Journal of Conflict Management & Sustainable Development

Volume 7 **Issue 2** **2021** ISBN:978-9966-046-15-4

Journal of Conflict Management and Sustainable Development

Volume 7 Issue 2 **2021**

Journal of Conflict Management and Sustainable Development

Typesetting by:
New Edge GS,
P.O. Box 60561 – 00200,
Tel: +254 721 262 409/ 737 662 029,
Nairobi, Kenya.

Printed by:
Mouldex Printers
P.O. Box 63395,
Tel – 0723 366839,
Nairobi, Kenya.

Published by:
Glenwood Publishers Limited
P.O. Box 76115 - 00508
Tel +254 2210281,
Nairobi, Kenya.

This Journal should be cited as (2021) 7(2) Journal of cmsd

ISBN 978-9966-046-15-40

Journal of Conflict Management and Sustainable Development

Editor's Note

It is with great pleasure that we launch the latest issue of the *Journal of Conflict Management and Sustainable Development*, Volume.7, No.2.

The Journal is a scholarly publication that offers readers an opportunity to interact with pertinent and emerging themes on Conflict Management and Sustainable Development.

The 21st century has witnessed a number of challenges that have captured global attention. These include climate change, conflicts between nations, economic challenges and a global health pandemic. In the midst of these challenges, the role of Sustainable Development becomes more vital. One of the goals of Sustainable Development is to achieve intergenerational equity by meeting the needs of the present generation without compromising the ability of future generations to meet their needs.

The Journal has witnessed tremendous growth since its launch. It is now widely accepted as one of the most authoritative and credible publications on Conflict Management and Sustainable Development. It is a valuable resource for scholars, authors, readers, students, policy makers and everyone interested in broadening their understanding in the areas of Conflict management and Sustainable development.

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

This issue contains papers on key thematic areas of Conflict management and Sustainable development including *Exploring Conflict Management and the Environment: The Kenyan Journey; Professional Ethics: An Advocate's Relationship with other Advocates; Revisiting the Place of Indigenous Knowledge in the Sustainable Development Agenda in Kenya; Intergovernmental Dispute Resolution: Analysing the Application and Future of ADR; Burden-sharing as a Tool to alleviate the Global Plight of Refugees; Enhancing Recognition of Environmental Rights as Human Rights for Sustainable Development;Implementing International Humanitarian*

Law and the Responsibility to Protect in Non-International Armed Conflicts (NIACs) – A Delicate Balance: The Case of the Tigray Crisis in Ethiopia.

The Editorial Team welcomes feedback and suggestions from our readers across the globe to enable us continue developing and refining the content of the Journal in order to enhance its quality, scope and diversity.

I wish to thank the contributing authors, Editorial team, reviewers and all those who have made this publication possible.

The Journal is available online https://journalofcmsd.net
We welcome submission of papers, commentaries, case and book reviews on the themes of Conflict Management and Sustainable Development or other related fields of knowledge to be considered for publication in subsequent issues of the Journal. These submissions should be channeled to editor@journalofcmsd.net and copied to admin@kmco.co.ke

Dr. Kariuki Muigua, Ph.D., FCIArb, (C.Arb),
Accredited Mediator.
Editor, Nairobi,
September, 2021.

List of Contributors

Dr. Kariuki Muigua
Dr. Kariuki is a distinguished law scholar, an accomplished mediator and arbitrator with a Ph.D. in law from the University of Nairobi and with widespread training and experience in both international and national commercial arbitration and mediation. Dr. Muigua is a Fellow of Chartered Institute of Arbitrators (CIArb)-Kenya chapter and also a Chartered Arbitrator. He also serves as a member of the National Environment Tribunal and is the Chartered Institute of Arbitrator's (CIArb- UK) Regional Trustee for Africa.

He is an Advocate of the High Court of Kenya of over 30 years standing and practicing at Kariuki Muigua & Co. Advocates, where he is also the senior advocate. His research interests include environmental and natural resources law, governance, access to justice, human rights and constitutionalism, conflict resolution, international commercial arbitration, the nexus between environmental law and human rights, land and natural resource rights, economic law and policy of governments with regard to environmental law and economics. Dr. Muigua teaches law at the Centre for Advanced Studies in Environmental Law and Policy (CASELAP), Wangari Maathai Institute for Peace and Environmental Studies (WMI) and the Faculty of Law, University of Nairobi.
Dr. Kariuki Muigua can be reached through muigua@kmco.co.ke or admin@kmco.co.ke

Prof. Tom Ojienda, SC
Prof. Ojienda holds a Doctor of Laws (LL.D.) degree from the University of South Africa, a Master of Laws (LL.M.) degree from King's College London, and a Bachelor of Laws (LL.B.) degree from the University of Nairobi (UoN). He is an Associate Professor of Public Law at Moi University and a practising Advocate of the High Court of Kenya of the rank of Senior Counsel. He has practised law for over 25 years. He is a former chair of the Law Society of Kenya (LSK), former President of the East African Law Society (EALS), and former Vice President and Financial Secretary of Pan African Lawyers Union (PALU). He has also served as a Commissioner in the Judicial Service Commission (JSC), Commissioner in the Truth Justice and Reconciliation Commission (TJRC) established after the 2007-2008 post-election violence in Kenya, Chair of the Land Acquisition Compensation Tribunal, and member of the National Environment Tribunal. Previously, he was also a Council Member of the International Bar Association, Member of the Board of American Biographical Society, Member of the Council of Legal Education, and Member of the Public Law Institute of Kenya, and the Kenya Industrial Property Institute.

Prof. Ojienda, SC is an ardent scholar and has edited and published over 15 books and over 40 articles on diverse areas of the law. The books include "Conveyancing: Theory and Practice" published by T.O. Ojienda and A.D.O. Rachier, Faculty of Law Moi University; "Constitution Making and Democracy in Kenya" edited by T.O. Ojienda ISBN: 9966-9611-3-6; "The Dawn of a New Era 2004" edited by Tom Ojienda, ISBN-9811-4-4; "A General Introduction to the New Law of the Sea" Published by T.O. Ojienda and Kindiki Kithure; "The Legal Profession and

Constitutional Change in Kenya; Anti-Corruption and Good Governance in East Africa: Laying Foundations for Reform" edited by Tom O. Ojienda and published by Law Africa Publishing (K) Ltd, Co-op Trust Plaza, 1st Floor, ISBN.9966-7121-1-9, 221 pages; "Conveyancing Principles and Practice" by Tom O. Ojienda and published by Law Africa Publishing (K) Ltd, Co-op Trust Plaza, 1st Floor, 521 pages; 'Conveyancing Principles and Practice' by Dr. Tom O. Ojienda and published by Law Africa Publishing (K) Ltd, Co-op Trust Plaza, 1st Floor (Revised edition); "Professional Ethics" by Prof. Tom Ojienda & Katarina Juma published by Law Africa Publishing (K) Ltd, Co-op Trust Plaza, 1st Floor. (Revised Edition) 195 pages; "The Enforcement of Professional Ethics in Kenya" (with Prof. Cox), Amazon Publishers, 2014; "Constitutionalism and Democratic Governance in Africa" (with Prof Mbodenyi), pulp publishers, 2013; "Mastering Legal Research" published by Law Africa, 2013; "Professional Ethics, A Kenyan Perspective" published by Law Africa 2012; "Anti-Corruption and Good Governance in East Africa" published by Law Africa, 2007; and "Conveyancing Theory and Practice" published by Law Africa, 2002.

His published articles include: "Sustainability and The Ivory Trade. Whither the African Elephant?" published in the 2002 issue of the East African Law Review; "Pitfalls in the Fight against Corruption in Kenya: Corruption or Inertia?" in "Anti-Corruption and Good Governance in East Africa: Laying Foundations for Reform" by T. O. Ojienda (eds) pages 95 – 131; "Exploring New Horizons in the Discipline of Advocates, Towards a Review of the Existing Regime of Law" published in "The Advocate; Learning Law by Doing Law: The Theoretical Underpinnings and Practical Implications of Clinical Legal Education in Kenya"; and "An Inventory of Kenya's Compliance with International Rights Obligations: A Case Study of the International Covenant on Civil and Political Rights" the East African Journal of Human Rights and Democracy Vol. 1, Issue No. 1, September 2003 at page 91-104; "Sectoral Legal Aid in Kenya: The Case of the Rift Valley Law Society Juvenile Legal Aid Project", published in various journals including the Advocate, the Lawyer, and the Newcastle Law Bulletin; "Surrogate Motherhood and the Law in Kenya: A Comparative Analysis in a Kenya Perspective"; "Polygamous Marriages and Succession in Kenya: Whither "the other woman?"; "Reflections on the Implementation of Clinical Legal Education in Moi University, Kenya" published in the International Journal of Clinical Education Edition No. 2, June 2002 at page 49-63; "Taking a Bold Step Towards Reform: Justifying Calls for Continuing Legal Education and Professional Indemnity" published in Law society of Kenya Publication (2003); "Terrorism: Justifying Terror in Kenya?" published in The East African Lawyer, Issue No. 5 at pages 18-22; "Land Law and Tenure Reform in Kenya: A Constitutional Framework for Securing Land Rights"; "A Commentary on Understanding the East African Court of Justice" published in the East African Lawyer, Issue No. 6 at pages 52-56; "Where Medicine Meets the Law: The Case of HIV/AIDS Prevention and Control Bill 2003" published in The Advocate at page 36-40; "The Advocates Disciplinary Process-Rethinking the Role of the Law Society" published in The Lawyer, Issue No. 78 at pages 15-16; "Ramifications of a Customs Union for East Africa" published in The East African Lawyer, Issue No. 4 at pages 17-25; "Gender Question: Creating Avenues to Promote Women Rights after the Defeat of the proposed Constitution" published in the Moi University Journal Vol. 1 2006 No.1, pages 82–92; "Of Mare Liberum and the Ever Creeping State Jurisdiction: Taking an Inventory of the Freedom of the Seas" published in the

Moi University Journal Vol. 1 2006 No. 1, pages 105 – 131; "Legal and Ethical Issues Surrounding HIV and AIDS: Recommending Viable Policy and Legislative Interventions" published in The East African Lawyer, Issue No. 12 at pages 19-24; "Implementing the New Partnership for Africa's Development (NEPAD): Evaluating the Efficiency of the African Peer Review Mechanism" published in the Kenya Law Review, 2007 Vol. 1, pages 81-119; "Protection and Restitution for Survivors of Sexual and Gender Based Violence: A case for Kenya." (with R. A. Ogwang and R. Aura) 90 Pages, ISSN:1812–1276; "Legal and Institutional Framework of the TJRC - Way Forward" published in the Law Society of Kenya Journal Vol. 6 2010 No. 1, pages 61 – 95; "A Critical Look at the Land Question in the New Constitution" published in Nairobi Law Monthly, Vol. 1, Issue No. 1 of 2010 at pages 76 – 81; "Access to Justice in the Era of COVID-19: Adaptations and Coping Mechanisms of the Legal Services Industry in Kenya' (with Lydia Mwalimu Adude) published in Journal of Conflict Management & Sustainable Development, Vol. 6, Issue 2, 2021, ISBN: 978-9966-046-15-4, pages 1-46; "Criminal Liability of Corporate Entities and Public Officers: A Kenyan Perspective" (with Lydia Mwalimu Adude) published in Journal of Conflict Management & Sustainable Development, Vol. 6, Issue 2, 2021, ISBN: 978-9966-046-15-4, pages 117-212; "Changes to Civil Litigation and Mediation Practice Under the Mediation Bill, 2020: What of the Right of Access to Justice and the Independence of the Judiciary?" published in Alternative Dispute Resolution Journal (CIArb-Kenya), Vol. 9, Issue 2, 2021, ISBN: 978-9966-046-14-7, pages 44-65; "Access to Justice: A Critique of the Small Claims Court in Kenya' (with Lydia Mwalimu Adude) published in Alternative Dispute Resolution Journal (CIArb-Kenya), Vol 9, Issue 2, 2021, ISBN: 978-9966-046-14-7, pages 170-201; "Conflict of Interest and Public Office in Kenya" (with Lydia Mwalimu Adude) published in Journal of Conflict Management & Sustainable Development, Vol 6, Issue 5, 2021, ISBN: 978-9966-046-15-4; and a Book Chapter entitled "Land Law in the New Dispensation" in a book edited by P.LO. Lumumba and Dr. Mbondenyi Maurice.

He has also peer reviewed articles, consulted for various agencies, including the World Bank, USAID, UNIFEM, and presented scholarly papers in many countries across the globe.

As a robust litigation counsel, Prof Ojienda, SC, has successfully handled numerous landmark cases at the Supreme Court of Kenya, on Constitutional Law, Administrative Law, Land and Environment Law, Electoral Law, Employment Law, Commercial Law, Family Law, and other areas of law. He represents various individuals, State agencies, private entities, county governments and multinational agencies. He has represented these entities before Kenyan courts, from the subordinate courts, all the way to the Supreme Court of Kenya. Some of his landmark cases at the apex Court include, In the Matter of the Speaker of the Senate & another [2013] eKLR - Speaker of the Senate & another v Attorney-General & 4 others (Advisory Opinion Reference No 2 of 2013); Independent Electoral and Boundaries Commission & 2 others v Evans Kidero (Petition 20 of 2014); Justus Kariuki Mate & another v Hon. Martin Nyaga Wambora (Petition 32 of 2014); In the Matter of the National Land Commission [2015] eKLR - National Land Commission v Attorney General & 5 others (Advisory Opinion Reference No 2 of 2014); Lemanken Aramat v Harun Meitamei Lempaka & 2 others [2014] eKLR (Petition No 5 of 2014); Cyprian Awiti & another v Independent Electoral and

Boundaries Commission & 2 others [2019] eKLR (Petition No 17 of 2018); Mohamed Abdi Mahamud v Ahmed Abdullahi Mohamad & 3 others; Ahmed Ali Muktar (Interested Party) [2019] eKLR (Petition No 7 of 2018); Martin Wanderi & 106 others v Engineers Registration Board & 10 others [2018] eKLR (Petition No 19 of 2015); Moi v Rosanna Pluda [2017] eKLR; Town Council of Awendo v Nelson O. Onyango & 13 others; Abdul Malik Mohamed & 178 others (Interested Parties) [2019] eKLR (Petition No 37 of 2014); Wilfrida Arnodah Itolondo v Attorney General & 9 others [2021] eKLR (Application No 3 of 2021 (E005 of 2021)); and Speaker Nairobi City County Assembly & another v Attorney General & 3 others (Interested parties) [2021] eKLR (Advisory Opinion Reference No 1 of 2020), among many others which are available at www.proftomojiendaandassociates.com.
Prof Ojienda, SC can be reached through tomojienda@yahoo.com

Berita Mutinda Musau
Berita Mutinda Musau, Doctoral Fellow, School of Humanities and Social Sciences, Strathmore University & PhD Student in International Relations, United States International University-Africa, Nairobi, Kenya. She holds an Erasmus Master of Arts (M.A) in Global Studies from the University of Leipzig, Germany and the University of Vienna, Austria and a Master of Arts (M.A) in International Studies from the Institute of Diplomacy and International Studies, University of Nairobi. She teaches German and International Studies in Strathmore University.
Berita Musau can be reached through **ritamusau@googlemail.com**

Oseko Louis D Obure
Oseko Louis D Obure is an LL.B student at the University of Nairobi (Class of 2022). Oseko is also a Student Member of the Chartered Institute of Arbitrators. He is also the current President of the Young Arbiters Society University of Nairobi Chapter and Secretary-General for the Student Association for Legal Aid and Research. Oseko has volunteered with Kituo Cha Sheria, the Kenya Human Rights Commission as a Legal Intern and O-Neill Institute for National and Global Health Law as a Legal Researcher. Oseko is passionate about Environmental Law, International Human Rights, Alternative Dispute Resolution, and International Economic Law.

Oseko has participated in different competitions, including the Dr Kariuki Muigua ADR Essay Award, where the paper he co-authored emerged second best. These opportunities and roles have enabled him to develop and appreciate the significance of legal writing and research in promoting good governance, sustainable development, and the rule of law.
Louis Oseko can be reached through osekolouis1@gmail.com

Kihiko Rosemary Wambui
Kihiko Rosemary Wambui is a student at the University of Nairobi pursuing a degree in Law and set to graduate in 2022. She is an Undergraduate Research Assistant at the Strathmore School of Law. Kihiko Rosemary is a Student Member of the Chartered Institute of Arbitrators. Additionally, she is a Team Leader in AIESEC in University of Nairobi; a role that enables her to initiate and actualise projects that contribute to reaching Sustainable Development Goals. Kihiko Rosemary is passionate about Alternative Dispute Resolution, Family Law and Legal Writing. Given her interest in Alternative Dispute Resolution, she participated in the Dr

Kariuki Muigua ADR Essay Award competition and came in second best. Through her roles and experiences, Kihiko has come to develop an appreciation for the place of legal discourse in championing human rights, access to justice and sustainable development.
Kihiko Rosemary Wambui **can be reached through kihikorosemary@gmail.com**

Doreen Olembo
Doreen Olembo is currently undertaking a Masters Degree programme in Environmental Law at the Centre for Advanced Studies in Environmental Law and Policy (CASELAP) at the University of Nairobi.

Ms Olembo holds an LLB Degree (Hons) from the University of Nairobi. She is interested in advancing legal scholarly research work and has participated in the annual University of Nairobi Research Week and the All African Universities (Human Rights) Moot Court Competition in 2014 that was hosted by the School of Law, University of Nairobi.

She has worked with Nestlé Foods Kenya Limited, Refugee Consortium of Kenya, Christian Health Association of Kenya and Innovative Lawyering, among other organizations, giving her a diverse experience in legal, commercial and non commercial backgrounds. Exposure to the corporate commercial, Non Governmental Organizations (NGOs), and the legal worlds have intrigued her insights into the social aspects of the environment which undoubtedly determine how successful conservation efforts will turn out. She continues to seek knowledge for the advancement of the protection of the environment.
Doreen Olembo **can be reached through** doreenadeborah@gmail.com

Leah Aoko
Leah Aoko is a budding Socio-Legal expert and Consultant with a passion to see sustainable solutions to the contemporary challenges facing the world socio economically and politically. She holds a Law degree from the University of Nairobi, a Post graduate diploma from the Kenya School of Law and is currently completing her Masters of Law, at the University of Nairobi. She is a Dispute and Resolution Advocate at the Firm of Kiptinness & Odhiambo Associates LLP and has interests in: Intellectual Property, Environmental Law, Governance, Arbitration, Public International Law and Child rights advocacy.
Leah Aoko can be reached through liyahaoko@gmail.com

Journal of Conflict Management and Sustainable Development

Volume 7 Issue 2

Exploring Conflict Management and the Environment: The Kenyan Journey

By: ***Kariuki Muigua****

Abstract

This paper is meant to capture the main themes that have featured in Kariuki Muigua's work, his contribution to the academia, policy and legal development in Kenya. It traces the running thread through his work with the aim of demonstrating that conflict management and environmental matters are not linear subjects and should be treated as such as they impact on every sphere of the human life. The paper is also important in that it traces the jurisprudential development of these themes within the Kenyan framework to show how far we have come as a country in guaranteeing environmental rights and creates an opportunity for the stakeholders in the justice sector and environmental management to reflect on the successes, challenges and the future prospects in ensuring that every Kenyan will access justice and a right to clean and healthy environment.

1. Introduction

The discourse on conflict management and the environment in Kenya has a come a long way. Various authors have voiced their opinion on the debates based on the developing international jurisprudence and the evolving domestic laws. One author who has been very consistent in exploring the same has been Kariuki Muigua. He has explored different topics including but not limited to: Access to Justice; Alternative Dispute Resolution; Arbitration; Alternative Dispute Resolution and Access to Justice; Sustainable Development; Environment/Bridges; Mediation; Negotiation; and Democracy/Environmental Democracy. His immense knowledge and understanding of the topics has not only been instrumental in informing legal debates but also in creating real change as far as practical application to real situations is concerned. His expertise has earned him both national and international accolades, with him being described as '*a highly respected arbitrator and mediator with a sterling background in commercial and constitutional cases, as well as matters relating to the environment and*

natural resources'.[1] His works have not only assisted students and academicians but also have been widely quoted by courts' decisions. This paper offers a recap of the works of Kariuki Muigua related to the above listed topics.

2. Exploring Conflict Management and the Environment: Tracing the Steps

2.1 Access to Justice

The quest for justice in Kenya predates the current Constitution of Kenya which was promulgated in 2010. Before then, there was little by way of statutory or legal instruments in Kenya that provided for the legal channels that guaranteed the citizenry's access to justice. Indeed, much of the debate surrounding access to justice were mainly based on enhancing the efficacy of the national courts and tribunals, which were considered as the major channels of accessing justice. While some of the works by Muigua that predate the 2010 Constitution acknowledged the place of Courts in the access to justice agenda, they also recommended the exploration of alternative means that would address such challenges as cost-effectiveness, time, physical accessibility and literacy levels among consumers of justice, among others.[2]

Kariuki Muigua has also published extensively after the 2010 Constitution on the subject of access to justice.[3] Apart from the publications, Kariuki

---

* 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 [April, 2020].

[1]https://www.chambersandpartners.com/123/645/editorial/2/1/global-kenya-dispute-resolution-arbitrators

[2] Muigua, K., Access to Justice: Promoting Court and Alternative Dispute Strategies (Available at http://www.kmco.co.ke/index.php/publications/108-access-to-justice-promoting-court-and-alternative-dispute-resolution-strategies.

[3] Muigua, K., Alternative Dispute Resolution and Access to Justice in Kenya, Glenwood Publishers, Nairobi – 2015; Muigua, K., Improving Access to Justice: Legislative and Administrative Reforms under the Constitution, Workshop on Access to Justice Tuesday, 23rd October 2012 at Sankara Hotel, Westlands.

Muigua has also widely consulted on the subject for both public bodies and the Non-Governmental Organizations (NGOs).[4]

Notably, Kariuki Muigua has also published some works exploring the link between access to justice and Alternative Dispute Resolution mechanisms[5], access to justice and natural resources, among others. However, these will be revisited under different thematic subtitles in this paper.

2.2 Alternative Dispute Resolution Mechanisms

Before the current constitutional dispensation, there was little local literature on the topic of Alternative Dispute Resolution (ADR) mechanisms. When Muigua first set out to formally contribute to the debate on the role of ADR mechanisms in not only enhancing access to justice but also the applicability of these mechanisms to various conflicts such as natural resource related conflicts, he wrote his Master of Laws (LLM) Thesis on the topic of

---

Available at http://www.kmco.co.ke/index.php/publications; Muigua, K. & Kariuki, F., 'ADR, Access to Justice and Development in Kenya,' Strathmore Law Journal, Vol. 1, No. 1, June 2015.

[4] Engaged as a Consultant by the Commission for the Implementation of the Constitution and IDLO in preparing the report on the "**Framework for the Consolidation and Harmonization of National Policies, Strategies and Legislative Instruments Relating to Access to Justice in Kenya**"- September to October 2012; Engaged as a consultant by the Commission for the Implementation of the Constitution, International Law Development Organisation and the United Nations Development Programme in preparing a "**Report for Review of Policy, Legislation and Administrative Structures on Access to Justice: Existing Gaps and Proposed Reforms to Align with the Constitution**"- 2015; Engaged as a consultant by the Commission for the Implementation of the Constitution, International Law Development Organisation and the United Nations Development Programme in preparing a "**Report for the Institutionalization of Traditional Dispute Resolution Mechanisms (TDRMs) and other Community Justice Systems-2015;** Engaged as a consultant by the International Law Development Organisation (IDLO) in the Consultancy on "**Baseline Assessment, Situational Analysis & Recommendation Report of Kenya's ADR Mechanisms towards Development and Alignment of Legal & Policy Framework with Aim to Deepen ADR for Access to Justice and Commercial Disputes**"- January 2018;

[5] Muigua, K., Alternative Dispute Resolution and Access to Justice in Kenya, Glenwood Publishers, Nairobi – 2015; He has also immensely contributed to the Chartered Institute of Arbitrators (Kenya) Journal, Alternative Dispute Resolution, where he is also the Managing Editor, among many other journals, both local and international. His publications dwell on various aspects of access to justice and their link with ADR mechanisms.

'resolution of natural resource conflicts in Kenya through arbitration and mediation' in 2005[6]. This is however not to say that before then he had not written or published anything on ADR mechanisms.[7]

In 2011, he completed his Ph.D thesis on the applicability of mediation in resolving environmental conflicts in Kenya.[8] The thesis critically examined the nature and scope of environmental conflicts in Kenya; the legal and institutional mechanisms in place at the time to address these conflicts; and their adequacy. The main focus of the discourse was if and how mediation could be applied in resolving environmental conflicts in Kenya.

His publications and writings cover the whole spectrum of ADR including arbitration, mediation, negotiation, conciliation and the hybrid methods falling under each of these.

2.2.1 Arbitration

Arbitration is one of the mechanisms that are commonly referred to as alternative dispute resolution mechanisms (ADR). Arbitration is defined as a mechanism for the settlement of disputes, which usually takes place in private, pursuant to an agreement between two or more parties, under which the parties agree to be bound by the decision to be given by the arbitrator according to law, or if so agreed, other considerations after a full hearing, such decision being enforceable at law.[9]

In line with his vast experience in arbitration matters, Kariuki Muigua has papers and books on arbitration. '*Settling Disputes through Arbitration in*

[6] Muigua, K., "The Resolution of Natural Resource Conflicts in Kenya through Arbitration and Mediation"- A Dissertation submitted in partial fulfillment of the requirements for the Degree of Master of Laws of the University of Nairobi, March 2005.

[7] His active membership and contribution to the activities of the Chartered Institute of Arbitrators goes beyond the year 2005.

[8] Doctor of Philosophy in Law (Ph.D.) -2011;
Thesis titled "Resolving Environmental Conflicts in Kenya through Mediation" at the University of Nairobi on 02/12/2011 focusing on the areas of Public Participation, Mediation and Environmental Democracy.

[9] Barnstein, R. The Handbook of Arbitration Practice: General Principles (Part 2) (Sweet & Maxwell, London, 1998), p.313.

Kenya' is a book that is currently in its third edition.[10] The book's publication was largely informed by the author's desire to ensure that the continued growth and embracing of ADR as part of access to justice framework in Kenya is supported by progressive literature that would allow more people to appreciate the place of ADR. Before the publication of this book, there was little local literature to support the work of arbitration institutions that offer training services, such as the Chartered Institute of Arbitrators, among others.

The book has been instrumental in not only making it easier for both practitioners and students to understand and appreciate the elements as well as stages of arbitration process but has also demystified the arbitration process for the general reader who is looking for general knowledge. Judges and magistrates looking for quick reference materials have also found the book and his other related articles useful.[11]

---

[10] Muigua, K., Settling Disputes through Arbitration in Kenya, 3rd Ed., Glenwood Publishers, Nairobi – 2017.

[11] See Shafi Grewal Kaka (Chairperson) & 3 others v v International Air Transport Association (IATA), Civil Case 605 of 2015, para. 38:

> 38. This was a clear intimation that the Plaintiff was not the appropriate party to seek the review and thus want of the locus standi.
> In the treatise of **Settling Disputes Through Arbitration In Kenya By Dr. Kariuki Muigua** page 46 the author opines that;
>
> > "Applicant must be a party to an arbitration agreement or at least a person claiming through is a personal representative or trustee in bankruptcy. This requirement is in view of the doctrine of privity of a contract which is to the effect that only parties to a contract can enforce it and a stranger to a contract cannot enforce it"

See also **Synergy Industrial Credit Limited v Cape Holdings Limited [2019] eKLR, Petition No. 2 of 2017**:

> **[121]** Confidentiality is also important in many commercial transactions. Some parties do not want their business secrets to be divulged to the entire public as is often the case with litigation. In this regard, one of the reasons why Arbitration is preferred as a means of dispute resolution is because it enhances confidentiality and creates a less tense atmosphere of dispute resolution. As Dr. Kariuki Muigua has observed:

Kariuki Muigua's work has been very instrumental in promoting the uptake of arbitration especially within the business and commercial community.[12]

> **"Unless parties agree otherwise in an Arbitration agreement … all the aspects of the case are confidential. … For parties who dread humiliation or condemnation or for those who simply do not want sensitive information to be disclosed, Arbitration allows settlement of disputes without exposure."[13 Kariuki Muigua (Dr.), Constitutional Supremacy over Arbitration in Kenya, March, 2016, pp. 11]**
>
> **[149]** Because the Kenyan Arbitration Act of 1995 puts emphasis on the concept of finality in arbitration and the above stated public policy to promote arbitration as encapsulated in Article 159(2)(c), save as stated in the Arbitration Act, awards should be impervious to court intervention as a matter of public policy. Unwarranted judicial review of arbitral proceedings will simply defeat the object of the Arbitration Act. The role of courts should therefore be merely facilitative otherwise excessive judicial interference with awards will not only be a paralyzing blow to the healthy functioning of arbitration in this country but will also be a clear negation of the legislative intent[29 Kariuki Muigua (Dr.), Alternative Dispute Resolution and Access to Justice in Kenya, Glenwood Publishers Limited, 2015, pp. 116, 117.] of the Arbitration Act.

See also **Cape Holdings Limited v Synergy Industrial Credit Limited [2016] eKLR, Miscellaneous Civil Application 114 & 126 of 2015 (Consolidated)**:

> 96. under section 17 of the Arbitration Act, the arbitrator is empowered to decide on the existence and validity of an arbitration agreement, however, the arbitrator is bound by the terms of the reference and the issues in dispute must be "contemplated by the parties in the agreement to arbitrate as a subject of a reference. See **Settling Disputes Through Arbitration In Kenya By Dr K Muigua page 93"**.

[12] See Modern Holdings (EA) Limited v Kenya Ports Authority [2020] eKLR, Petition 20 of 2017:

> 40. We agree with the appellant that arbitrations are private proceedings. As Dr. Kariuki Muigua has observed:
>
> > **"**Unless parties agree otherwise in an Arbitration agreement … all the aspects of the case are confidential. … For parties who dread humiliation or condemnation or for those who simply do not want sensitive information to be disclosed, Arbitration allows settlement of disputes without exposure**."[**4 Kariuki Muigua (Dr.),

2.2.2 Mediation

Mediation results from a process where two or more parties fail to resolve their differences through negotiation, hence the need to involve a third party to facilitate the negotiation process. While a lot has been written on the advantages and disadvantages of mediation, Kariuki Muigua's writings on mediation are unique in a number of ways.

Kariuki Muigua has not only immensely contributed to the teaching of mediation in Kenya but has also consulted widely for the Judiciary and has been playing an instrumental role in setting up a formal framework for mediation practice in the country.[13]

His work titled *'Resolving Conflicts through Mediation in Kenya'* [14] discusses the process of mediation in the context of African traditional setting. The book acknowledges the context within which mediation in the African traditional societies was conducted, and that is, the ultimate end was

---

Constitutional Supremacy over Arbitration in Kenya, March, 2016, pp. 11]

[13] Engaged as a consultant by the International Law Development Organisation (IDLO) in the Consultancy on "Baseline Assessment, Situational Analysis & Recommendation Report of Kenya's ADR Mechanisms towards Development and Alignment of Legal & Policy Framework with Aim to Deepen ADR for Access to Justice and Commercial Disputes"- January 2018; Engaged as a Consultant by CIC and IDLO in preparing the report on the "Framework for the Consolidation and Harmonization of National Policies, Strategies and Legislative Instruments Relating to Access to Justice in Kenya"- September to October 2012; Engaged as a consultant by the Commission for the Implementation of the Constitution, International Law Development Organisation and the United Nations Development Programme in preparing a "Report for Review of Policy, Legislation and Administrative Structures on Access to Justice: Existing Gaps and Proposed Reforms to Align with the Constitution"- 2015; Engaged as a consultant by the Commission for the Implementation of the Constitution, International Law Development Organisation and the United Nations Development Programme in preparing a "Report for the Institutionalization of Traditional Dispute Resolution Mechanisms (TDRMs) and other Community Justice Systems-2015; Muigua, K., Tribunals within the Justice System in Kenya: Integrating Alternative Dispute Resolution in Conflict Management, Paper presented at the Judiciary's 1st Annual Tribunals' Symposium held on 24th May 2019 at Sarova Whitesands Beach Hotel, Mombasa.

[14] Muigua, K., Resolving Conflicts through Mediation in Kenya, Glenwood Publishers, Nairobi, 2nd ed., 2017.

to foster peaceful coexistence through collaborative conflict resolution.[15] The book also recognises the fact that mediation process involves more than appreciating the issues in conflict as it also encompasses the parties' psychological issues. The psychological issues as discussed in this book require the mediator to come up with creative solutions that would help them address the parties' needs.[16]

'Resolving Conflicts through Mediation in Kenya' is a book that prepares anyone willing to start their journey in mediation through first, understanding the basic concepts of mediation, secondly, the process of mediation in terms of dos and don'ts and finally, on the skills required to conduct a successful mediation. While it is acknowledged that one may require advanced professional training in mediation, this book is definitely an important resource in offering the first step towards this journey.

Kenyan Judiciary has since embraced and put in a place a framework for court-annexed mediation. The Court Annexed Mediation has so far played an important role in enhancing access to justice in Kenya. The judiciary acknowledges that for cases that have been referred to mediation, the average time for their conclusion is less in comparison to the time taken under the normal court process.[17] Its continued success will however depend on how effectively the stakeholders preserve the positive aspects of the process which make it attractive.

Even as the ADR Policy gears towards mainstreaming the mediation process, the key benefits of a mediation process must be upheld.

---

[15] See Chapter Two, Muigua, K., Resolving Conflicts through Mediation in Kenya, Glenwood Publishers, Nairobi, 2nd ed., 2017; See also Chapter Eight on the Mediation Paradigm.

[16] See Chapter Nine, Muigua, K., Resolving Conflicts through Mediation in Kenya, Glenwood Publishers, Nairobi, 2nd ed., 2017.

[17] Muigua, K., Enhancing The Court Annexed Mediation Environment in Kenya, A Paper Presented at the 2nd NCIA International Arbitration Conference held from 4thto 6thMarch 2020 in Mombasa, Kenya. Available at http://kmco.co.ke/wp-content/uploads/2020/03/Enhancing-The-Court-Annexed-Mediation-Environment-in-Kenya-00000002.pdf

2.2.3 Negotiation

Negotiation has been part of the African culture for centuries since it has always been the first port of call in resolving conflicts among communities. The applicability of negotiation and its various forms has been discussed extensively in Kariuki Muigua's work.[18] Notably, negotiation is the first step towards mediation process.

Article 159 of the 2010 Constitution of Kenya acknowledges this as it lists negotiation as part of the acceptable ADR processes in Kenya. It is also a part of conciliation as confirmed by Kenyan courts.[19] Negotiation becomes even more relevant with the formal introduction of mediation into the Kenyan judicial process.

[18] See Chapter Seven, Muigua, K., Resolving Conflicts through Mediation in Kenya, Glenwood Publishers, Nairobi, 2nd ed., 2017.

[19] Karen Blixen Camp Limited v Kenya Hotels and Allied Workers Union [2018] eKLR, Civil Appeal 100 of 2013:

> *"ADR mechanisms are flexible and parties retain control of their dispute settlement. The Industrial Justice System would be slowed down considerably, if parties went seeking for support of trade dispute proceedings from the Civil Courts. There were options open to the claimant, but the exercise of these options would have resulted in delay. The role of Labour Officers under the Employment Act 2007 is to facilitate parties in their attempt to arrive at a voluntary settlement. There is no obligation imposed on an employee who is unfairly dismissed to initially seek the intervention of the Labour Office. Failure to seek the assistance of the Labour Office in any event would not invalidate a claim filed in Court. It should always be understood that even in embracing the ADR mechanisms, parties are mindful of other statutory constraints such as time limits. A party should not be compelled to go through the non-adjudicatory mechanism if in so doing for instance, that party ends up having his/her claim time-barred under section 90 of the Employment Act. Diplomatic means of settlement should be seen as complimentary to Adjudication.* ***Negotiation in particular, as seen daily in the work we do here, is not closed out by initiation of litigation****…."*

'Resolving Conflicts through Mediation in Kenya'[20], *Settling Disputes through Arbitration in Kenya*[21] and *Alternative Dispute Resolution and Access to Justice in Kenya*[22] books all carry comprehensive discussions on negotiation process and the various aspects of negotiation.

Notably, the Mediation Book, *'Resolving Conflicts through Mediation in Kenya'* does not discuss negotiation as an abstract process but ably establishes the relationship between negotiation and mediation. It clearly demonstrates the link between the negotiation process and the mediation process for both the general reader and the professional mediation enthusiasts.[23]

2.3 Alternative Dispute Resolution and Access to Justice

The publication '*Alternative Dispute Resolution and Access to Justice in Kenya'* was written to not only expound on the role of ADR in enhancing access to justice[24] in Kenya but also exploring the foundations of ADR[25] as well as the legal and institutional frameworks governing ADR in Kenya as a tool for access to justice. The book also offers rich discussions on if and how ADR practice can be regulated for current and future purposes[26], in order to enhance its effectiveness.

The book ably establishes the link between ADR and access to justice[27] in a way that has made it easier for the stakeholders in the local ADR industry to promote ADR as a tool for realisation of access to justice for all. This is in

[20] Muigua, K., Resolving Conflicts through Mediation in Kenya, Glenwood Publishers, Nairobi – 2013.
[21] Muigua, K., Settling Disputes through Arbitration in Kenya, 3rd Ed., Glenwood Publishers, Nairobi – 2017.
[22] Muigua, K., Alternative Dispute Resolution and Access to Justice in Kenya, Glenwood Publishers, Nairobi – 2015.
[23] See Chapters one and seven, Resolving Conflicts through Mediation in Kenya, Glenwood Publishers, Nairobi – 2013.
[24] See Chapter six, Muigua, K., Alternative Dispute Resolution and Access to Justice in Kenya, Glenwood Publishers, Nairobi – 2015.
[25] See Chapter Three, Muigua, K., Alternative Dispute Resolution and Access to Justice in Kenya, Glenwood Publishers, Nairobi – 2015.
[26] See Chapter Seven, Muigua, K., Alternative Dispute Resolution and Access to Justice in Kenya, Glenwood Publishers, Nairobi – 2015.
[27] See Chapter six, Muigua, K., Alternative Dispute Resolution and Access to Justice in Kenya, Glenwood Publishers, Nairobi – 2015.

line with the provisions of Article 159 of the Constitution of Kenya which requires Kenyan courts and tribunals to promote ADR.

The book cautions the stakeholders in the justice system on the challenges that they are likely to face when putting in place the court-annexed ADR processes, and especially mediation. However, it offers some possible considerations that may go a long way in overcoming such challenges.[28]

The book on ADR and access to justice[29] paints a bright future for ADR practice in the country but subject to a few adjustments in its practice and regulation.[30] Some of the recommendations by Muigua as captured in this book are being implemented through different channels by the Judiciary as well as other policy makers.

The proposition of a lawyer as a negotiator, mediator and peacemaker[31] has also seen such professional institutions as the Law Society of Kenya collaborating more with ADR professional training bodies to equip the lawyers and advocates with the necessary skills, a step in the right direction.

Muigua's publication[32] also argues that with adequate legal and policy framework on the application of ADR in Kenya, it is possible to create awareness on ADR mechanisms for everyone, including the poor who may well be aware of their right of access to justice but lacking means of realizing the same. It calls for consolidating and harmonizing the various statutes relating to ADR with the Constitution, in order to ensure access to justice by all becomes a reality.

---

[28] See Chapter five, Muigua, K., Alternative Dispute Resolution and Access to Justice in Kenya, Glenwood Publishers, Nairobi – 2015.
[29] Muigua, K., Alternative Dispute Resolution and Access to Justice in Kenya, Glenwood Publishers, Nairobi – 2015.
[30] See Chapter Nine, Muigua, K., Alternative Dispute Resolution and Access to Justice in Kenya, Glenwood Publishers, Nairobi – 2015.
[31] See Chapter Eight, Muigua, K., Alternative Dispute Resolution and Access to Justice in Kenya, Glenwood Publishers, Nairobi – 2015.
[32] Muigua, K., Alternative Dispute Resolution and Access to Justice in Kenya, Glenwood Publishers, Nairobi – 2015.

As advocated for in this publication, that continued sensitization of the key players in the Government, the judiciary, legal practitioners, business community and the public at large will also boost support for ADR mechanisms in all possible aspects as contemplated under the Constitution and various statutes, there have been an increase in efforts geared towards achieving this.[33] The book acknowledges that a full appreciation of the workings of ADR mechanisms is key in achieving widespread yet effective use of ADR and TDR mechanisms for access to justice.

The recommendations made in the ADR and Access to Justice Book were informed by the fact that the 2010 Constitution and the resultant statutes have been widening the scope of application of ADR mechanisms. The book could not therefore have come at a better time.

The timing of the ADR and Access to Justice Book was also critical considering that the Judiciary, the Nairobi Centre for International Arbitration and other key stakeholders in the justice sector has since come up with the *Draft National ADR Policy*[34]whose ultimate goal was to lay the framework for the ADR legislation.

2.4 Sustainable Development-The Bridges that Bind?

Sustainable development agenda has gained the support of the international community as part of adopting an integrated approach to development issues and environmental conservation and protection. Sustainable development seeks to ensure that all development activities are conscious of environmental conservation and protection. Kariuki Muigua's work, *Nurturing Our Environment for Sustainable Development*, (Glenwood Publishers, Nairobi – 2016) discusses in depth the various bridges that emerge from sustainable development and development activities. The

[33] *For instance, Kariuki Muigua was* Engaged as a consultant by the International Law Development Organisation (IDLO) in the Consultancy on "*Baseline Assessment, Situational Analysis & Recommendation Report of Kenya's ADR Mechanisms towards Development and Alignment of Legal & Policy Framework with Aim to Deepen ADR for Access to Justice and Commercial Disputes*"- January 2018.
This consultancy also involved several public for a where various stakeholders exchanged their views.

[34]

underlying thread in this book is to promote sound environmental governance and management for sustainable development. The discourse recognises that sustainable development agenda not only deals with the environment, but it seeks to address all the factors that affect people's livelihoods and consequently the sustainability of environment and natural resources. This is in recognition of the fact that people's livelihoods mainly depend on the natural and other environmental resources.

For instance, the book addresses the national obligations on environment and sustainable development; basic principles of sustainable development; general approaches to sustainability and sustainable development debate; the link between human rights and sustainable development; natural resources exploitation; climate change; environmental security; food security; trade; indigenous knowledge; gender equity; and natural resource conflicts, among others.

As rightly captured in Muigua's book on sustainable development, sustainable development agenda is not only concerned with environmental matters. Instead, it adopts both anthropocentric and ecocentric approaches. Muigua's work argues for promotion of sustainable development using the two approaches: Some of the running themes that are informed by the anthropocentric approach to environmental management include Poverty Eradication, Food Security, Environmental Democracy, Environmental Justice, Environmental Security, Public Participation, Gender Equity, Access To Information, Conflicts Management, amongst others.

All these themes are discussed within the broader theme of human rights while emphasizing the special relationship between human rights and the environment. This is particularly important in light of the new Constitutional provisions on governance and in the Bill of Rights including Articles of the Constitution that touch on environment and natural resources.[35]

Ecocentric arguments also inform the discussion on themes such as combating climate change, impact of resource extraction, environmental health, and environmental conservation for the sake of the Mother Nature.

[35] Muigua, K., Nurturing Our Environment for Sustainable Development, Glenwood Publishers, Nairobi – 2016, pp. xi-xii.

However, promoting such rights as the right to a clean and healthy environment has both anthropocentric and ecocentric benefits and should therefore be pursued.[36]

Thus, as seen in Muigua's work, the sustainable development agenda advocates for an integrated approach to tackling environmental management challenges as well as social problems affecting the society.[37] This is in line with the UNDP's approach in the recent past where it has been advocating for inclusivity, sustained political commitment and national ownership alongside the need to have gender equality, and integrated planning, budgeting and monitoring as part of achieving the 2030 Sustainable Development Goals (SDGs) agenda.[38]

OECD also calls for an integrated approach to the implementation of sustainable development and argues that many SDGs are interconnected with each other; an integrated approach implies managing trade-offs and maximising synergies across targets.[39]

Muigua's work succinctly captures the interconnectedness of the various themes on sustainable development and ably captures the justifications for an integrated approach to the realisation of the sustainable development

[36] Muigua, K., Nurturing Our Environment for Sustainable Development, Glenwood Publishers, Nairobi – 2016, p. xii.
[37] See also Hussein Abaza and Andrea Baranzini, Implementing Sustainable Development: Integrated Assessment and Participatory Decision-Making Processes (Edward Elgar Publishing 2002).
[38] United Nations Development Programme, "Implementation of 2030 Agenda has to be inclusive, participatory and bottom-up," Jul 18, 2017. Available at https://www.undp.org/content/undp/en/home/presscenter/pressreleases/2017/07/18/implementation-of-2030-agenda-has-to-be-inclusive-participatory-and-bottom-up.html [Accessed on 6/4/2020]; See also Rizza Ambra, 'An Integrated Approach to the Sustainable Development Goals' (Assembly of European Regions, 4 March 2019) <https://aer.eu/integrated-approach-sdgs/> accessed 6 April 2020;
[39] Rizza Ambra, 'An Integrated Approach to the Sustainable Development Goals' (Assembly of European Regions, 4 March 2019) <https://aer.eu/integrated-approach-sdgs/> accessed 6 April 2020.

goals.[40] Notably, the themes of Poverty Eradication[41], Food Security[42], Environmental Democracy[43], Environmental Justice[44], Environmental

[40] Muigua, K., Nurturing Our Environment for Sustainable Development, Glenwood Publishers, Nairobi – 2016, p. 343.

