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Editor's Note

Welcome to the latest edition of the *Journal of Conflict Management and Sustainable Development,* Volume 5 number 1.

Since its launch, the Journal has developed into a leading academic platform for scholarly and intellectual discourse on the key subjects of conflict management and sustainable development.

The Journal seeks to achieve the ideal of a conflict free environment that would facilitate sustainable development. It analyses thematic areas on conflict management and sustainable development with the aim of disseminating knowledge and ideas towards attainment of the ideal.

The Journal is peer reviewed and refereed in order to adhere to the highest academic standards.

This volume covers captures several themes including *Africa's Role in the Reform of International Investment Law and the Investor-State Dispute Settlement (ISDS) System, Traditional Dispute Resolution Mechanisms in Africa, the Resource Curse in Africa, neo liberalism theory and the COVID-19 pandemic.* We welcome our readers for a scholarly engagement and feedback to enable us continue improving the Journal.

I wish to thank our dedicated team of reviewers and editors for making this publication possible.

The editorial team welcomes submission of articles, comments and book reviews based on the themes of conflict management and sustainable development and related fields of knowledge for intended publication in the Journal. Submissions can be channeled to our official email address (editor@journalofcmsd.net) and copied to (admin@kmco.co.ke).

Dr. Kariuki Muigua, Ph.D, FCIArb (Chartered Arbitrator), Accredited Mediator.
Managing Editor,
September, 2020

Journal of Conflict Management and Sustainable Development - Volume 5 Issue 1

Africa's Role in the Reform of International Investment law and the Investor State Dispute Settlement (ISDS) System

By: ***Kariuki Muigua****

Abstract

One of the global key drivers of development is investment, with most investors moving from the developed world to invest in the developing regions of the world which are rich in natural resources such as the African continent. These investment activities naturally come with disputes. However, most of these investors do not have faith in the ability of the domestic judicial system of the host countries to address these disputes if and when they arise. As a result, the key players put in place the investor state dispute settlement system to handle such disputes, a system that is designed to work to a large extent independent of the host country's legal and institutional framework. However, most of the host countries which are mainly from the developing world have over the years complained that the investor state dispute settlement system is unfairly designed to favour the investors at the expense of the interests of the host states. Most of them have therefore been pushing for reforms. This paper explores the role of Africa in such reforms. It calls for a more active and meaningful involvement of African countries in the ISDS reforms debate as a way of ensuring that any continued use of ISDS does not adversely affect the development agenda of the African states and the continent in general. In addition, African countries must move from being investment rule-takers to being part of the rule makers.

1. Introduction

The global economy is mainly driven by trade and investment carried out by both states and private companies in the form of Foreign Direct Investments.[1]

****PhD in Law (Nrb), FCIArb (Chartered Arbitrator), LL. B (Hons) Nrb, LL.M (Environmental Law) Nrb; Dip. In Law (KSL); FCPS (K); Dip. In Arbitration (UK); MKIM; Mediator; Consultant: Lead expert EIA/EA NEMA; BSI ISO/IEC 27001:2005 ISMS Lead Auditor/ Implementer; Advocate of the High Court of Kenya; Senior Lecturer at the University of Nairobi, School of Law; CASELAP [August, 2020]****.

Most investors move from the developed world to invest in the developing regions of the world which are rich in natural resources such as the African continent, a continent endowed with immense natural and human resources as well as great cultural, ecological and economic diversity.[2] These foreign investment activities naturally come with disputes. Thus, laws determine whether and how investments may be made in a specific country, the nature of the respective privileges of the non-national or foreign investors and the host country's government.[3] Considering that most of these foreign investors do not have faith in the ability of the domestic judicial system of the host countries to address these disputes if and when they arise[4], the key players in international investment put in place the investor state dispute settlement system to handle such disputes, a system that is designed to work to a large extent independent of the host country's legal and institutional framework.[5]

However, most of the host countries which are mainly from the developing world have over the years complained that the investor state dispute settlement system is unfairly designed to favour the investors at the expense of the

[1] James E Anderson, Mario Larch and Yoto V Yotov, 'Trade and Investment in the Global Economy' (National Bureau of Economic Research 2017); Hezron M Osano and Pauline W Koine, 'Role of Foreign Direct Investment on Technology Transfer and Economic Growth in Kenya: A Case of the Energy Sector' (2016) 5 Journal of Innovation and Entrepreneurship 31.

[2] 'Africa: A Continent of Wealth, a Continent of Poverty' (*War on Want*, 30 June 2015)<https://waronwant.org/media/africa-continent-wealth-continent-poverty> accessed 13 August 2020; *Ayodele Odusola,* 'Investing in Africa Is Sound Business and a Sustainable Corporate Strategy' (*Africa Renewal*, 20 August 2018) <https://www.un.org/africarenewal/web-features/investing-africa-sound-business-and-sustainable-corporate-strategy> accessed 13 August 2020; 'Poverty and Development in Africa' <https://www.globalpolicy.org/social-and-economic-policy/poverty-and-development/poverty-and-development-in-africa.html> accessed 13 August 2020; Pippa Morgan and Yu Zheng, 'Tracing the Legacy: China's Historical Aid and Contemporary Investment in Africa' (2019) 63 International Studies Quarterly 558.

[3] Shirley Ayangbah and Liu Sun, 'Comparative Study of Foreign Investment Laws: The Case of China and Ghana' (2017) 3 Cogent Social Sciences 1355631.

[4] Leon E Trakman, 'Choosing Domestic Courts over Investor-State Arbitration: Australia's Repudiation of the Status Quo' (2012) 35 UNSWLJ 979.

[5] 'About ICSID | ICSID' <https://icsid.worldbank.org/About/ICSID> accessed 13 August 2020.

interests of the host states.[6] According to the *World Investment Report 2019*, about 70 per cent of the publicly available arbitral decisions in 2018 were rendered in favour of the investor, either on jurisdiction or on the merits.[7] Most of these developing world countries have therefore been pushing for reforms in the ISDS system.[8] This paper explores the role of Africa in such reforms and the possible alternatives.

2. The Investor State Dispute Settlement System: Prospects and Challenges

Notably, the foundations of the modern international investment regime were laid in the aftermath of World War II, where International Investment Agreements (IIAs) were meant to fill the legal gap left by the breakdown of colonial systems and in light of the expropriation policies adopted in many newly independent as well as communist states that often involved the denunciation of contracts between foreign investors and host countries.[9] The traditional investment treaties therefore included a core of substantive provisions meant to ensure foreign investors are treated without discrimination and according to a general international minimum standard, are compensated in the case of expropriation, have the right to move investment-related capital freely in and out of the host country and also included provisions that required host states to honour investment contracts between investors and host states, provisions that still persist in modern investment treaties.[10]

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[6] TRALAC TRADE LAW CENTRE, 'Investor-State Dispute Settlement in Africa and the AfCFTA Investment Protocol' (*tralac*) <https://www.tralac.org/blog/article/13787-investor-state-dispute-settlement-in-africa-and-the-afcfta-investment-protocol.html> accessed 13 August 2020.

[7] United Nations Conference on Trade and Development, *World investment report 2019: Special economic zones*. UN, 2019, p.102.

[8] Axel Berger, 'Developing Countries and the Future of the International Investment Regime' [2015] Deutsche Gesellschaft fürInternationale Zusammenarbeit (GIZ) GmbH,Berlin<https://www.die-gdi.de/uploads/media/giz2015-en-Study_Developing_countries_and_the_future_of_the_international_investment_regime.pdf> accessed 13 August 2020.

[9] Axel Berger, 'Developing Countries and the Future of the International Investment Regime' [2015] Deutsche Gesellschaft fürInternationale Zusammenarbeit (GIZ) GmbH, Berlin < https://www.die-gdi.de/uploads/media/giz2015-en-Study_Developing_countries_and_the_future_of_the_international_investment_regime.pdf> accessed 13 August 2020, p.6.

[10] Ibid, p.6.

With the introduction of IIAs came Investment- State Dispute Settlement system (ISDS). This is because the majority of IIAs signed since the late 1980s include investor–state dispute settlement mechanisms that, in cases of alleged breaches of IIA provisions, allow foreign investors to sue host states before an independent international tribunal without having to rely on the diplomatic protection of its home country.[11] This was based on the idea that increased legal protection would stimulate foreign investment and thus lead to economic development.[12] Technically, these treaties were created as a substitute for insufficient political and legal institutions in host countries.[13] The IIAs offer a range of substantive rights and procedural guarantees to investors: the substantive rights offered include relative standard of treatment; National Treatment and Most Favored Nation Treatment; absolute standard of treatment; rules on expropriation and compensation; and transfers of capital and returns as well as restriction against performance requirements, while the procedural guarantees relate to the question of dispute settlement which is primarily done through international arbitration.[14] The International Centre for Settlement of Investment Disputes (ICSID) and the Permanent Court of Arbitration (PCA) are the two primary institutional hosts for international investment arbitrations.[15] The most commonly used arbitration rules to govern

[11] Axel Berger, 'Developing Countries and the Future of the International Investment Regime' [2015] Deutsche Gesellschaft fürInternationale Zusammenarbeit (GIZ) GmbH, p.8.

[12] Ibid, p.8; See also Gerald M Meier, 'Legal-Economic Problems of Private Foreign Investment in Developing Countries' (1966) 33 The University of Chicago Law Review 463; Pascal Liu and others, *Trends and Impacts of Foreign Investment in Developing Country Agriculture: Evidence from Case Studies.* (Food and Agriculture Organization of the United Nations (FAO) 2013); Matthias Görgen and others, *Foreign Direct Investment (FDI) in Land in Developing Countries* (GTZ 2009).

[13] Axel Berger, 'Developing Countries and the Future of the International Investment Regime' [2015] Deutsche Gesellschaft fürInternationale Zusammenarbeit (GIZ) GmbH, Berlin, p.10.

[14] Tabitha Kiriti, 'Strategic Consultative Meeting on Reforming Bilateral Investment Treaties (BITs) in Kenya | WTO Chairs' <http://wtochairs.org/kenya/outreach-activity/strategic-consultative-meeting-reforming-bilateral-investment-treaties-bits> accessed 15 August 2020.

[15] Emma Aisbett and others, 'Rethinking International Investment Governance: Principles for the 21st Century' [2018] Rethinking International Investment Governance: Principles for the 21st Century (2018), p. 32.

the cases are produced by ICSID and the United Nations Commission on International Trade Law (UNCITRAL).[16]

Some consider ISDS as probably the most extensive arbitration mechanism in international law, with the intended aim of the ISDS mechanisms initially promoted by ICSID being to 'depoliticise' the resolution of investment-related disputes.[17] In addition, ISDS is meant to 'delocalise' dispute resolution and allow foreign investors to bypass the local court system of host states, thus allowing foreign investors to seek compensation for the alleged wrongdoings of host states without having to exhaust local remedies.[18]

Despite the earliest proponents of the ISDS system's advantages, and as already pointed out, most of the developing world countries, especially in the African continent have in recent times complained about the unfair effects of the ISDS system on their domestic affairs.[19] Specifically, African countries have raised concerns about the traditional investor-state dispute settlement (ISDS) system including: lack of legitimacy and transparency; exorbitant costs of arbitration proceedings and arbitral awards; inconsistent and flawed decisions; the system allows foreign investors to challenge legitimate public welfare measures of host states before international arbitration tribunals, and governments are concerned about their sovereignty or policy space as they have discouraged governments from adopting public welfare regulations, resulting in regulatory chill.[20] Regulatory chill is used to refer to a situation

[16] Ibid, p. 32.
[17] Axel Berger, 'Developing Countries and the Future of the International Investment Regime' [2015] Deutsche Gesellschaft fürInternationale Zusammenarbeit (GIZ) GmbH, Berlin, pp. 15-16.
[18] Ibid, p.16.
[19] GRAIN, 'Stop the Unfair Investor-State Dispute Settlement against Africa' <https://www.bilaterals.org/?stop-the-unfair-investor-state> accessed 13 August 2020.
[20] TRALAC TRADE LAW CENTRE, 'Investor-State Dispute Settlement in Africa and the AfCFTA Investment Protocol' (*tralac*) <https://www.tralac.org/blog/article/13787-investor-state-dispute-settlement-in-africa-and-the-afcfta-investment-protocol.html> accessed 13 August 2020; see also Michael D Nolan, 'Challenges to the Credibility of the Investor-State Arbitration System' American University Business Law Review, Vol. 5, No. 3, 429 <https://papers.ssrn.com/abstract=3157420> accessed 13 August 2020.

where governments do not enact or enforce legitimate regulatory measures due to concern about ISDS.[21] It has been noted that using lawsuit threats as a bargaining chip, arbitration lawyers also encourage their clients to use the threat of investment disputes as a way to scare governments into submission.[22] In addition to the above challenges, divergent interpretation by arbitral tribunals of identical treaty clauses has also led to a fragmentation of ISDS case law, thereby undermining the confidence of many countries in the system. This lack of confidence has been exacerbated by the fact that cases are litigated and decided by a small professional community of arbitrators and counsels who generally hail from western countries and elite socio-economic backgrounds. Furthermore, the systematic use of ISDS has excluded national courts from the process of hearing disputes involving public law/policy matters.[23]

Notably, in a number of high-profile ISDS cases, host countries have been sued by foreign investors on the basis of a seemingly outdated treaty signed decades previously.[24] It is documented that there has been an unprecedented boom in the number of claims against African countries where, between 2013 and 2019 only, African States have been hit by a total of 109 recorded investment treaty arbitration claims which represents about 11% of all known investor-state disputes worldwide.[25]

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[21] Tanaya Thakur, 'Reforming the Investor-State Dispute Settlement Mechanism and the Host State's Right to Regulate: A Critical Assessment' [2020] Indian Journal of International Law <https://doi.org/10.1007/s40901-020-00111-2> accessed 13 August 2020.

[22] Kavaljit Singh and Burghard Ilge, 'Rethinking Bilateral Investment Treaties: Critical Issues and Policy Choices' [2016] New Delhi: Both Ends, Madhyam, Centre for Research on Multinational Corporations < https://www.somo.nl/wp-content/uploads/2016/03/Rethinking-bilateral-investment-treaties.pdf > accessed 13 August 2020, p. 248.

[23] Emma Aisbett and others, 'Rethinking International Investment Governance: Principles for the 21st Century' [2018] Rethinking International Investment Governance: Principles for the 21st Century (2018), p. 33.

[24] Axel Berger, 'Developing Countries and the Future of the International Investment Regime' [2015] Deutsche Gesellschaft fürInternationale Zusammenarbeit (GIZ) GmbH, p.6.

[25] GRAIN, 'Stop the Unfair Investor-State Dispute Settlement against Africa' <https://www.bilaterals.org/?stop-the-unfair-investor-state> accessed 13 August 2020.

It has also been noted that the sharp increase in the number of ISDS related cases filed between 1987 and 2014 took many countries by surprise, with developed countries having started to recalibrate the contents of their IIAs, and developing countries generally stopping to sign new treaties or even beginning to terminate existing ones.[26] Indeed, as a result of the highlighted concerns raised by the developing countries, some states such as Indonesia and South Africa have gone as far as unilaterally terminating IIAs on a larger scale.[27]
Some players view ISDS as a system that "threatens domestic sovereignty by empowering foreign corporations to bypass domestic court systems" and "weakens the rule of law."'[28]

The United Nations Conference on Trade and Development (UNCTAD) observes that national investment laws operate within a complex web of domestic laws, regulations and policies that relate to investment (e.g. competition, labour, social, taxation, trade, finance, intellectual property, health, environmental, culture).[29] However, most of the times, it is the enforcement of these domestic laws against them that the foreign investors seek to challenge before the investor-state arbitration tribunals when they do not favour them or would result in higher operating costs.[30]

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[26] Axel Berger, 'Developing Countries and the Future of the International Investment Regime' [2015] Deutsche Gesellschaft fürInternationale Zusammenarbeit (GIZ) GmbH, p.8.
[27] Ibid, p.8.
[28] Michael D Nolan, 'Challenges to the Credibility of the Investor-State Arbitration System' American University Business Law Review, Vol. 5, No. 3, 429 <https://papers.ssrn.com/abstract=3157420> accessed 13 August 2020.
[29] United Nations Conference on Trade and Development, World Investment Report 2018(United Nations, 2018), p. 106 <https://unctad.org/en/PublicationsLibrary/wir2018_en.pdf> Accessed 15 August 2020.
[30] Gabrielle Kaufmann-Kohler and Michele Potestà, 'The Interplay Between Investor-State Arbitration and Domestic Courts in the Existing IIA Framework' in Gabrielle Kaufmann-Kohler and Michele Potestà (eds), *Investor-State Dispute Settlement and National Courts: Current Framework and Reform Options* (Springer International Publishing 2020) <https://doi.org/10.1007/978-3-030-44164-7_3> accessed 15 August 2020; 'Issues in International Trade: A Legal Overview of Investor-State Dispute Settlement' <https://www.everycrsreport.com/reports/R43988.html> accessed 15 August 2020; GRAIN, 'Investor–State Dispute Settlement Using the ECOWAS Court of Justice: An Analysis and Some Proposals'

Taking Kenya as an example, Kenya has been sued before international investment arbitration tribunals based on its Bilateral Investment Treaty's (BITs) commitments.[31] In 2013, when Kenya considered new changes in the mining sector to ensure its people benefit from its mineral resources, some investors sued the Government. In *Cortec Mining Kenya Limited, Cortec (Pty) Limited, and Stirling Capital Limited v. Republic of Kenya*[32], the claimants, Cortec Mining Kenya Limited (CMK), a private company constituted in Kenya, and its majority shareholders, Cortec (PTY) Limited and Stirling Capital Limited, two British holding companies, began to invest in a mining project in a niobium and rare earths exploration project located at Mrima Hill in Kenya in 2007, and obtained their Special Prospecting License (SPL 256) in 2008, which expired in December 2014 after two renewals. According to the investors, they were also granted Special Mining License 351 (SML 351) in March 2013 based on SPL 256.[33] However, in August 2013, the newly elected Kenyan government investigated and suspended several hundred "transition period" mining licences, including the investors' SML 351, due to "complaints regarding the process." According to the investors, this amounted to a revocation of their licence.[34] In 2015, the investors filed a request for an investor-state arbitral tribunal established under a bilateral investment treaty (BIT), where they claimed that Kenya's revocation of their SML 351 (their "key asset") constituted a direct expropriation contrary to the United Kingdom–Kenya BIT.[35]

<https://bilaterals.org/?investor-state-dispute-settlement-41351> accessed 15 August 2020.

[31] For a list of Kenya's BITs, see 'Mapping of IIA Content | International Investment Agreements Navigator | UNCTAD Investment Policy Hub' <https://investmentpolicy.unctad.org/international-investment-agreements/iia-mapping> accessed 15 August 2020.

[32] Cortec Mining Kenya Limited, Cortec (Pty) Limited and Stirling Capital Limited v. Republic of Kenya, ICSID Case No. ARB/15/29.

[33] 'Kenya Prevails in BIT Arbitration: British Investors' Claims Dismissed Due to the Absence of Environmental Impact Assessment – Investment Treaty News' <https://cf.iisd.net/itn/2018/12/21/kenya-prevails-in-bit-arbitration-british-investors-claims-dismissed-due-to-the-absence-of-environmental-impact-assessment-xiaoxia-lin/> accessed 15 August 2020.

[34] Ibid.

[35] Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Republic of Kenya for the Promotion and Protection of Investments, dated 13 September 1999; 'Kenya Prevails in BIT

The Kenyan Government's position was that "there was no expropriation of the "purported licence [SML 351]" by the Government because the licence was *void ab initio* for illegality and did not exist as a matter of law, as held by the Courts in Kenya. As a result, the Government argued, "where there is no protected investment, there can be no expropriation."[36]

The International Centre for Settlement of Investment Disputes (ICSID) Tribunal held it lacked jurisdiction to hear a dispute concerning a mining project that the tribunal found did not comply with domestic environmental law.[37] The tribunal thus confirmed that both the ICSID Convention and the BIT protected only "lawful investments". It held that non-compliance with the protective regulatory framework was a serious breach."[38] Concluding both on

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Arbitration: British Investors' Claims Dismissed Due to the Absence of Environmental Impact Assessment – Investment Treaty News' <https://cf.iisd.net/itn/2018/12/21/kenya-prevails-in-bit-arbitration-british-investors-claims-dismissed-due-to-the-absence-of-environmental-impact-assessment-xiaoxia-lin/> accessed 15 August 2020; see also Lorenzo Cotula and James T Gathii, 'Cortec Mining Kenya Limited, Cortec (Pty) Limited, and Stirling Capital Limited v. Republic of Kenya' (2019) 113 American Journal of International Law 574.

[36] Para. 4, Cortec Mining Kenya Limited, Cortec (Pty) Limited and Stirling Capital Limited v. Republic of Kenya; see also Cortec Mining Kenya Limited v Cabinet Secretary Ministry of Mining & 9 others [2015] eKLR , ELC NO. 195 OF 2014 (Formerly Misc. Application No. 298 Of 2013 (JR); Cortec Mining Kenya Limited v Cabinet Secretary Ministry of Mining & 9 others [2017] eKLR, Civil Appeal 105 of 2015. At the High Court stage, the trial court held as follows: '*A party who flouts the law to gain an advantage cannot expect that the court will aid him to sustain the advantageous position that he acquired through the violation of the law. The acquisition by the Applicant of the Mining Licence was not in compliance with the law and the licence was void abinitio and liable to be revoked. The 1st Respondent had a duty and obligation in the interest of the public to have the licence revoked'*.

Notably, while the Tribunal held that it was not bound by the decision of the Kenyan courts but it had reached the independent conclusion that SML 351 was void (para 11, Cortec Mining Kenya Limited, Cortec (Pty) Limited, and Stirling Capital Limited v. Republic of Kenya').

[37] Lorenzo Cotula and James Gathii, 'Cortec Mining Kenya Limited, Cortec (Pty) Limited, and Stirling Capital Limited v. Republic of Kenya' (2019) 113 American Journal of International Law 574.

[38] 'Kenya Prevails in BIT Arbitration: British Investors' Claims Dismissed Due to the Absence of Environmental Impact Assessment – Investment Treaty News' <https://cf.iisd.net/itn/2018/12/21/kenya-prevails-in-bit-arbitration-british-investors-

jurisdiction and merits that SML 351 was not a protected investment, the tribunal dismissed all of the investors' claims. The tribunal ordered the investors to pay half of the costs claimed by Kenya, in view of the unsupported "corruption objection" allegation and other blameful conduct by Kenya during the arbitral proceedings.[39]

The Claimants in the Cortec case have, however, since applied for annulment of the award,[40] seeking partial annulment of the Award on two grounds: (i) that the Tribunal manifestly exceeded its powers (ICSID Convention, Article 52 (1)(b))' and (ii) that the Tribunal failed to state the reasons on which the Award was based (ICSID Convention, Article 52(1)(e)).[41]

Notably, whatever the outcome of the pending application, the award raised significant issues of public international law, including how questions of investor compliance are considered in investor-state dispute settlement and the legal implications of investor noncompliance.[42] Should the Claimants in this case succeed in their application for annulment, it is likely to add to the complexities surrounding the ability of host countries to regulate the investors' activities that are likely to interfere with their duties under the sustainable development agenda and other regulatory laws, relating to human rights, economic, social and environmental concerns.[43] Thus, the abuse of Investor State Dispute Settlement System by the foreign investors and the adverse

claims-dismissed-due-to-the-absence-of-environmental-impact-assessment-xiaoxia-lin/> accessed 15 August 2020.

[39] Ibid.

[40] Cortec Mining Kenya Limited, Cortec (Pty) Limited and Stirling Capital Limited v. Republic of Kenya (ICSID Case No. ARB/15/29), Application for Annulment, 15 February 2019, 'Case Details | ICSID' <https://icsid.worldbank.org/cases/case-database/case-detail?CaseNo=ARB/15/29> accessed 15 August 2020.

[41] Cortec Mining Kenya Limited, Cortec (Pty) Limited and Stirling Capital Limited v. Republic of Kenya (ICSID Case No. ARB/15/29), Application for Annulment, 15 February 2019, para. 2.

[42] Lorenzo Cotula and James Gathii, 'Cortec Mining Kenya Limited, Cortec (Pty) Limited, and Stirling Capital Limited v. Republic of Kenya' (2019) 113 American Journal of International Law 574.

