

Journal of Conflict Management & Sustainable Development



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A Necessary Paradigm Shift

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Editor's Note

Welcome to Volume 4 number 4 of the *Journal of Conflict Management and Sustainable Development (JCMSD)*.

The Journal provides a platform for scholarly discourse on thematic areas of conflict management and sustainable development.

Sustainable development has emerged as an essential principle of good governance that shapes decision making at all levels. However, development is not feasible in an environment of conflicts.

The Journal contributes to debate on how to promote sustainable development through effective conflict management. The Journal is peer reviewed and refereed in order to adhere to the highest quality of academic standards.

This volume contains papers covering themes such as: COVID-19 and the Regulation of Foreign Investment Law; Redefining Development in Kenya-Reflections and Lessons from the Coronavirus disease (COVID-19) Pandemic; Sustainable Development in the Wildlife sector in Kenya; Environmental Governance and the Global Plastic Pollution Problem and Theoretical Underpinnings of Toxic Chemical Regime Formation.

In light of the COVID-19 pandemic, the Journal contributes to debate on redefining development in order to deal with emerging global challenges.

The Editorial Team welcomes feedback and suggestions from our readers across the globe to enable us continually improve the publication.

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

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

Managing Editor,

June, 2020

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Covid-19 and the Regulation of Foreign Investment Law: A Necessary Paradigm Shift

*By: W A Mutubwa * & Mohamed Fauz **

Introduction

The impact of the new killer disease, Covid-19, has been felt globally. It has swept through the world economies ravaging even economic powerhouses such as the U.S.A and China leading to losses worth billions of dollars. The world is in silent prayer and as the dust settles from this killer epidemic its impact will be felt in the legal sphere. This paper discusses the legal effects that Covid-19 has had on the relationship between foreign investors and host states, with one eye on the horizon and what the future will be like after the pandemic is over. The paper will approach the discussion based on perspectives offered by decided cases handed down by international tribunals and established legal principles. These will be applied to the emerging investor related legal issues brought about by the novel Covid-19.

This paper is split into five parts as follows: the first part will examine contractual obligations between a foreign investor and the host state broadly; the second part will examine the possible repercussions COVID related adjustments to national and international legislation will have on investors; the third part of this article deals with taxation policies adopted by governments and their effects on the investor-host state relationship with a focus on measures adopted by Kenya; the fourth part of this article discusses the future and long term legal repercussions Covid-19 will have on foreign investment; the last part of this article posits recommendations on how to restructure the legal relationship between investor and host state in light of the observations made in the preceding sections.

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1.0 The Contractual Dilemma

The novel COVID 19 pandemic has put the defence of force majeure to sharp focus in international investment law. The Force Majeure principle and the common law doctrine of frustration are often invoked as solutions to the ongoing dilemma on how to go on with performance and/or how to discharge the parties to a contract from the contractual obligations.

2.1 Force Majeure

Force majeure is a clause commonly found in commercial and contractual agreements, which states that one or both parties will not be liable for damages occasioned by any delay in performance or non-performance of its obligations, upon the occurrence of certain extraordinary events.¹

The court in the Kenyan case of *Pankaj Transport PVT Limited v SDV Transami Kenya Limited*,² quoting from Goirand's French Commercial Code, 2nd ed., p. 854, he says the term "force majeure" is used with reference to "all circumstances independent of the will of man, which is not in his power to control, and such force majeure is sufficient to justify the non-execution of a contract." It was also seen in the case of *Wuhan Airlines v Air Alaska*, where the same position was reiterated.

Importantly though, in the case above, the court in its ratio stated that, (a sharp distinction from the doctrine of frustration to be discussed herein below), the courts will however give effect to the force majeure doctrine only if parties have expressed it in their contract.

The words "*force majeure*" are also not exact in a fixed universal meaning, rather they are as contemplated by the parties in the wording of that particular clause expressed in the contract. The same goes to the consequences/effects of its occurrence. Therefore, a contract may be avoided, voided, delayed or given any other resultant effect, as contemplated by the clause (another distinction from doctrine of frustration).³

¹ *Tennents v Earl of Glasgow* (1864) 2 Macph HL 22.

² [2017] eKLR

³ Ibid

Importantly, the circumstances of ‘impossibility’ in which a force majeure clause may be invoked, are mainly similar to the circumstances in which the doctrine of frustration may be invoked, and will be discussed briefly.

2.2 Discharge by Impossibility or Doctrine of Frustration

The doctrine is an exception to the position at medieval common law, which was based on the principle of absolute contractual obligations. Under this principle, parties to a contract must perform their obligations failing which damages are payable by the party in the default as was opined in *Paradine v. Jane*⁴ where the plaintiff leased a piece of land to the defendant, but the latter could not cross the land or put it into any economic use. When sued for the lease charges he was held liable since the contract had not provided that he would be discharged if it became impossible to use the land.

A contract is said to be frustrated if performance of the obligation is rendered impossible, illegal or commercially useless by unforeseen or extraneous circumstances for which neither party is to blame. When a contract is frustrated, it terminates and the parties are discharged.⁵ The Doctrine of Frustration may be justified on various grounds: - The Implied Term Theory, Just and Reasonable Solution Theory, and the Change of Obligation Theory.⁶

2.2.1 Circumstances in which a Contract may be Frustrated

The first circumstance is destruction of subject matter. The destruction need not be total but must affect the commercial characteristics of the subject matter. This was discussed in the Case of *Taylor v Caldwell*⁷.

The second occasion is the non-occurrence of an event. If a contract is based on a particular event or state of affairs to obtain at a particular time, its non-occurrence frustrates the contract and discharges the parties. Similarly, for the contract to be frustrated, it must be evident that the event or state of affairs was the only foundation of the contract. However, if a contract has more than one foundation the mere disappearance of one does not frustrate it, given the other

⁴ [1647] EWHC KB J5

⁵ Elliot & Quinn, Contracts Law (2011).

⁶ Robert Hillman, Principles of Contract Law (2004).

⁷ (1863) 3 B & S 826

is capable of performance. As was the case in *Herne Bay Steamboat Co. v. Hutton*.⁸

The third instance is illegality. If performance of contractual obligations becomes illegal by reason of change of law or otherwise the parties are discharged as there is no obligation to perform that which has become illegal.⁹

The fourth occasion is death or permanent incapacitation. In contracts of personal service or performance e.g. employment, the death or permanent incapacitation of a party frustrates the contract and discharges the parties as the obligations are not generally transferable.¹⁰

The fifth instance is government intervention. If a policy act or regulation make it impossible for a party to complete its contractual undertaking the contract is frustrated and the parties discharged e.g. refusal to grant a license as was the case in *Karachi Gas Company v. Isaaq*. The position was reiterated in the Kenyan case of *Hakken Consulting Ltd v Seven Seas Technologies Ltd*¹¹.

Similarly, a contract would be frustrated if a government takes possession of the subject matter or stops the transaction, as was the case in *Metropolitan Water Board V. Dick Kerr and Co.* where It was held that the minister's act of ordering the respondent to stop the contract and dispose of its equipment, frustrated the contract and thereby discharged the respondent.¹²

The last instance is supervening events. These are events that delay performance and thereby change the commercial characteristics of the contract. The change must be fundamental. As a general rule, additional expenses do not frustrate a contract; however, they may if they render the transaction commercially useless.¹³

⁸ (1903) 2 KB 683

⁹ See e.g. Williams G. L The Cambridge Law Journal Vol. 8, No.1 (194), pp. 51-69

¹⁰ For example, the US Federal Legislation 48 CFR s. 37.104

¹¹ [2017] eKLR

¹² [1918] A.C. 119

¹³ *Tsakiroglou & Co Ltd v Noble Thorl GmbH* [1962] AC 93.

2.2.2 Effects/Consequences of Frustration

Frustrated contracts are governed by the English Law Reform (Frustrated Contracts) Act (1943) which applies in Kenya as a statute of general application and listed in the 1st schedule to the Law of Contract Act (1961).¹⁴ Under this Act, when a contract is frustrated: it is terminated, money paid is recoverable, money payable ceases to be payable, if a party has suffered loss by reason of performance, the court may order the other to pay to such party a sum of money and if a party has derived benefit other than financial, the court may order such party to pay to the order a sum of money which must be less than the benefit it so derived.

3.0 Comparative law: The Defense Production Act of the USA

This US federal legislation is useful in offering a discussion context. Under section 101 of the Defense (sic) Production Action Act (hereinafter “DPA”) the President is authorised to *inter alia* require the performance under contracts or orders which s/he deems necessary to promote national defence.¹⁵ Further the section provides that these contracts shall take priority over performance under any other contract or order by the person the President finds to be capable of their performance. The person who is directed to perform an order has been defined under section 702 to include an individual, corporation, partnership, association, or any other group of persons or legal successors or representative thereof of any State or local government or agency thereof.

The effect of section 101 as read together with section 702 is to bring foreign investors under the ambit of the DPA and consequently leaving them at the mercy of the President who may at his whims direct these investors to perform certain contracts that promote national defence. These contracts usurp the right of foreign investors and other persons obligated to perform them, in their rights under pre-existing contractual arrangements and the right to decline to do business. It is the crux of this section to determine whether this would amount to indirect expropriation.

¹⁴ Cap 23, Section 2.

¹⁵ [https://www.fema.gov/media-library-data/1515074994368-bdc5ff1d7b24e5e60888661aaca15bf1/Defense_Production_Act_\(current_thru_2017\).pdf](https://www.fema.gov/media-library-data/1515074994368-bdc5ff1d7b24e5e60888661aaca15bf1/Defense_Production_Act_(current_thru_2017).pdf). Accessed on 12th June 2020.

International investment agreements (hereinafter “IIA”) traditionally guarantee the protection of foreign investors from uncompensated expropriation.¹⁶ There are two forms of expropriation, direct and indirect expropriation. Direct expropriation encompasses the transfer of title or seizure of property.¹⁷ Indirect expropriation on the other hand include the destruction of the economic value of the investment or depriving the owner of its ability to manage use or control the property.¹⁸ There is also non-discriminatory regulatory measures which are acts taken by states in the exercise of their right to regulate in public interest which leads to effects similar to indirect expropriation but does not give rise to the obligation to compensate persons affected by the action.¹⁹

In the *Starrett Housing*²⁰ case indirect expropriation was defined as measures taken by the state that interfere with the property rights of the investor to an extent that they are rendered useless. In *Suez v Argentina*²¹ the tribunal broadened the definition of indirect expropriation to include an act where “*host States invoke their legislative and regulatory powers to enact measures that reduce the benefits investors derive from their investments but without actually changing or cancelling investors’ legal title to their assets or diminishing their control over them.*” This holding is broad enough to include measures that reduce the investor’s profits, however this has further been qualified by the need for the measure adopted by the government to have a long term effect on the investor.²²

There are however as earlier discussed certain state measures that are normal and thus non-compensable acts of state. In *Saluka Investments v Czech*

¹⁶UNCTAD, *Expropriation: A Sequel* (2012)

<http://unctad.org/en/Docs/unctadaddiaia2011d7_en.pdf> accessed 9 April 2020 xi.

¹⁷ Ibid.

¹⁸ Ibid.

¹⁹ Ibid.

²⁰ *Starrett Housing Corporation et al. v. The Government of the Islamic Republic of Iran*, Interlocutory Award No. ITL 32-24-1 of 19 December 1983.

²¹ *Suez, Sociedad General de Aguas de Barcelona S.A., and InterAgua Servicios Integrales del Agua S.A. v The Argentine Republic*, ICSID Case No. ARB/03/17, decision on Liability of 30 July 2010

²² UNCTAD (n 12).

*Republic*²³ the tribunal in reference to the above principle stated that “it is now established in international law that States are not liable to pay compensation to a foreign investor when, in the normal exercise of their regulatory powers, they adopt in a non-discriminatory manner bona fide regulations that are aimed at the general welfare.” Discrimination has been defined under Black’s law dictionary to mean deny someone the equal protection of the law and to treat people differently.²⁴ Under section 101 of the DPA persons may be obligated to perform contracts and this does not discriminate against foreign investors.

Further under section 101(b) the President may only invoke the power to require performance under the following conditions: such material is of a scarce nature essential to national defence; and the requirements for national defence cannot be met without creating a significant dislocation of the normal distribution of such resources. Section 101 in its entirety is therefore aimed at enhancing the general welfare of American citizens. The requirement of adequate compensation is also fulfilled by the Government as it compensates businesses under the contracts at reasonable rates.²⁵ This is in line with the doctrine of fair and adequate compensation for the products. Though the foreign investor may have negotiated a contract with better terms with his buyers he will nonetheless have to supply to the Government at the market value of the goods produced.

On the face of it this presents an infringement on the rights of the foreign investor, though the requirement for a long lasting effect on the foreign investor must also be established. The foreign investor may therefore sue for the difference in profits made in supplying the government with the essential products based on the holding of the tribunal in the *Suez* case where the profits

²³ *Saluka Investments BV (The Netherlands) v The Czech Republic*, UNCITRAL Arbitration, partial Award of 17 March 2006.

²⁴ Black’s Law Dictionary 2nd Ed available at <https://thelawdictionary.org/discrimination/> accessed 11 April 2020.

²⁵ David Dayen, ‘Unsanitized: The Gaping Hole in the Defense Production Act’ *The American Prospect* (24 March 2020) <https://prospect.org/coronavirus/unsanitized-gaping-hole-defense-production-act/> accessed 12 April 2020.

of the investor are reduced over an extended period of time as this amounts to indirect expropriation.

4.0 Taxation Policies

With the corona virus affecting people's ability to work, the government of Kenya through the President, offered taxation incentive proposals to businesses and commodities to enable the reduction of the cost of items. The incentive proposal specifically stated that resident corporate income tax be reduced from 30% to 25%.²⁶ The Income Tax Act Section 4(a) defines a resident company as one that is incorporated in Kenya and its jurisdiction is based in Kenya. Non-resident companies are taxed at a rate of 37.5% which remains the case despite the pandemic.²⁷ Most foreign investors would lie under that taxation regime. With the proposal not providing any incentive for foreign investors, this poses the risk of disadvantaging foreign investments.

The concept of national treatment can however be invoked in this case to cushion the blow on foreign investments granted there is a clause in the agreement on National treatment. National treatment means that a foreign investor and its investments will be treated no less than the national standards or the nationals of the host state. What this concept therefore means is that with the Bilateral Investment Treaties, Regional Investment Treaties and Multilateral Investment Treaties between Kenya and a foreign investor that provide a national treatment clause, the foreign investor should get the same treatment as the Kenyan national.

This can therefore be applied in the case of taxation where no incentive is provided for foreign investments, to act as a protective measure for the foreign investments. They can be given the same taxation incentives as local investors to enable them protect their investments. Failure to do so would result in the collapse of said investments. They run the risk of heavy losses by maintaining

²⁶ Jackson Okoth, 'Uhuru's Fiscal Plan Needs Parliamentary Approval' (2020) Kenyanwallstreet

< <https://kenyanwallstreet.com/uhurus-fiscal-plan-needsparliamentary-approval/> >
accessed 7th April 2020.

²⁷ John Mutua, *Citizen's Handbook on taxation in Kenya* (Institute of economic affairs 2011) 21.

high prices on commodities or lowering their prices. This could have serious adverse ramifications on the future of foreign investments even after the pandemic.

5.0 Long Term Repercussions

In the aftermath of a pandemic, trade is effectively disrupted and investments by foreign investors are clouded in uncertainty as countries gear up for the long term economic repercussions. From previous cases of pandemics some common threads do emerge. They generally involve reduced foreign investment opportunities by investors as many investments and production move back to home countries. This arises due to different restrictions involving travel and operation of businesses coming into force in host states. The standard of treatment of foreign investment law regarding full protection and security may be breached through alterations in legal framework in the aftermath of such pandemics.

In the case of *Wena Hotels v Egypt*,²⁸ the tribunal stated that changes in legal framework constitute a breach of principle of full protection and security. The changes in legal framework could be instituted for a variety of reasons from curbing transmission of virus to allow domestic producers to recoup their losses. The overall effect is that foreign investment may subsequently reduce due to changes in legal frameworks as countries re-evaluate their interests following such events. Additionally, pandemics are known to stagnate the economy with local businesses suffering greatly due to customers' reduced purchasing power. Foreign investment is adversely impacted as governments aim to create favourable conditions for local producers to resuscitate their businesses. Such preference results in cessation of favourable treatment afforded to foreign investors in foreign investment law.

One of the standards of protection afforded to foreign investment is the Most Favoured Nation treatment seen in many BIT and MIT treaties.²⁹ The clauses in such treaties are aimed to provide foreign investors with the same benefits in investing as local investors to create a 'level playing field'. In the aftermath

²⁸ *Wena Hotels v Arab Republic of Egypt* ICSID Case No. ARB/98/4

²⁹ Bloom, Erik, Vincent de Jose, 'Potential Economic Impact of an Avian Flu Pandemic on Asia' [2005]

of the pandemic it is envisionable that such MFN treatment afforded by host state is usually revoked. As governments have increased financial and social burdens they are unable to provide such concessions. However, in other cases pandemics may encourage foreign investment as governments encourage foreign investors to inject capital in local markets.

A possible remedy to revocation of MFN status could involve taking the matter to the ICSID tribunal by the claimant as was the case in *Maffezini v Spain*, the tribunal ruled that by virtue of the MFN clause mentioned in the 1991 Argentina-Spain BIT.³⁰ The claimant can resort to international arbitration if a BIT is breached no matter the circumstances. Countries are under an obligation to fulfil the terms of their treaties and should be the first stop in event of a disagreement over the terms.

As foreign investors leave, the host state's foreign workers are also expected to leave. This remains a worrying factor in many of the previous pandemics such as the SARS virus which contributed to most of foreign expatriates leaving. Cases of arbitrary and discriminatory treatment become common amongst foreign workers as governments prioritise needs of local workers.³¹ This is partly due to the fact that local workers are given preference over foreign workers. Arbitrary and capricious conduct could entail tightening restrictions on foreign workers permit and forbidding temporary residency. This has been extensively discussed in *Siemens v Argentina* which discussed that arbitrary conduct entailed capricious and despotic conduct which in this context can apply to treatment of foreign workers.³² A possible remedy to this treatment could be reviewing the terms of the treaties and include provisions placing restrictions on foreign workers in consultation with the relevant stakeholders so that foreign investors are not adversely impacted by the host state actions. Therefore, negotiations between foreign investors and the host state need to take place and the outcomes discussed in treaties.

³⁰ *Emilio Agustín Maffezini v. The Kingdom of Spain*, ICSID Case No. ARB/97/7

³¹ James Dacosta, The impact of coronavirus
<https://www.thequint.com/news/world/coronavirus-impact-on-china-foreign-trade>>
accessed on 10th March 2020

³² *Siemens A.G. v. The Argentine Republic*, ICSID Case No. ARB/02/8.

Finally, foreign investment is likely to increase based on a country's growth potential that foreign investors are eager to take full advantage of.

After the COVID 19 pandemic ends there is likely to be a more cautious approach between foreign investors and the host state when deciding to invest. This is due to the fact that pandemics exacerbate the economic woes of a particular country, trade is disrupted and uncertainty exists in the markets. This shall lead to many treaties such as BITs and MITs to be renegotiated to cater for the changing market dynamics. Therefore, future negotiations are likely to be marred with additional concessions made by host states in order to encourage foreign investments to flourish. A vivid example remains the SARS outbreak, which led to global decline in oil production.³³ As the disease was contained, many treaties that existed between Middle Eastern countries and China were renegotiated to enable Chinese foreign investment in the oil sector. Such a scenario remains likely in the aftermath of the COVID 19 crisis as many treaties will require amendments to encourage foreign investors to continue investing.

6.0 Recommendations

With regard to the DPA, an amendment must be made to introduce a provision regulating payment under the contracts. The clause should provide with specificity that the value of the subject matter of the contract will be the value accorded to it under other similar contracts negotiated by the business. This will shield the American government from claims for loss of profits filed by foreign investors at International tribunals.

In the aftermath of the COVID 19 pandemic crisis, there is a need for a re-evaluation of the treaties and other agreements existing between host states and foreign investors. This comes in the wake of the IMF's prediction that the global economy shall shrink by 3%. Undoubtedly, this shall have an adverse effect on the relations between foreign investors and host states as previous conditions and treatments afforded will no longer be applicable. Therefore, all the relevant stakeholders need to be involved in drawing up and amending the

³³ Oona A. Hathaway "Between Power and Principle: An Integrated Theory of International Law" [2

current BITS and MITS that exist. This, shall be in the best interest of maintaining friendly relations between states and avoiding a misunderstanding of any sorts.

The laws on taxation should also be amended to unequivocally include the place of foreign investors in the taxation system. Further the remedies available for foreign investments in such a scenario other than providing the tax incentive would be to extend the incentive for a considerable amount of time after the pandemic. This would enable both local and foreign investments to recover from the effects of a pandemic. A statement by KPMG regarding the directive by the president suggested that in order for the incentive to attain its desired effect, it would need to be carried out for months probably years after the pandemic is over³⁴.

³⁴ *ibid.*

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Redefining Development in Kenya-Reflections and Lessons from the Coronavirus disease (COVID-19) Pandemic

By: Kariuki Muigua*

Abstract

Since the first case of Coronavirus disease (COVID-19) in the world was diagnosed in China some time in December 2019, and has since then become a global pandemic, the resultant economic and social effects have been far greater than anything the world has experienced recently. However, these effects are arguably far much greater felt within the Global South region as compared to the Global North. This paper offers some reflections and lessons to the African countries and Kenya in particular on the need to shift their development goals towards building a better future for their people as far as socio-economic development is concerned. African countries, which are technically beggars as they stand today, need to draw some important lessons from the pandemic and chart a new development path post-Covid-19.

