, investments from the service itself and money lent or donated by other partners such as UNODC.⁵⁶ KWS also has an established endowment fund vested in its Board of Trustees aimed at promoting security operations, protecting endangered species and other connected purposes.⁵⁷

Noting that wildlife protection generally covers a large geographical area, any form of misappropriation of funds may easily expose wildlife to the risk of poaching. Embezzlement of funds in this respect occurs through outright theft by heads of department or through procurement fraud. Corrupt activities such as procurement fraud lead to agencies possessing substandard equipment leading to difficulties in the performance of duties.

5.3 Corruption in the Judicial Process.

The criminal justice system plays an important role in ensuring the perpetrators of wildlife crime are punished for their actions. Therefore, as the last safeguard of justice, any form of infiltration by players in wildlife crime means that all hope is lost to bring to book perpetrators.⁵⁸ Yet, the judiciary remains the Achilles heel in the fight against corruption. Corruption in the judiciary cuts across the support staff to judicial officers. Clerks in the court registries may be bribed to ensure court files or documents disappear in thin air, prosecutors may be compromised to act incompetently during the

⁵⁵ DLA Piper. 2014. Empty Threat: Does the Law Combat Illegal Wildlife Trade? A Ten- Country Review of Legislative and Judicial Approaches.

⁵⁶ Section 14 of the Wildlife Conservation and Management Act 2013.

⁵⁷ Section 23 of the Wildlife Conservation and Management Act 2013.

⁵⁸ Sundström, A. (2012), 'Corruption and Regulatory Compliance: Experimental Findings from South African Small-Scale Fisheries', *Marine Policy*, 36: 1255–1264.

prosecution period and judges and magistrates may receive bribes to give favourable decisions to accused persons.

One of the notable cases involving corruption of actors in the criminal justice system was the trial of Feisal Mohamed Ali. During the trial, evidence in police custody was lost, evidence was tampered with, the scene of the crime was destroyed and even a magistrate overturned a High Court decision.⁵⁹ All these factors led to the acquittal of Feisal Mohamed Ali by the High Court⁶⁰ and efforts to appeal were rejected by the Court of Appeal due to legal technicalities.⁶¹

5.4 In Situ Failures to Prevent Wildlife Crime

Wildlife corruption is also largely attributed to the lack of effectiveness by officers tasked with the protection of wildlife.⁶² Officials may well be aware of ongoing illegal activities in protected areas but turn a blind eye because of bribery. At times officials may provide valuable information to wildlife traffickers relating to wildlife protection measures such as patrol times, location of protected species and weak spots in protected areas.⁶³ It is also reported that a certain clique of wildlife wardens sometimes actively participate in wildlife crime by either acting in cohorts with wildlife traffickers.

6. Factors Contributing to Corruption in Wildlife Crime

Having discussed the forms of corruption in wildlife crime, we now turn to the reasons as to why corruption is prevalent in the wildlife sector. Understanding the root cause of this vice is instructive and vital in progressing to a corruption-less wildlife environment.

⁵⁹ <https://www.theguardian.com/environment/africa-wild/2016/jul/23/kenya-jails-ivory-kinpin-for-20-years> accessed on April 6, 2020.

⁶⁰ Feisal Mohamed Ali v Republic [2018] eKLR

⁶¹ Feisal Mohamed Ali Alias Feisal Shahbal v Republic [2015] eKLR

⁶² Moreto, W. D., Brunson, R. K. and Braga, A. A. (2015), 'Such Misconducts Don't Make a Good Ranger': Examining Law Enforcement Ranger Wrongdoing in Uganda', *British Journal of Criminology*, 55/2: 359–380.

⁶³ Ibid.

6.1 Human Insatiability and Greed.

Perhaps this is the main cause of corruption in all fields of human endeavour.⁶⁴ The disposition to compare our fortune with that of others, find it wanting, and pursue illegal ways to gain material goods by any means possible. Especially at the echelons of power, where material abundance is in plenty, it would disturb a reasonable person's human psyche on why one would still want more.

This is also the case in wildlife crime, embezzlement of wildlife budgetary allocations occurs at the hierarchies of most wildlife agencies despite the officials being well remunerated. But it is not confined to high ranking officials only, corruption fueled by insatiable human wants extends to lower cadres of wildlife agencies.⁶⁵ The proceeds of corruption most of the time highly exceed the pay of wildlife rangers and other personnel. Despite the fact that their salaries might be sufficient to enable them to live decently, it is the case that the frailty of the human flesh succumbs to the desire to gain more of the world.⁶⁶

6.2 Lack of Social Stigma against Corruption.

Corruption in Kenya is considered normalcy. Sometimes corruption is even perceived as an essential component of any administrative body in Kenya. This severity of this perception is compounded by the fact that the end goal of the corrupt practice might be beneficial to either the perpetrator or the beneficiary. However, to the rest of the populace, the corrupt practice is severely damaging to their prospects of being served effectively by authorities.

In 2018, the EACC corruption index report noted that 65.3 per cent of Kenyans did not perceive corruption negatively. On the previous year, the percentage was at a staggering 79.3 per cent.⁶⁷ Although grand corruption is always

⁶⁴ D. Melé Corruption: 10 Possible Causes available at <https://blog.iiese.edu/ethics/2014/11/06/corruption-10-possible-causes/> accessed on April 8, 2020.

⁶⁵ Leberatto, A. C. (2016), 'Understanding the Illegal Trade in Live Wildlife Species in Peru', *Trends in Organized Crime*, 19: 42–66.

⁶⁶ Ibid.

⁶⁷ EACC National Ethics and Corruption Survey 2018 Report

considered negatively, petty corruption is actually accepted without an iota of shame.⁶⁸ Despite there being avenues to report any corruption scheme, it is highly unlikely for petty corruption to be reported. In the case of wildlife crime, wildlife rangers would easily accept bribes in order to give way to wildlife traffickers.

6.3 Conflict of interest.

Conflict of interests manifests itself when a circumstance that has the potential to undermine the impartiality of an employee because of a possibility that there might be a clash between the person's private interest and the interest of a wildlife managing body such as the Kenya Wildlife Service. Notably, this interest may be actual interest or potential interest that may affect the non-economical and economical benefits of the officer, a spouse, relative or a business partner.⁶⁹ However, it is not entirely inappropriate for an officer to have a conflicting interest. It is when a person does not declare openly the conflict of interest and when he or she fails to refrain from any deliberations regarding a matter. This, in turn, adds fire to the corruption brigade since the person can easily be influenced by matters outside his ken of operations.

6.4 Lack of judicial independence.

As previously noted, the corridors of justice are sometimes the very citadels of corruption. Judicial officers succumb to the pressures of external forces and thereby leading to miscarriage of justice. Historically, the executive arm of the government has been known to coerce judges and magistrate to deliver rulings or judgments favourable to them.⁷⁰ Some wildlife traffickers enjoy the protection of government institutions and persons, therefore, making it easy for them to come to their rescue in case of arrest or prosecution. In other cases, judicial officers are not sufficiently remunerated and therefore easily accede to government favours.⁷¹

⁶⁸ Levin, M. and Satarov, G. (2000), 'Corruption and Institutions in Russia', *European Journal of Political Economy*, 16/1: 113–132.

⁶⁹ Katzner, T. E. (2005), 'Corruption – A Double-Edged Sword for Conservation? A Response to Smith & Walpole', *Oryx*, 39: 260–262.

⁷⁰ DLA Piper. 2014. Empty Threat: Does the Law Combat Illegal Wildlife Trade? A Ten- Country Review of Legislative and Judicial Approaches.

⁷¹ Ibid.

6.5 Inadequate Human Resources and Wanting Infrastructure.

Lack of personnel, resources and training spur the prevalence of corruption in the protection of wildlife. For any administrative body, human resource is an integral part of ensuring accountability.⁷² It is also the case that officers who are not well trained may often participate in corruption. Such officers may not be aware of the practices that are considered corrupt, the effects of corruption in the wildlife realm, the legal framework on corruption and the effects of corruption. Any shortcomings, therefore, exposes the Service to corruption risks. In addition to human resources, unreliable infrastructure contributes to the prevalence of corruption.⁷³ Unreliable infrastructure latently exposes opportunities that wildlife traffickers may exploit.

7. The Way Forward on Combating Corruption In Wildlife Crime.

To prevent corruption from eating away our rich wildlife flora and fauna, it is key that we develop appropriate measures to combat it. Such measures will inevitably if implemented to the letter, lower the levels of corruption associated with wildlife crime.

