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Editor's Note, Volume 8, No. 4

Welcome to the latest issue of the *Journal of Conflict Management and Sustainable Development*, Volume 8, No.4. This is the fourth issue of the Journal in the year 2022 demonstrating our commitment towards spearheading scholarly discourse on the themes of Conflict Management and Sustainable Development.

Since it was launched, the Journal has continued to grow as a key academic resource in the fields of Conflict Management, Sustainable Development and related fields of knowledge. It focuses on emerging and pertinent areas and challenges in these fields and proposes necessary legal, institutional and policy reforms towards addressing these issues. The Journal is now one of the most cited and authoritative publications in the fields of Conflict Management and Sustainable Development.

We are committed to ensuring that the Journal adheres to the highest quality of scholarly standards and credibility of information. To this extent, the Journal is peer reviewed and referred.

This volume covers relevant topics and themes on Conflict Management and Sustainable Development which are: *Transitioning from Fossil Fuel-Based Transport to Clean Energy Vehicles in Africa: Challenges and Prospects; Civilian Protection in War; An Insurmountable Task? Prohibited & Legally Permissible Conduct During Hostilities; Investment Treaties and The Arbitrability of Illegal Contracts: A Review of the Arbitral Award World Duty Free Company Limited Versus the Republic of Kenya; Charting a New Path for Environmental Management and Conservation in Kenya; The Law and Emerging Jurisprudence on the Jurisdiction of Political Parties Dispute Tribunal (PPDT) of Kenya; An Analysis of the Right of Refugees to Access Public and Private Services in Kenya; Managing Water Scarcity in Kajiado County; Military Siege: A Contemporary Analysis of its Effects on Civilian Protection During Armed Conflict and Accountability – The Bloodline of Universal Health Coverage.*

I wish to thank the contributing authors, Editorial Team, reviewers and all those who have made it possible to continue publishing this Journal whose impact has been acknowledged both in Kenya and across the globe.

The Editorial team welcomes feedback from our audience across the world to enable us continue improving the Journal and align it to current trends in academia and specifically in the fields of Conflict Management and Sustainable Development.

The Journal adopts an open publication policy and does not discriminate against authors on any grounds. We thus encourage submission of papers from all persons including professionals, students, policy makers and the public at large. These submissions should be channeled to editor@journalofcmsd.net and copied to admin@kmco.co.ke.

The Journal can be accessed on https://journalofcmsd.net.

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Editor, Nairobi,
June, 2022.

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He has experience in over 60 Arbitrations and Mediations, as arbitrator, Mediator and Party Representative. He has published a book, Commercial and Investment Arbitration: An African Perspective; and over 20 Articles on

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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.
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Transitioning from Fossil Fuel-Based Transport to Clean Energy Vehicles in Africa: Challenges and Prospects

By: ***Kariuki Muigua****

Abstract

Sustainable Development Goal 7 captures the commitments of nations in moving the world towards cleaner energy technologies. One of the greatest threats to this transition, however, is the transport sector especially in Africa which contributes a lot to air pollution as it still relies heavily on fossil fuel which contribute heavily to greenhouse gas emissions. This paper argues that if Africa is to keep up with the rest of the world in this transition, then it is the high time that it invested in electric vehicles in order to address the challenge of fossil fuel pollution sources.

1. Introduction

According to the current trends, the global number of light-duty cars will roughly double by midcentury, owing to increased prosperity, and demand for freight transportation (road, rail, sea, and air) as well as passenger aviation will also increase.[1] It has been argued that the transport sector has the potential to create an enabling environment for Africa's economic progress.[2] The downside to this is that in Africa, road transport emissions will continue to rise significantly as governments attempt to improve their road infrastructure networks for commercial activity, meeting the demands

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[1] Creutzig, F., Jochem, P., Edelenbosch, O.Y., Mattauch, L., van Vuuren, D.P., McCollum, D. and Minx, J., 'Transport: A Roadblock to Climate Change Mitigation?' *Science* 350, no. 6263 (2015): 911-912, at 911.

[2] 'Transforming Africa's Transport Sector with the Implementation of Intended Nationally Determined Contributions' 1 <https://repository.uneca.org/handle/10855/23728> accessed 2 February 2022.

of a growing population and a growing middle class.[3] According to studies, mortality rates from outdoor air pollution in Africa have climbed by 57 percent over the last three decades, with pollution from motor vehicles accounting for at least 85 percent of the continent's vehicle fleet, some of which are antiquated and utilise outdated technologies.[4]

Notably, the Paris Agreement urges countries to increase their mitigation ambition in their Nationally Determined Contributions (NDCs) by reviewing and assessing their ambition and developing long-term low-carbon development policies.[5]

Climate change mitigation requires a shift in production and consumption patterns in order to embrace more sustainable ways.[6] Notably, transportation is one of the main sectors that plays a critical role in attaining poverty eradication and sustainable development goals, as it is closely linked to and influences the development of other sectors of the economy.[7] It is against this background that this paper discusses the challenges and prospects of Africa moving towards adopting low or no emissions transport infrastructure.

2. Fossil Fuel-Based Transport and Climate Change: The Connection

SDG 7 states that increased use of fossil fuels without actions to mitigate greenhouse gases will have global climate change implications. Energy

[3] Ibid, 2.

[4] Ayetor, G. K., Innocent Mbonigaba, M. N. Sackey, and P. Y. Andoh. "Vehicle regulations in Africa: Impact on used vehicle import and new vehicle sales." *Transportation Research Interdisciplinary Perspectives* 10 (2021): 100384.

[5] 'Road Transport • The Road towards Low Carbon Mobility' <https://www.climate-chance.org/en/card/road-towards-low-carbon-mobility/> accessed 2 February 2022.

[6] Weijnen MP, Lukszo Z and Farahani S, 'Shaping an Inclusive Energy Transition' (Springer Nature, 2021).

[7] "United Nations. Economic Commission for Africa.; United Nations. Economic and Social Council (2009-08). Africa review report on transport: a summary. UN. ECA Committee on Food Security and Sustainable Development (CFSSD)/Regional Implementation Meeting (RIM) for CSD-18 (6th session: 2009, Oct. 27-30: Addis Ababa, Ethiopia).

efficiency and increased use of renewables contribute to climate change mitigation and disaster risk reduction.[8]

Vehicle emissions are a major source of tiny particles and nitrogen oxides, both of which contribute to urban air pollution, and cars account for 25% of all energy-related greenhouse gas emissions globally.[9] Poor fuel quality, an aging vehicle fleet, and a lack of mandatory roadworthy emission tests are all contributing to Africa's rising greenhouse gas emissions, which are expanding at a rate of 7% per year.[10]

The global road transport carbon emissions have increased since 2000 as a result of a complex combination of human behavior, economic growth, public policy, and transportation legislation.[11] In many African cities and most African countries, the transportation sector is the leading source of urban air pollution and energy-related greenhouse gas emissions.[12] Millions of secondhand cars, vans, and minibuses transported from Europe, the United States, and Japan to low- and middle-income nations are hampering efforts to mitigate climate change, according to a UNEP report released in 2020. They pollute the air and are frequently engaged in car accidents. Many

[8] Environment UN, 'GOAL 7: Affordable and Clean Energy' (*UNEP - UN Environment Programme*, 2 October 2017) <http://www.unep.org/explore-topics/sustainable-development-goals/why-do-sustainable-development-goals-matter/goal-7> accessed 3 February 2022.

[9] 'Used Vehicles Get a Second Life in Africa – but at What Cost? ' (*UNEP*, 26 October 2020) <http://www.unep.org/news-and-stories/story/used-vehicles-get-second-life-africa-what-cost> accessed 3 February 2022.

[10] Ayetor GK and others, 'Investigating the State of Road Vehicle Emissions in Africa: A Case Study of Ghana and Rwanda' (2021) 11 Transportation Research Interdisciplinary Perspectives 100409.

[11] 'Road Transport • The Road towards Low Carbon Mobility' <https://www.climate-chance.org/en/card/road-towards-low-carbon-mobility/> accessed 2 February 2022.

[12] 'African Countries Move toward Cleaner Car Imports' (*Climate & Clean Air Coalition*) <https://www.ccacoalition.org/en/news/african-countries-move-toward-cleaner-car-imports> accessed 2 February 2022.

are of poor quality and would fail roadworthiness tests in exporting countries.[13]

Globally, the transportation industry is anticipated to be responsible for roughly 23% of total energy-related carbon dioxide emissions, with the sector developing at a faster rate than most others with emissions expected to double by 2050. [14] Most African countries rely on used and old automobiles that are mainly outdated in technology, harming the environment significantly, especially when using contaminated fuel.[15]

Electric vehicles, on the other hand, are rapidly growing in popularity among the countries that export the most used automobiles.[16] For example, Europe, which primarily exports cars to West and North Africa, has announced internal combustion engine phase-out targets, and a stronger electrification push is expected across Europe to meet its net zero 2050 goal and stronger new 2030 carbon target, while Japan, the largest exporter of used cars to Mozambique and other right-hand-drive countries in Eastern and Southern Africa, has set a 2035 phase-out date for internal combustion engine cars.[17]

While countries across Africa, South Asia, and Latin America are now aware of the consequences of used vehicles and are erecting import barriers to contain them, an outright ban on used vehicle import is not possible in many African countries due to growing consumer demand for cheap used cars,

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[13] Environment UN, 'Global Trade in Used Vehicles Report' (*UNEP - UN Environment Programme*, 23 October 2020) <http://www.unep.org/resources/report/global-trade-used-vehicles-report> accessed 2 February 2022.