[41] Muigua, K., Utilizing Africa's Natural Resources to Fight Poverty, available at http://www.kmco.co.ke/attachments/article/121/Utilizing%20Africa's%20Natural%20Resources%20to%20Fight%20Poverty-26th%20March,2014.pdf

[42] Muigua, K., Achieving the Right to Food for Sustainable Development in Kenya, Paper Presented at the Public Engagement Forum on the Right to Food Inception Meeting held on 24th July 2018 at the African Population and Health Research Center (APHRC) Campus, available at http://kmco.co.ke/wp-content/uploads/2018/08/Achieving-the-Right-to-Food-for-Sustainable-Development-in-Kenya-Presentation-African-Population-and-Health-Research-Center-APHRC-Campus-24th-July-2018.pdf ; Muigua, K., Food Security and Environmental Sustainability in Kenya. (Available at http://www.kmco.co.ke/index.php/publications/129-food-security-and-environmental-sustainability-in-kenya);

[43] Muigua, K., 'Enhancing Environmental Democracy in Kenya,' The Law Society Law Journal, Vol. 4, No. 1, 2008; Muigua, K., Realising Environmental Democracy in Kenya, available at http://kmco.co.ke/wp-content/uploads/2018/08/REALISING-ENVIRONMENTAL-DEMOCRACY-IN-KENYA-4th-May-2018-1-1.pdf .

[44] Muigua, K., "Chapter 25: Natural Resource Conflicts in Kenya: Effective Management for Attainment of Environmental Justice", in Patricia Kameri-Mbote and Collins Odote, eds., Blazing the Trail - Professor Charles Okidi's Enduring Legacy In The Development of Environmental Law (University of Nairobi, March, 2019); Muigua, K. and Kariuki, F., 'Towards Environmental Justice in Kenya,' Journal of Conflict Management and Sustainable Development, Volume 1, No 1, (2017); Muigua, K., Natural Resource Conflicts in Kenya: Effective Management for Attainment of Environmental Justice, Paper Presented at the Fourth Symposium and Third Scientific Conference of the Association of Environmental Law Lecturers in African Universities, held at the Kenya School of Law, Karen Campus, Nairobi on 14th-17th December, 2015. (Available at http://www.kmco.co.ke/index.php/publications); Muigua, K., Reflections on ADR and Environmental justice in Kenya (Available at http://www.kmco.co.ke/index.php/publications/97-reflections-on-adr-and-environmental-justice-in-kenya).

Security[45], Public Participation[46], Gender Equity[47], Access To Information[48], Conflicts Management[49], combating climate change[50], impact of resource

[45] Muigua, K., Achieving Environmental Security in Kenya, available at http://www.kmco.co.ke/attachments/article/165/Environmental%20Security%20in%20Kenya%2027th%20October%202015.pdf .

[46] Muigua, K., Towards meaningful Public Participation in Natural Resource Management in Kenya. (Available at http://www.kmco.co.ke/index.php/publications/126-towards-meaningful-public-participation-in-natural-resource-management-in-kenya).

[47] Muigua, K., 'Attaining Gender Equity for Inclusive Development in Kenya,' Journal of Conflict Management and Sustainable Development, Volume 2, No 2, (2018).

[48] Muigua, K., 'Information Security Management: Demystifying the Role of the Company Secretary,' The Professional Management Journal for the institute of Certified Public Secretaries of Kenya, May, 2010.

[49] Muigua, K., 'International Investment Law and Policy in Africa: Human Rights, Environmental Damage and Sustainable Development,' Journal of Conflict Management and Sustainable Development, Volume 3, No 1, (May, 2019); Muigua, K. and Maina, N., 'Effective Management of Commercial Disputes: Opportunities for the Nairobi Centre for International Arbitration,' Journal of Conflict Management and Sustainable Development, Volume 1, No 1, (2017); Muigua, K., Tribunals within the Justice System in Kenya: Integrating Alternative Dispute Resolution in Conflict Management, Paper presented at the Judiciary's 1st Annual Tribunals' Symposium held on 24th May 2019 at Sarova Whitesands Beach Hotel, Mombasa; Muigua, K., Natural Resources and Conflict Management in East Africa, Paper Presented at the 1st NCMG East African ADR Summit held at the Windsor Golf Hotel, Nairobi on 25th & 26th September, 2014. (Available at http://www.kmco.co.ke/index.php/publications); Muigua, K., Conflict Management Mechanisms for Effective Environmental Governance in Kenya, available at http://kmco.co.ke/wp-content/uploads/2018/09/Conflict-Management-Mechanisms-for-Environmental-Governance-Kariuki-Muigua-September-2018.pdf ; Muigua, K., Harnessing Traditional Knowledge for Environmental Conflict Management in Kenya, available at http://www.kmco.co.ke/attachments/article/175/TRADITIONAL%20KNOWLEDGE%20AND%20CONFLICT%20MANAGEMENT-25%20April%202016.pdf.

[50] Gichira, P.S, Agwata, J.F & Muigua, K.D, 'Climate Finance: Fears and Hopes For Developing Countries,' Journal of Law, Policy and Globalization, Vol. 22 (2014), pp. 1-7.

extraction[51], environmental health[52], and environmental conservation for the sake of the Mother Nature are not only discussed in his text books but have also been critically explored in his other works published as academic papers and articles.

[51] Muigua, K., "Utilising Kenya's Marine Resources for National Development", in Herausgegeben von Prof. Dr. Patricia Kameri-Mbote, Prof. Dr. Alexander Paterson, Prof. Dr. Oliver C. Ruppel, LL.M., Prof. Dr. Bibobra Bello Orubebe, Prof. Dr. Emmanuel D. Kam Yogo (eds), Law | Environment | Africa, January, 2019, 724 S., Gebunden, ISBN 978-3-8487-5287-4, Publication of the 5th Symposium | 4th Scientific Conference | 2018 of the Association of Environmental Law Lecturers from African Universities in cooperation with the Climate Policy and Energy Security Programme for Sub-Saharan Africa of the Konrad-Adenauer-Stiftung and UN Environment.; Muigua, K., 'Reflections on Managing Natural Resources and Equitable Benefit Sharing in Kenya,' The Law Society of Kenya Journal, Vol. 15, No. 1, 2019: 1-42; Muigua, K., 'International Investment Law and Policy in Africa: Human Rights, Environmental Damage and Sustainable Development,' Journal of Conflict Management and Sustainable Development, Volume 3, No 1, (May, 2019); Muigua, K., 'Safeguarding Environmental Rights in Kenya,' Kenya Law Review Journal, Vol. IV, (2012-2013), pp. 279-294; Muigua, K., Natural Resource Conflicts in Kenya: Effective Management for Attainment of Environmental Justice, Paper Presented at the Fourth Symposium and Third Scientific Conference of the Association of Environmental Law Lecturers in African Universities, held at the Kenya School of Law, Karen Campus, Nairobi on 14th-17th December, 2015. (Available at http://www.kmco.co.ke/index.php/publications); Muigua, K., Multinational Corporations, Investment and Natural Resource Management in Kenya, available at http://kmco.co.ke/wp-content/uploads/2018/11/Multinational-Corporations-Investment-and-Natural-Resource-Management-in-Kenya-Kariuki-Muigua-November-2018.pdf; Muigua, K., Devolution and Natural Resource Management in Kenya, available at http://kmco.co.ke/wp-content/uploads/2018/09/Devolution-and-Natural-Resource-Management-in-Kenya-Kariuki-Muigua-September-2018-1.pdf; Muigua, K., Balancing Trade Environment and Development for Sustainability, available at http://kmco.co.ke/wp-content/uploads/2018/08/Balancing-Trade-Environment-and-Development-for-Sustainability-Kariuki-Muigua-August-2018.pdf; Muigua, K., Managing Environmental Conflicts through Participatory Mechanisms for Sustainable Development in Kenya, available at http://kmco.co.ke/wp-content/uploads/2018/08/Managing-Environmental-Conflicts-through-Participatory-Mechanisms-for-Sustainable-Development-in-Kenya-Kariuki-Muigua-August-2018.pdf .

[52] Muigua, K., Reconceptualising the Right to Clean and Healthy Environment in Kenya, Paper Presented at the side event at the 3rd United Nations Environment Assembly held in Nairobi, organized by the UoN School of Law & the Centre International de Droit Comparé de l'Environnement (CIDCE), at the UoN School of Law on Friday 1st December 2017.

2.5 Environment and Human Rights

2.5.1 Right to a clean and Healthy Environment

Even before the 2010 Constitution of Kenya which constitutionally guaranteed the right of every person to a clean and healthy environment and even provided for the legal basis for one to pursue justice before courts if the same is violated, Kariuki Muigua's scholarly work had argued for this approach in order to assure the justiciability of the same, seeing that environment is critical to the protection of the right to life. It is commendable that this right is no longer in doubt in Kenya and there even exists several court decisions affirming every person's right to pursue the same [53]. However, this did not mark the push for clearer framework to protect and implement this right.

In his work, *Securing Our Destiny through Effective Management of the Environment*[54], Muigua revisits the missteps that as a country we may have made, inadvertently presenting new hurdles to its full implementation. He observes that where the existing jurisprudence is that that where a party is unable to prove the denial, violation, infringement or threat to environmental rights for one reason or the other, then the same risks being violated. His argument however, is that even in such scenarios, courts should step in and use their *suo motu* powers in respect of environmental protection and conservation to safeguard the right to clean and healthy environment of all and promote the sustainable development agenda.[55]

---

[53] Article 42 of the Constitution of Kenya provides that every person has the right to a clean and healthy environment, which includes the right—to have the environment protected for the benefit of present and future generations through legislative and other measures, particularly those contemplated in Article 69; and to have obligations relating to the environment fulfilled under Article 70.

[54] Muigua, Securing Our Destiny through Effective Management of the Environment, Glenwood Publishers Limited (2020), ISBN: 978-9966-046-06-1.

[55] *Ibid, see also* Muigua, K., *Reconceptualising the Right to Clean and Healthy Environment in Kenya*, Paper Presented at the side event at the 3rd United Nations Environment Assembly held in Nairobi, organized by the UoN School of Law & the Centre International de Droit Comparé de l'Environnement (CIDCE), at the UoN School of Law on Friday 1st December 2017; Muigua, K., *Nurturing Our Environment for Sustainable Development,* Glenwood Publishers, Nairobi – 2016, chapter Nine;

2.5.2 Gender and Development

The call for public participation and the involvement of all stakeholders in the sustainable development agenda comes with the need to ensure that the gender aspect is also considered. This position is also constitutionally supported by Article 27 of the Constitution which guarantees the right of every person to equality and freedom from discrimination.[56] Bearing that environmental and natural resources and the related conflicts impact on both men and women, Kariuki Muigua's work has substantively delved into the subject of gender. In his work, 'Attaining Gender Equity for Inclusive Development in Kenya,'[57] Muigua advocates for more effective legal and institutional framework on gender equity and human rights with a view to making a case for the practical empowerment of all gender for national development.[58] His argument is based on a legal and moral argument in support of the need for full participation of both gender in the sustainable development efforts.[59]

His work on gender and development also touches on inclusion of both men and women in conflict management efforts. While advocating for the use of ADR and TDR mechanisms in conflict management, Muigua rightly points

---

[56] 27. (1) Every person is equal before the law and has the right to equal protection and equal benefit of the law.
(2) Equality includes the full and equal enjoyment of all rights and fundamental freedoms.
(3) Women and men have the right to equal treatment, including the right to equal opportunities in political, economic, cultural and social spheres.
(4) The State shall not discriminate directly or indirectly against any person on any ground, including race, sex, pregnancy, marital status, health status, ethnic or social origin, colour, age, disability, religion, conscience, belief, culture, dress, language or birth.
(5) A person shall not discriminate directly or indirectly against another person on any of the grounds specified or contemplated in clause (4).
(6) To give full effect to the realisation of the rights guaranteed under this Article, the State shall take legislative and other measures, including affirmative action programmes and policies designed to redress any disadvantage suffered by individuals or groups because of past discrimination.

[57] Muigua, K., 'Attaining Gender Equity for Inclusive Development in Kenya,' Journal of Conflict Management and Sustainable Development, Volume 2, No 2, (2018).

[58] Ibid.

[59] See also Muigua, K., Nurturing Our Environment for Sustainable Development, Glenwood Publishers, Nairobi – 2016, chapter Twelve.

out that traditionally, these mechanisms have often demonstrated some gender discrimination against women.[60] He points out that TDR mechanisms have traditionally had some disadvantages such as: potential disregard for basic human rights and gender imbalance in the composition of the committees, among others.[61] It is in this recognition that the Land Act, 2012[62] which is the substantive regime for matters pertaining to land in Kenya lays down the guiding values and principles of land management and administration which include *inter alia*: elimination of gender discrimination in law, customs and practices related to land and property in land; participation, accountability and democratic decision making within communities, the public and the Government in land dispute handling and management.[63]

Muigua correctly points out that some of the traditional practices have negative impacts such as discrimination of women and persons with disabilities,[64] and it is against this fact that the Constitution retains the test of non-repugnancy while applying traditional justice systems.[65] This is where the Courts come in as the legal guardians of the Bill of Human rights as envisaged in the Constitution.[66]

Kariuki Muigua thus asserts that in a community where gender and age is discriminated, these prejudices will continue to be perpetuated by their customs, unless the community is sensitized about these issues. Mainstreaming of gender and equality rights and what the law provides will

[60] Muigua, K., Alternative Dispute Resolution and Access to Justice in Kenya, Glenwood Publishers, Nairobi – 2015.
[61] Ibid.
[62] Land Act, No. 6 of 2012, Laws of Kenya.
[63]Ibid, S. 4.
[64] See generally, Muigua, K., "Securing the Realization of Environmental and Social Rights for Persons with Disabilities in Kenya". Available at http://www.kmco.co.ke/attachments/article/117/Securing%20the%20Realization%20of%20Environmental%20and%20Social%20Rights%20for%20Persons%20with%20Disabilities%20in%20Kenya.pdf; See also generally Human Rights Watch, World Report 2013, available at http://www.hrw.org/sites/default/files/wr2013_web.pdf.
[65] Art. 159(3).
[66] Art. 23.

go a long way in ensuring that ADR and TDR mechanisms respect the rights of all humans.[67]

Environmental and natural resources exploitation and the resultant conflicts affect both men and women especially based on their perceived traditional roles and this creates the urgent need to ensure that both groups are actively and meaningfully included in all management issues. Kariuki Muigua observes that Women elders also played a key role in resolving conflicts.[68] This is buttressed by the fact that among the traditional Igbo society in Eastern Nigeria, women are the sustainers and healers of human relationships.[69] Chinua Achebe buttresses this point further in his renowned novel, *Things Fall Part*, where he asserts as follows:

> *"…when a father beats his child, it seeks sympathy in its mother's hut. A man belongs to his father when things are good and life is sweet. But when there is sorrow and bitterness, he finds refuge in his motherland. Your mother is there to protect you".*[70]

This is true in virtually all the other African communities. The role of the Luo women, for instance, is also well documented in various stages of peace processes in their community. They could directly or indirectly intervene through elders and women networks within the warring factions to bring peace.[71]

However, while the above is true, Muigua is quick to point out that a critical look at the cultures of most of the other African communities reveals that the role of women as compared to men in conflict management activities was and is still negligible.[72] Thus, while the Constitution of Kenya calls for

---

[67] Muigua, K., Alternative Dispute Resolution and Access to Justice in Kenya, Glenwood Publishers, Nairobi – 2015.
[68] Ibid.
[69] Brock-Utne, B., "Indigenous conflict resolution in Africa," op cit., p.13.
[70] Achebe, C., Things Fall Apart, (William Heinemann Ltd, London, 1958) (As quoted in Brock-Utne, B., "Indigenous conflict resolution in Africa," op cit., p.13).
[71] Brock-Utne, B., Indigenous Conflict Resolution in Africa, op cit.
[72] See Alaga, E., Challenges for women in peacebuilding in West Africa, (Africa Institute of South Africa (AISA), 2010); Cf. Ibewuike, V. O., African Women and Religious Change: A study of the Western Igbo of Nigeria with a special focus on Asaba town, (Uppsala, 2006). Available at

empowerment and protection of traditionally marginalised and vulnerable groups such as women, it is important that these efforts are not only limited to national leadership positions but also ensure that they are reflected across the different spheres of everyday lives. Empowering both men and women individually will create stronger institutions even as the policy makers and legislators ensure that conflict management systems should require specifically that gender issues are given adequate weight and should include some requirement for inclusion of female conflict resolvers such as mediators and arbitrators when appropriate, like when land rights are involved.[73]

2.5.3 Democracy/Environmental Democracy

Environmental Democracy in Kenya has come a long way from being a virtually non-existent concept under the laws of Kenya to one that is now prominently recognised both under the law and the case law emanating from the highest courts. The wording of the statutes may not specifically mention the words 'environmental democracy' but the idea is captured in various words, especially in the 2010 post- constitutional era. For instance, Article 10 of the Constitution provides for the following national values and principles: patriotism; national unity; sharing and devolution of power; the rule of law; democracy and participation of the people; human dignity; equity; social justice; inclusiveness; equality; human rights; non-discrimination and protection of the marginalised; good governance; integrity; transparency and accountability; and sustainable development. These values and principles ought to bind all state organs, state officers, public officers and all persons whenever any one of them: applies or interprets the Constitution; enacts, applies or interprets any law; or makes or implements public policy decisions.[74]

---

https://uu.diva-portal.org/smash/get/diva2:167448/FULLTEXT01.pdf [Accessed on 6/4/2020].

[73] Fitzpatrick, D., "Dispute Resolution; Mediating Land Conflict in East Timor", in AusAID' *Making Land Work Vol 2; Case Studies on Customary Land and Development in the Pacific*, (2008), Case Study No. 9, p. 175. Sourced from http://www.ausaid.gov.au/publications/pdf, [Accessed on 12/4/2020].

[74] Article 10 (1), Constitution of Kenya, 2010.

The lack of environmental democracy was largely informed by the top-down approach previously adopted in Kenya.[75] Environmental democracy in environmental management matters led to the buttressing of the co-management of natural resources and environmental resources. Co-management of these resources has several advantages as it overcomes the many limitations and pitfalls of centralized, top-down resource management hence resulting in more efficient, appropriate and equitable resource management.[76] Further, it fosters meaningful communication in the decision-making process thus contributing to effective management of the marine resources.[77]

Kariuki Muigua's work has largely contributed to the debate leading to this transition.[78] *In the Matter of the National Land Commission [2015] eKLR*[79], the Supreme Court of Kenya in its advisory opinion observed as follows:

> *Kariuki Muigua, Didi Wamukoya, Francis Kariuki in their book, [***Natural Resources and Environmental Justice in Kenya** *(Glenwood Publishers Limited, Nairobi: 2015)] discuss the link between the growth of government structures, and the delegation of decision-making powers to state agencies, such as commissions. They observe as follows (pages 24 to 25):*
>
> > ***"In Kenya today, as the size and scope of government continues to grow, decisions that have previously been***

[75] See Muigua, K., Kariuki, F., Wamukoya, D., Natural Resources and Environmental Justice in Kenya, (Glenwood Publishers, Nairobi, 2015).
[76] Ibid; Article 10, Constitution of Kenya.
[77] Ibid.
[78] Muigua, K., 'Enhancing Environmental Democracy in Kenya,' The Law Society Law Journal, Vol. 4, No. 1, 2008; see also **Doctor of Philosophy in Law (Ph.D.) - 2011;**
Thesis titled "Resolving Environmental Conflicts in Kenya through Mediation" at the University of Nairobi on 02/12/2011 focusing on the areas of Public Participation, Mediation and Environmental Democracy; Muigua, K., Realising Environmental Democracy in Kenya, available at http://kmco.co.ke/wp-content/uploads/2018/08/REALISING-ENVIRONMENTAL-DEMOCRACY-IN-KENYA-4th-May-2018-1-1.pdf.
[79] In the Matter of the National Land Commission [2015] eKLR, Advisory Opinion Reference 2 of 2014.

> ***made by elected officials in a political process are now being delegated by statute to technical experts in state agencies and constitutional commissions. The rationale is, therefore, to incorporate public values into decisions, improve the substantive quality of decisions, resolve conflicts among competing interests and build trust in institutions and educate and inform the public."***[80]

The Supreme Court went further to capture the place of democracy (including environmental democracy) in the following words:

> [348] "*It is thus clear that the principle of the* ***participation of the people does not stand in isolation****; it is to be realised in conjunction with other constitutional rights, especially the* ***right of access to information*** *(Article 35); equality (Article 27); and the* ***principle of democracy*** *(Article 10(2)(a)). The right to equality relates to matters concerning land, where State agencies are encouraged also to engage with communities, pastoralists, peasants and any other members of the public. Thus****, public bodies should engage with specific stakeholders, while also considering the views of other members of the public****. Democracy is another national principle that is enhanced by the participation of the people*."[81]
>
> **[352] "***The* ***participation of the people is a constitutional safeguard, and a mechanism of accountability against State organs, the national and county governments, as well as commissions and independent offices****.* ***It is a device for promoting democracy, transparency, openness, integrity and effective service delivery****. During the constitution-making process, the Kenyan people had raised their concerns about the hazard of exclusion from the State's decision-making processes. The Constitution has specified those situations in which the public is assured of participation in decision-making processes. It is clear that the principle of public participation did not stop with the constitution-making process; it remains as crucial in the implementation phase as it was in the constitution-making process*."

[80] Ibid, para. 346.
[81] Ibid, para. 348.

[353] *"I agree fully with the views of Odunga J. in the case of* ***Robert Gakuru****, that* ***public participation is not an abstract notion and, on matters concerning land, State organs, the Ministry, and the NLC must breathe life into this constitutional principle, and involve the public in land management and administration; legislative plans and processes; and policy-making processes****. This is clear from the terms of Article 10 of the Constitution, which requires these bodies to:(a) apply or interpret this Constitution; (b) enact, apply or interpret any law; or (c) make or implement public policy decisions bearing in mind the participation of the people, and the goals of democracy, and transparency."*

[354] *"I would refer to the Draft Public Participation Guidelines for County Governments, which is of persuasive authority in this Advisory Opinion. It states that the importance of public participation includes to: strengthen democracy and governance; increase accountability; improve process, quality and results, in decision-making; manage social conflicts; and enhance process legitimacy. Although these are not the final guidelines, they bear similar objectives of public participation as those articulated in the Constitution, and in the County Governments Act. Finally, the Draft Guidelines provide conditions for meaningful public participation, such as: (i) clarity of subject-matter; (ii) clear structures and process on the conduct of participation; (iii) opportunity for balanced influences from the public in general; (iv) commitment to the process; (v) inclusive and effective representation; (vi) integrity; (vii) commitment to the value of public input; (viii) capacity to engage; (ix) transparency; and (x) considerations of the social status, economic standing, religious beliefs and ethnicity of the members of the public. These conditions are comparable to the constitutional values and principles of democracy, transparency, accountability and integrity."*

[355] *"In conclusion, an array of rich ingredients of the participation of the people, emerge from various sources: decisions by superior Courts in Kenya; comparative jurisprudence from another jurisdictions; works by scholars; draft principles and guidelines bearing upon public participation by various State organs and governments; and relevant constitutional and legal*

provisions. The categories of these ingredients are not closed. It will devolve to the citizens, as well as stakeholders, to monitor the practicability of these ingredients, and to appraise the scope for improvement, so they may increasingly reflect the vision of the Constitution."

2.5.4 International investments/Trade, Environment and Human rights

International investments and trade have come to be acknowledged to have a great impact on not only the environment but also human rights. Kariuki Muigua has ably discussed the relationship that exists between these concepts and how they affect each other. In his work, *Nurturing Our Environment for Sustainable Development, Glenwood Publishers, Nairobi – 2016,* he has discussed how they all relate to the sustainable development agenda. He bases his argument on the fact that trade is considered as one of the driving forces of economic development for all countries, usually aimed at development and the eradication of poverty. [82] On the one hand, environmental law, both national and international, and environmental policies—such as promotion of renewable energy, environmental taxation and conservation measures—help define how countries will structure their economic activities.[83] On the other hand, trade law affects the way in which countries design their laws and policies in areas—such as subsidies, technical regulations, investment policy and taxes—that are integral to environmental policy.[84]

It has been argued that the main link between trade and sustainable development is the use of non-renewable raw materials to earn foreign

[82] 'The Link between Trade and Development: What Role for the EU Trade Policy?' AIF Conference, Christiansborg, 12 September 2000; See also Preamble, World Trade Organization, "Marrakesh Agreement Establishing the World Trade Organization. Annex 1A: Multilateral Agreements on Trade in Goods- Agreement on Trade-Related Investment Measures", The Results of the Uruguay Round of Multilateral Trade Negotiations: The Legal Texts (World Trade Organization, Geneva, 1995), pp. 163-167.

[83] International Institute for Sustainable Development & United Nations Environment Programme, Trade and Green Economy: A Handbook, (International Institute for Sustainable Development, Geneva, 2014), pp. 3-4.

[84] Ibid, pp. 3-4.

exchange.[85] This, it has been suggested, is a result of a scenario where the dependence of the developed market economies on other mineral imports from the developing countries has also grown, and non-renewable resources like fuels and minerals, as well as manufactured goods, are now far more important than tropical products and other agricultural materials in the flow of primary products from developing to industrial countries.[86] This has been such a serious problem which has continually affected third world countries that the Agenda 2030 for Sustainable Development aims at ensuring that there is significant increase in the exports of developing countries, in particular with a view to doubling the least developed countries' share of global exports by 2020.[87]

His work supports the assertion that equitable international trade can enable countries to achieve food security, generate decent employment opportunities for the poor, promote technology transfer[88], ensure national economic security and support infrastructure development, not only for moving goods to and from ports, but also for basic services such as health, education, water, sanitation and energy.[89]

---

[85] Report of the World Commission on Environment and Development, Our Common Future, op cit., para. 41. However, this is not to say that it is the only link. There are other links between trade and sustainable development; if protectionism raises barriers against manufactured exports, for example, developing nations have less scope for diversifying away from traditional commodities. And unsustainable development may arise not only from overuse of certain commodities but from manufactured goods that are potentially polluting. The Commission also observed that the increase in protectionism in industrial countries stifles export growth and prevents diversification from traditional exports. Consequently, if developing countries are to reconcile a need for rapid export growth with a need to conserve the resource base, it is imperative that they enjoy access to industrial country markets for non-traditional exports where they enjoy a comparative advantage. (para. 51).

[86] Ibid, para. 40.

[87] United Nations, Transforming our world: the 2030 Agenda for Sustainable Development, op cit., para. 17.11.

[88] Art. 7 of the TRIPS states that: "The protection and enforcement of intellectual property should contribute to the promotion of technological innovation and to the transfer and dissemination of technology, to the mutual advantage of producers and users of technological knowledge and in a manner conducive to social and economic welfare, and to a balance of rights and obligations."

[89] Galmés, G.V., 'Trade as an enabler of sustainable development and poverty eradication,' in United Nations, The Road from Rio+20: Towards Sustainable

Equitable trade may be more effectively harnessed in delivering sustainable development when integrated into the SDG framework as an SDG enabler, where it would serve as a promoter for potential goals such as poverty eradication, job creation, universal healthcare and education, and a healthy environment.[90]

In his work, he acknowledges that trade can be instrumental for growth and development under appropriate conditions. Trade provides a means to overcome constraints posed by small domestic markets and allows countries to access larger external markets, as well as skills, technology and capital, which in turn enable a better use of productive resources to catalyse structural transformation.[91]

Muigua supports the idea that while environment, trade and development are clearly linked, an integrated approach that fully incorporates environmental concerns, fair trade and sustainable development is desirable.[92]

He also promotes the idea that an effective investment law and policy regime should be geared towards promoting sustainable development. It should also ensure minimal or no environmental damage.[93] In addition, he argues that human rights must at all times be upheld. He argues that for long lasting and sustainable investment policies that positively impact on the lives of communities, there is a need to ensure that the same are in line with the

---

Development Goals, Issue 4, September 2014, p. 10. UNCTAD/DITC/TED/2014/1 Available at http://unctad.org/en/PublicationsLibrary/ditcted2014d1_en.pdf [Accessed on 05/04/2020].

[90] Ibid, p.10.

[91] United Nations Conference on Trade and Development, Towards an enabling multilateral trading system for inclusive and sustainable development, op cit, para. 5.
Available at http://unctad.org/meetings/en/SessionalDocuments/cimem5d5_en.pdf [Accessed on 05/04/2020].

[92] Muigua, K., Nurturing Our Environment for Sustainable Development, Glenwood Publishers, Nairobi – 2016, chapter Ten.

[93] Muigua, K., *International Investment Law and Policy in Africa: Human Rights, Environmental Damage and Sustainable Development* - Paper Presented at the Africa International Legal Awareness (AILA) Africa International Legal Awareness (AILA)Conference Held on 5th November, 2018 at Riara University, Nairobi, Kenya.

principles of sustainable development especially those that seek to safeguard human rights as well as sound environmental management and governance.[94]

2.5.5 Traditional Ecological Knowledge, Conflict Management and Environmental Management

While discussing the place of ecological knowledge in achieving effective environmental and conflict management for sustainable development, Kariuki Muigua's work extensively discussed not only the use of formal knowledge but also traditional ecological knowledge. His work explores the place of traditional or indigenous knowledge in environmental management and conflict management. This is based on African traditional practices and the subsequent international recognition that that respect for indigenous knowledge, cultures and traditional practices contributes to sustainable and equitable development and proper management of the environment.[95] His position therefore, has been that the international recognition of indigenous knowledge means that national governments ought to give this knowledge more recognition and facilitate active uptake and use of the knowledge by communities.[96]

In addition, his position is that while there are commendable statutory and constitutional provisions in view of the fact that they have envisaged indigenous or traditional knowledge within the legal framework, the real task lies in implementing these provisions and creating opportunities for incorporation of such knowledge in decision-making. There is a need to move beyond recognition of traditional knowledge in Kenya to ensuring that the same has been fully incorporated and reflected in decision-making and also implemented where the Constitution so requires.[97]

Furthermore, Muigua argues that there is a clear need to integrate traditional and formal sciences for participatory monitoring, and taking feedback to achieve adaptive strategies for management of natural resources.[98] His

[94] Ibid.
[95] 61/295. United Nations Declaration on the Rights of Indigenous Peoples, Preamble.
[96] See also Muigua, K., Nurturing Our Environment for Sustainable Development, Glenwood Publishers, Nairobi – 2016, p. 254.
[97] Ibid, pp. 257-258.
[98] Pandey, D.N., 'Traditional Knowledge Systems for Biodiversity Conservation,'

position is that management of natural resources cannot afford to be the subject of just any single body knowledge such as the Western science, but it has to take into consideration the plurality of knowledge systems. There is a more fundamental reason for the integration of knowledge systems. Application of scientific research and local knowledge contributes both to the equity, opportunity, security and empowerment of local communities, as well as to the sustainability of the natural resources. Local knowledge helps in scenario analysis, data collection, management planning, designing of the adaptive strategies to learn and get feedback, and institutional support to put policies in to practice. Science, on the other hand, provides new technologies, or helps in improvement to the existing ones. It also provides tools for networking, storing, visualizing, and analyzing information, as well as projecting long-term trends so that efficient solutions to complex problems can be obtained.[99]

Through assimilation of indigenous knowledge, it is possible to capture the interests and genuine desires of the locals in natural resource exploitation activities. This reduces conflict, not only amongst the members of the concerned communities, but also between the communities and the authorities. Where they do not perceive a danger to their livelihoods, these communities are likely to embrace development projects and are also not likely to turn to unconventional ways of protecting their livelihoods.[100]

Traditional ecological knowledge is therefore an important part and parcel of solving environmental problems and effective conflict management, thus making Kariuki Muigua's work relevant and timely in the debate.

2.5.6 Role of science and Technology in environmental management

Kariuki Muigua has extensively contributed to the debate on the role of science and technology in environmental management. This is in line with the constitutional provisions acknowledging the place of science and technology in achieving sustainable development. [101] This is an

available at http://www.infinityfoundation.com/mandala/t_es/t_es_pande_conserve.htm [Accessed on 13/04/2020].

[99] Ibid.

[100] Muigua, K., Nurturing Our Environment for Sustainable Development, p. 258.

[101] See Constitution of Kenya, 2010, Article 11 (2) (b):

internationally agreed concept that indeed science, technology and innovation all have a role to play in realising the sustainable development agenda.[102] This critical role also extends to environmental management, a central element of SDGs.[103] Science for sustainable development also forms the basis of Chapter 35 of Agenda 21 which calls for: strengthening the scientific basis for sustainable management; enhancing scientific understanding; improving long-term scientific assessment; and building up scientific capacity and capability.[104]

Kariuki Muigua's paper on "*Utilising Science and Technology for Environmental Management in Kenya*"[105] advocates for the use of science and technology for environmental management in Kenya. It critically

---

(2) The State shall—

(*b*) recognise the role of science and indigenous technologies in the development of the nation;

[102] *Florian Kongoli, 'Role of Science and Technology on Sustainable Development' [2016] Sustainable Industrial Processing Summit, SIPS 1;* Kongoli, Florian. "Investments needed for new sustainable technologies." Copper Worldwide *6, no. 1 (2016): 3; See also* Likens, Gene E. "The role of science in decision making: does evidence-based science drive environmental policy?." Frontiers in Ecology and the Environment *8, no. 6 (2010): e1-e9; Miller, Clark A., Paul N. Edwards, and Paul Edwards, eds. Changing the atmosphere: Expert knowledge and environmental governance. MIT press, 2001;* Christmann, Petra. "Effects of "best practices" of environmental management on cost advantage: The role of complementary assets." *Academy of Management journal* 43, no. 4 (2000): 663-680; Cashmore, Matthew. "The role of science in environmental impact assessment: process and procedure versus purpose in the development of theory." *Environmental Impact Assessment Review* 24, no. 4 (2004): 403-426.

[103] See also Sustainable Development Goals Targets 17.6 and 17.8 which respectively aim to "Enhance North-South, South-South and triangular regional and international cooperation on and access to science, technology and innovation and enhance knowledge sharing on mutually agreed terms, including through improved coordination among existing mechanisms, in particular at the United Nations level, and through a global technology facilitation mechanism" and to "fully operationalize the technology bank and science, technology and innovation capacity-building mechanism for least developed countries by 2017 and enhance the use of enabling technology, in particular information and communications technology".

[104] 'Science.:. Sustainable Development Knowledge Platform' <https://sustainabledevelopment.un.org/topics/science> accessed 14 April 2020.

[105] Kariuki Muigua, 'Utilising Science and Technology for Environmental Management in Kenya' 23. Available at http://kmco.co.ke/wp-content/uploads/2020/04/Utilising-Science-and-Technology-for-Environmental-Management-in-Kenya.pdf [Accessed on 10/4/2020].

discusses the various environmental management tools in Kenya. The paper argues that environmental management tools in Kenya have not been fully effective in environmental protection and conservation as evidenced by several environmental concerns such as pollution and degradation. Muigua calls for the enhancement of science and technology as an environmental management tool in Kenya in order to effectively achieve the right to a clean and healthy environment and promote sustainable development.[106]

Muigua supports the view that while Science and technology have resulted in many environmental problems, they can and have provided effective solutions to most, if not all, environmental problems facing the world especially in relation to: climate change, waste management and environmental degradation.[107] This can be achieved through the use of science and technology in industrial waste management in order to enhance environmental management and protection; adoption of green and clean technologies; and climate change mitigation measures.[108] While Kenya has made some notable progress in adopting the same, Muigua argues for greater uptake and adoption of measures that will see more sectors embracing science, technology and innovation. He provides suggestions that would make this a reality.

These recommendations also notably feature in his other work such as the book on *Nurturing Our Environment for Sustainable Development*[109] and the 2020 book on *Securing Our Destiny through Effective Management of the Environment*[110], whose main running themes include the Role of Law in Environmental Management and Governance; Implementing Constitutional Provisions on Natural Resources and Environmental Management in Kenya; Role of Corporations in Environmental Conservation and Sustainable Development in Kenya; Achieving Environmental Security for Sustainable Development in Kenya; The Extractives Industry and Environmental Management in Kenya: the (Dis) Connect; Harnessing the Blue Economy:

[106] Ibid.
[107] Ibid, p. 12.
[108] Ibid.
[109]Muigua, K., Nurturing Our Environment for Sustainable Development, Glenwood Publishers, Nairobi – 2016.
[110] Muigua, Securing Our Destiny through Effective Management of the Environment, Glenwood Publishers Limited(2020), ISBN: 978-9966-046-06-1.

Challenges and Opportunities for Kenya; Environmental and Natural Resources and Equitable Benefit Sharing in Kenya; Adopting an Integrated Approach to Environmental Management and Conservation for Sustainable Development in Kenya; Environmental Liability Regime in Kenya and Sustainable Development; Managing Environmental and Land Related Conflicts Through Traditional Dispute Resolution Mechanisms; Effective Environmental Management and Governance for Peace Building in Kenya and Environmental Justice.

The book links these themes with environmental conservation and management and argues a case for effective management of the environment through an integrated approach that brings all stakeholders on board. Notably, the publication acknowledges the interconnectivity among the various environmental themes and thus cannot have come at a better time. While Kenya has a Constitution that acknowledges this interconnectivity and the different but important roles of the stakeholders in social, economic and environmental sectors play, there have been some sectoral yet disjointed efforts and approaches towards achieving the same. Muigua provides the much needed insight on how these disjointed efforts cannot work thus creating the need for reevaluation.

2.5.7 Climate Change

Over the years, climate change has become an international concern due to its adverse effects on both the environment and human livelihoods. Kariuki Muigua has thus dedicated a good chunk of his scholarly works in addressing the challenge. He establishes a link that demonstrates that climate change is a serious problem that affects all sectors of the environment and human life.[111] This discussion is also based on the fact that climate change efforts are connected to the sustainable development agenda and poverty eradication. Muigua thus calls for combined efforts from national, regional to international community to tackle the problem of climate change and this will ultimately impact positively on the fight against poverty.[112] The urgency

[111] Muigua, K., Nurturing Our Environment for Sustainable Development, Glenwood Publishers, Nairobi – 2016; Muigua, K., Kariuki, F., Wamukoya, D., Natural Resources and Environmental Justice in Kenya, Glenwood Publishers, Nairobi – 2015.

[112] Muigua, K., Nurturing Our Environment for Sustainable Development, Glenwood Publishers, Nairobi – 2016.

to address climate change is informed by the fact that impacts of climate change are disproportionately felt by among others: women, youth, coastal peoples, local communities, indigenous peoples, fisherfolk, poor people and the elderly. The local communities, affected people and indigenous peoples have also been kept out of the global processes to address climate change. This is despite the fact that the impacts of climate change also threaten food sovereignty and the security of livelihoods of natural resource-based local economies. They can also threaten the health of communities around the world-especially those who are vulnerable and marginalized, in particular children and elderly people.[113]

He thus offers practical recommendations geared towards addressing climate change through facilitative public participation such as: science based and ecosystem-based climate change mitigation and adaptation measures.

3. Telling the African Story: A Voice from the South

A noteworthy thread across Kariuki Muigua's scholarly work is that it not only focuses on the African continent's problems and challenges but also how the same can be solved using homegrown solutions; he seeks to tell the African story as seen from the eyes of the African people. The narrative of solving African problems using local solutions is based on the fact that Africa is well-endowed with natural resource wealth and as a result, there are many exploration and exploitation activities going on all over the continent.[114] Africa has a large quantity of natural resources like oil, gold, diamonds, iron, cobalt, copper, bauxite, silver, uranium, titanium, petroleum among others.[115] The natural resources wealth of Africa rightfully belongs to the people of Africa. The power to safeguard these resources is entrusted in the governments of African countries. The utilisation of Africa's resources

[113] Muigua, Securing Our Destiny through Effective Management of the Environment, Glenwood Publishers Limited (2020), ISBN: 978-9966-046-06-1.
[114] Rajaram, A., "Rich Countries, Poor People; Will Africa's Commodity Boom Benefit the Poor", available on http://blogs.worldbank.org/africacan/rich-countries-poor-people-will-africa-s-commodity-boom-benefit-poor [Accessed on 10/04/2020].
[115] World Resources, 'Natural Resources of Africa',
available at www.worldresources.envi.org/natural-rsources-africa/ [Accessed on 13/4/2020].

should contribute to the realization of economic rights of the people of Africa as envisaged in various international law instruments and national laws.[116]

Muigua has observed that while a cursory glance of Africa would paint a picture of a rich continent with the expectation of a people enjoying a high standard of living and excellent development; with good infrastructure, high employment levels, high quality education, good health and long life expectancy; and a conflict free zone where everyone is comfortable with life owing to the abundance of resources, ironically, the situation in Africa is strikingly the opposite.[117] Instead of being used to solve African people's problems, Africa's resources are fueling the world economy while Africa itself remains economically crippled; exploited and neglected. [118] He attributes the sad state of affairs largely to the national leaders who are entrusted with the mandate of safeguarding natural resources for the benefits of the people have betrayed the trust through: high levels of corruption in the application of revenue from the natural resources; and the fact that when they enter into resource extraction contracts, they do not carry people's interests at heart. In effect, Africans have been deprived of their right to benefit and control the utilisation of their natural resources. Poverty level is very high with a minority of extremely wealthy class and a majority of poor people.[119]

At the continental level, the *Africa Mining Vision 2009*[120] was expected to address most of these challenges including: exploitative multinational corporations, lack of expertise and corruption, and African countries negotiating unfavourable mining development agreements. The *Africa Mining Vision* was formally established in 2009 by the African Union (AU),

---

[116] Muigua, K., Nurturing Our Environment for Sustainable Development, p. 107.
[117] Ibid.
[118] Ibid.
[119] World Bank, Economic Survey for Sub-Saharan Africa, 2013, Africa Pulse October, 2013 Vol.8 available at http://www.worldbank.org/content/dam/Worldbank/document/Africa/Report/Africas-Pulse-brochure_Vol8.pdf [Accessed on 13/4/2020].
[120] African Union, Africa Mining Vision: "Transparent, equitable and optimal exploitation of mineral resources to underpin broad-based sustainable growth and socio-economic development", (United Nations Economic Commission for Africa (ECA), February, 2009). Available at https://www.uneca.org/sites/default/files/PublicationFiles/africa_mining_vision_english.pdf [Accessed on 13/4/2020].

to promote equitable, broad-based development through the prudent utilization of the continent's natural wealth.[121] However, as Muigua

[121] African Union, Africa Mining Vision, February 2009. Available at https://au.int/sites/default/files/documents/30995-doc-africa_mining_vision_english_1.pdf [Accessed on 13/4/2020].

This shared vision will comprise:

- *A knowledge-driven African mining sector that catalyses & contributes to the broad-based growth & development of, and is fully integrated into, a single African market through:*
    - *Down-stream linkages into mineral beneficiation and manufacturing;*
- *Up-stream linkages into mining capital goods, consumables & services industries;*
- *Side-stream linkages into infrastructure (power, logistics; communications, water) and skills & technology development (HRD and R&D);*
    - *Mutually beneficial partnerships between the state, the private sector, civil society, local communities and other stakeholders; and*
    - *A comprehensive knowledge of its mineral endowment.*
- *A sustainable and well-governed mining sector that effectively garners and deploys resource rents and that is safe, healthy, gender & ethnically inclusive, environmentally friendly, socially responsible and appreciated by surrounding communities;A mining sector that has become a key component of a diversified, vibrant and globally competitive industrialising African economy;*
- *A mining sector that has helped establish a competitive African infrastructure platform, through the maximisation of its propulsive local & regional economic linkages;*
- *A mining sector that optimises and husbands Africa's finite mineral resource endowments and that is diversified, incorporating both high value metals and lower value industrial minerals at both commercial and small-scale levels;*
- *A mining sector that harnesses the potential of artisanal and small-scale mining to stimulate local/national entrepreneurship, improve livelihoods and advance integrated rural social and economic development; and*

observes, African countries still struggle with making the mineral resources work for them, in uplifting the lives of their people.[122] For instance, this is demonstrated in the case of Nigeria where it has been reported that, despite the enactment of various acts, the culture of impunity and corruption has continued to occupy the country's oil industry and poverty reduction remains elusive.[123]

Kenya is no exception as it has a number of mineral deposits albeit in smaller amounts, which, as already pointed out, have not contributed much to the country's GDP as would be expected. The communities are also yet to boast of any significant benefits from the mining activities going on within their regions.[124] The challenges affecting the extractives sector in Kenya are not

---

- *A mining sector that is a major player in vibrant and competitive national, continental and international capital and commodity markets.*

[122] See generally, Abuya, W.O., "Mining Conflicts and Corporate Social Responsibility in Kenya's Nascent Mining Industry: A Call for Legislation," In Social Responsibility, IntechOpen, 2018; African Union, Assessment of the Mining Policies and Regulatory Frameworks in the East African Community for Alignment with the Africa Mining Vision, op cit.; Kimani, M., "Mining to profit Africa's people," Africa Renewal 23, no. 1 (2009): 4-5; Bush, R., "Conclusion: mining, dispossession, and transformation in Africa," In Zambia, mining, and neoliberalism, pp. 237-268. Palgrave Macmillan, New York, 2010. Available at https://www.sahistory.org.za/sites/default/files/file%20uploads%20/alastair_fraser_miles_larmer_zambia_mining_anbook4you.pdf#page=260 [Accessed on 13/4/2020]; Murombo, T., "Regulating mining in South Africa and Zimbabwe: Communities, the environment and perpetual exploitation," Law Env't & Dev. J. 9 (2013): 31.

[123] Poncian, J., & Kigodi, H. M., "Transparency initiatives and Tanzania's extractive industry governance," Development Studies Research 5, no. 1 (2018): 106-121, p. 108.