7.1 Training and Sensitization of Wildlife Personnel.

Training of wildlife personnel is crucial for organizational development and success of the Service. Being economical with home truths concerning corruption as noted is a factor that inevitably propels the wheels of corruption. Thus, proper training on matters corruption- the civilization of the mind-may well deal a big blow to wildlife traffickers. This then means that sufficient budgetary allocations should be set aside for the sole purpose of training. Training should not be limited to the legal regime governing corruption but should extend to the provinces of personal ethos, professionalism and governance. Further, the training ought to be multi-agency in nature. It should extend to law enforcement officers, judicial staff and the community. Only then will we witness the corruption levels at its nadir.

⁷² Lowenstein, A. K. (2013), *Letting the Big Fish Swim: Failures to Prosecute High-Level Corruption in Uganda*. Human Rights Watch.

⁷³ Eliason, S. L. (1999), 'The Illegal Taking of Wildlife: Toward a Theoretical Understanding of Poaching', *Human Dimensions of Wildlife*, 4: 27–39

7.2 Strict enforcement of the Laws against corruption and wildlife crime.

It is not a far-fetched summation that the body of laws prohibiting corruption, both on an international level and municipal level, are adequate and there is no need pressing need to add to them. However, the Sisyphean task is the implementation of the rules. The treatment of laws as constitutional or statutory suggestions rather than ironclad fiats has been one of the failures of our law enforcement institutions.

Enforcement of the law brings a deterrent effect on wildlife crime. Therefore, if wildlife traffickers are arrested, brought before the courts of law and justice meted out, panic buttons will be pressed among the traffickers. Albeit there being hefty fines and long-term sentences prescribed by the law, lack of enforcement has meant that traffickers don't feel the deterrent effect. Thus, if the law was strictly enforced and successful prosecutions published widely, the deterrent nature of the laws would be noted by all and sundry. Reward schemes should also be put in place. Officers who actively participate in the fight against corruption should be fairly rewarded. In turn, this incentivizes officers to raise red flags, resist the urge to receive bribes and intervene in cases of corruption.

7.3 Promoting Judicial integrity

The sanctums of justice are sometimes the only solace in times of great adversity and peril. Thus, maintaining high levels of integrity, independence and competence ultimately ensures that the law is interpreted and applied indiscriminately. The principle of separation of powers between the arms of government should be upheld and the boundaries clearly defined. Judicial officers should receive sufficient pay and given them carte blanche to make decisions without fear or favour. Further, the Judicial Service Commission, the body tasked with investigating the conduct of judicial officers, should fearlessly deal with any reports made against them touching on judges or magistrates implicated in corruption and bribery.

7.4 Proper Maintenance of Records and Documentation

Inaccurate records and improper documentation allows corrupt activities to go undetected. Therefore proper maintenance of wildlife records makes it difficult for wildlife traffickers and corrupt officials to conceal corruption, escape prosecution and launder illegal wildlife. The first step in ensuring the correctness of record and documents is enabling secure storage of data. This also extends to the documentation of court cases touching on corruption and wildlife crime in court registries. In the same vein, documents should be checked for their validity and have the data clearly and accurately recorded.

7.5 Provision of Adequate Resources

Sufficient resources are part and parcel of a good strategy aimed at combating corruption. The Service, therefore, should be adequately funded in terms of operational and human resource. Advanced computing systems for storing data, vehicles for patrolling camps, weapons and forensic equipment should be readily available. The service should also hire enough rangers and wardens to maximise camp security. This also means getting ahead of the curve and innovating new ways, such as drone technology, in wildlife protection zones to detect corruption risks.

8. Final Reflections on Corruption and Wildlife Crime

Humanity has a pivotal role to play in the fight against corruption in wildlife crime. And this role is not only in the best interest of wildlife but most critically in the best interest of ourselves and the generations to come. Many wildlife species are now extinct and the cause of this is largely due to our inability to strangle the corruption mammoth in the wildlife sector to death. We are also alive to the fact that the interaction between wildlife and humanity has caused so much harm to animals as it has had to humans. Epidemics such as the deadly Ebola in Congo which has a fatality rate of 50 per cent and the coronavirus that has made the world stand still are realities to the universe. How then will we prepare for the future? It is not befitting that we sit on our laurels. Humanity should act firmly and eliminate all acts of corruption in the wildlife sector.

Therefore, to prevent this bubonic plague from stifling the breathing organs of our wild flora and fauna, humanity should act in solidarity to end the vice. We should always remember the words of Charles Dicken in his magnum opus, *A Tale of Two Cities*, ‘It was the best of times, it was the worst of times..’

Africa's Agenda 2063: What is in it for Kenya?

*By: Kariuki Muigua**

Abstract

The African continent has been lagging behind in development when compared to the rest of the world. As such, there have been various efforts by the African Union and African States to boost growth and development and consequently put Africa at par with the rest of the world. One such development plan is the African Union's Agenda 2063 which is the subject of this paper. The paper looks at how this Agenda can contribute and spur development across different states and especially Kenya. The paper also discusses how Kenya can take advantage of the implementation of Agenda 2063 by different stakeholders to achieve its own development agenda.

1. Introduction

This paper is inspired by Africa's Agenda 2063 – *a shared strategic framework for inclusive growth and sustainable development*¹ (Agenda 2063) and it seeks to offer some reflections on how Kenya can contribute and benefit from the realisation of this Agenda. Arguably, Africa's success in realisation of the Agenda 2063 mainly depends on individual states' efforts towards implementation of the Agenda.

Africa's Agenda 2063 was unveiled in 2015 as the continent's new long-term vision for the next 50 years.² The New Partnership for Africa's Development (NEPAD) Agency, the implementing agency of the African Union, has been

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¹ African Union Commission, *Agenda 2063: The Africa we Want*, 2015, ISBN: 978-92-95104-23-5, adopted at the 24th Ordinary Assembly of the African Union (AU) in Addis Ababa in January 2015.

² NEPAD, *Agenda 2063*, available at <http://nepad.org/cop/agenda-2063> [Accessed on 17/04/2020].

tasked with fast-tracking the implementation and monitoring of major continental development programmes and frameworks, including Agenda 2063 and the Sustainable Development Goals (SDGs).³

The African Union Commission and NEPAD Agency are supposed to domesticate the first 10 year Implementation plan into national and regional plans to ensure effective and aligned implementation at national, regional and continental levels.⁴ Various authors have discussed what this development Agenda portends for Africa as a continent.⁵ However, there have been few, if any, commentaries on how this continental Development Blueprint is likely to influence Kenya's development agenda, if at all. It is against this background that this paper offers some insight on how Kenya can strategically position itself to not only contribute to the realisation of this Agenda but also to benefit from the same.

³ Ibid.

⁴ Ibid.

⁵ See generally, Tella, O., "Agenda 2063 and Its Implications for Africa's Soft Power," *Journal of Black Studies* 49, no. 7 (2018): 714-730; Slavova, M., & Okwechime, E., "African smart cities strategies for Agenda 2063," *Africa Journal of Management* 2, no. 2 (2016): 210-229; Vickers, B., *A handbook on regional integration in Africa: Towards Agenda 2063*, Commonwealth Secretariat, 2017; Kararach, G., Besada, H., & Shaw, T., "African development, political economy and the road to Agenda 2063," *Development in Africa: Refocusing the Lens After the Millennium Development Goals* (2015): 365; Ogbonnaya, U.M., "Terrorism, Agenda 2063 and the challenges of development in Africa," *South African Journal of International Affairs* 23, no. 2 (2016): 185-199; Ndzendze, B. and Monyae, D., "China's belt and road initiative: linkages with the African Union's Agenda 2063 in historical perspective," *Transnational Corporations Review* (2019): 1-12; Zhang, H., & Tesfaye, N., "Alignment of Belt and Road Initiative with Africa Agenda 2063," In *3rd International Symposium on Asian B&R Conference on International Business Cooperation (ISBCD 2018)*, Atlantis Press, 2018; DeGhetto, K., Gray, J. R., & Kiggundu, M. N., "The African Union's Agenda 2063: aspirations, challenges, and opportunities for management research," *Africa Journal of Management* 2, no. 1 (2016): 93-116; le Pere, G., "Harnessing Africa's External Trade Partnerships for 'Agenda 2063'," (2017); Achieng', R.M., "Can We Speak of African Agency?: APRM and Africa's Agenda 2063," *African Sociological Review / Revue Africaine De Sociologie* 18, no. 1 (2014): 49-64.