[14] Creutzig, F., Jochem, P., Edelenbosch, O.Y., Mattauch, L., van Vuuren, D.P., McCollum, D. and Minx, J., 'Transport: A Roadblock to Climate Change Mitigation? ' *Science* 350, no. 6263 (2015): 911-912.

[15] Ayetor G and others, 'Vehicle Regulations in Africa: Impact on Used Vehicle Import and New Vehicle Sales' (2021) 10 Transportation Research Interdisciplinary Perspectives 100384.

[16] 'Africa's Bumpy Road to an Electric Vehicle Future' (*E3G*, 6 January 2021) <https://www.e3g.org/news/africa-s-bumpy-road-to-an-electric-vehicle-future/> accessed 2 February 2022.

[17] Ibid.

making it difficult for governments to prohibit the import of old cars or impose improved emissions standards even after adopting cleaner fuels.[18] Addressing carbon emissions from the transport industry through adoption of cleaner technologies is one of the steps towards tackling climate change.

3. Transport Sector in Kenya

According to studies, Kenya's transportation sector contributes for 8.3% of the country's total GDP.[19] Because of Kenya's role as a trans-shipment hub for goods moving on to landlocked countries in East and Central Africa, with the Port of Mombasa serving as a critical landing point for goods, and links to the Northern Corridor that runs west across the country to the neighboring markets of Uganda, Rwanda, Burundi, and the Democratic Republic of Congo, transportation and logistics are at the heart of Kenya's economic narrative.[20] Furthermore, the road sub-sector accounts for over 80% of passenger traffic and 76 percent of freight, with Kenya's road network estimated to be 160,886 kilometers long, of which 61,945 kilometers are classified, and used by over 740,000 vehicles with a 6% annual traffic growth rate.[21]

The downside is that Kenya's transportation sector is the country's largest consumer of petroleum products and thus a major contributor to GHG emissions, accounting for roughly 67 percent of Kenya's energy-related CO2 emissions and 11.3 percent of total GHG emissions in 2015 for fuel

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[18] 'Consumer Demand Doesn't Let Countries Ban Import of Cheap Used Cars' <https://www.downtoearth.org.in/news/governance/consumer-demand-doesn-t-let-countries-ban-import-of-cheap-used-cars-62135> accessed 2 February 2022.

[19] 'Transport in Kenya's Nationally Determined Contribution' (Changing Transport) 1 <*https://changing-transport.org/publication/transport-in-kenyas-nationally-determined-contribution/*> accessed 26 January 2022.

[20] 'Transport' (Oxford Business Group, 21 May 2017) <*https://oxfordbusinessgroup.com/kenya-2017/transport*> accessed 26 January 2022.

[21] Christopher Onyango, 'Kenya's Transport Sector: Measuring Its Value Chains and Exploiting Its Potential, Mr. Christopher Onyango, KIPPRA' (2019) 4 <*https://unctad.org/system/files/non-official-document/aldc2019_kenya_servicestrade_Onyango_KIPPRA_en.pdf*> accessed 26 January 2022.

consumption in civil aviation, road transport, and rail.[22] This may have a negative impact on Kenya's contribution to the Paris Agreement's goal of keeping global warming well below 2 degrees Celsius compared to pre-industrial times.[23]

Kenya is ranked among the African countries with the highest numbers of imported cars as shown below, as at 2019.

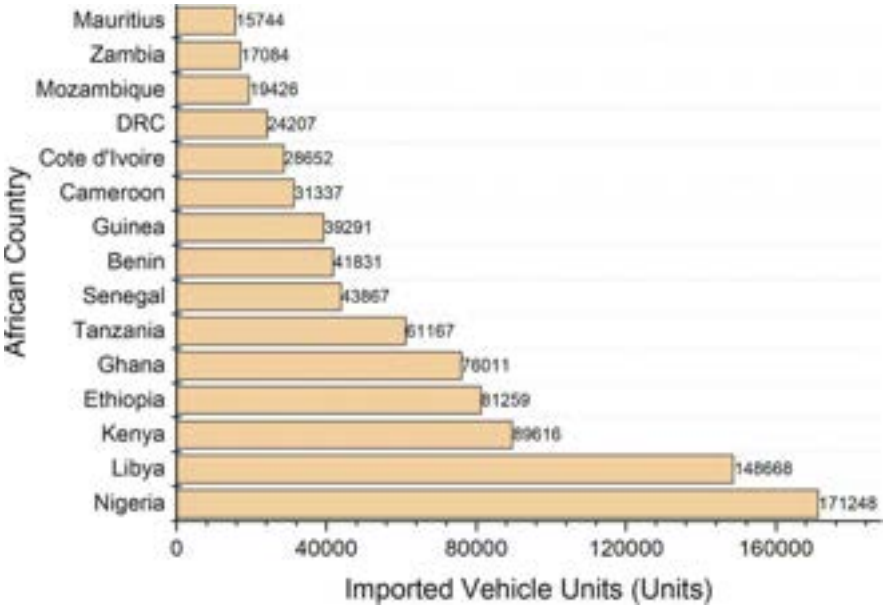

Fig. 1. Number of used vehicle units imported to some African countries in 2019.[24]

[22] 'Transport in Kenya's Nationally Determined Contribution' (Changing Transport) 4 <*https://changing-transport.org/publication/transport-in-kenyas-nationally-determined-contribution/*> accessed 26 January 2022.

[23] Ibid.

[24] Ayetor GK and others, 'Vehicle Regulations in Africa: Impact on Used Vehicle Import and New Vehicle Sales' (2021) 10 Transportation Research Interdisciplinary Perspectives 100384.
< *https://ars.els-cdn.com/content/image/1-s2.0-S2590198221000919-gr5_lrg.jpg*> accessed 27 January 2022.

Kenya's system, thus, requires a transition to more sustainable forms more than ever.

4. Development of Clean Energy Vehicle Technologies: Challenges and Prospects

With the Kigali Amendment to the Montreal Protocol on Substances that Deplete the Ozone Layer, which entered into force on January 1, 2019, the world took an important step toward drastically reducing the production and consumption of powerful greenhouse gasses known as hydrofluorocarbons (HFCs) and limiting global warming.[25]

Only four African countries—Egypt, Morocco, South Africa, and Sudan—have banned the import of old vehicles, with another 25 imposing age limitations ranging from 15 to three years.[26] Several countries are combining age restrictions with tax measures to raise the cost of importing older vehicles, such as Kenya, which, in addition to limiting the age to eight years, has levied an added tax on older vehicles, raising the whole cost.[27]

The used car market has also hampered the development of a dependable manufacturing industry, with African governments failing to persuade manufacturers to invest in assembly plants, owing to a lack of suppliers, distributors, and component makers, as well as a lack of new vehicle demand.[28]

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[25] 'World Takes a Stand against Powerful Greenhouse Gases with Implementation of Kigali Amendment' (UN Environment, 3 January 2019) <http://www.unep.org/news-and-stories/press-release/world-takes-stand-against-powerful-greenhouse-gases-implementation> accessed 27 January 2022.

[26] 'Consumer Demand Doesn't Let Countries Ban Import of Cheap Used Cars' <https://www.downtoearth.org.in/news/governance/consumer-demand-doesn-t-let-countries-ban-import-of-cheap-used-cars-62135> accessed 2 February 2022.

[27] Ibid.

[28] Alison, 'Are Africa's Used Car Import Bans Effective?' (*Global Fleet*, 22 June 2021) <https://www.globalfleet.com/en/safety-environment/africa-middle-east/analysis/are-africas-used-car-import-bans-effective> accessed 2 February 2022.

SDG 9 calls for construction of new greener infrastructures, retrofitting or reconfiguring existing infrastructure systems and exploiting the potential of smart technologies which can greatly contribute to the reduction of environmental impacts and disaster risks as well as the construction of resilience and the increase of efficiency in the use of natural resources.[29]

Target 9.a thereof seeks to facilitate sustainable and resilient infrastructure development in developing countries through enhanced financial, technological and technical support to African countries, least developed countries, landlocked developing countries and small island developing States. Equally, SDG 17 envisages that stronger partnerships will contribute to environmental protection and sustainable development by mobilizing resources, sharing knowledge, promoting the creation and transfer of environmentally sound technologies, and building capacity.

Countries can build on this to move towards cleaner energy and sustainable transport system.

5. Transitioning from Fossil Fuel-Based Transport to Clean Energy Vehicles in Africa

Reduced emissions in the transportation sector will almost certainly necessitate a move to low-emission vehicles and fuels, with governments taking praiseworthy steps to minimize emissions in the transportation sector through law.[30]

Energy is regarded as Africa's key to development and the foundation for industrialization, with the expansion of renewables going beyond providing reliable energy and climate protection to promoting economic development, which will benefit and create new jobs and opportunities for entire industries,

[29] Environment UN, 'GOAL 9: Industry, Innovation and Infrastructure' (*UNEP - UN Environment Programme*, 2 October 2017) <http://www.unep.org/explore-topics/sustainable-development-goals/why-do-sustainable-development-goals-matter/goal-9> accessed 3 February 2022.