[124] Ndemo, B., "Kenya's mineral resources could pull millions out of poverty, Daily Nation, Monday June 24 2019. Available at https://www.nation.co.ke/oped/blogs/dot9/ndemo/2274486-5169428-990fwj/index.html [Accessed on 13/4/2020]; Economic and Social Rights Centre (Hakijamii) (Kenya), Titanium mining benefit sharing in Kwale County:HAKIJAMIIA comprehensive analysis of the law and practice in the context of Nguluku and Bwiti, September, 2017. Available at http://www.hakijamii.com/wp-content/uploads/2017/09/Titanium-mining-benefit-sharing.pdf [Accessed on 13/4/2020]; cf. Base Titanium, "Response to Hakijamii's Draft Report on Base Titanium's Impacts on the Community," 25th August, 2017. Available at

only limited to those related to modes of benefit sharing. There has been a general lack of openness, transparency and accountability as far as the mining activities are concerned.

Despite its launch in 2009, the *Africa Mining Vision* which also binds the country and seeks to promote transparent, equitable and optimal exploitation of mineral resources is yet to have an impact in not only Kenya but also 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.[125]

The extractives industry in Kenya holds high hopes for the Kenyan people with not only increased revenues but also lowered cost of living as the prices of petroleum products have a significant effect on the cost of essential commodities in the country.[126] Some of the mechanisms that are meant to enhance the economies of the national, county governments and communities through benefit sharing include but not limited to: direct investment in projects that benefit the people, jobs and employment creation and technology transfer amongst others. Notably, this is in line with one of the EITI principles that the prudent use of natural resource wealth should be an important engine for sustainable economic growth that contributes to sustainable development and poverty reduction.[127]

---

https://www.business-humanrights.org/sites/default/files/documents/Hakijamii%20Base%20Response%20Final%20-%202017%2008%2028_0.pdf [Accessed on 13/4/2020]; see also Masinde, J., "Are Kwale residents expecting too much?" Daily Nation, Tuesday February 12 2013. Available at https://www.nation.co.ke/lifestyle/smartcompany/Are-Kwale-residents-expecting-too-much/1226-1690904-nb7rqyz/index.html [Accessed on 13/4/2020].

[125] 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 13/4/2020].

[126] Munyua, J., & Ragui, M., "Drivers of instability in prices of petroleum products in Kenya," Prime Journal of Business Administration and Management (BAM) 3, no. 3 (2013): 919-926.

[127] Muigua, Securing Our Destiny through Effective Management of the Environment, Glenwood Publishers Limited (2020), ISBN: 978-9966-046-06-1.

While the current legislation on the extractives industry in the country has several requirements on disclosure and reports touching on various aspects, Kenya cannot currently pride itself as having transparency by governments (both national and counties) and companies in the extractive industries and thus, there is the need to enhance public financial management and accountability. There is hardly any publicly available information on the important aspects that shed light on the status of the revenues from the extractives industry. Its only recently when the President mentioned that the first batch of oil had been exported, and there was mention of the amount exported or its value.[128] The details of such deals remain few. Kenya's scenario is not unique to this country but is also reflected across many African countries, to the detriment of the local communities.[129]

In the spirit of ensuring that African countries and especially Kenya only adopts what works for them, Kariuki Muigua argues that while we push for adoption of best practices in management of revenues from the extractives sector in Kenya, and considering that Kenya has had no previous experience in oil production, there is a temptation to adopt frameworks from other countries despite the contextual differences between countries.[130] It is therefore recommended that the Government of Kenya has a responsibility to adopt frameworks that are consistent with the prevailing social, economic, political and cultural circumstances in the country so as to facilitate the development of the oil and gas industry.[131]

Muigua's work does not however only paint a grim picture of the continent as he also offers some success stories within the continent. For instance,

---

[128] Presidential Strategic Communication Unit, "Kenya in Sh1.3bn oil export deal," Daily Nation, Thursday, August 1, 2019. Available at https://www.nation.co.ke/news/Kenya-joins-list-of-oil-exporters/1056-5219572-qkp633z/index.html [Accessed on 13/4/2020].

[129] Muigua, Securing Our Destiny through Effective Management of the Environment, Glenwood Publishers Limited (2020), ISBN: 978-9966-046-06-1.

[130] Kenya Civil Society Platform on Oil & Gas, "Setting the Agenda For The Development Of Kenya's Oil And Gas Resources – The Perspectives Of Civil Society," Aug 11, 2014. Available at http://kcspog.org/setting-the-agenda-for-the-development-of-kenyas-oil-and-gas-resources-the-perspectives-of-civil-society/ [Accessed on 13/4/2020].

[131] Muigua, Securing Our Destiny through Effective Management of the Environment, Glenwood Publishers Limited (2020), ISBN: 978-9966-046-06-1.

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.[132] Botswana mainly exports diamonds, as the world's largest producer in value terms, as well as copper and nickel.[133] 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.[134]

Thus, Kenya and the African continent in general, stands to benefit greatly from its oil, gas and mineral resources but only if the same are well managed through accountability and transparency in revenues declaration and ultimately, proper utilisation of such revenues in promoting growth, development and investment in other sectors of the economy.[135]

Natural resources and the fight for control of these resources inevitably come with conflicts. The risks of violent conflict increase when exploitation of natural resources causes environmental damage, loss of livelihood, or unequal distribution of benefits.[136] Sudan, DRC and Nigeria are just but few examples of African states that have gone on internal armed conflict because of their rich natural resources. There are natural resources in Democratic Republic of Congo in the tropical rain forest which covers more than 100 Million hectares. However, there have been recorded cases of terrible

---

[132] Jefferis, K., "The role of TNCs in the extractive industry of Botswana," Transnational corporations 18, no. 1 (2010): 61-92 at p.61.
[133] Ibid, p.61.
[134] 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 13/4/2020].
[135] Ibid.
[136]United Nations, "Environmental Rule of Law," available at https://www.unenvironment.org/explore-topics/environmental-rights-and-governance/what-we-do/promoting-environmental-rule-law-0 [Accessed on 13/4/2020].

violence and immense human suffering.[137] The war has largely impacted on the environment and native wildlife. Parties to armed conflicts have resorted to occupying natural habitats thereby scaring animals away.[138] In addition to discussing how African resources can be used to benefit the African people, Muigua has thus also extensively written on conflict management in the African continent and how indigenous conflict management mechanisms can be utilised alongside the judicial systems to address the many conflicts that have the ravaged the continent for long.

In his 2020 Book, *Securing Our Destiny through Effective Management of the Environment, Glenwood Publishers Limited (2020),* Muigua rightly points out that natural resources are a source of livelihood for many, and any development activities that affect the same in any way ought to seek the social licence through engaging the affected communities through public participation. Competition for scarce resources may lead to a 'survival of the fittest' situation.[139] In such circumstances, environmental degradation poses a higher potential for conflict, as every group fights for their survival.[140] Even where resources are abundant, conflicts can arise when one group controls a disproportionate portion of the same ("Resource capture"). Resource capture occurs when the supply of a resource decreases due to either depletion or degradation and/or demand increases (due to population and/or economic growth).[141] This encourages the more powerful groups in a

[137] 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 13/4/2020].

[138] Muigua, Securing Our Destiny through Effective Management of the Environment, Glenwood Publishers Limited (2020), ISBN: 978-9966-046-06-1.

[139] See generally, "Chapter 5: Survival at Stake: Violent Land Conflict in Africa," Small Arms Survey 2013, available at http://www.smallarmssurvey.org/fileadmin/docs/A-Yearbook/2013/en/Small-Arms-Survey-2013-Chapter-5-EN.pdf [Accessed on 15/1/2020].

[140] See Bowman, K., et al, "Chapter 1: Environment for Development," (United Nations), available at http://www.unep.org/geo/geo4/report/01_Environment_for_Development.pdf [Accessed on 15/1/2020].

[141] Khagram, S., et al, "From the Environment and Human Security to Sustainable Security and Development," Journal of Human Development, Vol. 4, No. 2, July 2003, pp. 289-313, p. 295.

society to exercise more control and even ownership of the scarce resource, thereby enhancing their wealth and power.[142] For instance, land has been an emotive issue in Kenya as it is in the hands of a few people in the country, and this has often led to tribal clashes.[143]

Considering that most of these conflicts have underlying issues that may not be fully addressed through the adversarial court system, Kariuki Muigua has offered recommendations on the use of ADR and TDR mechanisms such as negotiation and mediation processes can cure this as they can help them in playing a more meaningful and active role in conflict management and decision-making processes. Having forums for negotiation and mediation between the stakeholders and communities can go a long way in averting conflicts and allowing proposed and ongoing developmental activities enjoy social acceptance in the community since concerns and expectations are more likely to be managed through such forums. Conflict resolution mechanisms such as negotiation and mediation are recommended because they afford the affected communities or sections of the public an opportunity to negotiate and reach a compromise agreement, where all sides get satisfactory outcome. [144] ADR and Traditional dispute resolution mechanisms, especially negotiation and mediation, still have relevance in natural resource conflicts management, a role recognized in the Constitution of Kenya.[145] This is the true essence of environmental democracy; affording communities guaranteed and meaningful participation in the decision making process by presenting proof and reasoned arguments in their favour, as tools for obtaining a socio-economic justice.[146]

---

[142] Ibid.

[143] See the Report of the Judicial Commission Appointed to Inquire into Tribal Clashes in Kenya', (the 'Akiwumi Commission'), (Government Printer, Nairobi, 1999).

[144] Warner, M., 'Conflict Management in Community-Based Natural Resource Projects: Experiences from Fiji and Papua New Guinea,' Working Paper No. 135, (Overseas Development Institute, April 2000), p. 16.

[145] See Art. 60(1) (g); Art. 159.

[146] Ristanić, A., 'Alternative Dispute Resolution And Indigenous Peoples: Intellectual Property Disputes in the Context of Traditional Knowledge, Traditional Cultural Expressions and Genetic resources,' (Lund University, April 2015), available at https://www.law.lu.se/webuk.nsf/%28MenuItemById%29/JAMR32exam/$FILE/Alternative%20Dispute%20Resolution%20and%20Indigenous%20Peoples.%20Intel

These processes have been indigenous to the African continent for centuries and as comprehensively discussed by Muigua in his other works on ADR and TDR mechanisms, hold a key in addressing these conflicts with a relatively high degree of success.[147] His works thus offers insights on addressing the natural resources and environmental related conflicts in Africa and Kenya in particular.

4. Entrenching Environmental Rights and Effective Conflict Management Mechanisms in Kenya: The Future of Environmental Governance

As observed in the foregoing discussion, the actualisation of environmental rights within Kenya's policy, legal and institutional frameworks has come a long way. If sustainable development is to be achieved in the country, then there needs to be struck a balance between active promotion and protection of the citizenry's environmental rights and the ecocentric approach that seeks to protect the environment from adverse human activities. Where conflicts related to environmental and natural resources arise, the same should be addressed effectively using mechanisms that address the concerns of all stakeholders. Muigua's work offers useful insights for the policy makers on how these can be addressed. For instance, his book, *Nurturing Our Environment for Sustainable Development*, 2016 (op.cit.), carries the themes revolving around environmental resources management with the aim of achieving sustainable development. It is based on the idea that environment and its natural resources are a heritage that should be managed, conserved and protected not only for the sake of the current generation, but also for future generations. The book argues that due to its critical role in the human, social and economic development of the country, the environment is one of the most important elements necessary for the existence of the human life.

---

lectual%20Property%20Disputes%20in%20the%20Context%20of%20Traditional%20Knowledg.pdf [Accessed on 15/1/2020].

[147] Muigua, K., Settling Disputes through Arbitration in Kenya, 3rd Ed., Glenwood Publishers, Nairobi – 2017; Muigua, K., Alternative Dispute Resolution and Access to Justice in Kenya, Glenwood Publishers, Nairobi – 2015; Muigua, K., Resolving Conflicts through Mediation in Kenya, Glenwood Publishers, Nairobi – 2013; Muigua, K., "Chapter 25: Natural Resource Conflicts in Kenya: Effective Management for Attainment of Environmental Justice", in Patricia Kameri-Mbote and Collins Odote, eds., Blazing the Trail - Professor Charles Okidi's Enduring Legacy In The Development of Environmental Law (University of Nairobi, March, 2019).

Environment affects all the life on earth in various ways, be it directly or indirectly. The environment and the resources therein must be carefully nurtured to make sure that their health is not sacrificed at the altar of national development.[148]

Muigua proposes that both scientific and traditional knowledge approaches can be applied in conflict management. He goes on to propose that harnessing this knowledge is not a one person affair but instead calls for concerted efforts from all quotas. Non-Governmental organisations, academia and government institutions directly concerned can collaborate in creating awareness of the ways in which the scientific knowledge can be applied concurrently with traditional or indigenous knowledge to manage environmental conflicts for peace and sustainable development.

Churches and other religious organisations can also come in to facilitate the actual processes of conflict management and also foster awareness creation efforts. Courts are also under an obligation to take lead role in promoting the use of traditional knowledge in environmental conflict management. They should offer support and uphold the relevant provisions where they are faced with such situations.[149] He supports his proposition on involving everyone with the fact that it is affirmed in the Constitution which provides that every person has a duty to cooperate with State organs and other persons to protect and conserve the environment and ensure ecologically sustainable development and use of natural resources.[150]

It is imperative for the policy makers to ensure that the best international practices do not remain on paper but they are fully implemented. However, as rightly observed in Muigua's work, these practices need to not only be domesticated but also customised through concurrent application with local communities' traditional knowledge. This is not only important for enhancing their practicality but also ensuring that the local communities embrace them.

---

[148] Muigua, K., Nurturing Our Environment for Sustainable Development, Glenwood Publishers, Nairobi – 2016, p. xi.
[149] Ibid, p. 264.
[150] Constitution of Kenya 2010, Art. 69(2).

Environmental rights such as the right to clean and healthy environment are critical to the survival of the human race. As demonstrated recently by the *Covid-19* pandemic, a clean and healthy environment can indeed be equated to right to life as currently, the main preventive measure as currently advocated for by health professionals is maintaining personal hygiene and the environment around human dwellings.[151]

However, human health is not only dependent on hygiene but also food security, human security and access to proper healthcare. There is a need for concerted efforts from all stakeholders to ensure that human life is protected. Investment in terms of research, funding, science, technology and innovation should be encouraged. All these form part of the bigger puzzle-achieving sustainable development agenda.

5. Conclusion

Kariuki Muigua thus advocates for effective natural resources and environmental governance for fighting poverty, through accelerated economic growth and social empowerment of the people, effective and practical management of conflicts for peacebuilding, without which development cannot take place and ensuring that the right of access to justice is available to all regardless of their social, economic or political standing in the society. Environmental justice and democracy is also important for fighting climate change, environmental degradation and meaningful participation in environmental management and governance issues. These themes are evident across his work. He has also ably been able to establish the link between ADR and TDR Mechanisms and how the same can be used in enhancing access to justice for the Kenyan people and Africa in general.

This paper has offered an overview of the themes that have characterised Kariuki Muigua's academic journey and his contribution to the rule of law and sustainable development for a better future for the children of Kenya. Notably, the discussion is also intertwined with Kenya's story as far as achieving efficiency in the conflict management and environmental management framework for realisation of the sustainable development

[151]'WASH (Water, Sanitation & Hygiene) and COVID-19' <https://www.worldbank.org/en/topic/water/brief/wash-water-sanitation-hygiene-and-covid-19> accessed 14 April 2020.

agenda. The academic work discussed in this paper aptly captures Kenya's successes, challenges and dreams as far as achievement of the sustainable development agenda is concerned. It offers valuable lessons on the thematic areas discussed for the policy makers and legislators in Kenya on the future of the country's aspirations on sustainable conflict management and environmental management. The work also offers a solid ground for current and future students of environmental law and conflict management for them to advance their research on the related areas of study.

References

'Science.:. Sustainable Development Knowledge Platform' <https://sustainabledevelopment.un.org/topics/science> accessed 14 April 2020.

'The Link between Trade and Development: What Role for the EU Trade Policy?' AIF Conference, Christiansborg, 12 September 2000.

'WASH (Water, Sanitation & Hygiene) and COVID-19' <https://www.worldbank.org/en/topic/water/brief/wash-water-sanitation-hygiene-and-covid-19> accessed 14 April 2020.

"Chapter 5: Survival at Stake: Violent Land Conflict in Africa," *Small Arms Survey 2013*, available at http://www.smallarmssurvey.org/fileadmin/docs/A-Yearbook/2013/en/Small-Arms-Survey-2013-Chapter-5-EN.pdf [Accessed on 15/1/2020].

Abuya, W.O., *"Mining Conflicts and Corporate Social Responsibility in Kenya's Nascent Mining Industry: A Call for Legislation," In Social Responsibility, IntechOpen, 2018.*

African Union, *Africa Mining Vision, February 2009. Available at https://au.int/sites/default/files/documents/30995-doc-africa_mining_vision_english_1.pdf [Accessed on 13/4/2020]*.

African Union*, Africa Mining Vision: "Transparent, equitable and optimal exploitation of mineral resources to underpin broad-based sustainable growth and socio-economic development", (United Nations Economic Commission for Africa (ECA), February, 2009). Available at https://www.uneca.org/sites/default/files/PublicationFiles/africa_mining_vision_english.pdf [Accessed on 13/4/2020]*.

Alaga, E., *Challenges for women in peacebuilding in West Africa*, (Africa Institute of South Africa (AISA), 2010).

Barnstein, R., *The Handbook of Arbitration Practice: General Principles (Part 2)* (Sweet & Maxwell, London, 1998).

Base Titanium*, "Response to Hakijamii's Draft Report on Base Titanium's Impacts on the Community," 25th August, 2017*. Available at https://www.business-humanrights.org/sites/default/files/documents/Hakijamii%20Base%20Response%20Final%20-%202017%2008%2028_0.pdf [Accessed on 13/4/2020].

Bowman, K., et al, "Chapter 1: Environment for Development," (United Nations), available at http://www.unep.org/geo/geo4/report/01_Environment_for_Development.pdf [Accessed on 15/1/2020].

Bush, R., *"Conclusion: mining, dispossession, and transformation in Africa," In Zambia, mining, and neoliberalism, pp. 237-268. Palgrave Macmillan, New York, 2010.* Available at https://www.sahistory.org.za/sites/default/files/file%20uploads%20/alastair_fraser_miles_larmer_zambia_mining_anbook4you.pdf#page=260 [Accessed on 13/4/2020].

Cape Holdings Limited v Synergy Industrial Credit Limited [2016] eKLR, Miscellaneous Civil Application 114 & 126 of 2015 (Consolidated).

Cashmore, M., "The role of science in environmental impact assessment: process and procedure versus purpose in the development of theory." *Environmental Impact Assessment Review* 24, no. 4 (2004): 403-426.

Christmann, P., "Effects of "best practices" of environmental management on cost advantage: The role of complementary assets." *Academy of Management journal* 43, no. 4 (2000): 663-680.

Constitution of Kenya, 2010 (Government printer, Nairobi, 2010).

Economic and Social Rights Centre (Hakijamii) (Kenya), *Titanium mining benefit sharing in Kwale County:HAKIJAMIIA comprehensive analysis of the law and practice in the context of Nguluku and Bwiti, September, 2017.* Available at http://www.hakijamii.com/wp-content/uploads/2017/09/Titanium-mining-benefit-sharing.pdf [Accessed on 13/4/2020].

Fitzpatrick, D., "Dispute Resolution; Mediating Land Conflict in East Timor", in AusAID' *Making Land Work Vol 2; Case Studies on Customary Land and Development in the Pacific*, (2008), Case Study No. 9, p. 175. Sourced from http://www.ausaid.gov.au/publications/pdf, [Accessed on 12/4/2020].

Florian K.*, 'Role of Science and Technology on Sustainable Development' [2016] Sustainable Industrial Processing Summit, SIPS 1;* Kongoli, Florian. "Investments needed for new sustainable technologies." Copper Worldwide *6, no. 1 (2016): 3.*

Galmés, G.V., *'Trade as an enabler of sustainable development and poverty eradication,' in United Nations,* The Road from Rio+20*:* Towards Sustainable Development Goals*, Issue 4, September 2014, p. 10. UNCTAD/DITC/TED/2014/1 Available at* http://unctad.org/en/PublicationsLibrary/ditcted2014d1_en.*pdf [Accessed on 05/04/2020]*.

Gichira, P.S, Agwata, J.F & Muigua, K.D, 'Climate Finance: Fears and Hopes For Developing Countries,' *Journal of Law, Policy and Globalization*, Vol. 22 (2014), pp. 1-7.

Hussein Abaza and Andrea Baranzini, *Implementing Sustainable Development: Integrated Assessment and Participatory Decision-Making Processes* (Edward Elgar Publishing 2002).

Ibewuike, V. O., *African Women and Religious Change: A study of the Western Igbo of Nigeria with a special focus on Asaba town*, (Uppsala, 2006). Available at https://uu.diva-portal.org/smash/get/diva2:167448/FULLTEXT01.pdf [Accessed on 6/4/2020].

In the Matter of the National Land Commission [2015] eKLR, Advisory Opinion Reference 2 of 2014.

International Institute for Sustainable Development & United Nations Environment Programme, *Trade and Green Economy: A Handbook, (International Institute for Sustainable Development, Geneva, 2014).*

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 13/4/2020].

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

Karen Blixen Camp Limited v Kenya Hotels and Allied Workers Union [2018] eKLR, Civil Appeal 100 of 2013.

Kenya Civil Society Platform on Oil & Gas, "Setting the Agenda For The Development Of Kenya's Oil And Gas Resources – The Perspectives Of Civil Society," Aug 11, 2014. Available at http://kcspog.org/setting-the-agenda-for-the-development-of-kenyas-oil-and-gas-resources-the-perspectives-of-civil-society/ [Accessed on 13/4/2020].

Khagram, S., et al, *"*From the Environment and Human Security to Sustainable Security and Development," *Journal of Human Development*, Vol. 4, No. 2, July 2003, pp. 289-313.

Kimani, M., *"Mining to profit Africa's people," Africa Renewal 23, no. 1 (2009): 4-5.*

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 13/4/2020].

Land Act, No. 6 of 2012, Laws of Kenya.

Likens, Gene E. "The role of science in decision making: does evidence-based science drive environmental policy?." Frontiers in Ecology and the Environment *8, no. 6 (2010): e1-e9.*

Masinde, J., *"*Are Kwale residents expecting too much?" *Daily Nation,* Tuesday February 12 2013. Available at https://www.nation.co.ke/lifestyle/smartcompany/Are-Kwale-residents-expecting-too-much/1226-1690904-nb7rqyz/index.html [Accessed on 13/4/2020].

Miller, Clark A., Paul N. Edwards, and Paul Edwards, eds., Changing the atmosphere: Expert knowledge and environmental governance. *MIT press, 2001*.

Modern Holdings (EA) Limited v Kenya Ports Authority [2020] eKLR, Petition 20 of 2017.

Muigua, K. & Kariuki, F., 'ADR, Access to Justice and Development in Kenya,' *Strathmore Law Journal,* Vol. 1, No. 1, June 2015.

Muigua, K. and Kariuki, F., 'Towards Environmental Justice in Kenya,' *Journal of Conflict Management and Sustainable Development*, Volume 1, No 1, (2017).

Muigua, K. and Maina, N., 'Effective Management of Commercial Disputes: Opportunities for the Nairobi Centre for International Arbitration,' *Journal of Conflict Management and Sustainable Development*, Volume 1, No 1, (2017).

Muigua, K., 'Attaining Gender Equity for Inclusive Development in Kenya,' *Journal of Conflict Management and Sustainable Development*, Volume 2, No 2, (2018).

Muigua, K., 'Enhancing Environmental Democracy in Kenya,' *The Law Society Law Journal,* Vol. 4, No. 1, 2008.

Muigua, K., 'Information Security Management: Demystifying the Role of the Company Secretary,' *The Professional Management Journal for the institute of Certified Public Secretaries of Kenya,* May, 2010.

Muigua, K., 'International Investment Law and Policy in Africa: Human Rights, Environmental Damage and Sustainable Development,' *Journal of Conflict Management and Sustainable Development*, Volume 3, No 1, (May, 2019).

Muigua, K., 'Reflections on Managing Natural Resources and Equitable Benefit Sharing in Kenya,' *The Law Society of Kenya Journal*, Vol. 15, No. 1, 2019: 1-42.

Muigua, K., 'Safeguarding Environmental Rights in Kenya,' *Kenya Law Review Journal*, Vol. IV, (2012-2013), pp. 279-294.

Muigua, K., *'Utilising Science and Technology for Environmental Management in Kenya' 23.* Available at http://kmco.co.ke/wp-content/uploads/2020/04/Utilising-Science-and-Technology-for-Environmental-Management-in-Kenya.pdf [Accessed on 10/4/2020].

Muigua, K., "Chapter 25: Natural Resource Conflicts in Kenya: Effective Management for Attainment of Environmental Justice", in Patricia

Kameri-Mbote and Collins Odote, eds., *Blazing the Trail - Professor Charles Okidi's Enduring Legacy In The Development of Environmental Law* (University of Nairobi, March, 2019).

Muigua, K., "Resolving Environmental Conflicts in Kenya through Mediation" - *A Dissertation submitted in partial fulfillment of the requirements for the Degree of Doctor of Philosophy in Law (Ph.D.) of the University of Nairobi*, December, 2011.

Muigua, K., *"Securing the Realization of Environmental and Social Rights for Persons with Disabilities in Kenya".* Available at http://www.kmco.co.ke/attachments/article/117/Securing%20the%20Realization%20of%20Environmental%20and%20Social%20Rights%20for%20Persons%20with%20Disabilities%20in%20Kenya.pdf.

Muigua, K., "The Resolution of Natural Resource Conflicts in Kenya through Arbitration and Mediation"- *A Dissertation submitted in partial fulfillment of the requirements for the Degree of Master of Laws of the University of Nairobi*, March 2005.

Muigua, K., "Utilising Kenya's Marine Resources for National Development", in Herausgegeben von Prof. Dr. Patricia Kameri-Mbote, Prof. Dr. Alexander Paterson, Prof. Dr. Oliver C. Ruppel, LL.M., Prof. Dr. Bibobra Bello Orubebe, Prof. Dr. Emmanuel D. Kam Yogo (eds), *Law | Environment | Africa*, January, 2019, 724 S., Gebunden, ISBN 978-3-8487-5287-4, Publication of the 5th Symposium | 4th Scientific Conference | 2018 of the Association of Environmental Law Lecturers from African Universities in cooperation with the Climate Policy and Energy Security Programme for Sub-Saharan Africa of the Konrad-Adenauer-Stiftung and UN Environment.

Muigua, K., *Access to Justice: Promoting Court and Alternative Dispute Strategies* (Available at http://www.kmco.co.ke/index.php/publications/108-access-to-justice-promoting-court-and-alternative-dispute-resolution-strategies.

Muigua, K., *Achieving Environmental Security in Kenya*, available at *http://www.kmco.co.ke/attachments/article/165/Environmental%20Security%20in%20Kenya%2027th%20October%202015.pdf* .

Muigua, K., *Achieving the Right to Food for Sustainable Development in Kenya*, Paper Presented at the Public Engagement Forum on the Right to Food Inception Meeting held on 24th July 2018 at the African Population and Health Research Center (APHRC) Campus, available at http://kmco.co.ke/wp-content/uploads/2018/08/Achieving-the-Right-to-Food-for-Sustainable-Development-in-Kenya-Presentation-African-

Population-and-Health-Research-Center-APHRC-Campus-24th-July-2018.pdf

Muigua, K., *Alternative Dispute Resolution and Access to Justice in Kenya*, Glenwood Publishers, Nairobi – 2015.

Muigua, K., *Balancing Trade Environment and Development for Sustainability*, available at *http://kmco.co.ke/wp-content/uploads/2018/08/Balancing-Trade-Environment-and-Development-for-Sustainability-Kariuki-Muigua-August-2018.pdf*.

Muigua, K., Conflict Management Mechanisms for Effective Environmental Governance in Kenya, available at http://kmco.co.ke/wp-content/uploads/2018/09/Conflict-Management-Mechanisms-for-Environmental-Governance-Kariuki-Muigua-September-2018.pdf.

Muigua, K., *Devolution and Natural Resource Management in Kenya*, available at http://kmco.co.ke/wp-content/uploads/2018/09/Devolution-and-Natural-Resource-Management-in-Kenya-Kariuki-Muigua-September-2018-1.pdf.

Muigua, K., *Enhancing The Court Annexed Mediation Environment in Kenya*, A Paper Presented at the 2nd NCIA International Arbitration Conference held from 4thto 6thMarch 2020 in Mombasa, Kenya. Available at http://kmco.co.ke/wp-content/uploads/2020/03/Enhancing-The-Court-Annexed-Mediation-Environment-in-Kenya-00000002.pdf

Muigua, K., *Food Security and Environmental Sustainability in Kenya*. (Available at http://www.kmco.co.ke/index.php/publications/129-food-security-and-environmental-sustainability-in-kenya)

Muigua, K., *Harnessing Traditional Knowledge for Environmental Conflict Management in Kenya*, available at http://www.kmco.co.ke/attachments/article/175/TRADITIONAL%20KNOWLEDGE%20AND%20CONFLICT%20MANAGEMENT-25%20April%202016.pdf.

Muigua, K., *Improving Access to Justice: Legislative and Administrative Reforms under the Constitution*, Workshop on Access to Justice Tuesday, 23rd October 2012 at Sankara Hotel, Westlands. Available at http://www.kmco.co.ke/index.php/publications.

Muigua, K., *International Investment Law and Policy in Africa: Human Rights, Environmental Damage and Sustainable Development* - Paper Presented at the Africa International Legal Awareness (AILA) Africa International Legal Awareness (AILA)Conference Held on 5th November, 2018 at Riara University, Nairobi, Kenya.

Muigua, K., Kariuki, F., Wamukoya, D., *Natural Resources and Environmental Justice in Kenya*, (Glenwood Publishers, Nairobi, 2015).

Muigua, K., *Managing Environmental Conflicts through Participatory Mechanisms for Sustainable Development in Kenya*, available at http://kmco.co.ke/wp-content/uploads/2018/08/Managing-Environmental-Conflicts-through-Participatory-Mechanisms-for-Sustainable-Development-in-Kenya-Kariuki-Muigua-August-2018.pdf.

Muigua, K., *Multinational Corporations, Investment and Natural Resource Management in Kenya*, available at http://kmco.co.ke/wp-content/uploads/2018/11/Multinational-Corporations-Investment-and-Natural-Resource-Management-in-Kenya-Kariuki-Muigua-November-2018.pdf.

Muigua, K., *Natural Resource Conflicts in Kenya: Effective Management for Attainment of Environmental Justice*, Paper Presented at the Fourth Symposium and Third Scientific Conference of the Association of Environmental Law Lecturers in African Universities, held at the Kenya School of Law, Karen Campus, Nairobi on 14th-17th December, 2015. (Available at http://www.kmco.co.ke/index.php/publications).

Muigua, K., *Natural Resource Conflicts in Kenya: Effective Management for Attainment of Environmental Justice*, Paper Presented at the Fourth Symposium and Third Scientific Conference of the Association of Environmental Law Lecturers in African Universities, held at the Kenya School of Law, Karen Campus, Nairobi on 14th-17th December, 2015. (Available at http://www.kmco.co.ke/index.php/publications); Muigua, K., *Reflections on ADR and Environmental justice in Kenya* (Available at http://www.kmco.co.ke/index.php/publications/97-reflections-on-adr-and-environmental-justice-in-kenya).

Muigua, K., *Natural Resources and Conflict Management in East Africa*, Paper Presented at the 1st NCMG East African ADR Summit held at the Windsor Golf Hotel, Nairobi on 25th & 26th September, 2014. (Available at http://www.kmco.co.ke/index.php/publications).

Muigua, K., *Nurturing Our Environment for Sustainable Development*, Glenwood Publishers, Nairobi – 2016.

Muigua, K., *Realising Environmental Democracy in Kenya*, available at http://kmco.co.ke/wp-content/uploads/2018/08/REALISING-ENVIRONMENTAL-DEMOCRACY-IN-KENYA-4th-May-2018-1-1.pdf.

Muigua, K., Realising Environmental Democracy in Kenya, available at http://kmco.co.ke/wp-content/uploads/2018/08/REALISING-ENVIRONMENTAL-DEMOCRACY-IN-KENYA-4th-May-2018-1-1.pdf.

Muigua, K., *Reconceptualising the Right to Clean and Healthy Environment in Kenya*, Paper Presented at the side event at the 3rd United Nations Environment Assembly held in Nairobi, organized by the UoN School of Law & the Centre International de Droit Comparé de l'Environnement (CIDCE), at the UoN School of Law on Friday 1st December 2017.

Muigua, K., *Resolving Conflicts through Mediation in Kenya*, Glenwood Publishers, Nairobi, 2nd ed., 2017.

Muigua, K., *Settling Disputes through Arbitration in Kenya*, 3rd Ed., Glenwood Publishers, Nairobi – 2017.

Muigua, K., *Towards meaningful Public Participation in Natural Resource Management in Kenya.* (Available at *http://www.kmco.co.ke/index.php/publications/126-towards-meaningful-public-participation-in-natural-resource-management-in-kenya*).

Muigua, K., *Tribunals within the Justice System in Kenya: Integrating Alternative Dispute Resolution in Conflict Management*, Paper presented at the Judiciary's 1st Annual Tribunals' Symposium held on 24th May 2019 at Sarova Whitesands Beach Hotel, Mombasa.

Muigua, K., *Utilizing Africa's Natural Resources to Fight Poverty*, available at *http://www.kmco.co.ke/attachments/article/121/Utilizing%20Africa's%20Natural%20Resources%20to%20Fight%20Poverty-26th%20March,2014.pdf*

Muigua, *Securing Our Destiny through Effective Management of the Environment*, Glenwood Publishers Limited (2020), ISBN: 978-9966-046-06-1.

Munyua, J., & Ragui, M., "Drivers of instability in prices of petroleum products in Kenya," *Prime Journal of Business Administration and Management (BAM)* 3, no. 3 (2013): 919-926.

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

Ndemo, B., "Kenya's mineral resources could pull millions out of poverty, *Daily Nation*, Monday June 24 2019. Available at https://www.nation.co.ke/oped/blogs/dot9/ndemo/2274486-5169428-990fwj/index.html [Accessed on 13/4/2020].

Pandey, D.N., 'Traditional Knowledge Systems for Biodiversity Conservation,' available at http://www.infinityfoundation.com/mandala/t_es/t_es_pande_conserve.htm [Accessed on 13/04/2020].

Poncian, J., & Kigodi, H. M., "Transparency initiatives and Tanzania's extractive industry governance," *Development Studies Research,* 5, no. 1 (2018): 106-121.

Presidential Strategic Communication Unit, "Kenya in Sh1.3bn oil export deal," *Daily Nation,* Thursday, August 1, 2019. Available at https://www.nation.co.ke/news/Kenya-joins-list-of-oil-exporters/1056-5219572-qkp633z/index.html [Accessed on 13/4/2020].

Rajaram, A., *"Rich Countries, Poor People; Will Africa's Commodity Boom Benefit the Poor",* available on http://blogs.worldbank.org/africacan/rich-countries-poor-people-will-africa-s-commodity-boom-benefit-poor [Accessed on 10/04/ 2020].

Republic of Kenya, *Report of the Judicial Commission Appointed to Inquire into Tribal Clashes in Kenya', (the 'Akiwumi Commission'),* (Government Printer, Nairobi, 1999).

Rights Watch, World Report 2013, available at http://www.hrw.org/sites/default/files/wr2013_web.pdf.

Ristanić, A., 'Alternative Dispute Resolution And Indigenous Peoples: Intellectual Property Disputes in the Context of Traditional Knowledge, Traditional Cultural Expressions and Genetic resources,' (Lund University, April 2015), available athttps://www.law.lu.se/webuk.nsf/%28MenuItemById%29/JAMR32exam/$FILE/Alternative%20Dispute%20Resolution%20and%20Indigenous%20Peoples.%20Intellectual%20Property%20Disputes%20in%20the%20Context%20of%20Traditional%20Knowledg.pdf [Accessed on 15/1/2020].

Rizza A., 'An Integrated Approach to the Sustainable Development Goals' (Assembly of European Regions, 4 March 2019) <https://aer.eu/integrated-approach-sdgs/> accessed 6 April 2020.

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). Available at http://pubs.iied.org/pdfs/13578IIED.pdf [Accessed on 13/4/2020].

Shafi Grewal Kaka (Chairperson) & 3 others v International Air Transport Association (IATA), Civil Case 605 of 2015.

Synergy Industrial Credit Limited v Cape Holdings Limited [2019] eKLR, Petition No. 2 of 2017.

United Nations Conference on Trade and Development, *Towards an enabling multilateral trading system for inclusive and sustainable development, Available at*

http://unctad.org/meetings/en/SessionalDocuments/cimem5d5_en.pdf *[Accessed on 05/04/2020]*.

United Nations Development Programme, "Implementation of 2030 Agenda has to be inclusive, participatory and bottom-up," Jul 18, 2017. Available at https://www.undp.org/content/undp/en/home/presscenter/pressreleases/2017/07/18/implementation-of-2030-agenda-has-to-be-inclusive-participatory-and-bottom-up.html [Accessed on 6/4/2020].

United Nations, "Environmental Rule of Law," available at https://www.unenvironment.org/explore-topics/environmental-rights-and-governance/what-we-do/promoting-environmental-rule-law-0 [Accessed on 13/4/2020].

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.

United Nations, *United Nations Declaration on the Rights of Indigenous Peoples, 61/295*.

Warner, M., 'Conflict Management in Community-Based Natural Resource Projects: Experiences from Fiji and Papua New Guinea,' *Working Paper No. 135,* (Overseas Development Institute, April 2000).

World Bank, *Economic Survey for Sub-Saharan Africa*, 2013, Africa Pulse October, 2013 Vol.8 available at http://www.worldbank.org/content/dam/Worldbank/document/Africa/Report/Africas-Pulse-brochure_Vol8.pdf [Accessed on 13/4/2020].

World Resources, 'Natural Resources of Africa', available at www.worldresources.envi.org/natural-rsources-africa/ [Accessed on 13/4/2020].

World Trade Organization, "Marrakesh Agreement Establishing the World Trade Organization. Annex 1A: Multilateral Agreements on Trade in Goods-Agreement on Trade-Related Investment Measures", The Results of the Uruguay Round of Multilateral Trade Negotiations: The Legal Texts (World Trade Organization, Geneva, 1995), pp. 163-167.

Professional Ethics: An Advocate's Relationship with other Advocates

By: ***Prof. Tom Ojienda, SC****

1 Introduction

An advocate is a person whose name is duly entered upon the Roll of Advocates or upon the Roll of Senior Counsel, for advocates having the rank of Senior Counsel.[1] Certain officers are also entitled to act as advocates,

* *LLD (University of South Africa), LLM (King's College London), LL.B. (UoN). Prof Ojienda, SC is a practising Advocate of the High Court of Kenya of the rank of Senior Counsel and with over 25 years of law practice. He is a former chair of the Law Society of Kenya (LSK), former President of the East African Law Society (EALS) and former Vice President and Financial Secretary of Pan African Lawyers Union (PALU). He has also served as a Commissioner in the Judicial Service Commission (JSC), Commissioner in the Truth Justice and Reconciliation Commission (TJRC) established after the 2007-2008 post-election violence in Kenya, Chair of the Land Acquisition Compensation Tribunal, and member of the National Environmental Tribunal. Currently, he is a Council Member of the International Bar Association, Member of the Board of American Biographical Society, Member of the Council of Legal Education, Member of the Public Law Institute of Kenya, Kenya Industrial Property Institute, and Associate Professor of Public Law at Moi University.*

He has published over 40 articles and 15 books. The books include "Conveyancing: Theory and Practice" published by T.O. Ojienda and A.D.O. Rachier, Faculty of Law Moi University; "Constitution Making and Democracy in Kenya" edited by T.O. Ojienda ISBN: 9966-9611-3-6; "The Dawn of a New Era 2004" edited by Tom Ojienda, ISBN-9811-4-4; "A General Introduction to the New Law of the Sea" Published by T.O. Ojienda and Kindiki Kithure; "The Legal Profession and Constitutional Change in Kenya; Anti-Corruption and Good Governance in East Africa: Laying Foundations for Reform" edited by Tom O. Ojienda and published by Law Africa Publishing (K) Ltd, Co-op Trust Plaza, 1st Floor, ISBN.9966-7121-1-9, 221 pages; "Conveyancing Principles and Practice" by Tom O. Ojienda and published by Law Africa Publishing (K) Ltd, Co-op Trust Plaza, 1st Floor, 521 pages; 'Conveyancing Principles and Practice' by Dr. Tom O. Ojienda and published by Law Africa Publishing (K) Ltd, Co-op Trust Plaza, 1st Floor (Revised edition); "Professional Ethics" by Prof. Tom Ojienda & Katarina Juma published by Law Africa Publishing (K) Ltd, Co-op Trust Plaza, 1st Floor. (Revised Edition) 195 pages; "The Enforcement of Professional Ethics in Kenya" (with Prof. Cox), Amazon Publishers, 2014; "Constitutionalism and Democratic Governance in Africa" (with Prof Mbodenyi), pulp publishers, 2013; "Mastering Legal Research" published by Law Africa, 2013; "Professional Ethics, A Kenyan Perspective" published by Law Africa 2012; "Anti-Corruption and Good Governance in East

Africa" published by Law Africa, 2007; and "Conveyancing Theory and Practice" published by Law Africa, 2002.

Prof Ojienda, SC's published articles include: "Sustainability and The Ivory Trade. Whither the African Elephant?" published in the 2002 issue of the East African Law Review; "Pitfalls in the Fight against Corruption in Kenya: Corruption or Inertia?" in "Anti-Corruption and Good Governance in East Africa: Laying Foundations for Reform" by T. O. Ojienda (eds) pages 95 – 131; "Exploring New Horizons in the Discipline of Advocates, Towards a Review of the Existing Regime of Law" published in "The Advocate; Learning Law by Doing Law: The Theoretical Underpinnings and Practical Implications of Clinical Legal Education in Kenya"; and "An Inventory of Kenya's Compliance with International Rights Obligations: A Case Study of the International Covenant on Civil and Political Rights" the East African Journal of Human Rights and Democracy Vol. 1, Issue No. 1, September 2003 at page 91-104; "Sectoral Legal Aid in Kenya: The Case of the Rift Valley Law Society Juvenile Legal Aid Project", published in various journals including the Advocate, the Lawyer, and the Newcastle Law Bulletin; "Surrogate Motherhood and the Law in Kenya: A Comparative Analysis in a Kenya Perspective"; "Polygamous Marriages and Succession in Kenya: Whither "the other woman?"; "Reflections on the Implementation of Clinical Legal Education in Moi University, Kenya" published in the International Journal of Clinical Education Edition No. 2, June 2002 at page 49-63; "Taking a Bold Step Towards Reform: Justifying Calls for Continuing Legal Education and Professional Indemnity" published in Law society of Kenya Publication (2003); "Terrorism: Justifying Terror in Kenya?" published in The East African Lawyer, Issue No. 5 at pages 18-22; "Land Law and Tenure Reform in Kenya: A Constitutional Framework for Securing Land Rights"; "A Commentary on Understanding the East African Court of Justice" published in the East African Lawyer, Issue No. 6 at pages 52-56; "Where Medicine Meets the Law: The Case of HIV/AIDS Prevention and Control Bill 2003" published in The Advocate at page 36-40; "The Advocates Disciplinary Process-Rethinking the Role of the Law Society" published in The Lawyer, Issue No. 78 at pages 15-16; "Ramifications of a Customs Union for East Africa" published in The East African Lawyer, Issue No. 4 at pages 17-25; "Gender Question: Creating Avenues to Promote Women Rights after the Defeat of the proposed Constitution" published in the Moi University Journal Vol. 1 2006 No.1, pages 82–92; "Of Mare Liberum and the Ever Creeping State Jurisdiction: Taking an Inventory of the Freedom of the Seas" published in the Moi University Journal Vol. 1 2006 No. 1, pages 105 – 131; "Legal and Ethical Issues Surrounding HIV and AIDS: Recommending Viable Policy and Legislative Interventions" published in The East African Lawyer, Issue No. 12 at pages 19-24; "Implementing the New Partnership for Africa's Development (NEPAD): Evaluating the Efficiency of the African Peer Review Mechanism" published in the Kenya Law Review, 2007 Vol. 1, pages 81-119; "Protection and Restitution for Survivors of Sexual and Gender Based Violence: A case for Kenya." (with R. A. Ogwang and R. Aura) 90 Pages, ISSN:1812–1276; "Legal and Institutional Framework of the TJRC - Way Forward" published in the Law Society of Kenya Journal Vol. 6 2010 No. 1, pages 61 – 95; "A Critical Look

at the Land Question in the New Constitution" published in Nairobi Law Monthly, Vol. 1, Issue No. 1 of 2010 at pages 76 – 81; "Access to Justice in the Era of COVID-19: Adaptations and Coping Mechanisms of the Legal Services Industry in Kenya' (with Lydia Mwalimu Adude) published in Journal of Conflict Management & Sustainable Development, Vol. 6, Issue 2, 2021, ISBN: 978-9966-046-15-4, pages 1-46; "Criminal Liability of Corporate Entities and Public Officers: A Kenyan Perspective" (with Lydia Mwalimu Adude) published in Journal of Conflict Management & Sustainable Development, Vol. 6, Issue 2, 2021, ISBN: 978-9966-046-15-4, pages 117-212; "Changes to Civil Litigation and Mediation Practice Under the Mediation Bill, 2020: What of the Right of Access to Justice and the Independence of the Judiciary?" published in Alternative Dispute Resolution Journal (CIArb-Kenya), Vol. 9, Issue 2, 2021, ISBN: 978-9966-046-14-7, pages 44-65; "Access to Justice: A Critique of the Small Claims Court in Kenya' (with Lydia Mwalimu Adude) published in Alternative Dispute Resolution Journal (CIArb-Kenya), Vol 9, Issue 2, 2021, ISBN: 978-9966-046-14-7, pages 170-201; "Conflict of Interest and Public Office in Kenya" (with Lydia Mwalimu Adude) published in Journal of Conflict Management & Sustainable Development, Vol 6, Issue 5, 2021, ISBN: 978-9966-046-15-4; and a Book Chapter entitled "Land Law in the New Dispensation" in a book edited by P.LO. Lumumba and Dr. Mbondenyi Maurice.