[43] Hans Christiansen, *Foreign Direct Investment for Development: Maximising Benefits, Minimising Costs* (Organization for Economic 2002); Mohammed Aminu Aliyu, 'Foreign Direct Investment and the Environment: Pollution Haven Hypothesis Revisted'.

effects on host countries go beyond the huge financial burdens that it can potentially place on the losing state to affect its sovereign ability to regulate the investors' activities in protection of public interests and welfare as well as meeting its sustainable development goals.[44]

3. Reforming the Investor State Dispute Settlement System

It is worth pointing out that the influx in the number of ISDS cases filed by private investors is not only directed at the developing countries only but is also affecting middle income countries as well as the developed countries.[45] However, the bulk of these cases still involve developing countries as the respondents.[46] More countries and policy makers have therefore been calling for reforms to the ISDS system which is still largely viewed as more investor friendly at the expense of the hosts' countries' interests.[47]

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[44] Ridi, Niccolò. *Shifting paradigms in international investment law: more balanced, less isolated, increasingly diversified*. Vol. 27, no. 2. UK: Oxford University Press, 2016; Emma Aisbett and others, 'Rethinking International Investment Governance: Principles for the 21st Century' [2018] Rethinking International Investment Governance: Principles for the 21st Century (2018).

[45] UNCTAD, "Investor–State Dispute Settlement Cases Pass the 1,000 Mark: Cases And Outcomes In 2019," *IIA Issue Note*, Issue 2, July 2020 < *https://unctad.org/en/PublicationsLibrary/diaepcbinf2020d6.pdf* > accessed 13 August 2020.

[46] 'Fact Sheet on Investor–State Dispute Settlement Cases in 2018 | Publications | UNCTAD Investment Policy Hub'
<https://investmentpolicy.unctad.org/publications/1202/fact-sheet-on-investor-state-dispute-settlement-cases-in-2018> accessed 13 August 2020.

[47] Menu, An Action. "Reforming the International Investment Regime: An Action Menu" Chapter 15: World Investment Report 2015: Reforming International Investment Governance
< https://unctad.org/en/PublicationChapters/wir2015ch4_en.pdf> accessed 13 August 2020; Gaukrodger, D. and K. Gordon (2012), "Investor-State Dispute Settlement: A Scoping Paper for the Investment Policy Community", OECD Working Papers on International Investment, 2012/03, OECD Publishing
< http://www.oecd.org/investment/investment-policy/WP-2012_3.pdf> accessed 13 August 2020; Hancock, Angus. "A Dispute about Disputes: New Zealand and the Future of ISDS." (2018)
<https://www.otago.ac.nz/law/research/journals/otago716076.pdf> accessed 13 August 2020; Emma Aisbett, Bernali Choudhury, Olivier de Schutter, FrankGarcia, James Harrison, Song Hong, Lise Johnson, Mouhamadou Kane, SantiagoPeña, Matthew Porterfield, Susan Sell, Stephen E. Shay, and Louis T. Wells,Rethinking International Investment Governance: Principles for the 21st Century(2018) <

It has been observed that the trend towards more balanced IIAs was, incidentally, started by the United States (US) and its North American Free Trade Agreement (NAFTA) partners, Canada and Mexico, in response to a number of high-profile ISDS cases, where the three NAFTA countries introduced a number of pioneering provisions that aimed to recalibrate the relationship between investment protection and the regulatory policy space of host countries.[48] The recalibration of IIAs sought to increase governmental policy space relating to the regulation of foreign investors featuring a more restrictive definition of the investments covered, fair and equitable treatment clauses that do not require more beneficial treatment than is granted by customary international law, and a more constrained meaning of indirect expropriation.[49] With regard to the ISDS mechanism, the US introduced transparency requirements for arbitral proceedings and provisions aimed at preventing the filing of 'frivolous' claims, and it also strengthened the role of non-disputing parties.[50]

In 2017, the United States announced it would seek to excise the investor-state dispute settlement from NAFTA, and in 2015, the European Commission declared that an investor-state dispute settlement is not suited to resolution of

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http://ccsi.columbia.edu/files/2018/09/Rethinking-Investment-Governance-September-2018.pdf> accessed 13 August 2020; Kavaljit Singh and Burghard Ilge, 'Rethinking Bilateral Investment Treaties: Critical Issues and Policy Choices' [2016] New Delhi: Both Ends, Madhyam, Centre for Research on Multionational Corporations; Emma Aisbett and others, 'Rethinking International Investment Governance: Principles for the 21st Century' [2018] Rethinking International Investment Governance: Principles for the 21st Century (2018); Anthea Roberts, 'UNCITRAL and ISDS Reforms: What Are States' Concerns?' (*EJIL: Talk!*, 5 June 2018) <https://www.ejiltalk.org/uncitral-and-isds-reforms-what-are-states-concerns/> accessed 13 August 2020; Thomas Dietz, Marius Dotzauer and Edward S Cohen, 'The Legitimacy Crisis of Investor-State Arbitration and the New EU Investment Court System' (2019) 26 Review of International Political Economy 749.

[48] Axel Berger, 'Developing Countries and the Future of the International Investment Regime' [2015] Deutsche Gesellschaft fürInternationale Zusammenarbeit (GIZ) GmbH, p.8.

[49] Axel Berger, 'Developing Countries and the Future of the International Investment Regime' [2015] Deutsche Gesellschaft fürInternationale Zusammenarbeit (GIZ) GmbH, p.9.

[50] Ibid, p.9.

investment treaty disputes, and it began publicly pursuing development of alternative models.[51]

According to the United Nations Conference on Trade and Development's(UNCTAD's) World Investment report 2019, forward-looking international investment agreements' reform is well under way and involves countries at all levels of development and from all geographical regions, and with almost all the treaties concluded in 2018 containing a large number of reform features.[52] Some of the reforms are sustainable development-oriented, meant to take into account the sustainable development goals and aspirations.[53] The UNCTAD's Reform Package for the International Investment Regime sets out five action areas which include: safeguarding the right to regulate, while providing protection; reforming investment dispute settlement; promoting and facilitating investment; ensuring responsible investment; and enhancing systemic consistency.[54]

UNCTAD's World Investment Report 2019 has also pointed out that Investor–State arbitration continues to be controversial, spurring debate in the investment and development community and the public at large. As such, it has identified five principal approaches which have emerged from IIAs signed in 2018: (i) no ISDS, (ii) a standing ISDS tribunal, (iii) limited ISDS, (iv) improved ISDS procedures and (v) an unreformed ISDS mechanism.[55] In these principal approaches to ISDS, used alone or in combination:[56]

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[51] Emma Aisbett and others, 'Rethinking International Investment Governance: Principles for the 21st Century' [2018] Rethinking International Investment Governance: Principles for the 21st Century (2018), p. 26.
[52] United Nations Conference on Trade and Development, *World investment report 2019: Special economic zones*. UN, 2019, p. 104.
[53] Ibid, p. 104.
[54] Ibid, p. 104.
[55] United Nations Conference on Trade and Development, *World investment report 2019: Special economic zones*. UN, 2019, p. 106.
[56] United Nations Conference on Trade and Development, *World investment report 2019: Special economic zones*. UN, 2019, p. 106.

(i) No ISDS:

The treaty does not entitle investors to refer their disputes with the host State to international arbitration (either ISDS is not covered at all or it is subject to the State's right to give or withhold arbitration consent for each specific dispute, in the form of the so-called "case-by-case consent") (four IIAs entirely omit ISDS and two IIAs have bilateral ISDS opt-outs between specific parties).[57]

(ii)Standing ISDS tribunal:

The treaty replaces the system of ad hoc investor–State arbitration and party appointments with a standing court-like tribunal (including an appellate level), with members appointed by contracting parties for a fixed term (one IIA).[58]

(iii)Limited ISDS:

The treaty may include a requirement to exhaust local judicial remedies (or to litigate in local courts for a prolonged period) before turning to arbitration, the narrowing of the scope of ISDS subject matter (e.g. limiting treaty provisions subject to ISDS, excluding policy areas from the ISDS scope) and/or the setting of a time limit for submitting ISDS claims (19 IIAs).[59]

(iv)Improved ISDS procedures:

The treaty preserves the system of investor–State arbitration but with certain important modifications. Among other goals, such modifications may aim at increasing State control over the proceedings, opening proceedings to the public and third parties, enhancing the suitability and impartiality of arbitrators, improving the efficiency of proceedings or limiting the remedial powers of ISDS tribunals (15 IIAs).[60]

[57] *World investment report 2019: Special economic zones*. UN, 2019, p. 106.
[58] *World investment report 2019: Special economic zones*. UN, 2019, p. 106.
[59] *World investment report 2019: Special economic zones*. UN, 2019, p. 106.
[60] *World investment report 2019: Special economic zones*. UN, 2019, p. 106.

(v)Unreformed ISDS mechanism:

The treaty preserves the basic ISDS design typically used in old-generation IIAs, characterized by broad scope and lack of procedural improvements (six IIAs).[61]

Following the above highlighted approaches, countries therefore have a number of options to choose from while negotiating their IIAs with foreigners. They can settle on the approach that most favours their domestic interests while participating in international investments development.

4. Role of Africa in the Reform of Investor state dispute settlement System: Way Forward

Some authors have argued that African governments should maximize foreign investments by: eliminating corruption; improving safety and security; strengthening macroeconomic environment, investing in quality education and skill development in science, technology and innovation; and avoiding a 'race to the bottom' syndrome, that gives unnecessary tax holidays and waivers to foreign companies.[62] However, as already pointed out, some African states such as South Africa have already started terminating their IIAs in favour of more favourable dispute settlement forums, such as State-State arbitration.[63] Thus, while some states decide to opt out of ISDS system in favour of domestic courts or regional bodies, others prefer initiating reforms to their obligations under IIAs.[64]

Some authors have suggested that some of the ways in which ISDS can be made more responsive to the concerns raised would be making the system more transparent, forming a clear standard of review, and establishing a

[61] Ibid, p. 106.
[62] *Ayodele Odusola,* 'Investing in Africa Is Sound Business and a Sustainable Corporate Strategy' (*Africa Renewal*, 20 August 2018) <https://www.un.org/africarenewal/web-features/investing-africa-sound-business-and-sustainable-corporate-strategy> accessed 13 August 2020.
[63] Tanaya Thakur, 'Reforming the Investor-State Dispute Settlement Mechanism and the Host State's Right to Regulate: A Critical Assessment' [2020] Indian Journal of International Law <https://doi.org/10.1007/s40901-020-00111-2> accessed 13 August 2020.
[64] Ibid.

permanent arbitration forum or creating an appellate mechanism in order to strike a balance between investment protection and protecting the host states' right to regulate.[65] The appellate mechanism especially would be useful in addressing the concern regarding substantive inconsistency between arbitral decisions in investment treaty arbitration.[66]

4.1 To Retain ISDS or not?

As already pointed, the mechanism allowing private investors to submit investment claims to international arbitration has come under increasing public scrutiny, with several actors criticizing its lack of legitimacy.[67] UNCTAD's World Investment Report 2019 has also pointed out that Investor–State arbitration continues to be controversial, spurring debate in the investment and development community and the public at large. As already discussed above, it has identified five principal approaches which have emerged from IIAs signed in 2018: (i) no ISDS, (ii) a standing ISDS tribunal, (iii) limited ISDS, (iv) improved ISDS procedures and (v) an unreformed ISDS mechanism.[68] While it may not be possible yet to for African countries to agree on a single approach to these reforms, countries have these options to choose from while negotiating their IIAs with foreigners depending on their negotiating power, concerns and development needs.

4.2 'Africanization' of International Investment Law: Empowerment of Regional Dispute Settlement Bodies

In addition to the reform efforts going at the international arena, there have been efforts by the African Union aimed at what has come to be popularly known as 'Africanization' of international investment law. The first step

[65] International Bar Association, 'Consistency, efficiency and transparency in investment treaty arbitration,' *A report by the IBA Arbitration Subcommittee on Investment Treaty Arbitration*, November 2018.
[66] Ibid.
[67] Andrea Bjorklund, Yarik Kryvoi and Jean-Michel Marcoux, 'Investment Promotion and Protection in the Canada-UK Trade Relationship' [2018] Available at SSRN 3312617, p.v.
[68] United Nations Conference on Trade and Development, *World investment report 2019: Special economic zones*. UN, 2019, p. 106.

towards this was evidenced by the drafting of *Pan-African Investment Code*[69], whose main objective is to promote, facilitate and protect investments that foster the sustainable development of each Member State, and in particular, the Member State where the investment is located.[70] The Code is meant to apply as a guiding instrument to Member States as well as investors and their investments in the territory of Member States as defined by this Code.[71] In addition, this Code is meant define the rights and obligations of Member States as well as investors, and principles prescribed therein.[72]

The Pan-African Investment Code is hailed as the first continent-wide African model investment treaty elaborated under the auspices of the African Union, drafted from the perspective of developing and least-developed countries with a view to promote sustainable development.[73] In an attempt to make investment activities by foreigners more responsive to the sustainable development needs of African states, the Code has introduced some of innovative features such as the reformulation of traditional investment treaty provisions and the introduction of direct obligations for investors.[74] If adopted, this Code could potentially contribute to the reforms of the international and regional investment regimes.

Some commentators within the Continent have also proposed that setting up of regional courts is the way to go. For instance, in relation to the West African region, it has been suggested that for States in West Africa there might already exist a ready-made investment tribunal in the form of the Court of Justice of

[69] African Union Commission, Draft Pan-African Investment Code, Draft, December, 2016<https://au.int/sites/default/files/documents/32844-doc-draft_pan-african_investment_code_december_2016_en.pdf > Accessed 13 August 2020.
[70] *Pan-African Investment Code,* Article 1.
[71] Ibid, Article 2(1).
[72] Ibid, Article 2(2).
[73] Makane Moïse Mbengue and Stefanie Schacherer, 'The "Africanization" of International Investment Law: The Pan-African Investment Code and the Reform of the International Investment Regime' (2017) 18 The Journal of World Investment & Trade 414.
[74] Ibid.

the Economic Community of West African States (ECOWAS).[75] To the proponents of this position, all that is required is to activate the arbitral jurisdiction of the ECOWAS Court of Justice, considered the most successful of the African sub-regional courts, and extend its jurisdiction to cover investor-state jurisdiction.[76] This, it has been argued, given the present widespread dissatisfaction with investor–State dispute settlement, can provide an alternative to arbitration that is already up and running and would also help to cement African States' role as 'investment rule-makers' rather than 'rule-takers'.[77] This approach may also be duplicated in relation to the other regional courts such as the East African Court of Justice.[78] Currently, the African countries trade in terms of blocks, with States forming Regional Economic Communities (RECs) such as the East African Community (EAC), Economic Community of West African States (ECOWAS) and Southern African Development Community (SADC).[79] The debate is still ongoing with emergence of discourse on a possibility of a continental approach to the investment debate with the drafting of such instruments as the Pan African Investment Code[80] and the African Continental Free Trade Agreement.[81]

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[75] GRAIN, 'Investor–State Dispute Settlement Using the ECOWAS Court of Justice: An Analysis and Some Proposals' <https://bilaterals.org/?investor-state-dispute-settlement-41351> accessed 15 August 2020.

[76] Ibid.

[77] Ibid; See also 'Rule-Takers or Rule-Makers? A New Look at African Bilateral Investment Treaty Practice' <https://www.researchgate.net/publication/314518756_Rule-Takers_or_Rule-Makers_A_New_Look_at_African_Bilateral_Investment_Treaty_Practice> accessed 15 August 2020.

[78] See Muigua, K., Book Chapter: 'Effectiveness of Arbitration Institutions in East Africa,' in Onyema, E. (ed), *The Transformation of Arbitration in Africa: The Role of Arbitral Institutions*, (Kluwer Law International, The Netherlands, 2016).

[79] Muigua, Kariuki, "Investment-Related Dispute Settlement under the African Continental Free Trade Agreement: Promises and Challenges."< http://kmco.co.ke/wp-content/uploads/2020/06/Investment-Related-Dispute-Settlement-under-the-African-Continental-Free-Trade-Agreement-Promises-and-Challenges-Kariuki-Muigua-June-2020.pdf > Accessed 15 August 2020.

[80] African Union Commission, Draft Pan-African Investment Code, Draft, December, 2016.

[81] Muigua, Kariuki, "Investment-Related Dispute Settlement under the African Continental Free Trade Agreement: Promises and Challenges."

4.3 Capacity Building in Investment Knowledge and Expertise

While some commentators often argue that the lopsided relations in investment law negotiations that characterise the developed-developing world relations, others have argued that in contrast to North-South relations, negotiation outcomes seem to be shaped more by expert knowledge than by power asymmetries.[82] This, they have argued, is evidenced by a situation where powerful states like Egypt fail to dominate negotiations, while small-island-state Mauritius with its strategic investment policy agenda succeeds in setting the terms of investment agreements.[83] It has been observed that the foreign companies operating in Africa often have high bargaining power in the negotiations due to their influential position and backing from their governments. On the other hand, African governments have low bargaining power in these contracts or agreements because they are less influential.[84] They are more flexible in negotiations than their foreign counterparts. In exchange, they end up giving what rightfully belongs to the people to

[82] 'Rule-Takers or Rule-Makers? A New Look at African Bilateral Investment Treaty Practice' <https://www.researchgate.net/publication/314518756_Rule-Takers_or_Rule-Makers_A_New_Look_at_African_Bilateral_Investment_Treaty_Practice> accessed 15 August 2020.

[83] Ibid; See also 'Investing In Mauritius – Foreign Investment And Business Activity - Government, Public Sector - Mauritius' <https://www.mondaq.com/inward-foreign-investment/560050/investing-in-mauritius-foreign-investment-and-business-activity> accessed 15 August 2020; Zafar, Ali. "Mauritius: An economic success story." *Yes Africa can: Success stories from a dynamic continent* (2011): 91-106; Sobhee, Sanjeev K. "The economic success of Mauritius: lessons and policy options for Africa." *Journal of Economic Policy Reform* 12, no. 1 (2009): 29-42; Kalinichenko, Liudmila N., and Zinaida Novikova. "Mauritius: africa's business and financial centre." *Asia and Africa today* 4 (2020): 60-66.

[84] Jr Louis T. Wells, 'Negotiating with Third World Governments' [1977] *Harvard Business Review* <https://hbr.org/1977/01/negotiating-with-third-world-governments> accessed 16 August 2020; Rasmus Hundsbæk Pedersen, 'The Politics of Oil, Gas Contract Negotiations in Sub-Saharan Africa' (Danish Institute for International Studies 2014) <https://www.jstor.org/stable/resrep15998> accessed 16 August 2020; R Harrison Wagner, 'Economic Interdependence, Bargaining Power, and Political Influence' (1988) 42 International Organization 461; 'Mining to Profit Africa's People' (*Africa Renewal*, 15 April 2009) <https://www.un.org/africarenewal/magazine/april-2009/mining-profit-africa%E2%80%99s-people> accessed 16 August 2020.

foreigners.[85] There is a need for African countries to fight corruption, which often affect these negotiations and enforcement of domestic laws[86]

The *World Investment Report 2018* outlines challenges arising from the policymaking interaction between IIAs and the national legal framework for investment as follows: policymakers in charge of national and international investment policies might be operating in silos and create outcomes that are not mutually supportive or, worse, conflicting; incoherence (e.g. between a clearly defined Fair and Equitable Treatment (FET) clause in one or several IIAs and a broad FET clause in an investment law) may have the effect of rendering IIA reform ineffective; and incoherence between investment laws and IIAs may also create Investor-state dispute settlement (ISDS)-related risks when national laws include advance consent to international arbitration as the means for the settlement of investor-State disputes, which could result in parallel proceedings.[87] It has also been observed that post-2000, investors have increasingly relied on expansive interpretations of vaguely-drafted provisions in IIAs, national investment laws, investment contracts, and the dispute resolution provisions contained within such agreements, to sue host states for alleged violations of treaty or contractual obligations. This practice of "contract, treaty and forum shopping" has contributed to the multiplication of ISDS cases.[88] In addition, litigants place their court cases in the court system perceived most likely to find in their favour, thus affecting the legitimacy of the whole ISDS system.[89]

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[85] Africa Development Bank, "Resource companies ripping-off Africa"-AFDB Chief <http://uk.reuters.com/Art./2013/06/16/uk-africa-economy-idUKBRE95F0EH20130616 > Accessed 15 August 2020.

[86] See *World Duty Free Company Limited v. Kenya, ICSID Case No. ARB (AF)/00/7, Award (4 October 2006)* and Cortec Mining Kenya Limited, Cortec (Pty) Limited and Stirling Capital Limited v. Republic of Kenya, ICSID Case No. ARB/15/29. In both cases, there were allegations of corruption by high ranking Kenyan officials. While the World Duty case was not based on any Treaty, it shows how corruption can affect the country's ability to attract genuine investment by foreigners.

[87] United Nations Conference on Trade and Development, *World Investment Report 2018* (United Nations, 2018), p.107.

[88] Emma Aisbett and others, 'Rethinking International Investment Governance: Principles for the 21st Century' [2018] Rethinking International Investment Governance: Principles for the 21st Century (2018), p. 32.

[89] Ibid, p. 32.

There is therefore a need for the African Governments to invest in highly knowledgeable experts while negotiating and drafting the terms of investment agreements in order to ensure that the resultant documents are not only non-ambiguous but also guarantee that they do not adversely affect their ability to regulate the investment activities and enforcement of domestic laws.

5. Conclusion

As it has been highlighted above, IIAs grant extensive rights to a wide range of foreign investors against host states, without imposing any reciprocal obligations on those investors. Where broader concerns such as human rights or sustainable development[90] are included within IIAs, they do not, for the most part, demand action from investors or states. As a result, the legal framework for investment operates on an understanding of justice where fairness to investors is the dominant principle.[91]

As a result, there is a growing international consensus that more is needed from international investment treaties and the regime in general, if they are to have a meaningful future, or any future at all, and this consensus is increasingly revolving around the sustainable development paradigm.[92] As it has been demonstrated in this paper, the traditional approach to ISDS and investment law as adopted in the earlier investment agreements has continually been criticized especially by the developing countries as giving private investors unfair advantage to challenge domestic public policies of the host countries. This is because from its earliest origins, investment law has often been regarded as an isolated regime intended to ensure investors' benefits.[93]

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

[91] Emma Aisbett and others, 'Rethinking International Investment Governance: Principles for the 21st Century' [2018] Rethinking International Investment Governance: Principles for the 21st Century (2018), p. 31.

[92] Mann, H., "Reconceptualizing international investment law: its role in sustainable development." *Lewis & Clark Law Rev.* 17 (2013): 521, p. 536.

[93] Emma Aisbett and others, 'Rethinking International Investment Governance: Principles for the 21st Century' [2018] Rethinking International Investment Governance: Principles for the 21st Century (2018), p. 3.

In order to overcome the mechanism allowing private investors to submit investment claims to international arbitration, some policy-makers and negotiators have responded to these criticisms through various approaches included in recent IIAs and model agreements, namely: a reformed investor-state dispute settlement mechanism through the inclusion of new provisions, a return to diplomatic protection and state-to-state arbitration, reliance on domestic courts, Alternative Dispute Resolution Mechanisms, hybrid approaches, and an investment court system.[94]

There is a need to change the current trend where African states tend to be rule-takers in North-South relations, and yet enjoy greater agency in negotiations of South-South BITs. Only few African countries, however, use their greater say in intra-African negotiations to include public policy exceptions in BITs.[95] African countries have demonstrated some efforts towards either completely ditching the ISDS system in favour of domestic courts or coming up with customised legal instruments such as the Pan-African Investment Code, designed to offer guidelines to African countries when entering into or designing investment agreements with foreign investors. These homegrown solutions are meant to achieve this by: further clarifying the content of standards of protection that are traditionally included in IIAs; limiting definition of indirect expropriation; adopting constraining provisions imposing direct obligations on foreign investors in the face of domestic regulatory measures; and limiting foreign investors' access to international independent arbitral tribunals, among others.[96]

[94] Andrea Bjorklund, Yarik Kryvoi and Jean-Michel Marcoux, 'Investment Promotion and Protection in the Canada-UK Trade Relationship' [2018] Available at SSRN 3312617, p.v.