[30] Ayetor GK and others, 'Vehicle Regulations in Africa: Impact on Used Vehicle Import and New Vehicle Sales' (2021) 10 Transportation Research Interdisciplinary Perspectives 100384.

and reliable, sustainable energy will promote the provision of important basic socioeconomic services.[31]

It has been argued that while a 100 percent renewable economy would provide a long-term answer to climate change, energy security, sustainability, and pollution, converting the current transportation infrastructure appears to be one of the more difficult components of such a sustainable transition.[32]

While countries are working on adopting use of electric cars, importing countries, on the other hand, require regional coordination on age limits, fiscal measures, pollution rules, and fuel quality. They also need emissions, roadworthiness, and safety inspections, as well as a standardized methodology for vehicle registration and verification. To avoid dieselization, fuel efficiency efforts must be matched with increased emissions restrictions. Several countries that are building their own manufacturing and assembly capacities and enacting restrictive import restrictions must set pollution and safety regulations, as well as quality control for domestic production.[33]

5.1. Government's Tax Incentives on Electric Cars

The competition between used and new vehicles is primarily driven by price, and African countries' strategies to close the price gap have included banning the importation of used vehicles and encouraging the establishment of

[31] 'The Renewable Energy Transition in Africa: Powering Access, Resilience and Prosperity | Africa Energy Portal' 3 <https://africa-energy-portal.org/reports/renewable-energy-transition-africa-powering-access-resilience-and-prosperity> accessed 14 January 2022.

[32] Antonio García-Olivares, Jordi Solé and Oleg Osychenko, 'Transportation in a 100% Renewable Energy System' (2018) 158 Energy Conversion and Management 266 <https://www.sciencedirect.com/science/article/pii/S0196890417312050> accessed 27 January 2022.

[33] 'Consumer Demand Doesn't Let Countries Ban Import of Cheap Used Cars' <https://www.downtoearth.org.in/news/governance/consumer-demand-doesn-t-let-countries-ban-import-of-cheap-used-cars-62135> accessed 2 February 2022.

vehicle assembly plants by providing tax breaks and rebates to original equipment manufacturers, resulting in lower new vehicle costs.[34]

If Kenya and Africa in general is to ensure that their citizens embrace zero emissions vehicles, then they must work towards creating tax incentives on the cost of the vehicles. Rwanda's efforts are commendable, as the government approved an electric mobility adaptation strategy in April 2021, with the goal of increasing electric vehicles and motorcycles. The strategy includes a number of incentives for electric vehicles, plug-in hybrid electric vehicles, and hybrid electric vehicles.[35] In order to lower the cost of ownership and maintenance of electric vehicles, the Rwandan cabinet approved a strategy that exempted electric vehicles, spare parts, batteries, and charging station equipment from import and excise duties, as well as a zero-rated Value Added Tax on electric vehicles, spare parts, batteries, and charging station equipment from the ordinary vehicle import taxes of 25% import duty, 18% VAT, and 5% to 15% excise duty.[36]

While Kenya has made some similar efforts, the rate is so slow and the impact so small that it was previously reported that the Kenyan government aims to increase the uptake of electric vehicles in the country over the next five years, with a goal of having 5% of all registered vehicles in Kenya be electric by 2025, and all new public buildings must have charging stations.[37] This is a very low rate of progress considering that it was estimated that as at 2019 the electric vehicle industry in Kenya was still young with only 300 electric vehicles in the country.[38]

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[34] Ayetor GK and others, 'Vehicle Regulations in Africa: Impact on Used Vehicle Import and New Vehicle Sales' (2021) 10 Transportation Research Interdisciplinary Perspectives 100384.

[35] 'Rwanda Unveils New Incentives to Drive Electric Vehicle Uptake' (The New Times | Rwanda, 16 April 2021) <https://www.newtimes.co.rw/news/rwanda-unveils-new-incentives-drive-electric-vehicle-uptake> accessed 26 January 2022.

[36] Ibid.

[37] 'Electric Vehicles to Make up 5% of Registered Vehicles in Kenya by 2025 - Kenyan Wallstreet' (28 October 2020) <https://kenyanwallstreet.com/electric-vehicles-to-make-up-5-of-registered-vehicles-in-kenya-by-2025/> accessed 26 January 2022.

[38] Ibid.

African countries thus need to invest more in encouraging production and uptake of electric vehicles to enable them eventually get rid of internal combustion engine vehicles.

5.2. Adopting and Implementing Vehicles Standards in Africa

It has been observed that the different enforcement and testing regimes of world vehicle standards have made it difficult for Africa to adopt a unified vehicle standard, despite the fact that a unified vehicle standard has become even more necessary with the introduction of the African Continental Free Trade Area (AfCFTA), which should facilitate free vehicle trade across the continent.[39] At the moment, African countries are at various stages of adopting vehicle standards, with the African Organization for Standardization (ARSO) kicking off the development of a regulatory framework for the continent's automotive sector, with the only roadblocks being poor fuel quality, low consumer purchasing power, and a lack of data on used vehicle import.[40] There is also hope as Kenya banned used automobile imports older than eight years old in 2015, Tanzania charges an extra excise duty on used vehicles eight years old or older (counted from the year of production), and the entire East African Community began to apply standardised depreciation rates to these imports.[41]

There is a continuous need for African countries to explore frameworks such as AfCFTA to move the continent towards achieving verifiable vehicle standards.

[39] Ayetor GK and others, 'Vehicle Regulations in Africa: Impact on Used Vehicle Import and New Vehicle Sales' (2021) 10 Transportation Research Interdisciplinary Perspectives 100384.
[40] Ibid.
[41] 'African Countries Move toward Cleaner Car Imports' (*Climate & Clean Air Coalition*) <https://www.ccacoalition.org/en/news/african-countries-move-toward-cleaner-car-imports> accessed 2 February 2022.

5.3. Public-Private Partnerships for Funding, Research and Development and Operation of Electric Vehicles Infrastructure

Notably, worldwide vehicle legislation depends entirely on technology to reduce harmful emissions.[42] It has been correctly stated that the public and private sectors must collaborate openly, and state transportation agencies must remember their true purpose, which is to efficiently and effectively connect a region in a way that is inclusive of all parties who will be reliant on transportation infrastructure.[43] In other countries, such as the United States, the Department of Energy (DOE) collaborates with public and private sector partners to study, develop, and deploy technologies that improve the performance of electric vehicles.[44]

Notably, the construction and operation of a suitable electric vehicle charging infrastructure are prerequisites for the development and sustained operation of electric vehicles, as well as being important strategic measures for promoting a revolution in energy consumption and green development and as such, in order to promote the development of electric vehicles, it may be useful to offer these services to mobilize initiatives by the government and market, where the government may play a leading role in infrastructure construction according to the public–private partnership (PPP) model, to share risks and achieve a win–win situation if the public and private sectors engage in clear communication and reach agreements about how social capital can be guided to participate actively in the provision of public goods and services.[45] Such collaborations are important if the continent is to achieve its dream of transitioning to electric vehicles.

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[42] Ayetor GK and others, 'Vehicle Regulations in Africa: Impact on Used Vehicle Import and New Vehicle Sales' (2021) 10 Transportation Research Interdisciplinary Perspectives 100384.

[43] Callaway M, 'Transport in Kenya: Creating a More Efficient Network through Public-Private Partnerships', 7.

[44] 'Alternative Fuels Data Center: Electric Vehicle Research and Development' <https://afdc.energy.gov/fuels/electricity_research.html> accessed 26 January 2022.

[45] Tong Yang and others, 'Innovative Application of the Public–Private Partnership Model to the Electric Vehicle Charging Infrastructure in China' (2016) 8 Sustainability 738, 738 <https://www.mdpi.com/2071-1050/8/8/738> accessed 27 January 2022.

6. Conclusion

Africa is considered the last frontier in the automotive industry, and it is expected to be the last to transition from fossil fuels to electric vehicles. As a result, it is critical that clean mobility become a priority immediately. [46]

Because of high rates of urbanization and economic growth, the continent is experiencing an unprecedented rate of motorization, and as a result, most countries in the region are unable to plan and provide adequate transportation infrastructure and services, as well as take advantage of technological advancements seen in other regions to improve energy efficiency and reduce vehicle emissions.[47] In the fields of environment and transportation, there is a need for governments, the private sector, civil society, and development to collaborate, as this will allow the continent to develop a set of measures to move to cleaner mobility, based on good practices and case studies from within and outside the region.[48] Notably, SDG 17 provides that achieving the ambitious targets of the 2030 Agenda requires a revitalized and enhanced global partnership that brings together Governments, civil society, the private sector, the United Nations system and other actors, mobilizing all available resources.[49]

With global automobile markets rapidly shifting due to a mix of technological advancements, rapidly falling costs, and technological advancements, the African continent may have an opportunity to adopt electric mobility as a more sustainable means of transportation.[50]

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[46] Ayetor GK and others, 'Investigating the State of Road Vehicle Emissions in Africa: A Case Study of Ghana and Rwanda' (2021) 11 Transportation Research Interdisciplinary Perspectives 100409.

[47] 'Africa Clean Mobility Week' (*UNEP - UN Environment Programme*) <http://www.unep.org/events/conference/africa-clean-mobility-week> accessed 2 February 2022.

[48] Ibid.

[49] Environment UN, 'GOAL 17: Partnerships for the Goals' (*UNEP - UN Environment Programme*, 2 October 2017) <http://www.unep.org/explore-topics/sustainable-development-goals/why-do-sustainable-development-goals-matter/goal-17> accessed 3 February 2022.

[50] 'Africa's Bumpy Road to an Electric Vehicle Future' (*E3G*, 6 January 2021) <https://www.e3g.org/news/africa-s-bumpy-road-to-an-electric-vehicle-future/> accessed 2 February 2022.