As a robust litigation counsel, Prof Ojienda, SC, has successfully handled numerous landmark cases at the Supreme Court of Kenya, on Land and Environment Law, Electoral Law, Commercial Law, Family Law, and other areas of law. He represents various individuals, State agencies, private entities, county governments and multinational agencies. He has represented these entities before Kenyan courts, from the subordinate courts, all the way to the Supreme Court of Kenya. Some of his landmark cases at the apex Court include, In the Matter of the Speaker of the Senate & another [2013] eKLR - Speaker of the Senate & another v Attorney-General & 4 others (Advisory Opinion Reference No 2 of 2013); Independent Electoral and Boundaries Commission & 2 others v Evans Kidero (Petition 20 of 2014); Justus Kariuki Mate & another v Hon. Martin Nyaga Wambora (Petition 32 of 2014); In the Matter of the National Land Commission [2015] eKLR - National Land Commission v Attorney General & 5 others (Advisory Opinion Reference No 2 of 2014); Lemanken Aramat v Harun Meitamei Lempaka & 2 others [2014] eKLR (Petition No 5 of 2014); Cyprian Awiti & another v Independent Electoral and Boundaries Commission & 2 others [2019] eKLR (Petition No 17 of 2018); Mohamed Abdi Mahamud v Ahmed Abdullahi Mohamad & 3 others; Ahmed Ali Muktar (Interested Party) [2019] eKLR (Petition No 7 of 2018); Martin Wanderi & 106 others v Engineers Registration Board & 10 others [2018] eKLR (Petition No 19 of 2015); Moi v Rosanna Pluda [2017] eKLR; Town Council of Awendo v Nelson O. Onyango & 13 others; Abdul Malik Mohamed & 178 others (Interested Parties) [2019] eKLR (Petition No 37 of 2014); Wilfrida Arnodah Itolondo v Attorney General & 9 others [2021] eKLR (Application No 3 of 2021 (E005 of 2021)); and Speaker Nairobi City County Assembly & another v Attorney General & 3 others (Interested parties) [2021] eKLR (Advisory Opinion Reference No 1 of 2020), among many others which are available at www.proftomojiendaandassociates.com.

including an officer in the office of the Attorney-General or the Office of the Director of Public Prosecutions or such other public officer or an officer in a public corporation as specified by the Attorney General via Gazette Notice.[2] The legal profession is a self-regulating profession and advocates become members of the Law Society of Kenya (LSK) upon signing the Roll of Advocates.[3] Generally, advocates are regulated by **the Constitution of Kenya, 2010 (the Constitution)**,[4] the **Advocates Act**,[5] and the various subsidiary legislation made thereunder, **the Law Society of Kenya Act, 2014 (LSK Act, 2014)**,[6] and the subsidiary legislation made thereunder, and the **LSK Code of Standards of Professional Practice and Ethical Conduct (2017)**,[7] made pursuant to **sections 4 and 5 of the LSK Act, 2014**.[8]

This paper presented during the Advocates Mentorship and Couching Services (AMCS) August 2021 Programme)
Prof Ojienda, SC can be reached through tomojienda@yahoo.com.

[1] Advocates Act, Cap 16, Laws of Kenya, s 2.
[2] Ibid ss 2 and 10.
[3] Law Society of Kenya Act, 2014 (Act No 21 of 2014) s 7; and Advocates Act, Cap 16, Laws of Kenya, ss 15(4) and 16.
[4] Of particular relevance are chapter four (4) of the Constitution on the Bill of Rights, article 258 of the Constitution regarding the institution of legal proceedings to enforce the Constitution, article 156 of the Constitution on the Office of Attorney-General, and article 157 of the Constitution on the Office of Director of Public Prosecutions. See also the Office of the Attorney-General Act, 2012 (Act No 49 of 2012), the Office of the Director of Public Prosecutions Act, 2013 (Act No 2 of 2013), and the Office of the County Attorney Act, 2020 (Act No 14 of 2020). Moreover, among the objects and functions of the Law Society of Kenya under section 4(b) and (i) of the Law Society of Kenya Act, 2014 (Act No 21 of 2014) is to uphold the Constitution of Kenya and advance the rule of law and the administration of justice, and to formulate policies that promote the restructuring of the legal profession in Kenya to embrace the spirit, principles, values and objects the Constitution of Kenya.
[5] Cap 16, Laws of Kenya.
[6] Act No 21 of 2014, Laws of Kenya (LSK Act, 2014).
[7] Gazette Notice No 5212 of 2017, dated 11 March 2017. See The Kenya Gazette, Vol. CXIX—No. 69, dated 26 May 2017 <http://kenyalaw.org/kenya_gazette/gazette/volume/MTUyMA--/Vol.CXIX-No.69/> (accessed 9 August 2021).
[8] Section 4(c), (e) and (f) of the LSK Act, 2014 provides that the functions and objects of LSK include; ensuring that all persons who practise law in Kenya or provide legal services in Kenya meet the standards of learning, professional competence and professional conduct that are appropriate for the legal services they

Professionally, an advocate has duties towards his client, the court, the public, the profession, and other advocates or counsel, whether they are on the same side of a matter or on opposing sides. In ***Francis Mugo & 22 others v James Bress Muthee & 3 others***,[9] Musinga J eloquently stated:

> While I agree that the choice of counsels is a prerogative of a party to a suit, it must be borne in mind that in the discharge of his office, an advocate he has a duty to his client, a duty to his opponent, a duty to the court, a duty to himself and a duty to the state as was well put by Richard Du Cann in ***"THE ART OF THE ADVOCATE.***" As an officer of the court, he owes allegiance to a cause that is higher than serving the interests of his client and that is to the cause of justice and truth. [10]

This paper is concerned about those duties the advocate owes other advocates in the context of their professional relationship. The legal framework on the relationship between advocates is embodied in provisions of the law that pertain to the relations between advocates, particularly as depicted in the Advocates Act,[11] and relevant subsidiary legislation made thereunder, the Law Society of Kenya Act, 2014 (LSK Act, 2014),[12] and the relevant subsidiary legislation made thereunder, and the Law Society of Kenya Code of Standards of Professional Practice and Ethical Conduct (2017).[13]

provide; setting, maintaining and continuously improving the standards of learning, professional competence and professional conduct for the provision of legal services in Kenya; and determining, maintaining and enhancing the standards of professional practice and ethical conduct, and learning for the legal profession in Kenya.

[9] [2005] eKLR, HC (Nakuru) Civ Suit No 122 of 2005 (ruling dated 29 July 2005).

[10] *Francis Mugo & 22 others v James Bress Muthee & 3 others* [2005] eKLR.

[11] Cap 16, Laws of Kenya.

[12] Act No 21 of 2014, Laws of Kenya.

[13] Gazette Notice No 5212 of 2017, dated 11 March 2017. See The Kenya Gazette, Vol. CXIX—No. 69, dated 26 May 2017 <http://kenyalaw.org/kenya_gazette/gazette/volume/MTUyMA--/Vol.CXIX-No.69/> (accessed 9 August 2021).

2 Areas of Conflict in the Relationship between Advocates

There are a number of areas of conflict in the relationship between advocates. Advocate-advocate conflicts or disputes may arise in relation to the:

(i) Oral and written correspondence between advocates;
(ii) Professional undertakings made by an advocate;
(iii) Discovery and exchange of documents and authorities;
(iv) Confrontation during case presentation in court;
(v) Change of advocates; and
(vi) The law business, especially among partners, and even between partners and associates, and between associates themselves.[14]

However, though advocates are to zealously represent their client's legal interests,[15] they should remain professional and not take the client's case personally to the extent of transferring the ill feelings of the client to the professional relationship between advocates.

3 Duties of an Advocate to Fellow Advocates

In ***Republic v Ahmad Abolfathi Mohammed & another***,[16] the Supreme Court asserted that, **'It is clear, therefore, that Advocates, while discharging their duties, are under obligation to observe rules of professionalism, and in that behalf, they are to be guided by the fundamental values of integrity.'** [17] Consequently, for the sake of professionalism, the advocate's status and duty as an officer of the Court,[18] and the duty to protect and preserve the esteemed reputation of the legal

[14] See e.g., *Virginia Wangui Mathenge v Agnes Wairimu Njoroge & another* [2013] eKLR, HC (Nairobi, Civ Div) Civ Case No 568 of 2012.
[15] In *Republic v Silas Mutuma Marimi & 2 others* [2016] eKLR, HC (Nakuru) Crim Case No 5 of 2016, the Court stated that, 'an advocate is under an obligation to zealously represent his client and to this end he is expected to use all the information and skills he possesses to advance his clients interest (or defend his client against a criminal charge).'
[16] [2019] eKLR, SCoK, Pet No 39 of 2018 (ruling dated 15 March 2019).
[17] *Republic v Ahmad Abolfathi Mohammed & another* [2019] eKLR, para 11.
[18] Advocates Act, Cap 16, Laws of Kenya, ss 15(4) and 55.

profession in the eyes of the public, advocates owe each other the following duties:[19]

(i) Civility, courtesy and respect in court and out of court and in oral and written communication[20] – Uncivil, discourteous, and disrespectful behaviour towards a fellow advocate on account of differences in age, sex, ethnicity, race, religion, nationality, social and economic status is uncalled for.[21] We are all advocates and learned friends and should treat each other with civility, courtesy and respect on that accord, but with the acknowledgement of seniority as applicable.[22]

(ii) Refrain from abuse, insults or disparaging remarks against fellow advocates, especially personal remarks divorced from the professional business of law.

(iii) Honour express and implied promises, agreements, and professional undertakings (oral and written) made with other advocates in good faith per **order 52, rule 7 of the Civil Procedure Rules, 2010**.[23]

(iv) Exchange written drafts of oral understandings and proposed agreements and consents to ensure that all advocates involved are on the same page;[24] avoid sneaking in additions and making deletions that have not been agreed upon.

(v) Indulge or confer with opposing counsel on the viability of an out of court settlement, through a demand letter and alternative dispute resolution mechanisms, as applicable.[25]

---

[19] See e.g., American Bar Association (2 June 2020), 'Lawyers' Duties: Lawyers' Duties to Other Counsel' https://www.americanbar.org/groups/litigation/policy/conduct_guidelines/lawyers_duties/ (accessed 10 August 2021).

[20] Also entails the duty of counsel to respond with reasonable promptness to communications from opposing counsel; a view taken by the Queen's Bench of Manitoba in the Canadian case of *Maruca v Yarema* (2016) MBQB 200 (CanLII).

[21] See Constitution of Kenya, 2010, art 27(4) and (5).

[22] See Advocates Act, Cap 16, Laws of Kenya, s 20.

[23] See also Rule 46 of the Law Society of Kenya Digest of Professional Conduct and Etiquette (2000); and SOPPEC 9 of the Law Society of Kenya Code of Standards of Professional Practice and Ethical Conduct (2017).

[24] See e.g., *Maruca v Yarema* [2016] MBQB 200 (CanLII).

[25] See Ibid.

(vi) Professionalism during discovery and case management;[26] practice good faith advocacy and avoid concealing, altering, falsifying, or destroying evidence, but adhere to advocate-client confidentiality and privilege as provided in **sections 134-137 of the Evidence Act (Cap 80)**.

(vii) Prosecution counsel to honour the fair trial rights obligations to the defence under **article 50 of the constitution**, including the duty to inform the defence of the evidence the prosecution intends to rely on, and to afford the defence reasonable access to that evidence—also as pertains to rights of an arrested person under **article 49 of the Constitution** and the rights of a detained person under **article 51 of the Constitution**.

(viii) Communicate the notification of appointment and change of advocates and cessation of representation of a client to opposing counsel, and the court, as required under **order 9 of the Civil Procedure Rules, 2010**, and per **rule 6 of the Advocates (Practice) Rules, 1966**.

(ix) Avoid 'sharp practice,' including causing disappearance of files and pleadings from court, and unlawfully withholding information and documents during discovery;[27] only make

[26] See the Canadian case of *Schreiber v Mulroney* [2007] CanLII 31754 (ON SC), para 27 where the Ontario Superior Court of Justice called out the plaintiff's counsel for avoiding and frustrating the case management of the case; the plaintiff's counsel later agreed to the case management of the case.

[27] See e.g., *Pasha Enterprises Limited v Bernard Kinyua Githaka Kiburi* [2015] eKLR, HC (Nairobi) Civ App No 401 of 2011 (ruling dated 29 May 2015), para 11 where the Court dismissed the respondent's application to have the appellant's record of appeal and appeal struck out for being filed out of time and for missing the decree appealed from, faulting the respondent's counsel for sharp practice because, among other things, the respondent's counsel failed to disclose the same to the court when directions were taken on the matter; In *Republic v Disciplinary Committee & another Ex-Parte Daniel Kamunda Njue* [2016] eKLR, HC (Nairobi, JR Div) JR Appl No 218 of 2015, para 31, Odunga J recognized that 'sharp practice' amounts to professional misconduct as defined in section 60(1) of the Advocates Act, Cap 16, Laws of Kenya when he stated that, '"Sharp practice", it is my view falls within what can be termed as "*disgraceful or dishonourable conduct incompatible with the status of an advocate"*'; *Institute for Social Accountability & another v National Assembly of Kenya & 4 others* [2020] eKLR, SCoK, Pet No 1 of 2018 (ruling dated 4 August 2020) paras 10-16; and the Canadian case of *Schreiber v Mulroney* [2007]

appropriate discovery and interrogatory requests and objections etc.

(x) Honour and professionalism in undertaking the business of law; among partners, between partners and associates, and among associates.

(xi) Not to time the filing and service of documents, written pleadings, submissions, and authorities in a manner that prejudices the opposing party.[28]

(xii) Not to unnecessarily seek adjournment of matters to delay the process of court, the administration of justice, and to unfairly disadvantage the opposing party.

(xiii) Reasonably agree to justified requests for extension of time and to lawfully doing away with procedural technicalities where necessary and justified.

(xiv) Good faith obligation in scheduling court dates for mentions, hearings etc.

(xv) Courtesy and good advocacy during examinations in court (examination-in-chief, cross-examination, and re-examination), and to refrain from harassing and intimidating

---

CanLII 31754 (ON SC), paras 23-28 where the Ontario Superior Court of Justice expressed itself as follows as concerns 'sharp practice' by the plaintiff's counsel; 'Mr. Anka [counsel for the plaintiff] did not give any advance notice to Mr. Prehogan [counsel for the defendant] that he was going to note the defendant in default or take default judgment proceedings. In the circumstances of this case it is quite obvious that he should have done so. It constituted sharp practice that should not be condoned. While the "Principles of Civility for Advocates" published by the Advocates' Society are not the force of law, the lack of notice to Mr. Prehogan breached those principles of civility. Incredibly, even after instructions had been given by Mr. Anka to obtain a default judgment, he wrote on July 24, 2007 suggesting that there were still interlocutory matters to be dealt with without disclosing the default proceedings. Mr. Anka conceded that his client had not told him not to provide advance or post notice to Mr. Prehogan, so this is something that Mr. Anka took on his own behalf. This lack of frankness should not be condoned.' (See reason 6 in para 24 of the decision.)

[28] See e.g., Rule 28 of the Law Society of Kenya Digest of Professional Conduct and Etiquette (2000), which provides that 'As a matter of professional courtesy, the advocate acting for the opposing party should be furnished with a copy of the list of authorities as submitted to the librarian, at least one day prior to the hearing.'

opposing counsel and witnesses; question and object to questions within the parameters and limits imposed by law.[29]

(xvi) Refrain from making false statements of law and fact (material or otherwise) to opposing counsel and the court.

(xvii) Do not ascribe to an advocate a position they have neither taken orally nor in writing in court or in the court records, including an exercise of caution in sharing advocate-advocate correspondence to court, except as permitted in law.

(xviii) Draft orders and decrees to be approved by the court per the ruling or judgment and get opposing counsel to agree on the contents thereof before presenting them to court.

4 Dispute Resolution in the Context of the Relationship Between Advocates

4.1 Advocates Complaints Commission

The Advocates Complaints Commission is established in **section 53(1) of the Advocates Act** to enquire into complaints against any advocate, firm of advocates, or any member or employees thereof.[30] The Commission is under **'duty to receive and consider <u>a complaint made by any person</u>, regarding the conduct of any advocate, firm of advocates, or any member or employee thereof.'**[31] In essence, an advocate may also submit a complaint against another advocate to the Commission. In considering the complaint submitted to it, the Commission may reject those complaints without substance,[32] but those with substance will proceed through the disciplinary process set out under **section 53(4) of the Advocates Act**—the Commission will refer to the Advocates Disciplinary Tribunal complaints

[29] See e.g., Chapter V of the Evidence Act, Cap 80, Laws of Kenya as pertains to the examination and questioning of witnesses and the production of documents to be used as evidence.

[30] See the Advocates (Complaints Commission) (Structure and Procedure) Rules, 2003.

[31] Advocates Act, Cap 16, Laws of Kenya, s 53(4).

[32] Ibid s 53(4)(a).

that disclose a disciplinary offence,[33] but if not, the Commission will deal with such matters.[34]

Nonetheless, in matters that do not appear to be of serious or aggravated nature, the Commission will endeavour to promote reconciliation and encourage and facilitate an amicable settlement between the parties to the complaint.[35] However, if the complainant has suffered loss or damage by reason of the advocate's conduct, the Commission may, by order, award such complainant compensation or reimbursement not exceeding KES 100,000.00.[36] If a complaint has substance but the circumstances of the case do not disclose a disciplinary offence which can be dealt with by the Advocates Disciplinary Tribunal and the Commission considers that it should not deal with the matter, the Commission may advise the Complainant to refer the matter to the Court if that appears to be the proper remedy.[37]

4.2 Advocates Disciplinary Tribunal

Section 57 of the Advocates Act establishes the Advocates Disciplinary Tribunal to look into professional misconduct and disciplinary offences by advocates. Further, **section 58A of the Advocates Act** establishes **Regional Disciplinary Committees** with concurrent jurisdiction with the Advocates Disciplinary Tribunal.

By virtue of **sections 60 and 60A of the Advocates Act**, the LSK Council, the Advocates Complaints Commission, and any person, including advocates, can submit a complaint of professional misconduct against an advocate at the Disciplinary Tribunal. **Section 60(1) of the Advocates Act** defines professional misconduct as disgraceful or dishonourable conduct incompatible with the status of an advocate. The complaint against an advocate by a person, including another advocate, is made by way of an

[33] Ibid s 53(4)(b).
[34] Ibid s 53(4)(c) and (d).
[35] Ibid s 53(5).
[36] Ibid s 53(6)
[37] Ibid s 53(4)(e).

affidavit setting out the allegations of professional misconduct arising on the complaint.[38]

The advocate against whom a complaint is made has a right to be heard and if the Disciplinary Tribunal determines that a case has been made out against an advocate, the Tribunal may order that:[39]

(a) such advocate be admonished; or
(b) such advocate be suspended from practice for a specified period not exceeding five years; or
(c) the name of such advocate be struck off the Roll; or
(d) such advocate do pay a fine not exceeding one million shillings; or
(e) such advocate pays to the aggrieved person compensation or reimbursement not exceeding five million shillings, or such combination of the above orders as the Tribunal thinks fit.

Every advocate is subject to the Advocates Disciplinary Tribunal,[40] and the LSK Secretariat acts as the administrative arm of the Tribunal, receiving and forwarding complaints to the Tribunal and further forwarding, correspondences as between the Tribunal, the complainant and the advocate against whom a complaint has been made.[41]

Appeals against the decisions of the Disciplinary Tribunal lie at the High Court with a further appeal at the Court of Appeal.[42] Besides, one may file a complaint against an advocate at the Disciplinary Tribunal for professional misconduct occurring in a matter ongoing before the courts. A position that was reiterated by Odunga J in the case of *Republic v Disciplinary Committee & another Ex-Parte Daniel Kamunda Njue*,[43] where the Honourable Judge stated as follows:

[38] Ibid s 60(2).
[39] Ibid s 60(4).
[40] Ibid s 55.
[41] Ibid s 58(3).
[42] Ibid ss 62-68.
[43] [2016] eKLR, HC (Nairobi, JR Div) JR Appl No 218 of 2015.

It was contended that the Judgement in *Disciplinary Committee Cause Number 66 of 2013* was biased, unlawful and contravened the doctrine of *sub judice* as the Complainant has never prosecuted his claim in *Milimani CMCC No. 3623 of 2012 Boniface Otieno Agoro vs. Martin James Mwalimu & Another*. This Court has had occasion to deal with the issue of the concurrency of proceedings before the Respondent Tribunal and in a civil case and held that the mere fact that a party who has suffered a loss as a result therefor is entitled to invoke the Court's jurisdiction under Order 52 rule 7 of the Civil Procedure Rules does not bar a complaint being lodged with the Tribunal on the same issue. This was the position adopted in *R vs. The Disciplinary Tribunal of the Law Society of Kenya ex parte John Wacira Wambugu Nairobi JR Misc. Application No. 445 of 2013* where the Court expressed itself as follows:

"In my view the applicant's view that the Respondent's jurisdiction could only arise after the succession cause had been determined is with due respect misconceived. There are complaints which can properly arise during the course of litigation which may properly form the subject of disciplinary proceedings before the Respondent. One such complaint could be the failure to answer correspondences. Such a complaint does not have to await the determination of a particular case before the same can be entertained by the Respondent. Therefore as long as the Respondent does not purport to usurp the powers reserved for the Succession Court, I do not see how its entertainment of a complaint arising from the manner an advocate is handling a succession cause can be said to fall outside its jurisdiction. In other words the mere fact that a matter is the subject of court proceedings does not ipso facto deprive the Respondent of the jurisdiction to entertain a complaint arising therefrom as long as such a complaint is properly one that it is empowered to entertain."

Therefore, if the applicant's conduct amounted to a professional misconduct, the mere fact that a civil suit was yet to be determined did not bar the Respondent from entertaining the

> complaint. Therefore the issues of the Respondent sitting on appeal on a decision of the Court and casting aspersions at the Court do not arise.[44]

4.3 Disciplinary powers of Court

The advocate's relationship to other advocates in court and in relation to the processes of court may give rise to disciplinary action by the court. Pursuant to **section 56 of the Advocates Act**, the disciplinary mechanism for advocates under the Advocates Act, does not supersede, lessen nor interfere with the powers of the Chief Justice or any of the judges of the Court to deal with misconduct or offences by an advocate, or any person entitled to act as such, committed during, or in the course of, or relating to, proceedings before the Chief Justice or any judge.

Above all, advocates are officers of the Court and **section 55 of the Advocates Act** is clear that, **'Every advocate and every person otherwise entitled to act as an advocate shall be an officer of the Court and shall be subject to the jurisdiction thereof.'** Further, **section 15(4) of the Advocates Act** provides that **a person duly petitioning to be admitted as an advocate '(…) shall take an oath or make an affirmation as an officer of the Court before the Chief Justice in such form as he shall require, and shall thereafter sign the Roll (…).'** In ***Republic v Ahmad Abolfathi Mohammed & another***,[45] the Supreme Court in commenting on the status of an advocate as an officer of the Court stated as follows:

> The status of an Advocate as an Officer of the Court, is expressly provided for in *Section 55 of the Advocates Act.* An Advocate, consequently, bears an obligation to promote the cause of justice, and the due functioning of the constitutionally-established judicial process ensuring that the judicial system functions efficiently, effectively, and in a respectable manner. In that context, Advocates bear the ethical duty of telling the truth in Court, while desisting from any negative

[44] *Republic v Disciplinary Committee & another Ex-Parte Daniel Kamunda Njue* [2016] eKLR, paras 34-35.
[45] [2019] eKLR, SCoK, Pet No 39 of 2018 (ruling dated 15 March 2019).

> conduct, such as dishonesty or discourtesy. The overriding duty of the Advocate before the Court, is to promote the interests of justice, and of motions established for the delivery and sustenance of the cause of justice.[46]

Courts have inherent powers to hold persons in contempt and to punish for contempt, that is, conduct that tampers with the dignity and authority of the court and disrupts the process of court and the fair administration of justice—in the case of advocates, conduct unbecoming of an officer of the Court.[47] Under **section 28(1) of the Supreme Court Act, 2011**,[48] **a contemnor includes a person who assaults, threatens, intimidates, or wilfully insults an officer of the Court (includes advocates) during a sitting or attendance in Court, or in going to or returning from the Court**. A judge of the Supreme Court is empowered to make the order that a contemnor be taken into custody and be detained until the rising of the Court.[49] The Supreme Court may sentence a contemnor to imprisonment for a period not exceeding five days, or to pay a fine not exceeding KES 500,000.00, or both, for every offence of contempt of court.[50]

In addition, **part IX (rules 56-58) of the Supreme Court Rules, 2020** makes particular provision on the treatment of contempt of court before the Supreme Court—**contempt in the face of the Court (*in facie curiae*), and contempt of court proceedings initiated by the Court on its own motion or on the application of any person.** Regarding contempt in the face of Court, the Supreme Court 'may cause any person whose conduct before it manifests disobedience, obstruction or contempt, to be detained in custody,' and contempt proceedings will follow thereafter.[51] In any other cases, and by virtue of **section 28(4) of the Supreme Court Act, 2011**, where contempt proceedings are initiated on the motion of the Court or on the application of any person, the contemnor will be given an opportunity to be heard before

[46] *Republic v Ahmad Abolfathi Mohammed & another* [2019] eKLR, para 7.
[47] Ibid paras 24-30.
[48] Act No 7 of 2011, Laws of Kenya.
[49] Supreme Court Act, 2011, s 28(2).
[50] Ibid s 28(3).
[51] Supreme Court Rules, 2020, r 56.

the Court makes its determination on the matter.[52] Under **rule 58 of the Supreme Court Rules, 2020**, the penalty for contempt of court is such order as the Supreme Court may deem fit, including the issuance of an order denying audience to the contemnor for a period not exceeding one year.
Contempt proceedings may also be taken at the Court of Appeal,[53] the High Court,[54] and the Magistrates' Courts,[55] which Courts are equally empowered to punish for contempt. In ***Equip Agencies Limited v Credit Bank Limited***,[56] Warsame J (as he then was), when considering the framework on the enforcement of professional undertakings between advocates, expressed himself as follows:

> In my understanding an undertaking is usually given to ease and smoothen the path of transactions carried out by Advocates. It is a convenient method or tool to circumvent delay and operational difficulties, so that transactions can be easily, properly, smoothly and fastly conducted between Advocates. It is a contract between

[52] Ibid r 57.
[53] Section 38 of the Court of Appeal (Organization and Administration) Act, 2015 (Act No 28 of 2015) empowers the Chief Justice, in consultation with the President of the Court of Appeal, to generally make rules for the better administration and organization of the Court of Appeal, including rules on the procedure relating to contempt of court.
[54] See High Court (Organisation and Administration) (General Rules), 2016, pt VIII, rr 39-42 on the procedure relating to contempt of court before the High Court and contempt of subordinate courts, including revision of orders of a subordinate court to punish for contempt—rule 39 is very particular as to the objectives of punishing for contempt, which include to: 'uphold the dignity and authority of the Court; ensure compliance with the directions of the Court; ensure the observance and respect of due process of law; preserve an effective and impartial system of justice; and maintain public confidence in the administration of justice as administered by court.' The rules are made pursuant to section 39 of the High Court (Organization and Administration) Act, 2015 (Act No 27 of 2015) which generally empowers the Chief Justice to make rules for the effective organization and administration of the High Court, including rules on the procedure relating to contempt of court.
[55] See Magistrates' Courts Act, 2015 (Act No 26 of 2015), s 10. Section 20 of the Act generally empowers the Chief Justice to make rules for the effective organization and administration of the Magistrates' Courts, including rules on the procedure relating to contempt of court.
[56] [2007] eKLR, HC (Nairobi, Milimani Commercial Courts) Civ Case No 773 of 2004 (ruling dated 28 February 2007).

Advocates after an offer and acceptance, with a resulting consideration which follows from one Advocate to another.

In my humble view an undertaking is a promise to do or to refrain from doing something or acting in a manner which may prejudice the right of the opposite party. It means it is an unequivocal declaration of intention addressed to someone who reasonably places reliance on it. It can be made by an Advocate either personally or through the name of the firm he usually practices under.

It is my position that breach of professional undertaking can result in lack of mutual or cordial trust between Advocates. And invariably puts the administration of justice into disrepute. The Advocates by relating together through a professional undertaking are officers of the court, therefore as far possible it is mandatory for them to respect their words for the benefit of mutual continuality of their respective relationship.
In HCCC 2721/1976 Kenya Commercial Bank v Adala, Hancox J held

"1) The courts have inherent power to commit an Advocate for breach of an undertaking. The court has jurisdiction over an Advocate for breach of an undertaking on the basis that the order sought seeks the court to exercise its punitive and disciplinary power to prevent a breach of duty by an officer of the court, which is quite distinct and separate from the client's right. Therefore the court even if it has no right, it has jurisdiction to make an order in exercise of its disciplinary jurisdiction.
2) The purpose of the punitive and disciplinary powers of the court's jurisdiction over Advocate is not for the purpose of enforcing legal rights but for enforcing honourable conduct among them in their standing as officers of the court by virtue of [Sections 55 and 56] of the Advocates Act Cap 16 Laws of Kenya".[57]

[57] *Equip Agencies Limited v Credit Bank Limited* [2007] eKLR.

Warsame J (as he then was) then proceeded to justify the court's exercise of disciplinary powers over advocates in general and in the context of professional undertakings, and asserted that:

> It is not the business of the court to oppress an Advocate for no reasonable cause. The court is always reluctant to degrade an Advocate unless the circumstances shows that his conduct is dishonourable as an officer of the court. It is for that reason that the court would exercise its punitive and disciplinary powers to ensure that Advocates conduct themselves in a manner that pleases the eyes of justice. It is within the powers of the court to prevent a breach of duty by an Advocate, especially when he has given an unequivocal undertaking to another Advocate. As a matter of good practice relationship between Advocates must be resolved between themselves without recourse to the courts. However, when the dispute lands before court, the court would enforce that which is honourable among the officers of the court. The court would not shy away from exercising its punitive and disciplinary jurisdiction to ensure compliance of the promise given by an Advocate and acted upon by another Advocate.[58]

4.4 LSK's Intervention in Advocate-Advocate Disputes

Section 4(f) of the LSK Act, 2014 provides that **one of the functions and objects of LSK is to represent, protect and assist members of the legal profession in Kenya in matters relating to the conditions of practice and welfare.** This means that LSK can be the first stop in resolving any conflicts as pertains to the professional relationship between advocates. Where applicable, voluntary mediation of advocate-advocate disputes is one way to resolve professional issues arising between advocates and in turn protecting the reputation of the legal profession in the eyes of the public.

Besides, under **section 41(q) of the LSK Act, 2014**, the LSK Council may, subject to the Act and with the approval by a resolution of members, make **regulations, binding on all members of LSK, prescribing alternative forms of dispute resolution, including reconciliation, mediation and**

[58] Ibid.

arbitration. Of particular importance is **regulation 96 of the LSK (General) Regulations, 2020**,[59] which allows the Council to settle disputes, including member to member disputes, through arbitration.

4.5 Judicial proceedings

As already noted above, under **section 53(4)(e) of the Advocates Act**, if a complaint submitted against an advocate at the Advocates Complaints Commission has substance but does not disclose a disciplinary offence to be dealt with by the Advocates Disciplinary Tribunal and the Commission considers that it should not deal with the matter, the Commission may advise the complainant to refer the matter to the Court if that appears to be the proper remedy. Besides, advocates, like any other person, have legal rights. In line with the principle of equality before the law, advocates too are entitled to equal protection of the law just like any other person.

The Constitution is at the forefront as pertains to equal protection of the law. **Article 27(1) and (2) of the Constitution** guarantees to every person equality before the law and the right to equal protection and equal benefit of the law, including the full and equal enjoyment of all rights and fundamental freedoms. Other rights equally applicable to advocates as with any other person are: the right to human dignity under **article 28 of the Constitution**; the entitlement to freedom and security of the person in **article 29 of the Constitution**; the right to fair administrative action under **article 47 of the Constitution**; the right of access to justice under **article 48 of the Constitution;** the rights of an arrested person under **article 49 of the Constitution**; and the fair trial rights under **article 50 of the Constitution**.

Moreover, **article 19(3) of the Constitution** is emphatic that the rights and fundamental freedoms in the Bill of Rights belong to each individual and are not granted by the State, and are equally subject only to the limitations contemplated in the Constitution, and in accordance with **article 24 of the Constitution**.[60] Further, **article 20(1) and (2) of the Constitution** stipulates

[59] Legal Notice No 32 of 2020.

[60] Under article 24(1) of the Constitution, a right or fundamental freedom in the Bill of Rights can only be limited by law and any such limitation must be reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom. The limitation must also take into account all relevant factors, including

that the Bill of Rights applies to all law and binds all State organs and all persons, and every person is to enjoy the rights and fundamental freedoms in the Bill of Rights to the greatest extent consistent with the nature of the right or fundamental freedom.

Accordingly, an advocate may institute civil proceedings or make a criminal complaint against another advocate for civil or criminal wrongs. In addition, pursuant to **articles 22(1) and 258(1) of the Constitution**, an advocate whose fundamental rights and freedoms under the Constitution are threatened or have been denied, violated, or infringed, just like any other person, has the right to institute court proceedings claiming that a right or fundamental freedom in the Bill of Rights has been denied, violated or infringed, or is threatened or that the Constitution has been contravened, or is threatened with contravention.

5 Conclusion

This paper set out to interrogate the areas of conflict in the advocate-advocate relationship, and the duties of advocates to other advocates as depicted in the Constitution, the Advocates Act, and relevant subsidiary legislation made thereunder, the LSK Act, 2014, and the relevant subsidiary legislation made thereunder, and the LSK Code of Standards of Professional Practice and Ethical Conduct (2017). The paper has also explored the avenues for resolving advocate-advocate conflicts and disputes, including the advocates disciplinary mechanisms, disciplinary powers of the court, interventions by LSK in advocate-advocate conflicts and disputes, and judicial avenues and remedies available to advocates who have suffered civil and criminal wrongs, and constitutional contraventions or threatened contraventions in the context of the professional relationship between advocates.

---

the nature of the right or fundamental freedom, the importance of the purpose of the limitation, the nature and extent of the limitation, the need to ensure that the enjoyment of rights and fundamental freedoms by any individual does not prejudice the rights and fundamental freedoms of others, and the relation between the limitation and its purpose and whether there are less restrictive means to achieve the purpose.

References

Advocates (Practice) Rules, 1966.

Advocates Act, Cap 16, Laws of Kenya.

American Bar Association (2 June 2020), 'Lawyers' Duties: Lawyers' Duties to Other Counsel' https://www.americanbar.org/groups/litigation/policy/conduct_guidelines/lawyers_duties/>(accessed 10 August 2021).

Constitution of Kenya, 2010.

Court of Appeal (Organization and Administration) Act, 2015 (Act No 28 of 2015).

Equip Agencies Limited v Credit Bank Limited [2007] eKLR, HC (Nairobi, Milimani Commercial Courts) Civ Case No 773 of 2004 (ruling dated 28 February 2007).

Evidence Act, Cap 80, Laws of Kenya.

Francis Mugo & 22 others v James Bress Muthee & 3 others [2005] eKLR, HC (Nakuru) Civ Suit No 122 of 2005 (ruling dated 29 July 2005).

High Court (Organisation and Administration) (General Rules), 2016.

High Court (Organization and Administration) Act, 2015 (Act No 27 of 2015).

Institute for Social Accountability & another v National Assembly of Kenya & 4 others [2020] eKLR, SCoK, Pet No 1 of 2018 (ruling dated 4 August 2020).

Law Society of Kenya (General) Regulations, 2020, Legal Notice No 32 of 2020.

Law Society of Kenya Act, 2014 (Act No 21 of 2014).

Law Society of Kenya Code of Conduct and Ethics for Advocates (2016).

Law Society of Kenya Code of Standards of Professional Practice and Ethical Conduct (2017).

Law Society of Kenya Digest of Professional Conduct and Etiquette (2000). Magistrates' Courts Act, 2015 (Act No 26 of 2015).

Maruca v Yarema (2016) MBQB 200 (CanLII).

Noel Cox and Tom Odhiambo Ojienda, 'The Enforcement of Professional Ethics and Standards in the Kenyan Legal Profession' (CreateSpace Independent Publishing Platform (Amazon), 2013).

Office of the Attorney-General Act, 2012 (Act No 49 of 2012).

Office of the County Attorney Act, 2020 (Act No 14 of 2020).

Office of the Director of Public Prosecutions Act, 2013 (Act No 2 of 2013).

Pasha Enterprises Limited v Bernard Kinyua Githaka Kiburi [2015] eKLR, HC (Nairobi) Civ App No 401 of 2011 (ruling dated 29 May 2015).

Republic v Ahmad Abolfathi Mohammed & another [2019] eKLR, SCoK, Pet No 39 of 2018 (ruling dated 15 March 2019).

Republic v Disciplinary Committee & another Ex-Parte Daniel Kamunda Njue [2016] eKLR, HC (Nairobi, JR Div) JR Appl No 218 of 2015.

Republic v Silas Mutuma Marimi & 2 others [2016] eKLR, HC (Nakuru) Crim Case No 5 of 2016.

Schreiber v Mulroney [2007] CanLII 31754 (ON SC).

Supreme Court Act, 2011 (Act No 7 of 2011).

Supreme Court Rules, 2020.

Virginia Wangui Mathenge v Agnes Wairimu Njoroge & another [2013] eKLR, HC (Nairobi, Civ Div) Civ Case No 568 of 2012.

Implementing International Humanitarian Law and the Responsibility to Protect in Non-International Armed Conflicts (NIACs) – A Delicate Balance: The Case of the Tigray Crisis in Ethiopia

By: ***Berita Mutinda Musau*** [1]

Abstract

This research examines the link between International Humanitarian Law (IHL) and the principle of the Responsibility to Protect. It looks at the interplay between the two in which it examines the ability of the Ethiopian government to respect and implement IHL and execute its responsibility to protect its citizens in the Tigray region where since November 2020 the government and a militarily powerful regional force namely the Tigray People's Liberation Front (TPLF) have been engaging in an non-international armed conflict. The research further analyses the intervention of the international community in Tigray in the wake of massive IHL violations especially by the Ethiopian government forces and their allies as well as by the TPLF rebel groups. The research is a desk research which applies the qualitative research method and uses the crisis in Tigray as a case study. The research findings indicate a strong link between IHL and the responsibility to protect whereby violation of one during armed conflict amounts to the violation of the other while respect of one enhances the respect of the other and consequently the protection of civilians and dignity of human beings. A critical analysis highlights that the Ethiopian government has violated IHL and absconded its responsibility to protect its citizens in Tigray. The TPLF also violated IHL and posed a great threat and

[1] *Doctoral Fellow in the School of Humanities and Social Sciences, Strathmore University. She holds an Erasmus Master of Arts (M.A) in Global Studies from the University of Leipzig, Germany and the University of Vienna Austria, and a Master of Arts (M.A) in International Studies from the Institute of Diplomacy and International Studies (IDIS), University of Nairobi. She teaches German and International Studies in Strathmore University and is pursuing a PhD in International Relations at the United States International University-Africa, in Nairobi, Kenya. Berita Musau can be reached through ritamusau@googlemail.com*

challenge to the Ethiopian government's ability and willingness to protect its citizens, although the media focuses more on the Ethiopian government violations than on the rebels'. The research concludes that the situation in Tigray characterizes contemporary internal armed conflicts whereby the State has ceased to possess monopoly on the legitimate use of violence within its borders and is thus challenged by armed rebel groups that possess equal if not better military capability, coupled with an international community that is many a times reluctant to intervene timely and decisively.

Introduction

International Humanitarian Law (IHL) is a branch of international law that seeks to limit the brutality of armed conflicts on people and objects (Sassòli, Bouvier, & Quintin, (2011:4). States are the key actors involved in the creation of IHL. The duty to implement IHL also lies first and foremost with States. States also have a responsibility to protect populations in their jurisdiction from genocide, war crimes, ethnic cleansing and crimes against humanity and also to provide both State and human security within their jurisdiction. As such, they are the principle implementers of the principle of "Responsibility to Protect" (RtoP/ R2P). In order to guard their sovereignty, States are increasingly called upon to protect their population. Francis Deng viewed sovereignty as responsibility (Deng, 1995). Therefore, the R2P principle depicts a shift of conception of sovereignty from sovereignty as control to sovereignty as responsibility in both internal functions and external responsibilities of States (Peltonen, 2011:60).

However, contemporary conflicts involving armed rebel groups fighting against their governments challenge State's capability and willingness to execute their duties. Today, belligerents are more and more willing to use humanitarian assistance, life-saving assistance and even civilians themselves as weapons in their political struggles (Deng, 2010; Deng, 1995). This threatens State sovereignty and poses a major challenge to States' implementation of IHL and their ability and willingness to fulfill their responsibility to protect their populations since the governments begin to perceive their own citizens as enemies undeserving of protection. This has characterized many States in Africa in the post-Cold War era. Ben Arrous

and Feldman (2014:60) observe that the end of the Cold-War marked an end of the support that African States used to get from great powers from the East and West. This consequently left States vulnerable to rebel groups within their territories whose military capability challenges State's monopoly of violence and power. This in turn poses a great challenge to the survival of the States. Faced with these threats, States carry out military and counter insurgency operations which further complicate the dynamics of the conflicts and cause massive atrocities on civilians.

This is the case in the Tigray crisis in Ethiopia, a non-international armed conflict (NIAC) between the Government of Ethiopia and the Tigray Peoples Liberation Front (TPLF) which began in November 2020 when Abiy Ahmed the Prime Minister of Ethiopia ordered a military operation against the TPLF in Tigray in response to attacks on Ethiopian military bases and federal forces by the TPLF (HRW, 2020).

The objectives of this study are: to establish the link between IHL and the responsibility to protect in contemporary NIACs; to find out the violations of IHL by the Ethiopian government and the Tigray People's Liberation Front (TPLF) in the Tigray crisis; to establish the extent to which the TPLF challenges and threatens the Ethiopian government's ability and willingness to implement IHL and to protect its citizens especially in Tigray; to find out the response of the international community to the conflict in Tigray crisis with regard to IHL and RtoP.

The study is based on the just war theory particularly *jus in bello* which is directly related to IHL. It is further guided by the Common Article 3 of the Geneva Conventions as well as the Protocol II Additional to the Geneva Conventions of 12 August 1949 which are the key instruments that regulate the conduct of non-International Armed Conflicts (Protocol II). The paper first presents the just war theory and then discusses IHL as the core of the *jus in bello* component of the just war theory. It also discusses the IHL of non-international armed conflict and further presents the Responsibility to Protect (RtoP) principle linking it to IHL. This is then followed by a discussion of the Tigray crisis as a good case that demonstrates the delicate

balance that confronts States in their implementation of IHL and fulfillment of the R2P when confronted by formidable armed groups within their territories.

The Just war Theory

The just war theory, also known as the just war tradition is as old as the existence of humanity. Although the term "just war" is used frequently in the modern period, its application can be traced thousands of years ago (Neste, 2006:1). Even before the advent of the Christian era (CE), political philosophers such as Cicero wrote about just war. Cicero argued that there are two ways of contesting a decision: one by discussion and the other by force (Harrer, 1918:26). He attributed discussion to man and force to beasts and thus argued that man should recourse to force only when it is impossible to use discussion. He further gave two main reasons for waging war: punishment of wrong and self-defense and argued that the war has to be declared by responsible authorities (Harrer, 1918: 26). He also stated that war should be fought by the relevant forces and the amount of force applied ought to be proportional to the reason for which the war is fought. For instance, a small wrong doing should not be punished with excessive force. Cicero thus in his writing focused on the two main categories of the just war theory: *jus ad bellum* which seeks to offer conditions under which war is justified and *jus in bello,* referring to how war ought to be conducted.

During the Christian era, just war was used to justify religious wars and famous religious scholars such as St. Augustine of Hippo, St. Thomas Aquinas and Ibn Khaldun also wrote about the just war theory and sought to establish the reasons why war should be waged. Although Cicero argued that resort to conflict was the way for beasts and not humans, there has been a tendency of human beings to resort to war to solve most of their disputes. As such, war has been commonplace throughout history (Moir, 2002). Due to the realization of the fact that war is inevitable in human interactions, efforts have been made to regulate the conduct of war (*jus in bello*) in order to minimize its brutality as much as possible. This is the main preoccupation of International Humanitarian Law.

The IHL Principles

The principles of IHL are the key instruments that enhance its implementation and effectiveness. These principles must be observed during international armed conflicts as well as non-international armed conflict. According to the International Criminal Justice, (ICJ), the IHL principles constitute customary international law since they are fundamental to the respect of the human person and elementary considerations of humanity (ICJ Reports, 2004; ICJ Reports 1996). These principles are discussed below.

The principle of distinction between civilians and combatants.

This principle stipulates that civilians ought to be separated from combatants (Sassòli, Bouvier, & Quintin, 2011: 74). The principle aims at distinguishing civilians from combatants so that civilians can be protected. It can be argued to be the backbone of IHL since without distinction limitation in time of war would be a challenge. This principle of distinction is clearly spelled out in Article 48 of Additional protocol I "In *order to ensure respect for and protection of the civilian population and civilian objects, the parties to the conflict shall at all times distinguish between the civilian population and the combatants and between civilian objects and military objectives and accordingly shall direct their operations only against military objectives".* On the same note, the principle prohibits the use of any weapon which is incapable of distinguishing civilians and civilian objects and military and military objectives.