[95] 'Rule-Takers or Rule-Makers? A New Look at African Bilateral Investment Treaty Practice' <https://www.researchgate.net/publication/314518756_Rule-Takers_or_Rule-Makers_A_New_Look_at_African_Bilateral_Investment_Treaty_Practice> accessed 15 August 2020.

[96] Andrea Bjorklund, Yarik Kryvoi and Jean-Michel Marcoux, 'Investment Promotion and Protection in the Canada-UK Trade Relationship' [2018] Available at SSRN 3312617, p.v.

Clearly Africa has a key role in the reform of international investment law and the ISDS system:

Whichever approach they choose to adopt, African countries need to play a greater role in policy and rulemaking in international investment law, especially in relation to the ISDS system to ensure that they protect their domestic policies while at the same time attracting investments into their territories to boost national and regional development.

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A Critical Analysis of Maslaha as a Traditional Dispute Resolution Mechanism in North Eastern Kenya

By: ***Koriow Zamzam Mohamed* & Peter Mwangi Muriithi*****

Abstract

Traditional dispute resolution mechanisms (TDRMs) like Maslaha remain vital in the resolution of disputes within the Cushite community in Kenya. The longevity in the application of TDRMs by various communities in Kenya is a manifestation of the vital role they play in the resolution of disputes. However, despite the vital role played by traditional methods of resolving disputes, like Maslaha, they face a lot of criticism, especially when they are used to resolve criminal disputes. In essence, the grey area in the discourse of application of TDRMs like Maslaha remains their limitations by the existing legal framework in Kenya.

This paper seeks to analyze the application of Maslaha in the resolution of disputes in North Eastern Kenya as well as the criticisms to this dispute resolution mechanism. In doing so, this discourse shall; offer a brief introduction, a legal basis of application of TDRMs in Kenya, a critique of Maslaha as a TDRM, recommendations and lastly, give a conclusion.

1.0 Introduction

To commence this discussion, this paper notes the words of *Emeritus Chief Justice Dr Willy Mutunga* who stated as follows in his keynote speech during the judicial marches week [1] "*Let me reiterate our main aims in undertaking the judicial marches: …We want to encourage the public to use alternative dispute resolution mechanisms, including traditional ones, as long as they do not offend the Constitution*." This best captures the important role played by

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[1] Keynote Speech By The Chief Justice, Hon. Dr. Willy Mutunga, At The Commencement Of 'the Judicial Marches Week' Countrywide On August 21, 2012 <http://kenyalaw.org/kenyalawblog/commencement-of-the-judicial-marches-week-countrywide/> accessed on 14/07/20

traditional dispute resolution mechanisms in the resolution of disputes in Kenya.

The traditional methods of resolving disputes generally referred to as TDRMs are considered to be informal methods of resolving disputes. They operate outside the formal legal framework that exists. TDRMs vary from one community to another. Predominantly, TDRMs are based on cultural practices of various communities.

Each community has its own unique set of customary laws and as such each community has different method of dispute resolution.[2]The definition of offences and conflict differs from one community to another. Similarly, the punishment prescribed for each offence differs from one community to another. These various variances of traditional methods of resolving disputes inhibit creation of a concrete definition of TDRMs.

TDRMs existed even before colonialization.[3]These mechanisms were geared toward fostering peaceful co-existence among the members of each community. Existence of traditional conflict resolution mechanisms such as negotiation, reconciliation, mediation and others is evidence that these concepts are not new in Kenya.[4]

Communities in Kenya had their own ways of dealing with day to day challenges. They relied on their customs and practices to resolve their disputes. However, during colonialization the colonial masters deliberately suppressed customs and practices allowing them to be applied 'only if they were not

[2]Francis Kariuki, Community, Customary and Traditional Justice Systems in Kenya: Reflecting on and Exploring the Appropriate Terminology page 11
[3] Kariuki Muigua, Traditional Conflict Resolution Mechanisms and Institutions, page 2-3.
[4] See generally, Brock-Utne, B., "Indigenous conflict resolution in Africa," A draft presented to week-end seminar on Indigenous Solutions to Conflicts held at the University of Oslo, Institute of Educational Research, 2001, pp. 23-24 ;See also Ajayi, A.T., & Buhari, L.O., "Methods of conflict resolution in African traditional society," African research review,Vol.8, No. 2, 2014, page 138-157

repugnant to justice and morality'.[5] The repugnancy clause *'only if they were not repugnant to justice and morality or results in outcomes that are repugnant to justice or morality'* in regard to application of TDRMs in resolution of disputes, unfortunately has been retained in the Judicature Act, Cap 8 and the Constitution of Kenya 2010.[6]

Undoubtedly, there was a shift towards formal dispute resolution mechanisms leading to reduced application of TDRMs both after colonization and in the immediate post-colonial Kenya. This was premised on the deliberate insistence of application of formal methods to resolve disputes by colonial masters.[7]According to *Okoth Ogendo*[8], during this time TDRMs and in general customary law, went through a long period of expropriation, suppression and subversion.

However, this did not lead to the complete neglect of customary laws as *Francis Kariuki*[9]rightly posits,*"...it should be noted that after almost a hundred years of neglect customary laws and other indigenous traditions have remained resilient*."

Customary laws have continued to be applied up to date. Similarly, TDRMs have continued to be viable in communities in Kenya. This is premised on the features associated with TDRMs.

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[5]Kariuki Muigua, Alternative Dispute Resolution and Access to Justice in Kenya page 59

[6]The clause is retained under Section 3(2)Judicature Act, Cap 8 and Article 159(3) of the Constitution of Kenya 2010

[7]Kariuki Muigua, Alternative Dispute Resolution and Access to Justice in Kenya page 59

[8]Okoth- Ogendo, "The Tragic African Commons: A Century of Expropriation, Suppression and Subversion" (2010) Available at<http://dlc.dlib.indiana.edu/dlc/bitstream/handle/10535/8098/The%20Tragic%20African%20Commons.pdf?sequence=1> accessed on 20/07/20

[9]Francis Kariuki. Community, Customary and Traditional Justice Systems in Kenya: Reflecting on and Exploring the Appropriate Terminology. (2015) Available at, <http://www.strathmore.edu/sdrc/uploads/documents/books-and articles/Paper%20on%20Traditional%20justice%20terminology.pdf.>Kariuki asserts that "In customary justice systems anchored on customary law, the later becomes a critical part of its normative content and in the development of tribal/customary law jurisprudence."

Such features of TDRMs include inter alia; informality, affordability/less expensive, exhaustion of issues in dispute, they are not time consuming, reconciliatory in nature, familiarity and simplicity.[10]TDRMs are considered to be accessible by the rural poor and the illiterate people, flexible, voluntary, they foster relationships, proffer restorative justice and give some level of autonomy to the parties in the process.[11]

Most TDRMs are concerned with the restoration of relationships (as opposed to punishment), peace-building and parties' interests and not the allocation of rights between disputants.[12]

However, TDRMs are associated with some negative traits like; anarchy as TDRMs are not based on any written law, they can be contrary to the Constitution, they are sporadic and not structured as they change from one community to another, issues even not presented to the tribunal are sometimes handled, the rules guiding TDRMs maybe archaic e.g. flogging as a form of punishment, TDRMs are considered to be systematically biased against certain groups e.g. women , they are not formally structured, enforcement of decisions made through TDRMs can be difficult e.g. in 1960 the oath was enough the same may not suffice today and they operate within a very limited view of the affairs of the world.[13]

TDRMs operate within the realms of customary law. *Okoth-Ogendo* asserts that the reason why customary law has stood the test of time, among many other reasons, is because the customary laws have over time been seen to function as a set of social and cultural facts.[14] This is the case with TDRMs as

[10]ICJ-Kenya Report, 'Interface between Formal and Informal Justice Systems in Kenya,' (ICJ,2011), page 32; See also A.N. Allott, 'African Law,' in Derrett, J.D An Introduction to Legal Systems, (Sweet & Maxwell, 1968), page 131-156.
[11] Francis Kariuki 'Applicability of Traditional Dispute Resolution Mechanisms in Criminal Cases in Kenya: Case Study of Republic v Mohamed Abdow Mohamed [2013] eKLR, Alternative Dispute Resolution, Vol. 2, No. 1 (2014), page 202-228.
[12] ICJ-Kenya Report, 'Interface between Formal and Informal Justice Systems in Kenya,' (ICJ, 2011), page 32
[13]ICJ-Kenya Report, 'Interface between Formal and Informal Justice Systems in Kenya,' (ICJ, 2011)
[14]Okoth-Ogendo, "The Tragic African Commons: A Century of Expropriation, Suppression and Subversion" (2010)

they are governed by customary laws. Premised on the above assertions, it is clear that TDRMs play a critical role in the justice system in Kenya.

However, despite the vital role played by TDRMs they face a lot of criticism, especially when they are used to resolve criminal disputes. In essence, the grey area in the discourse of application of TDRMs remains their limitations by the existing legal framework in Kenya.

This paper seeks to analyze the application of Maslaha in the resolution of disputes in North Eastern Kenya as well as the criticisms to this dispute resolution mechanism. In doing so, the starting point has to be the legal basis of application of Maslaha in the resolution of disputes in North Eastern Kenya. Below is a succinct analysis of the legal framework governing TDRMs in Kenya.

2.0 Legal Framework Governing TDRMs in Kenya

Due to the informality of TDRMs there exist limited legal framework to guide their operations. However, the Constitution of Kenya 2010 and enabling legislations contains salient provisions that either directly or indirectly promote TDRMs in Kenya. At this juncture there is need to point out that culture and TDRMs are conjoined twins.[15] This assertion is based on the fact that TDRMs operate within the confines of cultural practices. As such, TDRMs vary from one community to the other based on each community's cultural practices.[16] It is on this basis then that one can assert that promoting cultural practices in Kenya, to a great extent promotes TDRMs. In essence TDRMs are based on African Customary Laws.

The most explicit legal provision for application of TDRMs in Kenya is Article 159 of the Constitution which addresses judicial authority and legal system.

[15] See generally Kassa, G.N., "The Role of Culture and Traditional Institutions in Peace and Conflict: Gada System of Conflict Prevention and Resolution among the Oromo-Borana," Master's thesis, 2006. Available at <http://urn.nb.no/URN:NBN:no-17988> [Accessed on 14/07/20]; See also Mengesha, A. D., et al, „Indigenous Conflict Resolution Mechanisms among the Kembata Society," *American Journal of Educational Research*, Vol.3, No.2, 2015, page 225-242.

[16] Francis Kariuki, Community, Customary and Traditional Justice Systems in Kenya: Reflecting on and Exploring the Appropriate Terminology page 11

Article 159 of the Constitution offers the best enumeration of the basis of application of TDRMs in Kenya. Under Article 159(2)(c) of the Constitution, TDRMs are considered to be one of the principles that ought to guide courts and tribunals in exercise of their judicial authority. Verbatim Article 159(2)(c) of the Constitution provides that; In exercising judicial authority, the courts and tribunals shall be guided by the following principles; alternative forms of dispute resolution including reconciliation, mediation, arbitration and *traditional dispute resolution mechanisms* shall be promoted, subject to clause (3).

In essence, Article 159(2)(c) of the Constitution persuades courts and tribunals to at all material times promote application of TDRMs provided they operate within the scope stipulated under Article 159(3) of the Constitution.
Article 159(3) of the Constitution though couched in a negative manner seeks to promote application of TDRMs. The negative connotation notwithstanding, Article 159 (3) of the Constitution verbatim provides: *Traditional dispute resolution mechanisms shall not be used in a way that;*

a) contravenes the Bill of Rights;
b) is repugnant to justice and morality or results in outcomes that are repugnant to justice or morality; or
c) is inconsistent with this Constitution or any written law.

In essence, the import of Article 159(3) of the Constitution is that TDRMs are applicable in Kenya as modes of dispute resolution provided that; they do not contravene the bill of rights, they are not repugnant to justice and morality and lastly that they are not inconsistent with the Constitution or any written law. Overtime, courts in Kenya in promoting application of TDRMs in Kenya have heavily relied on these provisions of the Constitution.

Buttressing this *Justice* **Edward M. Muriithi in the case of :Mary Kinya Rukwaru v Office of the Director of Public Prosecutions & another [2016] eKLR**[17]**stated as follows;**

[17]eKLR, Petition No. 285 of 2016 at paragraph 17 & 18

"*I would agree with Counsel for the Interested Party that "the Constitution of Kenya 2010 recognises that justice is not only about prosecution, conviction and acquittals [and that] it reaches out to issues of restoration of the parties [with] court assisted reconciliation and mediations are the order of the day with Article 159 being the basic test for that purpose. Accordingly, Alternative Dispute Resolution (ADR) "including reconciliation, mediation, arbitration and* ***traditional dispute resolution mechanisms****" are available means of settlement of criminal cases under the Constitution, and the Court is enjoined Article 159 to promote ADR."*

It is fair to state that, the underlining negative connotation under Article 159 (3)(b) of the Constitution when referring to application of TDRMs, reflects the continuing conflict between African legal systems and legal systems which began in the colonial era. The view that African legal systems are inferior to legal systems which began in the colonial era has been captured in writing by various foreign writers.

Arthur Phillips,[18] in a report he prepared propounds that it is inevitable and indeed desirable that Africans should eventually attain to a system of law and justice which is similar to though not necessary identical to the British system of law. *Frederick Lugard*, argued that only from native courts employing customary law was it possible to create rudiments of law and order, to inculcate a sense of responsibility and evolve among a primitive community some sense of discipline and respect for authority.[19] The view of Africans cultural practices like TDRMs as 'primitive' has always downgraded African legal systems which are primarily based on different cultural practices of communities.

It is observable that, where African ideas of custom and of law were retained by the legal systems imposed on the Africans during the colonial era the same

[18] Arthur Phillips, Report on Native Tribunals (Nairobi: Government Printer, Colony and Protectorate of Kenya, 1945), 5±6 on the powers of Native Tribunals,
[19] Lord Lugard, The Dual Mandate in British Tropical Africa (London, 1965 [1922]),547-8, 549-50.

was based on necessity. This was observed by *Karen Fields*[20] who verbatim stated "*...Britain had not the manpower, the money nor the mettle to rule by force of arms alone. Essentially, in order to make colonial rule work with only a `thin white line ' of European administrators, African ideas of custom and of law had to be incorporated into the new state systems. In a very real way, customary law and African courts provided the ideological and financial underpinnings for European colonial rule."*

It is on this background, then that one can appreciate why even where cultural practices like TDRMs are promoted by the existing legal framework the same is subject to various caveats and limitations like "*TDRMs are not used in a way that is repugnant to justice and morality or results in outcomes that are repugnant to justice or morality.*[21]"

Apart from Article 159 of the Constitution there are other few articles of the Constitution that encourage the use of TDRMs. It is important to appreciate that TDRMs as earlier stated is part and parcel of culture and/or cultural practices. As such, where the Constitution or statutes promote application, preservation and promotion of culture and/or cultural practices, TDRMs is part and parcel of the same. The preamble of the Constitution states that we are proud of our ethnic, cultural and religious diversity. Article 2(4) of the Constitution recognizes existence of customary law which governs TDRMs, though it limits its application where it is inconsistent with the Constitution. Article 11 of the Constitution recognizes culture as the foundation of the nation and as the cumulative civilization of the Kenyan people and nation. To this end, it advocates for promotion of cultural expressions.

Article 44 of the Constitution posits that every person has the right enjoy their language, and culture though no one should be compelled to perform, observe or undergo any cultural practice or rite. The Constitution under Article 45(4) requires the parliament to enact legislation that recognizes traditional marriages. Such marriages are based on cultural practices. Article 60 (1)(g) of the Constitution encourages communities in Kenya to settle land disputes

[20]See Karen Fields, *Revival and Rebellion in Colonial Central Africa* (Portsmouth, NH,1997), chs. 1±2.
[21]Article 159 3(b) of the Constitution of Kenya 2010

through recognised local community initiatives consistent with this Constitution.

Lastly, Article 67(2)(f) of the Constitution enlists one of the function of the National Land Commission is to encourage the application of traditional dispute resolution mechanisms in land conflicts.

On the other hand, statutes have sought to incorporate TDRMs as modes of dispute resolution. Judicature Act[22], under section 3(2) stipulates when the customary law is to be applicable. It states verbatim that: '*The High Court, the Court of Appeal and all subordinate courts shall be guided by African customary law in civil cases in which one or more of the parties is subject to it or affected by it, so far as it is applicable and is not repugnant to justice and morality or inconsistent with any written law, and shall decide all such cases according to substantial justice without undue regard to technicalities of procedure and without undue delay.*' Unfortunately, this provision retains the limitation of application of African customary law '*so far as it is applicable and is not repugnant to justice and morality or inconsistent with any written law*' as contained under Article 159(3) (b) of the Constitution.

Marriage Act[23], under Section 68 encourages use of TDRMs. Buttressing, Article 67(2)(f) of the Constitution, Section 5(1) (f) of the National Land Commission Act[24] provides that one of the function of National Land Commission is to encourage the application of traditional dispute resolution mechanisms in land conflicts.

Under Section 3(5) (b) of the Environmental Management and Co-ordination Act[25],the Environment and Land Court in exercise of its jurisdiction is required to be guided by the cultural and social principles traditionally applied by any community in Kenya for the management of the environment or natural resources in so far as the same are relevant and are not repugnant to justice and morality or inconsistent with any written law.

[22] Cap No.8 of the laws of Kenya
[23]Cap No. 4 of 2014
[24]Cap No. 5 of 2012
[25]Cap No.8 of 1999

Section 7(3) of the Magistrates Court Act[26] offers an enumeration of Civil matters that are subject to African Customary Law and to a great extent TDRMs.

On 4th March 2016, his Lordship the Chief Justice, Hon. (Dr.) Willy Mutunga, *vide The Kenya Gazette* (Special Issue) *Gazette Notice. Vol. CXVIII-No.21*, appointed the Taskforce on Alternative Justice Systems to look at the various *Traditional, Informal and Other Mechanisms Used to Access Justice in Kenya (Alternative Justice Systems).* The tenure of the Taskforce was subsequently extended by Chief Justice Hon. David Maraga.[27]

The Taskforce was required to examine the legal, policy and institutional framework for the furtherance of the endeavour by the Judiciary to exercise its constitutional mandate under Article 159 (2) and its plans to develop a policy to mainstream Alternative Justice System (*hereinafter AJS*) with a view to enhancing access to and expeditious delivery of justice as espoused at Pillar one of the *Judiciary Transformation Framework*, which was the blueprint which undergirded transformation in the Judiciary in the period 2012-2016. This objective was later included in the *Sustaining Judiciary Transformation* Blueprint.[28]

On 27th August 2020, which was the 10th Anniversary of the adoption of the Kenya Constitution, Chief Justice David Maraga presided over the launch of the Alternative Justice System Baseline Policy(AJS) after the completion of its preparation by the Taskforce. The Alternative Justice System Baseline Policy[29](hereinafter the policy) basically outlines steps to embrace and implement alternative justice systems in accordance with article 159(2) (c) of the Constitution 2010. This policy best encapsulates the effectiveness and application of TDRMs in Kenya comprehensively.

[26] Cap No.26 of Laws of Kenya
[27] Alternative Justice System Policy, Executive Summary page xiv
[28] Alternative Justice System Policy, Executive Summary page xiv
[29]Alternative Justice Systems Baseline Policy
<https://www.judiciary.go.ke/resources/publications/> accessed on 9/18/20

The policy analysis[30]:

a) *Alternative Justice Systems and the need for an AJS policy in context.*
b) *Conceptual framework and imperatives for Alternative Justice Systems.*
c) *Challenges and responses on Alternative Justice Systems.*
d) *How is AJS practiced? Existing models of AJS.*
e) *Operational doctrines of interaction between Courts and matters determined by or before AJS institutions.*
f) *Key areas of intervention and implementation.*
g) *Operationalizing the AJS policy—the roles of different actors.*
h) *Operationalizing the AJS policy: The implementation matrix.*

The policy in a nutshell emphasizes on importance AJS and the need for them to be adopted in our justice system to promote access to justice in Kenya. TDRMs form part of Alternative Justice Systems in Kenya as such the policy promotes TDRMs.

The significance of the policy lies in the fact that unlike the other legislations which seeks to promote TDRMs in Kenya, the policy identifies; the k*ey areas of intervention and proposes ways for operationalizing the AJS policy.* This in return will contribute significantly in promoting TDRMs in Kenya.

From the above analysis of legal framework governing TDRMs in Kenya, it is clear that TDRMs like Maslaha have a legal basis for application in Kenya as a mode of dispute resolution.

3.0 A Critique of Maslaha as a Traditional Dispute Resolution Mechanism

Maslaha , variously translated as *'social good'* or *'public interest,'* has become a buzzword in reformist circles, where it is touted as a remedy for legal stagnation. The practice has been successfully used to solve matters in most

[30]The table of Contents Alternative Justice Systems Baseline Policy page x to xi <https://www.judiciary.go.ke/resources/publications/> accessed on 9/18/20

Islamic states and has been adopted by the Cushitic communities and those who ascribe to Islam as a religion.[31]

The Maslaha system is an informal Traditional Dispute Resolution Mechanism practiced by the Somali Community in settling their feuds and disputes through elders and it has generally evolved as a way of maintaining cordial relationships between different neighbouring families and clans.Maslaha courts are managed by elder's usually male relatives of the survivor and perpetrators and uses traditional means to solve the problem, mostly this involves compensation in terms of money or livestock.

These courts are accused of being unfair, lack of legal representation; decisions that rely upon predetermined cultural rules; limited or no distinctions drawn between civil and criminal cases; social pressure to cover shame; and a lack of separation of powers for the accused and complainant, meaning that an authority figure in the Maslaha justice system may also have decision-making authority in the community, the Maslaha courts are viewed as not putting the victim at the center of the resolution but focusing more on the communal relationship.[32]

The Maslaha are influenced by the relative position of the clans involved and their negotiating power.[33]Nevertheless, people prefer the Maslaha system as it is part of their culture, it applies a concept of justice that is easily understood, and because it delivers at least monetary compensation while formal Kenyan justice is perceived as complicated, lengthy and often inconclusive.[34]

In addition, Maslaha is applied even to murder and sexual offences thereby raising contestations of the constitutionality and legality of this application.
In February 2018, the Minister for Interior reportedly directed national government officials, including chiefs, to cease the application of Maslaha in

[31]Grace Konde, Women And Peace building in Kenya: The Case Of Wajir Peace And Development Agency (2002-2018).
[32]Maryam Hassan Abdi, Assessment Of Sexual And Gender Based Violence Reporting Procedures Among Refugees In Camps In Dadaab, KenyaNovember, 2016
[33]Danny Turton (B.A., L.L.M) UNHCR Consultant, Strengthening Protection Capacity Project April 2005
[34]Supra

determining sexual offences.[35] However, questions arises as to the practicability, legality and rationale of enforcing such orders. Maslaha as a TDRM best demonstrates the challenges facing application of TDRMs in Kenya in a bid to enhance access to justice. The question has always been; To what extent should the TDRMs be applied in Kenya? What limitations exist in application of TDRMs in Kenya? Which offences should TDRMs not be used to resolve in Kenya?

These questions basically revolve around the question of jurisdiction of TDRMs (i.e. matters that TDRMs can hear and determine). The key concern is usually whether TDRMs like maslaha should be used to hear and determine all disputes or whether a limitation should be placed on the matters that are referred to these fora.

The most notable limitation of application of TDRMs in Kenya lies in the repugnancy clause *'only if they were not repugnant to justice and morality or results in outcomes that are repugnant to justice or morality'* as encapsulated under Article 159 3(b) of the Constitution of Kenya 2010 and the Judicature Act, Cap 8 of Laws of Kenya.[36]

This question has been presented before Courts which have sought to reconcile the existing provisions of the law especially Article 159 (3) of the Constitution and Section 3(2) Judicature Act, Cap 8 and the cases presented before them. In the case of: Republic ***Vs. Abdulahi Noor Mohamed (alias Arab) [2016] eKLR (Criminal Case No. 90 Of 2013 High Court Nairobi)*** *Judge Lesiit J* seeking to interpate Article 159 (3) of the Constitution, Section 3(2) Judicature Act, Cap 8 and Section 176 of the Criminal Procedure Code stated:

> *"…From the reading of the aforementioned statutory provisions, it is quite evident that application of alternative dispute resolution mechanisms in criminal proceedings was intended to be a very limited. The* ***Judicature Act*** *in fact only envisages the use of the*

[35]Available from www.nation.co.ke/news/Matiangi-warns-chiefs-mediating-rape-cases/1056-4322400-format-xhtmlhpy4b2/index.htm lastly accessed 4/8/20
[36]The clause is retained under Section 3(2)Judicature Act, Cap 8 and Article 159(3)(c) of the Constitution of Kenya 2010.