Through targeted regulatory reforms, strategic international cooperation and public-private partnerships, Africa is capable of investing and achieving the global dream of transitioning to hybrid and electric vehicles and modes of transport as part of the larger agenda of achieving sustainability in all sectors of economy and combating climate change.

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Civilian Protection in War; An Insurmountable Task? Prohibited & Legally Permissible Conduct During Hostilities

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&

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Abstract

During armed conflict, there are numerous deaths and loss of property to unimaginable levels. However, the people who bear the biggest brunt of war are civilians, despite the fact that they do not take part in active hostilities. This paper seeks to examine the current international legal framework when it comes to the protection of the lives and property of non-combatants. It is the position of this paper that the human life is sacrosanct and should be kept exactly so, hence the need for heightened measures geared towards the protection of such lives.

First and foremost, the paper proffers a conceptual and contextual analysis of armed conflict in general, as well as the requirements put in place in that regard. The paper then goes ahead to discuss the key players in an armed conflict, such as the armed forces, combatants and non-combatants.

Further on, the paper conceptualizes International Humanitarian Law, (IHL), as the basis of civilian protection during armed conflict, in an attempt to justify the protective principle, compounded by the principle of distinction. This is further supported through a key discussion on prohibited acts against civilians, such as use of civilians as human shields, the prohibition against direct attacks, prohibition against indiscriminate attacks among others.

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In order to achieve the ultimate goal of civilian protection during hostilities, the paper also discusses fundamental principles of IHL such as the principle of distinction, the principle of military necessity as well as the proportionality principle. The paper also discusses regulated means of warfare geared towards civilian protection, upon which it will proffer its conclusion.

Introduction

Armed conflict has evolved since the days of introduction and development of International Humanitarian Law (IHL). It was aimed initially at governing and regulating war among states following the Second World War that saw the need to make globalized rules formally and create sanctions to violations of such rules. The causes of armed conflict have also evolved in past years. The leading cause of war among states was conflict over boundaries and control of natural resources. In recent years however, we observe that political interests, identity and economic grievances have been the leading causes of armed conflict.[1]

If the protection of civilians during hostilities is anything to go by, then all the measures laid down within the existing legal framework must be taken into consideration, in order to ensure that the rules of IHL are fully respected by the parties to an armed conflict. These measures must be taken in both wartime and peacetime, and they ensure that: both civilians and the military personnel are familiar with the rules of humanitarian law; the structures, administrative arrangements and personnel required for compliance with the law are in place, and violations of humanitarian law are prevented and punished when they do occur.

The conduct of hostilities throughout the history of warfare has caused and continues to cause atrocious suffering on millions of families and

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

individuals, and massive destruction of property.[2] Both civilians and combatants are killed, wounded, or maimed for life. For example, the Korean War of 1950 to 1953 had 2,730,000 civilian casualties and 793,000 combatant casualties- thrice as many civilian casualties as combatant casualties.

It has long been a central objective of International Humanitarian Law (IHL), therefore, to prohibit unrestricted warfare and to regulate the conduct of hostilities to mitigate, as much as possible, the "calamities of war." This is in line with the St. Petersburg declaration of 1868, which states that:

> *the progress of civilization should have the effect of alleviating as much as possible the calamities of war; and the only legitimate object which States should endeavor to accomplish during war is to weaken the military forces of the enemy.*[3]

In summary, IHL in regulating the conduct of hostilities pursues two basic goals: First, to ensure the protection of the civilian population and civilian objects from the effects of the hostilities, and secondly, to impose restrictions on certain methods and means of warfare.[4]

1. IHL as a Basis for Protection of Civilians During Hostilities

The basis of IHL is to protect the civilian population from the effects of hostilities. This is guided by the principle of distinction, which provides that belligerents must "*at all times distinguish between the civilian population and combatants and between civilian objects and military objectives and*

[2] Nils Mezer, *International Humanitarian Law: A Comprehensive Introduction* (ICRC, 2016) pp. 79.
[3] Declaration Renouncing the Use, in Time of War, of Explosive Projectiles Under 400 Grammes Weight. Saint Petersburg, 29 November / 11 December 1868.
[4] Nils Mezer, *International Humanitarian Law: A Comprehensive Introduction* (ICRC, 2016) pp. 80.

accordingly shall direct their operations only against military objectives."[5] As a consequence, all States have the primary obligation to adopt and carry out measures implementing humanitarian law at the national level by putting in legislative measures to domesticate IHL and punish any breaches thereof.[6] The protective purpose of this principle can only be achieved if civilians, civilian objects, combatants, and military objectives are well defined, and if the scope and conditions of the protection afforded to civilians and civilian objects are clearly set out.

This paper relies on the conceptual definition of combatants pursuant to Article 43(2) of Additional Protocol 1 as well as Rule 2 of Customary International Humanitarian Law (CIHL)[7] which defines combatants as "all members of the armed forces of a party to an international armed conflict, except medical and religious personnel assuming exclusively humanitarian functions."[8] The only other category of weapon-bearers who may be regarded as combatants without being members of the armed forces are participants in a *Levée en masse*.[9]

[5]Article 48, *Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I)*, 8 June 1977, 1125 UNTS 3, available at: https://www.refworld.org/docid/3ae6b36b4.html [accessed 9 February 2022].

[6] ICRC Customary International Humanitarian Law Rules, rules 1 and 7, available at https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_rul accessed 9 February 2022.

[7]Customary IHL, *Rule 3. Definition of Combatants* (*Ihl-databases.icrc.org*, 2022) https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_rul_rule3 accessed 9 February 2022.

[8]Article 43(2), *Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I)*, 8 June 1977, 1125 UNTS 3, available at:https://www.refworld.org/docid/3ae6b36b4.html [accessed 9 February 2022]

[9]Article 2, *Hague Convention (IV) Respecting the Laws and Customs of War on Land and Its Annex: Regulations Concerning the Laws and Customs of War on Land*, 18 October 1907, available at: https://www.refworld.org/docid/4374cae64.html [accessed 9 February 2022]

Persons engaging in hostilities outside these categories, such as mercenaries,[10] or civilians taking a direct part in hostilities[11] are not entitled to combatant status. Having combatant status grants the combatants the "combatant privilege" which entails the right to participate directly in hostilities on behalf of a belligerent.[12] The consequences associated with this status are the loss of civilian status and loss of protection against direct attack.

From the above arguments, three key groups of people call for further analysis; members of the armed forces, participants in a *levée en masse* and civilians. They are as conceptualized below.

1.1.1 Members of the Armed Forces

Pursuant to Article 43 (1) of Additional Protocol 1 read with Rule 4 of CIHL[13] the armed forces of a party to a conflict comprise "*all organized armed forces, groups, and units which are under a command responsible to that party for the conduct of its subordinates.*"[14] However, this definition has evolved since the adoption of the 1907 Hague Regulations.[15] It recognizes that the laws, rights, and duties of war apply not only to the regular armed

[10] Article 47(1), *Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I)*, 8 June 1977, 1125 UNTS 3, available at: https://www.refworld.org/docid/3ae6b36b4.html [accessed 9 February 2022].
[11] Ibid, Article 51 (3).
[12] Ibid, Article 43(2).
[13] Customary IHL, *Practice Relating To Rule 4. Definition Of Armed Forces* (*Ihl-databases.icrc.org*, 2022) https://ihl-databases.icrc.org/customary-ihl/eng/docindex/v2_rul_rule4 accessed 9 February 2022
[14]Article 43 (1), *Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I)*, 8 June 1977, 1125 UNTS 3, available at: https://www.refworld.org/docid/3ae6b36b4.html [accessed 9 February 2022]
[15] *Hague Convention (IV) Respecting the Laws and Customs of War on Land and Its Annex: Regulations Concerning the Laws and Customs of War on Land*, 18 October 1907, available at: https://www.refworld.org/docid/4374cae64.html [accessed 9 February 2022].

forces but also to irregular militia and volunteer corps, on condition that they fulfill conditions assimilating them to regular armed forces.
These conditions include:

i. They are commanded by a person responsible for his subordinates
ii. They wield a fixed distinctive emblem recognizable at a distance
iii. They openly carry arms; and
iv. They conduct their operations per the laws and customs of war.[16]

Most military manuals for most countries adopt the above criteria for establishing the members of the armed forces. For instance, Kenya's LOAC Manual (1997) defines the armed forces of a State or of a party to the conflict as consisting of:[17]

> All organised units and personnel which are under a command responsible for the behaviour of its subordinates. The command of the armed forces must be responsible to the belligerent Party to which it belongs. The armed forces shall be subject to an internal disciplinary system which enforces compliance with the law of armed conflict. In the case of non-international armed conflict, in the sense of [the 1977 Additional Protocol II], the non-governmental forces or opposition forces have to fulfil two additional conditions in order to be considered "armed forces", namely:
>
> i. They must exercise control over a part of the State's territory
> ii. They must be able to carry out sustained and concerted military operations

[16] Ibid, Article 1.
[17] Kenya, *Law of Armed Conflict, Military Basic Course (ORS),* (4 précis, The School of Military Police, 1977, précis, No. 2) pp. 7-8.

1.1.2 Participants in a *Levée en masse*

In IHL, the term *levée en masse* is used to describe the inhabitants of a non-occupied territory who, on the approach of the enemy,[18] spontaneously take up arms to resist the invading forces without having had time to form themselves into regular armed units, provided they carry arms openly and respect the laws and customs of war.[19] It is the French term for a "mass uprising".