2. Overview of the Africa's Agenda 2063

The Agenda 2063 contains seven aspirations that are to guide its implementation. These include:⁶ *Aspiration 1*: A prosperous Africa based on inclusive growth and sustainable development⁷; *Aspiration 2*: An integrated continent; politically united and based on the ideals of Pan-Africanism and the vision of Africa's Renaissance⁸; *Aspiration 3*: An Africa of good governance, democracy, respect for human rights, justice and the rule of law⁹; *Aspiration 4*: A peaceful and secure Africa¹⁰; *Aspiration 5*: An Africa with a strong

⁶ African Union Commission, *Agenda 2063: The Africa we Want*, 2015.

⁷ *Aspiration 1: A Prosperous Africa based on inclusive Growth and Sustainable Development*: ending poverty, inequalities of income and opportunity; job creation, especially addressing youth unemployment; facing up to the challenges of rapid population growth and urbanization, improvement of habitats and access to basic necessities of life – water, sanitation, electricity; providing social security and protection; developing Africa's human and social capital (through an education and skills revolution emphasizing science and technology) and expanding access to quality health care services, particularly for women and girls; transforming Africa's economies through beneficiation from Africa's natural resources, manufacturing, industrialization and value addition, as well as raising productivity and competitiveness; radically transforming African agriculture to enable the continent to feed itself and be a major player as a net food exporter; exploiting the vast potential of Africa's blue/ocean economy; and finally putting in place measures to sustainably manage the continent's rich biodiversity, forests, land and waters and using mainly adaptive measures to address Climate change risks.

⁸ *Aspiration 2: An integrated continent, politically united, based on the ideals of Pan Africanism and the vision of Africa's Renaissance*: accelerating progress towards continental unity and integration for sustained growth, trade, exchanges of goods, services, free movement of people and capital through: (i) establishing a United Africa; (ii) fast tracking of the CFTA; (iii) improving connectivity through newer and bolder initiatives to link the continent by rail, road, sea and air; and (iv) developing regional and continental power pools, as well as ICT.

⁹ *Aspiration 3: An Africa of good governance, respect for human rights, justice and the rule of law*: consolidating democratic gains and improving the quality of governance, respect for human rights and the rule of law; building strong institutions for a development state; and facilitating the emergence of development-oriented and visionary leadership in all spheres and at all levels.

¹⁰ *Aspiration 4: A peaceful and secure Africa*: strengthening governance, accountability and transparency as a foundation for a peaceful Africa; strengthening mechanisms for securing peace and reconciliation at all levels, as well as addressing emerging threats to Africa's peace and security; and putting in place strategies for the continent to finance her security needs.

cultural identity, common heritage, shared values and ethics¹¹; *Aspiration 6*: An Africa, whose development is people-driven, relying on the potential of African people, especially its women and youth, and caring for children¹²; and *Aspiration 7*: Africa as a strong, united, resilient and influential global player and partner¹³. Notably, the Agenda mainly covers the areas of: social and economic development; integration, democratic governance and peace and security amongst others.¹⁴

The implementation of the Agenda 2063 is to be carried out in phases. The first phase covers the first ten years from the years 2013 to 2023. The First Ten Year Implementation Plan, the first in a series of five ten year plans over the fifty year horizon was adopted by the Summit in June 2015 as a basis for the preparation of medium term development plans of member states of the Union, the Regional Economic Communities and the AU Organs.¹⁵

¹¹ *Aspiration 5: An Africa with a strong cultural identity, common heritage, values and ethics*: inculcating the spirit of Pan Africanism; tapping Africa's rich heritage and culture to ensure that the creative arts are major contributors to Africa's growth and transformation; and restoring and preserving Africa's cultural heritage, including its languages.

¹² *Aspiration 6: An Africa whose development is people-driven, relying on the potential of African people, especially its women and youth, and caring for children*: strengthening the role of Africa's women through ensuring gender equality and parity in all spheres of life (political, economic and social); eliminating all forms of discrimination and violence against women and girls; creating opportunities for Africa's youth for self-realization, access to health, education and jobs; and ensuring safety and security for Africa's children, and providing for early childhood development.

¹³ *Aspiration 7: Africa as a strong, united, resilient and influential global player and partner*: improving Africa's place in the global governance system (UNSC, financial institutions, global commons such as outer space); improving Africa's partnerships and refocusing them more strategically to respond to African priorities for growth and transformation; and ensuring that the continent has the right strategies to finance its own development and reducing aid dependency.

¹⁴ . African Union, An Overview of Agenda 2063, available at https://au.int/sites/default/files/documents/33126-doc-11_an_overview_of_agenda.pdf [Accessed on 17/04/2020].

¹⁵ African Union, *Agenda 2063: First Ten-Year Implementation Plan 2014 – 2023*, September 2015. Available at <https://www.un.org/en/africa/osaa/pdf/au/agenda2063-first10yearimplementation.pdf> [Accessed on 17/04/2020].

In summary, the Agenda 2063 First Ten Year Implementation Plan document seeks to: identify priority areas, their associated targets/expected outcomes and indicative strategies to stakeholders; highlight the fast track programmes/projects that will bring quick wins and generate and sustain the interest of the African Citizenry in the African Agenda; assign responsibilities and accountabilities to all stakeholders in the implementation, monitoring and evaluation of the plan and outline the strategies required to ensure resource and capacity availability and sustained citizen's engagement for plan execution.¹⁶

The focus areas for the implementation of the Agenda include but are not limited to: Sustainable and inclusive economic growth; Human Capital Development; Agriculture/value addition and agro-businesses development; Employment generation, especially the youth and females; Social Protection; Gender / Women development and youth empowerment; Good governance including capable institutions; Infrastructural development; Science, Technology, Innovation; Manufacturing-based industrialization; Peace and Security; and Culture, Arts and Sports.¹⁷

Of utmost importance are the implementation, monitoring and evaluation responsibilities of Key Stakeholders, including Member States, towards the Agenda. The Member States are required to: Adopt/ integrate Agenda 2063 and the associated Ten Year Implementation Plans as the basis for developing their national visions and plans; Use the national planning systems- structures for implementation monitoring and evaluation, methodologies, systems and processes, rules and regulations, forms and formats in the execution of Agenda 2063; Develop policy guidelines on the design and implementation, monitoring and evaluation by various stakeholders; Ensure that the Legislature adopts Agenda 2063 as the blue print for Africa's social, economic and political development in the next 50 years; and encourage all political parties

¹⁶ Ibid. African Union, An Overview of Agenda 2063, available at https://au.int/sites/default/files/documents/33126-doc-11_an_overview_of_agenda.pdf [Accessed on 17/04/2020].

¹⁷ Ibid.

/ private candidates use Agenda 2063 as a basis for preparing their political manifestos.¹⁸

This Agenda is also geared towards achieving sustainable development agenda in the greater African continent. It is worth pointing out that the United Nations *2030 Agenda for Sustainable Development*¹⁹ has since been launched. There have even been efforts to integrate the implementation of Agenda 2063 and Agenda 2030 for Sustainable Development in Africa.²⁰ For instance, at the annual Africa Week in October 2015 held at the United Nations headquarters, representatives of the African Union's development institutions held discussions with their UN counterparts on the AU's Agenda 2063 and the newly-adopted Sustainable Development Goals (SDGs). Although they bear some differences, the two agendas were considered to be mutually supportive and coherent.²¹

Also notable is the fact that in achieving the main goals of these development plans, State Parties have specific roles to play towards social and economic development; integration, democratic governance and peace and security amongst others, which themes feature in both Agendas. It is for this reason

¹⁸ African Union, *Agenda 2063: First Ten-Year Implementation Plan 2014 – 2023*, op. cit., p. 25.

¹⁹ UN General Assembly, *Transforming our world: the 2030 Agenda for Sustainable Development*, 21 October 2015, A/RES/70/1.

²⁰ United Nations Office of the Special Adviser on Africa, "Implementing Agenda 2063 and Agenda 2030 for Sustainable Development in an Integrated and Coherent Manner in Africa: Moving Forward (21 September 2016)", *High-level Event*, available at

<https://www.un.org/en/africa/osaa/events/2016/mdgtosdgagenda2063.shtml> [Accessed on 17/04/2020].