The prohibition to attack those hors de combat,

The prohibition to attack any person *hors de combat* (for example those who are sick , wounded and prisoners of war) is a fundamental rule under IHL. For example, while a soldier could be targeted lawfully under normal circumstances, if he/she surrenders or is wounded and no longer poses a threat, then it is prohibited to attack him/her (Sassòli, Bouvier, & Quintin, 2011). Additionally, soldiers may be entitled to extensive protections if they meet the criteria of being Prisoners of War (POWs).

Prohibition of infliction of unnecessary suffering

While IHL does permit violence, it prohibits the infliction of unnecessary suffering and superfluous injury (Additional Protocol I Article 35). While the meaning of such terms is unclear and the protection may as such be limited, even fighters who may be lawfully attacked, are provided protection by this prohibition. One rule that has been established based on this principle is the prohibition on the use of blinding laser weapons.

The Principle of Military Necessity

Military necessity permits armed forces to engage in conduct that will result in destruction and harm being inflicted. The principle of military necessity refers to the concept of legally using only that kind and degree of force which is required to overpower the enemy (Vincze, 2017:19). The concept of military necessity acknowledges that under the laws of war, winning the war or battle is a legitimate consideration. However, the concept of military necessity does not give the armed forces the freedom to ignore humanitarian considerations altogether and do what they want (Forest, 2007). It must be interpreted in the context of specific prohibitions and in accordance with the other principles of IHL. The principle is anchored within the rules of IHL. For instance, Article 52 of Addition Protocol I lists those objects that can be subject to lawful attacks. The notion cannot be applied to override specific protections, or create exceptions to rules where the text itself does not provide for one.

The Principle of Proportionality

The principle of proportionality limits and protects potential harm to civilians by demanding that the least amount of harm is caused to civilians, and when harm to civilians must occur it needs be proportional to the military advantage (Forest, 2007). The article where proportionality is most prevalent is in Article 51(5) (b) of API concerning the conduct of hostilities which prohibits attacks when the civilian harm would be excessive in relation to the military advantage sought. Closely linked to the principle of proportionality is the rule of precaution. This calls for those engaged in conduct of hostilities to desist from causing harm or to seek to minimize arms on civilians. All the

principles of IHL are interrelated and they apply together to enhance IHL's protection of human dignity in times of war.

International Humanitarian Law of Non-international Armed Conflict

The initial development of IHL was influenced by the need to regulate international armed conflict which was commonly known as war and thus regulation of internal armed conflicts which were commonly known as civil wars was left to domestic jurisdiction (Sassòli, Bouvier, & Quintin, 2011: 231). In the post-colonial era, legal regulation of internal armed conflict has continued to grow in importance. This is due to the realization that since 1945, majority of armed conflicts have increasingly been internal rather than international (Moir, 2002:1). Indeed, former Secretary General to the United Nations, the late Kofi Annan observed that wars between sovereign States appeared to be a phenomenon in distinct decline, while those within states were on the rise, especially in Africa (Moir, 2002:1). There are two key legal instruments that regulate the conduct of non-international armed conflicts (NIACs): Common Article 3 of the Geneva Conventions and Additional Protocol II.

Common Article Three to the 1949 Geneva Conventions

This was the first legal regulation of internal armed conflict to be included in an international instrument. It is common to all the four Geneva Conventions. Common Article 3 provides that in the case of armed conflict not of an international character, occurring in the territory of one of the High Contracting Parties, each Party to the Conflict shall be bound to apply as a minimum the following provisions:

1. Persons not taking active part in hostilities including members of armed forces who have laid down their arms and those placed *hors de combat* by sickness, wounds, detention or any other cause shall in all circumstanced be treated humanely without any adverse distinctions founded on race, color, religion, faith or sex, birth or wealth, or any other similar criteria (Common Article 3). The article thus prohibits: a) violence to life and person, in particular murder of all kinds, mutilation, cruel treatment or torture; b) taking of hostages;

c) outrages upon personal dignity, in particular humiliating and degrading treatment; d) the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court affording all the juridical guarantees which are recognized as indispensable by civilized peoples.

2. The wounded and the sick shall be collected and cared for. The article provides that an impartial humanitarian body such as the International Committee of the Red Cross to offer its services to the parties to the conflict.

Additional Protocol II to the 1949 Geneva Conventions

During the period between 1949 when the Geneva Conventions were adopted and adoption of Protocol II to the Geneva Conventions, internal conflicts increased both in intensity and lethality (Haye, 2008:43). Most of these were wars of decolonization and self-determination. This called for a series of diplomatic conferences in Geneva. From the conferences, two Protocols were adopted in addition to the Geneva Conventions: Additional Protocol I regulation International Armed Conflict and Additional Protocol II to regulate non-international armed conflicts. Additional Protocol II was to apply in: *"armed conflict which takes place in the territory of High Contracting Parties between its armed forces and dissident armed forces or other organized groups, which under responsible command exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations and to implement the Protocol"* (Haye, 2008:44).

This Protocol was an improvement on the Common Article 3. For instance a) it details the fundamental guarantees of protection afforded to the person whose liberty has been restricted, b) it develops further the protection and care of the wounded sick and the shipwrecked spelling out the duty of protection of medical, religious personnel as well as medical units and transports and c) it includes specific provisions dealing with the protection of the civilian population from attacks, the protection of objects indispensable for the survival of the civilian population and cultural objects.

The Principle of Responsibility to Protect (R2P)

The Responsibility to Protect (R2P) is a principle aimed at the protection of the world's most vulnerable populations from the most atrocious international crimes: genocide, war crimes, ethnic cleansing and crimes against humanity (Australian Red Cross, 2009). It is important to mention that this is not an IHL principle although the two are closely linked. The principle originated from a report prepared by the International Commission on Intervention and State Sovereignty in 2001. The report aimed at addressing challenging issues regarding gross violations of human rights on the one hand and the principles of non-interference and Sovereignty on the other. It was also motivated by the realization that in some cases, civilians suffer in the hands of the States that are supposed to protect them. The principle continued evolving and in 2005, the United Nations General Assembly (UNGA) widely accepted and adopted it.

The central argument of R2P is that State sovereignty entails responsibility and therefore each State has a responsibility to protect its citizens from mass killings, and other gross violations of their rights (Stahn, 2007:99). Thus each individual State bears the responsibility of protecting its populations from genocide, war crimes, ethnic cleansing and crimes against humanity. However, if a State manifests inability or unwillingness to protect its population then automatically abrogates its sovereignty and the responsibility to protect is assumed by international actors (Stahn, 2007:288). The international community, through the United Nations, has the responsibility to take "timely and decisive" action through the various provisions set out in the UN Charter such as use appropriate diplomatic, humanitarian and other peaceful means, to help to protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity (Belamy, 2015:102).

The State is obliged to prevent commission of the crimes covered in the R2P principle: genocide, war crimes, ethnic cleansing and crimes against humanity. Since these crimes are also prohibited under international law, when an international criminal tribunal or court has been given jurisdiction to prosecute individuals for committing genocide, State obligations would

also include a duty to cooperate with the tribunal with regard to arrest or transfer of indictees to the court (Amnéus, 2013:19).

The Link between IHL and the Responsibility to Protect (RtoP)

The principle of R2P and IHL are closely linked. To start with, both aim at protecting and according human dignity to human beings. The primary responsibility of both IHL and R2P rests on the State. If a State honors its R2P, it automatically respects IHL. Similarly, a State that upholds IHL fulfils its responsibility to protect its citizens during armed conflict. The main difference between the two is that IHL is much broader in scope compared to R2P. It entails many rules and guidelines for the conduct of armed conflict while R2P is narrower in scope and it can apply both during armed conflict as well as in peacetime.

Secondly, one of the four crimes contained in the R2P principle is war crimes. War crimes are a violation of IHL. In this respect, it can be argued that the R2P principle inherently enhances State's respect of IHL. Thus IHL and R2P are not mutually exclusive but complementary. The obligation to respect IHL is binding for States as well as non-state parties under customary law including NIACs where Common Article 3 must be observed and respected in all circumstances (Amnéus, 2013:19). The R2P obliges States to respect and ensure respect of IHL so as to prevent commission of war crimes and seek out and prosecute those who commit them. States thus have a duty to ensure that civilians, military authorities, members of armed forces and the whole population in general respect all the principles of IHL (Amnéus, 2013:21).

The Tigray Crisis in Ethiopia

Ethiopia has an old and rich history. Its Aksum Empire was one of the oldest known African civilizations and the ruins of the city of Aksum in the Tigray region are a United Nations World Heritage Site (BBC, 2020). It is the only country in Africa that managed to successfully militarily resist and therefore evade the grip of colonialism. Ethiopia is comprised of several ethnic groups but the most politically relevant ethnic groups are the Oromo and Amhara and the Tigray. The Oromo and Amhara form the majority, a combination of

both amounting to 50-60% of the population of Ethiopia while the Tigray are a minority, consisting only of 6% of the country's population but have dominated Ethiopia politically and economically since 1991 (Woldemariam, 2018). The Somali ethnic group which forms about 6% has also been agitating for the self determination of the Somali region through the Ogaden National Liberation Front (Tsega, 2018:10).

The Tigray region is Ethiopia's northernmost region bordering Eritrea in the north and Sudan in the West. The region is one of the administrative regions in Ethiopia. The TPLF is the one in charge of administering and governing the Tigray region. In addition, the TPLF ostensibly presides over a large regional paramilitary police force as well as local militia (Human Rights Watch, 2020). This is in line with the Ethiopian constitution which authorizes regional states to oversee police and security in their respective regions. From 1991 until 2018, the TPLF leaders who dominated Ethiopian government's leadership concentrated a lot of development in the Tigray region (Assefa, 2021:33). Thus the region has for the last almost 30 years been economically, politically, and militarily very powerful while other parts of Ethiopia suffered marginalization.

Ylönen (2021:3) points out that since the fall of the communist Derg in 1991, Ethiopia has been dominated by ethnonationalist politics leading to a tension between centralization and devolution of power and the related question of self determination. In addition, Ethiopia's constitutional provision of the right to self determination entrenched ethnic nations at the expense of national unity. The Ethiopian People's Revolutionary Democratic Front (EPRDF), a coalition of parties (formerly rebel groups) based on Ethiopia's largest ethnic communities (the Oromo, Amhara, Tigray and Somali) had been the ruling coalition in Ethiopia since the oust of Mengistu Haile Mariam's military government in 1991 until 2018 when the new Prime Minister Abiy Ahmed dissolved it and formed the Prosperity Party. The EPRDF coalition was however politically, economically and militarily led and dominated by the Tigrean People's Liberation Front (TPLF) (Assefa, 2021:33).

Managing ethnicity was at the centre of Ethiopian politics under the Tigray leadership. Tsega (2018:5) points out that under the TPLF leadership, the EPRDF governed through divide and rule tactics that involved setting the Oromo and the Amhara against each other. This was because the minority Tigray viewed the Oromo-Amhara solidarity as posing a great threat to the EPRDF, an ethnic coalition whose power resided in the hands of the TPLF. The TPLF consistently securitized the Oromo and Amhara identities presenting them as posing an existential threat to the Tigray identity as the referent object. This securitization process served as a strategic move for the Tigray to achieve ethnic dominance and regime security. The goal of securitization is to authorize authorities to extraordinary measures to deal with the existential threat. In the case of Ethiopia, the securitization of the Oromo and Amhara identities led to the Tigray dominated government resulting to repression of any political dissent and opposition and also to the marginalization of other communities especially the Oromo and Amhara (Tsega 2018:7-8). This in turn created deep resentment of the Tigreans by the Oromo and Amhara who perceive them (the Tigreans) as privileged citizens (Woldemariam, 2018).

During it's almost three decades of dominance the TPLF had amassed a heavy cache of heavy artillery and control of nearly 80% of Ethiopia's top ranking military brass and security apparatus (Gabriel's comment on Walsh, 2021). This made the TPLF a formidable force to reckon with.

In 2018, after a series of tensions, incessant protests and political unrest Prime Minister Hailemariam Desalegn a Tigrean resigned and he was replaced by Abiy Ahmed who has a mixed Oromo-Amhara parentage (Burke, 2020). This ended an almost 30 years of Tigrean and TPLF Premiership and dominance in Ethiopian politics. It marked the beginning of a new era that entailed the systematic process of retracting the TPLF senior member's monopolization of political, military and economic power at the centre of the political system.

Within a short period into his Premiership, Abiy Ahmed carried out sweeping reforms. TPLF's top leaders were sacked from key security

positions and generals were arrested and charged with graft which reduced Tigrayan dominance of the armed forces, prisoners were freed and those in exile were welcomed back home, while state owned enterprises were privatized and restrictions on the media were relieved (Burke, 2020). In a move supposedly aimed at enhancing national unity and weakening the entrenched ethnic regionalism, Abiy Ahmed dismantled the ruling coalition EPRDF which had been dominated by the TPLF for almost three decades and replaced it with his own political party known as the *Prosperity Party* which the TPLF refused to join (Khorrami, 2021). Another significant change that Abiy Ahmed enacted was the reconciliation of Ethiopia with Eritrea, which earned him a Nobel Prize but further isolated the TPLF (Burke, 2020).

(Khorrami, 2021) points out that Abiy Ahmed's reforms were meant to weaken the TPLF nationally and in Tigray. He further argues that this is hard to achieve owing to the strong decades long emotional and cultural bonds that exist between the locals in Tigray and the TPLF and the absence of the Prosperity Party in Tigray. After being sidelined by Abiy's reforms, the TPLF leaders retreated to their home region in Tigray. The reforms created tensions between Abiy Ahmed and the TPLF and the tensions kept increasing over time.

Owing to the COVID 19 pandemic and related health risks, the Ethiopian government postponed highly anticipated national elections arguing that it would be impossible for the government electoral body to prepare adequately (Human Rights Watch, 2020). The TPLF defied this extension terming it as an unconstitutional extension of Abiy Ahmed's term and proceeded to conduct their regional elections in September in which the TPLF won 98% of the Vote (Wight 2020). The Tigray elections were annulled by the federal parliament and the governments stopped its budgetary support to the Tigrayan government and Abiy Ahmed began sending troops north (ibid). A process of mutual delegitimisation ensued whereby the TPLF considered Abiy's government illegitimate while Abiy in turn considered the Tigray regional government illegitimate.

TPLF's overt defiance angered Abiy Ahmed who labeled the group as a rebel and terrorist group accusing it of instigating violence in the Ethiopia since he took office in 2018 (Wight, 2020). Before the conflict commenced, the TPLF had engaged in unprecedented armament, in which it armed about 250,000 soldiers and also carried out a series of provocative military parades in Mekelle, the capital city of the Tigray region (ibid.). In addition to the parading of military might, the TPLF also kept interfering with the operations of federal army's Northern Command.

On 3 - 4 November 2020, as tensions between the TPLF and Abiy Ahmed's government escalated, the TPLF attacked and seized an army command centre near Mekelle, the capital of Tigray prompting the Ethiopian government to respond immediately with air strikes and ground attacks (Wight, 2020). The TPLF had also been accused of arresting top military commanders in the Tigray region. The Ethiopian government launched a military operation on 4 November 2020 in Tigray which it termed as a "law enforcement operation" (International Crisis Group, 2021; The Guardian, 2021). The Ethiopian military carried out ground operations and airstrikes that were reportedly aimed at targeting the military assets of the Tigray regional forces in various locations in Tigray (Human Rights Watch, 2020). On the other hand, the TPLF launched missile attacks and ground forces targeting the Ethiopian military as well as Amhara regional forces and militias (ibid).

The conflict pits the Ethiopian government against the TPLF leadership that was deemed illegal by the Abiy Ahmed's government. The Tigrayan leadership rallies under the banner of the Tigray Defence Forces (TDF), an armed resistance group whose leadership is drawn from the Tigrayan leaders who were ousted from the government and commanded by former high ranking Ethiopian National Defence Force Officers (International Crisis Group, 2021). This means that the TPLF presents a formidable force that the Ethiopian government ought to reckon with. The Ethiopian government has also been accused of using foreign military personnel from Eritrea as well as regional forces and militias from Amhara to fight on its side in the conflict.

At the end of November 2020, about four weeks into the operation, after the Federal Army's capture of Mekele the capital of the Tigray region and the removal of the Tigray Defence Forces (TDF), Abiy Ahmed the Ethiopian Prime minister declared victory and declared that the operation was complete (Reuters, 2020). He appointed an interim regional government in Tigray. Nevertheless, fighting continued outside Mekele between the TDF and government forces and its allies and while TPLF leaders escaped. It was feared that the Tigray leadership had withdrawn from Mekele before government's entry into the city and were perhaps planning to engage the Ethiopian government in a protracted guerrilla war (Reuters, 2020). The TPLF has a mastery of guerrilla warfare coupled with advantage provided by the Tigray region's highland topography and foreign borders (Reuters, 2020).

Taking advantage of their mastery of guerrilla warfare seven months later, on 29th June, the TDF rebels launched a rapid offensive and recaptured the Mekelle, declared victory and announced that Mekele was now under complete control of the TDF, the TPLF's armed wing (BBC, 2021).The TPLF spokesperson Gatachew Reda declared that the rebels were ready to render the enemy, whether from the Eritrean side, the Amhara side or Addis Ababa incapable of threatening the security of the Tigrean people any more (ibid). He further vowed that the rebels would destroy the enemy by entering Eritrea and Amhara region whose forces have been supporting the Ethiopian government. True to his word the TPLF rebels have actually been accused of entering neighboring regions of Afar and Amhara where they have attacked civilians, destroyed villages and looted aid supplies among other atrocities (AFP, 2021). With this trend, the Tigray conflict, if not checked could be snowballing into a protracted civil war that is not only restricted to Tigray but also spreads to the rest of Ethiopia and regionally to the Horn of Africa region.

There was jubilation as the Tigreans welcomed back their forces. Following the recapture or Mekele by the rebel forces, Prime Minister Abiy Ahmed unilaterally declared a military ceasefire saying that it was on humanitarian grounds to allow for aid workers to access the people in need and for farmers

to make use of the planting season to work in their farms (Quinn, 2021). The rebels dismissed the ceasefire and and vowed to continue fighting. The interim government and government forces retreated from Mekele and the TPLF reinstituted the regional government that had been elected in September 2020. The TPLF has however been accused of recruiting child soldiers.

The Tigray conflict has entailed the use of brutal force on civilians and *hors de combat*. Narrating an ordeal about a fiery exchange between civilians and Ethiopian soldiers, in Shire, a town in northern Tigray, elders said that residents had been slaughtered like chicken and their corpses abandoned to be eaten by hyenas (The Guardian, 2020). They also narrated of rampant vandalism and looting that had left all government assets destroyed and looted. Although the Ethiopian government claimed that no civilians were killed by government forces, reports on the ground confirmed otherwise. There has been random killings of civilians, massacres and alleged ethnic cleansing of the Tigray people in the hands of Ethiopian government forces, its allied militia from Amhara as well as Eritrean soldiers (Walsh, 2021). The government also launched airstrikes in some towns which instead of killing rebels would kill civilians. One of the airstrikes on a market in the city of Togoga which the government alleged targeted rebels killed 64 civilians and injured 180 others (Akinwotu, 2021). The TPLF has also launched missiles and rockets on Asmara the capital city of Eritrea and also on Amhara.

The operation has resulted in massive humanitarian consequences (Ylönen, 2021:3). Thousands of people have been killed, over two million internally displaced and tens of thousands of refugees fled to the neighboring Sudan (Global Centre for the Responsibility to Protect, 2021). Besides, people's livelihoods and facilities have been destroyed triggering a devastating famine which is hugely considered a manmade famine caused by Eritrean soldiers who were accused of pervasive looting while the Ethiopian army burned crops demolished health facilities and prevented farmers from ploughing their land (De Waal 2021). Due to the instability and threats from soldiers, the people of Tigray are unable to cultivate in their farms which renders them totally dependent on aid. Beside the huge deaths directly from

killings, starvation has been causing massive deaths and residents narrate of remote villages where people are just found dead having perished overnight. Women and children are the most adversely affected. In addition, psychological impacts are also enormous. For instance, "women who were kidnapped by soldiers and held as sexual slaves, receiving care in hospitals and safe houses are psychologically tormented by their children from whom they were separated, who may be starving without their mother's care" (De Waal 2021).

Sexual violence has also been rampant in the conflict. The parties to the conflict especially Ethiopian and Eritrean soldiers were reportedly carrying out systematic rape of women and girls, even to the extent of raping girls as young as 8 years old (Jaiswal, 2021). Indeed, Mark Locknow, the head of the United Nations for the Coordination of Humanitarian Affairs (UNOCHA) stated that rape was being used as a weapon of war, mainly by uniformed forces but also with accusations made against all warring parties in including the TPLF which targets non Tigreans (Nichols, 2021).

Exacerbating the crisis is also the obstruction and denial of humanitarian access to the numerous civilians that have been severely affected by the crisis. The Ethiopian government has on several occasions denied access to humanitarian organizations. The government also blocked access to Tigray including by road and air (HRW, 2020). The Ethiopian government's shut down of communication infrastructure including electricity, phone and internet has also posed numerous challenges in communication and hindered activities such as tending to those wounded and killed in the conflict. Eritrean troops, militias as well as the TPLF have also been reported to bottleneck humanitarian aid and even looting it. In addition, the Ethiopian National Defence Forces (ENDF) were accused of dismantling satellite equipment in the UNICEF office in Mekele, which violates IHL regarding respect for humanitarian relief (Paravicini, Houreld & Endeshaw, 2021; Akinwotu, 2021)

Caught up in the conflict also are Eritrean refugees in Ethiopia who have not been spared. Grave human rights and humanitarian law violations were

alleged to have been committed against Eritrean refugees in Ethiopia by the Federal Government of Ethiopia; government allied militia and Eritrean troops as well as by forces affiliated to the TPLF (UN Human Rights Commission, 2021). The Eritrean refugees suffered attacks, killings, sexual violence, beatings and even looting of their camps and property and even being cut off from humanitarian assistance (ibid.).

International community's response

From the onset of the conflict, the international community condemned the operation and called for a dialogue between the parties to the conflict. The United Nations, The African Union, the Intergovernmental Authority on Development (IGAD), the European Union, the United States, and other international bodies all denounced the violence in Tigray (Global Centre for the Responsibility to Protect, 2021). Following violations of human rights and International Humanitarian Law and the failure of the Ethiopian government to protect its citizens in Tigray, the European Union suspended budgetary aid amounting to 88 million Euros to Ethiopia (ibid.). The African Union appointed three high level envoys to mediate peace in Tigray between the Ethiopian government and Tigrayan leaders. However, the Prime Minister Abiy Ahmed rejected this offer of assistance terming the military operation in Tigray as a law and order operation and thus an internal Ethiopian matter (AFP, 2021).

The UN has been hesitant to enforce Resolution 2417 on armed conflict and hunger in Ethiopia. The resolution authorizes the UN to impose sanctions on individuals as well as entities that impede humanitarian operations and warns that using starvation as a weapon of war could amount to war crime (De Waal, 2021). The UN and humanitarian partners have also made efforts to assist the people who have been in dire need of humanitarian aid (Annys, et al., 2021:29). This is in spite of the impediments to humanitarian aid that the Ethiopian government has imposed. Nevertheless, the United Nations Security Council was faulted for its inability to demonstrate a unified response and the lack of agreement on a common statement on the Tigray crisis, with, the Western countries on the one hand pitted against Russia and China on the other (Nichols, 2021).

IHL and the Responsibility to Protect (R2P) in the Tigray Crisis: a Critical Analysis

The above section has provided a historical background to the conflict in Tigray, Ethiopia. It has offered the diverse and complex dynamics regarding its causes which makes it very hard to deal with. The section has also discussed about the international response to the conflicts and the challenges that have engulfed it as well as the weaknesses inherent in the responses.

International Humanitarian Law however does not focus on the causes nor the dynamics of the conflict but on the conduct of the conflict itself with the sole emphasis that laws of war must be observed at all times by all parties. The interest of this paper is therefore to highlight the violation of IHL by the various parties to the conflict but most predominantly the Ethiopian federal government and the TPLF. The Tigray crisis can be described as an internal armed conflict/non-international armed conflict (NIAC) between the Federal Government of Ethiopia and the TPLF. Ethiopia is a signatory to both the Geneva Conventions of 1949 and also to the Additional Protocol II of 1977. Indeed it is one of the earliest countries in Africa to sign the above legal documents having ratified and acceded to the Geneva Conventions of 1949 in October 1969 and Additional Protocol II to the Geneva Conventions, 1977 in April 1994 (ICRC database). The NIAC between the Ethiopian government and the TPLF is thus regulated by these IHL instruments, particularly Article 3 common to the four Geneva Conventions and Additional protocol II.

Violation of IHL by the Ethiopian Government in Tigray

The principles of IHL are the ones that enhance the protection and reduction of brutalities in conflict. The Ethiopian government violated all these principles in its military operation in Tigray as analysed below.

Use of unlawful combatants and civilianization of the conflict

IHL demands that under all circumstances, civilians should be protected and no attacks should be directed at them and their objects. Article 8 (2) (b) (i) of the Rome Statue further considers intentional direction of an attack against civilians is a war crime (Dinstein, 2005:129). This kind of protection applies

to those civilians who are not directly taking part in hostilities. If civilians take part in direct hostilities, they cease to be considered as civilians and are therefore not entitled to protection. The Ethiopian government has used the Amhara militia to attack civilians who were not directly involved in hostilities in Tigray. The Amhara militias are unlawful combatants and therefore by using them, the government was in contravention of IHL. The use of Amhara militias has exposed the Amhara region and civilians there to retaliatory attacks by the TPLF.

Indiscriminate attacks and disregard of the principle of distinction

In order to punish and weaken the TPLF, the Ethiopian government forces and their allies: Eritrean forces and Amhara regional forces and militias have indiscriminately attacked villages, towns and civilians in Tigray from which the TPLF draws their membership. They have used weapons such as bombs and airstrikes which are prohibited by IHL since it they cannot discriminate between combatants and civilians. Consequently the attacks have caused deaths and displacements of civilians and also destroyed infrastructure causing immense suffering in the Tigray region.

Abuse of the principle of proportionality and precaution in the conduct of hostilities

The principle of proportionality stipulates that the military action taken must be proportionate to the aim that parties to conflict seek to accomplish. Furthermore, the military advantage that a particular operation obtains ought to be greater than the damage caused to civilians. The force with which the government forces attacked civilians in Tigray is a total disregard of the principles of military necessity and proportionality. In addition, precaution must be taken so as to minimize civilian harm. The attacks by Ethiopian government forces and their allies from Amhara forces and militias as well as Eritrean soldiers on towns and villages in Tigray caused massive civilian harm. Little precaution has been taken to minimize harm on civilians. In fact, the civilians themselves were the direct targets leading to immense suffering, death displacement and loss of livelihood.

Other Abuses in contravention of Common Article 3 and Additional protocol II

In addition to the violation of the above principles, Ethiopian government and its allies carried out various actions that violated Common Article 3 and Additional Protocol II and consequently caused serious harm to the people of Tigray. Some of them included blocking of access to aid and on several occasions attacking aid and humanitarian workers thus denying the Tigreans, people access to humanitarian assistance and consequently causing unnecessary suffering. Eritrean soldiers fighting on the side of the Ethiopian government were accused of pervasive looting and pillaging while the Ethiopian army burned crops, demolished health facilities and prevented farmers from ploughing their land denied the people of Tigray their means of livelihood and has indeed led to a widespread manmade famine. They have also been involved in looting humanitarian aid. Furthermore, the Ethiopian forces and their allies have been accused of raping several girls and women, using rape as a weapon of war which is a gross violation of IHL.

Abdication of the Responsibility to Protect (RtoP) by the Ethiopian government

As indicated in this research the principle of R2P and International Humanitarian Law complement each other in protecting and according human beings dignity. The only main difference between the two is that while IHL applies during war, R2P applies all the time and also involves other actions and services that the State should render to its citizens. By directly attacking civilians in Tigray, the Ethiopian government abdicated its responsibility to protect its citizens. Furthermore, destroying the livelihood of the citizens as well facilities and infrastructure would have long term dire human security consequences for the citizens.

Earlier in the conflict on November 22, 2020, prior to a planned government artillery attack against TPLF groups in Mekelle, the capital city of Tigray and the most populated city in the region, the Ethiopian government spokesman warned the residents to “save themselves” (Human Rights Watch, 2020). This was a demonstration of the highest form of Ethiopian government’s disregard of its responsibility to protect the people of Tigray.

Thus the Ethiopian government has become the source of direct and structural violence for the citizens it is supposed to protect.

Violations of IHL by the TPLF

It is also important to note the role played by rebel groups in challenging the State's ability to function effectively. The TPLF should also be held accountable for atrocities they commit since they too ought to respect IHL. The TPLF forces have launched attacks on federal government facilities such as the government's Northern Command which actually triggered the conflict. In addition, they have used missiles and ground attacks against a number of locations in the neighboring Amhara region and in Eritrea (Human Rights Watch, 2020). They also launched rockets in Asmara Eritrea hitting the city's airport and also attacked Bahir Dar and Gondar airports in the Amhara region of Ethiopia (ibid). The use of these non discriminatory weapons and also attacks on non military objectives are acts in contravention of IHL. The TPLF has also been accused of recruiting child soldiers which also violates IHL and exposes the children to violent attacks.

In June, when the TPLF recaptured Mekelle in a massive attack, they captured government forces and paraded them in Mekelle as prisoners of war. This is in contravention of Common Article 3 which provides for protection, humane treatment and respect for the dignity of all civilians and captured combatants. The comment by the TPLF spokesperson that they will destroy their enemies is an indication of their unwillingness to protect prisoners of war and civilians. Indeed after they recaptured Mekele in June they started attacking civilians and destroying villages in neighobouring regions of Afar and Amhara and even looting humanitarian supplies further exacerbating the suffering of those in need of aid.

The TPLF has played a major role in destabilizing and threatening the Ethiopian federal government's sovereignty and state survival and in turn contributed to the government's apathy towards its citizens in the Tigray region where the TPLF draws its membership. Faced with the formidable military strength of the TPLF, the Ethiopian government's capability to maintain control of the instruments of power and violence remain uncertain

and under threa. It remains very challenging for the Ethiopian federal government to perform its responsibility to protect its citizens and to respect IHL when confronted with the formidable force of the TPLF that threatens State stability and sabotages the legitimacy of the government. Thus this research argues that the TPLF has played a significant role in bottlenecking the Ethiopian federal government's ability and willingness to implement IHL during counter-insurgency operations and also in performing its responsibility to protect its citizens particularly in Tigray.

The International Community, IHL and RtoP in Tigray

The R2P principle obligates the international community to intervene if a State is unwilling or incapable of protecting its citizens. The Tigray conflict attracted the intervention of the international community which has been quick to condemn the conflict and has called for secession of hostilities. The international community, particularly the African Union also offered to mediate the conflict but the government of Ethiopia turned down the offer terming the military operation as an internal Ethiopian affair. Economic sanctions have also been imposed on the Ethiopian government by international organizations such as the European Union. The international community has also intervened to provide the much needed humanitarian assistance amid the accessibility challenges access and also the insecurity posed not only by the Ethiopian government and its allies but also by the TPLF rebels.

Nevertheless, the international community has been faulted for not doing enough to intervene in the conflict. For instance the UN Security Council has not been in a position to issue a unified position on the conflict owing to differences between two sides of the veto wielding powers. The international community's calls for cession of hostilities and permission of unfettered humanitarian access seem to fall on deaf ears for the Ethiopian government and the TPLF rebels. The international community ought to take more decisive action to avert the immense suffering of civilians.

Conclusion

This paper has explored the link between IHL and RtoP using the Tigray crisis in Ethiopia as a case study. It has applied the just war theory, particularly *jus in bello* which is directly related to IHL. The study has established that there is a close link between IHL and R2P. Violation of RtoP for instance amounts also to violation of IHL especially in situations of armed conflict. The government of Ethiopia has violated both the RtoP and IHL by brutally responding to the TPLF rebels' attacks and by targeting civilians and civilian objects in Tigray. Nevertheless, the TPLF also violates IHL, challenges and pose a great threat to the Ethiopian government's capability and willingness to protect her civilians especially those from Tigray where the rebels draw their membership. This is a characteristic of contemporary internal armed conflicts whereby the State has ceased to possess monopoly of violence and faces great challenges from equally if not more strongly armed rebel groups. Although the international community has intervened in Tigray to protect civilians its response has been wanting and indecisive. The international community can still do more. Since the TPLF recaptured Mekele, their capital city in June, they have been fighting relentlessly and spreading the conflict to neighbouring regions such as Afar and Amhara. This poses a great threat not only to Ethiopia but also to the entire Horn of Africa region as the Tigray crisis could be snowballing into a protracted civil war in Ethiopia. The international community should thus intervene and act timely and decisively to bring the Ethiopian government and the TPLF to the negotiation table as soon as possible in order to avert further suffering of civilians in the country.

References

AFP. (2021, August 31). Tigray Lebels Looting Aid Suppies: US Agency. https://www.france24.com/en/live-news/20210831-ethiopia-s-tigray-rebels-looting-aid-supplies-us-agency (accessed, 31/08/2021)

Akinwotu, E. (2021, June 21). Interim Government of Tigray flees as Rebels Seize Capital. The Guardian. https://www.theguardian.com/world/2021/jun/28/interim-government-of-tigray-flees-as-rebels-advance-on-mekelle (accessed 18/08/2021)

Amneus, D. (2013). "The Coining and Evolution of Responsibility to Protect: The protection Responsibilities of the State", in Zyberi, G. An Institutional Approach to the Responsibility to Protect (ed.). Cambridge: Cambridge University Press.

Annys, S., Vanden Bempt, T., Negash, E., De Sloover, L., Nyssen, J. (2021). Tigray: Atlas of the Humanitarian Situation. *Journal of Maps, preprint*. https://www.researchgate.net/publication/349824181_Tigray_Atlas_of_the_humanitarian_situation (accessed, 16/08/2021)

Assefa, M. (2021). The Tigray Conflict and Abiy Ahmed's Struggle Against Identity Politics in Ethiopia. *The Horn Bulletin, IV (II),* 33-40.

Australian Red Cross. (2009). International Humanitarian Law and the Responsibility to Protect. A Handbook.

BBC. (2020, November 22). Ethiopia's Tigray Crisis: Debretsion Gebremichael, the Man at the Heart of the Conflict. https://www.bbc.com/news/world-africa-54972908 (accessed, 07/09/2021)

BBC. (2021 June 29). Ethiopia's Tigray Conflict: Street Celebrations as Rebels Seize Capital. https://www.bbc.com/news/world-africa-57645282 (accessed, 16/08/2021)

Belamy, A. J. (2015). International Responses to Human Protection: Responsibility to Protect and the Emerging Protection Regime. *RCCS Annual Review, 95-112*.

Ben Arrous, M. & Feldman, R. (2014). Understanding Contemporary Conflicts in Africa: A State of Affairs and Current Knowledge. *Defense and Security Analysis*, 30 (1), 55-66.

Burke, J. (2020, November 25). Rise and Fall of Ethiopia's TPLF-From Rebels to Rulers and Back. The Guardian. https://www.theguardian.com/world/2020/nov/25/rise-and-fall-of-ethiopias-tplf-tigray-peoples-liberation-front (accessed, 19/08/2021)

Deng, F. JISB Interview. (2010): The Responsibility to Protect. *Journal of Intervention and Statebuilding*, 4 (1), 83-89.

Deng, F. (1995). Sovereignty, Responsibility and Accountability: A Framework of Protection, Assistance and Development for the Internally Displaced. Concept Paper for Brookings Institution- Refugee Policy Group-Project on internal Displacement, 1-65.

De Waal, A. (2021, June 11). Ethiopia's Tigray Crisis: The Tragedy of the Man-made Famine. *BBC News*. https://www.bbc.com/news/world-africa-57422168 (accessed, 14/08/2021)

Dinstein, Y. The Conduct of Hostilities under the law of International Armed Conflict. Cambridge: Cambridge University Press.

Forest, C.J.S (2007). The Doctrine of Military Necessity and the Protection of Cultural Property During Armed Conflicts. California Western International Law Journal, 31 (2), 177-219.

Global Centre of the Responsibility to Protect (2021, May 31). Ethiopia: Populations at Risk. https://www.globalr2p.org/countries/ethiopia/ (accessed, 11/08/2021).

Harrer, G.A (1918). Cicero on Peace and War. The Classical Journal, 11 (1), 26-38.

Haye, E. 2008. War Crimes in Internal Armed Conflicts. Cambridge: Cambridge University Press.

Human Rights Watch. (2020, November 13). Ethiopia: Protect People as Tigray Crisis Escalates. https://www.hrw.org/news/2020/11/13/ethiopia-protect-people-tigray-crisis-escalates (accessed, 13/08/2021)

Human Rights Watch. (2020, November 25). Q & A: Conflict in Ethiopia and International Law. https://www.hrw.org/news/2020/11/25/qa-conflict-ethiopia-and-international-law (accessed, 13/08/2021).

ICJ Reports, 1996. Legality of the Threat of Use of Nuclear Weapons, Advisory Opinion, ICJ Reports, 1996, para. 79.

ICJ Reports 2004. Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, ICJ Reports, 2004, para. 157.

ICRC database: Treaties, State Parties and Commentaries. https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/vwTreatiesByCountrySelected.xsp?xp_countrySelected=ET (accessed 19/08/2021)

International Crisis Group (ICG). (2021, April 2). Ethiopia's Tigray War: A Deadly Dangerous Stalemate. *International Crisis Group Briefing No. 171/Africa*. https://www.crisisgroup.org/africa/horn-africa/ethiopia/b171-ethiopias-tigray-war-deadly-dangerous-stalemate (accessed, 13/08/2021).

Jaiswal, S. (2021, August 20). Sexual Violence in Tigray: Dire Humanitarian Crisis Erupting in Ethiopia. Human Rights Pulse. https://www.humanrightspulse.com/mastercontentblog/sexual-violence-in-tigray-dire-humanitarian-crisis-erupting-in-ethiopia (accessed 21/08/2021).

Khorrami, N. (2021, February 19). Abiy Ahmed's Law and Order Operation is Stocking Ethiopia's Crisis of Legitimacy. https://blogs.lse.ac.uk/africaatlse/2021/02/19/abiy-law-and-order-ethiopia-crisis-legitimacy-tplf-civil-war/ (accessed, 16/08/2021)

Moir Lindsay. (2002). The Law of Internal Armed Conflict. Cambridge: Cambridge University Press.

Nichols, M. (2021, April 16). Sexual Violence Being Used as a Weapon of War in Ethiopia's Tigray, U.N. Says. *Reuters*.

https://www.reuters.com/article/ozatp-us-ethiopia-conflict-rape-un-idAFKBN2C30PJ-OZATP (accessed 19/08/2021)

Paravicini, G., Houreld, K. & Endeshaw, D. (2021, June 29). Tigray's Former Rulers Back in Mekelle, Ethiopian Government Declares Ceasefire. *Reuters*. https://www.reuters.com/world/africa/mekelle-under-our-control-spokesperson-tigrays-former-rulers-says-2021-06-28/ (accessed, 17/08/2021)

Peltonen, H. (2011). Sovereignty as Responsibility, Responsibility to Protect and International Order: On Responsibility, Communal Crime Prevention and International Law. *Uluslararası İlişkiler*, 7 (28), 59-81.

Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I)

Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II).

Quinn, C. (2021, June 29). Ethiopia Declares Ceasefire as TPLF Retakes Capital. *Foreign Policy*. https://foreignpolicy.com/2021/06/29/ethiopia-tigray-tplf-mekele-abiy/ (accessed, 18/08/2021)

Reuters, (2020, November 28). Ethiopian Military Operation in Tigray is Complete, Prime Minister Says. https://www.reuters.com/article/us-ethiopia-conflict-idUSKBN28809E (accessed, 18/08/2021).

Sassòli, M., Bouvier, A. A., & Quintin, A. (2011). How does law protect in war? ICRC

Slaughter, Anne-Marie (2005). Security, Solidarity and Sovereignty: The Grand Themes of UN Reforms. *American Journal of International Law. Vol. 99. No. 3 (*July, 2005), pp 619-631.

Stahn, C. (2007). Responsibility to Protect: Political Rhetoric or emerging legal norm? The *American Journal of International Law, (101 (1), pp. 99-120.*

The Guardian. (2021, December 21). "Slaughtered Like Chicken": Eritrea Heavily Involved in the Tigray Conflict, say eyewitnesses. *The Guardian*. https://www.theguardian.com/globaldevelopment/2020/dec/21/slaughtered-like-chickens-eritrea-heavily-involved-in-tigray-conflict-say-eyewitnesses (accessed, 13/08/2021).

UN HRC. (2021, August 6). Tigray Conflict: All Combatants have the Obligation to Protect Eritrean Refugees- UN Expert. https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=27366&LangID=E (accessed, 11/08/2021)

Tsega, A. H. (2018). The Tigray Identity and the Paradox in the Securitization of the Oromo and Amhara Identities in Ethiopia. *International Journal of African Development*, 5 (1) 3.

Vincze, V. (2017). The Role of Customary Principles of International Humanitarian Law in Environmental Protection. *Pécs Journal of International and European Law*, pp 19-38.

Walsh, D. (2021, April, 1). Ethiopia's War Leads to Ethnic Cleansing in Tigray Region, U.S. Report Says. *New York Times*. https://www.nytimes.com/2021/02/26/world/middleeast/ethiopia-tigray-ethnic-cleansing.html (accessed, 16/08/2021)

Wenger, A. & Mason, S.J.A. (2008). The Civilianization of armed Conflict: Trends and Implications. *International Review of the Red Cross, 90 (872), 835-856.*

Wight P. (2020, December 2). Ethiopia's Civil War: Competing Visions on the Nature of the State. *ACCORD*. https://www.accord.org.za/analysis/ethiopias-civil-war-competing-visions-on-the-nature-of-the-state/ (accessed, 13/08/2021).

Woldemariam, Y. (2018, March 28). The Unenviable Situation of Tigreans in Ethiopia. *LSE -International Affairs*. https://blogs.lse.ac.uk/africaatlse/2018/03/28/the-unenviable-situation-of-tigreans-in-ethiopia/ (accessed, 19/08/2021)

Ylönen, A. (2021). Counting on Friends in Tigray: Internal and Regional Considerations in the Ongoing Crisis. *The Horn Bulletin, IV (II),* 1-13.

Revisiting the Place of Indigenous Knowledge in the Sustainable Development Agenda in Kenya

By: Kariuki Muigua*

Abstract

For centuries, the African communities and especially in Kenya have always upheld and utilised their cultural knowledge on management and conservation of the environmental and natural resources. However, colonialism marked an era of western knowledge subjugating the indigenous knowledge, a practice that has continued to date. This has been made worse by the top-down or what is commonly referred to as command and control approach where the state organs have often taken the lead role in not only management of the environment and natural resources but also in utilising western and scientific knowledge at the expense of the indigenous knowledge. This paper explores the place of indigenous knowledge, in not only the management of environmental and natural resources but also in realisation of the sustainable development agenda. This is based on the need to ensure active and meaningful participation of communities through enhanced access to information and public participation.

1. Introduction

The term "indigenous knowledge" may generally refer to how members of a community perceive and understand their environment and resources, particularly the way they convert those resources through labour. [1] Indigenous groups offer alternative knowledge and perspectives based on

**** 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.***

[1] Castro, A.P. & Ettenger, K., 'Indigenous Knowledge And Conflict Management: Exploring Local Perspectives And Mechanisms For Dealing With Community Forestry Disputes,' *Paper Prepared for the United Nations Food and Agriculture Organization, Community Forestry Unit, for the Global Electronic Conference on "Addressing Natural Resource Conflicts Through Community Forestry,"* (FAO, January-April 1996). Available at *http://www.fao.org/docrep/005/ac696e/ac696e09.htm* [Accessed on 14/7/2020].

their own locally developed practices of resource use.[2] In general, all traditional knowledge and resources are considered to be collective heritage of a community or ethnic group, even if the accumulation of knowledge is individual, because they are ancestral heritage, and are believed to come from God.[3] Thus, Indigenous knowledge is the local knowledge that is unique to a culture or society.[4] Indigenous knowledge is seen as the social capital of the poor since it is their main asset to invest in the struggle for survival, to produce food, to provide for shelter and to achieve control of their own lives.[5]

The Sustainable Development Goals (SDGs)[6] has several goals that seek to incorporate the knowledge vested in indigenous people in order to achieve its main agenda.

This paper offers some insights on debate relating to the place of indigenous knowledge in the sustainable development agenda as a means of promoting growth and development in Kenya.

2. Indigenous Knowledge as a Tool for Promoting Inclusive Growth and Development

Kenya has had a history of environmental injustice, where the colonialists used the law to appropriate all land and land-based resources from Africans

[2] Berkes, F., et. al., 'Rediscovery of Traditional Ecological Knowledge as Adaptive Management,' *Ecological Applications*, Vol. 10, No. 5., October 2000, pp. 1251-1262 at p. 1251.
[3] Swiderska, K., et. al., 'Protecting Community Rights over Traditional Knowledge: Implications of Customary Laws and Practices,' Interim Report (2005-2006), November 2006, p. 13. Available at *http://pubs.iied.org/pdfs/G01253.pdf* [Accessed on 14/7/2020].
[4] SGJN Senanayake, 'Indigenous Knowledge as a Key to Sustainable Development' (2006) 2 Journal of Agricultural Sciences–Sri Lanka<https://www.researchgate.net/publication/265197993_Indigenous_knowledge_as_a_key_to_sustainable_development> accessed 16 July 2020.
[5] Ibid.
[6] United Nations General Assembly, *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)].

and to vest them in the colonial masters.[7] In addition, the law gave the colonial authorities powers to appropriate land held by indigenous people and allocate it to the settlers.[8] The colonial authorities were, therefore, able to grant land rights to settlers in the highlands, while Africans were being driven and restricted to the native reserves. In the natives' reserves, there was overcrowding, soil erosion, and poor sanitation, amongst many other problems.[9]

The loss of control rights over natural resources also affected other resources including forests and water.[10] The focus of forests management in reserved forests was production and protection and included collection of revenues, supervisory permits and licences, protection against illegal entry and use, reforestation and afforestation, research and extension.[11] Further, outside reserved forests, the focus by the government authorities was regulation and control of forest resources utilisation through legislation without considering the interests of the local communities or the existing traditional management systems.[12]

Thus, the colonial government effectively transferred the management of forests from the local communities to the government through exclusionist and protectionist legal frameworks, a move that was inherited by the independent governments of Kenya.[13] It was only in the 1990s that there

[7] Ogendo, HWO, *Tenants of the Crown: Evolution of Agrarian Law & Institutions in Kenya, (*ACTS Press, Nairobi, 1991), p.54.