1. Introduction

The first case of Coronavirus disease (COVID-19) in the world was diagnosed in China some time in December 2019, and since then it has become a global pandemic, declared a pandemic by the World Health Organization (WHO) on 11 March 2020, which has continued to spread across the world.¹ The disease has not only caused unprecedented health crisis but has also threatened to bring the global economy to its knees.² In addition to this, the pandemic has exposed

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¹ 'Coronavirus (COVID-19) Events as They Happen'

<<https://www.who.int/emergencies/diseases/novel-coronavirus-2019/events-as-they-happen>> accessed 22 May 2020.

² Fernandes, N., "Economic effects of coronavirus outbreak (COVID-19) on the world economy." Available at SSRN 3557504 (2020); 'Complacency to Chaos: How Covid-

the underbelly of African economies as far as development is concerned. It is evident from the reports that most if not all African countries are heavily relying on donor funds to not only fight the pandemic but also to ensure that their economies do not collapse. This has necessitated revisiting the old debate between the Global North and the Global South on what development means for them.

This paper starts on the premise that the Global South has for long relied on the Global North for not only defining what development should mean for them but also dictating how development projects in the Global South are implemented. The main reason for this is that it is the Global North donors and countries that fund these projects and thus retain the powers to dictate what and how these projects should be actualised.

This discourse is important because African countries, which are technically beggars as they stand today, need to learn some important lessons from the pandemic and chart a new development path post-Covid-19. Apart from their weak health systems, it is also arguable that the reason most of the affected African countries have not been able to call for total lockdown as has been the case in countries such as China, United Kingdom, Italy among others, is because their economies may not survive a lockdown at this stage, especially without the donor funds. In addition, their people are too poor to remain indoors for months as most of them survive on wages and live hand to mouth.³ The existing socio-economic infrastructure and investments in the country cannot support the needs of the Kenyan population and this comes with greater

19 Sent the World's Markets into Freefall | Business | The Guardian' <<https://www.theguardian.com/business/2020/mar/28/how-coronavirus-sent-global-markets-into-freefall>> accessed 22 May 2020; <https://www.the-star.co.ke/authors/alex-awiti>, 'Covid-19 Triggers Unprecedented Global Economic Turmoil' (*The Star*) <<https://www.the-star.co.ke/opinion/columnists/2020-03-24-covid-19-triggers-unprecedented-global-economic-turmoil/>> accessed 22 May 2020.
³ Central Bank of Kenya, Kenya National Bureau of Statistics and FSD Kenya, *The 2019 Finaccess Household Survey*—Financial Sector Deepening Kenya, April 3, 2019 <<https://fsdkenya.org/publication/finaccess2019/>> accessed 22 May 2020; <https://www.the-star.co.ke/authors/amadala>, '51% of Kenyans Live Hand to Mouth - CBK Report' (*The Star*) <<https://www.the-star.co.ke/business/2019-04-03-51-of-kenyans-live-hand-to-mouth-cbk-report/>> accessed 22 May 2020.

risks of exposure Covid-19 for the general public. This paper proffers the hypothesis that there is hardly enough investment by the Government for socio economic development in the country.

The discourse revisits the widely discussed theme of development with a view to analysing the challenges that face the existing approaches to development, making them inappropriate for the Global South, especially Africa. The discussion highlights the existing definitions and approaches and how the same differ from the needs and circumstances existing within the third world, as far as development needs are concerned.

The phrase “Global South” is used to refer broadly to the regions of Latin America, Asia, Africa, and Oceania. It is one of a family of terms, including “Third World” and “Periphery,” that denote regions outside Europe and North America, mostly (though not all) low-income and often politically or culturally marginalized.⁴ Notably, the phrase ‘Global South’ is meant to mark a shift from a central focus on development or cultural difference toward an emphasis on geopolitical relations of power.⁵

This paper adopts the term ‘global south’ based on the hypothesis that development is greatly shaped by the power relations between the nations in the north and those in the south. Development is as much an economic as it is a political issue. No country can demand for political freedom when they cannot afford economic freedom.

2. Defining Development: Aspects and Theories of Development

The United Nations *Declaration on the Right to Development*⁶ recognises that development is a comprehensive economic, social, cultural and political process, which aims at the constant improvement of the well-being of the entire population and of all individuals on the basis of their active, free and meaningful participation in development and in the fair distribution of benefits

⁴ Dados, N. and Connell, R., "The global south." *Contexts* 11, no. 1 (2012): 12-13.

⁵ Ibid, p.12.

⁶ UN General Assembly, *Declaration on the Right to Development: resolution / adopted by the General Assembly*, 4 December 1986, A/RES/41/128.

resulting therefrom.⁷ The *Declaration* posits that the right to development is an inalienable human right by virtue of which every human person and all peoples are entitled to participate in, contribute to, and enjoy economic, social, cultural and political development, in which all human rights and fundamental freedoms can be fully realized.⁸ Notably, the term ‘development’ is not defined in the *Declaration* and instead it takes a descriptive approach which entails outlining the various aspects of development. Development takes many forms and thus defining the term must take into account the various elements of development.

Some scholars have defined ‘development’ to mean a multi-dimensional process that involves major changes in social structures, popular attitudes, and national institutions, as well as economic growth, reduction of inequality, and eradication of absolute poverty.⁹

Some opine that ‘development, then, is about: change for the better; continuing processes; collectivities of people; growth and prosperity; interrelationships.’¹⁰ The components of development are considered to be as follows: Growth, in the economy; Equity in the distribution of society’s resources to meet human needs; Participation in decisions about how these resources will be applied.¹¹

The international agenda which began to focus on development beginning in the second half of the twentieth century was reinforced by the belief the understanding that economic growth did not necessarily lead to a rise in the

⁷ Ibid, Preamble.

⁸ Article 1.1, *Declaration on the Right to Development: resolution / adopted by the General Assembly*, 4 December 1986, A/RES/41/128.

⁹ Gabriel Antwi, ‘The Theories of Development Studies’, 2019, p.1. Available at https://www.researchgate.net/publication/331262291_THE_THEORIES_OF_DEVELOPMENT_STUDIES [Accessed on 15/5/2020].

¹⁰ Bown, L., *What do we mean by Development?*. Development Education Centre and 80: 20 Educating and Acting for a Better World, 1999, p.4. Available at <https://developmenteducation.ie/media/documents/What.pdf> [Accessed on 15/5/2020].

¹¹ Bown, L., *What do we mean by Development?*. Development Education Centre and 80: 20 Educating and Acting for a Better World, 1999, p.7. Available at <https://developmenteducation.ie/media/documents/What.pdf> [Accessed on 15/5/2020].

level and quality of life for populations all over the world; there was a need to place an emphasis on specific policies that would channel resources and enable social and economic mobility for various layers of the population.¹² Indeed, this view has solidified over the years considering that it forms the foundation upon which the sustainable development agenda is built.

The three essential dimensions of sustainable development agenda are: *Economic*: an economically sustainable system must be able to produce goods and services on a continuing basis, to maintain manageable levels of government and external debt, and avoid extreme sectoral imbalances that damage agricultural and/or industrial production; *Environmental*: an environmentally sustainable system must maintain a stable resource base and avoid over-exploitation of non-renewable resource systems, including maintenance of biodiversity, atmospheric stability and ecosystems services not always looked upon as economic resources; and *Social*: a socially sustainable system must achieve fairness in distribution and opportunity among all persons with adequate provision of such social services as health, education and gender equity. The social dimension focuses on reconciliation of environment and development, and governance related to provision of social services.¹³

There are four main theories of development namely: modern; dependency; world-systems; and globalization.¹⁴ The proponents of modernisation theory argued that development involved the process of replicating the changes in social, economic and political systems that developed in western Europe and North America from the 17th century to the 19th century and have then spread to other countries and in the 19th and 20th centuries to the South American,

¹² 'What Is Development?' <<https://www.sid-israel.org/en/Development-Issues/What-is-Development>> accessed 19 May 2020.

¹³ Sanginga, P.C., Ochola, W.O. and Bekalo, I., "Natural resource management and development Nexus in Africa." *Managing Natural Resources for Development in Africa: A Resource Book* (2010): 11-43.

¹⁴ Shareia, B.F., "Theories of development." *International Journal of Language and Linguistics* 2, no. 1 (2015): 78-90.

Asian and African continents.”¹⁵ This would largely be facilitated through colonisation.¹⁶ It was thus a case of the Global North not only imposing their influence upon the Global South but was also exercising their power and setting the development agenda which they would later fund through donor funding. Indeed, some have argued that the reason for the emergence of Modernisation Theory was the freedom of Third World countries from colonization and the strategies employed during the Cold War by Western countries in order to prevent these countries from being controlled by communists.¹⁷

While the support from the Global North especially in terms of the funds may be welcome to the Global South as it strives to achieve socio-economic development for its people, the downside to this is that over the years, the leaders in these developing countries have had little if any incentive to invest in their institutions and their people as they always have a fall back plan through asking for foreign and donor funds to cushion their economies against shocks such as the current Covid-19 pandemic.

The focus of the modernisation approach on replicating the development model of the now developed nations makes the policymakers in the developing nations lose focus of the real challenges afflicting their people as they compete to become like the developed world in terms of infrastructural development. It must be appreciated that this theory envisages development as a phased process and different regions of the world must thus realise that they are at different phases of development. The leaders fail to acknowledge that as they seek to modernise the infrastructural systems in the country, the African countries are still struggling with poverty, hunger, disease, illiteracy, inequalities, corruption and other social ills.¹⁸

¹⁵ ‘The Basic Characteristics of Modernization. 1966’ (2006), in: Themenportal Europäische Geschichte, 2006, <<http://www.europa.clcio-online.de/quelle/id/q63-28279>> accessed 22 May 2020;

¹⁶ Ibid.

¹⁷ Shareia, B.F., "Theories of development." *International Journal of Language and Linguistics* 2, no. 1 (2015): 78-90, at p.79.

¹⁸ Handley, G., Higgins, K. and Sharma, B., *Poverty and poverty reduction in sub-Saharan Africa: An overview of the issues*. Overseas Development Institute, 2009;

The Dependency Theory seeks to improve the Modernisation Theory by combining elements from a neo-Marxist theory and adopting a “revolution of under developed nations’ model”.¹⁹ The theory focuses on the totality of society and social system periphery, which highlights the differences between imperialistic countries in the first world and underdeveloped countries.²⁰ Dependency Theory explains these differences by focusing on regions and structural conditions in different nation states.²¹

Three main characteristics of dependency theory are summarised as follows: First, the international system is seen as the sum of two sets of states: *dominant* and *dependent*; Second, dependency theory holds that *external forces* are critical in terms of economic activity of dependent states; Third, relationships, based on strongly historical patterns and dynamics (i.e., *internationalization of capitalism*), between dominant and dependent states are a vibrant process, with exchanges taking place between the states playing a considerable role in the reinforcement of patterns of inequality.²²

Dependency theory is a mixture of various theories, including world systems theory, historical structure theory, and neo-Marxist theory.²³ Some commentators have pointed out the following limitations of the dependency theory: the theory significantly failed to explain the rise of the newly industrialized countries of East Asia (Hong Kong, South Korea, Taiwan, and Singapore), as well as those of Southeast Asia (Indonesia, Malaysia, and Thailand); the theory also presumes that all developing countries share the same traits; and finally, dependency theory is limited in its analytical ability when applied to sectors beyond manufacturing.²⁴

¹⁹ Shareia, B.F., "Theories of development." *International Journal of Language and Linguistics* 2, no. 1 (2015): 78-90, p. 81.

²⁰ Ibid, p.81.

²¹ Ibid, p. 81.

²² Scott Romaniuk, ‘Dependency Theory’ in, Joseph, P., ed., *The SAGE encyclopedia of war: social science perspectives*. Sage Publications, 2016.

²³ Ibid.

²⁴ Scott Romaniuk, ‘Dependency Theory’ in, Joseph, P., ed., *The SAGE encyclopedia of war: social science perspectives*. Sage Publications, 2016., p. 4.

The World Systems Theory uses other levels of quantitative analysis, though it admits that there is no set of processes in World Systems Theory that is applicable to all economies.²⁵ World Systems Theory argues that international trade specialization and transfer of resources from less developed countries to developed countries (known as “core” countries) prevents development in less developed countries by making them rely on core countries and by encouraging peripheralization.²⁶ In other words, wealth is taken from semi-periphery or periphery zones to economies in the core countries.²⁷

Globalisation is a theory of development that uses a global mechanism of greater integration with particular emphasis on the sphere of economic transactions. It is a US- and Europe-centric positive model of development whose feature is the spread of capitalism around the globe.²⁸ Notably, these main theories revolve around the impact of the Global North’s policies and systems on the Global South. The bottom line is that the development agenda of the developing countries in the South seem to be inherently tied to that of the developing nations.

3. Need for Contextualised Development for the Global South: Prospects and Challenges

Some commentators have rightly pointed out that encouragement of growth and increase in wealth without safeguards over distribution of wealth leads to poverty for those who are excluded. In this respect, poverty, seen as human distress, becomes more dramatically noticeable in societies where there has been a rise in wealth for some but a widening gap between those who have benefited and those who have not.²⁹

Notably, while the Western concept of development largely relies on Gross National Product (hereafter GNP) or Gross Domestic Product (GDP) per

²⁵ Shareia, B.F., "Theories of development." *International Journal of Language and Linguistics* 2, no. 1 (2015): 78-90, p. 82.

²⁶ Ibid, p.82.

²⁷ Ibid, p. 82.

²⁸ Shareia, B.F., "Theories of development." *International Journal of Language and Linguistics* 2, no. 1 (2015): 78-90, p. 83.

²⁹ Bown, L., *What do we mean by Development?*. Development Education Centre and 80: 20 Educating and Acting for a Better World, 1999, p.11.

capita on which, for example, the World Bank bases its typology of development with occasional citation of other measures of development such as caloric intake, access to portable water, infant and maternal mortality, life expectancy, literacy, and so as representative measures of human development, as distinguished from measures of economic development, some scholars have rightly challenged this approach.³⁰ While it is acknowledged that none of these measures of the development of humanity can be improved without a certain level of economic well-being relative to the society in which one lives, exclusive reliance on economic quantities such as GNP per capita, however, as standards for the economic development of countries exclude, or at least supersede, these more broadly humanitarian issues.³¹ Furthermore, economic measures of wealth generally overlook the environmental costs of growth and the social costs incurred by families and communities as well as discrediting the benefits that accrue from non-monetary sources and social networks.³²

3.1 Response to Covid 19

Notably, in most developing countries especially within the urban poor living in slums and other informal settlements, the call for social distancing, self-isolation and other restrictive measures by the Government that are meant to curb the spread of Covid-19 remain difficult if not impossible to implement. This is due to the fact that for them it is a tough call to balance between the risk of contracting and spreading disease or putting up with hunger and possible death. Thus, for them it is a catch-22 situation. Poverty and lack of basic necessities have therefore made it harder to implement the Government's directives on combating Covid-19 among these poor and vulnerable groups of people in the country. It is not enough that the Government is receiving donor funding from donors to fight the pandemic; the systemic challenges of poverty, hunger, disease, illiteracy and corruption, among others still pose a greater challenge to combating Covid-19 in the country and the African continent at large. The pandemic has affirmed that it is difficult if not impossible to contain

³⁰ Debra Straussfogel, 'Redefining Development as Humane and Sustainable' (1997) 87, *Annals of the Association of American Geographers*, 280, at p.281.

³¹ *Ibid*, p. 281.

³² *Ibid*, p. 281.

a poverty-stricken populace even in the greatest external danger. Their first instinct is to fight hunger, which is the most basic survival need.

Kenya's development blueprint, Vision 2030 was launched by the Grand Coalition Government in July 2008. It was the first national long-term development vision and its aim was to transform Kenya into a newly industrialising, middle-income country providing a high quality of life to all its citizens by 2030 in a clean and secure environment. The three key pillars of this vision are: a sustained average economic growth rate of 10% p.a.; just, cohesive and equitable social development in a clean and secure environment; and an issue-based, people-centred, results-oriented and accountable democracy.³³ This is what is supposed to guide the country's development agenda and any investments should be geared towards achieving this.

The World Bank observes that Kenya has made significant political, structural and economic reforms that have largely driven sustained economic growth, social development and political gains over the past decade. However, its key development challenges still include poverty, inequality, climate change, continued weak private sector investment and the vulnerability of the economy to internal and external shocks.³⁴ Indeed, Covid-19 has demonstrated the extent to which Kenya's economy is vulnerable to external shocks. While data from the World Bank and the United Nations may paint a positive picture of development in a country, the reality on the ground may be different. Some commentators have even suggested that *"the questions to ask about a country's development are three: What has been happening to poverty? What has been happening to unemployment? What has been happening to inequality? If all three of these have declined from high levels, then beyond doubt this has been a period of development for the country concerned."*³⁵

³³ 'National Development Plan in Kenya'

<<http://www.commonwealthgovernance.org/countries/africa/kenya/national-development-plan/>> accessed 15 May 2020.

³⁴ 'Overview' (World Bank)

<<https://www.worldbank.org/en/country/kenya/overview>> accessed 15 May 2020.

³⁵ Seers, Dudley, 'The meaning of development' in International Development Review, Dec 1969, Reproduced Lehmann, 1979.

Kenya still struggles with giving positive feedback on the three questions and the situation becomes dire when we look at the rural areas as well as the urban informal settlements where there are high levels of poverty. Despite some positive reports on notable improvements, there still exist inequalities in Kenya, as far as access to social, economic and political opportunities are concerned.³⁶ In September 2018, the United Nations' human development index, which is the index used by the United Nations to measure the progress of a country, ranked Kenya as one of the countries still lagging behind as far as human development is concerned as it was ranked position 142 out of 189.³⁷ Again, according to the UNDP's *Human Development Report 2019*³⁸ titled "Beyond income, beyond averages, beyond today: Inequalities in human development in the 21st century", as at 2018, 38.7 per cent of Kenya's population or 19.2 million people were poor while an additional 34.9 per cent or 17.3 million people were classified as vulnerable. Even more worrisome is the 2019 survey report released by the Central Bank of Kenya to the effect that about 51 per cent of Kenyans are living hand to mouth, a rise from 34.3 per cent in 2016.³⁹ The implication of these statistics is that this huge percentage

³⁶ 'Kenya: Extreme Inequality in Numbers' (*Oxfam International*, 20 October 2019) <<https://www.oxfam.org/en/kenya-extreme-inequality-numbers>> accessed 22 May 2020; Stefania Ilinca and others, 'Socio-Economic Inequality and Inequity in Use of Health Care Services in Kenya: Evidence from the Fourth Kenya Household Health Expenditure and Utilization Survey' (2019) 18 *International Journal for Equity in Health* 196; 'Overview' (*World Bank*) <<https://www.worldbank.org/en/country/kenya/overview>> accessed 22 May 2020; 'Kenya Lags behind in Human Development, UN Report Reveals - Daily Nation' <<https://www.nation.co.ke/news/diaspora/Kenya-lags-behind-in-human-development--UN-report-reveals---/2107720-4760978-98afngz/index.html>> accessed 22 May 2020.

³⁷ 'Kenya Lags behind in Human Development' (*Daily Nation*) <<https://www.nation.co.ke/news/diaspora/Kenya-lags-behind-in-human-development--UN-report-reveals---/2107720-4760978-98afngz/index.html>> accessed 21 May 2020.

³⁸ Conceição, P. "Human development report 2019." *Beyond income, beyond averages, beyond today: Inequalities in human development in the 21st century*. New York, UNDP (2019). Available at <http://hdr.undp.org/sites/default/files/hdr2019.pdf> [Accessed on 16/5/2020].

³⁹ Central Bank of Kenya, Kenya National Bureau of Statistics and FSD Kenya, *The 2019 Finaccess Household Survey*—Financial Sector Deepening Kenya, April 3, 2019 <<https://fsdkenya.org/publication/finaccess2019/>> accessed 22 May 2020; <https://www.the-star.co.ke/authors/amadala>, '51% of Kenyans Live Hand to Mouth -

risks hunger in case they are completely contained within their houses. Arguably, fighting poverty is the first step towards a healthy nation and attaining economic freedom. As things stand, Kenya's economy and indeed most of other African countries are highly dependent on the generosity of the Bretton Woods institutions and other foreign donors. After the Covid-19 pandemic is over, it would therefore be impossible if not outright hilarious for these African countries to warn the developed countries to keep off their domestic issues as far as decision-making processes on development are concerned. It is a classic case of he who pays the piper calls the tune.

The Covid-19 pandemic has proved that no matter how industrialized a country becomes, as long as they have not invested in their people through socio-economic and human development, they are truly not independent. The ongoing Covid-19 pandemic has exposed the challenges that are still facing the country and the African continent at large.⁴⁰ The economies have been hit hard and it is expected that the effect will be felt for longer.⁴¹

CBK Report' (*The Star*) <<https://www.the-star.co.ke/business/2019-04-03-51-of-kenyans-live-hand-to-mouth-cbk-report/>> accessed 22 May 2020.

⁴⁰ Damian Zane, "'Without Food, We'll Die inside Our Homes'" *BBC News* (28 April 2020) <<https://www.bbc.com/news/world-africa-52426040>> accessed 22 May 2020; 'Aid Has Failed. COVID-19 Both Exposes This and Offers the Chance for a Reset.' (*African Arguments*, 16 April 2020) <<https://africanarguments.org/2020/04/16/aid-has-failed-coronavirus-covid-19-both-exposes-this-and-offers-the-chance-for-a-reset/>> accessed 22 May 2020; 'COVID-19 (Coronavirus) Drives Sub-Saharan Africa Toward First Recession in 25 Years' (*World Bank*) <<https://www.worldbank.org/en/news/press-release/2020/04/09/covid-19-coronavirus-drives-sub-saharan-africa-toward-first-recession-in-25-years>> accessed 22 May 2020.