"*The objective of the side event on "implementing Agenda 2063 and Agenda 2030 in an integrated and coherent manner" was to ensure that the highest offices, including the African group in New York and other relevant stake holders are fully aware of what the continent is doing with regard to the implementation of the regional and global agenda in an integrated manner. It also discussed how to put efforts together to effectively implement the development frameworks in Africa.*"

²¹ Kuwonu, F., "Agenda 2063 is in harmony with SDGs," *Africa Renewal, Online Magazine*, December 2015, available at <https://www.un.org/africarenewal/magazine/december-2015/agenda-2063-harmony-sdgs> [Accessed on 17/04/2020].

that individual African States, including Kenya, have a role to play not only to achieve their national development plans but also to contribute towards achieving the continental Agenda. The next section focuses specifically on Kenya and how the country can contribute towards realisation of Agenda 2063 while also achieving her own domestic development plan, including Vision 2030, the Big Four Agenda, amongst others.

3. Realising Africa's Agenda 2063: Integrating the Agenda 2063 into Kenya's Domestic Development Agenda

Kenya's *Vision 2030* is the long-term development blueprint for the country and is motivated by a collective aspiration for a better society by the year 2030.²² The aim of Kenya Vision 2030 is to create "a globally competitive and prosperous country with a high quality of life by 2030". It aims to transform Kenya into "a newly-industrialising, middle income country providing a high quality of life to all its citizens in a clean and secure environment".²³

The economic, social and political pillars of Kenya Vision 2030 are anchored on the foundations of macroeconomic stability; infrastructural development; Science, Technology and Innovation (STI); Land Reforms; Human Resources Development; Security and Public Sector Reforms.²⁴ The Vision 2030 is to be implemented through successive five-year medium term plans. The current stage of implementation is the Third Medium Term Plan (MTP III) 2018-2022 whose theme is dubbed *Transforming Lives: Advancing socio-economic development through the "Big Four"*.²⁵ The Second Medium Term Plan (MTP II) 2013-2017 was meant to achieve progress in development and modernisation of infrastructure, improved security, human resource development, job creation, expanding access to affordable health care, and in

²² Republic of Kenya, 'About Vision 2030', available at <http://vision2030.go.ke/about-vision-2030/> [Accessed on 17/04/2020].

²³ 'About Vision 2030', available at <http://vision2030.go.ke/about-vision-2030/> [Accessed on 17/04/2020].

²⁴ Ibid.

²⁵ Republic of Kenya, "Third Medium Term Plan 2018-2022," available at <http://vision2030.go.ke/publication/third-medium-term-plan-2018-2022/> [Accessed on 17/04/2020].

modernizing the country's public services.²⁶ As to whether the progress in these areas was felt across the country remains both a development and political question.

Currently, Kenya is thus pursuing the 'BIG FOUR' Agenda that seeks to ensure universal health coverage, affordable and decent housing, to increase the manufacturing contribution to the economy from 9.8 per cent to 15 per cent and guarantee food and nutrition security by 2022. The Kenya government's projects under the Big Four Agenda were allocated \$4.3 billion from the \$28 billion 2019/2020 budget.²⁷ Universal health coverage got \$906 million; manufacturing \$40.8 million; affordable housing \$183 million; and food and nutrition security \$177 million.²⁸

As already pointed out, the Agenda 2063 focuses on several areas of development including but not limited to: Sustainable and inclusive economic growth; Human Capital Development; Agriculture/value addition and agribusinesses development; Employment generation, especially the youth and females; Social Protection; Gender/Women development and youth empowerment; Good governance including capable institutions; Infrastructural development; Science, Technology, Innovation; Manufacturing-based industrialization; Peace and Security; and Culture, Arts and Sports.²⁹

These development themes notably overlap at the national and continental levels and it can thus be argued that the achievement of the national plans can greatly succeed by building synergies with the continental implementation plans especially as captured in the Agenda 2063 First Ten-Year Implementation Plan 2014-2023.

²⁶ Ibid.

²⁷ Njiraini Muchira, "Uhuru legacy projects get \$4.3b despite slow progress," *The East African*, Sunday, June 16, 2019. Available at <https://www.theeastafrican.co.ke/business/Uhuru-legacy-projects-get-allocation/2560-5158394-chedf89z/index.html> [Accessed on 17/04/2020].

²⁸ Ibid.

²⁹ Ibid.

The dream of a successful continent can only be achieved through ensuring that the member States are not only supporting the realisation of Agenda 2063 but also ensuring that their national development plans are in harmony with the Agenda and that they are actually achieved not just a matter of wishful thinking. Kenya's key development issues are especially among those given prominence in the Africa's Agenda 2063. These include infrastructure, health, manufacturing, affordable housing and food and nutrition security, amongst others.

Africa's Agenda 2063 has set forth certain milestones related to integration, prosperity, and African ownership of its development programmes.³⁰ Further milestones are related to structural transformation, human development, good governance and on innovation and technology transfer.³¹ Some of the most significant milestones on innovation and technology transfer are building a better infrastructure, engineering and manufacturing base that shows significant increase in local content and input, increased science, technology and innovation (STI) output at national and regional levels and increased human capacity for science and technology and stimulating entrepreneurship through an increased number of added value products and services.³²

Infrastructure is considered as bedrock for development, whereby, as an essential part of a supportive environment for investment and livelihood, adequate infrastructure promotes economic growth, reduces poverty, and improves delivery of health and other services.³³ A survey by Afrobarometer, a pan-African, non-partisan research network that conducts public attitude surveys on democracy, governance, economic conditions, and related issues

³⁰ Achieng', R.M., "Can We Speak of African Agency? APRM and Africa's Agenda 2063," *African Sociological Review / Revue Africaine De Sociologie* 18, no. 1 (2014): 49-64, p. 61.

³¹ Ibid, p.61.

³² Ibid, p.61.

³³ Mitullah, W. V., Samson, R., Wambua, P. M., & Balongo, S., "Building on progress: Infrastructure development still a major challenge in Africa," *Afrobarometer Dispatch No. 69*, 14 January 2016. Available at <https://www.africaportal.org/publications/building-on-progress-infrastructure-development-still-a-major-challenge-in-africa/> [Accessed on 17/04/2020].

across more than 30 countries in Africa, reported that provision of basic service infrastructure remains a challenge. On average across 35 African countries, only about two-thirds of citizens live in communities with an electric grid (65%) and/or piped water infrastructure (63%), and less than one in three have access to sewerage (30%). More than three times as many have access to cell phone service (93%), while about half (54%) live in zones with tarred or paved roads.³⁴ Rural residents continue to be severely disadvantaged in most countries, with urban-rural gaps of more than 40 percentage points in the average availability of an electric grid, sewerage, and piped water infrastructure.³⁵ This is despite the high priority assigned to infrastructure by both citizens and their governments in many African countries. Nevertheless, access to basic services remains highly variable across countries and regions.³⁶

Africa is also considered as the continent with the world's highest mortality rates, and it is the only continent where deaths from infectious disease still outnumber deaths from chronic disease.³⁷ Indeed, Sub-Saharan Africans' overall evaluation of their well-being has been reported to be lower than that of any other population in the world.³⁸ The Low well-being is also largely attributed to low incomes in sub-Saharan Africa.³⁹ Arguably, this is an indication of the interconnectedness of the various socio-economic rights and thus the need for an integrated approach to development.

³⁴ Mitullah, W. V., Samson, R., Wambua, P. M., & Balongo, S., "Building on progress: Infrastructure development still a major challenge in Africa," *Afrobarometer Dispatch No. 69*, 14 January 2016, p. 3.

³⁵ Ibid.

³⁶ Ibid; See also United Nations, "Regional overview: sub-Saharan Africa," *Education for All Global Monitoring Report*, 2011. Available at <https://en.unesco.org/gem-report/sites/gem-report/files/191393e.pdf> [Accessed on 17/04/2020]; Ayodele Odusola, Giovanni Andrea Cornia, Haroon Borat and Pedro Conceição (eds), "Income Inequality Trends in sub-Saharan Africa: Divergence, Determinants and Consequences," *Overview*, United Nations Development programme, 2017; Deaton, A. S., & Tortora, R., "People in sub-Saharan Africa rate their health and health care among the lowest in the world." *Health Affairs* 34, no. 3 (2015): 519-527.