[8] See generally the case of *Isaka Wainaina and Anor v Murito wa Indagara and others*, [1922-23] 9 E.A.L.R. 102.

[9] See Ogendo, HWO, *Tenants of the Crown: Evolution of Agrarian Law & Institutions in Kenya, (*ACTS Press, Nairobi, 1991).

[10] Mogaka, H., 'Economic Aspects of Community Involvement in Sustainable Forest Management in Eastern and Southern Africa,' *Issue 8 of Forest and social perspectives in conservation*, IUCN, 2001.p.74.

[11] Kigenyi, *et al*, 'Practice Before Policy: An Analysis of Policy and Institutional Changes Enabling Community Involvement in Forest Management in Eastern and Southern Africa,' *Issue 10 of Forest and social perspectives in conservation*, (IUCN, 2002), p. 9.

[12] *Ibid.*

[13] For instance, in 1985 the Government of the day effected a total ban on the shamba system, which was participatory in nature in that it allowed communities to settle in forests and engage in farming as they took care of the forests. Following the ban, the

emerged a paradigm shift towards community-based forests management, although this was done with minimal commitment from the stakeholders.[14] Arguably, this has been with little success due to the bureaucracy involved in requiring communities to apply for complicated licences and permits in order to participate in the same. Similarly, in relation to water resources, legal frameworks were enacted chief among which, was the Water Ordinance of 1929, vesting water resources on the Crown. This denied local communities the universal water rights that they had enjoyed in the pre-colonial period. It is noteworthy, that the problem of environmental injustice in Kenya has in fact continued into independent Kenya and often with ugly results, as has been documented in various Government reports.[15]

Environmental injustice continues to manifest itself in modern times. The recent conflicts such as those in Lamu County and in the pastoral counties are largely attributable to environmental injustices inflicted over the years.[16] In some, there are feelings that land and other land-based resources were taken away from local communities, creating a feeling of disinheritance. In other areas, there are conflicts over access to resources such as forests among

communities were resettled outside the gazette forest areas. This form of eviction has also been witnessed in such recent cases as the Endorois and the Ogiek cases.

[14] Emerton, L., 'Mount Kenya: The Economics of Community Conservation,' *Evaluating Eden Series*, Discussion Paper No.4, p. 6.

[15] See the *Report of the Judicial Commission Appointed to Inquire into Tribal Clashes in Kenya*, July 31, 1999 (Akiwumi Report, p. 59). The report found that some of the main causes of post-independence tribal clashes have been ambitions by some communities of recovering what they think they lost when the Europeans forcibly acquired their ancestral land; See also the *Kriegler and Waki Reports on 2007 Elections*, 2009, (Government Printer, Nairobi). The *Kriegler and Waki Reports* stated that the causes of the post-election clashes in the Rift Valley region covered by included conflict over land, cattle rustling, political differences and ecological reasons among others.

[16] "They Just Want to Silence Us" (*Human Rights Watch*, 17 December 2018) <https://www.hrw.org/report/2018/12/17/they-just-want-silence-us/abuses-against-environmental-activists-kenyas-coast> accessed 17 July 2020; Rachel Berger, 'Conflict over Natural Resources among Pastoralists in Northern Kenya: A Look at Recent Initiatives in Conflict Resolution' (2003) 15 Journal of International Development 245.

forest communities for livelihood, while in others conflicts emerge due to competition over scarce natural resources and competing land uses.[17]

Economically, forests provide timber which is an important source of revenue and a major foreign exchange earner. Forests also serve as habitats and a source of livelihoods for indigenous peoples and forest dwellers.[18] The Africa Forest Law Enforcement and Governance (AFLEG) Ministerial Declaration of 2003[19] recognized the role of forests in its preamble noting that Africa's forest eco-systems are essential for the livelihoods of the African people; especially the poor and that forests play important social, economic and environmental functions.[20]

Notably, while the laws acknowledge the existence of indigenous forests, the command and control approach to natural resource management and the associated sustainability and conservation measures do not differentiate indigenous forests from other types of forests in reality. All indigenous forests and woodlands are to be managed on a sustainable basis for purposes of water, soil and biodiversity conservation; riverine and shoreline protection; cultural use and heritage; recreation and tourism; sustainable production of wood and non-wood products; carbon sequestration and other environmental services; education and research purposes; and as habitats for wildlife in terrestrial forests and fisheries in mangrove forests.[21] As a result, the law requires the Kenya Forest Service to consult with the forest conservation committee for the area where the indigenous forest is situated

[17] 'FAO Working Paper 1' <http://www.fao.org/3/X2102E/X2102E01.htm> accessed 17 July 2020; Urmilla Bob and Salomé Bronkhorst, 'Environmental Conflicts: Key Issues and Management Implications' (2010) 10 African Journal on Conflict Resolution.

[18] UNFF Memorandum, available at www.iucnael.org/en/.../doc.../849-unit-3-*forest-game-backgrounder.html*. > accessed 16 July 2020; See also UNEP, *Global Environment Outlook 5: Environment for the future we want*, (UNEP, 2012), pp.145-154.

[19] Africa Forest Law Enforcement and Governance (AFLEG), Ministerial Conference 13-16 October, 2003; Ministerial Declaration, Yaoundé, Cameroon, October 16, 2003.

[20] Sec. 2, *Forest Conservation and Management Act*, No. 34 of 2016, Laws of Kenya.

[21] Sec. 42 (1), *Forest Conservation and Management Act*, No. 34 of 2016.

in preparing a forest management plan.[22] Further, the Forests Board may enter into a joint management agreement for the management of any state indigenous forest or part thereof with any person, institution, government agency or forest association.[23] While such arrangements are important in promoting environmental justice since communities get to participate in management of indigenous forests, there is little evidence of active involvement of these communities. If anything, they have been suffering eviction from the indigenous forests.[24]

It has been argued that many, if not all of the planet's environmental problems and certainly its entire social and economic problems, have cultural

[22] *Ibid*, S. 42(2).
[23] *Ibid*, S. 44(3).
[24] 'Kenya: Indigenous Peoples Targeted as Forced Evictions Continue despite Government Promises' <https://www.amnesty.org/en/latest/news/2018/08/kenya-indigenous-peoples-targeted-as-forced-evictions-continue-despite-government-promises/> accessed 16 July 2020; 'Kenya: Indigenous Ogiek Face Eviction from Their Ancestral Forest… Again' (*Mongabay Environmental News*, 8 October 2018) <https://news.mongabay.com/2018/10/kenya-indigenous-ogiek-face-eviction-from-their-ancestral-forest-again/> accessed 16 July 2020; 'Families Torn Apart: Forced Eviction of Indigenous People in Embobut Forest, Kenya - Kenya' (*ReliefWeb*) <https://reliefweb.int/report/kenya/families-torn-apart-forced-eviction-indigenous-people-embobut-forest-kenya-0> accessed 16 July 2020; 'Imminent Forced Eviction by Kenya Threatens Indigenous Communities' Human Rights and Ancestral Forests - Kenya' (*ReliefWeb*) <https://reliefweb.int/report/kenya/imminent-forced-eviction-kenya-threatens-indigenous-communities-human-rights-and> accessed 16 July 2020; 'Kenya Defies Its Own Courts: Torching Homes and Forcefully Evicting the Sengwer from Their Ancestral Lands, Threatening Their Cultural Survival | Forest Peoples Programme' <http://www.forestpeoples.org/topics/legal-human-rights/news/2014/01/kenya-defies-its-own-courts-torching-homes-and-forcefully-evi> accessed 16 July 2020; 'Kenya's Sengwer People Demand Recognition of "Ancestral Land" | Voice of America - English' <https://www.voanews.com/africa/kenyas-sengwer-people-demand-recognition-ancestral-land> accessed 16 July 2020; Jacqueline M Klopp and Job Kipkosgei Sang, 'Maps, Power, and the Destruction of the Mau Forest in Kenya' (2011) 12 Georgetown Journal of International Affairs 125; 'Kenya Forest Service - Kenya Forest Service' <http://www.kenyaforestservice.org/index.php?option=com_content&view=article&catid=223&id=149&Itemid=98> accessed 16 July 2020.

activity and decisions – people and human actions – at their roots.[25] As such, solutions are likely to be also culturally-based, and the existing models of sustainable development forged from economic or environmental concern are unlikely to be successful without cultural considerations.[26] Culture in this context, has been defined as: the general process of intellectual, spiritual or aesthetic development; culture as a particular way of life, whether of people, period or group; and culture as works and intellectual artistic activity.[27] Notably, the generation, adaptation and use of indigenous knowledge are greatly influenced by the culture.[28] It has rightly been observed that despite the indigenous populations having suffered from invasion and oppression, and oftentimes they have seen their knowledge eclipsed by western knowledge, imposed on them through western institutions, indigenous populations have managed to survive for centuries adapting in many different ways to adverse climate conditions and managing to create sustainable livelihood systems.[29] Indeed, their diverse forms of knowledge, deeply rooted in their relationships with the environment as well as in cultural cohesion, have allowed many of these communities to maintain a sustainable use and management of natural resources, to protect their environment and to enhance their resilience; their ability to observe, adapt and mitigate has helped many indigenous communities face new and complex circumstances that have often severely impacted their way of living and their territories.[30] It is therefore worth including indigenous knowledge and culture in any plans, programmes and policies aimed at realisation of sustainable development agenda.

---

[25] Dessein, J. et al (ed), 'Culture in, for and as Sustainable Development: Conclusions from the COST Action IS1007 Investigating Cultural Sustainability,' (University of Jyväskylä, Finland, 2015), p. 14. Available at *http://www.culturalsustainability.eu/conclusions.pdf* [Accessed on 17/7/2020].

[26] Ibid, p.14.

[27] Ibid, p. 21.

[28] SGJN Senanayake, 'Indigenous Knowledge as a Key to Sustainable Development' (2006) 2 Journal of Agricultural Sciences–Sri Lanka.

[29] Giorgia Magni, 'Indigenous Knowledge and Implications for the Sustainable Development Agenda.' (2017) 52 European Journal of Education 437, p.3 < https://unesdoc.unesco.org/ark:/48223/pf0000245623> Accessed 17 July 2020.

[30] Ibid; See also Anders Breidlid, 'Culture, Indigenous Knowledge Systems and Sustainable Development: A Critical View of Education in an African Context' (2009) 29 International Journal of Educational Development 140.

3. Place of Indigenous Knowledge in International and National Laws: The Framework

3.1 The International Law Framework

The *United Nations Declaration on the Rights of Indigenous Peoples*[31] was adopted against a background of indigenous peoples having suffered from historic injustices as a result of, *inter alia*, their colonization and dispossession of their lands, territories and resources, thus preventing them from exercising, in particular, their right to development in accordance with their own needs and interests.[32] It therefore came in to, *inter alia*, correct such situations through guaranteeing their right to self-determination.[33] In addition, it reaffirms the indigenous peoples' right to the lands, territories and resources which they have traditionally owned, occupied or otherwise used or acquired; the right to own, use, develop and control the lands, territories and resources that they possess by reason of traditional ownership or other traditional occupation or use, as well as those which they have otherwise acquired; and States should give legal recognition and protection to these lands, territories and resources.[34] Such right includes their right to use their customs, traditions and land tenure systems of the indigenous peoples concerned especially in relation to their right to the conservation and protection of the environment and the productive capacity of their lands or territories and resources.[35] States are therefore obligated to establish and implement assistance programmes for indigenous peoples for such conservation and protection, without discrimination.[36]

The *Convention on Biological Diversity*[37] recognises the role of indigenous knowledge in in-situ conservation of biological diversity and requires contracting states to respect, preserve and maintain knowledge, innovations and practices of indigenous and local communities embodying traditional

[31] 61/295, *United Nations Declaration on the Rights of Indigenous Peoples*, adopted by the General Assembly on Thursday, 13 September 2007.
[32] Ibid, Preamble.
[33] Ibid, Art. 3.
[34] Ibid, Art. 26.
[35] Ibid, Art. 29 (1).
[36] Ibid.
[37] United Nations, Convention on Biological Diversityof 5 June 1992, 1760 U.N.T.S. 69

lifestyles relevant for the *conservation and sustainable use of biological diversity*.[38] The Convention further advocates for promotion of wider application of indigenous knowledge with the approval and involvement of the holders of such knowledge who should equitably share in the benefits which arise from the use of their knowledge.[39] Further, under article 10(c) of the Convention, each Contracting Party shall, as far as possible and as appropriate protect and encourage customary use of biological resources in accordance with traditional cultural practices that are compatible with *conservation or sustainable use requirements.*

The Convention is the only international treaty that specifically acknowledges the role of traditional knowledge, innovations, and practices in biodiversity conservation and sustainable development and the need to guarantee their protection, whether through intellectual property rights or other means.[40] In order to achieve the vision of the Convention and optimise the role of indigenous knowledge in sustainable development, there is need to ensure clarity with regards to ownership of traditional knowledge and traditionally used biological resources; a process and set of requirements governing free prior and informed consent and equitable sharing of benefits with respect to traditional knowledge and associated genetic resources.[41]

Principle 22 of the *1992 Rio Declaration on Environment and Development* acknowledges that indigenous people and their communities and other local communities have a vital role in environmental management and development because of their knowledge and traditional practices. In light of this, States should recognize and duly support their identity, culture and

[38] Convention on Biological Diversity, Article 8 (j).
[39] Ibid
[40] Dutfield, G., 'TRIPS-Related Aspects of Traditional Knowledge,' Case Western Reserve Journal of International Law, Vol. 33, Iss. 2, 2001, pp. 233-275 at pp. 261-261.
[41] Convention on Biological Diversity, 'Presentation by Hamdallah Zedan Executive Secretary Convention on Biological Diversity to the WIPO Seminar on Intellectual Property and Development' Geneva, Switzerland, 2-3 May 2005, available at http://www.world-intellectual-property-organization.com/edocs/mdocs/mdocs/en/isipd_05/isipd_05_www_103974.pdf (accessed on 10/09/2020)

interests and enable their effective participation in the achievement of sustainable development.

The United Nations Educational, Scientific and Cultural Organization (UNESCO) asserts that 'culture is who we are and what shapes our identity. No development can be sustainable without including culture.'[42]

African States and other stakeholders, in the *Ngorongoro Declaration*[43] have acknowledged that Sustainable development can ensure that appropriate efforts are deployed to protect and conserve the cultural and natural resources of a region faced with the challenges of climate change, natural and human-made disasters, population growth, rapid urbanization, destruction of heritage, and environmental degradation for present and future generations.[44] As such, they declared that on the one hand, African heritage is central to preserving and promoting African cultures thereby uplifting identity and dignity for present and future generations in an increasingly globalized world, and on the other hand, heritage, including World Heritage properties, is a driver of sustainable development and critical for achieving regional socio-economic benefits, environmental protection, sustainable urbanization, social cohesion and peace.[45]

3.2 The National Policy and Legal Framework on Indigenous Knowledge

The Constitution of Kenya 2010 recognises culture as the foundation of the nation and as the cumulative civilization of the Kenyan people and nation.[46] In light of this, it obligates the State to, inter alia, promote all forms of national and cultural expression through literature, the arts, traditional celebrations, science, communication, information, mass media,

[42] United Nations Educational, Scientific and Cultural Organization (UNESCO), 'Culture for Sustainable Development,' available at *http://en.unesco.org/themes/culture-sustainable-development* [Accessed on 17/7/2020]
[43] The Ngorongoro Declaration on Safeguarding African World Heritage as a Driver of Sustainable Development, adopted in Ngorongoro, Tanzania on 4 June 2016.
[44] Ibid, p.2.
[45] Ibid, p. 3.
[46] Art. 11 (1), Constitution of Kenya, 2010.

publications, libraries and other cultural heritage; and recognise the role of science and indigenous technologies in the development of the nation.

The Constitution provides that the State shall protect and enhance indigenous knowledge of biodiversity of the communities.[47] The State is also obliged to encourage public participation in the management, protection and conservation of the environment.[48] In doing so, the State is also obligated to supply the relevant environmental information. Article 35(1) of the Constitution states that every citizen has the right of access to—(a) information held by the State; and (b) information held by another person and required for the exercise or protection of any right or fundamental freedom. *Access to Information Act*, 2015[49], which is intended to give effect to Article 35 of the Constitution; to confer on the Commission on Administrative Justice the oversight and enforcement functions and powers and for connected purposes. It classifies environmental information as part of the information that falls under information affecting public interest. Such environmental information is necessary to enable communities make informed decisions.[50] Thus decision-making processes should focus on the supply of the right information, incentives, resources and skills to citizens so that they can increase their resilience and adapt to climate change and other environmental changes.[51]

Notably, sustainable development involves adoption of sustainable methods of managing conflicts and disputes.[52] In settling land disputes, communities are encouraged to apply recognized local community initiatives consistent

[47] *Ibid*, Art. 69(1) (c).
[48] *Ibid*, Art. 69 (1) (d).
[49] Access to Information Act, No. 31 of 2016, Laws of Kenya.
[50] Carolina Zambrano-Barragán, 'Decision Making and Climate Change Uncertainty: Setting the Foundations for Informed and Consistent Strategic Decisions' (*World Resources Institute*, 27 June 2013) <https://www.wri.org/our-work/project/world-resources-report/decision-making-and-climate-change-uncertainty-setting> accessed 17 July 2020.
[51] Ibid.
[52] See Kariuki Muigua, *Harnessing Traditional Knowledge for Environmental Conflict Management in Kenya* (2016) < Http://Kmco.Co.Ke/Wp-Content/Uploads/2018/08/TRADITIONAL-Knowledge-And-Conflict-Management-29-September-2016.pdf> accessed 17 July 2020.

with the Constitution.[53] This will enhance community involvement in natural resource management thus enhancing their participation in achieving peace for sustainable livelihoods.[54]

All these provisions encourage in one way or the other the participation of local communities in the management, use or ownership of natural resources and most importantly, using their indigenous knowledge as a knowledge reference point. The *Protection of Traditional Knowledge and Traditional Cultural Expressions Act, 2016,*[55] which seeks to provide a unified and comprehensive framework for the protection and promotion of traditional knowledge and traditional cultural expressions; and to give effect to Articles 11, 40(5) and 69 of the Constitution, recognises the intrinsic value of traditional cultures and traditional cultural expressions, including their social, cultural, economic, intellectual, commercial and educational value.[56]

While the Act does not expressly mention the words 'sustainable development', it provides that equitable benefit sharing rights of the owners and holders of traditional knowledge or cultural expressions shall include the right to fair and equitable sharing of benefits arising from the commercial or industrial use of their knowledge, which right might extend to non-monetary benefits, such as *contributions to community development, depending on the material needs and cultural preferences expressed by the communities themselves* (emphasis added).[57] Notably, *2030 Agenda on Sustainable Development Goals* (SDGs) under Goal 16 which seeks to promote peaceful and inclusive societies for sustainable development, provide access to justice for all and build effective, accountable and inclusive institutions at all levels, calls for states to ensure responsive, inclusive, participatory and

[53] *Constitution of Kenya, 2010*, Art.60 (1) (g) and Art.67 (2) (f).
[54] See Kariuki Muigua, 'Mainstreaming Traditional EcologicalKnowledge in Kenya for Sustainable Development', 2020 Journal of cmsd Volume 4(1)< http://journalofcmsd.net/wp-content/uploads/2020/03/Mainstreaming-Traditional-Ecological-Knowledge-in-Kenya-for-Sustainable-Development-Kariuki-Muigua-23rd-August-2019.pdf> Accessed on 17 July 2020.
[55] *Protection of Traditional Knowledge and Traditional Cultural Expressions Act, No*. 33 of 2016, Laws of Kenya.
[56] Ibid, s. 2(d).
[57] Ibid, s. 24 (1)(2).

representative decision-making at all levels.[58] The SDGs also pledge to foster intercultural understanding, tolerance, mutual respect and an ethic of global citizenship and shared responsibility. They also acknowledge the natural and cultural diversity of the world and recognise that all cultures and civilizations can contribute to and are enablers of, sustainable development.[59] The provisions in the *Protection of Traditional Knowledge and Traditional Cultural Expressions Act, 2016* thus offer a rare opportunity for the state to realize the vision of the 2030 SDGs by incorporating Kenyan communities' indigenous knowledge in the roadmap to the achievement of the sustainable development agenda. By including these communities and their knowledge, any development policies aimed to benefit these communities will be more likely to not only respond to their cultural needs and preferences but will also enable them meaningfully participate.

The *Environmental Management and Conservation Act* (EMCA)[60] is the overarching law on environmental matters in Kenya. It is a framework environmental law establishing legal and institutional mechanisms for the management of the environment. It provides for improved legal and administrative co-ordination of the diverse sectoral initiatives in order to improve the national capacity for the management of the environment. Section 44 of the Act, mandates the National Environment Management Authority (NEMA), in consultation with the relevant lead agencies, to develop, issue and implement regulations, procedures, guidelines and measures for the sustainable use of hill sides, hill tops, mountain areas and forests. It also requires the formulation of regulations, guidelines, procedures and measures aimed at controlling the harvesting of forests and any natural resources located in or on a hill side, hill top or mountain areas so as to protect water catchment areas, prevent soil erosion and regulate human settlement. Section 46(1) requires every County Environment Committee to specify the areas identified in accordance with section 45(1) as targets for afforestation or reforestation. A County Environment Committee is to take measures, through encouraging voluntary self-help activities in their

[58] *2030 Agenda on Sustainable Development Goals,* Goal 16.7.
[59] Ibid, Vision, Para. 36.
[60] No. 8 of 1999, Laws of Kenya.

respective local community, to plant trees or other vegetation in any areas specified under subsection (1) which are within the limits of its jurisdiction.[61] It is noteworthy that such afforestation may be ordered to be carried out even in private land. Paragraph (3) thereof is to the effect that where the areas specified under subsection (1) are subject to leasehold or any other interest in land, including customary tenure, the holder of that interest shall implement measures required to be implemented by the District Environment Committee, including measures to plant trees and other vegetation in those areas.

Under section 48, the Director-General with the approval of the Director of Forestry, may enter into any contractual arrangement with a private owner of any land on such terms and conditions as may be mutually agreed for the purposes of registering such land as forest land. The powers of the Authority include the issuance of guidelines and prescribing measures for the sustainable use of hill tops, hill slides and mountainous areas.[62] To promote environmental justice and community participation in environmental matters, section 48 (2) prohibits the Director-General from taking any action, in respect of any forest or mountain area, which is prejudicial to the traditional interests of the indigenous communities customarily resident within or around such forest or mountain area.

The general objectives of the *Environmental Management and Co-ordination (Wetlands, River Banks, Lake Shores and Sea Shore Management) Regulation, 2009*[63] (dealing with wetlands management) include, *inter alia*: to provide for the conservation and sustainable use of wetlands and their resources in Kenya; to promote the integration of sustainable use of resources in wetlands into the local and national management of natural resources for socio-economic development; to ensure the conservation of water catchments and the control of floods; to ensure the sustainable use of wetlands for ecological and aesthetic purposes for the common good of all citizens; to ensure the protection of wetlands as habitats for species of fauna and flora; provide a framework for public participation

[61] S. 46(2), No. 8 of 1999.
[62] S. 47(1), No. 8 of 1999.
[63] Legal Notice No. 19, Act No. 8 of 1999.

in the management of wetlands; to enhance education research and related activities; and to prevent and control pollution and siltation.

Regulation 5(1) thereof provides for the general principles that shall be observed in the management of all wetlands in Kenya including: Wetland resources to be utilized in a sustainable manner compatible with the continued presence of wetlands and their hydrological, ecological, social and economic functions and services; Environmental impact assessment and environmental audits as required under the Act to be mandatory for all activities likely to have an adverse impact on the wetland; Special measures to promote respect for, preserve and maintain knowledge innovations and practices of indigenous and local communities embodying traditional lifestyles relevant for the conservation and sustainable use of biological diversity and promote their wider application with the approval and involvement of the holders of such knowledge, innovations and practices and encourage the equitable sharing of the benefits arising from the utilization of such knowledge, innovations and practices; Sustainable use of wetlands to be integrated into the national and local land use plans to ensure sustainable use and management of the resources; principle of public participation in the management of wetlands; principle of international co-operation in the management of environmental resources shared by two or more states; the polluter-pays principle; the pre-cautionary principle; and public and private good.

These are some of the initiatives that highlight the existing relationship between community indigenous and cultural knowledge and sustainable development, thus affirming the fact that cultural issues cannot be wished away in the discussion and efforts towards achieving sustainable development in Kenya and the world over.

4. Tapping into Indigenous Knowledge as a Means to an end: Place of Indigenous Knowledge in the Sustainable Development Agenda

The 2030 Agenda for Sustainable Development Goals captures the states' pledge to foster intercultural understanding, tolerance, mutual respect and an ethic of global citizenship and shared responsibility, and their acknowledgement of the natural and cultural diversity of the world and

recognition that all cultures and civilizations can contribute to, and are crucial enablers of, sustainable development.[64]

4.1 Environmental Justice and Access to Information

As already pointed out, in order to contribute to the protection of the right of every person to live in an environment adequate to his or her health and well-being, there is need to guarantee the rights of access to information, public participation in decision-making, and access to justice in environmental matters.[65] The Constitution guarantees the right of access to information held by the State, any other person and required for the exercise or protection of any right or fundamental freedom.[66] It also obligates the State to publish and publicise any important information affecting the nation.[67] Guaranteeing access to relevant information, is imperative in facilitating access to environmental justice and enabling the communities to give prior, informed consent in relation to exploitation of natural resources. With regard to informed consent, 'informed' has been defined to mean that all information relating to the activity is provided to indigenous peoples and that the information is objective, accurate and presented in a manner or form that is understandable to indigenous peoples.[68] Relevant information includes: the nature, size, pace, duration, reversibility and scope of any proposed project; the reason(s) or purpose of the project; the location of areas that will be affected; a preliminary assessment of the possible economic, social, cultural and environmental impacts, including potential risks and benefits; personnel likely to be involved in the implementation of the project; and procedures that the project may entail.[69]This informed consent cannot therefore be given

---

[64] United Nations, *Transforming our world: the 2030 Agenda for Sustainable Development*, A/RES/70/1, Resolution adopted by the General Assembly on 25 September 2015, para. 36.

[65] Art.1 of the *1998 Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters*, UN Doc. ECE/CEP/43.Adopted at the 4th UNECE Ministerial Conference, Aarhus, 25 June, 1998, UN Doc. ECE/CEP/43.

[66] Art. 35(1).

[67] Art. 35(2).

[68] FAO, 'Respecting free, prior and informed consent: Practical guidance for governments, companies, NGOs, indigenous peoples and local communities in relation to land acquisition,' *Governance of Tenure Technical Guide* No. 3, Rome, 2014, p.5.

[69] *Ibid.*

without first ensuring that the concerned communities have access to relevant information. In *Friends of Lake Turkana Trust v Attorney General & 2 others,*[70] the court was of the view that access to environmental information was a prerequisite to effective public participation in decision making and monitoring governmental and public sector activities on the environment.

The Court, in *Friends of Lake Turkana Trust* case, also observed that Article 69(1) (d) of the Constitution of Kenya 2010, placed an obligation on the state to encourage public participation in the management, protection and conservation of the environment. Public participation would only be possible where the public had access to information and was facilitated in terms of their reception of different views. Such community-based forums and Barazas can effectively facilitate this. Such public meetings should, as a matter of practice, be conducted in a manner that would ensure full and meaningful participation of all the concerned communities. Well conducted, these are viable forums through which access to environmental information can be realized and consequently enhance access to environmental justice.

4.2 Environmental Justice and Public Participation

Meaningful involvement of people in environmental matters requires effective access to decision making processes for all, and the ability in all communities to make informed decisions and take positive actions to produce environmental justice for themselves.[71] The *Vienna Declaration and Programme of Action*[72] states that all peoples have the right of self-determination.[73] By virtue of that right, they freely determine their political status, and freely pursue their economic, social and cultural development. This calls for free prior and informed consent from the affected communities in relation to exploitation of natural resources in their areas.

[70] ELC Suit No 825 of 2012.

[71] US Office of Legacy Management, 'Environmental Justice' *What Is Environmental Justice?* Available at *http://energy.gov/lm/services/environmental-justice/what-environmental-justice*[Accessed on 12/7/2020].

[72] UN General Assembly, *Vienna Declaration and Programme of Action*, 12 July 1993, A/CONF.157/23.

[73] Proclamation 1.2.

Free, prior and informed consent is a collective right of indigenous peoples to make decisions through their own freely chosen representatives and customary or other institutions and to give or withhold their consent prior to the approval by government, industry or other outside party of any project that may affect the lands, territories and resources that they customarily own, occupy or otherwise use.[74]It is, thus, not a stand-alone right but an expression of a wider set of human rights protections that secure indigenous peoples' rights to control their lives, livelihoods, lands and other rights and freedoms and which needs to be respected alongside other rights, including rights relating to self-governance, participation, representation, culture, identity, property and, crucially, lands and territories.[75] The Guidelines call for consultation and participation which entails engaging with and seeking the support of those who, having legitimate tenure rights, could be affected by decisions, prior to decisions being taken, and responding to their contributions; taking into consideration existing power imbalances between different parties and ensuring active, free, effective, meaningful and informed participation of individuals and groups in associated decision-making processes.[76]

The Constitution of Kenya provides that the objects of devolved government are, *inter alia*, to promote democratic and accountable exercise of power; to foster national unity by recognising diversity; to give powers of self-governance to the people and enhance their participation in the exercise of the powers of the State and in making decisions affecting them; to recognise the right of communities to manage their own affairs and to further their development; to protect and promote the interests and rights of minorities and marginalised communities; to promote social and economic development and the provision of proximate, easily accessible services throughout Kenya; to ensure equitable sharing of national and local resources throughout Kenya; and to facilitate the decentralisation of State organs, their functions and services, from the capital of Kenya.[77]

---

[74] FAO, 'Respecting free, prior and informed consent: 'Practical guidance for governments, companies, NGOs, indigenous peoples and local communities in relation to land acquisition, *op cit*, p.4.
[75] *Ibid.*
[76] *Ibid*, p. 4.
[77] Art. 174, Constitution of Kenya 2010.

The Constitution provides for participation of persons with disabilities,[78] youth,[79] minorities and marginalized groups,[80] and older members of society,[81] in governance and all other spheres of life. The foregoing provisions are important especially in relation to the provisions of the *County Governments Act*,[82] which are to the effect that citizen participation in county governments shall be based upon the principles of, *inter alia*, timely access to information, data, documents, and other information relevant or related to policy formulation and implementation; reasonable access to the process of formulating and implementing policies, laws, and regulations; protection and promotion of the interest and rights of minorities, marginalized groups and communities; legal standing to interested or affected persons, organizations, and where pertinent, communities, to appeal from or, review decisions, or redress grievances, with particular emphasis on persons and traditionally marginalized communities, including women, the youth, and disadvantaged communities; reasonable balance in the roles and obligations of county governments and non-state actors in decision-making processes; promotion of public-private partnerships; and recognition and promotion of the reciprocal roles of non-state actors' participation and governmental facilitation and oversight.[83]

These provisions have an implication on natural resources management. It means that the devolved governments must not purport to make unilateral decisions especially with regard to the management of natural resources. They must recognise the centrality of people in natural resources management, since these resources have an impact on the economic, social, cultural and even spiritual lives of the diverse communities in Kenya. As such, they must ensure their active participation in coming up with legislative and policy measures to govern their management and utilisation for the benefit of all. They must also be alive to the fact that any negative impact on the environment directly affects these communities and ultimately has an adverse effect on the sustainable development agenda.

---

[78] Art. 54.
[79] Art. 55.
[80] Art. 56.
[81] Art. 57.
[82] No. 17 of 2012, Laws of Kenya.
[83] *Ibid*, S. 87.

The Constitution of Kenya requires Parliament to conduct its business in an open manner, and its sittings and those of its committees to be open to the public; and to facilitate public participation and involvement in the legislative and other business of Parliament and its committees.[84] The proposed law, *The Natural Resources (Benefit Sharing) Bill*, 2018, also seeks to have established by each affected local community a Local Benefit Sharing Forum comprising of five persons elected by the residents of the local community.[85] Every affected local community is also to enter into a local community benefit sharing agreement with the respective county benefit sharing committee.[86] Such local community benefit sharing agreement is to include non-monetary benefits that may accrue to the local community and the contribution of the affected organization in realizing the same.[87]

It is, therefore, imperative that such communities be involved in the whole process to enable them air their views on the same and where such negative effects are inevitable due to the nature of exploitation of the natural resources, their appreciation of such impact is the ultimate key to winning social acceptance of these projects.[88] Indeed, participation will bring the most benefit when the process is seen as fair, and processes are seen as more fair, if those who are affected have an opportunity to participate in a meaningful way and their opinions are taken seriously.[89] Indicators of procedural justice have been identified as: presence of local environmental

[84] Art. 118(1) (a).
[85] Clause31 (1).
[86] Clause32 (1).
[87] Clause 32(2).
[88] S. 115 of the *County Governments Act*, 2012, provides that Public participation in the county planning processes shall be mandatory and be facilitated through—mechanisms provided for in Part VIII of this Act; and provision to the public of clear and unambiguous information on any matter under consideration in the planning process, including—clear strategic environmental assessments; clear environmental impact assessment reports; expected development outcomes; and development options and their cost implications.
[89] Amerasinghe, M., *et al*, 'Enabling Environmental Justice: Assessment of Participatory Tools. Cambridge, MA: Massachusetts Institute of Technology, 2008, p.3.
Available at *http://web.mit.edu/jcarmin/www/carmin/EnablingEJ.pdf* [Accessed on > accessed 17 July 2020].

groups, public participation or consultation on local developments and initiatives, access to information, and responsiveness by public bodies.[90]

Indeed, those affected by environmental problems must be included in the process of remedying those problems; that all citizens have a duty to engage in activism; and that in a democracy it is the people, not the government, that are ultimately responsible for fair use of the environment.[91] Active and meaningful public participation, therefore, through such means as suggested in the indicators of procedural justice are important in enhancing community participation in realisation of the sustainable development agenda.

4.3 Benefit Sharing Arrangements

Benefit-sharing is a way of integrating the economic, social and environmental considerations in the management of natural resources.[92] In order to protect community and individual interests over land-based resources, and facilitate benefit sharing, the *National Land Policy*, 2009, recommends that the Government should: establish legal frameworks to recognise community and private rights over renewable and non-renewable land-based natural resources and incorporate procedures for access to and sustainable use of these resources by communities and private entities; devise and implement participatory mechanisms for compensation for- loss of land and damage occasioned by wild animals; put in place legislative and administrative mechanisms for determining and sharing of benefits emanating from land based natural resources by communities and individuals where applicable; make benefit-sharing mandatory where land based resources of communities and individuals are managed by national authorities for posterity; and ensure the management and utilization of land-based natural resources involves all stakeholders.[93]

---

[90] Todd, H., & Zografos, C., Justice for the Environment: Developing a Set of Indicators of Environmental Justice for Scotland, *Environmental Values*, *14*(4), 483-501.

[91] Frechette, K.S., 'Environmental Justice: Creating Equality, Reclaiming Democracy,' OUP USA, 2005. Available at *http://philpapers.org/rec/SHREJC* Accessed on > accessed 17 July 2020.

[92] Government of Kenya, *Sessional Paper No. 3 of 2009 on National Land Policy*, p. 23, (Government Printer, Nairobi).

[93] *Ibid*, p. 23.

The proposed law, *Natural Resources (Benefit Sharing) Bill*, 2018[94] seeks to establish a system of benefit sharing in resource exploitation between resource exploiters, the national government, county governments and local communities; to establish the Natural Resources Benefits Sharing Authority; and for connected purposes. The Bill, if passed into law, is to apply with respect to the exploitation of petroleum, natural gas, minerals, forest resources, water resources, wildlife resources and fishery resources.[95] Notably, the Bill provides for the guiding principles in benefit sharing which include: transparency and inclusivity; revenue maximization and adequacy; efficiency and equity; accountability and participation of the people; and rule of law and respect for human rights of the people.[96]

The proposed law also proposes the establishment of a Benefit Sharing Authority,[97] with the mandate to, *inter alia*, coordinate the preparation of benefit sharing agreements between local communities and affected organizations; review, and, determine the royalties payable; identify counties that require to enter into benefit sharing agreement for the commercial exploitation of natural resources within the counties; oversee the administration of funds set aside for community projects identified or determined under any benefit sharing agreement; monitor the implementation of any benefit sharing agreement entered into between a county and an affected organization; conduct research regarding the exploitation and development of natural resources and benefit sharing in Kenya; make recommendations to the national government and county governments on the better exploitation of natural resources in Kenya; determine appeals arising out of conflicts regarding the preparation and implementation of county benefit sharing agreements; and advise the national government on policy and the enactment of legislation relating to benefit sharing in resource exploitation.[98]

[94] KenyaGazette Supplement No.130 (Senate Bills No.31).
[95] Clause3.
[96] Clause4.
[97] Clause5.
[98] Clause6 (1).

The Bill also seeks to establish in each county with natural resources, a County Benefit Sharing Committee.[99] Benefit sharing could effectively be used to promote environmental justice among communities and enhance the relationship between the government and communities, as well as among communities which in turn enhances peace in the country. A satisfied people are likely to support and even contribute in efforts towards the sustainable development agenda and are also more likely to adopt sustainable methods of production.

To facilitate more equitable distribution of accruing benefits among local, often subsistence, and indigenous peoples, there are those who advocate for approaches incorporating community based natural resource management (CBNRM) and other approaches that protect the interests of the local people. The CBNRM approach is built upon three assumptions: management responsibility over the local natural resources that is devolved to community level will encourage communities to use these resources up to sustainable levels; the "community" represents the interests of all its members; and communities are keen to accept management responsibility because they see the (long-term) economic benefits of sustainable utilisation, and they are willing to invest time and resources in natural resource management.[100]

[99] Clause28. The functions of the said Committees will include to: negotiate with an affected organization on behalf of the County Government prior to entering into a county benefit sharing agreement; monitor the implementation of projects required to be undertaken in the county pursuant to a benefit sharing agreement; determine the amount of money to be allocated to each local community from sums devolved under this Act; convene public forums to facilitate public participation with regard to proposed county benefit sharing agreements prior to execution by the county government; convene public forums for the purpose of facilitating public participation with regard to community projects proposed to be undertaken using monies that accrue to a county government pursuant to this Act; and make recommendations to the county government on projects to be funded using monies which accrue to the county government pursuant to this Act.(Clause 29).

[100] Shackelton, S. & Campbell, B. (eds), 'Empowering Communities to Manage Natural Resources:
Case Studies from Southern Africa,' Center for International Forestry Research, March 2000, p. 10.
Available at *http://www.cifor.org/publications/pdf_files/Books/Empowering.pdf* > accessed 17 July 2020.

4.4 Payment for ecosystem services

One aspect of biodiversity conservation that has not been tapped by Kenyans is payment for ecosystem services. Ecosystem services refer to the value people get from ecosystems. Examples are the value of ecosystems in freshwater purification, pollination, clean air, flood control, soil stability, water conservation and climate regulation.[101] The value of ecosystem services is estimated at more than one third of the total value of the world's economy.[102] The primary reason that ecosystem services are taken for granted is that they are deemed to be free.[103] An example of payment for ecosystem services includes the residents of Nairobi paying a certain amount of money to the communities surrounding Aberdare National Park because most of the water used in Nairobi comes from the Aberdares. This will encourage the Aberdare community to continue conserving the resources as such conservation benefits them. However, in Kenya, the value of ecosystem services rarely enters policy debates or public discussions.[104]

4.5 Use of Community-Based Natural Resource Management (CNRM)

This is the involvement of community members and local institutions in the management of natural resources for their economic growth and development. It involves devolution of power and authority from the State to local levels. This legitimises indigenous resource uses and rights and includes traditional values and ecological knowledge in modern resource management.[105] The Constitution provides that the state shall protect and enhance indigenous knowledge of biodiversity of the communities.[106] The

---

[101] Hunter, David, James Salzman, and Durwood Zaelke. *International environmental law and policy*. Vol. 516. New York: Foundation Press, 2007, p. 916.
[102] *Ibid*; Losey, J.E. & Vaughan, M., 'The Economic Value of Ecological Services Provided by Insects,' *BioScience*, Vol. 56, No. 4, April 2006, pp. 311-323; Costanza, R., 'The value of the world's ecosystem services and natural capital,' *Nature*, Vol. 387, 15 May 1997, pp. 253-260.
[103] Hunter, David, James Salzman, and Durwood Zaelke. *International environmental law and policy*. Vol. 516. New York: Foundation Press, 2007, p. 916; Salzman, J., 'Valuing Ecosystem Services,' *Ecology Law Quarterly*, Vol. 24, Iss. 4, September 1997, pp.887-904.
[104] *Ibid*.
[105] Kellert, S.R., *et al*, 'Community Natural Resource Management: Promise, Rhetoric and Reality,*' Society and Natural Resources: An International Journal*, Vol.13, No.8, 2000, p.706.
[106] Art. 69(1) (c).

use of indigenous knowledge in biodiversity conservation encourages community participation and benefits from conservation and ultimately leads to reduction in human-wildlife conflict.[107] The Wildlife Conservation and Management Act, 2013[108] (WCMA) provides for CBNRM through the recognition of community conservancies and sanctuaries.[109]

Another opportunity under CBNRM approach is the use of incentives to encourage participation in wildlife management. Command and control approaches to wildlife management have failed to curb loss of wildlife. If private land owners and communities are given incentives to keep wildlife on their land, then they will perceive wildlife as an economic good and protect it in the same manner they protect their private property. The WCMA now provides for incentives for wildlife management.[110] Economic incentives such as tax exemptions and waiver of stamp duties on land relating to wildlife would go a long way in encouraging Kenyans to conserve wildlife as an alternative land use method. These incentives may also be used in management of other resources such as forests, using indigenous community knowledge especially for those communities who have traditionally relied on such forests for their livelihoods.

4.6 Dissemination of Information and Environmental Education to Communities

Agenda 21 provides that Governments at the appropriate level, with the support of the relevant international and regional organizations, should, *inter alia*: promote a multidisciplinary and cross-sectoral approach in training and the dissemination of knowledge to local people on a wide range of issues which include various resources management.[111] Further, Agenda 21 states that Coastal States should promote and facilitate the organization of education and training in integrated coastal and marine management and

---

[107] Warren, M., 'Indigenous Knowledge, Biodiversity Conservation and Development' in Bennun*et,* L.A.*, al.,* (eds), *Conservation of Biodiversity in Africa: Local Initiatives and Institutional Roles* (Centre for Biodiversity, National Museums of Kenya, 1995) 93, p.96.

[108] Wildlife Conservation and Management Act, No. 47 of 2013, Laws of Kenya.

[109] Ibid, sec. 39 & 40.

[110] S. 70.

[111] Clause 13.22.

sustainable development for scientists, technologists, managers (including community-based managers) and users, leaders, indigenous peoples, fisherfolk, women and youth, among others. Management and development, as well as environmental protection concerns and local planning issues, should be incorporated in educational curricula and public awareness campaigns, with due regard to traditional ecological knowledge and socio-cultural values.[112] This is useful in promoting sustainable and inclusive sustainable resources management through empowering the local people to participate meaningfully in the same.

It is worth pointing out that while indigenous knowledge is relevant to the sustainable development agenda, information dissemination and environmental education for the communities will make them appreciate how their knowledge and experiences can fit into the sustainable development agenda for not only environmental conservation but also for betterment of their lives.

4.7 Community Participation in Climate Change Mitigation

The Bali Principles also affirm the fact that the impacts of climate change are disproportionately felt by small island states, women, youth, coastal peoples, local communities, indigenous peoples, fisherfolk, poor people and the elderly. Also noteworthy is the assertion that the local communities, affected people and indigenous peoples have been kept out of the global processes to address climate change. The Principles also acknowledge that unsustainable production and consumption practices are at the root of this and other global environmental problems. The impacts of climate change also threaten food sovereignty and the security of livelihoods of natural resource-based local economies. They can also threaten the health of communities around the world-especially those who are vulnerable and marginalized, in particular children and elderly people. More importantly, the *Bali Principles* acknowledge in the preamble that combating climate change must entail profound shifts from unsustainable production, consumption and lifestyles, with industrialized countries taking the lead.[113]

---

[112] Clause 17.15.