Participants in a *levée en masse* are the only armed actors regarded as combatants even though, by definition, they operate spontaneously and lack sufficient organization and command to qualify as members of the armed forces.[20] As soon as a *levée en masse* becomes continuous and organized, it is no longer regarded as such, but as an organized resistance movement.[21]

1.1.3 Civilians & Civilian Population

Within the confines of IHL, the civilian population is negatively defined as comprising all persons who are neither members of the armed forces of a party to the conflict[22] nor participants in a *levée en masse*.[23] This definition

[18]Article 4 (a), *Geneva Convention Relative to the Treatment of Prisoners of War (Third Geneva Convention)*, 12 August 1949, 75 UNTS 135, available at: https://www.refworld.org/docid/3ae6b36c8.html [accessed 9 February 2022]

[19] Article 2, *Hague Convention (IV) Respecting the Laws and Customs of War on Land and Its Annex: Regulations Concerning the Laws and Customs of War on Land*, 18 October 1907, available at: https://www.refworld.org/docid/4374cae64.html [accessed 9 February 2022]

[20] Nils Melzer, *International Humanitarian Law: A Comprehensive Introduction* (ICRC, 2016) pp. 82

[21] Ibid pp. 84.

[22]Customary IHL, *Rule 5. Definition Of Civilians* (*Ihl-databases.icrc.org*, 2022) *https://ihl-databases.icrc.org/customary-ihl/eng/docindex/v1_rul_rule5#:~:text=international%20armed%20conflicts-,Rule%205.,all%20persons%20who%20are%20civilians.&text=Some%20practice%20adds%20the%20condition,do%20not%20participate%20in%20hostilities.* accessed 9 February 2022.

[23] Article 50(1) & (2), *Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts*

also includes civilians accompanying the armed forces without being incorporated in the war, for example, war correspondents who are journalists who cover stories first-hand from a war-zone.[24] If there is any doubt about a person's civilian status, that person must be considered a civilian.[25] In the judgment of *Prosecutor v Tihomir Blaskic*, commonly referred to as *the Blaskic Case*," [26] the International Criminal Tribunal for the Former Yugoslavia also defined civilians as "persons who are not, or no longer, members of the armed forces.

Specific Prohibitions Geared Towards Civilian Protection

In order to ensure the protection of civilians from harm during hostilities, several prohibitions have been put in place within the larger IHL framework. They are as discussed below.

First, the prohibition against direct attacks on civilians or civilian objects. Pursuant to Article 51(2) of Additional Protocol 1 read with Rule 5 of CIHL,[27] direct attacks against civilians are expressly prohibited.[28] The word

(Protocol I), 8 June 1977, 1125 UNTS 3, available at: https://www.refworld.org/docid/3ae6b36b4.html [accessed 9 February 2022].

[24] Nils Mezer, *International Humanitarian Law: A Comprehensive Introduction* (ICRC, 2016) 85

[25] Article 50(1), *Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I)*, 8 June 1977, 1125 UNTS 3, available at: https://www.refworld.org/docid/3ae6b36b4.html [accessed 9 February 2022].

[26] *Prosecutor v Tihomir Blaskic (Trial Judgement)*, IT-95-14-T, International Criminal Tribunal for the former Yugoslavia (ICTY) 3 March 2000, available at https://www.refworld.org/cases,ICTY,4146f1b24.html accessed 9 February 2022.

[27] Customary IHL, *Rule 5. Definition Of Civilians* (*Ihl-databases.icrc.org*, 2022) *https://ihl-databases.icrc.org/customary-ihl/eng/docindex/v1_rul_rule5#:~:text=international%20armed%20conflicts-,Rule%205.,all%20persons%20who%20are%20civilians.&text=Some%20practice%20adds%20the%20condition,do%20not%20participate%20in%20hostilities.* accessed 9 February 2022.

[28]Article 51(2), *Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I)*, 8 June 1977, 1125 UNTS 3, available at: https://www.refworld.org/docid/3ae6b36b4.html [accessed 9 February 2022].

"attacks" does not only refer to offensive operations, but also includes defensive operations against the enemy.[29] For instance, Israel's Military Court in the *Kassem Case of 1969*, recognized the immunity of civilians from direct attack as one of the basic rules of IHL.[30] In the case of *Prosecutor v. Kunarac, Kovac and Vukovic*,[31] the term 'attack' was regarded as referring to the general mistreatment of civilians and not just to acts of violence alone. The second prohibition regards prohibition on acts of terror against the civilian population. Pursuant to Article 51(2) of Additional Protocol 1 read with Rule 2 of CIHL,[32] acts or threats of violence, the primary purpose of which is to spread terror among the civilian population is prohibited.[33]

Thirdly, prohibition against indiscriminate attacks. Article 51(4) and (5) and CIHL rules 8-11[34] prohibit indiscriminate attacks which are of a nature to strike military objectives and civilians and civilian objects without distinction, either because they are not or cannot be directed at a specific military objective or because their effects cannot be limited as required by IHL.[35] Indiscriminate attacks also include attacks that may be expected to

[29] Ibid, Article 49(1).
[30] *Military Prosecutor v Omar Mahmud Kassem and Others*, Israel Military court in Ramallah, April 13, 1969.
[31]ICTY, *Prosecutor v. Kunarac, Kovac and Vukovic, "Appeals Judgement"*, IT-69-23/IT-96-23-1, 12 June 2002, paras. 71-105.
[32] Customary IHL, *Rule 2. Violence Aimed At Spreading Terror Among The Civilian Population'* (*Ihl-databases.icrc.org*, 2022) https://ihl-databases.icrc.org/customary-ihl/eng/docindex/v1_rul_rule2 accessed 9 February 2022
[33] Article 51(2), *Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I)*, 8 June 1977, 1125 UNTS 3, available at: https://www.refworld.org/docid/3ae6b36b4.html [accessed 9 February 2022].
[34] Customary IHL, *Rules 11-13. Indiscriminate Attacks* (*Ihl-databases.icrc.org*, 2022) https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_rul_rule11 accessed 9 February 2022.
[35] Article 51(4) & (5), *Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I)*, 8 June 1977, 1125 UNTS 3, available at: https://www.refworld.org/docid/3ae6b36b4.html [accessed 9 February 2022].

cause incidental harm to civilians or civilian objects that would be excessive compared to the concrete and direct military advantage anticipated.[36]

In other words, failure to apply the principle of proportionality. Indiscriminate attacks are governed by the principle of distinction, which is enunciated in the *Additional Protocol I to the Geneva Conventions* where *Article 48* proscribes that parties to a conflict shall at all times make a distinction between civilian population and combatants and between civilian objects and military objectives while directing their operation only against military objectives.[37] Article 51 states the protection of civilian population, whereby *Article 51(2)* denotes that civilian population shall not be the object of attack while *Article 51(4)* prohibits indiscriminate attacks. *Article 52* provides for the general protection of civilian objects where *Article 53(2*) mentions that attacks shall be limited to military objective.

According to the provisions of *Rule 1 of the Study on Customary International Humanitarian Law (CIHL)* in conjunction with the *Protection of Civilian Populations against the Dangers of Indiscriminate Warfare*,[38] the principle of distinction is premised on the concept that combatants must be distinguished from civilians.[39] In consequence, Rule 1 CIHL[40] makes it a

[36] Ibid, Article 51(5)(b).

[37]*Article 51, Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I)*, 8 June 1977, 1125 UNTS 3, available at: https://www.refworld.org/docid/3ae6b36b4.html [accessed 9 February 2022].

[38]Customary IHL, *Rule 1. The Principle Of Distinction Between Civilians And Combatants* (*Ihl-databases.icrc.org*, 2022) https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_rul_rule1 accessed 9 February 2022.

[39] Henckaerts, J.M. *Study on customary international humanitarian law: a contribution to the understanding and respect for the Rule of Law in Armed Conflict*. 2005, 857 IRRC 198; see *also Protection of Civilian Populations against the Dangers of Indiscriminate Warfare*, Res. XXVIII, adopted by the XXth International Conference of the Red Cross, Vienna, 1965.

[40] Customary IHL, *Rule 1. The Principle Of Distinction Between Civilians And Combatants* (*Ihl-databases.icrc.org*, 2022) https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_rul_rule1 accessed 9 February 2022

requirement that combatants must not launch an attack to hurt civilians, indiscriminately or disproportionally.[41]

The distinction between who falls within the ambit of a 'combatant' or a 'civilian' is therefore essential in international humanitarian law.[42]

The principle of distinction is palpable in international customary law as seen in the case of *Prosecutor vs Tadic, the decision on the defence motion for Interlocutory Appeal on jurisdiction*[43], together with the case of *Prosecutor vs Martic case*[44] where Rule 1 of the Study of Customary International Law was iterated: "*the parties to the conflict must at all times distinguish between civilians and combatants. Attacks may only be directed against combatants. Attacks must not be directed against civilian".*[45] In their pleadings before the International Court of Justice in ***the*** *Nuclear Weapons Case*, Australia, India, Mexico, New Zealand, and the United States of America invoked the prohibition of indiscriminate attacks in their assessment of whether an attack with nuclear weapons would violate IHL.[46]

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[41] Customary IHL, *Rule 1. The Principle Of Distinction Between Civilians And Combatants* (*Ihl-databases.icrc.org*, 2022) https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_rul_rule1 accessed 9 February 2022

[42] Kleffner, J. K. *From "belligerents" to "fighters" and civilians directly participating in hostilities. On the principle of distinction in non-international armed conflicts one hundred years after the Second Hague Peace Conference*, (2007, LIV NILR 315) p. 321.

[43] *Prosecutor v. Tadic*, Case Nº IT-9-1-AR72, Appeals Chamber, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995, paragraph 87.