³⁷ Deaton, A. S., & Tortora, R., "People in sub-Saharan Africa rate their health and health care among the lowest in the world." *Health Affairs* 34, no. 3 (2015): 519-527, at p. 519.

³⁸ Ibid, p. 520.

³⁹ Ibid, p. 521.

The Government of Kenya's *Sector Plan for Science, Technology and Innovation 2013-2017* recognises that Science, Technology and Innovation (ST&I) play a pivotal role in the industrialization, sustainable development and growth of nations. Investments and integration of ST&I into social, economic and governance policies is expected to increase Kenya's global competitiveness, create employment and increase productivity.⁴⁰ This was developed in line with the recognition that the Kenya Vision 2030 and the Constitution explicitly place a premium on the generation and management of a knowledge-based economy and the need to raise productivity and efficiency.⁴¹ While Kenya has made significant progress in the area of science, technology and innovation, it is worth pointing out that this is a sector that requires cooperation among countries especially if the same is to be used to promote and sustain cross-border trade. Also closely related to this is manufacturing and value addition. This will go a long way in enhancing national incomes as well as boosting agricultural production. Investing in people and technology transfer from developed states will boost Africa's manufacturing industries. Value addition for agricultural produce will also boost Africa's standing at the global platform as far as trade and commerce are concerned.

This is why Agenda 2063's focus on promoting the growth and development of science, technology and innovation is a welcome move that requires goodwill and concerted efforts of all stakeholders. Both Agenda 2063 and Kenya's Vision 2030 seek to promote environmental rule of law which is central to sustainable development, a concept that seeks to integrate environmental needs with the essential elements of the rule of law, and

⁴⁰ Republic of Kenya, *Sector Plan for Science, Technology and Innovation 2013-2017*, available at research.tukenya.ac.ke/images/Sector-Plan-for-Science-and-Technology.pdf [Accessed on 17/04/2020].

⁴¹ Ibid, p.1. Science, Technology and Innovation Act, No. 28 of 2013, Laws of Kenya, was enacted to facilitate the promotion, co-ordination and regulation of the progress of science, technology and innovation of the country; to assign priority to the development of science, technology and innovation; to entrench science, technology and innovation into the national production system and for connected purposes.

provides the basis for improving environmental governance.⁴² However, while the Constitution of Kenya 2010 and other post constitution statutes and policy documents recognise the centrality of sustainable development, Kenya still has a long way to go in achieving sustainable production and development practices. Agenda 2063 seeks to promote environmentally sustainable climate and resilient economies and communities. Arguably, this will not be achieved unless individual states put in place national measures geared towards this. Individual efforts coupled with concerted efforts from all African governments will ensure that Africa achieves its targets under Agenda 2063 as well as United Nations Agenda 2030 on Sustainable Development.

Sustainable agricultural production features in both AU Agenda 2063 and Kenya's Agenda 2030. If the African continent is to guarantee food and nutritional security for its people, then there must be cooperation amongst states in research and tackling infrastructure challenges that make it difficult to access and/or distribute food across countries and regions. Boosting agricultural production also requires land reforms across various states. There is need for supporting the agricultural sector through modern methods of production, guaranteeing farmers protection from foreign invasion of markets especially those outside Africa, good infrastructure, investing in value addition and enhancing national food storage and preservation facilities, amongst others.

Gender parity is a subject that is still relevant not only in Kenya but across many African societies. Investing in both men and women will go a long way in realisation of Africa's development agenda. Putting in place empowerment measures such as fair labour practices and protection from all forms of violence is important. While having domestic laws on gender equality and equity is important, there is need for strong reporting mechanisms within the Agenda 2063 implementation framework, in order to ensure that no state is left behind as far as this issue is concerned. Some parts of Kenya and Africa in general still suffer violence and general insecurity. Some concerted efforts

⁴² See generally, UN General Assembly, *Transforming our world: the 2030 Agenda for Sustainable Development*, 21 October 2015, A/RES/70/1.

towards promoting peace and stability in the continent are still required as a basis for meaningful development.

4. Conclusion

Africa is a Continent that is rich in natural resources and cultural diversity amongst its many communities. However, it has lagged behind in development and protection of its riches both in terms of diverse communities and source of wealth for the rest of the world. Agenda 2063 promises to coordinate the various countries' development agenda through outlining a development blueprint that should be used as a yardstick to ensure that the Continent moves forward as one. Kenya can work closely with other states to not only realise this Agenda but to also benefit from the same. Africa as a continent can certainly achieve the vision of prosperity. There is a lot for Kenya in this dream. Kenya can contribute and benefit from the realisation of Africa's Agenda 2063.

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Critiquing the Role of Courts and Tribunals in Developing Environmental Law Jurisprudence

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Abstract

Environmental law jurisprudence contributes significantly to the protection of the environment and promote sustainable development. Courts and tribunals have a vital role to play in the growth of environmental law jurisprudence. This paper argues that the place of courts and tribunals in the growth of environmental law jurisprudence cannot be underrated. In so doing, the paper shall examine some of the seminal decisions by courts and tribunals. This is with a view of outlining the specific contribution by courts and tribunals in developing environmental law jurisprudence.

Succinctly, the paper shall; give a brief introduction, discuss the basis of application of environmental law jurisprudence developed by courts and tribunals in Kenya, outline the specific role played courts and tribunals in developing environmental law jurisprudence and lastly, the paper shall give a conclusion.

1. Introduction

The starting point of this discourse is defining what constitutes environmental law. What is, or is not, properly the province of "environmental law" will depend very much on the definition of "environment" which is adopted. Perhaps the simplest and most memorable definition of "environment" is that given by *Albert Einstein*, who once said, "...the environment is everything that isn't me."¹ The only problem with adopting this definition is that there will be very little activity which does not have an "environmental" impact.² This illustrates that defining environment is challenging due to the scope of what can be regarded as part of the environment.

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¹<https://www.brainyquote.com/quotes/albert_einstein_165189> accessed on 14/04/20

² Justine Thornton & Silas Beckwith, *Environmental Law*(Sweet and Maxwell 1997) Pg.2

A succinct definition of environment is that it is a combination of elements whose complex interrelationships make up the settings, the surroundings and the conditions of life of the individual and society as they are and as they are felt. (EC Council Regulation 1872/84, Action by the Community Relating to the Environment, 1984.)³ A legal definition of the term *environment in Kenya is provided by* Section 2 of the *Environmental Management and Co-ordination Act*⁴ which states that: "*Environment*" includes the physical factors of the surroundings of human beings including land, water, atmosphere, climate, sound, odour, taste, the biological factors of animals and plants and the social factor of aesthetics and includes both the natural and the built environment"

Given the above understanding of what is the environment, one can then appreciate what is environmental law. *Environmental Law* can be described as the body of law that is concerned with protecting the natural resources of land, air, water (the three "environmental media") and the flora and fauna which inhabit them.⁵

The *Black's Law Dictionary 9th edition* defines *environmental law* as the field of law dealing with the maintenance and protection of the environment, including preventive measures such as the requirements of environmental-impact statements, as well as measures to assign liability and provide clean-up for incidents that harm the environment.⁶ It's noteworthy that there are four main principles enshrined in environmental law. These are; preventative principle, the polluter pays principle, the precautionary principle and sustainable development. Principles such as these, along with other environmental policies and aims are sometimes referred to as 'soft law' and overtime have been expounded and applied by courts and tribunals in their decisions where applicable. In comparison, 'hard law' refers to actual laws which can be enforced.⁷ This paper seeks to enunciate the role of courts and tribunals in developing environmental law jurisprudence.

³ Mark Stallworthy, *Environmental Law 1st Edition* ,pg.2

⁴ Act No. 8 of 1999

⁵ Ibid No. 3

⁶ Bryan A. Garner, *Black's Law Dictionary 9th Edition*

⁷ Brenda Short, *Environmental Law 1st Edition* ,Pg.12

2. The basis of application of environmental law jurisprudence developed by Courts and Tribunals in Kenya

The *Judicature Act Cap 8* under section 3 allows the court to refer to common law as a source of law. The common law doctrines can be referred to in environmental protection. Common law is in various aspects. Common law reflected the view that free people must take responsibility for their actions and must be held responsible for their actions, with the courts providing an important avenue for holding them accountable. Illustrating the seminal role of courts and tribunals in developing environmental law jurisprudence, the classical case of *Ryland's v Fletcher* established the doctrine of strict liability in the torts of negligence and nuisance, in the control of environmental damage and pollution. Courts and tribunals have applied common law in resolving environmental cases.