[113] Though non-binding, the *Bali Principles* give some recommendations that can boost efforts to achieve sustainable development. These include, inter alia: the need

It has rightly been argued that forest and landscape restoration is about more than just trees. It goes beyond afforestation, reforestation, and ecological restoration to improve both human livelihoods and ecological integrity. Key characteristics include the following: Local stakeholders are actively engaged in decision making, collaboration, and implementation; whole landscapes are restored, not just individual sites, so that trade-offs among conflicting interests can be made and minimized within a wider context;

---

to reduce with an aim to eliminate the production of greenhouse gases and associated local pollutants; the rights of indigenous peoples and affected communities to represent and speak for themselves; Governments' responsibility for addressing climate change in a manner that is both democratically accountable to their people and in accordance with the principle of common but differentiated responsibilities; fossil fuel and extractive industries be held strictly liable for all past and current life-cycle impacts relating to the production of greenhouse gases and associated local pollutants; clean, renewable, locally controlled and low-impact energy resources in the interest of a sustainable planet for all living things; the right of all people, including the poor, women, rural and indigenous peoples, to have access to affordable and sustainable energy; the need for solutions to climate change that do not externalize costs to the environment and communities, and are in line with the principles of a just transition; the need for socio-economic models that safeguard the fundamental rights to clean air, land, water, food and healthy ecosystems; the rights of communities dependent on natural resources for their livelihood and cultures to own and manage the same in a sustainable manner, and avoiding the commodification of nature and its resources; recognition of the right to self-determination of Indigenous Peoples, and their right to control their lands, including sub-surface land, territories and resources and the right to the protection against any action or conduct that may result in the destruction or degradation of their territories and cultural way of life; the right of indigenous peoples and local communities to participate effectively at every level of decision-making, including needs assessment, planning, implementation, enforcement and evaluation, the strict enforcement of principles of prior informed consent, and the right to say "No"; the need for solutions that address women's rights; the right of youth as equal partners in the movement to address climate change and its associated impacts; education of present and future generations, emphasising on climate, energy, social and environmental issues, while basing itself on real life experiences and an appreciation of diverse cultural perspectives; the need for we, as individuals and communities, to make personal and consumer choices to consume as little of Mother Earth's resources, conserve our need for energy; and make the conscious decision to challenge and reprioritize our lifestyles, re-thinking our ethics with relation to the environment and the Mother Earth; while utilizing clean, renewable, low impact energy; and ensuring the health of the natural world for present and future generations; and the rights of unborn generations to natural resources, a stable climate and a healthy planet.

landscapes are restored and managed to provide for an agreed, balanced combination of ecosystem services and goods, not only for increased forest cover; a wide range of restoration strategies are considered, from managed natural regeneration to tree planting; and continuous monitoring, learning, and adaptation are central.[114]

Further, a restored landscape can accommodate a mosaic of land uses such as agriculture, protected reserves, ecological corridors, regenerating forests, well-managed plantations, agroforestry systems, and riparian plantings to protect waterways. Restoration must complement and enhance food production and not cause natural forests to be converted into plantations.[115] Communities can and should therefore be encouraged to utilise their indigenous knowledge and technologies in combating climate change. It has been suggested that inclusive innovations enhance the social and economic well-being of disenfranchised society members and the participatory element in innovative systems development.[116] This is because the redistribution of resources is combined by the active participation of the marginalized poor applying participatory processes in relation to problem, conflict solution and related strategies.[117] Communities should therefore not be left out in climate change mitigation measures as they may have some contribution to make.

4.8 Incorporation of Indigenous Knowledge in Food Production Methods

SDG Goal 2 seeks to end hunger, achieve food security and improved nutrition and promote sustainable agriculture.[118] In order to achieve this, the SDGs Agenda aims at ensuring that by 2030, state parties will double the agricultural productivity and incomes of small-scale food producers, in

[114] World Resources Institute, 'Atlas of Forest and Landscape Restoration Opportunities,' available at *http://www.wri.org/resources/maps/atlas-forest-and-landscape-restoration-opportunities* > accessed 17 July 2020.
[115] Ibid.
[116] Jussi S Jauhiainen and Lauri Hooli, 'Indigenous Knowledge and Developing Countries' Innovation Systems: The Case of Namibia' (2017) 1 International Journal of Innovation Studies 89.
[117] Ibid.
[118] UNGA, *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)], Goal 2.

particular women, indigenous peoples, family farmers, pastoralists and fishers, including through secure and equal access to land, other productive resources and inputs, knowledge, financial services, markets and opportunities for value addition and non-farm employment.[119]

Food security depends, *inter alia*, on sustainable management of fish, forests, and wildlife since in many indigenous communities; these resources are the principal sources of protein in the diet.[120] It also highlights the fact that the traditional knowledge within indigenous communities also plays an important role in the achievement of food security for these communities and others.[121]

It has been argued that the interaction and cooperation between different actors facilitate learning and knowledge creation in specific socioeconomic contexts in which innovation and development processes are embedded.[122] In addition, the impact of the context is reciprocal: it influences the capacity of individuals, institutions, sectors, regions, and countries to develop, apply, and diffuse innovations while these innovations change the context.[123]

As already pointed, the Constitution also obligates the State to recognise the role of science and indigenous technologies in the development of the nation.[124] These rights are important, not only for the individual citizens, but also for the country in adopting scientific knowledge especially local for eliminating unsustainable and harmful practices that adversely affect realisation right to clean and healthy environment for all.

It has been observed that indigenous knowledge may get lost due to the intrusion of foreign technologies and development concepts aimed at short-term gains or solutions to problems without being capable of sustaining

[119] Ibid, SDG Goal 2.3.
[120] The *Rome World Food Summit* Commitment No. 3.
[121] Ibid.
[122] Jussi S Jauhiainen and Lauri Hooli, 'Indigenous Knowledge and Developing Countries' Innovation Systems: The Case of Namibia' (2017) 1 International Journal of Innovation Studies 89.
[123] Ibid.
[124] Art. 11(2) (b).

them.[125] Thus, even as the stakeholders in the ministry of agriculture gear towards adoption of improved methods of crop and animal production such as Genetically Modified technologies, there is a need to involve communities in coming up with adoptive methods, which may include indigenous knowledge and technologies available and utilised by certain communities in certain regions.

5. Conclusion

The Constitution further creates obligations on the State to ensure sustainable exploitation, utilisation, management and conservation of the environment and natural resources, and ensure the equitable sharing of the accruing benefits; protect and enhance intellectual property in, and indigenous knowledge of, biodiversity and the genetic resources of the communities; encourage public participation in the management, protection and conservation of the environment; protect genetic resources and biological diversity; eliminate processes and activities that are likely to endanger the environment; and utilize the environment and natural resources for the benefit of the people of Kenya.[126]

Indigenous knowledge offers a viable platform for exchange of ideas between the state organs and communities in their efforts towards realisation of the sustainable development agenda.

[125] SGJN Senanayake, 'Indigenous Knowledge as a Key to Sustainable Development' (2006) 2 Journal of Agricultural Sciences–Sri Lanka.
[126] Constitution of Kenya 2010, Art. 69(1).

References

'Families Torn Apart: Forced Eviction of Indigenous People in Embobut Forest, Kenya - Kenya' (*ReliefWeb*) <https://reliefweb.int/report/kenya/families-torn-apart-forced-eviction-indigenous-people-embobut-forest-kenya-0> accessed 16 July 2020.

'FAO Working Paper 1' <http://www.fao.org/3/X2102E/X2102E01.htm> accessed 17 July 2020; Urmilla Bob and Salomé Bronkhorst, 'Environmental Conflicts: Key Issues and Management Implications' (2010) 10 African Journal on Conflict Resolution.

'Imminent Forced Eviction by Kenya Threatens Indigenous Communities' Human Rights and Ancestral Forests - Kenya' (*ReliefWeb*) <https://reliefweb.int/report/kenya/imminent-forced-eviction-kenya-threatens-indigenous-communities-human-rights-and> accessed 16 July 2020.

'Kenya Defies Its Own Courts: Torching Homes and Forcefully Evicting the Sengwer from Their Ancestral Lands, Threatening Their Cultural Survival | Forest Peoples Programme' <http://www.forestpeoples.org/topics/legal-human-rights/news/2014/01/kenya-defies-its-own-courts-torching-homes-and-forcefully-evi> accessed 16 July 2020.

'Kenya: Indigenous Ogiek Face Eviction from Their Ancestral Forest… Again' (*Mongabay Environmental News*, 8 October 2018) <https://news.mongabay.com/2018/10/kenya-indigenous-ogiek-face-eviction-from-their-ancestral-forest-again/> accessed 16 July 2020.

'Kenya: Indigenous Peoples Targeted as Forced Evictions Continue despite Government Promises' <https://www.amnesty.org/en/latest/news/2018/08/kenya-indigenous-peoples-targeted-as-forced-evictions-continue-despite-government-promises/> accessed 16 July 2020.

'Kenya's Sengwer People Demand Recognition of "Ancestral Land" | Voice of America - English' <https://www.voanews.com/africa/kenyas-sengwer-people-demand-recognition-ancestral-land> accessed 16 July 2020.

"They Just Want to Silence Us" (*Human Rights Watch*, 17 December 2018) <https://www.hrw.org/report/2018/12/17/they-just-want-silence-us/abuses-against-environmental-activists-kenyas-coast> accessed 17 July 2020.
Access to Information Act, No. 31 of 2016, Laws of Kenya.

Africa Forest Law Enforcement and Governance (AFLEG), Ministerial Conference 13-16 October, 2003; Ministerial Declaration, Yaoundé, Cameroon, October 16, 2003.

Amerasinghe, M., Farrell, L., Jin, S., Shin, N. Y., & Stelljes, K., 'Enabling Environmental Justice: Assessment of Participatory Tools' Cambridge, MA: Massachusetts Institute of Technology, 2008.Available at *http://web.mit.edu/jcarmin/www/carmin/EnablingEJ.pdf* [Accessed on > accessed 17 July 2020].

Berkes, F., Colding, J., & Folke, C., 'Rediscovery of Traditional Ecological Knowledge as Adaptive Management,' *Ecological Applications*, Vol. 10, No. 5., October 2000, pp. 1251-1262.

Breidlid, A., 'Culture, Indigenous Knowledge Systems and Sustainable Development: A Critical View of Education in an African Context' (2009) 29 International Journal of Educational Development 140.

Castro, A.P. & Ettenger, K., 'Indigenous Knowledge And Conflict Management: Exploring Local Perspectives And Mechanisms For Dealing With Community Forestry Disputes,' *Paper Prepared for the United Nations Food and Agriculture Organization, Community Forestry Unit, for the Global Electronic Conference on "Addressing Natural Resource Conflicts Through Community Forestry,"* (FAO, January-April 1996). Available at *http://www.fao.org/docrep/005/ac696e/ac696e09.htm* [Accessed on 14/7/2020].

Constitution of Kenya, 2010.

Convention on Biological Diversity, 'Presentation by Hamdallah Zedan Executive Secretary Convention on Biological Diversity to the WIPO Seminar on Intellectual Property and Development' Geneva, Switzerland, 2-3 May 2005, available at http://www.world-intellectual-property-organization.com/edocs/mdocs/mdocs/en/isipd_05/isipd_05_www_103974.pdf

Costanza, R., 'The value of the world's ecosystem services and natural capital,' *Nature*, Vol. 387, 15 May 1997, pp. 253-260.

County Governments Act, No. 17 of 2012, Laws of Kenya.

Dessein, J., Soini, K., Fairclough, G., Horlings, L., Battaglini, E., Birkeland, I., ... & Mihailova, M. (ed), 'Culture in, for and as Sustainable Development: Conclusions from the COST Action IS1007 Investigating Cultural Sustainability,' (University of Jyväskylä, Finland, 2015). Available at *http://www.culturalsustainability.eu/conclusions.pdf* [Accessed on 17/7/2020].

Dutfield, G., 'TRIPS-Related Aspects of Traditional Knowledge,' Case Western Reserve Journal of International Law, Vol. 33, Iss. 2, 2001, pp. 233-275 at pp. 261-261.

Emerton, L., 'Mount Kenya: The Economics of Community Conservation,' *Evaluating Eden Series*, Discussion Paper No.4.

Environment (Conservation and Management) Act, No. 8 of 1999, Laws of Kenya.

European Union, *1998 Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters*, UN Doc. ECE/CEP/43.Adopted at the 4th UNECE Ministerial Conference, Aarhus, 25 June, 1998, UN Doc. ECE/CEP/43.

FAO, 'Respecting free, prior and informed consent: Practical guidance for governments, companies, NGOs, indigenous peoples and local communities in relation to land acquisition,' *Governance of Tenure Technical Guide* No. 3, Rome, 2014.

Forest Conservation and Management Act, No. 34 of 2016, Laws of Kenya.
Frechette, K.S., 'Environmental Justice: Creating Equality, Reclaiming Democracy,' OUP USA, 2005. Available at *http://philpapers.org/rec/SHREJC* Accessed on > accessed 17 July 2020.

Giorgia Magni, 'Indigenous Knowledge and Implications for the Sustainable Development Agenda.' (2017) 52 European Journal of Education 437< https://unesdoc.unesco.org/ark:/48223/pf0000245623> Accessed 17 July 2020.

Gondo, P., Kigenyi, F., & Mugabe, J., 'Practice Before Policy: An Analysis of Policy and Institutional Changes Enabling Community Involvement in Forest Management in Eastern and Southern Africa,' *Issue 10 of Forest and social perspectives in conservation*, (IUCN, 2002).

Hunter, David, James Salzman, and Durwood Zaelke. *International environmental law and policy*. Vol. 516. New York: Foundation Press, 2007. *Isaka Wainaina and Anor v Murito wa Indagara and others*, [1922-23] 9 E.A.L.R. 102.

Jacqueline M Klopp and Job Kipkosgei Sang, 'Maps, Power, and the Destruction of the Mau Forest in Kenya' (2011) 12 Georgetown Journal of International Affairs 125; 'Kenya Forest Service - Kenya Forest Service'<http://www.kenyaforestservice.org/index.php?option=com_content&view=article&catid=223&id=149&Itemid=98> accessed 16 July 2020.

Jussi S Jauhiainen and Lauri Hooli, 'Indigenous Knowledge and Developing Countries' Innovation Systems: The Case of Namibia' (2017) 1 International Journal of Innovation Studies 89.

Kellert, S. R., Mehta, J. N., Ebbin, S. A., & Lichtenfeld, L. L., 'Community Natural Resource Management: Promise, Rhetoric and Reality,*' Society and Natural Resources: An International Journal*, Vol.13, No.8, 2000, p.706.

Losey, J.E. & Vaughan, M., 'The Economic Value of Ecological Services Provided by Insects,' *BioScience*, Vol. 56, No. 4, April 2006, pp. 311-323.

Mogaka, H., 'Economic Aspects of Community Involvement in Sustainable Forest Management in Eastern and Southern Africa,' *Issue 8 of Forest and social perspectives in conservation,* IUCN, 2001.

Muigua, K., 'Mainstreaming Traditional Ecological Knowledge in Kenya for Sustainable Development', 2020 Journal of cmsd Volume 4(1)< http://journalofcmsd.net/wp-content/uploads/2020/03/Mainstreaming-Traditional-Ecological-Knowledge-in-Kenya-for-Sustainable-Development-Kariuki-Muigua-23rd-August-2019.pdf> Accessed on 17 July 2020.

Muigua, K., *Harnessing Traditional Knowledge for Environmental Conflict Management in Kenya* (2016)< http://kmco.co.ke/wp-content/uploads/2018/08/TRADITIONAL-KNOWLEDGE-AND-CONFLICT-MANAGEMENT-29-SEPTEMBER-2016.pdf> accessed 17 July 2020.

Ogendo, HWO, *Tenants of the Crown: Evolution of Agrarian Law & Institutions in Kenya, (*ACTS Press, Nairobi, 1991).

Protection of Traditional Knowledge and Traditional Cultural Expressions Act, No. 33 of 2016, Laws of Kenya.

Rachel Berger, 'Conflict over Natural Resources among Pastoralists in Northern Kenya: A Look at Recent Initiatives in Conflict Resolution' (2003) 15 Journal of International Development 245.

Republic of Kenya, *Kriegler and Waki Reports on 2007 Elections*, 2009, (Government Printer, Nairobi).

Republic of Kenya, *Report of the Judicial Commission Appointed to Inquire into Tribal Clashes in Kenya*, July 31, 1999 (Akiwumi Report.

Republic of Kenya, *Sessional Paper No. 3 of 2009 on National Land Policy*, (Government Printer, Nairobi).

Salzman, J., 'Valuing Ecosystem Services,' *Ecology Law Quarterly*, Vol. 24, Iss. 4, September 1997, pp.887-904.

Senanayake, S. G. J. N., 'Indigenous Knowledge as a Key to Sustainable Development' (2006) 2 Journal of Agricultural Sciences–Sri Lanka<https://www.researchgate.net/publication/265197993_Indigenous_knowledge_as_a_key_to_sustainable_development> accessed 16 July 2020.

Shackelton, S. & Campbell, B. (eds), 'Empowering Communities to Manage Natural Resources: Case Studies from Southern Africa,' Center for International Forestry Research, March 2000. Available at *http://www.cifor.org/publications/pdf_files/Books/Empowering.pdf* > accessed 17 July 2020.

Swiderska, K., 'Protecting Community Rights over Traditional Knowledge: Implications of Customary Laws and Practices,' Interim Report (2005-2006), November 2006. Available at *http://pubs.iied.org/pdfs/G01253.pdf* [Accessed on 14/7/2020].

The Ngorongoro Declaration on Safeguarding African World Heritage as a Driver of Sustainable Development, adopted in Ngorongoro, Tanzania on 4 June 2016.

Todd, H., & Zografos, C., Justice for the Environment: Developing a Set of Indicators of Environmental Justice for Scotland, *Environmental Values*, *14*(4), 483-501.

UN General Assembly, *Vienna Declaration and Programme of Action*, 12 July 1993, A/CONF.157/23.

UNEP, *Global Environment Outlook 5: Environment for the future we want*, (UNEP, 2012), pp.145-154.

UNFF Memorandum, available at www.iucnael.org/en/.../doc.../849-unit-3-forest-game-*backgrounder.html*. > accessed 16 July 2020.

UNGA, *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)].

United Nations Educational, Scientific and Cultural Organization (UNESCO), 'Culture for Sustainable Development,' available at *http://en.unesco.org/themes/culture-sustainable-development* [Accessed on 17/7/2020]

United Nations, Convention on Biological Diversityof 5 June 1992, 1760 U.N.T.S. 69

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

United nations, *United Nations Declaration on the Rights of Indigenous Peoples*, adopted by the General Assembly on Thursday, 13 September 2007, 61/295.

US Office of Legacy Management, 'Environmental Justice' *What Is Environmental Justice?* Available at *http://energy.gov/lm/services/environmental-justice/what-environmental-justice*[Accessed on 12/7/2020].

Warren, M., 'Indigenous Knowledge, Biodiversity Conservation and Development' in Bennun*et*, L.A., *al*., (eds), *Conservation of Biodiversity in Africa: Local Initiatives and Institutional Roles* (Centre for Biodiversity, National Museums of Kenya, 1995) 93.

Wildlife Conservation and Management Act, No. 47 of 2013, Laws of Kenya.

World Resources Institute, 'Atlas of Forest and Landscape Restoration Opportunities,' available at *http://www.wri.org/resources/maps/atlas-forest-and-landscape-restoration-opportunities* > accessed 17 July 2020.

Zambrano-Barragan, C., 'Decision Making and Climate Change Uncertainty: Setting the Foundations for Informed and Consistent Strategic Decisions' (*World Resources Institute*, 27 June 2013) <https://www.wri.org/our-work/project/world-resources-report/decision-making-and-climate-change-uncertainty-setting> accessed 17 July 2020.

Intergovernmental Dipsute Resolution: Analysing the Application and Future of ADR

By: ***Oseko Louis Denzel Obure**** ***& Kihiko Rosemary Wambui*****

Abstract

The government of Kenya, post-2010, is composed of different levels of government. These levels are the national and devolved government composed of various organs. Devolution has led to the transfer of functions, powers, and services form the national government to the county governments and its organs. Inevitably, the management and exercise of these powers and functions have created friction. The Constitution of Kenya, 2010 envisioned this friction. Consequently, it provided for a the application of Alternative Dispute Resolution (ADR) to facilitate an out-of-court process that would resolve these disputes while maintaining the harmonious relationship between these governments, seeing as they are interdependent. Consequnetly, parliament enacted the Intergovernmental Relations Act, 2012 (IGRA) to bolster the proviosions of the Constitution. However, this statute has weaknesses that have made it ineffective in resolving intergovernmental disputes. Arguably, ADR remains to be the appropriate mechanism for resolving intergovernmental disputes for it protects the relationship existing between these codependent levels of government which must work through consultaion and corperation. Through an analysis of the place of ADR in the resolution of intergovernmental disputes, this paper demonstrates the gaps that must be filled to improve the efficiency of ADR in intergovernmental dispute resolution (IGDR).

1.0 Introduction

The Republic of Kenya is governed through a devolved system comprising of both national and county governments.[1] The Constitution of Kenya 2010

* **Student, University of Nairobi School of Law. Email: osekolouis1@gmail.com Phone: +254 796 467 738**

established a devolved system[2] in a bid to enhance the quality of governance through the decentralisation of power.[3] To achieve this end, it is imperative that all levels of government work cooperatively. This working relationship was envisioned by Article 189 of the Constitution, which stipulates that national and county governments ought to support and consult with each other. The provision, additionally, obliges both levels of government to respect each other's functional and institutional integrity.[4] The position of the Constitution on the ideal nature of relationships between the national and county governments is reiterated in the Intergovernmental Relations Act of 2012. Section 4 of the Act, stipulates that governments ought to discharge their duties and carry out their mandate with respect for other governments' sovereignty, cooperation and collaborative consultation. Despite the ideals put forth by both the Constitution and the Intergovernmental Relations Act, conflicts arise between governments for a variety of reasons. The digression from the ideal is, however, not unanticipated. Both the Constitution and the Intergovernmental Relations Act contemplated the possibility of disputes. The Constitution places a duty upon different governments to make every reasonable effort to resolve disputes,[5] indicating appreciation of the fact that disputes are bound to occur. Likewise, the IGA sets out that governments ought to minimise disputes and foster cooperation.[6] Where disputes cannot be avoided or minimised, there are avenues that can be explored for their resolution. Championed for by the Constitution through Article 159, Alternative Dispute Resolution methods find application in resolving disputes between governments.[7] The forms of ADR that may be used are mediation, arbitration and negotiation. These methods of dispute resolution

[**] **Student, University of Nairobi School of Law. Email: kihikorosemary@gmail.com Phone: +254 706 382 029**

[1] Article 1(4), Constitution of Kenya, 2010.
[2] Article 6, Constitution of Kenya, 2010.
[3]Jepchumba Cheserek, *An Appraisal of the Bicameral Legislature under the Kenyan Constitution, 2010*. (2015) <https://www.academia.edu/21712072/AN_APPRAISAL_OF_THE_BICAMERAL_LEGISLATURE_UNDER_THE_KENYAN_CONSTITUTION_2010?email_work_card=view-paper> Accessed 15th June 2021.
[4] Article 189, Constitution of Kenya, 2010.
[5] *Ibid, n 3*
[6] Section 4, Intergovernmental Relations Act, 2012.
[7] *Ibid, n 3*

ought to be applied and exhausted before litigation is considered,[8] as it should be the last resort.[9] The central role that ADR mechanisms ought to play gives rise to the need for a comprehensive framework through which they operate. By evaluating the existing legal and institutional framework governing the application of Alternative Dispute Resolution methods in the resolution of intergovernmental disputes, this paper shall propose recommendations whose implementation should enhance the efficacy of ADR.

2.0 Parties to Intergovernmental Disputes

As the term 'intergovernmental' suggests, intergovernmental disputes occur between different levels of government. The Constitution of Kenya establishes two separate levels of governments, namely the national and county governments.[10] At the national level, there exists three arms of government. The legislative arm upon which the power to make, amend and repeal laws is vested is the parliament.[11] The parliament is bicameral in nature, which means that it consists of two chambers, namely, the National Assembly and the Senate. The executive is established by the Constitution,[12] and its role is to implement policies. Finally, the judiciary is responsible for the interpretation of the law.[13] Owing to devolution, Kenya is divided into counties, each having its own government, which is distinct.[14] County governments are divided into county assemblies and county executives.[15] Conflicts occurring between the levels of government as described herein may be termed as intergovernmental disputes. The Intergovernmental Relations Act sets aside a Part dealing with the resolution of disputes and provides that the Part shall apply to the

[8] Section 31, Intergovernmental Relations Act, 2012.
[9] *County Government Of Nyeri v Cabinet Secretary, Ministry Of Education Science & Technology & Another* [2014] eKLR
[10] *Ibid, n 1*
[11] Article 94, Constitution of Kenya, 2010
[12] Article 129, Constitution of Kenya, 2010
[13] Article 1(3), Constitution of Kenya, 2010
[14] Aricle 6, Constitution of Kenya, 2010
[15] Article 176, Constitution of Kenya, 2010

resolution of disputes between the national government and county governments or amongst county governments.[16] It so follows that the parties to these conflicts are the national government and county governments.

3.0 Nature of Intergovernmental Disputes

The implementation of a devolved system of government, which vests power in different actors, has been met with considerable hardship due to the emergence of disputes between different governments. These disputes have emerged in the course of discharging duties, which then impede the attainment of the goals of the devolved system of government. The causes and nature of these disputes vary, a few of which are as follows;

3.1 Supremacy wars between the National Assembly and the Senate

The National Assembly and the Senate are established by the Constitution of Kenya at Article 93. On the one hand, the roles of the National Assembly pertain to deliberating and making decisions that affect the interests of the people.[17] On the other hand, the Senate is charged with the duty to protect and safeguard the interests of counties and their governments.[18] The Constitution is silent on whether the National Assembly and the Senate are equal or whether one has a higher status than the other. This position leads to a rivalry between the National Assembly and the Senate, which then escalates to a total disregard of functional integrity between the two parties. This can be exemplified by the exclusion of the Senate from matters pertaining to County Governments by the National Assembly. This matter was tabled before the Supreme Court for an advisory opinion, *In the Matter of the Speaker of the Senate & another*,[19] where it was averred that the different levels of government ought to work collaboratively and in

[16] Section 30(2), Intergovernmental Relations Act, 2012
[17] Article 95, Constitution of Kenya, 2010
[18] Article 96, Constitution of Kenya, 2010
[19] [2013] eKLR

consultation with each other. It was also contended that the two levels of government ought to exhaust Alternative Resolution methods before turning to the court system. In her dissenting opinion, Ndungu Njoki SCJ pronounced herself on the matter of the court's jurisdiction stating that seeking an advisory opinion form the Supreme Court was misguided. This is due to the fact that the parties to the matter had not exhausted both the informal and formal mechanisms set in place to resolve intergovernmental disputes.[20] The position of Ndungu Njoki goes to show that before escalating intergovernmental disputes to the court, parties to these conflicts ought to utilize ADR mechamisms exhaustively.

3.2 Disputes Resulting from Transfer of Functions and powers

With the advent of the devolved system of government came the transfer of powers and functions from one level of government to another.[21] These transfers would be done where they would enhance the efficacy of the government since some levels could put some powers to better use and discharge some duties more effectively than others. Distribution and transfer of powers and functions between the national and county governments have been outlined in the Fourth Schedule of the Constitution of Kenya. In the course of discharging their duties, the national government and county government have had conflict over which level may perform which duties. In the matter of *County Government of Migori & 4 others v Privatisation Commission of Kenya & another*[22], there was a dispute between the national government and county governments over the milling of sugar. It was maintained by the latter that sugar milling was a devolved function;[23] hence, the former could not rightfully privatise sugar milling as it was not within its powers. The national government averred that while crop and animal husbandry were within the purview of county

[20] *In the Matter of the Speaker of the Senate & another,* [2013] eKLR
[21] Article 187, Constitution of Kenya, 2010
[22] [2017] eKLR
[23] Part 2, Fourth Schedule of the Constitution of Kenya.

governments, sugar milling companies were public investments, which ought to be dealt with by the national government. The court acknowledged the nature of the dispute to be intergovernmental and maintained the position of the Constitution and the Intergovernmental Relations Act that all such disputes should be resolved through Alternative Dispute Resolution mechanisms and that the courts are the last resort.[24]

3.3 Disputes over Allocation of Funds and Resources

The distribution of powers and functions establishes the powers that are vested in different levels of government and the functions that they may carry out. In order to carry out these functions and exercise their mandate, governments are allocated funds and resources. With the transfer of certain powers, there have been conflicts as to the erroneous allocation of funds. In such instances, governments are allocated funds for functions that are not within their purview. Such conflict arose between the Council of County Governors and the Attorney General, where the national government had allocated itself resources for the performance of functions within the scope of county governments.[25] Conflicts also arise as to the jurisdiction of national and county governments in legislating on money matters. *In the Matter of the Speaker of the Senate & another*,[26] there arose between the national government and the Senate an issue over whether the Senate ought to have been involved in the enactment of the Division of Revenue Bill. The Senate was of the position that it had an interest in the subject matter of the Bill, so it ought to have been involved. The conflict arose when the National Assembly maintained that it had exclusive legislative authority.

[24] Section35, Intergovernmental Relations Act, 2012
[25] *Council of County Governors v Attorney General & 4 others; Controller of Budget (Interested Party)* [2020] eKLR
[26] [2013] eKLR

4.0 Legal and Institutional Framework for ADR in IGDR

Kenya has made some strides in establishing a legal and institutional framework best suited for resolving disputes, particularly intergovernmental dispute resolution. However, these institutions and legal frameworks have not proven to be effective in managing these disputes. For instance, these disputes often escalate and end up in courts and the media - with each party threatening the other with dire consequences because of their positions. This was particularly so when the council of Governors threatened to shut down counties should the national treasury fail to pay the sum of Kshs. 102Billion owed to the counties by 18th June 2021.[27] This section seeks to critically examine the existing legal and institutional framework in the settling of intergovernmental disputes.

4.1 The Constitution of Kenya and Intergovernmental Relations Act

The Kenyan Constitution provides for a mandatory settlement of intergovernmental disputes. This is particularly so per article 189(3) and (4) of this constitution. The constitution places a positive duty on the county and national government to make "reasonable efforts" in settling disputes.[28] Also, the constitution provides for the ADR mechanism for the settling of these disputes, notably mediation, negotiation, and arbitration.[29] Similarly, Article 6(2) of the constitution provides that owing to the interdependence of these levels of government, their mutual relationships must be conducted in a manner characterised by consultation and cooperation. A constructive interpretation of this provision makes it applicable in instances where there is friction between these levels of governments or their organs.

[27]Citizen TV, 'Governors Threaten to Shut down Counties Due to Cash Crisis' (14 June 2021) <https://www.youtube.com/watch?v=9kQB817pw3c> accessed 18 June 2021

[28] Article 189(3), Constitution of Kenya, 2010.

[29] Article 189(4), Constitution of Kenya, 2010.

These provisions of the constitution have been bolstered by section 33 of the Intergovernmental Relations Act.[30] This provision provides for the ADR mechanisms and procedures to be followed before and after the declaration of a dispute. However, per section 35 of this statute, the courts have been granted the powers to intervene should all reasonable efforts fail. Arguably, this section is against the spirit of Article 189 of the constitution. Although the provision provides that the parties may seek to resolve the matter through arbitration or court intervention, it is this paper's claim that arbitration ought to have been the ultimate mechanism for settlement of disputes. Besides, this provision eroded the very objective of keeping intergovernmental disputes out of the court. It can be seen as counterproductive which is exemplified by the fact that despite the conditions under section 35 of IGRA, the courts have been hesitant in settling these types of disputes, for many are referred to ADR. For instance, in *Council of County Governors v Lake Basin Development Authority & 6 Others,*[31] the court dismissed the matter while urging the parties to seek alternative dispute resolution mechanism.

It is worth noting that there are other legislations that provide for the resolution of intergovernmental disputes. These are statutes with clauses that mandate parties to resolve their disputes through alternative dispute resolution. For instance, matters regarding functions and the delivery of service between the national government and the city of Nairobi are to be resolved through ADR.[32] Although the Intergovernmental relations Act outlines the procedure for settling these disputes, in instances such as a matter arising from the Urban Areas and Cities Act, the relevant Act will take precedence over IGRA unless the Act provides for the invocation of the Act provisions of IGRA.

[30] Act No. 2 of 2012.
[31] Petition No. 280 of 2017
[32] Section 6(6)(d), Urban Areas and Cities Act No. 13 of 2011

4.2 The National and County Governments Coordinating Summit and Council of Governors

This Act establishes the summit, which comprises the President, governors, forty-seven counties, a secretariat among others.[33] The primary role of this summit is to resolve disputes between the national and county government,[34] while the leading role of the Council of Governors is to resolve disputes between the county governments.[35] Although these institutions bear the potential of resolving these disputes owing to the enabling legal framework, they have been caught in the jaws of politics primarily characterised by party interests and political alliances. Scholars such as Mitulla posit that the realisation of the objectives of these institutions lies in cushioning them from political party interests.[36] However, this seems nearly impossible, seeing as the members are politically elected and have their political interests to advance. Also, this shortcoming was reported by the Intergovernmental Relations Technical Committee report of 2015.[37] Consequently, these weaknesses contribute largely to these disputes finding their ways in courts – a process that strains intergovernmental relations.

5.0 The Place of ADR in Intergovernmental Dispute Resolution

5.1 Intergovermental Dispute Resolution Globally

The concept of a devolved system of governamnce is not unique to Kenya. Globally, coutries like the United Kindgom are characterised by a devolved system of government. As discussed earlier, this system of governace has a penchant for conflicts in the course of service

[33] Section 7, Intergovernmental Relations Act No 2 of 2012.
[34] *Ibid*, Section 8.
[35] *Ibid*, Section 20(1)(d).
[36]Winny M, 'Intergovernmental Relations Act 2012: Reflection And Proposals On Principles, Opportunities And Gaps' <https://profiles.uonbi.ac.ke/mitulla/files/web_pdf_mitullah_intergovernmental_relations_act_2012_review_edited.pdf> accessed 18 June 2021
[37] 'Status of Intergovernmental Institutions; After Two Years of Devolution' (Intergovernmental Relations Technical Report Committee (IGRTC) 2015)

delivery. In the United Kingdom these levels of government have signed a Memorandum of Understanding (MoU) entailing the principles of co-existence among these governments. This principle enhances consultaion, open communication, and cooperation that serve to minise instances of dipsutes. Also, the United Kindgom has protocols signed in 2001 by the Joint Ministerial Coimmittee on the avoidance of conflicts.[38]

Regionally, South Africa boasts of a comprehensive statutory instruments and judicial precedent in the area of intergovernmental dispute resolution. For instance, the courts have continued to appreciate the fact that state organs have a negative duty of avoiding litigation. Although the courts are actively involved in intergovernmental dispute resolution, their role is limited to promotimng the resolution of intergovernmental disputes amicably. This is evidenced by the consistency in judicial orders on Intergovervemntal disputes. To begin with, in *National Gambling Board* case[39] the consititutional court declared that "organs of the state must try and solve their disputes amicably." Additionally, the courts have found that setllting of disputes amicably is essential for the cooperative aspect of government between the different levesl and organs; thus, resolution ought to be an obligation between the parties.[40] It is worth noting that these matters were determined before the enactment of the Intergaovernmental Realtions Framework[41] in 2005.

[38]United Kingdom Publishing Servivces, Protocol for Avoidance and Resolution of Disputes (2001) <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/62121/avoidance-resolution.pdf> accessed 20 June 2021.

[39] *National Gambling Board versus Premier of Kwazulu Natal and others* [2002] 2 BCLR156 (CC)

[40] *Uthekele District Municipality and Others vs. President of the Republic and Others* [2003] 1 S.A. 678(CC)

[41] Act No 13 of 2005

5.2 Intergovernemntal Dsipute Resolution in Kenya

In a devolved system of governance, service delivery is characterised by competing and conflicting interests that risk impeding efficiency in the delivery. Consequently, ensuring efficient service delivery between these levels of government and their organs requires an effective mechanism to resolve the disputes borne of these competing and conflicting interests. Laibuta posits that such a mechanism must be efficient, cost-effective, and with quality outcomes.[42] Although Kenya has a functioning judiciary that can resolve disputes, the nature of intergovernmental disputes is such that litigation shall not be an effective way of settlement. ADR serves to provide a platform through which these governments and their organs can resolve their disputes. ADR serves to protect the relationship between these national and county governments and amongst county governments by ensuring parties' satisfaction. Litigation is famous for its winner-takes-all norm; when a matter is settled, there is a loser and a winner. The danger presented by litigation is that it injures the relationship that exists between the parties. This is something that one would not wish between these levels of government which must work together through consultation and corporation as provided for by the constitution.[43] Besides, since these are political organs, as discussed before in this paper, it is essential to encourage a culture of solving society's problems by political compromises at the political level.[44]

This compromise is only achievable through ADR mechanisms such as mediation and negotiations. Compromise and a mutually accepted settlement through mediation, conciliation, and negotiation serve to safeguard the relationship between these parties.

---

[42] Kibaya Laibuta, 'The Place of ADR in Intergovernmental Disputes' (2021) <https://lc-adr.net/blog/the-place-of-adr-in-intergovernmental-disputes> accessed 19 June 2021

[43] Article 6(2), Constitution of Kenya 2010.

[44] John M Kangu, *Constitutional Law of Kenya on Devolution* (Strathmore University Press 2015) pg. 131 -133.

Alternative Dispute Resolution offers a cost-effective and efficient method of dispute resolution.[45] aving cost involves saving both time and money. However, this statement has often fallen victim to overstatement, some mechanisms such as arbitration have grown to be costly. Undoubtedly, litigation has often been expensive and time-consuming, which is as a result of recurrent adjournments and hefty legal fees, among other things.[4647] As such, the implementation of decisions or policies is delayed. If the same were to happen to an intergovernmental dispute, it would delay service delivery, particularly essential services, which would occasion great harm on the people of the Republic. The costly nature of litigation is evidenced by intergovernmental disputes that have been filed in courts. For instance, the county government of Bomet was sued by renowned advocate Prof Ojienda for legal fees amounting to Kshs. 75Million[48] after representing them in a land dispute. Also, Baringo county was sued by Donald Kipkorir over KSh. 17.5Million owed for services offered.[49] Arguably, the costs would have been lesser had the matters been referred to the Summit or Council of Governors, which are mandated to resolve these disputes in accordance with the Intergovernmental Relations Act, 2012.

Politically charged disputes ought to be subjected to a process best suited for their determination. More often than not, these disputes arise in the course of exercising sovereignty over territories; that is, when a county government wants to exploit the resources occurring naturally

[45] Kariuki Muigua, *Alternative Dispute and Access to Justice in Kenya* (Glenwood Publishers Limited 2015) 40

[46]Mbuthi G, 'Implementation Of Alternative Dispute Resolution (ADR) In The Devolved System In Kenya: Challenges And Perspectives' <https://www.academia.edu/39403819/implementation_of_alternative_dispute_resolution_adr_in_the_devolved_system_in_kenya_challenges_and_perspectives> accessed 15 June 2021

[47] John M Kangu, *Constitutional Law of Kenya on Devolution* (Strathmore University Press 2015) pg. 131 -133.

[48] *Ibid* n 40. p24.

[49] *KTK Advocates vs. Baringo County Government* [2018] eKLR.

within its boundaries, but is disputed by a neighbouring county. These powers are exercised by the politically elected and appointed. Consequently, the dispute arising should be subjected to ADR as they revolve around policy choices and administrative judgements, as posited by Kangu.[50] Besides, through resolution, the parties reach a solution that best serves their present and future interests while saving them the agony of the delays, seeing as the judiciary is riddled with many matters causing a backlog. The likelihood of destructive escalation in such matters also creates the need for the utilization of a more conciliatory than adversarial system; thus, the application of ADR would be more appropriate.

Essentially, ADR plays a critical role in intergovernmental dispute resolution seeing as litigation may be counterproductive. For instance, from the above, ADR promotes the parties' satisfaction, produces quality outcomes that appreciate the present and future interests of the parties and saves on cost and time. Its apparent benefits notwithstanding, ADR is not the key to the creation of a utopian dispute-solving framework, a position that was asserted by Laibuta in writing that, "ADR is not the panacea for all conflicts and disputes but a practical solution to disputes that plague service delivery."[51]

6.0 Gaps in the Current Framework

While there exists a legal and institutional framework for the application of Alternative Dispute Resolution Methods in tackling intergovernmental disputes, there are gaps and ambiguities which impede the efficacy of these mechanisms. These gaps may interfere with the independence and impartiality of the process, the expedition with which matters are resolved, and the quality of outcomes achieved.

---

[50] *Ibid* n.39.

[51] Kibaya Laibuta, 'The Place of ADR in Intergovernmental Disputes' (2021) <https://lc-adr.net/blog/the-place-of-adr-in-intergovernmental-disputes> accessed 19 June 2021.

6.1 Lack of Limitations of Time

Procedural time limits, where imposed, function to control the period over which a matter may be in issue.[52] In the resolution of intergovernmental disputes, these limitations would be necessary to govern the amount of time that a matter may be dealt with through negotiation, mediation or arbitration. The matters dealt with as a result of these conflicts are varied, with some being of an urgent nature. Thus, there is a need for proper definitions of the limitations of time in the context of intergovernmental disputes in order to avoid unnecessary delays, which would cause irreparable damage.

6.2 Lack of Definite Procedure for Selecting Neutral Third Party

In the application of mechanisms of Alternative Dispute Resolution, a third party is involved. The role of the third party is to facilitate constructive discussion and consultation, and the reaching of a workable solution.[53] It is crucial that the relevant third party be neutral. A lack of bias enhances the quality of the proceedings since all parties are given equal chance to participate, and matters are considered without partiality. Currently, there are no definite procedures or guidelines for the selection of a neutral third party in the case of intergovernmental disputes. This may be problematic since it may lead to the selection of a prejudiced third party, which would defeat the essence of Alternative Dispute Resolution.

6.3 Uncertainty as to the Best Applicable ADR Method

The nature of disputes between governments is varied, and the outcomes that are desired from dispute resolution are also different. It then follows that there are forms of ADR that may suit some circumstances better than others. Granted, Secrion 34 of the

[52] Dalia Averkienė, 'The Meaning of Procedural Time Limits in Civil Procedure', (2012) 4 SS 4

[53]Harpole Sally A, 'The Role of The Third Party Neutral when Arbitration and Conciliation Procedures are Combined'. Asian Leading Arbitrators' Guide To International Arbitration (2007).

Intergovernmental Relations Act provides for the selection of an appropriate meachnism. However, this provision is riddled with ambiguity since it leaves the decision to any intergovernmental structure or legislation on the off-chance that a statute dealing with a particular matter exists. There ought to be definite and comprehensive guidelines that stipulate which matters may be resolved through mediation, negotiation or arbitration. This would ensure that matters are resolved through the most suitable ADR mechanism; hence, the most appropriate outcome would be achieved.

7.0 Conclusion

ADR provides promising mechanisms in resolving intergovernmental disputes despite substantial ineffectiveness brought by its inherent and institutional weaknesses. Besides, ADR has not been applied as was anticipated by the constitution and the Intergovernmental Relations Act. Additionally, the established institutions have not realised their potential as they are riddled with political agendas and self-interests. The lack of competence and independence is a hurdle to ADR application.

One must note that these challenges are not limited to competence and independence, but extend to the attitude many have adopted towards ADR. For instance, litigation is far more popular than ADR, hence the continued filing of disputes in courts, including intergovernmental disputes. However, not much has been done to change this perception by creating awareness amongst the masses, including the levels of government and their organs which are deeply seated in the litigation mania.

8.0 Recommendations

This paper recommends that the existing legal and institutional framework be reformed in a manner that bolsters the application of ADR in intergovernmental dispute resolution. To begin with, although the Intergovernmental Relations Act provides for the procedure under

section 33 and creates the institutional bodies, the same has been eroded with the clawbacks under section 35 that allows for courts intervention. This is a contravention of the spirit of Article 189(4)[54] , which advocates for ADR in these disputes. Therefore, there is the need to harmonise these provisions to enhance the existing framework and make ADR mandatory in resolving disputes arising from intergovernmental relations. Also, the reforms must speak firmly on the timeframe for resolving these disputes or delays in the process slow down the delivery of resources. Besides, ADR ought to mitigate the delays that characterise litigation.[55] Seeing as the importance of a neutral third party cannot be gainsaid, it is crucial that a procedure be outlined for the choosing of the said third party, so as to ensure a prejudice-free process.

Awareness should be created amongst the public on ADR. Sadly, even in the levels of government that have legal advisors among other experts, the matters are still filed in courts, and when the matters are not filed in court, they are politically debated in public with parties taking strong positions. For instance, in the matter of the national treasury owing the county governments Kshs. 102Billion, instead of the parties resolving the dispute, the first step by the council of governors was to threaten to shutdown counties' delivery of essential services.[56] This indicates a total disregard of the ADR mechanisms in place and spirit of Article 6(2) of the constitution on cooperation. Therefore, there is the need to promote ADR through affirmative action like creating awareness amongst the relevant parties and the public at large.

---

[54] The Constitution of Kenya, 2010.

[55] John M Kangu, *Constitutional Law of Kenya on Devolution* (Strathmore University Press 2015) pg. 131 -133.

[56]Citizen TV, 'Governors Threaten to Shut down Counties Due to Cash Crisis' (14 June 2021) <https://www.youtube.com/watch?v=9kQB817pw3c> accessed 18 June 2021

The summit and Council of Governors should undertake comprehensive training on the application of ADR mechanisms. This is essential since the summit and council are composed of persons who may not possess sufficient knowledge of ADR mechanisms. Additionally, tools and systems should be put in place that simplifies the referral procedures, declaration of disputes and aids the stakeholders in managing the conflicts. This training should incorporate emerging trends; therefore, there should be revenue that facilitates research within and outside Kenya on effective ways of addressing these disputes.

Finally, the varied nature of intergovernmental disputes suggests that there are disputes that are more sensitive than others. The lack of a proper framework on how to deal with the different disputes is problematic since it may result in irreparable harm. One such sensitive conflict is boundary disputes; hence, caution ought to be observed and special attention given to them. First, their resolution should encourage cultural tolerance and not a political approach. This should be particularly so in instances where there are impasses on which border a natural resource is located. An appropriate metho of resolving sucg a conflict would be adopting the establishment of regional blocks where both parties can benefit under a mutual agreement. This initiative has proven effective looking at the Regional Approach for Sustainable Conflict Management Integration which involves border communities in Ethiopia and Somalia.[57] These initiatives promote cultural tolerance and peaceful existence between the neighbouring counties.