[44] *Prosecutor v. Martic*, Case Nº IT-95-11-I, Trial Chamber, 8 March 1996, paragraph. 10.

[45] Customary IHL, *Rule 1. The Principle Of Distinction Between Civilians And Combatants* (*Ihl-databases.icrc.org*, 2022) https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_rul_rule1 accessed 9 February 2022

[46] *The legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, ICJ Reports 1996, p.226, International Court of Justice (ICJ) 8 July 1996, available at https://www.refworld.org/cases,ICJ,4b2913d62.html accessed 9 February 2022.

The fourth prohibition regards the prohibition of the use of civilians as human shields. Pursuant to Article 51(7) of Additional Protocol 1 and CIHL rule 97,[47] IHL prohibits belligerent parties from using civilians as "human shields." It prohibits the use of the presence or directing the movement of the civilian population or individual civilians to attempt to shield military objectives from attack or to shield, favor or impede military operations.[48] However, even unlawful recourse to human shields by the defending party does not absolve the attacking party from its obligations under IHL, especially the principles of proportionality and precaution in the attack.

An example of an instance where human shields were used by parties in armed conflicts is the *Wola Massacre of 1944* in Poland where the Nazis forced civilian women onto armored vehicles as human shields to enhance their effectiveness.[49]

Lastly, the prohibition against reciprocity and prohibition of attacks by way of reprisal. All of the above-mentioned prohibitions are non-reciprocal in that their violation by the enemy. However, pursuant to Article 51(8) of Additional Protocol 1 and CIHL Rule 140,[50] the non-compliance by one party does not absolve belligerent parties from their obligations concerning

[47]Customary IHL, *Rule 97. Human Shields* (*Ihl-databases.icrc.org*, 2022) https://ihl-databases.icrc.org/customary-ihl/eng/docindex/v1_rul_rule97 accessed 9 February 2022

[48]Article 51(7), *Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I)*, 8 June 1977, 1125 UNTS 3, available at: https://www.refworld.org/docid/3ae6b36b4.html [accessed 9 February 2022].

[49] Grzebyk, P. *Hidden in the Glare of the Nuremberg Trial: Impunity for the Wola Massacre as the Greatest Debacle of Post-War Trials*, (2019, MPILux Research Paper).

[50] Customary IHL, *Rule 140. Principle Of Reciprocity* (*Ihl-databases.icrc.org*, 2022) https://ihl-databases.icrc.org/customary-ihl/eng/docindex/v1_rul_rule140 accessed 9 February 2022

the civilian population under IHL.[51] Precisely, attacks by way of reprisal against civilians are prohibited.[52][53]

Civilian Participation in Hostilities

As a basic rule, civilians in situations of armed conflict are entitled to protection against direct attack "unless and for such time as they take a direct part in hostilities."[54] In other words, if civilians participate in direct hostilities, they may be directly attacked as if they were combatants, but only for the duration of their direct participation in these hostilities. However, IHL provides no definition of conduct that amounts to direct participation in hostilities.[55] Consequently, the International Committee of the Red Cross (ICRC) conducted an informal expert process from 2003 to 2009, which resulted in the publication of its *Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law*. However, this document is not binding, but persuasive.[56]

Meaning of "Direct Participation in Hostilities"

Under the *Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law*, the concept of direct

[51] Article 51(8), *Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I)*, 8 June 1977, 1125 UNTS 3, available at: https://www.refworld.org/docid/3ae6b36b4.html [accessed 9 February 2022].

[52] Articles 28 & 33, *Geneva Convention Relative to the Protection of Civilian Persons in Time of War (Fourth Geneva Convention)*, 12 August 1949, 75 UNTS 287, available at: https://www.refworld.org/docid/3ae6b36d2.html [accessed 9 February 2022]. and CIHL, rules 145 and 146.

[53] Article 51(6), *Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I)*, 8 June 1977, 1125 UNTS 3, available at: https://www.refworld.org/docid/3ae6b36b4.html [accessed 9 February 2022].

[54] Ibid, Article 51(3).

[55] Nils Melzer, *International Humanitarian Law: A Comprehensive Introduction* (ICRC, 2016) pp. 87.

[56] Goodman, R., & Jinks, D. *The ICRC interpretive guidance on the notion of direct participation in hostilities under international humanitarian law: an introduction to the forum*, (2009, NYUJ Int'l L. & Pol., 42, 637).

participation in hostilities comprises two basic components, which are of "hostilities" and that of "direct participation" in these hostilities. Hostilities refer to the collective recourse by belligerent parties to means and methods of warfare.[57] Participation in hostilities refers to the individual involvement of a person in these hostilities.[58] Depending on the quality and degree of such involvement, individual participation in hostilities may be described as "direct" or "indirect." Direct participation refers to specific hostile acts carried out as part of the conduct of hostilities between parties to an armed conflict and leads to loss of protection against direct attack.[59]

Indirect participation may contribute to the general war effort, but does not directly harm the enemy and therefore does not entail the loss of protection against direct attacks.[60]

The Interpretive Guidance further gives a criterion to determine if an act qualifies as direct participation in hostilities. To qualify as direct participation in hostilities, a specific act must meet all the following requirements:

i. *Threshold of Harm*: The harm likely to result from the act must be either specifically military in nature or involve death, injury, or destruction
ii. *Direct Causation*: There must be a direct causal relationship between the act and the expected harm
iii. *Belligerent Nexus:* The act must be an integral part of the hostilities occurring between parties to an armed conflict and must, therefore, aim to support one belligerent party to the detriment of another.[61]

[57] Ibid, p. 640
[58] Ibid, p. 641
[59] Ibid, p. 644.
[60] Ibid, p. 643.
[61] Ibid, p. 644.

Protection of Civilian Objects, Certain Areas & Institutions

Pursuant to Article 52(2) of the Additional Protocol I, civilian objects are those objects which are not military objectives. Article 8(2)(b)(ii) of the Rome Statute, prohibits the intentional and direct attack against civilian objects.[62] Rule 10 of CIHL states that civilian objects lose its protection from attack, when the civilian object is being used for *military purposes*.[63] This is as conceptualised below.

1.1.4 Military Objectives & Civilian Objects

IHL provides that attacks must be strictly limited to military objectives and that civilian objects may not be the object of attacks or reprisals.[64] In *the Nuclear Weapons Case* before the International Court of Justice, several States invoked the principle of distinction between civilian objects and military objectives.[65] In its advisory opinion, the Court stated that the principle of distinction was one of the core principles of IHL and one of the intransigent principles of international customary law.[66]

Civilian objects are negatively defined as all objects that are not military objectives.[67] Military objectives, on the other hand, are defined as "*those*

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[62] Article 8(2)(b)(ii), *Rome Statute of the International Criminal Court (last amended 2010)*, 17 July 1998, ISBN No. 92-9227-227-6, available at: https://www.refworld.org/docid/3ae6b3a84.html [accessed 9 February 2022].

[63]Customary IHL, *Rule 10. Civilian Objects' Loss Of Protection From Attack* (*Ihl-databases.icrc.org*, 2022) https://ihl-databases.icrc.org/customary-ihl/eng/docindex/v1_rul_rule10 accessed 9 February 2022.

[64]Article 33, *Geneva Convention Relative to the Protection of Civilian Persons in Time of War (Fourth Geneva Convention)*, 12 August 1949, 75 UNTS 287, available at: https://www.refworld.org/docid/3ae6b36d2.html [accessed 9 February 2022].

[65] *The legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, ICJ Reports 1996, p.226, International Court of Justice (ICJ) 8 July 1996, available at https://www.refworld.org/cases,ICJ,4b2913d62.html accessed 24 March 2021.

[66] Ibid

[67]Article 52(1), *Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I)*, 8 June 1977, 1125 UNTS 3, available at: https://www.refworld.org/docid/3ae6b36b4.html [accessed 9 February 2022].

objects which by their nature, location, purpose or use make an effective contribution to military action and whose total or partial destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military advantage."[68] In cases of uncertainty as to whether an object normally used for civilian purposes, for example, a place of worship, a building or other dwelling or a school, is being used to make an effective contribution to military action, it is presumed not to be so used.[69]

The General Meaning of a "Military Objective"

To qualify as a military objective, an object must meet this two-part test. First, it must contribute effectively to the adversary's military action, and this contribution must be by its nature, location, purpose, or current use.[70] Second, its destruction, capture, or neutralization offers the attacker a definite military advantage. This advantage must be concrete and perceptible, not merely speculative or hypothetical.[71]

The Hague Convention, Article 23 (g) stipulates that "*it is especially forbidden . . . [t]o destroy or seize the enemy's property, unless such destruction or seizure be imperatively demanded by the necessities of war*".[72] This provision forms the backbone of military necessity as it is widely recognized in international humanitarian law and was featured in the first official codification of the modern laws of international law.[73] In essence, military necessity permits force that is necessary to weaken the enemy.

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[68] Ibid, Article, 52(2).
[69]Ibid, Article, 52(3).
[70] Nils Melzer, *International Humanitarian Law: A Comprehensive Introduction* (ICRC, 2016) 92
[71] Ibid
[72] Article 23(g), *Hague Convention (IV) Respecting the Laws and Customs of War on Land and Its Annex: Regulations Concerning the Laws and Customs of War on Land*, 18 October 1907, available at: https://www.refworld.org/docid/4374cae64.html [accessed 20 July 2021].
[73] Lieber, F., Hartigan, R. S., & U.S.A. *Lieber's Code and the law of war*, (1983, Chicago: Precedent).