The courts and tribunals in their decision making when handling environmental cases amounts to lawmaking hence developing environmental law jurisprudence. Buttressing this role of courts in making laws. Judge *John M. Mativo* in the case of *County Government of Kiambu & another v Senate & others [2017] eKLR*⁸ stated verbatim; "...while interpreting the law, the court should bear in mind that they should make laws when necessary to make the ends of justice. Legal systems world over could not grow as has been the case without a great amount of judicial law-making in all fields, Constitutional law, Common Law and statutory interpretation. However, to the extent that judges make laws, they should do so with wisdom and understanding. Judges should be informed on the factual data necessary to good policymaking. This includes not only the facts peculiar to the controversy between the litigants before them but also enough of an understanding of how our society works so that they can gauge the effect of the various alternative legal solutions available in deciding a case."

Buttressing the importance of judicial decisions, Article 38 paragraph 1 of the Statute of the International Court of Justice recognizes judicial decisions as a source of international law. International law form part of the laws of Kenya. By dint of Article 2(5) and 2(6) of the Constitution of Kenya 2010, all International Conventions that have been ratified by Kenya now form part of

⁸ Constitutional Petition No. 229 of 2015

Kenyan law. Article 2(5) of the Constitution incorporates general rules of international law into our municipal law.⁹ Article 2(6) of our Constitution transforms rules of treaty/conventions into our municipal Law.¹⁰ This forms the basis of application of environmental law jurisprudence developed by courts and tribunals in Kenya.

3. The Role of Courts and Tribunals in Developing Environmental Law Jurisprudence

Many decisions have been made over time by courts and tribunals. These decisions are considered to have contributed significantly to the growth of environmental law jurisprudence necessary for environmental protection, especially in Kenya. As D. Kaniaru, L. Kurukulasuriya, and C. Okidi¹¹ stated: *“The judiciary plays a critical role in the enhancement and interpretation of environmental law and the vindication of the public interest in a healthy and secure environment. Judiciaries have, and will most certainly continue to play a pivotal role both in the development and implementation of legislative and institutional regimes for sustainable development. A judiciary, well informed on the contemporary developments in the field of international and national imperatives of environmentally friendly development will be a major force in strengthening national efforts to realise the goals of environmentally friendly development and, in particular, in vindicating the rights of individuals substantively and in accessing the judicial process.”* The courts and tribunals role in developing environmental law jurisprudence has taken several forms as discussed below.

⁹ Article 2(5) states: The general rules of international law shall form part of the law of Kenya.

¹⁰ Article 2(6) states: Any treaty or convention ratified by Kenya shall form part of the law of Kenya under this Constitution.

¹¹ D. Kaniaru, L. Kurukulasuriya, & C. Okidi, *UNEP Judicial Symposium on the Role of the Judiciary in Promoting Sustainable Development*, in Conference Proceedings 22 (presented to the Fifth International Conference on Environmental Compliance and Enforcement in Monterey, California in Nov. 1998), available at <<http://www.inece.org/5thvol1/lal.pdf>>

Forms in which Domestic Courts and Tribunal have developed environmental law jurisprudence:

a) Articulating and implementing environmental law principles

There are various environmental law principles. These principles are recognized in the Constitution of Kenya 2010 and international environmental instruments. The Constitution and sectoral laws on natural resources have translated these principles into legally binding norms.¹² These principles are the ones that are mainly encompassed in almost all the international treaties that relate to the environment and are universal.

They include: the principle on transboundary environmental damage, sustainable development, sustainable use, prevention principle, precautionary principle, the polluter pays principle, reasonable use and equitable utilization, international cooperation in the management of natural resources, common but differentiated responsibilities and state sovereignty over their natural resources.¹³ The courts and tribunals in Kenya have overtime applied these environmental principles in making decisions and emphasized their importance. To a great extent, the courts and tribunals have interpreted these environmental principles to solve environmental disputes in Kenya.

In so doing, the courts and tribunals tailor-make these environmental principles to fit the Kenyan context.

The importance of these environmental principles was buttressed by the case of; *Kenya Association of Manufacturers & 2 others v Cabinet Secretary - Ministry of Environment and Natural Resources & 3 others* [2017] eKLR¹⁴, the Court stated,

*“...in determining environmental disputes at any stage, Kenyan courts are obliged to be guided by and promote the constitutional framework on the environment... In this regard, Articles 42, 69 and 70 of the Constitution and the **broad environmental principles** set out in Section*

¹² Kariuki Muigua, Didi Wamukoya Francis Kariuki, Natural resources and Environmental Justice in Kenya page 17

¹³ Ibid No 10

¹⁴ eKLR Petition No 32 of 2017

3 of the EMCA are important tools in the interpretation of the law and adjudication of environmental disputes.”

b) Acting as a gatekeeper for environmental law (both domestic and international) in Kenya

Over time, the courts and tribunal in Kenya have acted as guardians of environmental law in Kenya. In so doing the courts and tribunals develop environmental law jurisprudence through interpretation and enforcement of environmental law in Kenya in a progressive manner. For example;

i) Classifying various actions that destroy the environment as torts to protect the environment

The courts in Kenya have over-time classified various actions as either tort of nuisance or negligence. These actions were classified as torts to protect landowner in the enjoyment of his or her property. It can be public or private property.

In the case of; *Peter K. Waweru v Republic [2006] eKLR*¹⁵, nuisance was seen by the actions of the accused person to direct raw sewage into the public water source. This constituted an act of nuisance.

In the case of; *Gitiriku Wainaina & Another v Kenafric industries & another [2007] eKLR*¹⁶ where the Plaintiff claimed that the Defendants had constantly caused noxious and offensive gases, smells and vapours to come into his premises causing a nuisance. The court established there were nuisance and negligence on the part of the Defendants.

ii) Developing jurisprudence on an easement

Easement seeks to address the loss of wildlife and their habitat outside protected areas. Easement seeks to limit the use of land to activities which negatively affect wildlife habitat like erecting fences or barriers that impede wildlife movement e.t.c This enables animals to easily migrate from one area to another. This was seen in the case of; *East Africa Wildlife Society and 2 others v Kenya National Highways Authority*¹⁷ where the NEMA was faulted

¹⁵ Misc. Civil Application No. 118 of 2004

¹⁶ Tribunal Referral Net 8 of 2006

¹⁷ ELC Appeal No. 16 of 2015

for allowing KENHA (Kenya National Highway Authority) to construct a road through Nairobi National Park.

iii) Developing jurisprudence on public interest litigation and locus standi on environmental matters

The Constitution of Kenya 2010 allows public interest litigation when it comes to environmental cases. This is a great improvement brought by the Constitution of Kenya 2010. Previously, as was evidenced in the case of; *Wangari Maathai v Kenya Times Media Trust Ltd* [1989] *eKLR*¹⁸, where the applicant was denied redress in court on the basis that she lacked *locus standi*. In accordance with the Constitution of Kenya 2010, the courts have developed jurisprudence that supports public interest litigation on environmental matters. This allows concerned citizens to move to court to enforce the rights of those that are affected. In the case of *Peter Kinuthia Mwaniki and 2 others vs. Peter Njuguna eKLR*¹⁹ the Plaintiffs were not the owners of the land to be affected by waste from a slaughterhouse, their application was allowed. In this case, the Plaintiffs had moved to court to stop the construction of a slaughterhouse by the Defendant. The court found the Defendant to have infringed on the right to a clean and healthy environment. In this regard the court in its judgment stated

“...the plaintiffs, though not the owners of the land in dispute, nevertheless have the authority to sue, such authority being derived from Section 3(3) of the Environmental Management and Co-ordination Act, 1999...”