> *African customary law in dispute resolution only in civil cases that affect one or more of the parties that is subject to the particular customary law. It is also evident that even where the alternative dispute resolution mechanisms are to be used in the criminal matters, it is limited to misdemeanors and not on felonies. The accused herein has been charged with the offence of murder, which has been classified as a felony and therefore, among the crimes that* ***Section 176*** *of the* ***Criminal Procedure Code*** *prohibits the courts from adopting reconciliation as a form of justice."*

It is observable that in regard to application of TDRMs in Civil matters, Section 7(3) of the Magistrates Court Act[37] offers an enumeration of Civil matters that are subject to African Customary Law and to a great extent TDRMs. These include;

a) Land held under customary tenure;
b) Marriage, divorce, maintenance or dowry;
c) Seduction or pregnancy of an unmarried woman or girl;
d) Enactment of, or adultery with a married woman;
e) Matters affecting status, particularly the status of women, widows and children, including guardian-ship, custody, adoption and legitimacy;
f) Intestate succession and administration of intestate estates, so far as it is not governed by any written law;

Affirming the provisions of Section 7(3) of the Magistrates Court Act the case of; ***Kamanza Chiwaya Vs. Tsuma (unreported High Court Civil Appeal No. 6 of 1970)*** the High Court held that the above list of claims under customary law was exhaustive and excludes claims in tort or contract.

The ***Alternative Justice System Baseline Policy*** *(AJS)* offers yet the most recent and what in our considered view ought to be adopted in application of TDRMs in Kenya. The policy analysis various issues which are seminal in

[37] Cap No.26 of Laws of Kenya

delimiting the application of TDRMs in Kenya including but not limited to the issue of jurisdiction of TDRMs.

Seminal features of the Policy that promote and delimit the application of TDRMs in Kenya

The following constitutes the seminal features that seek to promote and delimit the application of TDRMs in Kenya;

a) ***Agency Theory of Jurisdiction of AJS as a means of delimiting jurisdiction of TDRMs:*** The Policy proposes an Agency Theory of alternative justice system in delimiting the jurisdiction of TDRMs. The theory ***does not distinguish civil from criminal law***.[38]

Instead, it asks if it can be objectively determined that the parties to a given dispute have consensually and voluntarily submitted themselves to TDRMs; and whether the consent of the parties can be objectively and credibly be determined to be informed, mutual, free and revocable. If the answer is in the affirmative and if there is no specific legislation or public policy ousting the jurisdiction of TDRMs, then the dispute is amenable to the TDRMs whether the dispute is formally determined to be "civil" or "criminal."[39]Addressing the issue of jurisdiction in essence the policy proposed the following[40]:

i) Enhanced non-distinction between civil and criminal matters in regard to jurisdiction of TDRMs.
ii) Enhanced stakeholder and peoples' involvement in cases of public interest and concerns of the aggrieved party.
iii) Enhanced efficiency and effectiveness of the justice system.

b) ***Operational Doctrines of Interactions Between the TDRMs and Courts:***

The Policy makes recommendations and provides guidelines of how Judges and Judicial Officers should deal with questions related to TDRMs

[38] Alternative Justice System Baseline Policy, page xvii
[39] Ibid No. 38 page xvii
[40] Ibid No. 38 page 67

when they encounter them in the course of determining controversies filed in Court. The Policy terms the different approaches to this question as "*Operational Doctrines*" and identifies six such doctrines as follows[41]:

i)*Avoidance*: The Court could simply ignore previous TDRMs proceedings and awards.

ii) *Monism*: The Court could treat previous TDRMs proceedings or awards as a tribunal of "first instance" from which a dissatisfied party is permitted to appeal to the Court. In this mode, the Court conducts a *de novo* review of both facts and law.

iii) *Deference*: The Court reviews previous TDRMs proceedings and awards for procedural propriety and proportionality only. This is the most appropriate interaction between the Courts and TDRMs.

iv) *Convergence*: The Court defers to the TDRMs process only when both parties agree. In this mode, either party has a veto to choose whether previous, concurrent or intended TDRMs proceedings should be taken into account by the Court.

v) *Recognition and Enforcement in the Mode of Arbitral Awards*: Here, the Court has a duty to recognize and enforce an award by an TDRMs mechanism as it would its own decree subject only to the right of one party to set aside the award for an extremely narrow set of reasons: where the award is unconscionable or offends public policy or where the adjudicators/members of the panel were corrupted or otherwise unduly influenced.

vi) *Facilitative Interaction*: In this mode, the Court accepts the TDRMs proceedings or awards as evidence for the parties in the Court process. While the Court, therefore, does not accept and enforce the TDRMs award or verdict as given in the TDRMs proceedings, the award or proceedings serve as one of the pieces of evidence the Court uses to reach its own verdict. The probative value the Court assigns to this evidence will vary depending on the nature of the TDRMs proceedings.

[41] Alternative Justice System Baseline Policy, page xvii to xviii

In conclusion, the Policy encourages Judges and Judicial Officers to deploy either the *Deference or Recognition and Enforcement Operational Doctrines* when they encounter these questions in practice. There may be instances where a prior agreement of the parties or the specific circumstances of the case make the *Monist or Facilitative Doctrines appropriate*.[42]

However, the Policy reaches the conclusion that *Avoidance and Convergence doctrines are inappropriate* in Kenya constitutional context in view of Articles 159, 11 and 44 of the Constitution. The Policy insists Courts should not, therefore, resort to these two doctrines when they encounter questions related to TDRMs.[43]

c) TDRMs expands human rights and human autonomy

TDRMs is an important tool for the vindication and expansion of human rights and human autonomy.[44] Its mechanisms are based on three human rights-based avenues. Firstly, the human rights imperative under article 48 of the Constitution. This provision mandates the State to ensure access to justice for all persons. Engaging TDRMs has the direct consequence of fulfilling, respecting and protecting this important fundamental human right as majority of Kenyans access justice through TDRMs Mechanisms.[45]

Secondly, human rights-based constitutional principles under Article 10 as read together with Article 28 of the Constitution provide the principles for vindicating and expanding the TDRMs framework in Kenya. Finally, TDRMs acts as a strong framework for anchoring human rights. Article 44 (on everyone's right to use the language and to participate in the cultural life of their choice) anchors this position. This is bolstered by the Constitution's recognition of culture as the foundation of the nation and the cumulative civilization of the Kenyan people and nation (Article 11 of the Constitution).[46] The policy therefore argues that promotion of TDRMs contributes to the expansion of the fundamental human rights mandated and anchored in the

[42] Alternative Justice System Baseline Policy, Executive Summary page xviii
[43] Alternative Justice System Baseine Policy, Executive Summary page xviii
[44] Alternative Justice System Baseine Policy, Executive Summary page xv
[45] Ibid No.44 page 17-18
[46] Alternative Justice System Baseline Policy page 18

Constitution. The policy asserts that it is a misconception and an error of a contextual reading to identify, reify and essentialize TDRMs as spaces for human rights violations. [47]

To this end the policy argues that while it is true that some processes and substantive outcomes of TDRMs Mechanisms may run afoul of the Constitution in the same way some Court and Tribunal procedures and outcomes may be volatile of the Constitution, characterizing TDRMs spaces as cesspools of human rights violations is empirically and epistemologically false. Instead, properly conceived, TDRMs Mechanisms are an important site for guaranteeing human rights by providing an easier, more affordable, more approachable and more culturally and socially appropriate forums for individuals to access justice. [48]

In conclusion, it is the considered view of the policy that where the TDRMs fail to adhere to the minimum human rights standards in terms of their obligations of process as well as obligations of results, it is incumbent upon the Judiciary, through its mandate under Article 159(2)(c) to engage with and appropriately intervene by deploying the Human Rights Framework proposed by the Policy in order to respect and protect the other rights which might potentially be violated by the TDRMs while simultaneously transforming TDRMs to be respectful of the human rights.[49]

d) Interpreting the Repugnancy Clause

The policy recognizes that Kenya legal framework has retained the repugnancy clause *(i.e. 'repugnant to justice and morality or results in outcomes that are repugnant to justice or morality')* under Article 159(3)(b) of the Constitution and Section 3(2) of the *Judicature Act* cap 8 of laws of Kenya.[50] This is read together with the Article 2(4) of the Constitution, which provides that any law, including customary law that is inconsistent with the

[47] Ibid No.46 page 18
[48] Alternative Justice System Policy, Executive Summary page 18
[49] Alternative Justice System Baseline Policy page 18
[50]The '*repugnancy clause'* is retained under Section 3(2) Judicature Act, Cap 8 and Article 159(3) of the Constitution of Kenya 2010 which provides that TDRMs will only be applicable *if they are not repugnant to justice and morality'*

Constitution is void. The policy deliberately offers a progressive interpretation on this clause.

The policy argues that it is apparent that the limitation placed on the application of customary law to civil matters under the *Judicature Act* cannot be permissible under the Constitution. It is the progressive lens through which the doctrine of repugnancy should be viewed.

The policy asserts that the progressive character of the Kenyan Constitution requires Courts to give new meaning to Article 159 of the Constitution. The policy insists that compliance with the call of Article 259 of the Constitution will be critical in meeting this goal.[51]

The policy insists that the repugnancy clause should neither be seen as a stumbling block, nor be allowed to constitute a supervising doctrine for customary law. It beseechs litigants and Courts to reject the "civilization mission" approach. The policy argues that the repugnancy clause ought to be viewed as a building block towards access to justice and promotion of the rights set out in the Bill of Rights. This is the lens via which Courts should view the repugnancy clause. [52]

The policy argues that the repugnancy limit in the Constitution can also be said to be redundant as Article 153(3) of the Constitution subjects the use of traditional dispute resolution to the Bill of Rights, the Constitution and any other written law. The policy asserts that the redundancy is based on the breadth and coverage of constitutional rights in the bill of rights. The policy argues that it is difficult to see why a repugnancy clause based on justice and morality is still present yet the Kenyan Constitution prides itself in having a robust Bill of Rights. [53]

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[51] This article requires the Constitution to be interpreted in a manner that—
(*a*) promotes its purposes, values and principles;
(*b*) advances the rule of law, and the human rights and fundamental freedoms in the Bill of Rights;
(*c*) permits the development of the law; and
(*d*) contributes to good governance.
[52] Alternative Justice System Baseline Policy, page 21
[53] Alternative Justice System Baseline Policy, page 21

The policy arguing against the application of the repugnancy clause states that; the net effect of the application of the clause is that it renders it easy for any party challenging the decision of an AJS forum such as TDRMs to allege that the process did not comply to '*justice and morality'* or it 'results in outcomes that are repugnant to justice or morality'.[54]

Premised on this understanding the policy asks several vital and rhetorical questions :Whose morality are we going to base our analysis on?[55] What is the applicable standard? Which test(s) should we draw on? What amounts to justice? The policy argues that these are some of the questions that will need to be fleshed out, at the outset. [56]

The policy states that failure to adopt this approach when interpreting the repugnancy clause will set the bar for challenging an AJS decision very low. The consequence of this is that it is counterproductive as Courts will be clogged with challenges from AJS decisions which is an unintended consequence.[57]

The policy argues that customary law is dynamic, not static. Hence it is simplistic to assume that these laws are the way they were when the colonialists first came to Africa. Courts must come to grips with this reality. Judges and Magistrates must adopt a view that is consistent with the modern times. The policy argues that adopting this dynamic approach proposed by the policy will ensure customary law endures.[58]

e) *Key Areas of Intervention:*

To promote application of AJS like TDRMs the policy has identifies the following five key areas of intervention and implementation[59]:

i) To recognize and identify the nature of cases AJS mechanisms

[54] Article 159(3)(b) of the Constitution.
[55] See Roscoe Pound, 'Law and Morals-Jurisprudence and Ethics', (1945) 23(3) *North Carolina Law Review.*
[56] Alternative Justice System Baseline Policy, page 21
[57] Ibid No. 56, page 22
[58] Alternative Justice System Baseline Policy, page 22
[59] Alternative Justice System Policy, Executive Summary page xviii

can hear.

ii) Strengthening the processes for selection, election, appointment and removal of AJS practitioners.

iii) Develop Procedures and Customary Law jurisprudence.

iv) Facilitate Effective intermediary interventions.

v) Strengthened and Sustainable Resource Allocation and Mobilization.

The policy to a great extent addresses main challenges facing the application of TDRMs in resolving dispute and ensuring access to justice.

4.0 Recomendations

Whereas, the traditional justice systems draw their inspiration from well-defined cultural structures of various communities, the underlying frameworks and principles of the traditional justice systems are similarly well defined. Since the traditional systems are operational within the context of a broader formal justice system to which it is not well aligned, this has given rise to gaps that reflect in effectiveness and impact of these traditional justice systems.

There is therefore a need for organizations and stakeholders that are working with traditional justice mechanisms to enhance awareness and sensitization on human rights, gender and the law.

Since the traditional structures almost invariably all start off from the point of male domination, it is important for the promotion and protection of the rights of women in the processes and judgments of the traditional justice systems. To effectively incorporate the principles of equality and non-discrimination in the actualization of Article 159 (2) (c) and (3) of the Constitution of Kenya 2010, the structure of the traditional justice systems must embrace the 2/3 principle to ensure that men and women are represented. As it were, some structures such as the Kuria have no female members.

Previously, the lack of recorded proceedings has been a challenge in follow up of the cases to ensure that the decisions of the elders are adhered to. The elders now record the proceedings and have the parties sign the agreements or decisions. The elders also ensure that the proceedings are typed and these have

been used in inheritance cases that have proceeded to the formal justice system.

The elders are currently not paid and are working with non – governmental organizations in the traditional justice system who are funded to do the work. This would also minimize the instances of actors engaging in corruption to ensure that their cases are heard and determined favorably. This is particularly important if the traditional justice systems are to be incorporated into the formal justice system since the latter operates on the basis of a well-defined and financed structure. This would facilitate the provisions of administrative support for the traditional justice systems.

To better align the work of the traditional justice systems with the Constitution, there is need for more training on the Constitution especially on the Bill of Rights and how it relates with the work that they do. The elders would also benefit from training on all the other aspects of the Constitution, including Chapter 5 on land, for a greater understanding of this fundamental document on which their work must be invariably be based to bring into effect Article 159 (2) (c) and (3) of the Constitution.

5.0 Conclusion

TDRMs like Maslaha play a seminal role in promoting access to justice in Kenya. As such, their application in our justice system is vital. Buttressing this, the Alternative Justice System Policy opines that majority of Kenyans resolve their disputes through alternative justice systems like TDRMs. It is premised on this understanding that there is need to promote TDRMs in Kenya especially through enabling legislations, progressive interpretation of the legal provisions that seek to promote TDRMs by courts and sensitization of the public on the need to adopt TDRMs in resolving their disputes.

The question has always been: Does enacting more legislation to promote application of TDRMs in Kenya take away the informality nature of TDRMs, which make them attractive to citizens?

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17. www.nation.co.ke/news/Matiangi-warns-chiefs-mediating-rape-cases/1056-4322400-format-xhtmlhpy4b2/index.htm

18. Roscoe Pound, 'Law and Morals-Jurisprudence and Ethics', (1945) 23(3) *North Carolina Law Review*

A Grand Strategy for Kenya is Timely – Lessons from Elizabeth 1

By: ***Caroline Shisubili Maingi****

Abstract

Since March 2020, something happened in Kenya that would change the course of things perhaps permanently. The 'country stopped'. It was already happening elsewhere in the world and has created a period we now call 'new normal'. This is the current pandemic caused by the COVID 19 virus. Whilst the 'new' is quickly experienced, the 'normal' is strange and will take a while before humanity adapts. This calls for an urgent new grand strategy that will see the hard and bad times manageable in anticipation for better ones. Kenya, a country to reckon with in the East African Community and the Horn of Africa, needs to employ the best possible approaches in coordinating military expertise, political influence, diplomatic capability, and economic force, within a consistent national strategy that will address the current situation. How the Leadership deals with the present determines how the near future unfolds, a period everyone is looking forward to. This paper goes back into history to tap into the reign of Elizabeth 1 (1533 – 1603) whose grand strategy was hailed in the 16th Century in order to draw some lessons to apply to Kenya's current situation. Her strategy was intentioned and focused. It comprised military capability[1], building alliances, assembling a good inner team known as the Privy Court and political calculations that an excellent negotiation skill. Her reign would last for over 40 years at a time when women were neither heads of states nor commander in chiefs.

1. Introduction

This study utilizes a historic case study approach. Making reference to Elizabeth I's grand strategy, the study explores five key areas of her grand strategy that relate to events in the leadership and governance of Kenya while

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[1] Eltis, David. "77i* Military Revolution in Sixteenth Century Europe." (1995).

paying attention to the prevailing situation induced by the pandemic. The basis for the Kenyan case is premised in an article written in one of the Kenyan dailies by a renowned diplomatic historian Macharia Munene[2] in August 2018. Written two years back, it is still as relevant. In it Munene notes that Kenya urgently needs a grand strategy for emerging issues such as regional geopolitics, state of the military, maritime forces and its level of preparedness towards national emergencies such as the current pandemic.[3] In many other articles by Munene that are cited, there are clear propositions on what Kenya can do to craft a grand plan that would steer the country to a new level.

Every country needs a grand strategy and thus, smart leaders have deliberately developed grand strategies throughout history. This is enabled by effective national leadership. In doing that, most of them have effectively executed them and have accomplished political, economic and social cultural goals and sometimes religious objectives. As this process is immensely complex, not all leaders have been successful, and that is perhaps what Kenya as a country is undergoing. The actions of leaders at the highest level may have failed to attain the country's ends. It bears examination, then to look into Kenya's grand strategy and evaluate while bearing in mind to learn a thing or two from Elizabeth I's grand strategy. Elizabeth I has been hailed as a leader whose grand strategy brought back England's glory. Likewise, Kenya needs to restore its glory that is slowly slipping away in recent times. In that vein thus, Kenya can draw lessons from Elizabeth I's reign applying them to the current situation hence contributing to a newer, better and stronger grand strategy to bring Kenya back to its place in the region.

[2] Prof *Macharia Munene* teaches history and international relations at United States International University - Africa.

[3] Macharia Munene, "Kenya needs a grand plan to stay ahead of others," The Standard, Monday August 20, 2018, p 14

2. Strategy

From time immemorial, the word strategy has been applied and experienced by people of all civilizations albeit it referred to different meanings. If one goes by the meaning of a plan, then people have always planned. If the meaning of strategy is the art of planning and directing an operation, then this has always been carried out as people from ancient times have had conflicts and wars. These are great empires like the Mauryan in ancient India, or the times of Sun Tzu.

In political lexicon, the word strategy has been evolving. The present-day application of the word is traced back to ancient Greece where it referred to the art and skill of The General. That original recapitulation is what in present day stands for tactics.[4] Beatrice Heuser, one of the contemporary scholars in strategy traces the word to late 16th century when it first came to be used in discussions on military affairs.[5] Its broader meaning is however developed in the 20th century where it is applied retrospectively to the past practitioners. When scholars are researching on how warfare was staged in the past, they employ this term as it enables them to explore continuities in practice as they make comparisons on them over time.

Lawrence Freedman is another scholar who dedicated a whole book on Strategy. He builds up from Heuser when he states that in order to achieve political objectives, one has to utilize military means.[6] It is therefore clear that the word strategy cannot be detached from military affairs. Taking a different view, Cohen Eliot defines strategy in the context of threat and force to achieve policy ends.[7] Cohen further adds that strategy should be used as a steady bridge connecting the political purpose and the military power. Therefore, up until WW1 strategy had a precise military character. The meaning eventually

[4] Beatrice Heuser, *The Evolution of Strategy*, Cambridge, UK: Cambridge University Press, 2010, p. 4;
[5] Beatrice Heuser, *The Evolution of Strategy*, and *The Strategy Makers: Thoughts on War and Society from Machiavelli to Clausewitz* (Santa Barbara, CA: Praeger Security International, 2010).
[6] Freedman, Lawrence. "The Meaning of Strategy: Part I: The Origin Story (November 2017)." *Texas national security review* (2017).
[7] Cohen Eliot A., "A Revolution in Warfare, *Foreign Affairs*," March/April 1996, pp. 37-54.

broadened to include other areas in academia such as sports and business strategy. Currently, military strategy[8] is a subcategory of the broader field.

Strategy is significant for all countries as it provides a theory of success. Functioning plans aimed at converting trifling military capabilities into suitable combat against the enemy are rooted in strategy. By this, strategy performs a conversion function. Richard Rosseau on this point, stresses that the strategist must convert military power into political benefit.[9] The demands of strategy calls for silent growth. When there is victory, one needs to adapt themselves to the newly created situation and plan on the next action. Strategy then becomes a system of maneuvers[10]. In the wake of COVID 19 pandemic, Kenya has had to literally convert the military into an instrument for order, for peace and for security, strategies that should reap political mileage for the leadership in the end.

3. Grand strategy

Grand Strategy literally means a plan that is holistic, complete and vast in all ways. These Grand plans are held and pursued by the highest levels of a state mainly to defend the national interests. If national interests are well safeguarded, they provide a platform for external projection in international relations and foreign policy. For every country, a grand strategy is required especially in emergencies, but with a longer term projection. In Kenya, this is 'that particular time'. An extraordinary time.

In that vein, Tami Biddle states that using a combination of instruments of power such as the diplomatic, the economic and the military, grand strategy identifies and articulates how to achieve a given political actor's objectives.[11] America calls this National Security Strategy (NSS). Lindel Hart referring to

[8] It was used in other contexts during the 19th century, but (as with revolutionary strategy) with a military analogy in mind. For the history of the concept see Lawrence Freedman, *Strategy: A History* (New York: OUP, 2013).

[9] Rousseau, Richard. "Strategic Perspectives: Clausewitz, Sun-tzu and Thucydides." (2012). pp 75

[10] Helmuth von Moltke, *Moltke on the Art of War*, edited by Daniel J. Hughes (Novato, CA: Presidio
Press, 1993), 47.

[11] Biddle, Tami D. *Strategy and grand strategy: What students and practitioners need to know*? Army War College-Strategic Studies Institute Carlisle United States, 2015.

the NSS, states that to achieve policy outcomes, one has to use all assets in a country in a coordinated way.[12] A seamless coordination needs a grand plan.

In addition to Hart, there are other key scholars who have mastered the grand strategy narrative. Elizabeth 1's grand strategy is like what Clausewitz would write on years later. In his 'On War', he explains his theory; that all military prowess points to one goal; that of attaining the political objective of the war. Clausewitz's writings continue to impact the issue of grand strategy in many states. At the heart of his theory is the triad of i) a strong passion – for the enemy ii) fortune, opportunity and risk – much like the activities of the army and its commander and iii) motive – that translates into policy.[13] In other words, defeat the enemy, take possession of their resources and win public support.

During Elizabeth I's reign, Spain was always a country to watch, more of a foe than an ally. Having applied the tactics similar to those presented by Clausewitz, Elizabeth realized victory in her grand plan as compared to Phillip II of Spain. One major strategy was to fortify England's place in relation to Continental Europe. Further, it is curious that one of her grand plans was tied to her remaining spinster and with no child. Like that, she was able to focus on the exercise of power without being drawn into wars for successional reasons.[14]

Other scholars share similar propositions albeit different periods in time. In early 1980's, Barry Posen defined grand strategy that became fundamental for later authors. Grand strategy, for Posen, is that collection of military, economic, and political means and ends with which a state attempts to achieve security. It is "a political - military, means - ends chain, a state's theory about how it can best cause' security for itself."[15] Similarly, for Hal Brands, a grand strategy is "an integrated scheme of interests, threats, resources and policies"

[12] B.H. Liddell Hart, *Strategy: The Indirect Approach* (London: Faber and Faber, 1967), 31, 336.
[13] Clausewitz, On War, op. cit., 89.
[14] Groves, Bryan N. "The Multiple Faces of Effective Grand Strategy." *Journal of Strategic Security* 3, no. 2 (2010): 1-12.
[15] Barry R. Posen, *The Sources of Military Doctrine: France, Britain, and Germany Between the World Wars* (Ithaca, NY: Cornell University Press, 1984), 7, 13.

that represent a "conceptual framework that helps nations determine where they want to go and how they ought to get there."[16]

John Lewis Gaddis defines grand strategy as 'aligning potentially unlimited aspirations with necessarily limited capabilities' and highlights the persistent error of focusing on the former while ignoring the latter. Gaddis suggests that they two attributes should be combined. That means a focus on primary goals while responding realistically to the prevailing circumstances. By this, he describes grand strategy "the calculated relationship of means to large ends. It's about how one uses whatever one has to get to wherever it is one wants to go."[17]

Nina Silove contrastingly pokes into these definitions by stating that there is 'no true' definition of grand strategy but rather a series of equally justifiable conceptions. This statement is supported by her argument that differing ideas of grand strategy can be classified according to whether the scholars view such strategies as a plan for action or a set of theoretical or organizing principles, or a pattern of behavior.[18] Appalled, scholars have termed those assertions as relativistic.