⁴¹ Union, African. "Impact of the Coronavirus Covid-19 on the African Economy." *Addis Ababa: African Union* (2020); Ozili, P.K. "COVID-19 in Africa: socioeconomic impact, policy response and opportunities." *Policy Response and Opportunities (April 13, 2020)* (2020); Bong, C.L., Brasher, C., Chikumba, E., McDougall, R., Mellin-Olsen, J. and Enright, A., "The COVID-19 Pandemic: Effects on Low- and Middle-Income Countries." *Anesthesia and Analgesia* (2020); Gilbert, M., Pullano, G., Pinotti, F., Valdano, E., Poletto, C., Boëlle, P.Y., d'Ortenzio, E., Yazdanpanah, Y., Eholie, S.P., Altmann, M. and Gutierrez, B., "Preparedness and vulnerability of African countries against importations of COVID-19: a modelling study." *The Lancet* 395, no. 10227 (2020): 871-877;

Most African countries have resorted to giving out food handouts in form of care packages and monthly stipends to the section of their population that is considered poor and vulnerable and the funds to do this have originated from donors.⁴² This was reflected by the World Bank Vice President for Africa's comments that they are "rallying all possible resources to help countries meet people's immediate health and survival needs while also safeguarding livelihoods and jobs in the longer term – including calling for a standstill on official bilateral debt service payments which would free up funds for strengthening health systems to deal with COVID 19 and save lives, social safety nets to save livelihoods and help workers who lose jobs, support to small and medium enterprises, and food security."⁴³ The April edition of *Africa's Pulse*, the World Bank's twice-yearly economic update for the region, recommended that African policymakers pay attention to saving lives and protecting livelihoods by focusing on strengthening health systems and taking quick actions to minimize disruptions in food supply chains. They also recommend implementing social protection programs, including cash transfers, food distribution and fee waivers, to support citizens, especially those working in the informal sector.⁴⁴

In line with this, Kenya's new scheme, known as the *Covid-19 Support Stipend* which was launched by President Uhuru Kenyatta targets only the most poor and vulnerable. While the initiative is well meaning, it is not clear if the same will be sustained for long should the pandemic continue for longer. It is also worth pointing out that those considered to be poor and vulnerable are largely being picked based on their income. However, it is also true that a good number of the major town dwellers especially in Nairobi and Mombasa are on salaries

⁴² Ibid; See also 'Grants Not Loans Needed in Africa to Fight' <<https://www.theafricareport.com/25870/fighting-covid19-in-africas-most-vulnerable-states-needs-grants-not-loans/>> accessed 22 May 2020; Andrew Mizner, 'ALB - African Law and Business' (*ALB Legal and Business Issues from Africa*) <<https://iclg.com/alb/11307-african-countries-receive-imf-support-for-covid-19>> accessed 22 May 2020.

⁴³ 'COVID-19 (Coronavirus) Drives Sub-Saharan Africa Toward First Recession in 25 Years' (*World Bank*) <<https://www.worldbank.org/en/news/press-release/2020/04/09/covid-19-coronavirus-drives-sub-saharan-africa-toward-first-recession-in-25-years>> accessed 22 May 2020.

⁴⁴ Ibid.

and wages and with the continued layoffs at workplaces, it is expected that more people will join this category of the vulnerable. Indeed, this is not unique to Kenya as it is estimated that 85% of the continent's urban dwellers do not receive a regular wage.⁴⁵

This leaves the Government with the hard question as to whether the targeted bracket of people will be expanded. What qualifies or disqualifies one from being eligible to receive the government grants? It is not to be forgotten that the Horn of Africa is still suffering an unprecedented locust invasion and subsequent crop failures.⁴⁶ The implication of this invasion is that even after the coronavirus pandemic is over, the affected communities and to some extent the whole country will have to fight hunger and famine that will continue ravaging the country.

With the slowed down economic activities, many people have been left at the mercy of relying on aid and handouts. Indeed, even the Government has been relying on aid from donor countries and organisations in order to take care of its people. While this may not only be limited to Kenya, it is evident that the situation is mostly common with the African countries.⁴⁷

Questions have arisen as to whether, with the rising cases of coronavirus pandemic, donors will continue giving donations to the developing countries,

⁴⁵ 'Aid Has Failed. COVID-19 Both Exposes This and Offers the Chance for a Reset.' (*African Arguments*, 16 April 2020) <<https://africanarguments.org/2020/04/16/aid-has-failed-coronavirus-covid-19-both-exposes-this-and-offers-the-chance-for-a-reset/>> accessed 22 May 2020.

⁴⁶ 'Locust Plague Devastates Crops in Horn of Africa - Reuters' <<https://www.reuters.com/article/us-africa-locusts/locust-plague-devastates-crops-in-horn-of-africa-idUSKBN1ZG1GC>> accessed 22 May 2020; Nathaniel Gronewold News E&E, 'Unprecedented & rdquo; Locust Invasion Approaches Full-Blown Crisis' (*Scientific American*) <<https://www.scientificamerican.com/article/unprecedented-locust-invasion-approaches-full-blown-crisis/>> accessed 22 May 2020; 'East Africa's Plague of Locusts and the Bizarre Climate Science behind It' <<https://www.nationalgeographic.com/science/2020/02/locust-plague-climate-science-east-africa/>> accessed 22 May 2020.

⁴⁷ 'Grants Not Loans Needed in Africa to Fight' (*The Africa Report.com*, 9 April 2020) <<https://www.theafricareport.com/25870/fighting-covid19-in-africas-most-vulnerable-states-needs-grants-not-loans/>> accessed 22 May 2020.

mostly in the global south or they will focus on their own people who are also affected.⁴⁸ It has been observed that with countries focusing on their own outbreaks and economic turmoil, they could hesitate to contribute more abroad, potentially allowing the virus to take hold in vulnerable communities.⁴⁹ This is an eye opener for the Global South countries as far as over-reliance on donor funding and aid is concerned. Indeed, some African commentators have rightly pointed out that COVID-19 has changed the world especially in relation to donor aid. It is feared that it could lead to significant setbacks in the fight against poverty as developed countries turn inwards, thus changing the nature of aid as we know it.⁵⁰ African countries are therefore encouraged to consider this as an opportunity to reset their priorities, where the African countries learn to own their problems and invest in their homegrown lasting solutions.⁵¹

The mismanagement and/or non-priority utilisation of funds is evident across Africa in terms of Africa's infrastructural deficit, now badly exposed by coronavirus.⁵² Reports show that Africa has the lowest number of doctors per capita in the world, with the likes of Uganda limited to just 1 doctor per 10,000 people.⁵³ It is even surprising that these countries still export doctors or allow

⁴⁸ 'Will the Coronavirus Endanger Foreign Aid?' (*Council on Foreign Relations*) <<https://www.cfr.org/in-brief/coronavirus-endanger-foreign-aid-WHO>> accessed 22 May 2020.

⁴⁹ Ibid.

⁵⁰ 'Aid Has Failed. COVID-19 Both Exposes This and Offers the Chance for a Reset.' (*African Arguments*, 16 April 2020) <<https://africanarguments.org/2020/04/16/aid-has-failed-coronavirus-covid-19-both-exposes-this-and-offers-the-chance-for-a-reset/>> accessed 22 May 2020.

⁵¹ 'Aid Has Failed. COVID-19 Both Exposes This and Offers the Chance for a Reset.' (*African Arguments*, 16 April 2020) <<https://africanarguments.org/2020/04/16/aid-has-failed-coronavirus-covid-19-both-exposes-this-and-offers-the-chance-for-a-reset/>> accessed 22 May 2020.

⁵² 'Aid Has Failed. COVID-19 Both Exposes This and Offers the Chance for a Reset.' (*African Arguments*, 16 April 2020) <<https://africanarguments.org/2020/04/16/aid-has-failed-coronavirus-covid-19-both-exposes-this-and-offers-the-chance-for-a-reset/>> accessed 22 May 2020.

⁵³ 'Aid Has Failed. COVID-19 Both Exposes This and Offers the Chance for a Reset.' (*African Arguments*, 16 April 2020) <<https://africanarguments.org/2020/04/16/aid-has-failed-coronavirus-covid-19-both-exposes-this-and-offers-the-chance-for-a-reset/>> accessed 22 May 2020; 'Medical Doctors (per 10 000 Population)'

brain drain due to poor pay and poor working conditions, losing them to the developed world countries despite the shortage and the dire need for their services at home, due to a high disease burden and already fragile health systems.⁵⁴ At the same time, they still import doctors from countries such as Cuba⁵⁵, Kenya, Uganda and South Africa being some of the examples.⁵⁶

<<https://www.who.int/data/maternal-newborn-child-adolescent/monitor>> accessed 22 May 2020; 'Aid Has Failed. COVID-19 Both Exposes This and Offers the Chance for a Reset.' (*African Arguments*, 16 April 2020) <<https://africanarguments.org/2020/04/16/aid-has-failed-coronavirus-covid-19-both-exposes-this-and-offers-the-chance-for-a-reset/>> accessed 22 May 2020; 'Lowest Physicians Density Worldwide by Country 2016' (*Statista*) <<https://www.statista.com/statistics/280151/countries-with-the-lowest-physicians-density-worldwide/>> accessed 22 May 2020; abaird9z, 'Africa Has about One Doctor for Every 5000 People' (*Quartz*) <<https://qz.com/520230/africa-has-about-one-doctor-for-every-5000-people/>> accessed 22 May 2020.

⁵⁴ 'Diagnosing Africa's Medical Brain Drain | Africa Renewal' <<https://www.un.org/africarenewal/magazine/december-2016-march-2017/diagnosing-africa%E2%80%99s-medical-brain-drain>> accessed 22 May 2020; Olayinka Stephen Ilesanmi Ibadan University of, 'As Nigeria's Health Infrastructure Crumbles, Doctors Have Become a Key Export' (*Quartz Africa*) <<https://qz.com/africa/1657343/why-nigerias-doctors-are-leaving-in-droves/>> accessed 22 May 2020; Robbert J Duvivier, Vanessa C Burch and John R Boulet, 'A Comparison of Physician Emigration from Africa to the United States of America between 2005 and 2015' (2017) 15 *Human Resources for Health* 41; Alon Mwesigwa, 'Uganda Crippled by Medical Brain Drain' *The Guardian* (10 February 2015) <<https://www.theguardian.com/global-development/2015/feb/10/uganda-crippled-medical-brain-drain-doctors>> accessed 22 May 2020; Akhenaten Benjamin Siankam Tankwanchi, Çağlar Özden and Sten H Vermund, 'Physician Emigration from Sub-Saharan Africa to the United States: Analysis of the 2011 AMA Physician Masterfile' (2013) 10 *PLOS Medicine* e1001513.

⁵⁵ 'How Doctors Became Cuba's Biggest Export' (*Time*) <<https://time.com/5467742/cuba-doctors-export-brazil/>> accessed 22 May 2020.

⁵⁶ 20/1/2020, 'When Cuban Doctors Leave...' (*Daily Nation*) <<https://www.nation.co.ke/health/when-cubans-leave/3476990-5424908-cv5o0n/index.html>> accessed 22 May 2020; Reuters, 'Cuba Sends Doctors to South Africa to Combat Coronavirus' (*The Standard*) <<https://www.standardmedia.co.ke/article/2001369161/cuba-sends-doctors-to-south-africa-to-combat-coronavirus>> accessed 22 May 2020; 'How Doctors Became Cuba's Biggest Export' (*Time*) <<https://time.com/5467742/cuba-doctors-export-brazil/>> accessed 22 May 2020.

The sad reality is that while these foreign doctors were expected to facilitate knowledge, skills and technology transfer, and have indeed impacted positively on the recipient countries' health sector, the host countries have not done much to facilitate this by way of investing in the relevant infrastructure.⁵⁷

The statistics paint a grim picture of African countries' priorities as far as development is concerned especially in consideration of the fact the greatest threat to Africa is not posed by the pandemic itself; it is posed by careless African leaders, abdicating the responsibility for development and care for their citizens.⁵⁸

Political leaders and policymakers must take up the challenge and review their priorities when it comes to investments for national development. They must start paying serious attention to socio-economic and human development through such initiatives as adequate investment in education and health for inclusive growth and meaningful participation of groups vulnerable to poverty.

4. Redefining Development in Kenya- Adopting a Customised Global South Perspective on Development

Historically, the less developed countries have not defined what development means for their societies and are indeed considered as less developed based on the criteria delineated by the so called developed countries; instead, the values of the more developed countries are imposed on those societies which, from the eurocentric perspective, do not possess all the requisite development criteria. These criteria, therefore, become the measures of development denoting progress toward desired goals.⁵⁹ This has often led to underdevelopment or white elephant projects at the expense of people-centred development that would actually impact on the livelihoods of their people.

⁵⁷ 20/1/2020, 'When Cuban Doctors Leave...' (*Daily Nation*) <<https://www.nation.co.ke/health/when-cubans-leave/3476990-5424908-cv5o0n/index.html>> accessed 22 May 2020.

⁵⁸ 'Aid Has Failed. COVID-19 Both Exposes This and Offers the Chance for a Reset.' (*African Arguments*, 16 April 2020) <<https://africanarguments.org/2020/04/16/aid-has-failed-coronavirus-covid-19-both-exposes-this-and-offers-the-chance-for-a-reset/>> accessed 22 May 2020.

⁵⁹ Debra Straussfogel, 'Redefining Development as Humane and Sustainable' (1997) 87, *Annals of the Association of American Geographers*, 280, at p.280.

Development in Kenya and other African countries should focus on poverty eradication, economic empowerment of people, eliminating illiteracy, strengthening democratic and governance processes and institutions and fighting corruption.

Poverty eradication, sustainable economic growth and environmental sustainability are considered to be the key pillars of development plans in most African countries.⁶⁰ In addition, there is consensus that natural resources, especially those of land, soil, water, forest, plant and animal diversity, vegetation, renewable energy sources, climate change and ecosystems services are fundamental for improving livelihoods and achieving sustainable development in Africa.⁶¹ As already pointed out, one of the components of development is participation in decisions about how these resources will be applied. It is therefore arguable that it is not enough in an African country that its natural resources are utilised for what is considered to be national development but the targeted populace must also be included in making such decisions. Appropriation of available resources must be done in a way that takes into account the views of those expected to benefit. As already agreed that the development needs of each country differ from the rest, it is also when it comes to the regional parts of the country. What may be pressing for the residents of Nairobi may not be a priority or even a need at all for people living in the Western part of the country.

As an attempt to enhance Kenya's economic development, President Uhuru Kenyatta during his inauguration speech for the second term, unveiled the Big Four Agenda on food security, affordable housing, manufacturing and affordable healthcare. Kenya's current development plans are aligned towards these priorities in which the government plans to create 1.3 million jobs in the manufacturing sector by 2022 in order to pave the way for Kenya's future:

⁶⁰ Sanginga, P.C., Ochola, W.O. and Bekalo, I., "Natural resource management and development Nexus in Africa." *Managing Natural Resources for Development in Africa: A Resource Book* (2010): 11-43, at p.11. Available at <https://www.idrc.ca/sites/default/files/openebooks/506-9/index.html> [Accessed on 17/5/2020].

⁶¹ Ibid, p.11.

moving from a lower middle-income to an upper middle-income economy by the year 2030.⁶²

Some commentators have however argued that while all the four agenda items are undoubtedly important pillars in enabling the achievement of SDGs, whether they do end up supporting the attainment of SDGs or not will so much depend on the economic strategy chosen; policy choices embedded in such a strategy; as well as the ways and means of implementation.⁶³ They also observe that an economic growth path that is widening inequalities leaves experts worried whether all these notable efforts would help the country meet its stated Vision 2030 and global ambitions.⁶⁴

It is evident that Kenya is still ravaged by poverty and there is need to relook into what the decision making organs and agencies consider to be poverty. As one commentator has argued, policy makers and governments should look at other dimensions of poverty beyond income because income does not speak to what people can do, or how they can improve their own situation.⁶⁵ Interventions must be targeted to the type of poverty they are meant to fix – and to unexpected groups that may not seem to be poor at first glance.⁶⁶ Arguably, generalized approaches to poverty eradication may not achieve lasting outcomes since some poor groups may be left out of empowerment programmes only for them to fall further into the poverty at a later time, thus counteracting the government's efforts to comprehensively address poverty.

⁶² 'Linking Local Aspirations to Global Frameworks for Sustainable Development | KCIC' <<http://www.kenyacic.org/blog/linking-local-aspirations-global-frameworks-sustainable-development>> accessed 21 May 2020.

⁶³ 'Linking Local Aspirations to Global Frameworks for Sustainable Development | KCIC' <<http://www.kenyacic.org/blog/linking-local-aspirations-global-frameworks-sustainable-development>> accessed 21 May 2020.

⁶⁴ 'Linking Local Aspirations to Global Frameworks for Sustainable Development | KCIC' <<http://www.kenyacic.org/blog/linking-local-aspirations-global-frameworks-sustainable-development>> accessed 21 May 2020.

⁶⁵ 'Redefining Poverty in Kenya's Fishing Villages' <<https://rethink.earth/redefining-poverty-in-kenyas-fishing-villages/>> accessed 22 May 2020.

⁶⁶ Ibid.

The pandemic lays bare Africa's challenges and inadequacies of its development agenda. The 'investments' meant to boost development over the years were clearly not well thought out. The socio-economic development agenda of the African countries has been neglected. This is closely connected to the human development, which again, has been neglected for many years. Human development heavily relies on the socio-economic development agenda and if any lasting results are to be realised, then the two must go hand in hand. The basic objective of human development should be enlarging people's choices by creating an enabling environment for people to enjoy long, healthy and creative lives, to be educated, and to enjoy a decent standard of living, political freedom, guaranteed human rights and self-respect.⁶⁷

Arguably, the African Continent should be looking at COVID-19 as an opportunity to reset their politics, policies and economies and in response to this, if donors want to be partners to African countries in the long-term, they should reset theirs too.⁶⁸ Africa should learn to be self-reliant and move away from the begging mentality that has not only made it become excessively dependent on the generosity of others, but has also made it vulnerable to changes of circumstance such as the current global economic meltdown due to corona virus pandemic.⁶⁹

There is a need for these countries especially those in the South to revisit and redefine what they consider development. This may not be as easy as it sounds. It has been pointed out by some scholars that the Global North donors' influence on the agenda setting of Global South recipients cannot be ignored.⁷⁰ Indeed, it has been concluded through past evaluations of project aid that it led to: (i) a high administrative burden on recipients due to multiple

⁶⁷ Kiriti, T. and Tisdell, C.A., *Gender inequality, poverty and human development in Kenya: Main indicators, trends and limitations*. No. 1745-2016-141001. 2003, p. 1.

⁶⁸ Ibid.

⁶⁹ 'Aid Has Failed. COVID-19 Both Exposes This and Offers the Chance for a Reset.' (*African Arguments*, 16 April 2020) <<https://africanarguments.org/2020/04/16/aid-has-failed-coronavirus-covid-19-both-exposes-this-and-offers-the-chance-for-a-reset/>> accessed 22 May 2020.

⁷⁰ Bradley, M., "Whose agenda? Power, policies, and priorities in North-South research partnerships," *Putting Knowledge to Work: Collaborating, influencing and learning for international development* (2017): 37À70.

reporting and accounting requirements; (ii) inefficient spending dictated by donor priorities and procurement arrangements; (iii) highly unpredictable funding levels; (iv) undermining of state systems through parallel structures and staffing; (v) corrosion of democratic accountability through mechanisms to satisfy donor rather than domestic accountability; (vi) difficulties in ensuring sustainability; and (vii) openness to corruption.⁷¹

It is thus known that when funds are available to a country, there are certain terms and conditions on how the same should be utilised, sometimes to promote the interests of the donor organisations and/or countries. For instance, it has rightly been pointed out that while Africa receives more than \$60 billion every year in aid, much of this is not spent on Africans themselves, of course, but on services from donors, such as Western management consultants. Around one-fifth of total bilateral aid in 2012, for example, went back to donor countries or took the form of debt relief.⁷² In addition, much aid, too, is wasted by going to regimes that lack the governance or policies to further development. Rather than using it for the benefit of their populations, this much-needed funding is used instead to shore up political power.⁷³

With such outcomes, it is arguable that the solutions for the Global South will not be found within donor funding. The political leaders and policymakers from the African countries must therefore reconsider their approaches to the development agenda in their countries and focus more on approaches that directly benefit their people.

⁷¹ Handley, G., Higgins, K. and Sharma, B., *Poverty and poverty reduction in sub-Saharan Africa: An overview of the issues*. Overseas Development Institute, 2009, p. 23.

⁷² 'Aid Has Failed. COVID-19 Both Exposes This and Offers the Chance for a Reset.' (*African Arguments*, 16 April 2020) <<https://africanarguments.org/2020/04/16/aid-has-failed-coronavirus-covid-19-both-exposes-this-and-offers-the-chance-for-a-reset/>> accessed 22 May 2020.

⁷³ 'Aid Has Failed. COVID-19 Both Exposes This and Offers the Chance for a Reset.' (*African Arguments*, 16 April 2020) <<https://africanarguments.org/2020/04/16/aid-has-failed-coronavirus-covid-19-both-exposes-this-and-offers-the-chance-for-a-reset/>> accessed 22 May 2020.

While the Global South encompasses developing countries across different continents including Africa and Asia, African countries seem to be lagging behind other Global South regions as far as taking charge of their development agenda is concerned. While the donors set the agenda in Africa, this is not the case in most Asian countries. For example, it has been observed that in much of Asia, countries took ownership of their own development, setting priorities and leading donors, unlike in Africa, where the countries are led by our donors. As a result, many externally-funded roads, railways and ports – especially in the case of China – are motivated by vanity or opportunities for individual profit rather than their benefits for citizens.⁷⁴ The positive steps in Asia are further reflected in improvement in human development, where the 2018 UN report on human development noted that South Asia was the fastest growing region over 1990–2017, at 45.3 percent, followed by East Asia and the Pacific at 41.8 percent and Sub-Saharan Africa at 34.9 percent.⁷⁵

Kenya and the African continent need to take charge of their development agenda and truly focus on what will benefit their people. They must ask themselves whether every development project they are carrying out is for selfish interests or for the common good of their people.