The Court of Appeal in the case of; *Mumo Matemu v Trusted Society of Human Rights Alliance & 5 others* (2013) *eKLR*²⁰ observed that the conservative requirements of locus that existed in the old regime that treated litigants, other than those directly affected, as mere or meddlesome busybodies had the negative effect of limiting access to justice. These are the ills that existed in our law that the Act and more recently the Constitution 2010 intended to cure and which must be emphasized. The Supreme Court in the same case; *Mumo*

¹⁸ Civil Case No 5403 of 1989

¹⁹ Civil Case 313 of 2000

²⁰ Civil Appeal No. 290 of 2012

*Matemu v Trusted Society of Human Rights Alliance & 5 Others (supra)*²¹ remarked on the importance of public interest litigation which had been thwarted under the old constitutional regime and stated as follows;

“...Public Interest Litigation plays a transformative role in society. It allows various issues affecting the various spheres of society to be presented for litigation. This was the Constitution’s aim in enlarging locus standi in human rights & constitutional litigation. Locus standi has a close nexus to the right of access to justice. In instances where claims in the interest of the public are threatened by administrative action to the detriment of constitutional interpretation and application, the Court has discretion on a case by case basis, to evaluate the terms and public nature of the matter vis-a-vis the status of the parties before it

c) Promoting the seminal principle of sustainable development

Sustainable development seeks to limit environmental damage arising from anthropogenic activities and to lessen the depletion of non-renewable resources and pollution of the environment while promoting economic growth.²² *The Brundtland Commission*²³ considered sustainable development to be “*development that meets the needs of the present without compromising the ability of future generations to meet their own needs.*”

Courts and tribunals have been called upon in the quest for enforcing sustainable development policies owing to their traditional role in dispute resolution and interpretation of laws.²⁴ The courts and tribunals in Kenya have been in forefront seeking to enforce sustainable development policies and laws.

²¹ Petition No. 12 of 2013

²² Cullet P., *Differential Treatment in International Environmental Law and its Contribution to the Evolution of International Law*(Aldershot: Ashgate, 2003) page 8 to 9

²³*The Brundtland Commission* was established by the United Nations in 1983 to address the problem of deterioration of natural resources.

²⁴ Patricia Kamari-Mbote, *Collins Odote Courts as Champions of Sustainable Development: Lessons from East Africa* page 1

In the case of; *Save Lamu & 5 Others v. National Environmental Impact Assessment & Another*²⁵ Recognizing the important role of the concept of sustainable development the tribunal opined: “*The purpose of the Environment Impact Assessment (EIA) process is to assist a country in attaining sustainable development when commissioning projects. The United Nations has set Sustainable Development Goals (SDGs), which are an urgent call for action by all countries recognizing that ending poverty and other deprivations must go hand-in-hand with strategies that improve health and education, reduce inequality, and spur economic growth – all while tackling climate change and working to preserve our oceans and forests.*”

Forms in which International Courts have developed environmental law jurisprudence:

This discourse shall primarily focus on the International Court of Justice. International environmental law jurisprudence has developed primarily through negotiations among States rather than judicial decisions. This being the case, the contribution of the International Court of Justice to international environmental law has been comparatively modest.²⁶

However the increasing judicialization²⁷ of international law in recent decades has included an uptick in environmental litigation, most of this litigation has taken place in specialized tribunals such as the regional human rights courts, the International Tribunal for the Law of the Sea, and the World Trade Organization’s Dispute Settlement Mechanism, not the International Court of Justice.²⁸

The International Court of Justice has taken a rather conservative approach, lending the Court’s authority to well-established principles rather than breaking new ground. To the extent the Court’s jurisprudence has contributed to international environmental law, its contributions have taken the following forms:

²⁵ Tribunal Appeal No. Net 196 of 2016

²⁶ Daniel Bodansky , International Environmental Law page 1

²⁷ Andreas Føllesdal and Geir Ulfstein (eds.), *The Judicialization of International Law: A Mixed Blessing?* (Oxford: Oxford University Press 2018).

²⁸ James Harrison, *The annual surveys of international environmental litigation* (The Journal of Environmental Law.)

1) Articulating foundational principles

Until the 1990s, the International Court of Justice contributed to international environmental law only indirectly, by embracing the foundational concepts²⁹ of;

- a) *Sic utero tuo* (use your property in such a manner as not to injure that of another) in *the Corfu Channel (United Kingdom v. Albania)*³⁰

The Corfu Channel Case concerned damage to British warships rather than harm to the environment but is usually considered part of the Court's 'environmental' jurisprudence because it articulated the principle, *sic utere tuo ut alienum laedas* – 'use your property in such a manner as not to injure that of another' – which underpins much of international environmental law.

In *Corfu Channel*, the United Kingdom argued that Albania violated international law by failing to provide notice of a minefield within its waters.

The Court agreed, finding a 'general and well-recognized principle' that every State has an obligation 'not to allow knowingly its territory to be used for acts contrary to the rights of other States'.³¹

The *Corfu*

Channel case bolstered the environmental principle of prevention by placing it in the broader framework of international law.

- b) *Obligations erga omnes* (obligations owed by a state towards the community of states as a whole) *Barcelona Traction Case (Belgium v. Spain)*³²

The International Court of Justice made its next contribution to the development of international environmental law in another non-environmental case, *Barcelona Traction Case*, where it articulated the concept of *obligations erga omnes* that is, *obligations owed not bilaterally between States but to the international community as a whole*.

²⁹ Daniel Bodansky, *International Environmental Law* page 2

³⁰ *Corfu Channel Case*, Judgment, (1949) ICJ 4.

³¹ *Corfu Channel*, p. 22.

³² *Barcelona Traction, Light and Power Company*, Judgment, (1970) ICJ 3.

Although the Court's discussion in *Barcelona Traction* case of obligations *erga omnes* did not include any environmental obligations in its list of examples, obligations to protect global commons such as the atmosphere and the high seas would appear excellent candidates for *erga omnes* status, since by their nature they involve the interests of the international community generally, not individual States. *Barcelona Traction Case* thus complements *Corfu Channel's case* focus on transboundary harms by helping to lay the foundation for the protection of the global commons.

2) Acting as a gatekeeper for customary international law

The International Court of Justice has lent its weight to claims about the customary international law status of widely recognized rules such as the duty to prevent significant transboundary pollution and the duty to undertake environmental impact assessments. In doing so, the International Court of Justice has served as the 'gatekeeper and guardian' of general international law, which includes International environmental law as Jorge Viñuales puts it.³³ Using *Legality of the threat or use of Nuclear Weapons case (1996 ICJ pg 90)* as an example the ICJ held that UN General Assembly resolutions can in certain circumstances provide evidence important for establishing the existence of a customary rule or the emergence of an opinion *Juris et neccessitatis*.

3) Elaborating existing principles

The International Court of Justice has taken the role of elaborating existing environmental principles. For example by holding that the duty of due diligence entails procedural duties to assess, notify, and consult. This is demonstrated in the case of *Pulp Mills and Costa Rica v. Nicaragua* cases. The *Pulp Mills Case (Argentina v. Uruguay)*³⁴ is perhaps the Court's most important environmental case to date because of its extensive discussion of the duty to prevent and the related duty to perform environmental impact assessments of activities that risk significant transboundary harm.

In this case, Argentina brought the case in 2006, claiming that construction by Uruguay of two pulp mills on the River Uruguay violated a bilateral treaty

³³ Jorge E. Viñuales, (2008) 32 *Fordham International Law Journal* 232, 258 (2008).

³⁴ *Pulp Mills on the River Uruguay (Argentina v. Uruguay)*, Judgment, (2010) ICJ 14.

between the two countries governing the use of the river. The Court found that the Parties' obligation under the agreement to 'protect and preserve the aquatic environment and, in particular, to prevent pollution' is a due diligence obligation that entails both 'adopting appropriate rules and measures' as well as exercising 'a certain level of vigilance in their enforcement'.³⁵

It further found that the practice of undertaking an environmental impact assessment when there is a risk of significant transboundary harm 'has gained so much acceptance among States that it may now be considered a requirement under general international law' and is an element of due diligence.³⁶

However, in the Court's view, international law allows States to determine in their domestic legislation the 'scope and content' of the assessment, rather than specifying these itself.³⁷ After a lengthy review of Uruguay's actions, the Court concluded that Uruguay had breached various procedural obligations under the bilateral treaty with Argentina, but that there was 'no conclusive evidence' showing a failure to exercise due diligence.³⁸

4) Interpreting environmental agreements

Although the Court has played a limited role in interpreting multilateral environmental agreements (since most create their own compliance systems rather than provide for compulsory dispute settlement by the Court), Australia and Japan's acceptance of the Court's compulsory jurisdiction under the Optional Clause gave the Court the opportunity, in the *Japanese Whaling case*, to interpret the International Whaling Convention's exemption for scientific whaling. *Japanese Whaling (Australia v. Japan)*³⁹

This case that was brought before ICJ was premised on a multilateral environmental agreement. Australia brought the case against Japan in 2010, contending that the taking of whales by Japan under its 'scientific' whaling program did not qualify for the scientific research exemption provided in

³⁵ Ibid No.30 page 79, paragraph 197.