4. Kenya needs a grand strategy

In times of crisis, what counts is the leadership's ability to rise up to restore the public's confidence. For the pandemic crisis in Kenya thus far, the President and his Ministers have demonstrated this aspect. Munene informs us that the 20th century has had a few such leaders. During the great depression, Franklin D. Roosevelt came up with a New Deal to deal with the economy. Using radio, he effectively restored public confidence. Likewise, Winston Churchill used the radio with inspiring speeches to recapture the British Empire's trust during the World War II, making a tough situation appear surmountable. By recasting the relationship between politics and economic theories, Nestor Kirchner of Argentina stabilized the country's economy. Kenya experienced smooth transition from colonialism to independence as

[16]Brands, Hal. *What good is grand strategy? Power and purpose in American statecraft from Harry S. Truman to George W. Bush*. Cornell University Press, 2014.
[17] Gaddis, John Lewis. *On grand strategy*. Penguin Books, 2019.
[18] Nina Silove, "Beyond the Buzzword: The Three Meanings of 'Grand Strategy,' " *Security Studies* 27, no. 1 (2018): 27–57.

Jomo Kenyatta exuded enough authority. This is despite the reputation that he was a Mau Mau chief.[19] Presently in Kenya, it is time Kenyatta's son, Uhuru to craft a grand strategy that will see the country triumph through the COVID 19 pandemic and the consequences thereof.

Independent Kenya prides itself for being a democratic state that has regular elections, with their attendant hiccups and often punches above its geopolitical weight[20]. Kenya is a beautiful country in Africa that acts as a benchmark and a reference point to many African countries. This is because of many factors such as its geopolitical position, its progress in democracy, its use of English language and touristic features. Kenya is a country that has been relatively peaceful in the region while brokering peace to other countries such as South Sudan. The peace period was put to test following the violence that erupted in 2007 that saw lots of deaths and displacements of people. The once peaceful country was shaken to its core and its people pushed to the brink. Other than the active violence that was witnessed–Kenyan people have complained of significant injustices, lack of delivery of services and goods, poor infrastructure to support an upcoming democracy and politicization of many sectors to the detriment of the citizenry such as education and health. Despite these factors however, Kenya and Kenyans have been resilient. They fight on, and forge means and ways that propel them forward.

Currently, Kenya needs a grand plan in order to stay ahead of other countries in the East African Community and in the Horn of Africa. Kenya needs to reclaim and go beyond its eroding position of pre-eminence. Munene affirms that 'the essence of "grand strategy" is a big vision to achieve and sustains long-term objectives by overcoming potential obstacles and threats to national interests'[21]. There is need for massive education on national interest, the concept and application, to involve the three branches of government. Each branch needs exposure on the value of the others to the state and the national well-being. For this to happen, suspicion and bad faith needs to be shunned

19 Macharia Munene, "Uhuru must now show his leadership mettle", The Standard, 23 March 2020

20 Forein affairs Principle Secretary Macharia Kamau presentation at the Auditorium of the United States International University, Nairobi, Wednesday, January 9, 2019

21 Macharia Munene, "Kenya needs a grand plan to stay ahead of others," The Standard, Monday August 20, 2018, p 14

down to enable the ability to think big, to think 'grand strategy'.[22] Munene, in his article states that when there is a call for a grand strategy undertaking, it is because there is a serious disappointment or there are threats to perceived interests of specified geopolitical units. Further, he explains that threats can be of war or military in nature, but they can also be geopolitical, economic, and socio-cultural.[23] Kenya is experiencing the same issues as well; there is a deadly pandemic that has caused a myriad of problems in the country mainly on the economy and education, there is tiff with the horn especially the maritime border and the Djibouti issue, diplomatic rows between Kenya and Tanzania. These interests that are threatened by creeping structural, cultural, and political challenges calls for an urgent Kenyan Grand Strategy.

5. Lessons from Elizabeth 1

History has shown us that when there is a noxious problem ailing a society, there needs to be a robust plan to counter the ills of that problem. The counter measure plans should be double stronger than the problem, that is the only way to defeat it. Then, Elizabeth I seemingly inherited a country that was ailing following the death of Mary Tudor. She needed to do something to prevent the country from losing itself. Some may have objected to her ascension to power given she was the half-sister to Mary Tudor, and thus no clear succession line.

Elizabeth, daughter of King Henry VIII and his second wife Anne Boleyn was born in 1533 and died in 1603. Elizabeth's mother was guillotined when she was two years old. That execution was ordered by her father the King, having been accused of adultery and conspiracy[24]. At age 25, upon her half-sisters Mary Tudor's death, she became Queen. She claimed the throne despite having been declared illegitimate through political machinations. She would rule for 45years. Perhaps following the fact that she never married, she was known by other names such as the Virgin Queen and or Queen Mary. Elizabethan Age is a period in history that is traced back to her. This is an age

[22] Macharia Munene "Conflicts among the three arms of government in Kenya: Issues, problems and Prospects." Discussion paper no. 2. November 2018

[23] Macharia Munene, "Kenya needs a grand plan to stay ahead of others," The Standard, Monday August 20, 2018, p 14

[24] Biography.com Editors. Queen Elizabeth I Biography. https://www.biography.com/royalty/queen-elizabeth-i Access date. March 16, 2020

when England proclaimed itself strongly as a major European power in politics, commerce and the arts[25]. Elizabeth was a long serving queen, governing with relative steadiness and prosperity.

The issues she encountered and had to deal with included a plaque, maritime wars, diplomatic rows and a complex of church and state all compounded by dissident voices in her government that did not subscribe to her school of thought and therefore hindering development in any way.

Upon Elizabeth's death, many of her subjects lamented, but others were relieved[26]. This is a common occurrence when a person dies, and more so leaders of states as they are known far and wide, and have as many friends as enemies. King James took over the leadership of England following Elizabeth I's death. However, a nostalgic revival of the Elizabeth I's cult happened when expectations placed on King James upon her death were not met.[27] It is like realizing the key role played by a leader after they are gone. This has happened in Kenya with the demise of the late president Moi. In the meantime, Elizabeth I had inherited a myriad of problems initiated by her half-sister Mary. The war with France for instance proved very expensive to the English people. Upon her death, and the citizens' realization that she had been a good leader, some of her achievements were revived.

5.1 London Plague of 1563 - On the Corona Virus pandemic

16th c was a tough period for London. In 1563, London was hit by a plague that led to the deaths of at least 20,136 people from the city and its environs.[28] The outbreak was devastating. It has been noted that around 24% of London's

[25] John S. Morrill and Stephen J. Greenblatt , Elizabeth I, Encyclopedia Britannica, Inc., December 18, 2019https://www.britannica.com/biography/Elizabeth-I March 16, 2020

[26] Loades, David. *Elizabeth I*. A&C Black, 2003.

[27] Somerset, Anne. *Elizabeth i*. Macmillan, 1992.

[28] Nichols, John (1823). *The Progresses and Public Processions of Queen Elizabeth, Among which are Interspersed Other Solemnities, Public Expenditures, and Remarkable Events During the Reign of that Illustrious Princess*. John Nichols, F.S.S Lond. Edina. & Perth. Retrieved 5 May 2019.

population ultimately perished[29], the plague affected London's insanitary parishes and neighborhoods the most[30].

By every standard, a similar event is currently happening in Kenya dating back to March 2020. The emergence of the 2019 novel coronavirus (COVID-19) infections that were first observed in China in December 2019[31] have rapidly spread the whole world. It has become a global emergency, given its impact on the entire world population especially the health and the economy sectors. This is nothing anyone expects, worse still, leaders of affected countries.

By comparison therefore, it is crucial to critically examine what Elizabeth I did that Kenya can learn. Immediately the plague was confirmed, Queen Elizabeth's government gave new orders that all households with infected individuals should have their windows and doors locked up and for forty days, no persons inside the houses should dare make contact with persons outside[32]. President Kenyatta in an effort to minimize the spread, declared a dawn to dusk curfew and intercountry lockdown in the country. Kenyan citizens have to bear with this, as hard it is–it is after all perhaps the best way to manage the spread of the virus.

Another measure the Queen took was to move the Royal Court to Windsor Castle and while there, erected gallows in the market squares. She threatened to hang anyone who followed them from London. As human as she was, fearing contagion, she prudently banned the transportation of goods into Windsor from London. In hind sight, this was harsh of a leader given her people were scared, suffering and dying. However, it can be argued that a leader needs as much as possible, to stay alive to steer the direction of his or her country.

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[29] London Plagues 1348-1665" *www.museumoflondon.org.uk*. Museum of London. 2011. Retrieved 12 May 2019.

[30] *Kohn, George (ed.). Encyclopedia of Plague and Pestilence: From Ancient Times to the Present (3 ed.). InfoBase Publishing. p. 229. Retrieved 12 May 2019.*

[31] Lu, Hongzhou, Charles W. Stratton, and Yi-Wei Tang. "Outbreak of pneumonia of unknown etiology in Wuhan, China: The mystery and the miracle." *Journal of medical virology* 92, no. 4 (2020): 401-402.

[32] Creighton, Charles (1891). *A History of Epidemics in Britain*. Cambridge, UK: Cambridge University Press. pp. 315–317

This issue of delivery of goods and services is challenging in Kenya's day to day economy, where many of its citizens work for a minimum wage of less than a dollar a day, with most living from hand to mouth. This amidst an impending economic crisis, remains a challenge for the Kenyan Leadership to tackle. The president needs to quickly move from employing abstract economic theories and jump into the boldness of advanced political economy thinking. This being an extraordinary time calls for extraordinary measures. It is perhaps an ideal time to discourage imports and encourage local manufacturing. The corona virus pandemic has demanded global leadership and individual policy ingenuity. While no country escapes health induced disarray, few have the stamina and the brilliance to act right. So far, Kenya's health response has been commendable. However, its economic policy response needs recasting[33]. A good leader must make changes in government if necessary such as forming committees, empowering country governments so as to ensure the economy does not collapse as a result of the pandemic.

Munene deliberates that a strategic leader should display statecraft dexterity in pulling his or her country through difficult situations. Further, he states that leaders win or lose depending on focus, farsightedness, the right temperament, and having ability to balance aspirations and capabilities while tackling the unexpected. He affirms that great leaders figure out how to enhance capabilities rather than let available capabilities limit their aspirations[34]. High policy makers with little sense of statecraft can easily expose themselves and the country, thereby becoming a great liability to national security. Leaders desiring to make their countries globally felt tend to be visionaries and develop grand strategies in which they remain focused while balancing resources with ultimate objectives despite anticipated and unexpected obstacles[35].

[33] Macharia Munene, "Uhuru must now show his leadership mettle", The Standard, 23 March 2020

[34] Macharia Munene, "Kenya needs a grand plan to stay ahead of others," The Standard, Monday August 20, 2018, p 14

[35] Macharia Munene, "Horn of Africa: Western powers' battleground", The Standard. February 4, 2020

5.2 Defeat of the Armada - The Kenya Maritime borders

During Elizabeth I reign, there were tensions between Spain and England. Each of these countries would want to come out victorious. The winner would have to be strategic and that is what England's Elizabeth I did. At the beginning of her reign, Elizabeth I had very few ships. She nevertheless was keen to ameliorate the strength of her military and the navy was one of the areas she fully funded continuously. She spent more on her navy than any other European Monarch during peace times. She thus was ready to face Spain's Grand Armada with about 34 ships[36].

At the time, the ships built by Elizabeth I were special since she employed new technology. It was a revolutionary technique that became a blue print for all the ships at the time. This was a grand strategy – the ships were lighter and nimbler that enabled for greater speed and heavy armament. In the same vein, she employed the earlier revolutionary technology of her father's gun founders to make iron canons that were vastly cheaper. Thus, they were produced en masse and used at war[37].

The Spanish's invisible Armada was an enormous 130- ship naval fleet. In 1588 it was dispatched by Spain as part of the invasion to England. However, Elizabeth I and her army outfoxed it on the way back to Spain. There were many storms that battered it leading to the ship sinking and getting damaged[38]. As much as her popularity with the people was enhanced, the relationship with Phillip II of Spain was dented.

In the recent times, Historians have taken a more intricate view of Elizabeth I in view of the battles. As much as her reign is famous for the defeat of the Armada military failures on land and at sea are pointed out[39]. Even in Ireland, despite the fact that her forces ultimately prevailed, her tactics trained her record[40]. Strategically evaluating advice from her key advisors, Elizabeth

[36] Parker, 93; also:http://www.the-tudors.org.uk/tudor-navy.htm (last accessed, 3 May 2011).
[37] Parker, Geoffrey. "If the Armada had landed." *History* 61, no. 203 (1976): 358-368.
[38] www.history.com › topics › british-history › spanish-armada
[39] Haigh, Christopher. "Elizabeth I, [1988]." *Londres et New York: Longman Pearson* (2000).
[40] Black, John Bennett. *The reign of Elizabeth, 1558-1603*. Pickle Partners Publishing, 2018.

ended England's war with France and Spain and hence forth avoided clashing with other super powers of her time.

One of the techniques Elizabeth I sought was to use her guidelines in decentralized execution of her grand strategy. She counted on commanders Lord Howard and Sir Drakes to "harass"[41] the Spanish Armada utilizing the point Clausewitz referred to as the 'culminating point.'[42]. That meant that she timed the point when the enemy was vulnerable and decisively engaged. The measure of allowing the commanders to act with full freedom enabled them to develop tactical and operational means. By doing this, they were able to postpone Spanish invasion by a year.[43] Thus with Spanish errors and poor weather in the high seas, the English came out victors. She calculated, she was rational in her approach – and this grand strategy proved more successful that Phillip II. In that regard she exemplified her understanding of Clausewitz principle 'determining political aim then making means to accomplish it [44].

What can the leadership in Kenya learn from this? It is important to note that the maritime issues Kenya is experiencing are not about a real war in the sea or invasions like happened in Europe. However, if the people mandated to sort them do not act quickly, the tensions may escalate to active conflict. Making reference to Munene's elucidation on these, Kenya's marine issue can be summarized into two main complications. Firstly, Kenya is facing Somali irredentism of the sea, which as Munene put it, is supported by foreign powers such as the United Kingdom (UK), United Arab Emirates (UAE), and Qatar among others. Historically, Africa's security thinking has kept a keen interest to the terrestrial domain as opposed to the maritime[45]. Munene cites trust issues inherent in frameworks like the 'Yaoundé Code of Conduct[46], adding that partnering with foreign powers is euphemism for aid. Since the

[41] Garrett Mattingly, *The Armada*, (New York: Houghton Mifflin Company, 2005), 200–232.
[42] Howard and Paret, *On War*, 582.
[43] Mattingly, *The Armada*, 93–109.
[44] *The Prince*, p. 22. See also Unger, *Machiavelli*, pp. 33–34.
[45] Maritime Border Challenges and Implications on Security: The Kenya-Somalia Dispute in Perspective. An Experts' Symposium. Report. September 2019. Nairobi
[46] A framework for repressing piracy, armed robbery of ships, illicit maritime activity in West and Central Africa

importance of access to the sea is increasing, Kenya has to watch and change such mentalities.

Secondly, there are strange geopolitical reconfigurations that arise out of the discovery of huge quantities of such natural resources as oil and gas in the sea. Because of lack of strategy at the Sea and an inchoate maritime security, Kenya has experienced major obstacles in piracy. That puts Kenya at unfavorable position because sea resources are then lost to sea powers who simply ignore weak states. The problems only increase when Somalia, giving prospecting oil and gas concessions to corporations from hegemonic states, seemingly gained enough ability to 'adjust its map', for the Kenya Somali border in such a way as to claim the resources in Kenyan waters[47]. The reason the Europeans pushed Somalia to encroach on Kenyan waters and sea wealth was partly because Kenya has no recognizable maritime force. With the real threat coming from the sea, the perceived maritime weakness was an invitation to sea irredentism. Kenya's commitment to two things would help to avoid becoming other countries' created realities. First, adjust sense of national priorities to create maritime industry and undertake serious naval build up. Second, mount serious questioning of Euro using the Somali proxy to rearrange Kenya's sea geography. Push for the establishment of the Coast Guard with enough reach in the deep sea[48].

The East African Community - EAC regional block can play a significant role in this. The EAC has to be aware of its strengths and weaknesses when it comes to securing core regional interests and planning on ways to protect them. In addition, the block needs commitment to the national and regional wellbeing. The heads of states of the region have to support in the election of credible, capable and committed policy makers with influence. It can make the people internalize the Indian Ocean as being critical to the regional survival and therefore help to make them "own" maritime security[49].

[47] Macharia Munene, "Why Blue Economy matters to us, Africa. The Standard. 26th November 2018

[48] Macharia Munene. "Strong navies crucial to Africa's coastal defences". The Standard. 29th July 2019

[49] Macharia Munene. "Let's Boost EA Maritime Security". The Business Daily. Monday, May 6, 2013.

5.3 Elizabeth I's appreciation of art and poetry – Education in Kenya

England's Golden Age or Elizabethan England were names coined mainly to refer to the reign of Elizabeth 1. It was an era of beauty! An era when peace and prosperity, when arts had a chance to blossom with Elizabeth's support. She scheduled for relaxation time where she enjoyed music and play of the lute. In line with watching plays, the queen promoted the works of Shakespeare and Malowe. In fictitious forms, Authors of the era paid homage to the Queen. Poetry was also encouraged.[50] In Kenya, it would be about the education system. Blending what worked during the Elizabethan era, Kenya has a duty to critically analyze underlying patterns and causal mechanisms that worked and how best we can approach it and or improve it.

Currently there are two concurrent national educational systems in Kenya. Besides that, private entities and international schools employ other systems all for the learner, imparted by the teacher. Here, the point of contention lies in the deep rooted philosophical concepts of schooling and learning. Such action is constrained by factors that are explicitly recognized.

Munene, in his analysis of the recent pronouncements from the Ministry of Education office highlights that the love for schooling and not learning has held the country back in terms of education.[51] The minister, in view of the prevailing pandemic announced that the country has lost an academic year, the year 2020, and that there shall be no national exams. This statement has myriad effects to the person and the country, that it calls for its own study. For this purpose, however, the issue is that the country lacks a grand strategy when it comes to the education of its people. Emphasis as Munene puts it should be on learning, and not schooling even though the two are closely related but not the same. The government is obsessed with national institutions that drive the government approved curriculum – that has its own issues. The whole schooling concept goes back to colonial times different aspects of schooling for Africans in the name of education. What has happened in schools is a stress on conformity and forced amnesia, not free-thinking.

[50] Biography.com Editors. Queen Elizabeth I Biography. The Biography.com website. Original Published April 2, 2014. Last Updated February 7, 2020

[51] Macharia Munene, "Love for schooling and not learning is holding us back," The Standard, July 20, 2020

Munene points to the fact that the Kenyan education system seemingly ignores such thinking and value adding disciplines as history. Most leaders act a though they missed lessons in ethics and were thus miseducated. Munene insists that national self-confidence erosion is reason for Kenya to recast the educational system stressing on units such as statecraft, history, and values[52]. Subjects such as critical thinking, history and philosophy should be taught all through the schooling of a student so that they know the sequence of events in the country are known.

There is an urgent need for Kenya to embrace critical thinking, creativeness and innovation. This will shift the preoccupation with schooling to learning. Munene reiterates that the Ministry of Education's decree that students lose a whole academic year is 'school' thinking and not 'education' thinking.[53]

Psychologists have come out in arms to stress the repercussions this will have on roughly one quarter of the Kenyan population. It is part of a grand strategy to give hope and not stagnation and despair as the Ministry of Education has. The Elizabethan grand strategy could be a useful way of blending history, philosophy and political science to Kenya's current situation.

5.4 Elizabeth 1 relations with other States – Kenyan foreign Policy and diplomacy

Queen Elizabeth I realized yet another grand strategy in her diplomatic engagements. During her reign, a British imperial diplomatic system was created due to the emergence of new institutions and patterns in English diplomacy. The European landscape was changing in various sectors including the religious, political, economic and military. That required a dynamic administration of England's foreign policy of which Elizabeth I crafted new alliances to manage disputes. In the end, there were close alliances with old time enemies such as France and Scotland albeit have

[52] Macharia Munene, "Kenya needs a grand plan to stay ahead of others," The Standard, Monday August 20, 2018, p 14

[53] Macharia Munene, "Love for schooling and not learning is holding us back," The Standard, July 20, 2020

created a foe in Spain which had been England's ally during Mary Tudor's reign.[54]

Elizabeth I practiced a defensive foreign policy which elevated England's status abroad. She had cultivated a triumphalist image towards the end of her reign, against a background of division and military and economic difficulties which the people had taken at face value.[55] Once, Pope Sixtus V remarked at how she made herself feared by the empire, by Spain and by France.[56] As Christendom fragmented, England gained a new sense of sovereignty and self-confidence since she had returned to England and back to Protestantism under the state. Established the English church that helped shape a national identity that remains in place to date[57]. Her legend was adapted to the imperial ideology of time during the Victorian era.[58] As recently as the mid-20th century, Elizabeth was made a romantic symbol of the national resistance to foreign threat.[59] Historians of that period, such as J. E. Neale (1934) and A.

L. Rowse (1950), interpreted Elizabeth's reign as a golden age of progress. To mark the Elizabethan age as a renaissance, a symbol of Britannia was used. First in 1572 then onwards as an inspiration to national pride through classical ideals, international expansion and naval triumph over the Spanish.[60]

Grand strategy can be understood as a reconciliatory art of means and ends. It is important to note that Kenya's foreign policy is driven by ideas demonstrated into *'visions'.* First vision that stands out is 'a peaceful, prosperous and globally competitive Kenya'. The second one more nationalistic goal is the significance of 'national values and aspirations of the

[54] Fett, Denice. "Elizabethan Diplomacy." *The Encyclopedia of Diplomacy* (2018): 1-9.
[55] Haigh, Christopher. "Elizabeth I, [1988]." Londres et New York: Longman Pearson (2000).
[56] Somerset, Anne. Elizabeth i. Macmillan, 1992.
[57] Hogge, Alice. God's Secret Agents: Queen Elizabeth's forbidden priests and the hatching of the Gunpowder Plot. Harper Collins, 2005.
[58] Loades, David. Elizabeth I: the golden reign of Gloriana. National Archives UK, 2003.
[59] Neale, John Ernest. The Elizabethan political scene. G. Cumberlege, 1945.
[60]Boundless World History. Authored by**:** Boundless. Located at**:** https://www.boundless.com/world-history/textbooks/boundless-world-history-textbook/. License**:** *CC BY-SA: Attribution-ShareAlike*

Kenyan people', as enshrined in the constitution of Kenya. Lastly, is the then grand idea 'vision 2030' which aimed at obtaining medium plans that are so significant for the country such as the advancement of economic prosperity of Kenyans and projection of Kenya's image and prestige among others. Kenya Foreign Policy report was released in November 2014 after consultative meetings which the bodies concerned. Five years later, the proposals captured in the document continue to guide and shape the foreign policy and the diplomatic activities of the country. The findings in the report will inform this section of the article.

Kenya foreign policy is aims to strategically place the country in the international arena, by employing a pragmatic approach, informed by several principles to ensure that it efficaciously cements reciprocally beneficial alliances with the West while constructively engaging the East through its policy of positive economic and political non-alignment.[61] This is essence is a means of creating peace and stability, in addition to fostering economic growth in Kenya and the wider African community. Conversations to enhance the relations with the Horn of Africa, Tanzania, EAC are underway, and should from part of the grand strategy. Again, since vision 2030 has been taken over by other *visions* such as the Building Bridges Initiative and the president's Agenda.