This definition is clearly belaboured in the 1868 St. Petersburg Declaration and states that the only legitimate purpose that should be accomplished during war is to *weaken the military forces of the enemy* and "*for this purpose it is sufficient to disable the greatest number of men".*[74] It further states that "*disablement of able-bodied, non-surrendering enemy combatants is hereby deemed materially unnecessary*"[75] for attaining the military objective since, *"the employment of such arms would, therefore, be contrary to the law of humanity*".[76]This Declaration lays a salient emphasis on the fact that anything other than the military goal is considered to be beyond the confines of the law and therefore, a breach of the law of war.[77]

A legal commentary by Nobuo Hayashi perfectly describes the concept of military necessity, "*To the rational soldier of Clausewitzian cast, a good war is one in which every act is "militarily necessary" - that is, executed professionally and with the optimal resource mobilization, and directed towards a clearly defined, strategically sound and reasonably attainable military goal".*[78]

To further expound on the conceptual analysis of what constitutes a military objective, let us take the example of the journalists who act as war correspondents and the media in armed conflict. Do the media and war correspondents engaged in war propaganda amount to a military objective? Article 79 of the 1977 Additional Protocol I provides, a) that journalists engaged in dangerous professional missions in areas of armed conflict shall be considered as civilians,[79] within the meaning of Article 50 (1) of the same

[74] *Declaration Renouncing the Use, in Time of War, of Explosive Projectiles Under 400 Grammes Weight.* Saint Petersburg, 29 November / 11 December 1868.
[75]*Declaration Renouncing the Use, in Time of War, of Explosive Projectiles Under 400 Grammes Weight.* Saint Petersburg, 29 November / 11 December 1868.
[76] Ibid.
[77] Ibid, *supra 75.*
[78] Hayashi, N. *Requirements of military necessity in international humanitarian law and international criminal law,* (2010, BU Int'l LJ, 28) pp. 39.
[79] Article 79, *Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I),* 8 June 1977, 1125 UNTS 3, available at:

protocol,[80] b) they shall be protected as such under Conventions and the protocol, provided they *take no action adversely affecting their status as civilians* and without prejudice to the right of war correspondents accredited to the armed forces to the status provided for in 4(A)(4) of the third convention.[81]

According to The Committee of Ministers of the Council of Europe in *Recommendation No. 4,*[82] media personnel encompass all the representatives of the media, namely all those engaged in the collection, processing and dissemination of news and information including cameramen and photographers, as well as support staff such as drivers and interpreters.[83] According to Oxford Learner's Dictionaries, propaganda, are ideas or statements that may be false or exaggerated and that are used to gain support for a political leader or party.[84]

Propaganda is a powerful weapon in war; it is used to dehumanize and create hatred toward a supposed enemy, either internal or external, by creating a

https://www.refworld.org/docid/3ae6b36b4.html [accessed 9 February 2022].

[80] Article 4 (a) (1), *Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I)*, 8 June 1977, 1125 UNTS 3, available at: https://www.refworld.org/docid/3ae6b36b4.html [accessed 9 February 2022].

[81] Persons who accompany the armed forces without being members thereof, such as civilian members of military aircraft crew a, war correspondents, supply contractors, members of labour units or services responsible for the welfare of armed forces, if they have received authorization from the armed forces which they accompany, who shall provide them for that purpose with an identity card similar to the annexed model.

[82] Defined by *the Committee of Ministers of the Council of Europe in Recommendation No. 4* as 'covering all representatives of the media, namely all those engaged in the collection, processing and dissemination of news and information including cameramen and photographers, as well as support staff such as drivers and interpreters.

[83] Recommendation CM/Rec (2021) 4.

[84] Oxford's Learner's Dictionaries, *Definition of Propaganda noun from the Oxford Advanced American Dictionary* [Oxford University Press] Accessed on the 14th of July 2021.

false image in the mind of soldiers and citizens.[85]*NewsWatch Canada's* Co-Director, Rober A Hackett stated, "in war time, media are not mere observers but simultaneously a source of intelligence, combatant, a weapon, target and a battlefield. Due to the media's power in influencing the audience's opinion, news coverage of war can function as an effective propaganda strategy to obtain a competitive advantage."[86]

In the *Nuremberg Trials*, the prosecutor stated that the propaganda released by the radio division had a role in shaping the German public opinion of the Jews, thus, preparing them psychologically for an orchestrated state-sponsored programme to exterminate the Jews[87]. The same sentiments were said by the chamber in *Prosecutor v Ferdinand Nahimana, Jean- Bosco Barayagwiza, Hassan Ngeze*[88], paragraph 242 and 243, that the newspaper *Kangura*, had the effect of poison, and at times explicit on its readers to take action, its message of prejudice and fear paved the way for massacres of the Tutsi population.

In the *Tadic trial*,[89]all media was Serb controlled. The radio and Television pounded out the same unrelenting message the Serbs were about to be overwhelmed by *Ustasha* (Fascist). Prior to the armed conflict break, the Serbian Democratic Party, started waging a propaganda war which had a disastrous impact in the people of all ethnicities, creating mutual fear and hatred and particularly inciting the Bosnian Seeb population against other ethnicities. Within a short period of time, citizens who had previously lived together peacefully, became enemies and killers influenced by the media.

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[85] Alex Carey, *Taking the Risk out of Democracy: Propaganda in the Us and Australia*, (1995, University of NSW Press,.214).
[86] RA Hackett, *Journalism versus Peace? Notes on a Problematic Relationship*, (2007, 2 Global Media Journal: Mediterranean Edition 47) pp. 48.
[87]Richard A.W., *Propaganda and History in International Criminal Trials*, (Journal of International Criminal Justice, Volume 14, Issue 3, July 2016) pp. 519-541.
[88] *The Prosecutor v. Ferdinand Nahimana, Jean-Bosco Barayagwiza, Hassan Ngeze* (Appeal Judgment), ICTR-99-52-A, International Criminal Tribunal for Rwanda (ICTR), 28 November 2007
[89] Richard A.W., *Propaganda and History in International Criminal Trials*, (Journal of International Criminal Justice, Volume 14, Issue 3, July 2016) pp. 519-541.

In the ICTR case of *Prosecutor v Georges Ruggiu*[90], the chambers held;

> The media, particularly RTLM radio, was a key tool used by extremists within the political parties to mobilize and incite the population to commit the massacres. RTLM had a large audience in Rwanda and became an effective propaganda instrument. The accused, who was a journalist and broadcaster with the RTLM, played a crucial role in the incitement of ethnic hatred and violence, which RTLM vigorously pursued. In his broadcasts at the RTLM, he encouraged setting up roadblocks and congratulated perpetrators of massacres of the Tutsis at these roadblocks. In his broadcasts, he continued to call upon the population, particularly the military and the Interahamwe militia, to finish off the 1959 revolution. His broadcasts incited massacres of the Tutsi population.

Generally, media houses and journalists enjoy civilian protection, to the extent journalists, take no action adversely affecting their status as civilians and the civilian objective is not being used for a military purpose. However, their potential involvement in war propaganda may in effect, transform them into a military objective. This is argument is effectively based on the *Dual-Use Objects Doctrine*. Most civilian objects can be used for military purposes and can, therefore, be a military objective for the duration of such use. For example, infrastructure such as roads, bridges, railways, ports and airports, power plants, and communication networks. To the extent that such specific dual-use objects make an "effective contribution" to the enemy's military action and their destruction, neutralization or capture offers a definite military advantage, they qualify as military objectives regardless of their simultaneous civilian use.[91] The principle of proportionality must be used in the attack of such dual-use objects. Accordingly, an attack against a dual-use object qualifying as a military objective would be unlawful if it is

[90] *The Prosecutor v. Georges Ruggiu (Judgement and Sentence)*, ICTR-97-32-I, International Criminal Tribunal for Rwanda (ICTR), 1 June 2000,
[91] Ibid, par. 93.

expected to cause excessive civilian harm compared to the concrete and direct military advantage anticipated by such an attack.[92]

Fundamental Tools/Principles for Protection of Civilians During Hostilities

1.1.5 The Principle of Unnecessary Suffering

The principle of unnecessary suffering considers it unlawful to inflict suffering or injury on a combatant beyond what would necessarily render them *hors de combat*. Essentially, war should, at least in principle, be aimed at achieving a military objective or weakening an opposing high contracting party.[93] It is directly related to the principle of military necessity, as proclaimed in the St. Petersburg declaration; that to some extent, military necessity must be subservient to requirements of humanity.[94] The principle is primarily intended to protect combatants. Non-combatants or civilians who take up arms are also deemed as falling within the purview of individuals protected by the principle.

Scholars have used both the proportionality test and comparative test in applying this principle. The proportionality test balances between military objective and injury suffered while the comparative test looks at suffering or injury caused to civilians and civilian objects from collateral damage. Adjectives 'unnecessary' and 'superfluous' are comparative and not absolute in nature. The test of unnecessary and superfluous damage would not be met in two instances:

i. When no military advantage will be obtained.
ii. When causing excessive injuries in pursuing a military objective.