³⁶ Pulp Mills on the River Uruguay (Argentina v. Uruguay), Judgment, (2010) ICJ page 83 paragraph 204.

³⁷ Ibid No.30 page 83, paragraph 205.

³⁸ Pulp Mills on the River Uruguay (Argentina v. Uruguay), Judgment, (2010) ICJ page 101, 106, paras. 265, 282(1).

³⁹ Whaling in the Antarctic (Australia v. Japan), Judgment, (2014) ICJ 226.

Article VIII (1) of the International Whaling Convention.⁴⁰ The Court's decision turned on the relatively narrow question of whether Japan's program was 'for purposes of scientific research', rather than examining the program's consistency with the object and purpose of the Whaling Convention more generally. The Court held that, although Article VIII (1) gives Parties discretion in designing scientific research programs, it establishes an objective standard that requires that a program's 'design and implementation be reasonable in relation to its stated research objectives'.⁴¹

Applying this reasonableness standard, the Court decided by a 12-4 vote that the Japanese program was not 'for purposes of scientific research', did not, therefore, qualify for the Article VIII exemption, and hence violated Japan's obligations under the Schedule to the Convention.

5) Valuing environmental harms

The court has recently ventured into the realm of valuation of environmental harms to award environmental damages. This was vividly demonstrated in the case of *Costa Rica v. Nicaragua*⁴² which discussed the methodology of environmental damage valuation. The case further incorporated environmental considerations into other areas of international law. In this case, there were claims by both Costa Rica and Nicaragua concerning violations of international environmental law resulting from activities in the border region between the two countries. The Court in its judgment discussed customary rules relating to transboundary pollution and was supplemented by ten separate opinions.

In brief, the Court reiterated its conclusions in *Pulp Mills* case that States have a duty under customary international law to use due diligence to prevent significant transboundary harm, to conduct environmental impact assessments of activities that risk causing significant harm to other States, and to notify and consult with potentially affected states.⁴³

⁴⁰ International Convention for the Regulation of Whaling, Washington, D.C., 2 December 1946, in force 10 November 1948, 161 UNTS 72.

⁴¹ Whaling in the Antarctic, paragraph 88.

⁴² *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v. Nicaragua)* and *Construction of a Road in Costa Rica along the San Juan River (Nicaragua v. Costa Rica)*, Judgment, (2015) ICJ 665.

⁴³ *Costa Rica v. Nicaragua*, Judgment, page 706-707, paragraph 104.

Applying these rules, the Court concluded that:

- i) Nicaragua's dredging activities did not create a risk of significant transboundary harm, and therefore did not violate either its procedural obligations related to assessment, notification, or consultation or its substantive duty not to cause significant transboundary harm.⁴⁴
- ii) Costa Rica violated its duty under international environmental law to conduct an environmental impact assessment of its planned road construction.
- iii) Nicaragua was responsible for the environmental damage to Costa Rica caused by its construction of a canal in Costa Rica. In a subsequent decision in 2018, the Court awarded compensation based on a lengthy analysis of environmental damages valuation.⁴⁵

6) Incorporating environmental considerations into other areas of international law

Lastly, apart from contributing to international environmental law as a distinct field, the International Court of Justice has helped diffuse environmental considerations into other areas of international law, including international humanitarian law. This is demonstrated in; *Nuclear Weapons Advisory Opinion*⁴⁶ where the Court said that environmental damage should be included in necessity and proportionality analysis and the law of state responsibility in the *Gabčíkovo-Nagymaros Project (Hungary/Slovakia)*⁴⁷ where the Court acknowledged that damage to the environment could create a state of ecological necessity that would excuse an otherwise wrongful act.

4. Conclusion

Courts and tribunals play a seminal role in developing environmental law jurisprudence that is necessary for the protection of the environment as illustrated above. Environmental law jurisprudence developed by courts and tribunals overtime contributes significantly towards the realization of

⁴⁴ Costa Rica v. Nicaragua, Judgment, page 710, paragraph 112.

⁴⁵ Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v. Nicaragua), Judgment on Compensation, (2018) ICJ 15.

⁴⁶ Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, (1996) ICJ 226.

⁴⁷ Gabčíkovo-Nagymaros Project (Hungary/Slovakia), Judgment, (1997) ICJ 7.

sustainable development goals. Hence, the role of courts and tribunals in the development of environmental law jurisprudence is unquestionable.

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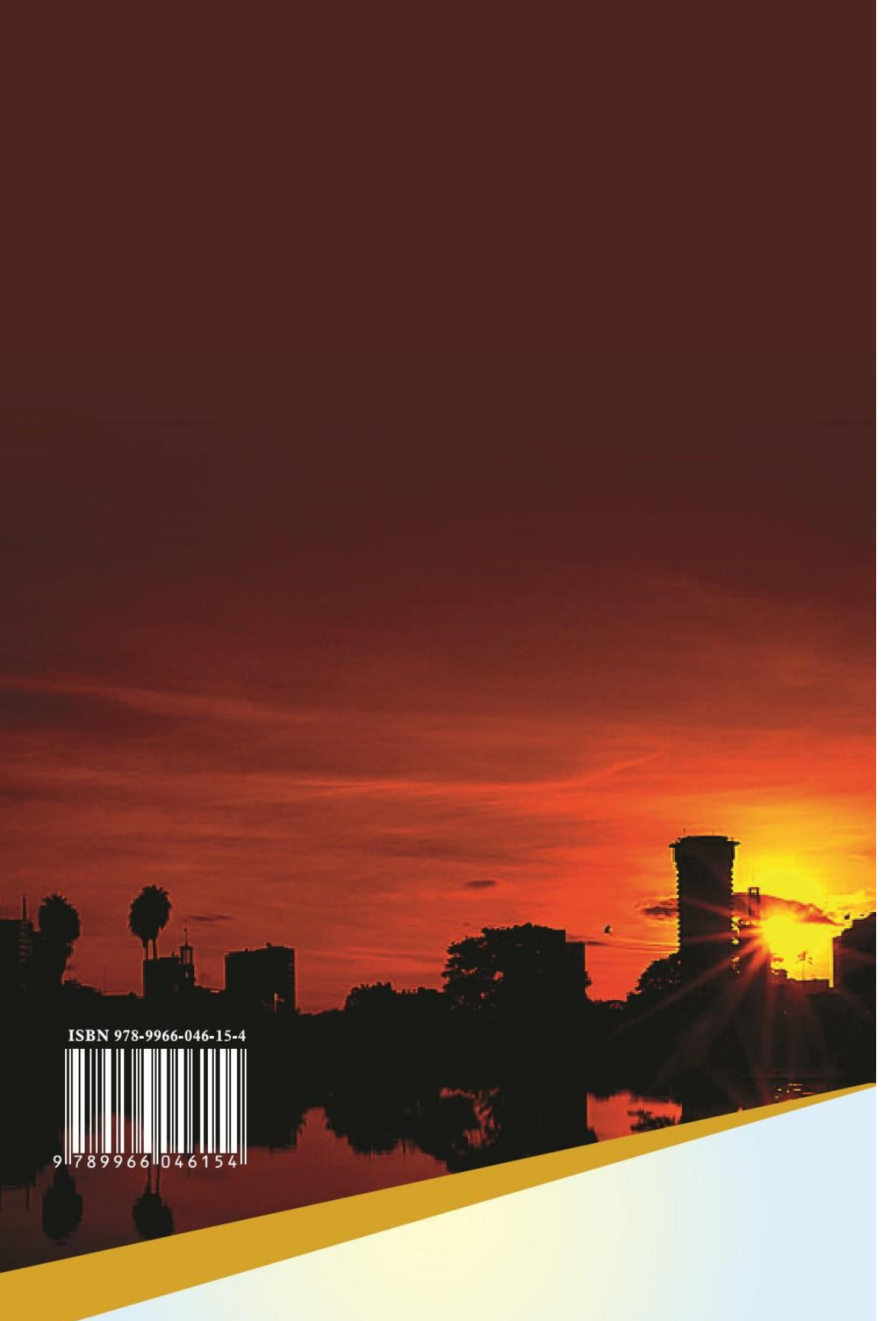
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