5.5 Reclaiming Protestantism - On the Church and State in Kenya

Mary Tudor's Church invented the Counter-Reformation. During her reign, and using any means necessary, Mary had worked to restore England to Roman Catholicism. As a result, she was named Bloody Mary as a result of ordering the execution of many protestants as heretics. The incinerations terrified most of them into superficial conformism leading to minority convinced protestants.[62] When Elizabeth ascended to the throne, there was great tension between different religious factions. In her swift action, during

[61] Kenya, R. o. (2014, November). Kenya Foreign Policy. Retrieved April 22, 2016, from http://www.mfa.go.ke/wp-content/uploads/2016/01/Kenya%20Foreign%20Policy.pdf

[62] Houlbrooke, Ralph. "Fires of faith. Catholic England under Mary Tudor. By Eamon Duffy. Pp. xiv+ 249 incl. frontispiece, 6 maps and 1 graph+ errata slip and 30 colour plates. New Haven–London: Yale University Press, 2009. £ 19.99. 978 0 300 15216 6." *The Journal of Ecclesiastical History* 61, no. 4 (2010): 855-856.

the first session of Parliament in 1559, she would re-establish the Church of England by first, calling for the passage of the Act of Supremacy and second the Act of Uniformity which created a common prayer book creating a church that is under the state, ruled by Elizabeth 1 then[63]. Rome viewed this in the dimmest sense possible and in 1570, excommunicated Elizabeth.

As part of her strategy, she would take a moderate approach to the divisive religious conflict in her country and worked towards coexistence. She firmly stated that there was one Jesus Christ, and that the rest were disputes over trifles. This approach of letting Catholics and Protestants coexist enabled her to focus on her grand plan as it minimized all public religious squabbles. Nyerere adopting this approach, managed to effectively rule Tanzania. He managed to find a way for different religious factions to coexist in Tanzania. Although Elizabeth was praised as a heroine of the Protestants cause and the ruler of a golden age, it is stated that Catholics did suffer persecution under her reign as much as James was depicted as a Catholic sympathizer, presiding over a corrupt court.[64] The people chose Elizabeth over the King. The picture of Elizabeth painted by her Protestant admirers of the early 17th century has proved lasting and influential[65]. The main reason why this period was idealized is that the crown, church and parliament had worked in a constitutional balance[66].

What then can Kenya learn from this? To effectively frame a grand strategy, a leader has to balance means and ends in addition to setting realistic goals while setting aside necessary resources to achieving those goals. It is essential to realize that Kenya's colonial past is less than 100 years old during which it has faced events that have drastically transformed its people. The error of colonialism was terrible, it brought dissimilar people with radically different cultures under one umbrella for easy governance – the divide and rule

[63] Jew Jr. "Church and State in England." *Journal of Church and State* (1967): 305-316.
[64] Strong, Roy. *Gloriana: the portraits of Queen Elizabeth I*. Vol. 581. Random House, 2003.
[65] Haigh, Christopher. "Elizabeth I, [1988]." *Londres et New York: Longman Pearson* (2000).
[66] Dobson, Michael, and Nicola Watson. "Elizabeth's Legacy." *Doran, Susan, Elizabeth: The Exhibition at the National Maritime Museum, London: Chatto and Windus* (2003).

approach. All the dictates that would be imposed became acceptable and formed part of ordinary life of Kenyans.[67] In his book *'culture and religion conflict'*, Munene states that in that time, African's reluctantly accepted Christianity as a new religion. This created problems of identity as one was to state if they accepted it or chose to keep their culture. Besides, there were divisions among the various denominations that led to confusion. The conflicts that arose within the church either led to resignation and or cultural compromises. These compromises not only worked for church, but also for the Africans and the colonial administration.[68]

Attempts to impose a particular faith on others, currently common with the rise of *faith* terrorism, looks new but it is as old as the development of religion. It embraces *faith exclusivity* and makes claims of faith universalism. This is imperialism which is an abuse of faith and tends to generate a sense of insecurity[69]. Pope Francis stresses the value of listening to the opposing side, calls for "healthy realism" which rejects dogmatism and rigid idealism.[70] For him, therefore, involvement in exclusivity, dogmatism or rigid idealism is heretical and abuse of faith that would often lead to unacceptable violence. This accommodative stand is more inclusive rather than exclusive to diverse religious forces that would likely reduce the abuse of faith as an excuse for violence or conflicts or wars.

6 Conclusion

Each specific country needs its strategy at the time of need. Various strategies can differ depending on the sector in a country such as the foreign affairs, education, borders among others. The so called micro strategies calumniate to the macro ones. This is the time for Kenya!

On education, the current situation aroused by the pandemic has had all stakeholders in the education sector in dialogue. This is a good thing. There

[67] Munene, Macharia. "Culture and religion in conflict management." (1997).
[68] Munene, M. (1997). Culture and Religion in Conflict Management. Africa Media Review, 11(3), 25-39.
[69] Macharia Munene. "Abuse of Faith and State". Faiths and (in) security in Africa conference, July 4-8, 2016. St. Paul's University
[70] Rose Scammell, "Pope Francis: A 'my-way-or-the-highway' faith is heretical," in religious News Service, June 9, 2016 http://religiousnews.com/2016/06/09/pope-francis-a-my-way-or-the-highway-approach-to-faith-is-heretical/accessed 8/14/2016

is an urgent need to rethink exams in Kenya. Perhaps an assessment of students can suffice other than being subjected to a national exam that holds all Kenyan junior and senior learners at ransom. Further, perhaps the student's whose schools moved to remote online learning should have progressed. This would make sense for business continuity. There would have been a few freshmen in Kenyan campuses and a few learners in secondary schools. If the famous 'Laptop Project' would have been implemented, perhaps there would have been more students plugged online. That is a strategy that did not take off, and in retrospect, has had major consequences. Perhaps the new curriculum already rolling out in the country that offers a different approach to learning should not be sabotaged, but supported by stakeholders and learners as well. Perhaps it is time to disentangle self from colonial approaches to education and embed African culture while staying focused on the globalized world.

Regional cohesion is a strategy Kenya needs to take up so as to strengthen the East African Community (EAC). EAC needs an identity that can be achieved by expediting the free movement of goods and services through the borders. Peace efforts with Tanzania, Somalia, Ethiopia and Djibouti through diplomatic means can be an ongoing.

Kenya can leverage on a great many treasures it has access to such as the peaceful coexistence of the people, of the church and state and of ethnic groups albeit some conflicts from time to time. The country can leverage on the Indian Ocean and on the Mombasa Port. Importantly, and something that is not highlighted, Kenya is highly digitalized with high internet speeds in comparison with its counterparts in the region.

In 2019 during an interview, Manfred Honeck[71] stated that the *'loudest sound in the world cannot top the energy of silence'*. With the prevailing circumstances created by the pandemic, the World, the Country Kenya is somewhat silent. Are the Leaders listening? Are they strategizing? One thing that cannot be wished away is that for a grand plan to be actualized, there has

[71] Manfred Honeck is an Austrian conductor and Music Director of the Pittsburgh Symphony Orchestra.

to be good will on the part of every citizen and more so, those at the helm of leadership. Their activities have to be directed for a common good.

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Parker, 93; also:http://www.the-tudors.org.uk/tudor-navy.htm (last accessed, 3 May 2011).

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Conference Papers

Foreign affairs Principle Secretary Macharia Kamau presentation at the Auditorium of the United States International University, Nairobi, Wednesday, January 9, 2019

Macharia Munene. "Abuse of Faith and State". Faiths and (in) security in Africa conference, July 4-8, 2016. St. Paul's University

Exploited, Poor and Dehumanised: Overcoming the Resource Curse in Africa

By: ***Kariuki Muigua****

Abstract

Despite its huge wealth of natural resources, the African continent remains largely underdeveloped with majority of its population poor and living in dehumanizing conditions. While these resources would naturally be expected to spur growth and development, the opposite has been the reality for Africans. The Continent has been afflicted by natural resource-based conflicts resulting from either scramble for scarce resources or the fight for control and management of abundant resources. This is what is often referred to as 'natural resource curse'. This paper critically discusses the challenge of natural resource curse in Africa and offers some recommendations on how best the African countries can overcome the challenge and utilise their resources to promote growth and development for their people.

1. Introduction

There is documented evidence from majority of resource-rich countries, especially those endowed with depletable natural resources (i.e. fuels, ores, minerals and metals), which suggests that resource riches can be a ‘‘curse’’ rather than a ‘‘blessing’’.[1] It has been observed that while one might expect to see better development outcomes after countries discover natural resources, resource-rich countries tend to have higher rates of conflict and authoritarianism, and lower rates of economic stability and economic growth, compared to their non-resource-rich neighbors.[2] This paper explores the topic

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[1] Tsani, S., Natural resources, governance and institutional quality: The role of resource funds,’ *Resources Policy*, 38(2013), pp.181–195, p. 181.

[2] Natural Resource Governance Institute, “The Resource Curse: The Political and Economic Challenges of Natural Resource Wealth,” *NRGI Reader*, March, 2015, p. 1. Available at

of resource curse in Africa which has led to the exploitation and dehumanization of African people who struggle with high levels of poverty despite most countries in the Continent being rich in diverse natural resources that would have otherwise uplifted the livelihoods of these people.

2. The Resource Curse Phenomenon and Natural Resource-Based Conflicts

Natural resource conflicts may be divided into two broad types: Type one conflict encompasses situations where armed conflict is financed or sustained through the sale or extra-legal taxation of natural resources, and Type two conflict results from competition over resources among various groups.[3] Normally, it is countries with environmental and natural resources scarcity that are faced with a high risk of conflicts and even violence. Environmental scarcities greatly affect populations, including violent conflicts in many parts of the developing world.[4] Considering that in many parts of the poor and developing world, natural resources form the main source of livelihood for the majority of the poor communities. As a result, any conflicts relating to access and control of these resources are usually more devastating in these poor societies since they are less able to buffer themselves from environmental scarcities and the social crises they cause.[5]

On the other hand, there are natural resource based conflicts that arise from the abundance of resources in a country. Indeed, many oil-, gas- and mineral-rich countries, have failed to reach their full potential as a result of their natural resource wealth. In general, they are also more authoritarian, more prone to conflict, and less economically stable than countries without these resources.[6]

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https://resourcegovernance.org/sites/default/files/nrgi_Resource-Curse.pdf [Accessed on 26/5/2020].

[3] United States Agency for International Development (USAID), 'United States Agency for International Development (USAID), 'Conflict over Natural Resources at the Community Level in Nepal Including Its Relation to Armed Conflict', May 2006 , p. v. Available at *pdf.usaid.gov/pdf_docs/PNADF990.pdf*[Accessed on 27/5/2020].

[4] Homer-Dixon, T.F., "Environmental scarcities and violent conflict: evidence from cases," *International security* 19, No. 1 (1994): 5-40 at p. 6.

[5] Ibid., p.6.

[6] Natural Resource Governance Institute, "The Resource Curse: The Political and Economic Challenges of Natural Resource Wealth," *NRGI Reader*, March, 2015, p. 1. Available at

The two approaches that have been proposed to explain the role of natural resources in conflict include scarcity (sometimes called the neo-Malthusian view) and abundance.[7] The 'resource curse' phenomenon, also commonly referred to as the 'Dutch Disease' or the *paradox of plenty* refers to the failure of many resource-rich countries to benefit fully from their natural resource wealth, and for governments in these countries to respond effectively to public welfare needs.[8]

Under the scarcity theory, a number of challenges which include rapid population growth, environmental degradation, resource depletion, and unequal resource access combine to aggravate poverty levels and income inequality in many of the world's least developed countries, and such deprivations are easily translated into grievances, increasing the risks of rebellion and societal conflict."[9] An example of areas experiencing scarcity problems in Kenya is Turkana County which has been documented as one of the Counties with the highest level of poverty in Kenya[10], and with the distrust between local communities around the region against each other[11] leading to constant conflicts as well as cross border conflicts.[12] The conflict is largely

https://resourcegovernance.org/sites/default/files/nrgi_Resource-Curse.pdf [Accessed on 26/5/2020].

[7] United States Institute of Peace, *Natural Resources, Conflict, and Conflict Resolution*, A Study Guide Series on Peace and Conflict For Independent Learners and Classroom Instructors, 2007, p.8.

[8] Natural Resource Governance Institute, "The Resource Curse: The Political and Economic Challenges of Natural Resource Wealth," *NRGI Reader*, March, 2015, p. 1. Available at https://resourcegovernance.org/sites/default/files/nrgi_Resource-Curse.pdf [Accessed on 26/5/2020].

[9] Ibid., p.8.

[10] *Turkana County –United Nations Joint Programme 2015-2018*, (Executive Office, Turkana County Government, Lodwar, Turkana UN Resident Coordinator Office, Nairobi, Kenya), p. 4. Available at https://info.undp.org/docs/pdc/Documents/KEN/ProDoc%20Turkana-UN%20Joint%20Programme%20final%205th%20%20March%202015-binder%20%282%29.pdf [Accessed on 27/5/2020].

[11] Bollig, M., "Ethnic Conflicts in North-West Kenya: Pokot-Turkana Raiding 1969—1984." *Zeitschrift FürEthnologie* 115 (1990), pp. 73-90. http://www.jstor.org/stable/25842144. [Accessed on 27/5/2020].

[12] Johannes, E.M., et al, 'Oil discovery in Turkana County, Kenya: a source of conflict or development?' *African Geographical Review*, Vol. 34, No.2, 2015, pp.142-164, p. 142.

attributed to livestock rustling, harsh climate and boundary dispute. A scramble for the scarce resources has often led to poverty and even violent and armed conflict.[13]

On the other hand, it is commonly expected that countries that are rich in natural resources such as oil and gas can base their development on these resources, and use them as a key path for sustained economic growth.[14] However, that is not always the case. There are a good number of countries that have huge reserves of natural resources but are far from being considered economically stable and/or even successful.[15] Thus, those who view abundance as a problem argue that it is in fact resource abundance, rather than scarcity, that is the bigger threat to create conflict, often referred to as the "resource curse"—corruption, economic stagnation, and violent conflict over access to revenues.[16]

Apart from the adverse effect of the conflict on the environment, the illegal trade of minerals bars communities from benefiting from its resources.[17]

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[13] 'Wangari Maathai-an excerpt from the Nobel Peace Prize winner's Acceptance Speech,' *Earth Island Journal*. Available at http://www.earthisland.org/journal/index.php/eij/article/wangari_maathai_an_excerpt_from_the_nobel_peace_prize_winners_acceptance_sp/ [Accessed on 27/5/2020].

[14] Badeeb, R.A., Lean, H.H. and Clark, J., "The evolution of the natural resource curse thesis: A critical literature survey." *Resources Policy* 51 (2017): 123-134, at p. 123.

[15] 'Why Natural Resources Are a Curse on Developing Countries and How to Fix It - The Atlantic' <https://www.theatlantic.com/international/archive/2012/04/why-natural-resources-are-a-curse-on-developing-countries-and-how-to-fix-it/256508/> accessed 28 May 2020; 'Few Developing Countries Can Climb the Economic Ladder | St. Louis Fed' <https://www.stlouisfed.org/publications/regional-economist/october-2015/trapped-few-developing-countries-can-climb-the-economic-ladder-or-stay-there> accessed 28 May 2020; Van der Ploeg, F., "Africa and natural resources: managing natural resources for sustainable growth." (2008), available at https://www.economics.ox.ac.uk/images/Documents/OxCarre_Policy_Papers/oxcarrepp200801.pdf [Accessed on 27/5/2020].

[16] United States Institute of Peace, *Natural Resources, Conflict, and Conflict Resolution*, A Study Guide Series on Peace and Conflict For Independent Learners and Classroom Instructors, 2007, p.8.

[17] See 'Diamonds in Sierra Leone, A Resource Curse?' available at http://erd.eui.eu/media/wilson.pdf [Accessed on 27/5/2020]; Kinniburgh, C., 'Beyond "Conflict Minerals": The Congo's Resource Curse Lives On,' *Dissent Magazine*, Spring 2014, available at https://www.dissentmagazine.org/article/beyond-conflict-minerals-the-congos-resource-curse-lives-on [Accessed on 27/5/2020]; Free the

Communities expect that availability of environmental goods and services in their region will improve their livelihoods by 'real' development, which may not always be the case.[18] Poor and low economic development[19] and consequently, failed economies result in conflicts,[20] as a result of environmental and natural resources' bad governance or mismanagement.[21] Skewed distribution of benefits from natural resources and other environmental goods may fuel social exclusion and conflict, threatening sustainability.[22]

As far as the abundance theory is concerned, rent-seeking models assume that resource rents can be easily appropriated hence encouraging bribes, distorted public policies and diversion of public towards favour seeking and corruption,[23] which is a threat to protected human security.[24] Natural and

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Slaves, 'Congo's Mining Slaves: Enslavement at South Kivu Mining Sites,' *Investigative Field Report,* June 2013. Available at https://www.freetheslaves.net/wp-content/uploads/2015/03/Congos-Mining-Slaves-web-130622.pdf [Accessed on 27/5/2020].

[18] Sigam, C. & Garcia, L., *Extractive Industries: Optimizing Value Retention in Host Countries*, (UNCTAD, 2012). Available at http://unctadxiii.org/en/SessionDocument/suc2012d1_en.pdf [Accessed on 27/5/2020].

[19] See Billion, P., *Wars of Plunder: Conflicts, Profits and Politics,* (New York: Columbia University Press, 2012).

[20] Maphosa, S.B., *Natural Resources and Conflict: Unlocking the Economic dimension of peace-building in Africa.* ASIA Policy brief Number 74, 2012.

[21] Billion, P., *Wars of Plunder: Conflicts, Profits and Politics*. (New York: Columbia University Press, 2012.); See also Wiebelt, M., et al, 'Managing Future Oil Revenues in Uganda for Agricultural Development and Poverty Reduction: A CGE Analysis of Challenges and Options,' (Kiel Working Paper No. 1696, May 2011). Available at https://www.ifw-members.ifw-kiel.de/publications/managing-future-oil-revenues-in-uganda-for-agricultural-development-and-poverty-reduction-a-cge-analysis-of-challenges-and-options/kap-1696.pdf [Accessed on 27/5/2020].

[22] Saboe, N.T., 'Benefit Sharing Among Local Resource Users: The Role of Property Rights,' *World Development*, Vol. 72, pp. 408–418, 2015, p. 408.

[23] Tsani, S., Natural resources, governance and institutional quality: The role of resource funds,' *Resources Policy*, 38(2013), pp.181–195, p. 184.

[24] Alao, A., *Natural Resource Management and Human Security in Africa,* in Abass, A., *Protecting Human Security in Africa* (ISBN-13: 9780199578986, Oxford University Press, 2010); Lawson, T. R. & Greestein, J., 'Beating the resource Curse in Africa: A global Effort,' *Africa in Fact,* August 2012. Available at http://www.cfr.org/africa-sub-saharan/beating-resource-curse-africa-global-effort/p28780 [Accessed on 27/5/2020].

environmental resources exploitation is capable of degenerating into a war. Effective governance of these resources is thus necessary for security and peace. Thus, competition for scarce resources, as well as inequality in access to accruing environmental benefits where there are abundant resources, both have the effect of heightened animosity and potential cause for violence.[25]
The natural resource-based conflicts often arise from the different uses for such resources such as forests, water, pastures and land, or the desire to control or manage them. While environmental factors are rarely, if ever, the sole cause of violent conflict, the exploitation of natural resources and related environmental stresses can be implicated in all phases of the conflict cycle, from contributing to the outbreak and perpetuation of violence to undermining any prospects for peace.[26] Disagreements arise when different groups' interests and needs are incompatible, or when the priorities of some user groups are not considered in policies, programmes and projects. There are four conditions that may influence how access to resources could become contested. These are: the scarcity of a natural resource; the extent to which two or more groups share the supply; the relative power of those groups; the degree of dependence on this particular resource, or the ease of access to alternative sources.[27] Such conflicts are especially usually prevalent among pastoralist and agricultural communities who are usually faced with challenges which arise from the constant shrink in the land they use for these practices.

3. The Resource Curse in Africa: So Much yet so Little

Some scholars have rightly argued that mineral endowment in Africa is a "resource curse" rather than a blessing mainly because of the corrupt collusion of African political elites and some of the so-called "investors" in the mining sector.[28] This has resulted in the continued African continent's struggle with

[25] See Muigua, K., Kariuki, F., Wamukoya, D., *Natural Resources and Environmental Justice in Kenya*, Glenwood Publishers, Nairobi, 2015.
[26] United Nations Environment Programme, 'From Conflict to Peacebuilding: The Role of Natural Resources and the Environment,' p. 5.
Available at *http://www.unep.org/Themes/Freshwater/PDF/FromConflict_to_Peacbuilding.pdf*[Accessed on 27/5/2020].
[27] Engel, A. & Korf, B., 'Negotiation and mediation techniques for natural resource management' (FAO, Rome, 2005), p. 22.
[28] Mupambwa, G. and Xaba, M.B., "Chapter Ten "Investors" or Looters? A Critical Examination of Mining and Development in Africa." *Grid-locked African Economic*

development issues.[29] For instance, extractive industries, particularly in sub-Saharan Africa, have been associated with increasing levels of political, social, technical and environmental risk.[30] This has been the case in countries like Sudan, Democratic Republic of Congo[31] and Nigeria where there have been eruption of internal armed conflict as a result of their rich natural resources as well as significant environmental degradation.[32] A degraded environment leads to a scramble for scarce resources and may culminate in poverty and even conflict.[33] Notably, environmental degradation may be as a result of either overexploitation of resources or total disregard for the environmental laws by corporations especially in the extractives industry. In Nigeria, despite the oil revenue, poverty rates are generally higher and infrastructure is poorer in the oil-rich states and there is disproportionate allocation of such funds.[34] It has been documented in the past that while oil exports had fuelled real GDP growth of over 5 per cent a year in Nigeria, the official unemployment rate

Sovereignty: Decolonising the Neo-Imperial Socio-Economic and Legal Force-fields in the 21st Cen (2019): 292.

[29] Ibid.

[30] Alstine, J.V., et al, Resource Governance Dynamics: The Challenge Of 'New Oil' In Uganda, *Resources Policy*, Vol. 40, 2014, pp.48–58, p. 48; see also Lohde, L.A., *The Art and Science of Benefit Sharing in the Natural Resource Sector*, (International Finance Corporation, February 2015), p. 55. Available at https://commdev.org/wpcontent/uploads/2015/07/IFC-Art-and-Science-of-Benefits-Sharing-Final.pdf [Accessed on 27/5/2020].

[31] Samndong, R.A. & Nhantumbo, I., *Natural resources governance in the Democratic Republic of Congo: Breaking sector walls for sustainable land use investments*, (International Institute for Environment and Development Country Report, February 2015), p. 11. Available at http://pubs.iied.org/pdfs/13578IIED.pdf [Accessed on 27/5/2020].

[32] Ballet, J., et al, 'Social Capital and Natural Resource Management: A Critical Perspective,' *The Journal of Environment & Development*, Vol. 16, No. 4, December 2007, pp. 355-374, p. 367.

[33] 'Wangari Maathai-an excerpt from the Nobel Peace Prize winner's Acceptance Speech,' *Earth Island Journal*. Available at http://www.earthisland.org/journal/index.php/eij/article/wangari_maathai_an_excerpt_from_the_nobel_peace_prize_winners_acceptance_sp/ [Accessed on 27/5/2020].

[34] Shaxson, N., 'Nigeria's Extractive Industries Transparency Initiative: Just a Glorious Audit?' (Royal Institute of International Affairs, 2009), p. 4.

climbed from 15 per cent in 2005 to 25 per cent in 2011, and youth unemployment rates were estimated to be as high as 60 per cent.[35]

The relationship between industrial mining and communities in Ghana is complex and highly contested, because, despite macroeconomic growth fueled by the mining boom, Ghana remains a country with high rural poverty.[36] There have even been instances of misappropriation of mineral benefits distributed through the grassroots leaders, namely, village chiefs who are supposed to ensure that the funds are invested well for the benefit of the communities.[37] The result has been unending poverty despite the presence of resources.