Lawmakers and policymakers need to ensure that they put in place governance structures that will uplift the lives of citizens through promoting good governance and holding accountable those charged with utilising public funds. As expected of law in its role to promote development, the Constitution of Kenya 2010 outlines the national values and principles of governance which must bind all State organs, State officers, public officers and all persons whenever any of them—applies or interprets the Constitution; enacts, applies or interprets any law; or makes or implements public policy decisions.⁷⁶ These values include: (a) patriotism, national unity, sharing and devolution of power,

⁷⁴ 'Aid Has Failed. COVID-19 Both Exposes This and Offers the Chance for a Reset.' (*African Arguments*, 16 April 2020) <<https://africanarguments.org/2020/04/16/aid-has-failed-coronavirus-covid-19-both-exposes-this-and-offers-the-chance-for-a-reset/>> accessed 22 May 2020.

⁷⁵ UNDP, UNDP. "Human development indices and indicators: 2018 statistical update." (2018): 22-25, at p.22.

⁷⁶ Art. 10(2) (d), Constitution of Kenya.

the rule of law, democracy and participation of the people; (b) human dignity, equity, social justice, inclusiveness, equality, human rights, non-discrimination and protection of the marginalised; (c) good governance, integrity, transparency and accountability; and (d) sustainable development.⁷⁷ These values and principles of governance are geared towards creating a socially just society where all persons equally and equitably enjoy high socio-economic and human development benefits. The inclusion of sustainable development as one of the national values and principles of governance also speaks volumes as to the path that national development agenda is expected to take. It is a path that is supposed to empower the citizens socially, economically and politically (giving them a voice) while at the same time meeting their basic needs in a sustainable way for the good of the current and future generations.⁷⁸

⁷⁷ See Art. 10(1), Constitution of Kenya 2010.

⁷⁸ See also Art. 42-Right to Clean and Healthy environment which includes the right—to have the environment protected for the benefit of present and future generations through legislative and other measures, particularly those contemplated in Art. 69; and to have obligations relating to the environment fulfilled under Art. 70.

Article 69 outlines the State and individual obligations in respect of the environment. Clause (1) provides that the State shall—(a) ensure sustainable exploitation, utilisation, management and conservation of the environment and natural resources, and ensure the equitable sharing of the accruing benefits; (b) work to achieve and maintain a tree cover of at least ten per cent of the land area of Kenya; (c) protect and enhance intellectual property in, and indigenous knowledge of, biodiversity and the genetic resources of the communities; (d) encourage public participation in the management, protection and conservation of the environment; (e) protect genetic resources and biological diversity; (f) establish systems of environmental impact assessment, environmental audit and monitoring of the environment; (g) eliminate processes and activities that are likely to endanger the environment; and (h) utilise the environment and natural resources for the benefit of the people of Kenya.

Article 70(1) provides that if a person alleges that a right to a clean and healthy environment recognised and protected under Art. 42 has been, is being or is likely to be, denied, violated, infringed or threatened, the person may apply to a court for redress in addition to any other legal remedies that are available in respect to the same matter. Clause (2) thereof provides that on application under clause (1), the court may make any order, or give any directions, it considers appropriate—(a) to prevent, stop or discontinue any act or omission that is harmful to the environment; (b) to compel any public officer to take measures to prevent or discontinue any act or omission that

This is also reflected under Article 43 of the Constitution which guarantees the rights of every person to an adequate standard of living for all and this encompasses right to adequate food, clothing, shelter, clean and safe water, education, health and social security. Faced with the threat of Covid-19, locusts' invasion and raging floods across the country, these should serve as a wakeup call for the National and County Governments on what really matters for their people. The county governance system was introduced to take development nearer to the people. This also meant that such development should be implemented with closer and frequent consultation and participation of all the affected groups of people. As already pointed out, there have been instances where a large chunk of donor funds is directed towards administrative activities, for both local and the foreign human resource activities, leaving a barely enough percentage to go towards the actual projects. This is a trap that even the national and county governments have often found themselves in. Their primary focus should be to ensure the implementation of Article 43 of the Constitution of Kenya 2010 on socio-economic rights. While infrastructural development across the country is important, the socio-economic rights of communities deserve equal if not more attention. One cannot negotiate or consult with a hungry person on the best types of roads to put up within the counties. That is not to say that the infrastructural development activities are not important, but they do not fall within the definition of basic needs of human beings.

The various socio-economic rights as outlined under Article 43 may currently be at different stages of realisation by the national and county governments for the different regions and counties. The aspirations and social realities of the different regions may also mean differing priorities. For these reasons, it may be beyond the scope of this paper to offer recommendations on the best way forward on realising the same. However, as held in various domestic court cases, these social and economic rights should be progressively realised. Lady

is harmful to the environment; or (c) to provide compensation for any victim of a violation of the right to a clean and healthy environment.

Justice Mumbi Ngugi, J. held in ***Mitubell Welfare Society vs. The Attorney General & 2 Others, Petition No. 164 of 2011*** that;⁷⁹

"The argument that socio-economic rights cannot be claimed at this point two years after the promulgation of the Constitution ignores the fact that no provisions of the Constitution is intended to wait until the state feels it is ready to meet its constitutional obligations. Article 21 and 43 require that there should be "progressive realization" of socio-economic rights, implying that the state must be seen to be taking steps, and I must add be seen to take steps towards realization of these rights.....Granted also that these rights are progressive in nature, but there is a constitutional obligation on the state, when confronted with a matter such as this, to go beyond the standard objection....Its obligation requires that it assists the court by showing if, and how, it is addressing or intends to address the rights of citizens to the attainment of the socio-economic rights, and what policies, if any it has put in place to ensure that the rights are realized progressively and how the Petitioners in this case fit into its policies and plans."

It was also acknowledged in ***Isaac Kipyego Cherop v State Ministry of Water & 142 others [2017] eKLR, Petition 348 of 2015***, that “Rights under Article 43 of the Constitution can only be realized progressively. The State cannot realize this right for every Kenyan in one investment”.

The import of this is that the real development should mainly be geared towards making tangible and lasting investments for the realisation of the socio-economic rights as guaranteed under Article 43 of the Constitution. It is the high time that the political leaders and policy makers realised that the solutions to most of the challenges facing their people during this period of the Covid-19 pandemic will not be solved by the foreign aid and donations but by conscious homegrown solutions developed through people-centred investments. The national development agenda such as the Vision 2030 and other development initiatives should guide their expenditure. Corruption

⁷⁹ See also ***In the Matter of the Principle of Gender Representation in the National Assembly and the Senate [2012]eKLR, Advisory Opinions Application 2 of 2012*** .

should also be firmly dealt with as it is also a huge threat to achieving these aspirations.

The concept of development in the country as we know it must be revisited so as to ensure that it captures the aspirations of the local people since what they feel about it also matters. Development should offer them the freedom from the shackles of poverty, hunger, illiteracy and other social ills.⁸⁰ The concept of development is both objective and subjective and the policymakers must thus always bear this in mind when coming up with development projects and programmes. The Development programmes, plans and projects must start working towards empowering people so that they can stand on their own. The country must start investing in its own people and also work towards building wealth that would not only cushion the national economy against internal and external shocks such as the current pandemic but also cushion the public against abject poverty and the extreme levels of vulnerability. While it may certainly not be feasible for the country to immediately stop their reliance on foreign aid, such funds must be redirected towards building a solid economy that will take the country towards self-reliance in future. The country must aggressively start the aspirational journey towards economic and social freedom of its people in the near future.

5. Conclusion

The Covid-19 pandemic has devastated economies and lives across the world. However, it is arguable that there is no other region that has been hit harder by these adverse effects than the Global South and especially the African continent. This paper urges that the political leaders and policy makers in the African continent and especially Kenya need to learn from the pandemic and focus on redefining their priorities when it comes to development agenda. They must not compete with the developed world in getting to the so called mass consumption stage of development as envisaged by the modernisation theory before they ensure that their people have access to the most basic

⁸⁰ Sen, A., *Development as freedom*. Oxford Paperbacks, 2001; Sen, A., "The concept of development." *Handbook of development economics* 1 (1988): 9-26; Giri, A.K., "Rethinking human well-being: a dialogue with Amartya Sen." *Journal of International Development: The Journal of the Development Studies Association* 12, no. 7 (2000): 1003-1018.

human rights to food, shelter, education and health. They must acknowledge that development is context-based and differs from country to country. The development agenda of a country must be informed by their local aspirations and the international agenda should only be used to facilitate realisation of the domestic agenda.

We must change our choices as a country and ensure that the period post-covid-19 will mark a new beginning-point towards building a better economy and spurring growth and development that focuses on the local problems of the people. There is certainly a need to reflect on and redefine the concept of development in Kenya. The Covid-19 pandemic has taught us lessons that we cannot ignore.

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Sustainable Development: Conflict or Synergy in Promoting both Protection of Wildlife and Economic Development in Wildlife Conservancies in Kenya

By: Peter Mwangi Muriithi

*

Abstract

Sustainable development seeks to limit environmental damage which includes wildlife while promoting economic growth through economic activities. The author seeks to question; whether the sustainable development has succeeded as a panacea to the prevalent disputes that are based on the divergent interests of protection of wildlife in wildlife conservancies and promoting economic activities in wildlife conservancies in Kenya.

Succinctly, the paper shall; give a brief introduction, outline the historical perspective of sustainable development, analyze the legal framework providing for sustainable development in Kenya, analyze the role of the concept of sustainable development and question whether it creates synergy or conflict in promoting both protection of wildlife in wildlife conservancies and promoting economic activities in wildlife conservancies in Kenya and lastly give recommendations and a conclusion.

1.0 Introduction

To realize UN sustainable development goals¹ and even the ambitious Kenya vision 2030² objectives, wildlife as part of the environment is at the heart of such a discourse. The importance of wildlife in Kenya cannot be understated.

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¹UN Sustainable Development Goals were adopted by UN General Assembly in September 2015

<<https://sustainabledevelopment.un.org/content/documents/21252030%20Agenda%20for%20Sustainable%20Development%20web.pdf>> accessed on 04/05/20

²Kenya Vision 2030< <https://vision2030.go.ke/>> accessed on 04/05/20

In Kenya, wildlife plays multifaceted critical roles which include; critical ecological functions that are important for the interconnected web of life-supporting systems, socio-cultural and aesthetic values and contribution to Kenya's economic growth through wildlife tourism. Wildlife tourism is the proverbial goose that lays the golden egg in the Kenyan economy. Bluntly stated it is the lifeline to Kenya economy. Wildlife conservation is thus inextricably linked to Kenya's economic development and the livelihood of its people.³ This at the very least illustrates the importance of wildlife in Kenya and why it is at the centre of this discourse.

Summarily stated, UN sustainable development goals and Kenya vision 2030 main objective can be generally be termed as to transform Kenya into a newly industrializing, middle-income country by ensuring a sustainable environment for its future generations. Wildlife forms part of the environment,⁴ hence its conservation is vital to the realization of such futuristic and vital goals.

Section 2 of the Wildlife Conservation and Management Act⁵ defines some of the terms that this paper adopts. In this regard, it defines; *wildlife* as any wild and indigenous animal, plant or microorganism or parts thereof within its constituent habitat or ecosystem on land or in water, as well as species that have been introduced into or established in Kenya. Further, it defines *wildlife conservancy* as land set aside by an individual landowner, body corporate, group of owners or a community for purposes of wildlife conservation.

Paramount to this discourse is the widely discussed concept of *sustainable development*. The Concept of Sustainable Development predates the 1972 Stockholm Conference and can be traced back to traditional communities and ancient civilizations.⁶ The exact meaning of *sustainable development* remains

³ Paul Udoto, *Wildlife as a Lifeline to Kenya's Economy: Making Memorable Visitor Experiences*, volume 29, No. 1 page. 51–58 (2012).

⁴Section 2 of the Environmental Management and Co-ordination Act Act No. 8 of 1999 "Environment" includesthe biological factors of animals and plants and the social factor of aesthetics...."

⁵ Act No. 47 of 2013

⁶ Per Judge Christopher Weeramantry in *Hungary v Slovakia*, 1997 WL

unclear as there is no agreed definition of what constitutes 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.⁷

*The Brundtland Commission*⁸ considered sustainable development to be “development that meets the needs of the present generation without compromising the ability of future generations to meet their own needs.” On the other hand, Section 2 of the Environmental Management and Co-Ordination Act No. 8 of 1999 defines sustainable development “as development that meets the needs of the present generation without compromising the ability of future generations to meet their needs by maintaining the carrying capacity of the supporting ecosystems.”⁹ Essentially, from these definitions sustainable development seeks to address *intra-generational equity*, that is equity among present generations, and *inter-generational equity*, that is the equity between generations.¹⁰

Sustainable development is considered to bring together different and conflicting interests, but some argue that it is vague and imprecise. Indeed, the

1168556(I.C.J-1997)

⁷ Cullet P., *Differential Treatment in International Environmental Law and its Contribution to the Evolution of International Law*(Aldershot: Ashgate, 2003) page 8 to 9

⁸*The Brundtland Commission* was established by the United Nations in 1983 to address the problem of deterioration of natural resources. Its Mission was to unite countries to pursue sustainable development. It was officially dissolved in 1987 after releasing a report entitled *Our Common Future*, also known as the *Brundtland Report*. This report defined the meaning of the Sustainable Development.

⁹ Section 2 of EMCA Act Laws of Kenya

¹⁰Weiss, E.B, “In Fairness to future generations and Sustainable Development.” *American International Law Review*, Vol. 8 1992.

popularity and resilience of the concept of sustainable development is largely attributed to its *malleability*.¹¹

Premised on the above understanding this paper seeks to discuss the role that sustainable development has played in both protection of wildlife in wildlife conservancies and promoting economic activities in wildlife conservancies in Kenya. In essence, the author questions whether sustainable development has succeeded in promoting both the protection of wildlife and promoting economic activities in wildlife conservancies.

2.0 Historical perspective of Sustainable Development

Sustainable development is a concept that emerged in the context of a growing awareness of an imminent ecological crisis, as one of the driving forces of world history in the period around the end of the 20th century.¹²

In 1972 United Nations Conference on the Human Environment, in Stockholm, Sweden brought the industrialized and developing nations together to delineate the ‘rights’ of the human family to a healthy and productive environment. A series of such meetings followed, e.g. on the rights of people to adequate food, to sound housing, to safe water, to access to means of family planning. The recognition to revitalize humanity’s connection with nature led to the creation of global institutions within the UN system.¹³

At this point, the term ‘sustainable’ had yet to take off. The United National Conference on Sustainable Development provides an excellent, condensed history of the term. This provides that: *“The concept of sustainable development was originally synonymous with that of sustainability and is often still used in that way. Both terms derive from the older forestry term*

¹¹ Ross, Andrea. “Modern Interpretations of Sustainable Development.” Journal of Law and Society, vol. 36, no. 1, 2009, page 32–54. JSTOR, www.jstor.org/stable/40206877.

¹²Jacobus A. Du Pisani Professor of History (2006) Sustainable development – historical roots of the concept, Environmental Sciences, 3:2, 83-96, DOI: 10.1080/15693430600688831

¹³<<http://www.uncsd2012.org/history.html>> accessed on 04/05/20

“sustained yield”, which in turn a translation of the German term “nachhaltiger Ertrag” is dating from 1713. According to different sources, the concept of sustainability in the sense of a balance between resource consumption and reproduction was however applied to forestry already in the 12th to 16th century. The history of the concept of sustainability is however much older. Already in 400 BCE, Aristotle referred to a Greek concept in talking about household economics. This Greek household concept differed from modern ones in that the household had to be self-sustaining at least to a certain extent and could not just be consumption-oriented.”¹⁴

The first time the term ‘sustainable’ was used “in the modern sense” was as a part of the Club of Rome’s publication in 1972. This came to the fore as a part of the publication of Limits to Growth, a report that described a particular state in which the global population would achieve balance or equilibrium. Describing the desirable “state of global equilibrium”, the authors used the word “sustainable”: *“We are searching for a model output that represents a world system that is: 1) sustainable without sudden and uncontrolled collapse; and 2) capable of satisfying the basic material requirements of all of its people.”*¹⁵

About fifteen years after the Club of Rome’s publication came another large step forward in this movement, at least according to most mainstream sources. The World Commission on Environment and Development (WCED) was tasked by the Secretary-General of the UN, in 1983, to *“re-examine critical environmental and development problems around the world and formulate realistic proposals to address them.”*¹⁶ This culminated in the 1987 Brundtland Report’s publication of *“Our Common Future”*, which established a suggested path for sustainable development on a global level and served to bring the concept of sustainability into the foreground on an international level.¹⁷

¹⁴<https://rio20.un.org/resolutions> accessed on 04/05/20

¹⁵ <https://rio20.un.org/resolutions> accessed on 04/05/20

¹⁶ <http://yosemite.epa.gov/r10/oi.nsf/Sustainability/History> accessed on 04/05/20

¹⁷ Danny Stofleth, A Short History of Sustainable Development <http://rethinkingprosperity.org/a-short-history-of-sustainable-development/> accessed on 04/05/20

A ground-breaking step came in 1992 with the first UN Conference on Environment and Development (UNCED) in Rio de Janeiro. At this conference, an agenda called Agenda 21 was adopted, which “*recognized each nation’s right to pursue social and economic progress and assigned to States the responsibility of adopting a model of sustainable development.*”¹⁸ The Secretary-General of UNCED regarded Agenda 21 as a “*program of action for a tolerable future for the human family and an initial step toward making sure the world will change into a more just, secure and wealthy habitat for all humanity.*”¹⁹

The focus had become broader. The emphasis was much more clearly on working towards a world where all peoples had access to the natural resources they needed to thrive. Another notable international protocol designed to guide the international community towards sustainable development, in this case particularly environmental, was the Kyoto Climate Agreement in 1997.²⁰ Its goal was to reduce the emissions of its signatories, with more emphasis placed on those developed countries which were responsible for most of the air pollution and its subsequent consequences. It might be noted that the US is the only developed country and one of the only two in general (the other being South Sudan) that has not ratified this protocol.²¹ From this time onwards, the Concept of Sustainable Development has been duly incorporated in various national legislations, regional legislation, international instruments and judicial decisions.

3.0 Legislating on the Concept of Sustainable Development in Kenya

There exists a robust legal framework in Kenya in support of the concept of sustainable development. This illustrates the importance of the concept of

¹⁸<https://rio20.un.org/resolutions> accessed on 04/05/20

¹⁹<http://www.sustainabledevelopmentinfo.com/history-of-sustainable-development/> accessed on 04/05/20

²⁰Danny Stofleth, A Short History of Sustainable Development<http://rethinkingprosperity.org/a-short-history-of-sustainable-development/> accessed on 05/05/20

²¹Ibid No.20

sustainable development. Below a succinct analysis of the legal framework providing for the concept of sustainable development in Kenya:

a) The Constitution of Kenya 2010

The Constitution of Kenya 2010 is the supreme source of law in Kenya in the sense that all written and unwritten laws must be consistent with its express provisions and principles. In effect, no law may be enacted or applied to violate or conflict with any of the provisions of the Constitution. Statute law provides means by which obligations imposed thereunder are effectively enforced. Otherwise, the Constitution would amount to no more than an instrument of mere declarations. Its supremacy is underscored in Article 2(1). Further, Article 2(4) expounds on the supremacy of Constitution by asserting that any law or customary law that is contrary to the Constitution, is void to that extent in Kenya.

Article 10(2) of the Constitution of Kenya 2010 considers sustainable development to be one of the national values and principles of governance. On this basis and in accordance with Article 10(1) of the Constitution of Kenya all State organs, State officers, public officers and all persons are bound by the concept of sustainable development whenever they apply or interpret the Constitution; enacts, applies or interprets any law; or makes or implements public policy decisions.

The import of this provision is that the Constitution of Kenya 2010 imposes an onerous duty upon all citizens' especially state officers or public officers, to uphold religiously the concept of sustainable development. This includes government agencies like Kenya Wildlife Service (KWS) which are tasked with protecting which is tasked with protecting and conserving wildlife in wildlife conservancies and promoting economic activities in wildlife conservancies. This is with the sole purpose of achieving sustainable wildlife conservation.²²

²²Section 7 of Wildlife Conservation and Management Act No. 47 of 2013

The centrality of sustainable development is perhaps more explicit when one looks at Article 69(1) of the Constitution of Kenya 2010 which provides that the State shall ensure the sustainable exploitation, utilization, management and conservation of the environment and natural resources and ensure equitable sharing of the accruing benefits.

The Constitution thus takes an ecological perspective to sustainable development; a perspective geared towards the protection of the environment which includes wildlife for ecological reasons as well as for the satisfaction of human needs.²³

The Constitution of Kenya 2010 under Article 69(2) implicitly imposes a duty on all persons in Kenya to cooperate with state organs like Kenya Wildlife Service and other persons to protect and conserve the environment and ensure ecologically sustainable development and use of natural resources. This presupposes that ensuring there is sustainable development in Kenya remains one of the main objectives of the Constitution.

b) Environmental Management and Co-Ordination Act No. 8 of 1999(EMCA)

This is a statute whose main purpose is to protect the environment. In this regards under Section 2, it defines sustainable development as “*development that meets the needs of the present generation without compromising the ability of future generations to meet their needs by maintaining the carrying capacity of the supporting ecosystems.*”²⁴

Under Section 3(2A), EMCA imposes a duty on all persons in Kenya to cooperate with state organs and other persons to protect and conserve the environment and ensure ecologically sustainable development and use of natural resources. Section 3 (5) of EMCA outlines principles of sustainable development that ought to guide the Environment and Land Court in exercising the jurisdiction conferred upon it.