[57] *Ibid n.*40. pg 41.

References

Legal Instruments and Statutes

Constitution of Kenya, 2010.

The Urban Areas and Cities Act No. 13 of 2011.

Intergovernmental Relations Act No 2 of 2012.

Intergovernmental Relations Framework Act No 13 of 2005.

United Kingdom Publishing Servivces, Protocol for Avoidance and Resolution of Disputes (2001) <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/62121/avoidance-resolution.pdf> accessed 20 June 2021.

Case Law

KTK Advocates v Baringo County Government [2018] eKLR.

Council of County Governors v Lake Basin Development Authority & 6 Others, Petition 280 of 2017.

Council of County Governors v Attorney General & 4 others; Controller of Budget (Interested Party) [2020] eKLR

County Government Of Nyeri v Cabinet Secretary, Ministry Of Education Science & Technology & Another [2014] eKLR

County Government of Migori & 4 others v Privatisation Commission of Kenya & another [2017] eKLR

In the Matter of the Speaker of the Senate & another [2013] eKLR

National Gambling Board versus Premier of Kwazulu Natal and others [2002] 2 BCLR156 (CC)

Uthekele District Municipality and Others vs. President of the Republic and Others [2003] 1 S.A. 678(CC)

Books and Journal Articles

Harpole Sally A, *The Role of The Third Party Neutral when Arbitration and Conciliation Procedures are Combined*. Asian Leading Arbitrators' Guide To International Arbitration (2007).

Dalia Averkienė, 'The Meaning of Procedural Time Limits in Civil Procedure', (2012) 4 SS 4

Kangu JM, *Constitutional Law of Kenya on Devolution* (Strathmore University Press 2015) 131-133.

Mittulah W, 'Intergovernmental Relations Act 2012: Reflection And Proposals On Principles, Opportunities And Gaps' <https://profiles.uonbi.ac.ke/mitulla/files/web_pdf_mitullah_intergovernmental_relations_act_2012_review_edited.pdf> accessed 18 June 2021.

Muigua KD, *Alternative Dispute and Access to Justice in Kenya* (Glenwood Publishers Limited 2015) 40

Papers

Cheserek J, *An Appraisal of the Bicameral Legislature under the Kenyan Constitution, 2010*. (2015) <https://www.academia.edu/21712072/AN_Appraisal_Of_The_Bicameral_Legislature_Under_The_Kenyan_Constitution_2010?email_work_card=view-paper> Accessed 15th June 2021.

Mbuthi G, 'Implementation Of Alternative Dispute Resolution (ADR) In The Devolved System In Kenya: Challenges And Perspectives' <https://www.academia.edu/39403819/implementation_of_alternative_dispute_resolution_adr_in_the_devolved_system_in_kenya_challenges_and_perspectives> accessed 15 June 2021.

Reports

'Status of Intergovernmental Institutions; After Two Years of Devolution' (Intergovernmental Relations Technical Report Committee (IGRTC) 2015)

Broadcasts

Citizen TV, 'Governors Threaten to Shut down Counties Due to Cash Crisis' (14 June 2021) <https://www.youtube.com/watch?v=9kQB817pw3c> accessed 18 June 2021

Websites

Laibuta K, 'The Place of ADR in Intergovernmental Disputes' (2021) <https://lc-adr.net/blog/the-place-of-adr-in-intergovernmental-disputes> accessed 19 June 2021.

Enhancing Recognition of Environmental Rights as Human Rights for Sustainable Development

By: ***Doreen Olembo****

1.1 Introduction

Rights can be inferred from a legal positivist view or a natural law theory view. Legal positivism reasons that rights are created by the government and encrusted in law, whereas natural law theorists posit that rights are inherent in nature, granted by the Creator and the State cannot take them away but can only secure them.[1]

Human rights are described as those rights which are inherent to the nature and well-being of man, needing enforcement and protection for optimal living.

Common categorizations of human rights include civil and political rights, and socio-economic and cultural rights[2]. Rights have a co-relation of entitlement, duty and responsibility[3]. The State has a duty to respect, protect and fulfil these rights within their required context. The State must also make it possible for the rights to be claimed by citizens.

Enforcement of rights will depend on the type of right, i.e. Civil and political rights demand a compulsory enforcement whereas socio-economic and cultural rights though equally important, are allowed to be enforced progressively[4].

* ***LLB (Hons) University of Nairobi & MA Environmental Law student at the Centre for Advanced Studies in Environmental Law and Policy (CASELAP), University of Nairobi***

[1]John G. Sprankling, *Understanding Property Law*, Professor of Law McGeorge School of Law University of the Pacific

[2] United Nations Human Rights, 'What are Human Rights' available at https://www.ohchr.org/en/issues/pages/whatarehumanrights.aspx#main

[3] Lyons.D., *The Correlativity of Rights and Duties*, Nous, Volume.4, No.1,

[4] Judicial Enforcement of Economic, Social and Cultural Rights, available at https://www.icj.org/wp-content/uploads/2015/07/Universal-Judicial-Enforcement-ESCR-Geneva-Forum-Series-2-Publications-Conference-Report-2015-ENG.pdf

Although considered controversial in some quarters, Human rights have a nature of being universal and metaphysical. Rights are inherent in and spread across societies in a trans-boundary manner[5]. The universality of human rights therefore implores communities and state parties to enforce these rights at civil & political, economic and social as well as at humanitarian levels.

Since the environment is the base for all living, environmental rights form a vital part of the human right that is right to life (a fundamental right, inalienable and the core of all existence).

Consequently, the right to a clean and healthy environment hugely impacts on the quality of that right to life. As we shall see later, Environmental rights are encapsulated in the major categories of human rights.

1.2 Recognition of Environmental Rights as Human Rights

In recent times, the recognition of environmental human rights has come to the fore under the ambit of environmental justice. Environmental rights as human rights is core to the safeguarding of sanctity of life in its natural and bio-diverse forms since man coexists with other living and non-living organisms which form part of the environment.

To illustrate the above, an environment that is polluted threatens the dignity of life of man, and also may shorten the life span of man and all living organisms in that environment arising from diseases emanating from a poor waste disposal and management system allowing hazardous chemical pollutants to be deposited in air, water and land[6].

Modern environmental justice activism has seen some community groups lobby successfully for the recognition of some sectors of the environment as a distinct personality with independent rights. For example, the Maori of New Zealand through the *TeUrewera Act (2001)* had the government revoke

[5] United Nations Population Fund, *Human Rights Principles*, available at https://www.unfpa.org/resources/human-rights-principles

[6] F. Navarro & T. Vincenzo., *Waste Mismanagement in Developing Countries: A Review of Global Issues*, International Journal of Environmental Research and Public Health, Volume 16, No.6

the status of their national park from a protected area to a legal person with similar rights as human rights[7]. In this instance, this community exercised civil and political rights to enforce their socio-economic and cultural rights.

References to Environmental Rights under Human Rights are captured expressly and impliedly in various constitutional, legal and institutional texts, both at local and international levels.

(a) The Constitution of Kenya (2010)

The *Preamble* introduces the recognition of the environment as a vital part of living, and calls for sustainable management of the same to provide for current and future generations.

Chapter Four on *The Bill of Rights* spells out rights and duties which affect the utilization of the environment in one way or another. Basic human needs are mentioned, and which can only be satisfactorily met in a clean, healthy and stable environment.

Some of these basic rights include right to dignity, right to a clean and healthy environment, right to land, right to culture, right to access to information, public participation, access justice and the right to a free and fair trial, among others.

- A. 4& 11*Culture and Social Rights*. The protection of the environment includes a cultural dimension under public participation. Environmental stewardship was an integral component of African Customary Law.[8]
- A.26 *Right to Life* (and quality of life). This is the basis on which the right to a clean and healthy environment is argued.
- A.27 has such progressive provisions as *Equality and Freedom from Discrimination*; women and men have the right to equal treatment,

[7] Te Urewera Act, available at https://www.legislation.govt.nz/act/public/2014/0051/latest/whole.html

[8] The *Endoroi* case is an example of an indigenous community taking up their cultural rights based on knowledge of, protection of indigenous species and cultural engagement with the forest in which they were resident. Traditional knowledge is a crucial part of understanding the workings towards conservation, of the environment around us.

including the right to equal opportunities in political, economic, cultural and social spheres. The State shall not discriminate directly or indirectly against any person on any ground, including race, sex, pregnancy, marital status, health status, ethnic or social origin, colour, age, disability, religion, conscience, belief, culture, dress, language or birth.

- *A.28 Right to Human Dignity* Most environmental wrongs are decisions made by a few elite groups excluding the most vulnerable groups most likely to be affected by the wrongs. For instance, dumping of hazardous waste is common along neighbourhoods of low income earners. Environmental justice thus finds strength based on this right.
- *A.30 Freedom from Slavery, Servitude and Forced Labour*– marginalized communities are involved in economic activities which unfortunately
- A. *53-55Protecting Marginalized Groups* The Bill of Rights provides for ensuring women's right to equal treatment, as well as laying out steps for affirmative action for marginalized groups. For example, it provides for 1/3 women on government boards and county assemblies, youth and persons living with disabilities for a wider inclusion in decision making at both levels of government.

  These marginalized groups daily interact with the environment and their exclusion in providing solutions for environmental wrongs makes it more difficult to sustain state efforts in environmental management.
- As. *33-34Freedom of Expression* and *Media Rights* Provides for access to information in the public and private sectors. Any information pertinent to the health of the environment should be accessible to citizens to help them make informed choices on the management of the environment. For the whistleblowers against environmental wrongs, A. 34(media freedom) forbids the State to exercise control over or interfere with any person engaged in broadcasting, the production or circulation of any publication or the dissemination of information by any medium; or penalize any person for any opinion or view or the content of any broadcast, publication or dissemination.
- *A.35 Access to Information* – stakeholders in the environment sector have a right to information regarding development planning to monitor employment of the Principle of Sustainable Development.
- *A.41Fair Labour Practices* – a majority of workers in the agricultural, horticultural and mining sectors are covered by Constitutional provisions

for better employment terms. The modern workplace demands an environmental safety consciousness in its strategic planning business.

- *A. 10 Promotes Equal and Fair Use of National Resources* The Constitution provides for Public Participation, Democracy, Inter/Intra generational Equity, Sustainable Development and Access to Justice as also captured in S. 3 of EMCA.
- *A.40 Property Rights* – regulation of real property (land rights) and intellectual property rights (traditional knowledge of indigenous species and protection of innovative technological advances in research - safeguarded in the Constitution.
- Tax revenues to be fairly distributed between the national government and County governments, which will receive and share at least 15 percent of revenue raised by the state. Another 0.5 percent will go to an equalization fund for the government to use to provide services to marginalized communities for the next 20 years.
- The commission on revenue allocation determines how much each county receives out of the national government's revenues and the senate would vote every five years on resolutions about sharing resources among counties. The question, however, is there intentionality in budgeting for the allocation of resources towards environmental stewardship at both levels of government?
- There is a system of tax separation – county governments should collect property, entertainment and other taxes approved by Parliament, while only the national government will collect income tax, customs, excise and value added taxes.
- County Governments have the opportunity to utilize property and other taxes collected to strengthen environmental protection initiatives, such as awareness, disaster preparedness and mitigation and intervention initiatives. The extractives industry where natural resources are concerned can benefit from investment arising out of these kind of taxes.

Environmental Sectoral Laws

(b) Judiciary

The Environment and Lands Court instituted under the High Court is an integral institution in defining, adjudicating and initiating processes aimed at

promoting better environmental stewardship in Kenya under A. 42[9]. The Supreme Court Advisory opinion in *National Land Commission vs CS Ministry of Lands* was a good start in distinguishing and contra-distinguishing the roles of two institutions managing land, an important sector within the environment. Magistrate courts are also now empowered to handle environmental rights disputes cases.

(c) A.6 Devolution and Access to Services

The realization of socio-economic and cultural rights under A. 43 can be best achieved by the pro-active engagement of county governments where most natural resources are based. Core functions like education, health, infrastructure, water and sanitation, etc under the Fourth Schedule interpretation leaves the county governments on the periphery of the "real work"[10] yet have the human resource to effect natural resource policies at the grassroots level.

(d) Constitutional Commissions

A. 248 of the Constitution establishes 10 independent commissions. The Human Rights and Equality Commission also features. These commissions look into providing terms for crucial areas of service. Unfortunately, as important as the Environment is crucial to the existence and survival of life and nonlife organisms, there is no specific commission tasked with securing the rights of the environment. Perhaps it is time to propose for the formation of one by environment's protection enthusiasts?

(e) International Human Rights Instruments

United Nations Human Rights Council previously *United Nations Commission on Human Rights* since 2006, for the enforcement of international human rights law. Environmental law is now being hosted by human rights law.

[9] Constitution of Kenya, 2010, Article 162 (2) (b)

[10]Sihanya B, *Constitutional Implementation in Kenya, 2010-2015:Challenges and Prospects*,(2011) FES, P39

Universal Declaration of Human Rights[11] – This is a UN General Assembly declaration. It does not in form create binding international human rights law but serves as an authoritative human rights reference. Seen as evidence of customary international law, it provides the basis of many international human rights instruments such as:

International Covenant on Civil and Political Rights(ICCPR)[12]. Political rights such as freedom of expression, association, media freedoms, access to justice and fair trial concerning the environment are covered in this convention.

International Covenant on Economic, Social and Cultural Rights) (ICESCR) [13] . The enforcement of environmental rights is realized progressively under socio-economic rights banner.

The *Convention Relating to the Status of Refugees (**CSR**)*[14] (adopted in 1951 and entered into force in 1954). Due to climate change patterns, a new group of climate refugee climates is arising.

The *Convention on the Elimination of All Forms of Racial Discrimination*[15] (**CERD**) (adopted in 1965 and entered into force in 1969);[4] Environmental justice requires that all consumers of environment's public goods are treated fairly and without bias.

The *Convention on the Elimination of All Forms of Discrimination Against Women* (**CEDAW**)[16] (entered into force in 1981); Women are equal and

[11] *Universal Declaration of Human* Rights, available at https://www.un.org/sites/un2.un.org/files/udhr.pdf
[12] International Covenant on Civil and Political Rights https://www.ohchr.org/documents/professionalinterest/ccpr.pdf
[13] *International Covenant on Economic, Social and Cultural Rights*, available at https://www.ohchr.org/en/professionalinterest/pages/cescr.aspx
[14] The *Convention Relating to the Status of Refugees,* available at https://www.unhcr.org/1951-refugee-convention.html
[15] The Convention on the Elimination of All Forms of Racial Discrimination, available at https://www.ohchr.org/en/professionalinterest/pages/cerd.aspx
[16] The *Convention on the Elimination of All Forms of Discrimination Against Women*, available at https://www.ohchr.org/documents/professionalinterest/cedaw.pdf

important users of the environment and their participation in decision making will improve environmental stewardship.

The *Convention on the Rights of the Child*[17] (**CRC**) (adopted in 1989 and entered into force in 1990);[7]Under sustainable development, the inter-generational rights of the child and the youth have to be considered.

The *International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families*[18](**ICRMW**) (adopted in 1990 and entered into force in 2003);

The *Convention on the Rights of Persons with Disabilities*[19](**CRPD**) (entered into force on May 3, 2008); and

The *International Convention for the Protection of All Persons from Enforced Disappearance*[20] (adopted in 2006 and entered into force in 2010). A few environmental activists like Ken Saro Wiwain the Shell BP *Ogoni* case should not have been executed if this convention were to be applied seriously,

The *African Charter on Human and Peoples' Rights for Africa*[21] of 1981, in force since 1986; Has been instrumental in recognizing the cultural and intellectual property rights of indigenous communities, in decisions made in *Endorois* case.

---

[17] The Convention on the Rights of the Child, available at https://www.ohchr.org/en/professionalinterest/pages/crc.aspx

[18] The *International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families*, available at https://www.ohchr.org/en/professionalinterest/pages/cmw.aspx

[19] The *Convention on the Rights of Persons with Disabilities*, available at https://www.un.org/development/desa/disabilities/convention-on-the-rights-of-persons-with-disabilities.html

[20]The *International Convention for the Protection of All Persons from Enforced Disappearance*, available at https://www.ohchr.org/Documents/ProfessionalInterest/disappearance-convention.pdf

[21] *African Charter on Human and Peoples' Rights for Africa*, available at https://www.ohchr.org/Documents/ProfessionalInterest/disappearance-convention.pdf

(f) Conclusion

Environmental rights are beginning to get prominence from recent past events where natural disasters have arisen due to unstable topography caused by heavy and careless human industrial activity. This situation if goes unchecked may be ticking time bomb.

Unfortunately, Environmental rights suffer the fate of human rights which are relegated to second place after civil and political rights. More emphasis on civil and political rights seem out of place in the developing world where socio-economic and cultural rights are yet to be fully implemented, worsened by the progressive implementation nature placed upon them. There is need to increase awareness and activism on environmental rights, hinged on crucial socio-economic rights.

References

The Constitution of Kenya

Environment Management and Coordination Act (EMCA)

East Africa Common Market Protocol on Movement of Labour

East Africa Common Market Protocol on Natural Resources and Environment

Kariuki M., Wamukoya D., &Kariuki F., *Natural Resources and Environmental Justice in Kenya*, (2015), Glenwood Publishers Ltd, Nairobi, p237

John G. Sprankling Professor of Law McGeorge Understanding Property Law, School of Law University of the Pacific http://www.environment.go.ke/ accessed 10/07/2016Michael Lockwood[1],

Julie Davidson[1], Allan Curtis[2], Elaine Stratford[1] and Rod Griffith[2,] *Governance principles for natural resource management;* School of Geography & Environmental Studies, University of Tasmania, Australia and Institute for Land, Water and Society, Charles Stuart University, Australia

Hayward T, *Constitutional Environmental Rights*,(2005), Oxford University Press; also

David R Boyd, *The Environmental Rights Revolution: A Global Study of Constitutions, Human Rights, and the Environment (*2012), Law and Society *Natural Resource Management*, Denmark in Kenya, Ministry of Foreign Affairs http://kenya.um.dk/en/danida-en/nrm/

Chris Alden & Christina Ana Alves, *China and Africa's Natural Resources: Challenges and Implications for Development and Governance*; Governance of Africa's Resources Programme, Occasional Paper no. 41, September 2009; available at

http://www.voltairenet.org/IMG/pdf/China_and_Africa_s_Natural_Resources.pdf

Charles Mwalimu, *Kenya's Legal Framework on Mining, Its adequacy in Safeguarding the Social, Economic, and Environmental Welfare of the Local Community in Mui Basin*, available at http://www.academia.edu/3841695/Kenya_S_Legal_Framework_On_Mining_It_S_Adequacy_In_Safeguarding_The_Social_Economic_And_Environmental_Welfare_Of_The_Local_Community_In_Mui_Basinnd accessed 04/06/2016

Pambazuka News, *Kenya: From Non-Beneficiaries to Active Shareholders, The Endorois* ;http://allafrica.com/stories/201004150930.html accessed 12/07/2016

http://www.afdb.org/en/topics-and-sectors/initiatives-partnerships/african-natural-resources-center-anrc/ accessed 17/07/2016

http://www.nsi-ins.ca/wp-content/uploads/2014/01/Brief-Shaw-Post-2015-Natural-Resource-Governance-in-Africa-African-Agency-and-Transnational-Initiatives-to-Advance-Developmental-States.pdf accessed 17/07/2016

Tim Shaw, *Post -2015 Natural Resource Governance in Africa: African Agency and Transnational Initiatives to Advance Developmental States;* Massachussetts, Boston available at http://www.nsi-ins.ca/wp-content/uploads/2014/01/Brief-Shaw-Post-2015-Natural-Resource-Governance-in-Africa-African-Agency-and-Transnational-Initiatives-to-Advance-Developmental-States.pdf accessed 17/07/2016

United Nations Human Rights, 'What are Human Rights' available at https://www.ohchr.org/en/issues/pages/whatarehumanrights.aspx#main

Lyons.D., *The Correlativity of Rights and Duties*, Nous, Volume.4, No.1,

Judicial Enforcement of Economic, Social and Cultural Rights, available at https://www.icj.org/wp-content/uploads/2015/07/Universal-Judicial-

Enforcement-ESCR-Geneva-Forum-Series-2-Publications-Conference-Report-2015-ENG.pdf

United Nations Population Fund, *Human Rights Principles*, available at https://www.unfpa.org/resources/human-rights-principles

F.Navarro & T.Vincenzo., *Waste Mismanagement in Developing Countries: A Review of Global Issues,* International Journal of Environmental Research and Public Health, Volume 16, No.6

Te Urewera Act, available at https://www.legislation.govt.nz/act/public/2014/0051/latest/whole.html

Universal Declaration of Human Rights, available at https://www.un.org/sites/un2.un.org/files/udhr.pdf

International Covenant on Civil and Political Rights https://www.ohchr.org/documents/professionalinterest/ccpr.pdf

International Covenant on Economic, Social and Cultural Rights, available at https://www.ohchr.org/en/professionalinterest/pages/cescr.aspx

The *Convention Relating to the Status of Refugees*, available at https://www.unhcr.org/1951-refugee-convention.html

The Convention on the Elimination of All Forms of Racial Discrimination, available at https://www.ohchr.org/en/professionalinterest/pages/cerd.aspx

The *Convention on the Elimination of All Forms of Discrimination Against Women*, available at https://www.ohchr.org/documents/professionalinterest/cedaw.pdf

The Convention on the Rights of the Child, available at https://www.ohchr.org/en/professionalinterest/pages/crc.aspx

The *International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families*, available at https://www.ohchr.org/en/professionalinterest/pages/cmw.aspx

The *Convention on the Rights of Persons with Disabilities*, available at https://www.un.org/development/desa/disabilities/convention-on-the-rights-of-persons-with-disabilities.html

The *International Convention for the Protection of All Persons from Enforced Disappearance*, available at https://www.ohchr.org/Documents/ProfessionalInterest/disappearance-convention.pdf

African Charter on Human and Peoples' Rights for Africa, available at https://www.ohchr.org/Documents/ProfessionalInterest/disappearance-convention.pdf

Burden-sharing as a Sustainable Tool to alleviate the Global Plight of Refugees

By: ***Leah Aoko****

Abstract

This paper examines the plight of refugees in the absence of a workable implementation mechanism on burden sharing as an easement tool for developing countries. It argues that this core concept is conspicuously missing in many key legal frameworks on refugees and should be thus included for proper implementation. This paper is divided into four parts.

Part One of this paper explores the current plight of refugees globally.

Part Two briefly discusses conceptual framework of burden sharing.

Part Three ventures into analyzing the International and Regional Framework or lack thereof of Burden sharing.

Part Four provides recommendations on how burden sharing can be implemented in order to alleviate economically burdened states.

Key Words: Refugees, Burden Sharing, UNHCR, Asylum, Proportionate, Developed Countries, Host Countries

I. Introduction

As of 2020, there were over 82.4 million refugees globally.[1] These are populations that have been forced to escape their resident countries due to conflict which often results into grave human rights violations.[2] Many of the refugees flee to neighboring developing countries for safety. Approximately

[*] ***The Author is a University of Nairobi graduate: Bachelor of Laws LLB Hons, Pg-diploma, KSL, Advocate of the High Court, (LLM Candidate, UoN) and a UNITAR Scholar.***

[1] Global Trends Forced Displacement in 2020, UNHCR Report.

[2] Amnesty International, Tackling the Global Refugee Crisis: From Shirking to Sharing Responsibility, 4 October 2016, available at: http://www.refworld.org/docid/57f3d8f94.html accessed 16/8/2021.

86% of the current number of refugees reside in least developed states.[3] In Africa, as of 2020, Uganda had the highest number of refugees with a growing figure of over 1.4 million refugees. Sudan is the second highest refugee hosting country with a figure of over 1 million refugees. Other developing countries with an increasing number of refugee population in Africa include: Ethiopia, DR Congo, Chad, Kenya, Cameroon, South Sudan, Niger and Tanzania.[4]

While this is the dire situation in most developing countries, many developed states are minimally affected. They take in a restricted number of refugees into their fiercely guarded borders. For instance, the UK has accepted approximately 132,349 refugees as at 2020 with 77, 245 pending asylum cases by the same year.[5]. In 2020, US only welcomed 11, 814 refugees, a significant drop of up to 86% from the previous admissions running as far back to 2016.[6] This is negligible in comparison to 740,000 refugees in states like Ethiopia or the growing numbers in Kenya.[7]

This paper examines burden sharing as a potentially successful mechanism for addressing such situations facing developing countries that experience a mass influx of refugees.[8]

II. Burden Sharing as A Sustainable Tool for Alleviating the Plight of Refugees

Burden Sharing refers to taking proportional responsibility for refugees according to one's resources and socio-economic capabilities or assisting

[3]https://www.unhcr.org/refugee-statistics/ accessed 16/8/2021.
[4]https://www.statista.com/statistics/1232812/african-countries-hosting-most-refugees/ accessed 16/8/2021.
[5] https://www.unhcr.org/uk/asylum-in-the-uk.html accessed 7/9/2021.
[6] https://www.hrw.org/news/2020/10/21/us-australia-hit-new-lows-refugee-resettlement accessed 7/9/2021.
[7] Ibid (n3).
[8] Martin G, 'International Solidarity and Co-Operation in Assistance to African Refugees: Burden-Sharing or Burden-Shifting.' (1995) 7(Special Issue) Int'l J Refugee L 250.

other states to cater for their refugee population. [9]The term in this context refers to situations where developing countries experience mass influx of refugees.[10] This concept posits that the burden of hosting refugees should be equitably distributed amongst states and thus relieving developing nations of the difficulties faced in providing adequately for refugees.[11]

Burden sharing acknowledges that granting asylum may create difficulties for some states. Industrialized countries are occasionally called upon to voluntarily accept into admittance refugees according to a certain quota based on the population of the country and the Gross Domestic Product. [12] This is in contrast to the larger refugee populations that developing countries accept within their borders.

Burden sharing recognizes the effects of refugee migration into host countries and as such include aspects such as: economic, environmental, socio-political as well as matters pertaining to peace and security.[13]

a) *Economic*: The presence of large refugee populations often leads to substantial demands on food, energy, transportation, employment and public services such as education, health and water facilities. The financial costs have to be viewed in the context of structural adjustment programs being carried out simultaneously in many of the developing countries such as Kenya. The refugee camps need to be set up and maintained even in the face already dire economic situations.

[9] Kathleen Newland, Cooperative Arrangements to Share Burdens and Responsibilities in Refugee Situations short of Mass Influx UNHCR Migration Policy Institute, 2011

[10]http://www.migrationpolicy.org/article/burden-sharing-new-age-immigration. accessed 14/8/2021.

[11] Grahl-Madsen, *"Plan for distributing asylum seekers,"* Nordisk Tidskrift for International Ref 35 (1965) p.175 ff.

[12] Robinson W, 'The Comprehensive Plan of Actions for Indochinese Refugees, 1989-1997: Sharing the Burden and Passing the Buck.' (2004) 17(3) J Refugee Stud 319.

[13] Ibid n 10.

b) *Environmental*: An increase in refugee populations usually leads to serious, uncontrolled environmental imbalances which can affect entire eco-systems. Refugees also often create an unexpected and massive demand for scarce natural resources such as land, fuel, water, food and shelter materials, with long-term implications for their sustainable regeneration.[14]

c) *Social-political*: The impact is notably felt when refugees are from different cultural, ethnic, religious, or linguistic groups from the host population, leading to an exacerbation of social tensions. Most of these are thus looked down upon as 2nd class citizens undeserving of government services.

d) *Peace and security*: The presence of large refugee populations can have serious implications for internal security, particularly in situations where the ratio of these populations to the local populations is high. For example, in Kenya, the unprecedented increase in terrorist attacks has cast more suspicion on the refugees in various camps. [15]

In Africa, there has been massive inter-country influx of refugees. This large population has been a result of the prevalent civil conflicts in the immediate postcolonial period. Political instability has also proved a major driving force for the increase in the number of refugees. Countries such as Ethiopia have an open-door policy in its reception of refugees and thus have easily become overwhelmed socio economically as it also struggles to provide adequately for its population.[16]

Unfortunately, the concept of burden sharing does not constitute binding obligations on states. Essentially, the duty under international law to engage

[14] https://www.iom.int/jahia/webdav/site/myjahiasite/shared/shared/mainsite/policy_and_research/rcp/APC/2000-Discussion-Paper-UNHCR-submission-5th-plenary.pdf. accessed 16/8/2021.
[15] https://www.chathamhouse.org/sites/files/chathamhouse/field/field_document/2014Somali%20Refugees%20in%20Kenya.pdf. Accessed 16/8/2021.
[16] UNHCR Ethiopia 2020-2021 Country Refugee Response Plan.

in burden sharing is nonexistent.[17] Any activities undertaken in this regard are purely discretional. As a result, developing countries are usually left to a large extent to bear the brunt of hosting refugees admitted into their territories. Contextually, the non-codification of the burden sharing concept under international law relating to refugees has had a huge bearing in the current crisis of overflow of refugees.[18]

III. International and Regional Legal Framework on Refugees

i. International Legal Framework on Refugees.

The major reigning international convention on refugee law is the 1951 Convention relating to the Status of Refugees [19] and its 1967 Optional Protocol relating to the Status of Refugees.[20] Both were drafted in the wake of the Second World War. The 1951 Convention establishes the definition of a refugee as well as the principle of non-refoulement and the rights afforded to those granted refugee status.[21]

Burden sharing is alluded to in the Preamble of the 1951 Convention Relating to the Status of Refugees which affirms that the UN endeavors to assure refugees the widest possible exercise of fundamental rights and freedoms considering that the grant of asylum may place unduly heavy burdens on certain countries and this requires international cooperation to tackle.

[17] Hathaway, James C. and Alexander Neve, "Making International Refugee Law Relevant Again: A proposal for collectivized and solution-oriented protection." *Harvard Human Rights Journal* (1997) 10:115-211.

[18]Göran Melander, *The International Migration Review*, Vol. 15, No. 1/2, Refugees Today (Spring - Summer, 1981), pp. 35-41.

[19] UN General Assembly, *Convention Relating to the Status of Refugees*, 28 July 1951, United Nations, Treaty Series, vol. 189, p. 137, available at: https://www.refworld.org/docid/3be01b964.html [accessed 16 August 2021]

[20] UN General Assembly, *Protocol Relating to the Status of Refugees*, 31 January 1967, United Nations, Treaty Series, vol. 606, p. 267, available at: https://www.refworld.org/docid/3ae6b3ae4.html [accessed 16 August 2021]

[21]Ibid n15.

The Protocol relating to the Status of Refugees was opened for signature on 31st January 1967[22], thus doing away with the gaping limitations of the "refugee" definition in the 1951 Convention.[23]

The year 1967 also saw the adoption of the Declaration on Territorial Asylum by the General Assembly of the United Nations.[24] The Declaration gives expression to the notion of international solidarity in the solution of refugee problems and restates the rule of non-refoulement as a general principle, to be respected by all States. Additionally, under the human rights regime, article 14(1) of the UDHR,[25] guarantees individuals the right to seek and enjoy asylum in other countries.

In the above major refugee conventions, burden sharing has not been explicitly explored as a tool for alleviating the plight of refugees. This is despite the obvious and unique challenges that developing countries face in catering for refugees compared to their developed countries counterparts.

ii. The New York Declaration 2016

In a more deliberate and recent attempt to highlight the need for burden sharing, states participated in the making of the UN New York declaration 2016. It was unanimously adopted on September 19th 2016.

According to the UN High Commissioner for Refugees, Fillipo Grandi, the New York Declaration represents significant political commitment that seeks to fill in the burden sharing gap in the international protection of refugees.[26] It deals with both refugees and immigrants. This step came in the

[22]Grahl-Madsen, "International Refugee Law Today and Tomorrow." *Archiv Des Völkerrechts*, vol. 20, no. 4, 1982, pp. 411–467. *JSTOR*, JSTOR, www.jstor.org/stable/40798007.

[23] Ibid n 16.

[24] UN General Assembly, *Declaration on Territorial Asylum*, 14 December 1967, A/RES/2312(XXII), available at: https://www.refworld.org/docid/3b00f05a2c.html [accessed 16 August 2021]

[25]UN General Assembly, *Universal Declaration of Human Rights*, 10 December 1948, 217 A (III), available at: http://www.refworld.org/docid/3ae6b3712c.html [accessed 21 September 2017].

[26] https://www.unhcr.org/new-york-declaration-for-refugees-and-migrants.html accessed 7/9/2021.

wake of several people reported to be dying at western borders or capsizing in boats in a bid to reach peaceful borders. The West has been notorious for reinforcing its borders against refugees in a move that is ascribed to general social phobia within local communities.[27]

The New York declaration has thus paved the way for states to fully respect the human rights of refugees and immigrants.[28] In the celebrated document, it is further agreed that protecting refugees and supporting countries that shelter them are shared international responsibilities and must be borne equitably and predictably. In expressing their commitment, countries pledged robust support to those states which are affected by large movements of refugees across their borders.

The Declaration contains 4 key objectives of a Comprehensive Refugee Response Framework which are:

1. To ease the pressure of host countries and communities. This will also reduce conflict between the refugees and locals over scarcely available resources.
2. Enhance refugee self-reliance by absorbing them into the country's economy.
3. Expanding 3rd country solutions. Adopting different approaches in tackling influxes of refugees into developing countries.
4. Supporting conditions in countries of origin for return in safety and dignity. This deals with the root cause of displacement and seeks to also facilitate smooth and voluntary refugee repatriation.[29]

[27] Cuttitta, P. & Last, T. Border Deaths: Causes, Dynamics and Consequences of Migration-Related Mortality. Amsterdam: Amsterdam University Press, 2020.
[28] UN General Assembly, *New York Declaration for Refugees and Migrants: resolution / adopted by the General Assembly*, 3 October 2016, A/RES/71/1, available at: https://www.refworld.org/docid/57ceb74a4.html [accessed 16 August 2021]
[29] V Turk and M Garlick, 'From Burdens and Responsibilities to Opportunities: The Comprehensive Refugee Response Framework and a Global Compact on Refugees' 28 International Journal of Refugee Law 656 (2016).

The New York Declaration is a sure step in the right direction with regard to formulating a concrete and global burden sharing mechanism

iii. Regional Human Rights Regime on Refugees

Regional human rights instruments have also placed emphasis on the right to seek and be granted asylum in a foreign territory, in accordance with the legislation of the state and international conventions. Such instruments include: The American Convention on Human Rights[30] and the Banjul Charter.[31]

In the African context, the Organization of African Unity adopted an OAU Convention governing the Specific Aspects of Refugee Problems in Africa in 1969.[32] Two of the renown regional frameworks on refugees are briefly explored below:

a. The 1969 OAU Convention Governing the Specific aspects of Refugee Problem in Africa.

Under this instrument, where a Member State finds difficulty in continuing to grant asylum to refugees, such a Member State may appeal directly to other Member States and through the OAU, and such other Member States shall in the spirit of African solidarity and international cooperation take appropriate measures to lighten the burden of the Member State granting asylum.[33]

b. 1987 Addendum to the 1966 Bangkok Principles Concerning the Treatment of Refugees

The concept of burden sharing was included in Paragraph III of the Bangkok Principles Concerning the Treatment of Refugees, adopted by the Asian-

[30] Article 22(7).
[31] Article 12(3).
[32] Organization of African Unity (OAU), Convention Governing the Specific Aspects of Refugee Problems in Africa ("OAU Convention"), 10 September 1969, 1001 U.N.T.S. 45, available at: https://www.refworld.org/docid/3ae6b36018.html [accessed 16 August 2021].
[33] Article II (4).

African Legal Consultative Committee (AALCC).[34] It verily provides that the principle of international solidarity and burden-sharing should be seen as applying to all aspects of the refugee situation, including the development and strengthening of standards of treatment of refugees, support to States in protecting and assisting refugees, the provision of durable solutions and the support of International bodies with responsibilities for the protection and assistance of refugees.

There are various bodies of law that are geared towards addressing refugees' concerns. However, there is a gap in the consolidation of the concept of burden sharing mainly because it is challenging to get developed countries to unwaveringly support the plight of refugees in developed countries. Socio economic concerns as well as political interplay have contributed much to the restrictionist principles adopted by western countries.

IV. Recommendations and Conclusion

The concept of burden sharing is one that has been lightly voiced since the inception of the UNHCR. It has to be recognized that the scope and nature of this concept cannot be achieved without international cooperation.

The adoption of the New York Declaration for Refugees and Immigrants in 2016 has been the most recent milestone in committing states to an equitable sharing of the burden and responsibility of hosting refugees.

Unfortunately, burden sharing is highly politicized within the international regime governing refugees. It is most difficult to achieve owing to claims of state sovereignty and social phobia in conservative environments. This notwithstanding, it is one whose adoption and implementation cannot be dispensed with in view of the growing refugee population globally.

It is obvious that a solid practical regime on state responsibility concerning refugees is missing within the International and Regional framework and that

[34] Asian-African Legal Consultative Organization (AALCO), *Bangkok Principles on the Status and Treatment of Refugees ("Bangkok Principles")*, 31 December 1966, available at: https://www.refworld.org/docid/3de5f2d52.html [accessed 16 August 2021].

this has brought about immense confusion on how to handle refugees. The results have been dire, with hundreds losing their lives and thousands living in deplorable conditions within camps in developing countries.

There in need for a more sustainable plan in handling refugee affairs in developing countries through a workable burden sharing regime. This includes sustainable structural and financial support from developed countries to alleviate the plight of refugees in developing countries.

Ultimately, the success of such a regime is highly dependent on international political good will and the commitment of states to alleviating the plight of refugees.

References

Amnesty International, Tackling the Global Refugee Crisis: From Shirking to Sharing Responsibility, 4 October 2016, available at: http://www.refworld.org/docid/57f3d8f94.html accessed 16/8/2021.

Asian-African Legal Consultative Organization (AALCO), Bangkok Principles on the Status and Treatment of Refugees ("Bangkok Principles"), 31 December 1966, available at: https://www.refworld.org/docid/3de5f2d52.html [accessed 16 August 2021]

Cuttitta, P. & Last, T. Border Deaths: Causes, Dynamics and Consequences of Migration-Related Mortality. Amsterdam: Amsterdam University Press, 2020.

Göran Melander, The International Migration Review, Vol. 15, No. 1/2, Refugees Today (Spring - Summer, 1981), pp. 35-41.

Grahl-Madsen, "International Refugee Law Today and Tomorrow." Archiv Des Völkerrechts, vol. 20, no. 4, 1982, pp. 411–467. JSTOR, JSTOR, www.jstor.org/stable/40798007.

Grahl-Madsen, "Plan for distributing asylum seekers," Nordisk Tidskrift for International Ref 35 (1965) p.175 ff.

Hathaway, James C. and Alexander Neve, "Making International Refugee Law Relevant Again: A proposal for collectivized and solution-oriented protection." Harvard Human Rights Journal (1997) 10:115-211.

Kathleen Newland, Cooperative Arrangements to Share Burdens and Responsibilities in Refugee Situations short of Mass Influx UNHCR Migration Policy Institute, 2011

Martin G, 'International Solidarity and Co-Operation in Assistance to African Refugees: Burden-Sharing or Burden-Shifting.' (1995) 7(Special Issue) Int'l J Refugee L 250.

Organization of African Unity (OAU), Convention Governing the Specific Aspects of Refugee Problems in Africa ("OAU Convention"), 10 September 1969, 1001 U.N.T.S. 45, available at:

https://www.refworld.org/docid/3ae6b36018.html [accessed 16 August 2021]

Robinson W, 'The Comprehensive Plan of Actions for Indochinese Refugees, 1989-1997: Sharing the Burden and Passing the Buck.' (2004) 17(3) J Refugee Stud 319.

UN General Assembly, Convention Relating to the Status of Refugees, 28 July 1951, United Nations, Treaty Series, vol. 189, p. 137, available at: https://www.refworld.org/docid/3be01b964.html [accessed 16 August 2021]

UN General Assembly, Declaration on Territorial Asylum, 14 December 1967, A/RES/2312(XXII), available at: https://www.refworld.org/docid/3b00f05a2c.html [accessed 16 August 2021]

UN General Assembly, New York Declaration for Refugees and Migrants: resolution / adopted by the General Assembly, 3 October 2016, A/RES/71/1, available at: https://www.refworld.org/docid/57ceb74a4.html [accessed 16 August 2021]

UN General Assembly, Protocol Relating to the Status of Refugees, 31 January 1967, United Nations, Treaty Series, vol. 606, p. 267, available at: https://www.refworld.org/docid/3ae6b3ae4.html [accessed 16 August 2021]

UN General Assembly, Universal Declaration of Human Rights, 10 December 1948, 217 A (III), available at: http://www.refworld.org/docid/3ae6b3712c.html [accessed 21 September 2017].

UNHCR Ethiopia 2020-2021 Country Refugee Response Plan.

V Turk and M Garlick, 'From Burdens and Responsibilities to Opportunities: The Comprehensive Refugee Response Framework and a Global Compact on Refugees' 28 International Journal of Refugee Law 656 (2016).

Online Links accessed

https://www.statista.com/statistics/1232812/african-countries-hosting-most-refugees/ accessed 16/8/2021.

https://www.unhcr.org/refugee-statistics/ accessed 16/8/2021.

https://www.chathamhouse.org/sites/files/chathamhouse/field/field_document/2014Somali%20Refugees%20in%20Kenya.pdf. accessed 16/8/2021.

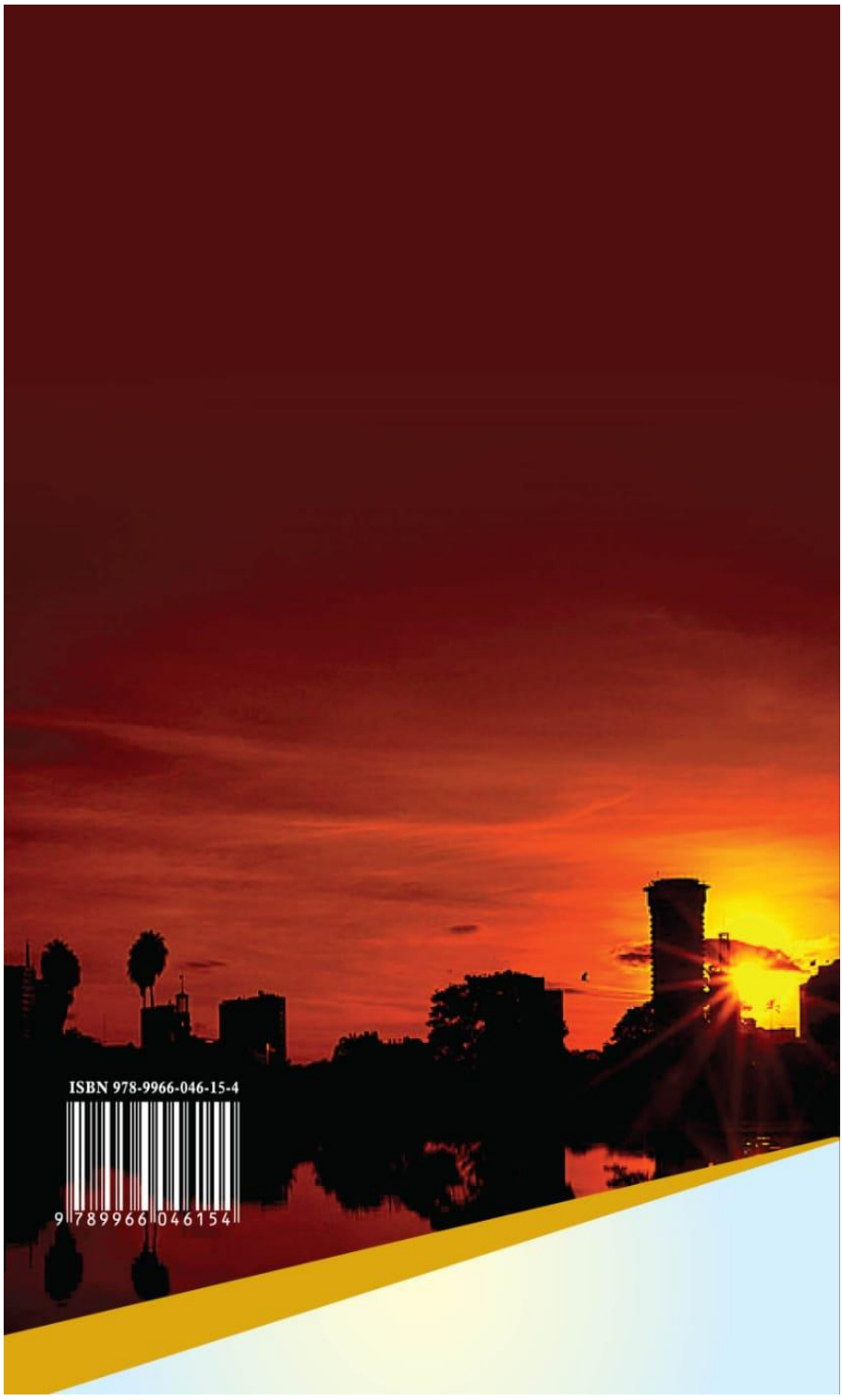
https://www.iom.int/jahia/webdav/site/myjahiasite/shared/shared/mainsite/policy_and_research/rcp/APC/2000-Discussion-Paper-UNHCR-submission-5th-plenary.pdf. accessed 16/8/2021.

http://www.migrationpolicy.org/article/burden-sharing-new-age-immigration accessed 16/8/2021.

https://www.unhcr.org/new-york-declaration-for-refugees-and-migrants.html accessed 7/9/2021.

https://www.unhcr.org/uk/asylum-in-the-uk.html accessed 7/9/2021.

https://www.hrw.org/news/2020/10/21/us-australia-hit-new-lows-refugee-resettlement accessed 7/9/2021.



ISBN 978-9966-046-15-4