It has been observed that unlike other resources, natural resources (i.e., oil, gas and minerals) do not need to be produced, but only extracted. Because the generation of natural resource wealth is not a result of production, it can occur relatively independently of other economic processes and does little to create employment.[38] As a result, the presence of these resources in a country does not always translate to job opportunities as demonstrated by the aforementioned countries.

The soda ash mining in Lake Magadi where the poverty and lack of investments in Magadi, after 100 years of exploitation of trona worth trillions of shillings, has been attributed to the lack of transparency in the governance of natural resources, corruption, and illegal outflows.[39] Thus, the locals, despite suffering adverse environmental effects from the mining activities, have not benefitted from the resources.

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[35] Africa Progress Panel, 'Equity in Extractives: Stewarding Africa's natural resources for all,' *Africa Progress Report* 2013, p. 31. Available at http://appcdn.acwupload.co.uk/wpcontent/uploads/2013/08/2013_APR_Equity_in_Extractives_25062013_ENG_HR.pdf [Accessed on 27/5/2020].

[36] Standing, A., 'Ghana's extractive industries and community benefit sharing: The case for cash transfers,' *Resources Policy*, vol. 40, 2014, pp.74–82, p. 75.

[37] Ibid.

[38] Badeeb, R.A., Lean, H.H. and Clark, J., "The evolution of the natural resource curse thesis: A critical literature survey." *Resources Policy* 51 (2017): 123-134, at p. 124.

[39] Kamau, J., "Magadi saga exposes the ugly side of capitalism," *Daily Nation*, Sunday April 21 2019. Available at https://www.nation.co.ke/news/Magadi-saga-exposes-the-ugly-side-of-capitalism/1056-5080906-2eii8rz/index.html [Accessed on 26/5/2020].

Natural resource conflicts mainly have to do with the interaction between the use of and access to natural resources and factors of human development factors such as population growth and socio-economic advancement.[40] One of the goals of the *Agenda 2030 on Sustainable Development*[41] is promoting human development. Natural resources are expected to contribute to national development, where development carries several dimensions which include:

Economic development, that is, improvement of the way endowments and goods and services are used within (or by) the system to generate new goods and services in order to provide additional consumption and/or investment possibilities to the members of the system; Human development, that is, people-centred development, where the focus is put on the improvement of the various dimensions affecting the well-being of individuals and their relationships with the society (health, education, entitlements, capabilities, empowerment etc.); Sustainable development, that is, development which considers the long term perspectives of the socio-economic system, to ensure that improvements occurring in the short term will not be detrimental to the future status or development potential of the system.[42]

Sustainable development is linked to the right to development, human rights and good governance, when it is described as sustainable human development. Sustainable human development focuses on material factors such as meeting basic needs and non-material factors such as rights and participation. It also seeks to achieve a number of goals which include, poverty reduction, promotion of human rights, promotion of equitable opportunities,

[40] Toepfer, K., "Forward", in Schwartz, D. & Singh, A., Environmental *conditions, resources and conflicts: An introductory overview and data collection* (UNEP, New York, 1999), p.4.

[41] United Nations, *Transforming our world: the 2030 Agenda for Sustainable Development*, Resolution adopted by the General Assembly on 25 September 2015, [without reference to a Main Committee (A/70/L.1)], Seventieth session, Agenda items 15 and 116, 21 October 2015.

[42] Bellù, L.G., 'Development and Development Paradigms: A (Reasoned) Review of Prevailing Visions,' (Food and Agriculture Organization of the United Nations, May 2011), p.3. Available at *http://www.fao.org/docs/up/easypol/882/defining_development_paradigms_102EN.pdf* [Accessed on 26/5/2020].

environmental conservation and the assessment of impacts of development activities.[43]

The *Agenda 21*[44], under Chapter 15 acknowledges that the current decline in biodiversity is largely the result of human activity and represents a serious threat to human development.[45]

Resource-based conflicts usually are a major threat to the sustainable development of natural resources in Africa and usually have the result of undermining economic development, sustainability and definitely human development.[46] Conflicts usually complicate the exploitation of the natural resources and as such there are usually no resulting benefits to the various parties. It is important to note that overdependence on natural resources is also a potential source of conflicts among communities in different countries especially when these resources get exhausted. It is thus imperative that countries diversify their economies in order to ensure that various sectors of the economy contribute to the well-being of the people and that other sectors of the economy are also given the importance deserved.

Kenya's development Blueprint, the *Vision 2030*[47], adopts sustainable human development as it seeks to address the economic, social and political pillars. It thus fosters both material factors and non-material factors.[48] Sustainable human development is, therefore, inextricably linked to people's livelihoods, and is thus requisite in moving towards environmental justice.

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[43] See generally Amartya S., *Development as Freedom* (Anchor Books, New York, 1999), pp.35-53; See also UNDP, *Human Development Report 2011, The Real Wealth of Nations: Pathways to Human Development*, (Palgrave Macmillan Houndmills, Basingtoke, Hampshire, 2011), p. (i)-12. This report defines sustainable human development as *the expansion of the substantive freedoms of people today while making reasonable efforts to avoid seriously compromising those of future generations*.

[44] *Agenda 21* (A/CONF.151/26, vol.II), adopted by the United Nations Conference on Environment and Development on 14 June 1992.

[45] Agenda 21, Para. 15.2.

[46] Abba Kolo, A., 'Dispute settlement and sustainable development of natural resources in Africa,' in Botchway, F. (ed), *Natural Resource Investment and Africa's Development* (Edward Elgar Publishing, 2011).

[47] Republic of Kenya, Kenya Vision 2030, Government of Kenya, 2007.

[48] Kenya Vision 2030, Government of Kenya, 2007.

Despite such ambitious development blueprints, which may be found in many other African countries, there is usually the risk of resource capture by the powerful elites in natural resource-rich countries, who are less likely to invest in productive enterprises, such as job-creating manufacturing industries, and instead pursue *rent-seeking*, that is, fight for control of these resources, or *rent-seizing*, that is, politicians or government officials purposefully dismantling societal checks or creating new regulations to get access to these resources or to provide access to friends or family.[49] Rent-seeking and rent-seizing promotes corruption and is damaging to institutional development.[50]

The mismanagement of resources and the resultant failure to invest in crucial socio-economic sectors such as education, job creation and health has led to low human development with Africa still recording high levels of poverty, diseases and illiteracy.[51] The *2018 UN report on Human Development* noted that South Asia was the fastest growing region during the period 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.[52] This is despite Africa being one of the richest in terms of natural resources wealth.

4. Overcoming the Resource Curse in Africa for economic and Human Development

Natural resource wealth is often expected to offer three large benefits for poor economies. First, the income stream from resource extraction can boost real living standards by financing higher levels of public and private consumption. Second, resource extraction can finance higher levels of investment, both directly out of natural resource income, and indirectly from borrowing made possible by that income. Third, since resource income typically accrues largely to the public sector, and indeed to the public budget, it can remove a huge barrier to development: the lack of fiscal resources needed to finance core

[49] Natural Resource Governance Institute, "The Resource Curse: The Political and Economic Challenges of Natural Resource Wealth," *NRGI Reader,* March, 2015, p. 4.
[50] Ibid, p.4.
[51] 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 26/5/2020].
[52] UNDP, UNDP. "Human development indices and indicators: 2018 statistical update." (2018): 22-25, at p.22.

public goods, including infrastructure.[53] Despite this, the natural resource curse has led to a situation where many countries in Africa and the Middle East rich in oil and other natural resources, have their people continuing to experience low per capita income and a low quality of life.[54]

Since minerals and hydrocarbons and indeed most natural resources are finite resources, developing countries rich in these resources should come up with strategies to harness the opportunities created with the extractive industries to support sustainable economic development.[55] It has been acknowledged that some resources such as oil, mineral and gas wealth is distinct from other types of wealth because of its large upfront costs, long production timeline, site-specific nature, scale (sometimes referred to as large *rents*), price and production volatility, non-renewable nature, and the secrecy of the industry.[56] However, there are a few success stories from the African continent and beyond that would offer valuable lessons to the other countries on how best they can utilise their resources to build their economies and uplift their people from abject poverty. Botswana is one such country.

4.1 The Case of Botswana: A Success Story

The extractives industry has promoted socio-economic development in some African countries without falling into the trap of resource curse. For instance, Botswana has extractive mineral industries that have played a crucial role in the development of the country. Through proper management of its resources and thus achieving a mineral-led economic growth, the country has been transformed from one of the poorest countries in the world at the time of independence in 1966 to an upper-middle income country.[57] Botswana mainly

[53] Badeeb, R.A., Lean, H.H. and Clark, J., "The evolution of the natural resource curse thesis: A critical literature survey." *Resources Policy* 51 (2017): 123-134, at p. 124.
[54] Ibid, p. 124.
[55] Claudine Sigam and Leonardo Garcia, *Extractive Industries: Optimizing Value Retention In Host Countries*, UNCTAD/SUC/2012/1 (New York and Geneva, 2012), p. 1. Available at https://unctad.org/en/PublicationsLibrary/suc2012d1_en.pdf [Accessed on 26/5/2020].
[56] Natural Resource Governance Institute, "The Resource Curse: The Political and Economic Challenges of Natural Resource Wealth," *NRGI Reader*, March, 2015, p. 1.
[57] Jefferis, K., "The role of TNCs in the extractive industry of Botswana," *Transnational corporations* 18, no. 1 (2010): 61-92 at p.61.

exports diamonds, as the world's largest producer in value terms, as well as copper and nickel.[58]

Botswana's record of mineral-led development is remarkable and the country is also considered to be relatively free of the corruption and environmental damage that is often associated with mining industries. Public finances are strong, debt is minimal, and the country enjoys investment-grade credit ratings.[59] It has been observed that Botswana's approach has not been based on offering low-tax incentives, but on a stable, open and transparent policy regime, free of corruption and political interference, that allows investors freedom to operate once agreements have been reached.[60]

Botswana has also achieved favourable balance of payments and fiscal positions. In addition, there has been great attention to how these revenues are spent, with an overriding objective of devoting mineral revenues – derived from the sale of a non-renewable asset – to investment in other assets (economic, social and financial) that will help to generate future economic growth.[61] In addition, significant financial reserves have been built up that enable the economy to get insulation against the economic shocks that may come with risks and uncertainties in mineral commodities.[62]

Despite scholarly evidence that mineral-dependent economies perform worse than other, otherwise similar economies across the gamut of development indicators and the argument that mineral dependent states have particularly low living standards, high poverty rates, and high income inequality, Botswana seems to have figured it out to go against the grain and achieved

[58] Ibid, p.61.

[59] Ibid, p.61; See also International Monetary Fund, Botswana: 2017 Article iv Consultation—Press Release; Staff Report, August 2017, IMF Country Report No. 17/249. Available at https://www.imf.org/~/media/Files/Publications/CR/2017/cr17249.ashx [Accessed on 26/5/2020].

[60] Jefferis, K., "The role of TNCs in the extractive industry of Botswana," *Transnational corporations* 18, no. 1 (2010): 61-92 at p.62.

[61] Ibid, p. 62.

[62] Ibid, p.62; See also Kojo, N.C., *Diamonds are not forever: Botswana medium-term fiscal sustainability*, The World Bank, 2010. Available at https://openknowledge.worldbank.org/bitstream/handle/10986/3962/WPS5480.pdf?sequence [Accessed on 26/5/2020].

high economic development through its mineral resources.[63] Other countries like Indonesia, Chile and Tanzania have also mitigated the resource curse effects of their substantial mineral sectors and used those sectors to achieve strong development outcomes in many areas.[64]

4.2 Utilising Natural resources to Address Poverty in Africa

The *Agenda 21*[65] which was adopted in 1992 to facilitate combating the problems of poverty, hunger, ill health and illiteracy, and the continuing deterioration of the ecosystems on which the human race depend for their well-being.[66] It provides that while managing resources sustainably, an environmental policy that focuses mainly on the conservation and protection of resources must take due account of those who depend on the resources for their livelihoods.[67] Otherwise, it could have an adverse impact both on poverty and on chances for long-term success in resource and environmental conservation.[68]

Sustainable exploitation, utilisation, management and conservation of the environment and natural resources and equitable sharing of the accruing benefits are key in fighting poverty and consequently, empowering communities for overall national development. The *2030 Agenda for Sustainable Development*[69] acknowledges that eradicating poverty in all its

[63] Dougherty, M., "A Policy Framework for New Mineral Economies: Lessons from Botswana," *Research Paper* C1-2011 (2011): 2; See also Limi, A., "Escaping from the Resource Curse: Evidence from Botswana and the Rest of the World." *IMF Staff Papers* 54, no. 4 (2007): 663-699.

[64] Ibid.

[65] (A/CONF.151/26, vol.II), United Nations Conference on Environment & Development Rio de Janeiro, Brazil, 3 to 14 June 1992, Agenda 21.

[66] Ibid, Preamble.

[67] Ibid, Clause 3.2.

[68] Ibid, Clause 3.2.

[69] United Nations, *Transforming our world: the 2030 Agenda for Sustainable Development*, Resolution adopted by the General Assembly on 25 September 2015, A/RES/70/1; See also United Nations General Assembly, "The road to dignity by 2030: ending poverty, transforming all lives and protecting the planet," *Synthesis Report of the Secretary-General on the post-2015 Sustainable development agenda*. A/69/700. para.45.

forms and dimensions, including extreme poverty, is the greatest global challenge and an indispensable requirement for sustainable development.[70] The mining sector and all other commercially viable resources in any country are expected to uplift the lives of its people by not only creating employment opportunities but also jobs through creating markets for local goods. One way of alleviating poverty in such regions would be empowering the local people through job opportunities such as direct employment opportunities or creating markets for the locally produced goods and services.[71] Income growth is touted as the main contributor to directly increasing the capabilities of individuals and consequently the human development of a nation since it encapsulates the economy's command over resources.[72] Improving levels of education and health should have priority or at least move together with efforts to directly enhance growth.[73] This would greatly contribute to alleviation of abject poverty in the continent.

4.3 Curbing Corruption: Need for Enhanced Accountability and Transparency in Resource Management and Governance

Despite its launch in 2009, the *Africa Mining Vision* which seeks to promote transparent, equitable and optimal exploitation of mineral resources is yet to have an impact on resource extraction activities in many other African countries as there are still rampant cases of illicit financial flows, lack of mineral value addition and poverty among communities living in mining areas.[74]

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[70] Ibid.

[71] See generally, Musawenkosi, N., "Does mining alleviate or exacerbate poverty: Are local community grievances really'Much Ado about Nothing'?" PhD diss., University of Cape Town, 2017. Available at https://open.uct.ac.za/bitstream/handle/11427/24930/thesis_com_2017_nxele_musawenkosi.pdf?sequence=1&isAllowed=y [Accessed on 26/5/2020]; Pegg, S., "Mining and poverty reduction: Transforming rhetoric into reality," *Journal of cleaner production*, Vol.14, no. 3-4 (2006): 376-387.

[72] Ranis, G., "Human development and economic growth." *Yale University Economic Growth Center Discussion Paper* 887 (2004), p. 2.

[73] Ibid, p. 10.

[74] Kitimo, A., "Call to adopt mining values and principles in East Africa," *The East African*, Saturday July 27 2019. Available at https://www.theeastafrican.co.ke/business/Call-to-adopt-mining-values-and-principles-in-East-Africa/2560-5212362-hwctkgz/index.html [Accessed on 26/5/2020].

One of the major reasons why the general public in many African countries do not benefit from the wealth of their countries is that they are not even aware of what is available in those countries. They entrust leaders with all the decision-making powers or even denied such rights in decision making and the leaders gladly engage in corrupt dealings with local and foreign investors thus benefitting only a few.

Some authors have convincingly argued that where there are adequate funds accruing from natural wealth, governments are likely to become immune to the citizenry's concerns and complaints and even become authoritarian. This is not new in Africa as some of the countries such as Democratic Republic of Congo with immense natural wealth have also had some of the worst internal conflicts. This has been explained in terms of taxation in that, in general, governments are more responsive to their citizens and are more likely to transition to democracy when government spending is reliant on citizen taxation.[75] However, when countries collect large revenues from natural resources, they are less dependent on levying taxes on citizens, and thus citizens feel less invested in the national budget.[76] In addition, politicians and government officials are also less directly tied to citizen requests or demands. Further, when resource revenues are secret, citizens do not have a clear sense of whether the resource revenues are being spent well or not.[77] The proponents of this theory thus suggest that the tendency toward authoritarianism can be mitigated by increasing transparency of revenues and strengthening the links between government and citizens through citizen participation in budgeting or direct distribution of wealth (e.g., cash transfers).[78]

It is thus important that the governance structures meant to enhance democratic space, accountability and transparency are strictly enforced. Courts have a great role in achieving such accountability and transparency in mining activities and other resource extraction deals in the country as a means of avoiding resource curse. Courts should also be strengthened in order to uphold the rule of law and promote openness, transparency and accountability.

[75] Natural Resource Governance Institute, "The Resource Curse: The Political and Economic Challenges of Natural Resource Wealth," *NRGI Reader,* March, 2015, p. 2.
[76] Ibid, p. 2.
[77] Ibid, p. 2.
[78] Ibid, p. 2.

They should not shy away from cancelling licensing deals that go against the national laws.[79]

The licensing processes should be beyond reproach and non-partisan. These decisions should not be left to one body. Anti-corruption bodies should also be well monitored and strengthened to ensure that they are independent enough to curb and prevent such practices.

4.4 Diversifying the Economy: Putting the Natural Resources income to proper Use

Natural resources can be used to jump-start economies and invest in the infrastructure, institutions, and quality public services needed to translate growth into human development, if managed in transparent, inclusive, and sustainable ways.[80] However, natural resources are often finite resources that must be utilised well when available to build a strong and diversified economy. However, this is not often the case since most resource-rich governments often get trapped in boom-bust cycles where they spend on legacy projects, over-spending on government salaries, inefficient fuel subsidies and large monuments and to underspend on health, education and other social services.[81] In addition, governments often over-borrow because they have improved credit-worthiness when revenues are high, a behaviour that was attributed to

[79] See Cortec Mining Kenya Limited v Cabinet Secretary Ministry of Mining & 9 others [2015] eKLR; cf. Mui Coal Basin Local Community & 15 others v Permanent Secretary Ministry of Energy & 17 others [2015] eKLR, Constitutional Petition Nos 305 of 2012, 34 of 2013 & 12 of 2014(Formerly Nairobi Constitutional Petition 43 of 2014) (Consolidated).

[80] Grynspan, R., "The role of natural resources in promoting sustainable development," Remarks for Rebeca Grynspan, Associate Administrator of UNDP on the occasion of the Opening of the 67th UN General Assembly side event on "The Role of Natural Resources in Promoting Sustainable Development" UN New York, 28 September, 2012, available at *http://www.undp.org/content/undp/en/home/presscenter/speeches/2012/09/28/rebeca-grynspan-the-role-of-natural-resources-in-promoting-sustainable-development-/* [Accessed on 27/5/2020].

[81] Natural Resource Governance Institute, "The Resource Curse: The Political and Economic Challenges of Natural Resource Wealth," *NRGI Reader,* March, 2015, pp. 2-3; Badeeb, R.A., Lean, H.H. and Clark, J., "The evolution of the natural resource curse thesis: A critical literature survey." *Resources Policy* 51 (2017): 123-134.

debt crises when revenues declined in Mexico, Nigeria and Venezuela in the 1980s.[82]

Botswana is a good example of how to avoid resource curse by properly managing the available mineral resources as well as diversifying the economy and avoiding over-reliance on extractives as a shock insulator against uncertainties in minerals, oil and gas prices in the international markets.

There is need for the African countries to use their resources to benefit their people through two pillars of production; accelerated economic growth, job creation and poverty alleviation, and sustainability; combatting climate change and controlling pollution and environmental degradation.[83] They should forge mutually beneficial alliances as well as meaningful inclusion of all the stakeholders, including communities as a way of ensuring that their citizenry is empowered in order to fight poverty.

African governments currently enjoying huge natural resources wealth in their countries can avoid the 'Dutch disease' by transforming resource revenue inflows into tangible investments, such as roads and electricity; using resource revenues to make investments in the economy that generate non-resource sector growth; or the government placing a portion of its resource revenues in foreign assets.[84] A diversified economy is more likely to withstand both internal and external shocks such as global commodity price deterioration and

[82] Natural Resource Governance Institute, "The Resource Curse: The Political and Economic Challenges of Natural Resource Wealth," *NRGI Reader*, March, 2015, p. 3.
[83] *Report on the Global Sustainable Blue Economy Conference 26th – 28th November 2018, Nairobi, Kenya*, p.3:
These were held in the context of the Leaders Commitment Segment, nine Signature Thematic Sessions, Business and Private Sector Forum, Governors and Mayors Convention, Science and Research Symposium, Civil Society Forum, Side Events and the Leaders Circle and Closing segments. Partnerships for financing, access to new technologies and innovations; capacity building, integrating women, youth and people in vulnerable situations and opportunities, priorities and challenges in the blue economy sectors were discussed as cross cutting issues (p.3.).
[84] Natural Resource Governance Institute, "The Resource Curse: The Political and Economic Challenges of Natural Resource Wealth," *NRGI Reader*, March, 2015, p. 3.

economic meltdown like the one currently occasioned by the Coronavirus (COVID-19) disease[85].

4.5 Managing Public Spending and Debt

It is not uncommon for African countries to become slaves of foreign countries through aid and takeover of the exploitation of their resources in order to repay huge debts that often accumulate through inefficient spending and borrowing to finance development projects and their governments' recurrent expenditure. Recently, China has been on the limelight for lending African countries such huge infrastructural loans that they become unable to repay prompting takeover of the extraction of some their natural resources as collateral. Indeed, this idea is not farfetched as China is already reported as having taken land in Tajikistan and a port in Sri Lanka in exchange for the waiving of outstanding debt.[86]

It is estimated that in the five years from 2012 to 2017, Chinese lending to sub Saharan African countries jumped to more than $10 billion a year, up from less than $1 billion in 2001.[87] During that period, China pledged billions of dollars to countries in loans, grants, and development financing as a way of extending their "win-win" economic policy by investing in railway, highway

[85] Fernandes, N., "Economic effects of coronavirus outbreak (COVID-19) on the world economy." *Available at SSRN 3557504* (2020); 'Complacency to Chaos: How Covid-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 on 27/5/2020].; 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 on 27/5/2020].

[86] 'Tajik Land Deal Extends China's Reach in Central Asia - Reuters' <https://www.reuters.com/article/us-tajikistan-china-land/tajik-land-deal-extends-chinas-reach-in-central-asia-idUSTRE72O1RP20110325> [Accessed on 27/5/2020]; Tripti Lahiri, 'The Specter of Sri Lanka's Debt Is Hovering over a Gathering of African Leaders in China' (*Quartz*) <https://qz.com/1377321/the-specter-of-sri-lankas-chinese-debt-is-hovering-over-a-gathering-of-african-leaders-in-china/> [Accessed on 27/5/2020].

[87] Abdi Latif Dahir, 'Chinese Lending to African Countries Jumped Tenfold in the Last Five Years' (*Quartz Africa*) <https://qz.com/africa/1463948/chinese-lending-to-african-countries-jumped-tenfold-in-the-last-five-years/> [Accessed on 27/5/2020].

and port projects besides industrialization.[88] The result has been a borrowing spree by African countries meant to allegedly boost their infrastructure, economic growth, and global competitiveness, a practice which has come under scrutiny in recent years, with critics noting they could encourage dependency, entrap nations in debt, and push debt limits to unsustainable levels.[89]

Countries such as Kenya, Zambia, Djibouti and Angola have reached critical levels of debt where it has been reported that Angola, for instance, services its debt to China by shipping specific quantities of oil.[90]

While these loans were meant to put up infrastructure that would generate enough income to repay the loan and boost the national coffers, there have been reported cases of corruption in management of these funds as well as economic non-viability of some of the projects. A good example is Kenya's Standard Gauge Railway (SGR) which has been reporting losses since it was operationalized or marginal profits, hardly enough to be self-sufficient in repaying the loans.[91]

There is a need for African countries to review their priorities in public expenditure and borrowing to minimise the risk of exposure. This will not only ensure economic stability but will also ensure that the available resources are

[88] Ibid.
[89] Ibid.
[90] Ibid.
[91] 'SGR Makes Sh10 Billion Loss in First Year: The Standard' <https://www.standardmedia.co.ke/article/2001288487/sgr-makes-sh10-billion-loss-in-first-year> [Accessed on 27/5/2020]; 'The Hits, Misses and Hopes of SGR Dream' (*Daily Nation*) <https://www.nation.co.ke/business/The-big-SGR-dream-begins-to-fizzle-out/996-5138766-97cb5gz/index.html> [Accessed on 27/5/2020]; 'CS Macharia Defends Loss Making SGR on Sentimental Value' (*Citizentv.co.ke*) <https://citizentv.co.ke/business/cs-macharia-defends-loss-making-sgr-sentimental-value-250788/> [Accessed on 28/5/2020]; 'SGR Raked in Sh10bn Revenue in First Year' (*Business Daily*) <https://www.businessdailyafrica.com/economy/SGR-raked-in-Sh10bn-revenue-in-first-year/3946234-5020294-13c0x1lz/index.html> [Accessed on 28/5/2020]; Julie Owino, 'SGR Profits Rise to Sh8.8 Billion from Sh3.7 Billion in 2019' (*Capital Business*, 17 January 2020) <https://www.capitalfm.co.ke/business/2020/01/sgr-profits-rise-to-sh8-8-billion-from-sh3-7-billion-in-2019/> [Accessed on 28/5/2020].

utilised to improve the lives of its people instead of repaying foreign debts. It will also reduce the risk of foreign capture of national resources as collateral.