²³Article 69 (1) Constitution of Kenya 2010

²⁴ Section 2 of EMCA Act Laws of Kenya

The National Environment Management Authority as established under section 7 of EMCA, is required under Section 63 of EMCA to issue an environmental impact assessment license only on such terms and conditions as may be appropriate and necessary to facilitate sustainable development and sound environmental management. Under Section 129(3) of EMCA, the National Environmental Tribunal is empowered to make orders to enhance the principles of sustainable development.

c) International Legal Framework

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 Kenyan law. However, the International Conventions must be ratified in accordance with the Treaty Making and Ratification Act No. 45 of 2012 to be part of Kenya legal framework. Succinctly stated, Part III of Cap No. 45 of 2012 outlines the procedure which ought to be adhered to before ratification of a treaty. This procedure which leads to the ratification of a treaty must be adhered to religiously. This includes approval by the Cabinet and the National Assembly as provided by Section 7 and 8 of Cap No. 45 of 2012 respectively. In essence, these provisions of the Constitution provides a means by which international law becomes part of the Kenya legal framework.

Sustainable development has, over the last 30 years, received wide support in a vast array of non-binding international legal documents. It finds expression in countless Declarations of states, resolutions of international organizations, programmes of action, and codes of conduct.²⁵

To the extent that these various instruments are not recognized as among the formal sources of international law, they are incapable, in and of themselves, of giving rise to a valid legal rule relating to sustainable development, irrespective of the legal strength of their formulation.

²⁵ For an overview see V. Barral, 'Le développement durable en droit international: Essai sur les incidences juridiques d'un concept évolutif' (PhD thesis on file at the EUI, Florence).

For example; Agenda 21 the non-binding programme of action adopted by the Rio Conference, refers in its preamble to the need for '*global partnership for sustainable development*,' and most its provisions are intended to promote the concept, whose implementation is monitored by the Commission on Sustainable Development.²⁶ Sustainable development also finds expression in several international treaties. For example:

Sustainable development informs much of the *Rio Declaration*, as well as the *Conventions on Climate Change and Biological Diversity*, and it is central to the elaboration of global environmental responsibility by these and other instruments such as Kyoto Protocol which Kenya has ratified.²⁷

Regionally, Kenya has ratified The Treaty for the Establishment of the East African Community 1999 which envisages development of programs and policies in a diverse range of areas, including the environmental field and economic activities. This is manifested by Article 5(3) stipulates that: For purposes set out in paragraph 1 of this Article and as subsequently provided in particular provisions of this Treaty, the community shall ensure:

- a) The attainment of *sustainable growth and development* of the Partner States by the promotion of a more balanced and harmonious development of the Partner states.
- b) The promotion of *sustainable utilization* of natural resources of the partner states and the taking of measures that would, in turn, raise the standard of living and improve the quality of life of their populations.

All these treaties which Kenya has ratified on the concept of sustainable development bind Kenya. Sustainable development is included in over 300 conventions, and a brief survey of these is revealing from the point of view of

²⁶ UNGA Res 47/191(1992), See Osborn and Bigg, *Earth Summit II: Outcomes and Analysis* (London 1998) 608

²⁷ See 1992 Convention on Climate Change, Article 3; 1992 Convention on Biological Diversity, Articles 8 and 10; 1994 Convention to Combat Desertification, Articles 4 and 5

the categories of conventions at stake, the location of the proposition relating to sustainable development, and the function attributed to it.²⁸

4.0 Analyzing the role of the concept of sustainable development: Conflict or Synergy in Promoting both Protection of Wildlife and Economic Development in Wildlife Conservancies in Kenya

It is not in doubt that there have been much-publicized disputes premised on the need to protect wildlife conservancies and on the other hand the need to promote economic growth through undertaking economic activities in wildlife conservancies.

More often than not, these disputes are between the general public represented by environmentalist activists and/or lobby groups and the government represented by its various agencies. These disputes have escalated to the corridors of justice where neither of the parties wishes to abdicate their position. In this regard, cases have been filed either at the Environment and Land Court or National Environment Tribunal (NET). When faced with such disputes, the courts or tribunal have overtime incorporated the concept of sustainable development in their decisions. The examples of such disputes include but not limited to;

The government mega project of Standard Gauge Railway (SGR) which passes through the Nairobi National Park a wildlife conservancy. This was highly opposed by various conservationists group led by the Friends of Nairobi National Park group and the Kenya Coalition for Wildlife Conservation and Management group.

The conservationists' groups' arguments were largely premised on the need to protect wildlife in the Nairobi National Park as a wildlife conservancy. They argued that construction of Standard Gauge Railway (SGR) through the Nairobi National Park would affect the ecology of the park, endangering the

²⁸Virginie Barral, Sustainable Development in International Law: Nature ^[11]and Operation of an Evolutive Legal Norm, *European Journal of International Law*, Volume 23, Issue 2, May 2012, Pages 377–400, <https://doi.org/10.1093/ejil/chs016>

wildlife and their natural habitats.²⁹ The activists insisted that the construction of SGR through the park would lead to the Nairobi National Park as wildlife Conservancy being irreparably damaged.³⁰ The activists held demonstrations as they demanded that the construction of the Standard Gauge Railway be rerouted around Nairobi National Park. To put this into perspective one of the activists one Patricia Heaths was quoted saying “*This is a tiny park. It’s an absolute jewel to the Nairobi citizens and all of Kenya. It is crowded with guests. Everybody who comes for safari, their first stop is Nairobi National Park before they go to the Mara and all those places, and it’s a disaster if they take it away.*”³¹

The government on the other led by his Excellency the President Uhuru Muigai Kenyatta advocated for the need to construct the Standard Gauge Railway (SGR) through Nairobi National Park for economic reasons. This was supported by the National assembly which clandestinely passed the Prevention of Torture Bill, 2017, an amendment to the Environmental Management Act, which had the effect of reversing all stop orders previously issued by the National Environment Tribunal (NET).³² This vividly illustrates the existence of the conflicting interests of the need to protect wildlife in wildlife conservancies and promoting economic activities in wildlife conservancies in Kenya.

Another example is the recently proposed construction of a hotel at the Nairobi National Park which was to have an eco-lodge, a high-end restaurant and an amphitheatre. This was to be undertaken by the Kenya Wildlife Service a government Agent.³³ Again this has been highly opposed by various lobby

²⁹<<https://www.voanews.com/africa/environmentalists-kenya-protest-china-backed-railway-construction>> accessed on 10/05/20

³⁰<<https://www.nation.co.ke/oped/opinion/SGR-to-irreparably-damage-Nairobi-national-park/440808-4336360-r7w1d5z/index.html>> accessed on 10/05/20

³¹<<https://www.voanews.com/africa/environmentalists-kenya-protest-china-backed-railway-construction>> accessed on 10/05/20

³²<<https://www.nation.co.ke/oped/opinion/SGR-to-irreparably-damage-Nairobi-national-park/440808-4336360-r7w1d5z/index.html>> accessed on 10/05/20

³³Kenya Wildlife Service- established under Section 6 of Wildlife Conservation and Management Act No. 47

groups led by Friends of Nairobi National Park group. Edwin Kiraki, a conservation enthusiast, was quoted saying *“Building a multimillion shilling hotel in Nairobi National Park will destroy wildlife ecological spaces. It will reduce wildlife habitats thus threatening wildlife green spaces. Green spaces should be respected.”*³⁴

The opposition to the construction of the hotel was successful. The government through the Tourism and Wildlife ministry directed the Kenya Wildlife Service (KWS) to suspend the plans to build a hotel inside Nairobi National Park until after a public participation forum was held.

Ahmed Elmawi, the ministry’s head of communications stated that *“The public participation shall be extended for the public to raise their concerns or support so that analysis and improvement of the plan can be undertaken for the public interest.”*³⁵

Again this is proof of the divergent interests that exists where one side advocates for the need to protect wildlife in wildlife conservancies and the other advocates for promoting economic activities in wildlife conservancies in Kenya.

Recently also there was the illegal construction of an amusement park at the Hells Gate National Park. Tourism Cabinet Secretary Najib Balala suspended the said construction of the Hells Gate amusement park.³⁶ This clearly shows the existence of these two divergent interests; the need to protect wildlife in wildlife conservancies versus promoting economic activities in wildlife conservancies in Kenya.

³⁴ <<https://www.nation.co.ke/news/Lobbies-oppose-KWS-plan-for-hotels-in-park/1056-5529852-76uf7k/index.html>> accessed on 10/05/20

³⁵ <<https://www.pd.co.ke/lifestyle/kenya-wildlife-service-halts-construction-of-hotel-in-nairobi-park-35842/>> accessed on 10/05/20

³⁶ <<https://www.the-star.co.ke/news/2018-04-27-photos-illegal-construction-of-amusement-park-ongoing-at-hells-gate/>> accessed on 10/05/20

Lastly, in the case of; *Wildlife Director (Kenya) v. Kenya Wildlife Services & 4 others; Kenya Wildlife Services (Defendant); National Environment Management Authority (Interested Party) [2020] eKLR*.³⁷ Wildlife Director (Kenya) had brought a claim against Kenya Wildlife Services for organizing events at Hell's Gate National Park. This included the World Rally Championship and Koroga Festival that were to be held inside Hell's Gate National Park.

The court ruled that it did not have jurisdiction to hear the petition. In making his ruling, in this case, Justice John Mutungi verbatim, stated: *"The present matter though coached as a constitutional petition in real sense is a Wildlife Conservation and Management matter which the Wildlife Conservation and Management Act read together with the Environmental Management and Co-ordination Act, 1999 have provided adequate dispute resolution mechanisms which the Petitioner ought to have invoked rather than come to this Court."* However, despite the ruling Dr Paula Kahumbu, chief executive officer at Wildlife Director (Kenya) stated that *"Success is not winning a court case. Success is a thriving wildlife. It is a very sad day for Kenya and lovers of wildlife that the agency responsible for the conservation of wildlife has accepted Sh700, 000 even though the event imperils critically endangered species in an already degraded park."*³⁸

It is crystal clear from the above statement by Dr Paula Kahumbu, that in the dispute presented to the court the divergent interests were the need to protect wildlife in wildlife conservancies versus promoting economic activities in wildlife conservancies in Kenya. The concept of sustainable development has a seminal role to play in reconciling these two divergent interests i.e the need to protect wildlife in wildlife conservancies versus promoting economic activities in wildlife conservancies in Kenya. Countries now have agreed that to reconcile these two divergent interests the concept of sustainable

³⁷ ELC Petition No. 3 of 2020

³⁸ <<https://mobile.nation.co.ke/news/Court-throws-out-Koroga-case-Hell-s-Gate-Paula-Kahumbu/1950946-5453670-gu5htr/index.html>> accessed on 10/05/20

development³⁹ is seminal.⁴⁰ The concept of sustainable development succinctly stated envisions a situation where there is an equilibrium between the protection of the environment through the protection of wildlife and promoting economic growth through economic activities.

In essence, the concept posits; in the realization of equilibrium between wildlife protection in wildlife conservancies and economic growth through economic activities in wildlife conservancies, then we can realize *development that meets the needs of the present without compromising the ability of future generations to meet their own needs*.⁴¹

The main objective of promoting economic activities in wildlife conservancies is to promote economic growth. On the other hand, there is the need to protect wildlife in wildlife conservancies. The question then arises as to whether the concept of sustainable development, creates conflict or synergy between economic development in wildlife conservancies and protection of wildlife in wildlife conservancies in Kenya. It is generally accepted that the concept of sustainable development ought to create a synergy between these two varying interests.

This was rightly pointed out in the case of *Hungary v. Slovakia, 1997*⁴² sustainable development as a concept was judicially interpreted. In this particular case, *Judge Weeramantry* rightly argued that the concept of

³⁹ Sustainable development is considered to be development that promotes prosperity and economic opportunity, greater social well-being, and protection of the environment like wildlife offers the best path forward for improving the lives of people everywhere.

⁴⁰ United Nations, 'What We Do: Promote Sustainable Development,' available at <http://www.un.org/en/s.s/what-wedo/promote-sustainable-development/index.html> > accessed on 10/05/20

⁴¹ The Brundtland Commission was established by the United Nations in 1983 to address the problem of deterioration of natural resources. Its Mission was to unite countries to pursue sustainable development. It was officially dissolved in 1987 after releasing a report entitled *Our Common Future*, also known as the *Brundtland Report*. This report defined the meaning of the Sustainable Development.

⁴² WL 1168556 (I.C.J-1997) (Gabcikovo-Nagymoros Project (Hungary-Slovakia))

sustainable development is one that has received worldwide acceptance not only by the developing states but also by the developed countries, as it reaffirms that there must be both development and environmental protection and that neither of these rights can be neglected at the expense of the other, thus making it part of modern international law. He considered sustainable development to be a '*principle with normative value*' demanding a balance between development and environmental protection.

However, it is easier said than done that the concept of sustainable development ought to create a synergy between the need to protect wildlife in wildlife conservancies versus promoting economic activities in wildlife conservancies in Kenya. This because the interpretation of the concept of sustainable development has mutated over time. This has given rise to various interpretations of the concept of sustainable development. These various interpretations of the concept of sustainable development work within the *Brundtland* formula but vary in regards to the emphasis placed on each of the components of sustainable development: economy, environment, society.⁴³

Disparities also exist about the nature of human needs now, the future and technology's role in meeting those needs. When differing values combine with these different definitions, sustainable development is construed as legitimizing 'business-as-usual' patterns of economic growth or, at the other extreme, requiring a fundamental reworking of the socio-economic order.⁴⁴

In the United Kingdom for example, as in most countries, national and business interpretations and strategies for sustainable development have underpinned by what is commonly referred to as 'weak sustainability'.⁴⁵ Weaker interpretations of sustainable development focus

⁴³ Ross, Andrea. "Modern Interpretations of Sustainable Development." *Journal of Law and Society*, vol. 36, no. 1, 2009, page 32–54. JSTOR, www.jstor.org/stable/40206877.

⁴⁴ J. Alder and D. Wilkinson, *Environmental Law and Ethics* (1999) 141; A. Dobson, *Green Political Thought* (1995, 2nd Edition) Chapter 3

⁴⁵ A. Blowers, 'Planning a Sustainable Future: Problems, Principles and Prospects' (1992) 61 *Town and Country Planning*

more on development and are indifferent to the form in which capital stock is passed on.⁴⁶

Pearce,⁴⁷ notes that on the weak sustainability interpretation of sustainable development there is no special place for the environment. The environment is simply another form of capital.⁴⁸ This is reflected in the description of sustainable development as a trade-off between the environment and economic development prominent in the early 1990s'.⁴⁹

Later interpretations consider the three components of the economy, environment, and society as interdependent and mutually reinforcing pillars, yet still, favour high economic growth.⁵⁰ These approaches are based on the premise that technology and international trade and investment will ensure there are always enough resources to meet cultural or human carrying capacity.⁵¹ Sustainable Development is also linked to the right to development, human rights and good governance when it is described as sustainable human development.⁵²

⁴⁶ D. Pearce, *Blueprint 3 - Measuring sustainable development* (1993) at page 15.

⁴⁷ Ibid No.46

⁴⁸ The weak sustainability interpretation of sustainable development still requires that the depletion of natural resources that are in fixed supply - non-renewable resources - should be accompanied by investment in substitute sources (id. at pp. 15-16). For a slightly stronger view, see J. Bowers, *Sustainability and Environmental Economics - An Alternative Text* (1997) at 194.

⁴⁹ See; *Sustainable Development: The UK Strategy*, (1994; Cm. 2426) Principle 4; Rio Declaration on Environment and Development UN Doc. A/CONF.151/26 (Vol. I) (1992).

⁵⁰ DETR, *A better quality of life: A strategy for sustainable development for the United Kingdom* (1999; Cm. 4345); and Programme of Implementation of the World Summit on Sustainable Development, Johannesburg UN Doc. A/CONF. 199/20(2002)

⁵¹ Ross, Andrea. "Modern Interpretations of Sustainable Development." *Journal of Law and Society*, vol. 36, no. 1, 2009, page 32–54. JSTOR, www.jstor.org/stable/40206877.

⁵² Kariuki Muigua, Didi Wamukoya, and Francis Kariuki, *Natural Resources and Environmental Justice in Kenya* page 18

This means that interpretation of the concept of sustainable development is key in a discourse of determining the role the concept of sustainable development. This paper hence posits that the Environment and Land Court and National Environment Tribunal (NET) have a seminal role to play for the realization of the objective of the concept of sustainable development.

This is because when there is a dispute based on these divergent interests,⁵³ the dispute is resolved in these two forums as they possess the requisite jurisdiction to resolve such a dispute. It's imperative then that the Environment and Land Court and National Environment Tribunal (NET), adopts an interpretation of the concept of sustainable development suitable to promote synergy between these divergent interests.⁵⁴

In doing so the main objective of creating an equilibrium between protection of the environment through the protection of wildlife in wildlife conservancies and promoting economic growth through economic activities in wildlife conservancies can be realized through the concept of sustainable development. This paper recommends that; to give effect to the concept of sustainable development it ought to be incorporated in the decision-making process of the authorities tasked with conservation and management of wildlife. The most effective and legal way to incorporate sustainable development in the decision-making process of the authorities tasked with conservation and management of wildlife is at the public participation stage. At this juncture, parties have a chance to implement sustainable development goals by mutually arriving at a decision that meets the needs of the present without compromising the ability of future generations to meet their own needs.

In essence, where the guiding principle is sustainable development during the public participation stage, then the final mutual decision arrived at by the parties, can be a decision that; promotes economic activities in wildlife

⁵³ The divergent interest of : the need to protect wildlife in wildlife conservancies versus promoting economic activities in wildlife conservancies in Kenya,

⁵⁴ Ibid No.53

conservancies where necessary and at the same time one that protects wildlife in wildlife conservancies.

The legal basis of public participation as a prerequisite in wildlife conservancy and management decision-making process is the Constitution of Kenya 2010, Wildlife Conservation and Management Act No. 47 of 2013 and Environmental Management and Co-Ordination Act No. 8 of 1999 (EMCA). Under Article 10 of the Constitution, one of the national values and principles of governance that ought to guide all state organs, state officers, public officers and all persons when making or implementing public policy decisions is public participation.

Under Section 4 of the Wildlife Conservation and Management Act,⁵⁵ public participation is one of the guiding principles that ought to be adopted in the conservation and management of wildlife. This is further buttressed by provisions of Section 5 (5) of Wildlife Conservation and Management Act No. 47 of 2013, which requires the Cabinet Secretary when formulating a national wildlife conservation and management strategy to consult the public in accordance with the Fourth Schedule of the Act.

Further, Section 5 (c) (a) of the EMCA Act No. 8 of 1999, requires the Cabinet Secretary to provide evidence of public participation in the formulation of the policy and the environmental action plan. The aforesaid provisions of the law assert the importance of public participation.

Lastly, this paper recommends that it's imperative that the Environment and Land Court and National Environment Tribunal, when faced with disputes concerning wildlife conservancy and management, to adopt the principle of sustainable development in their decision making.

In so doing, the Environment and Land Court and National Environment Tribunal (NET) will be exercising their requisite jurisdiction within the provisions of EMCA Act No. 8 of 1999 . Section 3 (5) of the EMCA Act No.

⁵⁵ Act No. 47 of 2013

8 of 1999 which requires the Environment and Land Court in the exercise of its jurisdiction to be guided by the principle of sustainable development. Further, the National Environment Management Authority as established under section 7 of EMCA, is required under Section 63 of EMCA to issue an environmental impact assessment license only on such terms and conditions as may be appropriate and necessary to facilitate sustainable development and sound environmental management. Under Section 129(3) of EMCA, the National Environmental Tribunal is empowered to make orders to enhance the principles of sustainable development.

The analysis above shows the importance of public participation and how it provides an avenue, to incorporate sustainable development in wildlife conservancy and management decision-making process. This to a great extent, if done in good faith and being guided by the tenets of sustainable development would go long way in addressing creating a convergence of the divergent interests⁵⁶.

5.0 Conclusion

Sustainable development is vital in reconciling the divergent interest⁵⁷ that frequently manifests themselves in wildlife conservancies in Kenya. If the concept of sustainable development is adopted as envisaged by *the Brundtland Commission*⁵⁸ then it would go a long way in creating a synergy between protection of the environment through the protection of wildlife in wildlife conservancies and promoting economic growth through economic activities in wildlife conservancies.

⁵⁶ The divergent interest of : the need to protect wildlife in wildlife conservancies versus promoting economic activities in wildlife conservancies in Kenya,

⁵⁷ The divergent interest of : the need to protect wildlife in wildlife conservancies versus promoting economic activities in wildlife conservancies in Kenya,

⁵⁸ *The Brundtland Commission* was established by the United Nations in 1983 to address the problem of deterioration of natural resources. Its Mission was to unite countries to pursue sustainable development. It was officially dissolved in 1987 after releasing a report entitled *Our Common Future*, also known as the *Brundtland Report*. This report defined the meaning of the Sustainable Development.

All authorities e.g Kenya Wildlife Service (KWS), tasked with the onerous role of managing wildlife conservancies or sanctuaries in Kenya, ought to adopt the concept of sustainable development in their decision making. This would reduce disputes associated with the divergent interests⁵⁹ that frequently manifest themselves in wildlife conservancies in Kenya. In the end, this paper posits that if the concept of sustainable development is adopted as envisioned by *the Brundtland Commission*, it can be a panacea to the disputes that often manifest themselves in wildlife conservancies.

⁵⁹ The divergent interest of : the need to protect wildlife in wildlife conservancies versus promoting economic activities in wildlife conservancies in Kenya,

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*Sustainable Development: Conflict or
Synergy in Promoting both Protection of
Wildlife and Economic Development in
Wildlife Conservancies in Kenya:
Peter Mwangi Muriithi*

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Wildlife Conservation and Management Act No. 47 of 2013.

Environmental Governance and the Global Plastic Pollution Problem: Driving Kenya Towards a Circular Economy

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Abstract

This paper elaborates on the use of environmental governance instruments to address plastic pollution, addressing conflicting interests between stakeholders involved in the global plastic trade with the overall aim of contributing to sustainable development. Taking the plastic bag ban in Kenya as a case study, this paper examines the global discussion on addressing plastic pollution. Taking the directive from the Cabinet Secretary for Environment as an example, it argues that some Governments may adopt approaches that may not be in concordance with the direct interests of all parties at the outset. However, such actions may drive change and achieve an acceptable solution in collaboration with stakeholders, moving countries a step closer towards achieving a circular economy.

1. Introduction

In March 2019, 170 countries at the United Nations Environment Assembly pledged to “significantly reduce” the use of plastics by 2030.¹ This was a significant milestone and a result of global efforts to address the increasing plastic pollution problem, plaguing countries around the world and prompting

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¹ United Nations Environment Assembly, ‘Addressing Single-Use Plastic Products Pollution’ <<https://papersmart.unon.org/resolution/uploads/k1900861.pdf#overlay-context=node/271>> accessed 20 February 2020; BBC, ‘UN Pledges Plastic Reduction by 2030’ *BBC News* (15 March 2019) <<https://www.bbc.com/news/science-environment-47592111>> accessed 3 February 2020.

various initiatives to explore sustainable solutions. Single-use plastics make up an estimated 40% of all plastics produced worldwide.² While plastic has its advantages in that it is cheap, lightweight, versatile, and durable, on the negative side single-use plastics like bottles, straws, shopping bags, cups, and food packaging degrade slowly, and causing harm and even death when animals ingest them.^{3,4} Furthermore, when plastic does break down, it degrades into smaller particles called microplastics that enter our water supply, the air, and the animal products we eat (e.g. fish), which may also create a human health risk.⁵ These plastics are often not recycled, and even when they are, they are usually only recycled once and then still end up in a landfill or in the ocean. Additionally, estimates suggest that plastic production is responsible for around 6% of global oil consumption (equivalent to the global aviation sector).⁶

An appreciation of the benefits and negative impacts of plastic have in recent years come to the forefront not only at the global level, but also at regional and national levels, driving conversations in communities and households. As Africa leads the world with over 31 countries on the continent having adopted legislative measures to address plastic pollution,⁷ regional bodies such as the African Union continue to explore avenues towards achieving pollution-free

² Laura Parker, 'Plastic Bag Bans Are Spreading. But Are They Truly Effective?' (*National Geographic Society*, 17 April 2019)

<<https://www.nationalgeographic.com/environment/2019/04/plastic-bag-bans-kenya-to-us-reduce-pollution/>> accessed 19 February 2020.

³ United Nations Environment Programme, 'Clean Seas: Plastic Management' <https://wedocs.unep.org/bitstream/handle/20.500.11822/21511/CleanSeas_final_Infographic.pdf?sequence=1&isAllowed=y> accessed 3 February 2020.

⁴ Hannah Ritchie and Max Roser, 'Plastic Pollution' [2018] *Our World in Data* <<https://ourworldindata.org/plastic-pollution>> accessed 13 May 2020.

⁵ *ibid.*

⁶ Ellen MacArthur Foundation, World Economic Forum and McKinsey & Company, 'The New Plastics Economy: Rethinking the Future of Plastics' (World Economic Forum 2016)

<http://www3.weforum.org/docs/WEF_The_New_Plastics_Economy.pdf> accessed 23 November 2017.

⁷ Ephrat Livni, 'Africa Is Leading the World in Plastic Bag Bans' (*Quartz Africa*, 18 May 2019) <<https://qz.com/africa/1622547/africa-is-leading-the-world-in-plastic-bag-bans/>> accessed 20 February 2020.

economies.⁸ While solutions must be sought, the question of whether it is possible to embrace a plastic-free life has been the subject of widespread debate, which continues in earnest.⁹

A post on social media about a recent development by a local supermarket in Geneva, Switzerland stirred attention online. The supermarket had introduced a product where juicy, red tomatoes were on sale for half the average market price. Yet, the person posting was outraged. Shouldn't they be pleased that such a drastic reduction in price was offered for good quality tomatoes, one might ask. The problem lay in the packaging: these tomatoes on offer were wrapped in two thick layers of plastic. For regular priced tomatoes, a customer would handpick them and place them in a biodegradable bag provided by the supermarket, and the customer would weigh and pay the value for the weight. Yet for these well-priced ones, as a pre-packaged selection the customer would in essence be unwittingly coerced to agree to plastic packaging. The concerned citizen referred to this as an attempt by the manufacturing industry to offload a burden of its own plastic packaging by passing it off to the consumer who then would be responsible for proper disposal.

This is not an isolated occurrence. It draws attention to various aspects of the prevailing global debate on plastic pollution, where issues relating to consumer versus corporate power, inequality, incorrect placing of values, and sustainable development find centre stage.

⁸ African Union, 'High Level Working Session on Banning Plastics in Africa: Towards a Pollution-Free Africa' (*African Union*, 10 February 2019) <<https://au.int/fr/node/35821>> accessed 20 February 2020.

⁹ Steven Kurutz, 'Life without Plastic Is Possible. It's Just Very Hard.' *The New York Times* (16 February 2019) <<https://www.nytimes.com/2019/02/16/style/plastic-free-living.html>> accessed 20 February 2020; Rachel Obordo, 'Is It Possible to Live without Plastic? Readers' Tips for Tip-Free Living' *The Guardian* (17 January 2018) <<https://www.theguardian.com/environment/2018/jan/17/is-it-possible-to-live-without-plastic-readers-tips-for-tip-free-living>> accessed 20 February 2020; Deutsche Welle, 'How Hard Is Living without Plastic?' (*DW.COM*, 11 October 2018) <<https://www.dw.com/en/how-hard-is-living-without-plastic/a-45829332>> accessed 20 February 2020.

This paper is based on a desk-based review of available literature at the global, regional, and national level, including laws, court decisions, reports, and articles. It offers reflections on plastic pollution, the proliferation of plastics in everyday use, and marine plastics and micro-plastics challenges. It examines efforts to address the conflict between current and ideal approaches to dealing with the proliferation of plastics. The examination focuses on countries in Africa, including highlighting the judicial decision concerning the plastic bag ban in Kenya. It concludes that there is an ever-increasing need for concerted effort for States, businesses, consumers, and other stakeholders to explore alternatives to single-use plastic and to adopt measures to protect future generations in the ends of sustainable development.

2. Plastic pollution: A global conflict

“An exciting opportunity for researchers and people generally interested in scientific studies!”

This was the gist of a tag line inviting interested applicants for a volunteering programme for one month in the Antarctic.¹⁰ The small team of researchers would join one of the world’s first extensive studies of how micro-plastics travel around the world from the points of production and disposal, to what can be referred to as the ends of the earth. Through collecting samples of snow and ice which would then be examined for the particles of what would have then disintegrated from the bottle, container, straw, or other similar item, the findings would provide insights into the use of plastics from different countries. This contributes to decades of studies that have been prepared to illustrate the unsustainability of present day manufacture, use, and disposal of plastic and plastic products.

Plastic is currently embedded in everyday life, a reality that has increasingly manifested since large-scale plastic production began in the 1950s.¹¹ Its inherent properties make it an ideal material for myriad uses – from construction, to consumer packaging, components of electronics, tools, cars,

¹⁰ Airbnb, ‘Wanted: Five Volunteers to Join Scientific Research Mission to Antarctica’ (*Airbnb Newsroom*, 24 September 2019)

<<https://news.airbnb.com/antarcticsabbatical/>> accessed 20 February 2020.

¹¹ Roland Geyer, Jenna Jambeck and Kara Law, ‘Production, Use, and Fate of All Plastics Ever Made’ (2017) 3 *Science Advances* e1700782.

photographs, utensils, and an endless list of products. Once produced, however, plastics are one of the most persistent materials in existence, and for hundreds of years will continue to form part of ecosystems until when – and if – they disintegrate. There lies the problem. While plastics might break down from an integral product into smaller and yet smaller particles – microplastics to nano-plastics and so on – there lies the question of whether it is possible for them to completely “go away” from existence. Once produced, as some authors describe them as near immortal,¹² it is arguable that they will outlive the producers and consumers for the foreseeable future. Yet it is this durability that places plastic as one of the most useful materials with wide-ranging use.

3. Fifty years and counting to infinity and beyond

Plastic has taken centre stage as one of the most expedient materials in industry and daily life, since the 1950s.¹³ To date, an estimated 8.3 billion tonnes of plastic has been produced, generating approximately 6.3 billion tonnes of plastic waste.¹⁴ By 2015, production of plastics increased nearly 200-fold to 381 million tonnes that year, and in 2017, taking the example of plastic packaging alone, 95% valued at USD 80 – 120 billion is lost every year, and only 9% of plastic waste has been recycled.¹⁵

Around the world there have been over the years various campaigns spurring citizen participation with initiatives to reduce, reuse and recycle. Yet, as is illustrated from the relatively low volume of plastic that is recycled, the

¹² Manya Russo, ‘Opinion Piece: How Plastic Never Dies, An Immortal Tale That Will Make You Rethink Plastic’ (*World Wide Fund for Nature (WWF)*, 12 October 2017) <<https://wwf.panda.org/?313732/Opinion-Piece-How-Plastic-Never-Dies-An-Immortal-Tale-That-Will-Make-You-Rethink-Plastic>> accessed 12 February 2020; GrrlScientist, ‘Five Ways That Plastics Harm the Environment (And One Way They May Help)’ (*Forbes*) <<https://www.forbes.com/sites/grrlscientist/2018/04/23/five-ways-that-plastics-harm-the-environment-and-one-way-they-may-help/>> accessed 12 February 2020.

¹³ United Nations Environment Programme, *Single-Use Plastics: A Roadmap for Sustainability*. (United Nations Environment Programme 2018) vi <<https://www.unenvironment.org/resources/report/single-use-plastics-roadmap-sustainability>> accessed 29 January 2020.

¹⁴ United Nations Environment Programme, ‘Clean Seas: Plastic Management’ (n 3).

¹⁵ *ibid*.

remainder ends up either in land-fills where in many countries it is burnt contributing to air pollution, or on land and water, where it will persist in the environment for hundreds of years. For example, the Great Pacific Garbage Patch, a collection of marine debris where approximately 54% originates from North America and Asia, and approximately 20% from sea-based vehicles majority of which is fishing nets,¹⁶ demonstrates the flow of waste (one globally uniting factor between the continents being oceans), and the potentially debilitating effect continued business-as-usual has on oceans, from both sea and land-based sources. It also shows that while some consider that the plastic problem is solved by placing it properly in a recycling bin, plastics may be here to stay “to infinity and beyond.” Further to this, plastic is in fact being “down-cycled,” because recycling processes lead to products of lower quality and economic value, and can only be recycled once or twice before being finally disposed of.¹⁷ So even if human behaviour changed and all plastics were actually sent to a recycling facility, studies have suggested that “recycling delays, rather than avoids, final disposal,”¹⁸ and the majority of plastic still ends up in landfill or being incinerated anyway.

4. Addressing plastic pollution as a sustainable development issue

There is an increasing recognition of the massive impact of single-use plastic, accounting for almost 50% of global waste annually.¹⁹ With this in consideration, as of 2018 more than 60 countries had included restrictive measures such as complete bans or taxes and levies, in relation to the manufacture and use of single-use plastic.²⁰ In 2019, it was reported that almost 50 countries had in place complete bans while almost 50 countries had imposed either national or sub-national charges for plastic bags.²¹

¹⁶ National Geographic Society, ‘Great Pacific Garbage Patch’ (*National Geographic Society*, 5 July 2019) <<http://www.nationalgeographic.org/encyclopedia/great-pacific-garbage-patch/>> accessed 19 February 2020.

¹⁷ Roland Geyer and others, ‘Common Misconceptions about Recycling’ (2016) 20 *Journal of Industrial Ecology* 1010.

¹⁸ Roland Geyer, Jenna Jambeck and Kara Law (n 11).

¹⁹ United Nations Environment Programme, *Single-Use Plastics: A Roadmap for Sustainability*. (n 13).

²⁰ *ibid* viii.

²¹ United Nations Department of Economic and Social Affairs, *Report of the Inter-Agency Task Force on Financing for Development 2019* (United Nations 2019) 41

Efforts to address plastic pollution have gained a more concerted approach with the overarching Sustainable Development Goals (SDGs), specifically with respect to sustainable consumption and production. This from a perspective that generally the global economy is singular, where there is a one-way movement of resources, from extraction to production, use and disposal. Most of the products once used a single time cannot be reused, and end up in disposal in the environment. In the case of single-use plastics, petroleum extraction and production of virgin plastic, manufacture of a plastic product, use by a consumer, and disposal only contributes to exacerbating the waste problem. A wholesome approach to this reveals that our societies do not have a 'waste problem'. Rather, it is a consumption and production problem that is the root of what we dispose. Therefore, approaches to address consumption and production under the SDGs has been recognised as beneficial. This calls for action to deal with the root problem, rather than implementing piecemeal efforts at the disposal level when already the product, as in the case of single-use plastic, cannot be returned to the production cycle and as a result its use not maximised.

Combating the global plastic pollution problem is one potential avenue to contributing towards achieving sustainable development. Sustainable consumption and production, particularly addressing plastic pollution, has an implication on various SDGs, including SDGs 2, 3, 6, 8, 12, 13, 14, and 15.²²

<<https://developmentfinance.un.org/sites/developmentfinance.un.org/files/FSDR2019.pdf>>.

²² United Nations Department of Economic and Social Affairs, 'Sustainable Consumption and Production: An Expert Group Meeting in Preparation for HLPF 2018: Transformation towards Sustainable and Resilient Societies' <https://sustainabledevelopment.un.org/content/documents/17953SCP_EGM_concept_note.pdf> accessed 13 February 2020. SDG 2 on "zero hunger", is to end hunger, achieve food security and improved nutrition and promote sustainable agriculture. SDG 3 on "Good health and well-being", is to ensure healthy lives and promote well-being for all at all ages. SDG6 on "clean water and sanitation", is to ensure availability and sustainable management of water and sanitation for all. SDG8 on "Decent work and economic growth" is to promote sustained, inclusive and sustainable economic growth, full and productive employment and decent work for all. SDG12 on "Responsible consumption and production" is to ensure sustainable consumption and production patterns. SDG13 on "Climate action" is to take urgent action to combat climate change and its impacts. SDG14 on "life below water" is to conserve and

Also important in the discussion on plastic pollution are SDG 16 and SDG 17.²³ Efforts therefore conducted in an inclusive manner involving governments, businesses, communities, and other stakeholders can drive commitments aimed at reducing hunger, promoting good health and well-being, ensuring clean water and sanitation, and promoting decent work and economic growth. Innovative initiatives and responsible consumption and production patterns can be achieved without - or with reduced - plastic use. Further, in seeking alternatives to fossil fuel products such as plastics, addressing plastic pollution goes hand in hand with climate action, and seeks to protect life below water as well as life on land. Through strengthened partnerships with all stakeholders, goals such as securing peace, justice and strong institutions can be achieved, overall for the greater good of humankind.

5. Regulatory and policy measures: a global problem with local impacts

Addressing the plastic pollution problem is arguably mainly a regulation and policy issue, and governments around the world have engaged varying degrees of stringency towards effective reduction, collection, recycling and disposal of plastic waste.²⁴ While Africa does not feature on the global map of notable sources of plastic waste comparably, the impacts of plastic pollution are acutely felt on the continent. According to the World Bank, in 2016, East Asia and the Pacific accounted for 57 million tonnes, Europe and Central Asia contributed 45 million tonnes, and North America produced 35 million tonnes of plastic waste - a combined 137 million tonnes out of the global plastic waste

sustainably use the oceans, seas and marine resources for sustainable development. SDG15 on "life on land" is to protect, restore and promote sustainable use of terrestrial ecosystems, sustainably manage forests, combat desertification, and halt and reverse land degradation and halt biodiversity loss.

²³ SDG16 on "peace, justice, and strong institutions" is to promote peaceful and inclusive societies for sustainable development, provide access to justice for all and build effective, accountable and inclusive institutions at all levels. SDG17 on "partnerships for the goals" is to strengthen the means of implementation and revitalize the global partnership for sustainable development.

²⁴ Olha Krushelnyska, 'Solving Marine Pollution: Successful Models to Reduce Wastewater, Agricultural Run-off and Marine Litter' (The World Bank 2018) 16–18 <<http://documents.worldbank.org/curated/en/651521537901259717/pdf/130154-WP-PUBLIC-SolvingMarinePollution.pdf>> accessed 19 February 2020.

generation volume of 242 million tonnes, or 56.6% of global plastic waste.²⁵ Yet the impacts of plastic waste in Africa are as visible as across the world, illustrating the common impacts of unsustainable consumption and production.

Various countries in Africa have taken measures to address plastic pollution. Rwanda is a pioneer in implementing a plastic bag ban, and other countries such as South Africa, Kenya, Senegal, and Tanzania, all totalling 34 countries, have adopted regulatory or policy measures of varying levels and implications.²⁶ These initiatives have taken different shapes depending on the country, some driven from a top-down approach and others from a bottom-up fashion. In some countries including Kenya, citizen and civil society campaigns have contributed to the creation of awareness leading up to the plastic bag ban, illustrating the power of social media campaigns and residents raising environmental governance issues at their community and local government levels to highlight living conditions and contribute to social change.²⁷

The plastic bag ban conflict in the Kenyan courts

The issue of the plastic ban is not new to the courts in Kenya, and has been analysed in previous instances where there have been attempts by the Kenyan Government to either restrict or otherwise ban the use of plastic bags. The case of *Kenya Association of Manufacturers & 3 others v Cabinet secretary, Ministry of Environment and Natural Resources & 3 others*²⁸ represents what

²⁵ The World Bank, 'Tackling Increasing Plastic Waste' (*World Bank*, 2020) <http://datatopics.worldbank.org/what-a-waste/tackling_increasing_plastic_waste.html> accessed 3 February 2020.

²⁶ Chancia Plaine, 'Plastic Waste: An Overview of Repressive Legislation in African Countries' (*Afrik 21*, 30 July 2019) <<https://www.afrik21.africa/en/plastic-waste-an-overview-of-repressive-legislation-in-african-countries-1-2/>> accessed 13 February 2020.

²⁷ United Nations Environment Programme, 'Meet James Wakibia, the Campaigner behind Kenya's Plastic Bag Ban' (*UN Environment*, 4 May 2018) <<http://www.unenvironment.org/news-and-stories/story/meet-james-wakibia-campaigner-behind-kenyas-plastic-bag-ban>> accessed 12 February 2020.

²⁸ *Kenya Association of Manufacturers & 3 others v Cabinet secretary, Ministry of Environment and Natural Resources & 3 others* [2018] Environment and Land Court

the Environment and Land Court at Nairobi termed as “a protracted dispute the facts of which look straight forward on the surface but contain complicated legal issues underneath”. The case originated from a February 2017 decision of the Cabinet Secretary of the Ministry of Environment and Natural Resources, and the National Environment Management Authority (NEMA) to ban the use, manufacture and importation of certain types of plastic bags used for commercial and household packaging. Two constitutional petitions – one decrying a lack of public participation brought by the manufacturing industry, and another brought by a human rights defender citing lack of consultation of consumers and workers in the plastics industry – and one application for judicial review with similar intent to quash the decision of the then Cabinet Secretary, were consolidated and argued as one case before the court. The manufacturing industry made reference to a regulatory and policy vacuum, with weak enforcement mechanisms of the government being at the heart of the plastic waste problem, and a lack of institutional progress – again from the government’s side – in implementing a joint implementation plan for sustainable management of plastic waste signed in June 2007.

It is not peculiar to Kenya that the manufacturing industry would raise arguments to oppose what has been termed as a draconian action by the Government,²⁹ a description attributed to a decision in support of public interest yet attracting mixed sentiment. The plastics industry around the world has been accused of being on the offensive in various instances to maintain the status quo, financing a powerful lobby in some cases to circumvent existing regulations, and in others to downright undermine governance measures.³⁰ It may be perceived that the arguments raised by the manufacturing industry in

at Nairobi Petition 32 & 35 of 2017 & Judicial Review Application 30 of 2017 (Consolidated), eKLR.

²⁹ Jonathan Watts, ‘Eight Months on, Is the World’s Most Drastic Plastic Bag Ban Working?’ *The Guardian* (Nairobi, Kenya, 25 April 2018) <<https://www.theguardian.com/world/2018/apr/25/nairobi-clean-up-highs-lows-kenyas-plastic-bag-ban>> accessed 23 September 2019.

³⁰ Center for International Environmental Law, ‘Impact Report’ (Center for International Environmental Law (CIEL) 2018); Sharon Lerner, ‘Waste Only: How the Plastics Industry Is Fighting to Keep Polluting the World’ (*The Intercept*, 20 July 2019) <<https://theintercept.com/2019/07/20/plastics-industry-plastic-recycling/>> accessed 17 February 2020.

Kenya in opposition of the plastic bag ban, while highlighting important challenges with the environmental governance framework including in relation to lack of enforcement, give credence to the opposition of a paradigm shift towards a circular economy.