4.6 Investing in Science, Technology and Innovation

The ability to generate scientific and technological knowledge and translate it into new products or processes is a key instrument of economic growth and development.[92] For the longest period, Africa has been a consumer of scientific knowledge, which underpins much of the technological capacities that fuel the knowledge economy: production and services based on knowledge-intensive activities that contribute to an accelerated pace of technological and scientific advance[93], rather than a contributor at the global level. This has often reduced it to a consumer of resultant goods and services from the rest of the world as opposed to a producer. Indeed, it is estimated that Africa produces a paltry 1% of the global scientific knowledge.[94] If Africa is to realise its development agenda and transact business with other continents as able partners, this trend must be addressed.

There is a need for Africa to invest heavily in science, technology and innovation for not only insulating their economies but also for development of strong value addition industries and information technology, among others. Science forms a strong basis for improvements in human welfare, through technologies which it develops for health, food production, engineering and communication.[95] In addition, science is also important in solving problems created by human activity, such as environmental degradation and climate

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[92] Mormina, M., "Science, technology and innovation as social goods for development: rethinking research capacity building from sen's capabilities approach." *Science and engineering ethics* 25, no. 3 (2019): 671-692, at p. 671.

[93] Ibid, at p. 674.

[94] Tom Kariuki, 'Africa Produces Just 1.1% of Global Scientific Knowledge - but Change Is Coming' *The Guardian* (26 October 2015) <https://www.theguardian.com/global-development-professionals-network/2015/oct/26/africa-produces-just-11-of-global-scientific-knowledge> [Accessed on 28/5/2020]; Elsevier, 'Africa Generates Less than 1% of the World's Research; Data Analytics Can Change That' (*Elsevier Connect*) <https://www.elsevier.com/connect/africa-generates-less-than-1-of-the-worlds-research-data-analytics-can-change-that> [Accessed on 28/5/2020].

[95] 'Why the World Needs to Embrace Science | World Economic Forum' <https://www.weforum.org/agenda/2015/12/why-the-world-needs-to-embrace-science/> [Accessed on 28/5/2020].

change.[96] Science, technology and innovation is considered key for future development strategies relating to innovation in products, services, business and social processes as well as models.[97]

Thus, science and technology are key to economic and social development, and African countries should pay more attention to development cooperation, building or developing research capacity. They should focus on developing scientists' technical competencies through training, with parallel investments to develop and sustain the socioeconomic and political structures that facilitate knowledge creation.[98]

4.7 Reviewing Resource Extraction Agreements

The extractive or mining industries generally have long been touted as key to anchor 'development' or 'economic growth' to alleviate poverty in developing countries.[99]

Despite this, many African countries have largely exhibited low levels of development and poor standards of living.[100] This has been attributed to various factors including exploitative multinational corporations, lack of expertise and corruption, and African countries negotiating unfavourable

[96] Ibid.

[97] Schaaper, M., "The Importance of Science, Technology and Innovation Indicators for Policy," *UNESCO Institute for StatisticsUNESCO Workshop on Surveys on Science, Technology and Innovation (STI) Policy Instruments, Governing Bodies, Policies and Indicators*, Harare, Zimbabwe7-8 November 2012. Available at http://www.unesco.org/new/fileadmin/MULTIMEDIA/HQ/SC/pdf/UIS-Schaaper_Harare.pdf [Accessed on 28/5/2020].

[98] Mormina, Maru. "Science, technology and innovation as social goods for development: rethinking research capacity building from sen's capabilities approach." *Science and engineering ethics* 25, no. 3 (2019): 671-692.

[99] Murombo, T., "Regulating mining in South Africa and Zimbabwe: Communities, the environment and perpetual exploitation," *Law Env't & Dev. J.*, 9 (2013): 31, at p.33.

[100] African Union, *Assessment of the Mining Policies and Regulatory Frameworks in the East African Community for Alignment with the Africa Mining Vision*, p. 2. Available at https://repository.uneca.org/bitstream/handle/10855/23538/b11580379.pdf?sequence=1 [Accessed on 28/5/2020].

mining development agreements, with the result that the Continent has received inadequate returns for its mineral wealth.[101]

Some governments often enter into exploitative agreements that result in minimal, if any, benefits accruing to their people or even the national coffers. The lopsided agreements lead to most of the income from the resources leaving the country, where most of the accruing profits from the extraction of the resources end up in the investors' home countries. The governments are unable to even benefit or even compensate the state and communities for depleting their resources and related environmental damage or loss of livelihood.[102] This often attributed to instances where countries are so eager to encourage resource extraction that they lower the rates for taxes and royalties without understanding the true value of their resources.[103] It is also noted that in capital-intensive (rather than labour-intensive) extractive industries, few non-tax benefits, such as jobs, accrue to locals. While expectations for local content, that is employment, local business development and improved workforce skills, are often very high, the actual number of opportunities may be few. The industry has a very low employment rate relative to the size of investments and those jobs, and the machinery required to implement them, mostly imported from abroad, tends to be extremely specialized.[104]

While countries such as Kenya often have regulations requiring promotion of job creation through the use of local expertise in the mining industry, the entire mining value chain and to retain the requisite skills within the country; develop local capacities in the mining industry value chain through education, skills and technology transfer, research and development; and achieve the minimum local employment level and in-country spend across the entire mining industry value chain,[105] there is little evidence that this is often achieved.

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[101] Ibid, p.2; Ezekwe sili, O.K., "Harnessing Africa's natural resources to fight poverty," *Daily Nation*, Wednesday April 15 2009. Available at https://www.nation.co.ke/oped/opinion/440808-560566-gnl8o6z/index.html [Accessed on 28/5/2020].

[102] Natural Resource Governance Institute, "The Resource Curse: The Political and Economic Challenges of Natural Resource Wealth," *NRGI Reader*, March, 2015, p. 4.

[103] Ibid.

[104] Natural Resource Governance Institute, "The Resource Curse: The Political and Economic Challenges of Natural Resource Wealth," *NRGI Reader*, March, 2015, p. 4.

[105] *Mining (Employment and Training) Regulations, 2017,* Regulation 3.

There is a need for the African countries to consider renegotiating these agreements in order to safeguard the national interests as far as benefit sharing and economic growth is concerned. Some countries such as Tanzania have sought to renegotiate their extractives exploitation contracts where it was deemed necessary. The Tanzanian government enacted laws that introduced changes in the exploitation of natural resources in the country's mining sector to ensure that Tanzania's natural resources are exploited to benefit the citizens.[106] Some of the laws such as the Natural Wealth and Resources Contracts *(Review and Re-negotiation of Unconscionable Terms) Act, 2017*[107] are meant to empower Parliament to review all the arrangements and agreements made by the government regarding natural resources.[108] The Natural Wealth and Resources Contracts (Review and Re-negotiation of Unconscionable Terms) Act 2017 is meant to give powers to parliament to direct the Government to re-negotiate and rectify any term that seem to bear questionable circumstances in the contracts.

Renegotiation of existing mining agreements may be justified:- when rigid contractual terms provide for an excessive duration, secured against any legislative change; when the agreement reflects the one-sided distribution of bargaining power and ability in favour of the transnational corporations; when circumstances have changed considerably so that the agreement needs adjustment to existing usages; and, when the agreement hampers severely the host country's freedom to employ its natural resources as a lever for effective economic development.[109]

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[106] "Tanzania seeks to reform mining sector for citizens' benefit," *The East African*, Saturday July 1 2017, available at https://www.theeastafrican.co.ke/business/Tanzania-seeks-to-reform-mining-sector/2560-3995660-7pyhb5/index.html [Accessed on 28/5/2020].

[107] Natural Wealth and Resources Contracts (Review and Re-Negotiation of Unconscionable Terms) Act, No.6 of 2017, Laws of Tanzania. Available at https://tanzlii.org/tz/legislation/act/2017/6-0 [Accessed on 28/5/2020].

[108] "Tanzania seeks to reform mining sector for citizens' benefit," *The East African*, Saturday July 1 2017, available at https://www.theeastafrican.co.ke/business/Tanzania-seeks-to-reform-mining-sector/2560-3995660-7pyhb5/index.html [Accessed on 28/5/2020].

[109] Walde, T.W., "Revision of Transnational Investment Agreements in the Natural Resource Industries," *University of Miami Inter-American Law Review*, Vol.10, no. 2 (1978): 265, at p. 267; Kuruk, Paul. "Renegotiating Transnational Investment

Other African countries should consider following Tanzania's path in order to reclaim their rights to exploit and use their natural resources to develop their economies and fight poverty among its citizens.

5. Conclusion

It is a blessing that the African Continent is rich in diverse natural resources that can be exploited. However, as discussed above, it is not enough that a country has a wealth of natural resources; effective management of these resources and equitable benefit sharing are essential. The natural resources are meant to promote national development and assist the African countries to achieve national development as envisaged in the United Nations sustainable development goals.[110] Time has come for the African leaders to go back to the drawing board and figure out where they go wrong. Some Asian countries have been able to put into use their most important resource (mainly oil) to pull their people out of poverty while their African counterparts have only experienced poverty, conflicts and environmental degradation from the mining and extraction of their oil and other mineral resources.

There is need for the leaders to put in place measures and enforce them on how best to manage natural resources and the extractive industry wealth in order to curb the resource curse and alleviate poverty and promote development. A strong legal framework for benefit sharing ought to be put in place covering the expectations, rights and obligations of all parties concerned. As long as leaders remain complacent, the African continent will remain poor and be associated with conflicts, despite its natural resource wealth, while the developed countries take advantage of this to accrue raw materials to develop their own economies. Africa can no longer remain exploited, poor and dehumanised. The resource curse can and should be overcome.

Agreements: Lessons for Developing Countries from the Ghana-Valco Experience," *Michigan Journal of International Law* 13, no. 1 (1991): 43-82.

[110] United Nations, Transforming our world: the 2030 Agenda for Sustainable Development, Resolution adopted by the General Assembly on 25 September 2015, A/RES/70/1.

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'Few Developing Countries Can Climb the Economic Ladder | St. Louis Fed' <https://www.stlouisfed.org/publications/regional-economist/october-2015/trapped-few-developing-countries-can-climb-the-economic-ladder-or-stay-there> accessed 28 May 2020.

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'SGR Raked in Sh10bn Revenue in First Year' (*Business Daily*) <https://www.businessdailyafrica.com/economy/SGR-raked-in-Sh10bn-revenue-in-first-year/3946234-5020294-13c0x1lz/index.html> [Accessed on 28/5/2020].

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Neoliberalism Bows to COVID 19: A Critical Analysis

*By: **Henry Murigi****

Neoliberalism is a good theory that weaved through the international development landscape and introduced a new way of thinking about trade, economy, and politics. Neoliberalism arose as a reaction and objection to the Keynesian theory of macroeconomics by John Maynard Keynes who advocated for a welfare society in which the State took care all aspects of society (Keynes, 1973). The main contention was the Keynesian theory did not have a clear analysis of the household and the realities the welfare state intended. The Keynesian theory was challenged mainly by Martin Freedman who argued that free markets were the panacea to development. Freedman analyzed the disparity between average consumption vis a vis income and that people would modify their spending based on available and disposable income (Friedman, 2018). In addition, Freedman argued that the coercive power of a state was immoral (Kay, 2009). This argument can be taken further by theory of justice that advocated for individual liberty to determine their fate (Rawls, 1971).

Neoliberalism thrives on several assumptions that can be used to explain the international development. The assumptions, in brief, include (1) a strong argument for the removal of state control in the economy (2) allowing privatization of previously owned state institution thereby terminating the state enterprise (3) decreasing of government spending and employment to allow attractive rates in the private sector (4) use of infrastructure as a factor of production (5) charging of user fees for social services and removal of subsidy from state organizations. The invisible hand of the market is given prominence and importance. It is hoped that with these assumption in mind then development will be a private enterprise and it will lead to development[1]. This

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[1] This paper acknowledges the difficulty in defining development. Development thinking can be traced from the period following the age of enlightenment when human progress was tied to the economy by thinkers such as contributions from David

theory has become critical in the post cold war era influencing behavior of governments towards markets. The force of neoliberalism has been so great that it has literally increased the growth of the private sector and reduced market regulation.

These are great ideas that have been subject to debate and discussions, however, three arguments touching on neoliberalism are critical. First when carefully examined neoliberalism is a threat to the rule of law and democracy. Second that in the original position advanced by John Rawls, there is no potential for clash in economic ideology since the allocating and distributing arm of the State cater for the welfare of society. In other words, the choice should not be between two evils (free markets or government regulations), instead the choice is dictated by the common good such as universality of human rights. Third neoliberalism has affected every feature of life including education, and social life. These three reasons show that this theory although relevant does not explain fully the complex situation in Africa.

Even with these challenges, COVID-19 has introduced a different reality that the world should contend with. Neoliberalism had its fault lines including being a threat to the rule of law (Ngugi, 2005), promoting inequality in the society through markets (Rawls, 1971) (Sachs, 2015) and it was too ambitious in its attempt to affect all aspects of life (Marber, 2005). This paper makes three arguments. First, what seems to be fault lines or cracks in neoliberalism as a theory have been burst wide open by the global pandemic COVID-19. Here we suggest that was neoliberalism strong enough its tenets would have withstood the test by the pandemic. Second, this paper argue that economic growth determines politics and human rights which neoliberalists seem to place as footnotes in the main argument. Here we suggest that neoliberalism as a theory does not appreciate to the requisite extent the influence of politics

Hume, Adam Smith, James Stuart and John Stuart Mill, among other, which mark the origin of debates on economic growth, the distribution of wealth and the principles underlying public action (market based approach). Also, the growth of international development can be traced from end of the Second World War which saw an increase in the involvement of States in the international arena in a quest to control ideas (right based approach). This is important because it places focus on different ways to explain the varying ideas that help crystalize international development. In my view each part of the world ought to be allowed to define its own understanding and expectation of development.

and human rights. Third, neoliberalism being a recent theory failed to adequately address the definition of poverty. Here we suggest that there ought to be a new definition of poverty and a clear classification of who are the poor. First, (Karl, 1963) argues that for a theory to be valid it must be falsifiable. Oddly, neoliberalism had an opportunity to prove its mettle when the world was hit by the global pandemic Covid19. With the global lockdowns, restrictions of movement of goods and persons, closing of the largest economies of the world, free markets are not as free as neoliberals aspire. The closing down of Airports, movement of goods and people, closing down of both public and private institutions it is clear that neoliberalism is unable to explain such phenomenon. Also, the government had to intervene to reduce the spread of the virus as well as regulate sale of goods and services such as alcohol. With the massive loss of jobs and businesses it is clear that the markets are not what they used to be even with easing of restrictions. Scholars will speculate for a long time whether neoliberalism would have regulated the market in the wake of a pandemic. In addition there is no indication whether any of the approaches to international development will survive this global pandemic. There is an undoubted reality that the economies of the world have been affected by the pandemic but there is no unanimity on its effect on the economies. What is however abundantly clear is that the assumptions of neoliberalism such as open markets, un-regulation by government, privatization, investment by private sector, and removing state control have turned out to be irrelevant. Instead, the focus has been on the health sector and the debates around the source, impact, and the best approach to combat COVID-19. Here we suggest that an all-round view of international economic development is critical especially since every abstract theory such as neoliberalism collapse when attacked from all sides as is the case here (Erick S. Reintert, 2016). COVID-19 has thus introduced a grand norm that calls for a reconsideration of the realities of previous theories or models of development which would perhaps lead to a definition development as nothing more than global faith (Rist, 2008).

The second argument that is proffered is that neoliberalism has not adequately acknowledged the place of politics and human rights. For instance, by fixing the price of fertilizer and maize in Kenya, the government does the opposite of what neoliberal's root for. However, fixing the price of fertilizer and maize is a political decision as the government attempts to subsidize for the poor

farmers who would otherwise not have access to the markets. (Donnelly, 1985) argues that the government plays a strategic role in meeting the basic needs of its population by attempting to balance between politics and human rights. Although Donnelly argues that state intervention helps the wealthy and that the needs of the poor are not always the priority, it is instructive to note that neoliberalism does not place special emphasis on these two realities confirming the contention that the planners are not in touch with the situation on the ground (Easterly, 2006). It is also noteworthy that in most of the developed democratic states human rights and politics were not the trigger for development. However, according to (Aristotle, 1888) man is first a political being and has inherent human dignity and rights which in my view precede any economic activity they may engage in. Therefore, politics and human rights ought to be the drivers of the economy but due to the inequality in the world, big economies and elites are the main determinant of politics and human rights (Klein, 2007). As such what appears pragmatic is to focus on development first then human rights and democracy.

Lastly, there appears to be a need to reconsider the definition of terms such as poverty and poor. (Broad, 2006) argues that Freidman and Sachs got the definition of poverty wrong by using per-capita rather than the quality of life and basing it on wrong and incomplete facts. No wonder the solutions they come up with are misleading and ineffective. Broad and Cavanagh highlight five myths that are found in the arguments by Sachs and Friedman. However, they fail to provide a definition of poverty or poor. To define poverty and the poor, it is important to have in mind the cause of poverty which Broad and Cavanagh argue is not laziness or corruption. Instead, poverty is caused by powerful actors and large corporations. The epistemology and ontology of poverty and the poor should be premised on the correct methodology. All knowledge about poverty and poor has been Eurocentric which has not been based on logic or dialectics. This appears to be an empire that must be confronted by laying siege to it, shaming it , mocking it with art, music, literature, stubbornness, joy, brilliance, sheer relentlessness, and the ability to tell indigenous stories that are different from the ones we are being brainwashed to believe (Arendhati, 2003). In this way a new definition of poverty and poor is likely come up as has been the case in South America Argentina, Brazil, Peru and Venezuela. No one should insist on one way of creating knowledge about Africa or the global south generally since all

methodologies have some weaknesses but certainly produce valid knowledge of some kind (Feyerabend, 1993).

The other related challenge is that there is no universally acceptable measurement for the rich-poor gap because of the bourgeoise mentality. This has been exposed clearly in the COVID-19 season since, for instance, the government has actively subsidized tests and provided personal protective equipment to the medical officers. The rich-poor gap has continued to increase with the massive loss of jobs. Common indicators of the rich-poor gap have been suggested to include healthcare, wealth, and education as the primary basis for measuring the gap. One way of attempting to measure world income distribution inequality is testing whether there has been an increase in the distribution alternatives to enable countries to have equal purchasing power (Wade, 2008). Here the suggestion is that this will cause the increase in the growth of middle income countries such as India and China inviting an increase in tendency for migration (Wade, 2008). The second way of measuring rich-poor gap is found in what (Passe-Smith, 2008) argues can be demonstrated in the characteristic of the income gap between the countries in 1960 to 2020 which are (1) absolute gap which is the difference between the mean GDP/pc of a set of high-income countries and that of poor countries or group of countries and (2) relative gap which is the measure of GDP/pc of the poor or middle-income groups as a percentage of the high-income countries. Both the relative and absolute gap are based on the three thematic areas health, knowledge, and wealth. The third way of measuring the inequality gap is based on the resource mobilization of any state structure based on land maldistribution (Seligson, 2008). There is a clear need to revisit these definitions with a view to identify the new poor, realities of the rich-poor gap. This has been exposed by the COVID-19 where some Countries in the global north had provided all the indicators of the rich-poor gap and more, yet they were unable to provide instant solutions to the pandemic. There is a clear need to then come up with new definitions.

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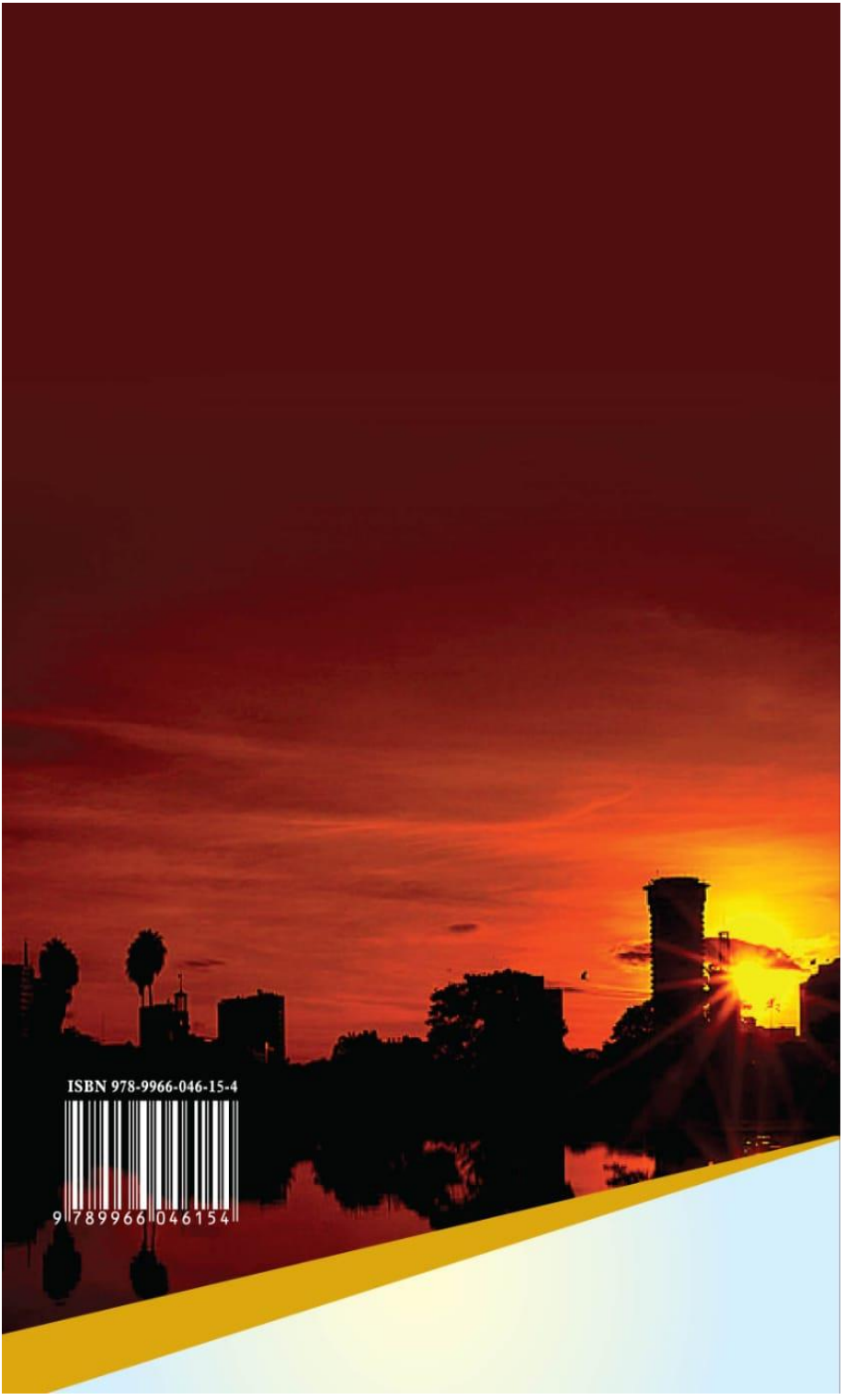

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