In the case, the first argument put forward by the manufacturing industry was that the ban would cause economic and job losses. Secondly, that the ban would compromise the existing collaborative initiatives towards plastic waste management. Thirdly, that the sudden unexpected and drastic policy change in addressing plastic waste would cause disarray in the manufacturing sector and was likely to affect investor confidence. Fourthly, that the wording of the legal notice was ambiguous and amounted to a total ban of all plastic carrier bags and flat bags. And fifthly that the ban ignored the existing collaborative initiatives in plastic waste management. Similar arguments have been raised in conflicts surrounding regulation of plastic bags in other countries. For example in South Africa, the 2003 attempts to ban plastic bags led to outcry from the Congress of South African Trade Unions (COSATU) which opposed the move raising that this would lead to closure of factories and approximately 3,800 job losses.³¹

The court found that the ban on the plastic bags was in conformity with the powers of the Cabinet Secretary, was carried out with respect for the principles of public participation, and also was in compliance with Article 69 of the Constitution guaranteeing the right to a clean and healthy environment – from which derives the State’s duty to take action to eliminate activities or actions that may have a negative impact on the environment. The court also made reference to the successful ban of plastic bags imposed in Rwanda in 2008, which served as a good example, albeit countries such as South Africa and Uganda unsuccessfully implemented such bans. While so, the High Court of Uganda at Kampala in *GreenWatch v Attorney General* agreed with the parties who settled by admission that “the use, manufacture and distribution of polythene bags of more than 30 microns constitute a danger to the environment

³¹ BBC, ‘South Africa Bans Plastic Bags’ *BBC* (9 May 2003)
<<http://news.bbc.co.uk/2/hi/africa/3013419.stm>> accessed 17 February 2020.

and in turn violate the rights of citizens of Uganda to a clean and health environment.”³²

Challenges persist in countries that have implemented measures to address plastic pollution, in some instances leading to reduced impact. In South Africa, while the ban was put in place, enforcement was lacking, leading to a slight drop in production at the initial stages of implementation and later reverting to a spike in consumption.³³ Similarly in Uganda, the manufacturing lobby ensured enforcement failed and while the ban entered into force in 2009 on lightweight plastic bags,³⁴ these bags are still found in the country.³⁵ Renewed efforts to implement a ban include a 2019 review of Uganda’s National Environment Act No. 5 of 2019 banning plastic bags of less than 30 microns in thickness.³⁶

While challenges exist in adapting to the law on the part of consumers, traders, workers, businesses, and even the Government, it is a welcome step, and one that according to international environmental law experts can be used to encourage other countries to adopt similar measures to address plastic bags and other single-use plastics.³⁷ Taking measures to address the proliferation of plastic bags can provide an avenue for the gradual change of consumer behaviour and set a framework for addressing plastic pollution from other single-use plastic products.³⁸ For businesses also, a shift in business models has been considered a necessary step throughout the lifecycle of plastics. For

³² *GreenWatch v Attorney General & National Environment Management Authority (NEMA)*(5 October 2012); / Uganda Legal Information Institute [2012] High Court of Uganda at Kampala Miscellaneous Cause No. 140 of 2002, 205 UGHC.

³³ United Nations Environment Programme, *Single-Use Plastics: A Roadmap for Sustainability*. (n 13) 30.

³⁴ Government of Uganda, ‘Statement on the Management of Plastic Pollution’ <https://papersmart.unon.org/resolution/uploads/uganda_statement.pdf> accessed 17 February 2020.

³⁵ United Nations Environment Programme, *Single-Use Plastics: A Roadmap for Sustainability*. (n 13) 30.

³⁶ Government of Uganda (n 34).

³⁷ Jonathan Watts (n 29).

³⁸ Joseph Curtin, ‘Let’s Bag Plastic Bags’ *The New York Times* (3 March 2018) <<https://www.nytimes.com/2018/03/03/opinion/sunday/plastic-bags-pollution-oceans.html>> accessed 19 February 2020.

example, various local individuals and community members in Kenya have developed innovative uses for plastic waste, including two environmental scientists-turned entrepreneurs making roofing tiles from plastic and glass waste.³⁹

Implementing legal, regulatory and policy measures is the first stage, yet for effective environmental governance, strong enforcement of the measures in place is essential. In Kenya, there have been solid waste management policies in place for many years. However, ineffective local government laws facing limited enforcement, the absence of a strong waste management system, and the absence of appropriate consumer behaviour regarding proper waste disposal,⁴⁰ all contribute to the situation calling for urgent stringent action.

While it is indeed important to focus on efforts towards recycling plastic waste where it is possible, Governments and businesses should also place an emphasis on pursuing alternatives, especially given that recycling has proven to be an ineffective and deceptive solution for the plastic problem. Furthermore, efforts to reduce, re-use, and recycle, have positive effects, but placing the burden inadvertently on consumers coupled by failures to promote consumer awareness of alternatives present a flawed perception of global realities. For example, this approach is modelled around a society where there are existing systems and infrastructure designed to handle recycling. In many countries, for example in Kenya, the waste management system simply is not supportive of any consumer action in this regard. There are no separate bins for different types of waste. Even if this were so, there are no separate waste collection, sorting, or processing avenues.

Consumers are increasingly coming to the realisation that ‘plastic recycling is a myth’, where out of the 8.3 billion tonnes of virgin plastic produced across the world, approximately only 9% of it is recycled, 12% is incinerated, and

³⁹ ‘Kenyan Scientist Uses Throw-Away Plastics to Build Homes’ *Al Jazeera* (13 December 2019) <<https://www.aljazeera.com/ajimpact/kenyan-scientist-throw-plastics-build-homes-191213191145227.html>> accessed 12 February 2020.

⁴⁰ Catherine M Aurah, ‘Assessment of Extent to Which Plastic Bag Waste Management Methods Used in Nairobi City Promote Sustainability’ (2013) 1 *American Journal of Environmental Protection* 96.

79% (the lion's share) ends up in landfills or the natural environment.⁴¹ Taking into account that a household may be willing to separate their waste, such would be piled up together in one central waste collection – again only where available – and sent to a large garbage dump. This again only takes into consideration efficient urban waste management, where to contrast with rural waste management, no alternative systems to waste collection and processing exist. Open waste burning, whether for the urban waste which ends up in large open pit burning sites, or rural waste which each household may take responsibility for ensuring its processing, is in most cases the only available recourse.

In addition to the lack of infrastructure of many rural locations and developing countries to deal with their own plastic waste, this issue is further exacerbated by plastic waste imports exportation from rich to poor countries. Between 1988 and 2016, the top ten plastic waste exporters (high-income countries including Hong Kong, the US, Japan, Germany, Mexico, the UK, the Netherlands, France and Belgium), had exported 168 million tonnes over this period, with an economic value of USD 65 billion.⁴² Previously, this waste was predominantly sent to China until 2017 when China announced a ban on plastic waste imports. Since 2018, much of this plastic has been sent to Southeast Asia, particularly Malaysia, Thailand and Vietnam, causing serious environmental and human health issues, as these poorer countries do not have the capacity to deal with the plastic waste and instead often end up illegally burning it or dumping it in unauthorized landfills.⁴³ Data on plastic imports in Africa are scarce, however of the 33 African countries with at least 10 years of data, it has been estimated that 230 Mt of plastics were imported in Africa between 1990 and 2017, primarily being sent to Egypt, Nigeria, South Africa,

⁴¹ Roland Geyer, Jenna Jambeck and Kara Law (n 11); Oliver Franklin-Wallis, “Plastic Recycling Is a Myth”: What Really Happens to Your Rubbish?’ *The Guardian* (17 August 2019) <<https://www.theguardian.com/environment/2019/aug/17/plastic-recycling-myth-what-really-happens-your-rubbish>> accessed 17 February 2020.

⁴² Amy L. Brooks, Shunli Wang and Jenna R. Jambeck, ‘The Chinese Import Ban and Its Impact on Global Plastic Waste Trade’ (2018) 4 *Science Advances* eaat0131.

⁴³ Greenpeace Southeast Asia, ‘The Recycling Myth’ (*Greenpeace Southeast Asia*, 27 November 2018) <<https://www.greenpeace.org/southeastasia/publication/549/the-recycling-myth>> accessed 13 May 2020.

Algeria, Morocco, and Tunisia.⁴⁴ As awareness is growing around the methods and consequences and of plastic pollution, some governments are making efforts to block imports and crack down on the illegal plastic waste trade; however, it is clear that stricter policies and regulatory enforcement is needed.

6. Conclusion and Way Forward

Plastics are embedded in everyday life. There is an inextricable link between addressing the global plastic pollution problem and contributing towards achieving the Sustainable Development Goals. Governments can impose policy measures to embed sustainability especially in areas where there are sustainability externalities that do not have a significant impact on corporate profitability, but where the corresponding public benefit is determined to be in the public good.⁴⁵ For example, in various efforts around the world, including in Kenya, where government action, although opposed by industry based on profitability, can be illustrated to provide an overall beneficial outcome taking into account the impacts on economic development and mitigating the negative impacts with alternative ways of achieving profit with simultaneous benefit to the public.

An all-around approach is needed to support individual policy measures such as legislative actions banning single-use plastics, for example, in order to support implementation of specific measures. A strong basic waste management system should also be in focus, coupled with a robust involvement of society to address individual and household needs.⁴⁶ Partnership with industry whose immense contribution to the plastic economy can be leveraged, for example through altering production cycles to reduce volume of materials required and to re-introduce resources once initially used, would be important.⁴⁷ Further, innovative methods to allow for reuse of packaging material and less consumption, which has become excessive in the

⁴⁴ Joshua O. Babayemi and others, 'Ensuring Sustainability in Plastics Use in Africa: Consumption, Waste Generation, and Projections' (2019) 31 *Environmental Sciences Europe* 60.

⁴⁵ United Nations Department of Economic and Social Affairs (n 21) 58.

⁴⁶ The World Bank (n 25).

⁴⁷ The World Bank (n 25).

throwaway culture that has emerged in recent decades, should be closely considered.

Efforts have been made in countries around the world to pursue alternatives to single-use plastics. With the consideration that the benefits of plastic for various uses including its versatility and durability and as argued by some that plastics are here to stay, discussions about various approaches to explore alternatives and less harmful forms of plastic, at the same time as limiting single-use plastics, remains another avenue. For example, regulatory measures that States can adopt to support efforts to promote innovation and improve quality of products, for reduced negative environmental impact include: (1) harmonising chemicals and food regulation to address the harmful impacts of certain chemicals in plastics on health, (2) alignment of waste classification among countries to address the current inconsistencies that contribute to plastic substances classified as waste in one country being shipped to other countries to the recipient countries' detriment, (3) introducing and promoting eco-design measures and standardisation to address the design stage of products where 80% of their environmental impact is determined, and (4) supporting recycling opposed to uptake of virgin plastic.⁴⁸

Multi-pronged approaches involving the various stakeholders in plastic pollution can be implemented, with efforts including holding businesses accountable for their contributions and therefore leveraging the industry as a potential key ally for solutions, promoting strengthened legal frameworks including their enforcement, and empowering communities to drive behavioural change and spur action from their governments and businesses.⁴⁹ Governments should put in place appropriate legal mechanisms and strengthen enforcement measures to address plastic pollution. For example, as actions on pursuing extended producer responsibility to promote recycling are being explored in Kenya, concern should be addressed towards the sustainability of implementing such measures. Environmental governance frameworks are

⁴⁸ Emma Watkins and others, 'Policy Approaches to Incentivise Sustainable Plastic Design' (Organisation for Economic Co-operation and Development (OECD) 2019) Working Paper ENV/WKP(2019)8 26.

⁴⁹ Center for International Environmental Law (n 30).

reliant on various aspects including promoting access to information and participation. There is equally a need for robust evaluations of the impacts that these measures have on businesses, governments, and communities, in Kenya and in other parts of the world, identifying measurable results. Data generation, maintenance and dissemination would be beneficial towards these aims of quantifying the relative impacts of the bans and other related actions once implemented are put in place – to drive forward further efforts to address the situation.

To these ends, governments should involve relevant stakeholders, including businesses and consumers in discussions aimed towards implementing measures. It is the State that has the overarching obligation to protect, respect, and fulfil human rights, including the right to environment and especially safeguarding environmental health. A human-rights based approach to addressing plastic pollution would therefore be imperative towards ensuring measures implemented promote equality.

Businesses should promote investment in innovation and development of technology to pursue alternatives to single-use plastic. Investors should embrace the life-cycle approach to chemicals and wastes, and contribute towards the goal of achieving a circular economy. This may take the form of public-private partnerships geared towards developing sustainable alternatives, while at the same time engaging constructively in regulatory initiatives addressed towards recycling and waste management. In Kenya specifically, there is an ever-increasing need to focus on home-grown solutions developed in partnership with businesses, including through eco-design of products and reduction of use of virgin plastic, among other potential areas of action.

Consumers should speak up more loudly about the environmental issues plaguing their local community, and present these issues at discussion forums, online platforms, and local governments, to promote a community of environmentally conscious citizens. Around the world there are various examples of movements of consumers spurring behavioural change through community engagement. While this can be a gradual shift, changes including

at the household level such as shopping habits like carrying one's own shopping bag, or taking action through clean-ups can foster a mentality of reduction of single-use plastic and an awareness of the damage it is causing, which is vital to bringing about a systemic shift towards more sustainable practices. Brought together with the initiatives at the regulatory and industry level, the collated response can drive countries, including Kenya, closer to achieving a sustainable future for generations to come.

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Theoretical Underpinnings of Toxic Chemical Regime Formation: The Road to Rotterdam Convention

*By: Henry Murigi **

Abstract

The balance between human activities in developing toxic chemicals do not always take into account the effect on environment. Regime construction is often seen as a seamless process especially when one considers the outcome attained in any convention. Often what is left out is that any regime must be defined by science as well as political actors. Getting the balance between these two competing concerns calls for compromise. There have been several attempts to address the effects of toxic chemicals to the environment. This paper seeks to trace the theoretical origins of the toxic chemical regimes and address how they have been formulated. The effect of any regime often boils down to the question of compliance and implementation. This paper seeks to therefore highlight some of the realities of compliance and implementation of the toxic chemical regimes.

1. Introduction

Environmental historians make a grand claims that the last fifty years have seen the rise of techno scientific practices and modes of governmentality that together make the molecular realm newly legible and politicizable¹. The reality is that the mid twentieth century witnessed a rapid expansion of the chemical industries. With this expansion there was an intrusion of chemical technology into practically all branches of the economy and everyday life. Many states have passed law and regulations regarding the evaluation and control of chemicals in the environment and require information to be submitted to national authorities before chemicals can be manufactured or used.

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¹ Michelle Murphy “*Environmental History*”. (2008), Oxford University Press, Vol. 13 No 4. (Oct) pp. 695-703

After the Second World War, there seems to be a systematic growth in the production and use of chemical weapons for commercial purposes. Understanding the nature of environmental global politics on chemical weapons and toxic chemicals entails recognizing the importance of international regimes. This paper seeks to examine the theoretical underpinnings of the construction, compliance and enforcement of the regime on toxic chemicals management on the environment. Chemicals have both positive and negative effects on the environment with the latter being more appalling and concerning. These concerns have led to the formulation of numerous regimes that deal both directly and indirectly with Chemicals. Although pollution, waste management, hazardous waste management, biodiversity have separate regimes this paper argues that they are all connected to the toxic chemicals regime.

2. Conceptualizing International Regimes

There is limited disagreement on the concept of International Regimes which may be defined in two ways². First, it is a set of norms, rules or decision making procedure whether implicit or explicit that assist in finding an agreement which informs international behavior. The second definition of regime is the principle, norms, rules, operating procedures and institutions that actors create or accept to regulate or coordinate action in a particular area of international relations. For purpose of this paper norms are standards of behavior while principles are belief of fact, causation and rectitude. Rules are specific prescriptions or prescription for actions. Operating procedures are prevailing practices for work within the regime including methods of making, implementing, operating, evaluating and expanding the regime and policy.

Formation of environmental regimes, such as toxic chemical regimes, requires an in-depth understanding of regime construction, negotiations, implementation and impact. John Ruggie³ is often credited for introducing

² Chasek Pamela S, et al. *Global Environmental Politics, Dilemmas in World Politics* (2006) 4th Ed, Westview Press. USA

³ John Gerard Ruggie, "*International Response to Technology: Concepts and Trends*" International Organization (1975) Vol. 29 pp. 570 He introduced the concept international regime and epistemic communities into international relations field by adopting the Karl Polanyi term embedded liberalism. A foreign policy Magazine has

international regime as a set of mutual expectations, rules, regulations, plans, organizational energies and financial commitments which have been accepted by a group of states. Haas defined regimes as collective arrangement among nations designed to create or more effectively use scientific and technical capabilities to manage an international phenomenon⁴. Keohane and Nye also defined regime instrumentality as creation or acceptance of procedures, rules or institutions for certain kind of activity which governments regulate and control transnational and interstate relations⁵. They also define regime as a network of rules norms and procedures that regulate behavior. In 1963 a group of leading scholars attempted defines regimes as targeted principles, policies and traditions that are internationally accepted with a view to standardize and extend regime study⁶. Regimes take the form of treaties, protocols, agreements, accords and conventions among others.

2.1 Regime Theory

Regimes are found in many areas of international relations and as a result regime theory has received attention from scholars on the longstanding debate on power, interest, ideas and cooperation under the anarchical system of global politics. Environmental regimes require all stakeholders including governments to surrender part of their sovereignty for external interjections in regards to the usage or exploitation of resources whenever there is any reason. However a counter argument is that International environmental regimes have assisted states to reinforce their internal judicial procedures, legal dispensation, which helps consolidate their statehood thereby contributing to enhanced projection sovereignty.

There are several assumption made under this environmental regime theory. First, the assumption among others, is that the international politics is

named him one of the 25 most influential international relations scholars in United States and Canada.

⁴ Ernst Haas, "*On Systems and International Relations*" World Politics, (1975), pp. 27.

⁵ Robert O. Keohane and Joseph S. Nye *Power and interdependence* (1977) Boston: Little Brown. pp. 5, 19.

⁶ Stephen Krasner, *International Regimes*, Ithacia Cornell University Press (1983) pp 2.

concerned with power plays. It is not an ordered realm but dominated by anarchy. This explains the progenitor's approach which demonstrates the impact and mitigation of structural anarchy in the international system. The power plays are compounded by the absence of a hierarchical structure governing international politics. The second assumption is based on the institutional processes leading to the formation of the treaty. This assumption concentrates on environment organization's actual operation. The assumption considers views taken by **constitutionalist** who study treaties and the formal structure of international organization. The third assumption is that scholars and 'State men' must learn how these interest can be realized despite structural anarchy, extensive common interests existing among states and their people.

The last assumption is based on functionalists' argument, associated with David Mitrany who opines that scholarly and political focus of international cooperation must center, not on formal interstate politics, rather on providing opportunities for technical cooperation⁷. Indeed cooperation between states may lead to erosion of domestic legislative function in favor of a more global legislation. However the functionalist idea has been developed to anticipate global institution and regional organization as an effective way of creating international governance. The effect of this is debatable. The complexity of actors involved (states and individuals), as well as the reality of coherence of the actors, presents a mirage. Yet interdependence in environmental politics is a reality and is one of the main concerns of the study on environmental regimes⁸.

2.2 Regime Construction Stages

Although States are consistent in their unending competition for power as a means of defense, no State acting alone can solve the environmental crisis that has global scale consequences⁹. Regime formation is founded on the relationship between knowledge and power. Regime formation is not about

⁷ David Mitrany, *The Functional Theory of Politics* London, London School of Economics St Martin Press (1975).

⁸ Chasek Pamela S, et al. *Global Environmental Politics, Dilemmas in World Politics* (2006)

⁹ Caroline Thomas, *The Environment in International Relations*, London, Chameleon Press Limited (1992)

fixing the environmental problem that exists, rather it is the consideration of the broader issues of politics that are at play in the international system¹⁰. Therefore regimes, exist (to attempt) to tame the excesses identified within the environmental problem. Regime building developed by liberal institutionalism which led to the green diplomacy movement which is arguably one of the solution to save the world from global environmental collapse¹¹.

Regime formation is largely informed by the existence of a foundational environmental **problem**. There must be a concrete definition of the issue before any action can be taken. The main concern is how to develop a regime so that it attains the status of an express legal commitment politics notwithstanding. This introduces the poignant question which addresses the issue of who is best suited to define environmental policy matters; the politician or the scientist¹². It is also posited by Broadhead¹³ that there are two prong approaches to framing the environmental problem. Firstly, the source of knowledge production is critical. Scientist are central in the formulation of the issue. Science is a major source of knowledge production in environmental politics since it aids in identifying the problem with precision which is critical in framing the environmental issue¹⁴. Secondly there is also a network of professionals with recognized expertise and competence in a particular domain and are authoritative in a given area and form what is called *epistemic community*¹⁵. They go beyond the basic scientific expertise in a given field to define the problem based on epistemology and scholarly research. This paper suggests a healthy mix of the two is critical to attaining a clear regime.

¹⁰ Lee-Ann Broadhead, “*International Environmental Politics: The Limits of Green Diplomacy*” (2002)

¹¹ Ibid

¹² Chris Methmann, *The Sky is the Limit: Global Warming as Global Governmentality*. European Journal of International Relations, (2011), Volume: 19 issue: 1, page(s): 69-91

¹³ Lee-Ann Broadhead, “*International Environmental Politics: The Limits of Green Diplomacy*”

¹⁴ Owen Green (1994), “*Environmental Issues; The Globalization of World Politics* ed By John Baylis and Steve Smith. Oxford University Press.

¹⁵ Ibid

The second stage after framing the environmental problem is **fact finding**. Facts must be gathered correctly before a decision to define a problem is made. Cogent evidence must be available to support the reality of existence of a problem. The debate is that facts may be made to look what the fact finder desires. The fact finder ought to be objective and neutral. Hard evidence presented by credible members of the international community such as scientists inform the quest by interest groups or the political players with a view to formulating the international agenda on environmental discourse. Organizations such as United Nations Environmental Programme (UNEP) frequently play a critical role in the articulation and dissemination of the best available evidence as it is collected and debated through variety of channels such as bureaucracies, academia, and businesses among others¹⁶.

Under fact finding stage the foundation of knowledge production must attempt to satisfy **four elements**¹⁷. These are (1) normative and principled belief on a value based rationale for social action, (2) shared causal belief based on practice contributing to the problem that invites policy action toward a desired outcome, (3) shared notions of validity and (4) common policy enterprise associated with the problem to which professional competence is directed. These are cumulative and hard to arrive at policy formulation. The *epistemic community* should not be seen to replace the need for participation and expression of democratic will by influential elements such as hegemonic actors.

Once the foundational problem is determined decisively by concerned states the formulation process takes the often treacherous trajectory of negotiations, advocacy, data gathering, which leads high level conference that produces and agreement. The states will then sign the agreement and thereafter ratify the same in their respective nations as postulated in their internal legislation. Ratification is ideally the international act in which a state indicates its consent to be bound to a treaty. Often this is the easy part. Compliance and implementation is where the rubber meets the road.

¹⁶ Lee-Ann Broadhead, “ International Environmental Politics: The Limits of Green Diplomacy” (2002)

¹⁷ Peter Haas “*Banning Chloroflourocarbon: Epistemic Community Efforts to Protect Stratospheric Ozone*” International Organization Winter (1994) pp 187-224

Toxic Chemicals have both positive and negative impacts on the atmosphere. Their reaction with the atmosphere, may provide a positive impact for more chemical production or negative impact with harmful effects on human beings and environment. The latter is always concerning. Negative impacts from toxic chemicals, manifested through neurobehavioral effects as one example, can have two feedbacks¹⁸. The first negative feedback is adverse health impacts that dampen the ability of the system to self-perpetuate. The second negative feedback occurs when the widespread use of compensatory chemicals leads to increasing environmental degradation and adverse health impact¹⁹. A positive feedback occurs as we increase our discovery, production and use of chemicals and other resources to compensate for the adverse impacts from toxic chemicals, e.g. pharmaceuticals, more infrastructure to cope with toxic chemical-induced impacts. The issue is whether we allow profits over environment since the negatives always outweigh the positives.

The atmosphere is a complex, self-perpetuating system and yet current trends of environmental degradation and resource consumption threaten its future. Toxic chemicals constitute a small but critical fraction of total chemical use that enables activities and infrastructure in the technosphere. What if the toxic chemicals are, at the same time, increasing risks to the atmosphere's future? Management of these health effects requires resources, including chemicals that could themselves cause additional impacts. Moreover, the negative health impacts impose direct and indirect costs that divert resources from innovating sustainable solutions for perpetuation of the technosphere. The effect of toxic chemicals is an ongoing concern that requires more study. This reality led to the continuous attempt to address the environment concerns raised by the increase of toxic chemicals.

¹⁸ Miriam L Diamond, "Toxic chemicals as enablers and poisoners of the technosphere" Special issue: Perspectives on the technosphere, *Anthropocene Review*, (2017) Vol. 4(2) 72–80

¹⁹ Kolpin DW, Furlong ET, Meyer MT et al. Pharmaceuticals, hormones, and other organic

Waste water contaminants in US streams, 1999–2000: A national reconnaissance. *Environmental Science & Technology* (2002) Vol 36: 1202–1211

3. Tracing the Road to Rotterdam

Having considered the brief foundational concept of regime construction, we now shift gears to a more specific regime on toxic chemical formulated in Rotterdam. The theoretical journey to Rotterdam can be traced back from early 1960 in Rachael Carson's publication of the *Silent Spring*. The book documented the dangers of pesticides to human health, introduced a renewed zeal for understanding scientifically the invincible threats to the environment. Previously the dominant debates focused on other aspects of social interaction and not the environment. The traditions focused on restrictions based on legal principles such as oceans and rivers among others promoted by dominant theory of cooperation and not concern for the environment. Initially states approached the issue of toxic chemicals by developing national legislation to deal with environmental effects of such chemical waste. This thinking was affected by the need to consider the global effect of the environment to entire mankind. For instance in 1967 the Swedish Government was supported by the United States to host the Stockholm convention which was the first global conference convened to discuss the Human Environment. 114 States (excluding the Soviet bloc) attended this conference and approved a declaration containing 26 broad principles on management of the global environment.

One can discern chemical regime by effort to define chemical waste found in **Principle 6²⁰**. The principle provided that *"The discharge of toxic substances or of other substances and the release of heat, in such quantities or concentrations as to exceed the capacity of the environment to render them harmless, must be halted in order to ensure that serious or irreversible damage is not inflicted upon ecosystems. The just struggle of the peoples of ill countries against pollution should be supported"*. This was in response to the issue raised by Rachael Carson's *Silent Spring* and the high profile accidents such as the 1968 tragedy in Yoshio Japan where many people were poisoned after eating rice contaminated with high level of polychlorinated biphenyls. In the late 1960 and early 1970 a new risk assessment led many industrialized

²⁰ Declaration of the United Nations Conference on the Human Environment-Stockholm Declaration 1972

countries to adopt domestic regulations on relatively small set of hazardous chemicals²¹.

Another initiative at the 1972 Stockholm conference in connection with **Principle 6** was introduction of the principle that the just struggle of the people(s) of all countries against pollution should be supported. A register of all the International Register of Potentially Toxic Chemicals (IRPTC) was set up with the objective of availing access to existing data on effects of chemicals on man and his environment²². Also it acted as an aid to identify gaps in knowledge on the effect of chemicals, potential hazards from chemicals, provide information for national, regional and global policies among others. The information contained in the register is published in periodical bulletins and other documents. This idea was supported by the UNEP which led the development of the International Code of Conduct for the distribution and use of pesticides in 1985 and the London Guidelines for Exchange of Information on Chemicals in international trade of 1987²³.

4. Initiatives on Toxic Chemicals

There were some significant inroads made to the theoretical underpinnings of the toxic regime especially in Europe. The European Union has used some of the international initiatives to support and strengthen their new policies such as attempts to harmonize international standards by trying to “pull along” less advanced or more reactive European countries to protect the European Union from potential trade-related disputes as a result of chemicals restrictions²⁴. Some of the international treaties and programs influencing current European approaches to chemicals management include the following. First, the Oslo and Paris (OSPAR) Convention for Protection of the Marine Environment of

²¹ Chasek Pamela S, et al “Global Environmental Politics, Dilemmas in World Politics” 4th Ed, Westview Press. USA (2006).

²² Kucherenko, A., & Huismans, J. The International Register of Potentially Toxic Chemicals (IRPTC) of UNEP. Environmental Conservation, (1982). Vol. 9(1), 59-63

²³ Jonathan Krueger and Henrik Selin “Governance for Sound Chemicals Management: The Need for a More Comprehensive Global Strategy” Global Governance 8 (2002): 323-342

²⁴ Joel Tickner and Ken Geiser “The Problem of Current Toxic Chemicals Management: New Solutions” Department of Work Environment, Baywood Publishing Co., Inc. (2004) Vol. 14(1) 43-58,

the North-East Atlantic. The OSPAR Convention, adopted in 1992, build on two previous conventions addressing marine pollution in the Northeast Atlantic. This convention of Northeast Atlantic nations, including the European Commission, encourages binding decisions of states to protect the marine environment by requiring the prevention of pollution that is land based. For instance the 1998 OSPAR Strategy on Hazardous Substances establishes a process for eliminating hazardous inputs in the region within one generation through development of tools for assessing risks of potential hazardous substances in the marine environment by identification and prioritization of chemicals of concern.

Second, the 2001 Stockholm Convention on Persistent Organic Pollutants which established a legally binding means to address threats to health and the environment caused by persistent organic pollutants (POPs). It recognized an international production phase-out of twelve substances, including already restricted pesticides; polychlorinated biphenyls; and dioxins and furans. It also provided for financial and technical assistance to developing countries in recording inventories and destroying existing stocks of POPs, Also international research and monitoring of POPs; and a “precautionary” process was added to the new POPs convention based on evidence of risk and long range transport, even where information is not available²⁵.

Third, Joel Tickner and Ken Geiser posits that, the United Nations has undertaken several other initiatives to reduce risks from the global circulation of chemicals²⁶. The Global Mercury Assessment seeks to characterize and reduce risks to health from exposure to mercury. The Regionally Based Assessment of Persistent Toxic Substances builds on the Stockholm Convention to establish a comprehensive regionally based assessment of the damage, threats, and concerns posed by persistent toxic substances and to evaluate and agree on priorities for intervention.

Fourth, the Rotterdam Convention on Prior Informed Consent (PIC), adopted in 1998, facilitated information exchange about hazardous chemicals, their international trade, and restrictions on their use. It provides policy guidance,

²⁵ Joel Tickner and Ken Geiser “The Problem of Current Toxic Chemicals Management: New Solutions” Department of Work Environment, Baywood Publishing Co., Inc. (2004) Vol. 14(1) 43-58,

²⁶ Ibid

identifies priorities, produces information, develops strategies and makes recommendations for collective action on chemicals classification and labeling, pollution prevention, and hazard reduction. The United Nations is now trying to unify its disparate efforts under the rubric of a newly established Strategic Approach to International Chemicals Management. Key sectors of society ought to come together in common understanding of the nature and gravity of the challenge posed by toxic chemicals to the environment and seize the opportunity to revise their agenda²⁷. This is unlikely since the behavior of man is to resist change even when aware of the seriousness of the potential threat. The way of thinking of the modern scientific method engenders allows for an operational rationality that lead to use of technology. This debate led to the conceptualization of the Bundtland Commission and Enlightenment Thought. After the Bundtland Commission there was a systematic approach to manage the message on the question of sustainable development.

4.1 Chemical Weapons

Another initiative on toxic chemical is the Convention of prohibition of the development, production stockpiling and use of chemical weapons and their destruction (CWC) which came into force in 1997. This landmark Convention complemented and reinforced the 1925 Geneva Protocol prohibiting the use of chemical and biological weapons by banning the development production and stockpiling of chemical weapons. The CWC was negotiated in Geneva from 1972 to 1992 and was opened for signature in 1992 and attracted upwards of 160 states. This is seen more in the lenses of humanitarian law norms. The Convention on the prohibition of the development, production stockpiling and use of chemical weapons and their destruction (CWC) which came into force in 1997.

4.2 Rio and Rotterdam Convention on Toxic Chemicals

The Rio Convention preceded the Rotterdam Convention as will be discussed below. The Rotterdam Convention is constitutive of 30 Articles and 6 Annexes. It provides a proper framework for its operationalization. It came into effect on 24th February 2004 in Rotterdam, Netherlands and was signed on 10th September 1998. Due to the overlapping and closely related mandates

²⁷ Paul Raskin et al, Great Transition: The Promise and Lure of the Times Ahead Boston Stockholm Environmental Institute (2002).

of the UNEP part in the Rotterdam Convention, Stockholm and Basel Convention, in 2012, the three Secretariats were merged. As at 2018, the convention had 161 parties, which include 158 UN member states and European Union. The Convention promotes open exchange of information and calls on exporters of hazardous chemicals to use proper labeling, include directions on safe handling, and inform purchasers of any known restrictions or bans. Signatory nations can decide whether to allow or ban the importation of chemicals listed in the treaty, and exporting countries are obliged to make sure that producers within their jurisdiction comply. In 1989 the introduction of the voluntary Prior Informed Consent (PIC) procedure helped the third world countries identify the chemicals that had been banned or severely restricted in other countries so that they could make informed decisions.

Interestingly, the RIO Convention coincided with fact finding process for the efforts to treatise toxic chemical waste. This is captured in Agenda 21 of the Rio Convention which among other things, called on states to create mandatory procedure and improve coordination (PIC) among national agencies, international organization working on chemical or related issues²⁸. This was to result in the Rotterdam convention on Prior Informed Consent Procedure for Certain Hazard chemicals and Pesticides in International Trade. The main goal of Rotterdam convention was to promote the open exchange of information and a call for exporters of hazardous chemicals to use proper labelling, include direction on safe handling and inform purchasers of any known restrictions or bans. The objective of the Convention, captured under Article 1, is to promote shared responsibility and cooperative efforts among Parties in the international trade of certain hazardous chemicals in order to protect human health and the environment from potential harm and to contribute to their environmentally sound use, by facilitating information exchange about their characteristics, by providing for a national decision-making process on their import and export and by disseminating these decisions to Parties.

²⁸ Chasek Pamela S, et al. Global Environmental Politics, Dilemmas in World Politics (2006)

The issue of toxic chemicals is also provided for in the Rio Convention 1992. In particular **Agenda 19** of the Rio Convention provided as follows: *Seeks objectives such as: full evaluation of 500 chemicals before the year 2000; control of chemical hazards through pollution prevention, emission inventories, product labelling; use limitations, procedures for safe handling and exposure regulations; phase-out or banning of high-risk chemicals; consideration of policies based on the principle of producer liability; reduced risk by using less-toxic or non-chemical technologies; review of pesticides whose acceptance was based on criteria now recognized as insufficient or outdated; efforts to replace chemicals with other pest-control methods such as biological control; provision to the public of information on chemical hazards in the languages of those who use the materials; development of a chemical-hazard labelling system using easily understandable symbols; control of the export of banned or restricted chemicals and provision of information on any exports to the importing countries.*

The most relevant provision to toxic chemicals found in Agenda 19 of the Rio Convention was given effect by the **Rotterdam Convention on the Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade** (Rotterdam Convention). Article 1 of the Rotterdam Convention provides thus “*The objective of this Convention is to promote shared responsibility and cooperative efforts among parties in the international trade of certain hazardous chemicals in order to protect human health and the environment from potential harm and to contribute to their environmentally sound use, by facilitating information exchange about their characteristics, by providing for a national decision-making process on their import and export and by disseminating these decisions to Parties*”.

4.3 Enforcement and Compliance with Toxic Chemical Regimes

Having traced the road that led to toxic chemical regime formation, it is important to highlight some of the mechanism for enforcement. Regime impact or effectiveness is a complex and multi-faceted concept, encompassing how well regimes work across different dimensions and the impacts it has on a range of outcomes and variables. Discussions around identifying these different dimensions of effectiveness have been informed by perspectives from international relations and political science, legal theory, environmental

studies, and policymakers. Oran Young²⁹ identifies no fewer than six distinct dimensions of regime effectiveness; problem-solving, goal attainment, behavioral, process, constitutive, and evaluative effectiveness, taking into account how regimes solve problems or reach their goals, change participants' behavior in meaningful ways, and whether their results meet criteria such as equity. In practice, scholars have tended to focus on two main dimensions of regime effectiveness; compliance and problem-solving. The issue is whether states implement domestic laws and regulations in order to fulfill their obligations. Also do these legal changes induce behavioral changes in the actors they target, such as polluting firm? Do states exceed compliance expectations, or do they stick simply to the letter of the agreement. Behavioral and political changes are easier to identify and measure than other sorts of regime impacts.

5. Compliance

The other part of effectiveness of a treaty is whether states comply with the provisions whenever there is a conflict of interests between implementation and ancillary interest. Three different types of compliance are related to behavior. **First**, procedural compliance means that state actors fulfill their obligations to the treaty process, for example by preparing national legislation to reflect the intended goal of the treaty. This is normally challenged by partisan political interest. **Second**, substantive compliance refers to actions taken to fulfill treaty obligations. **Finally**, compliance with the "spirit" of the treaty refers to actions that fulfill the broad normative framework of the treaty, often spelled out in the treaty's preamble. One of the other an anticipated models for compliance is through elaborate dispute resolution models. The Rotterdam convention provides for an elaborate mechanism for dispute resolution. Without going into depth on all the dispute resolution models suggested in Article 20 of the Convention, resolving dispute by use of the International Court of Justice is anticipated in the Convention.

²⁹ Oran Young in an article *inferences and Indices: Evaluating the Effectiveness of International Environmental Regime*

6. Environmental Dispute Resolution

Many scholars argue that the effectiveness of international environmental law by means of third party adjudication is based on the notion or principle of state responsibility. Joost Pauwelyn (2005) suggests that there are three main systemic issues relating to environmental dispute resolution³⁰. **Firstly**, judicial settlement of environmental disputes are largely bilateral and confrontational whereas the environmental problems are international and hence the victim remains unclear. **Secondly**, judicial enforcement operates *ex post facto* (after the fact) and is negative in nature since it is focused on reparation. The architecture of environmental issues require a more proactive and protective approach as opposed to reactive models. **Thirdly**, environmental disputes often times raise seriously scientific questions which may be beyond the expertise of a judicial organ. Courts are not well equipped with the technical expertise to determine scientific question with mathematical precision.

Joost therefore favors a more multilateral compliance mechanism based on factual data from states efforts in monitoring and evaluation of the treaties and convention. The argument is complicated more by the fact that there is no compulsory dispute resolution mechanism for which states and non-state actors can resort to ensure compliance with the obligations in treaties and conventions. Joost Pauwelyn suggests that a World Environment Court would somewhat introduce order in the myriad of environmental treaties and convention. Obviously there would be a framework under which the court would operate. The clamor for a Court to deal with global environmental issues is pertinent and should be supported by all states. The larger issue is whether the international environmental Court would be able to effectively deal with the attendant breaches by sovereign states.

7. Conclusion

Conceptualizing International Regimes is an integral part of understanding environmental politics. The overarching concern for states is the question of power, interest and ideas that are present in all their actions including regime

³⁰ Joost Pauwelyn, "Judicial Mechanism: Is there a need for a World Environment Court" *Reforming International Environmental Governance: From Institutional Limits to Innovative Reforms*. Ed by W. Bradnee Chambers and Jessica F Green. (2005). United Nations University Press USA

formation. Therefore when state undertake to formulate a regime and before consensus is arrived at, a clear problem must be adequately identified with evidence in terms of scientific data or academic research. Chemical substances continue to be invented or produced even with the several international initiatives being formulated with a view to address the effects such chemicals on the environment. The Rotterdam convention is one of the latest attempts to formulate the management of environment on the issues of toxic chemicals. The potentials of the environmental regimes and enforcement mechanism available on toxic chemical regimes are yet to be fully actualized. This is because of the functional difficulties encountered in the compliance of the regimes in their entirety. This proved an area of further study to identify the how to ensure compliance and test whether the problem is ultimately solved.

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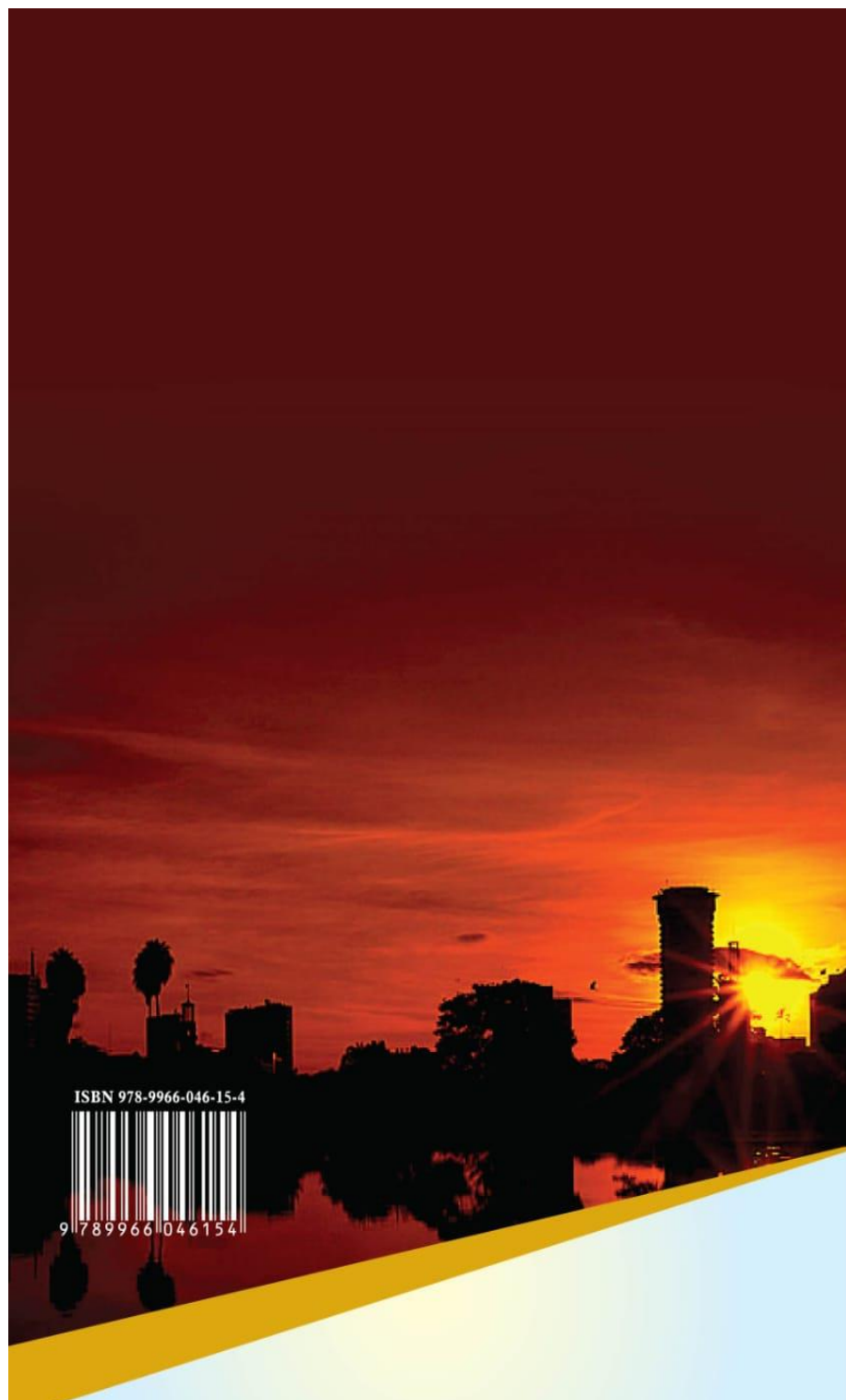
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