[92] Ibid, *supra, par. 95.*
[93] Preamble, *Declaration Renouncing the Use, in Time of War, of Explosive Projectiles Under 400 Grammes Weight.* Saint Petersburg, 29 November / 11 December 1868.
[94] *Ibid.*

The ICJ in its *Advisory Opinion on Nuclear Weapons* espoused that the principle of proportionality should be applied in choosing weapons."[95] Further, Article 35 (2) of Additional Protocol I prohibits the use of weapons likely to cause superfluous injury and unnecessary suffering."[96] Article 22 of the 1907 Hague Regulations also explains that the rights of belligerents to adopt means of injuring the enemy is not unlimited, hence the principle of proportionality should be applied.[97]

Meaning of 'Suffering' and 'Injury'

In order to effectively conceptualize the meaning of the term(s) suffering and injury in the context of civilian protection, a three-part test is used in assessing the level of suffering:

i. The likelihood of death
ii. The intensity of pain
iii. The degree of permanent disability.

Suffering includes both physical and psychological elements. Thus, suffering still accrues in case of loss of a leg even when physical pain ceases. The Saint Petersburg Declaration conceptualized 'suffering' through the logic of excessiveness though it is less objective and quantifiable,[98] unlike the term 'injury. ' Suffering cannot be graphically or numerically related to wounding.[99] Military manuals of most States in this regard refer against the aggravation of injuries. State practice recognizes psychological and physical

[95] *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, ICJ GL No 95, [1996] ICJ Rep 226, ICGJ 205 (ICJ 1996), 8th July 1996, United Nations [UN]; International Court of Justice [ICJ]**.**

[96] Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol 1).

[97] Hague Conventions of 1899 and 1907.

[98] M.A. Meyer (ed.*), Armed Conflict and the New Law*, (British Institute of International and Comparative Law, London, 1989) p. 277.

[99] R. Scott, *Unnecessary Suffering? A Medical View* (1989).

suffering together with injury as constituting components of the principle of unnecessary suffering.[100]

Means of Warfare Deemed to be of a Nature to Cause Superfluous Injury or Unnecessary Suffering

As stated earlier, this principle includes both means and methods of warfare. Where means of warfare are concerned, the ICRC in 2005 explicitly prohibits or restricts the use of certain weapons. Article 23(e) of the 1899 Hague Regulations considers it 'especially' prohibited to employ arms, projectiles, or material of a nature to cause superfluous injury. Moreover, Article 35 (2) of Additional Protocol I espouses that it is prohibited to employ weapons, projectiles, and material and methods of warfare of a nature to cause superfluous injury or unnecessary suffering. The latter is focused on the extent and nature of the effects of weapons and how these weapons are used. The following weapons have been restricted or altogether prohibited by instruments of international humanitarian law: chemical and biological weapons, nuclear weapons, landmines, and cluster munitions, and expanding bullets.

1.1.6 The Principle of Distinction

Among the founding principles of IHL is the principle of distinction. It illustrates that to protect civilians in armed conflict a distinction has to be made between the underlying categories of person ("civilians" and "combatants") and objects ("civilian objects" and "military objectives").[101] These are set out in articles 48 and 52 of Additional Protocol 1 to Geneva Conventions.[102] Among the most fundamental maxims of IHL relevant to the

[100] W. H. Parks, *Memorandum of Law: The Use of lasers as Antipersonnel Weapons*, (29 September 1988, in The Army Lawyer, November 1988) p. 3.
[101] Nils Melzer, *International Humanitarian Law: A Comprehensive Introduction*, ICRC, November 2019.
[102] and Additional Protocol I, Article 52(1) & (2), *Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I)*, 8 June 1977, 1125 UNTS 3, available at: https://www.refworld.org/docid/3ae6b36b4.html [accessed 9 February 2022].

conduct of hostilities is the general protection of both the civilian population and individual civilians against dangers arising from military operations.[103] Regarding the natural environment, rule 43 of CIHL[104] provides the general principles on the conduct of hostilities that apply to the natural environment as follows:

i. No part of the natural environment may be attacked unless it is a military objective.
ii. Destruction of any part of the natural environment is prohibited unless required by imperative military necessity.
iii. Launching an attack against a military objective that may be expected to cause incidental damage to the environment which would be excessive compared to the concrete and direct military advantage anticipated is prohibited.

Regarding military objectives and protection of civilian objects, as earlier discussed, IHL provides that attacks must be strictly limited to military objectives and that civilian objects may not be the object of attacks.[105] If there is any doubt whether an object normally used for civilian purposes, such as a place of worship, a house or other dwelling or a school, is being

[103]Article 51(1), *Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I)*, 8 June 1977, 1125 UNTS 3, available at: https://www.refworld.org/docid/3ae6b36b4.html [accessed 9 February 2022].

[104] Customary IHL, *Rule 43. Application Of General Principles On The Conduct Of Hostilities To The Natural Environmen*t (*Ihl-databases.icrc.org*, 2022) https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_rul_rule43#:~:text=the%20natural%20environment-,Rule%2043.,it%20is%20a%20military%20objective.&text=Destruction%20of%20any%20part%20of,required%20by%20imperative%20military%20necessity. accessed 9 February 2022.

[105]Article 33, *Geneva Convention Relative to the Protection of Civilian Persons in Time of War (Fourth Geneva Convention)*, 12 August 1949, 75 UNTS 287, available at: https://www.refworld.org/docid/3ae6b36d2.html [accessed 9 February 2022].

used to make an effective contribution to military action, it is presumed not to be so used.[106]

Regarding the protection of works and installations containing dangerous forces, certain installations, namely dams, dykes, and nuclear power stations, are specially protected from attack because their partial or total destruction would likely have catastrophic humanitarian consequences for the surrounding civilian population and objects. As long as such works and installations constitute civilian objects they are protected against direct attack. However, even dams, dykes, and nuclear power stations that qualify as military objectives, as well as other military objectives located in their vicinity, must not be attacked if such attack can cause the release of dangerous forces and consequent severe losses among the civilian population.[107]

This special protection against attack ceases only if the military objective in question is used in regular,[108] significant, and direct support of military operations and if such attack is the only feasible way to terminate such support.[109] Also, such works, installations, or military objectives should not be made objects of reprisals.[110] If special protection ceases and any such works, installations, or neighboring military objectives are attacked, in

[106]Article 52(3), *Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I)*, 8 June 1977, 1125 UNTS 3, available at: https://www.refworld.org/docid/3ae6b36b4.html [accessed 9 February 2022].
[107]Ibid, Article 56(1).
[108] 'Customary IHL - Rule 42. Works And Installations Containing Dangerous Forces' (*Ihl-databases.icrc.org*, 2022) https://ihl-databases.icrc.org/customary-ihl/eng/docindex/v1_rul_rule42 accessed 9 February 2022
[109] Article 56(2), *Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I)*, 8 June 1977, 1125 UNTS 3, available at: https://www.refworld.org/docid/3ae6b36b4.html [accessed 9 February 2022].
[110] Customary IHL, *Rule 147. Reprisals Against Protected Objects* (*Ihl-databases.icrc.org*, 2022) https://ihl-databases.icrc.org/customary-ihl/eng/docindex/v1_rul_rule147 accessed 9 February 2022

addition to the precautionary measures required by the general rules on the conduct of hostilities, all practical precautions must be taken to avoid the release of the dangerous forces.[111] To facilitate their identification, such objects should be marked with a special sign consisting of a group of three bright orange circles placed on the same axis.[112] Such marking is purely indicative in nature and is not a precondition for the special protection afforded by IHL.[113]

The Ruses of War

Ruses of war are defined as acts intended to confuse the enemy.[114] Under the UK Military Manual, for instance, these may include surprises, ambushes, feigning attacks, transmitting bogus signals, retreats, and building of roads and bridges that you do not intend to use among others.[115] Rule 57 of CIHL states that ruses of war are generally accepted for so long as they do not violate any rule of IHL. Generally, they are accepted, however, improper use of a white flag of truce[116], improper use of the emblems of the Geneva Conventions,[117] improper use of United Nations emblems,[118] Further, Article 39 of the Additional Protocol I and Rule 62 and 63 of the ICRC CIL, prohibit

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[111] Article 56(3), *Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I)*, 8 June 1977, 1125 UNTS 3, available at: https://www.refworld.org/docid/3ae6b36b4.html [accessed 9 February 2022].

[112]Ibid, Annex I & Article 17.

[113]Ibid, *supra 111*, Article 56 (7).

[114]Jean-Marie Henckaerts, *Customary International Humanitarian Law Volume I: Rules*, (2009, Cambridge University Press) p. 204.

[115]UK Government, *The Joint Service Manual of The Law of Armed Conflict* (2004) available at <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/27874/JSP3832004Edition.pdf > accessed 9 February 2022.

[116] Customary IHL, *Rule 58. Improper Use of The White Flag of Truce* (*Ihl-databases.icrc.org*, 2022) https://ihl-databases.icrc.org/customary-ihl/eng/docindex/v1_rul_rule58 accessed 9 February 2022

[117] Ibid, Rule 59.

[118] Ibid, *supra 116*, Rule 60.

the use of military emblems, uniforms of neutral states, where those of the adverse parties may be used as a ruse.[119]

Perfidy

Additional Protocol I define perfidy as "acts inviting the confidence of an adversary to lead him to believe that he is entitled to, or obliged to accord, protection under the rules of international law applicable in armed conflict, with intent to betray that confidence.[120] Such acts may include feigning intention to negotiate by flying the white flag of truce, feigning being injured or sick, and feigning protected status by use of the emblems of the United Nations or States not a party to the conflict.[121]

What sets aside perfidy from improper use is the intention to betray the adversary's confidence that is, an abuse of good faith. Thus, perfidy is considered to be a more serious violation than improper use. Rule 65 of CIHL prohibits the killing, injury, or capture of an adversary by resort to perfidy.[122]

Reprisals

Reprisals are defined as actions that would otherwise be unlawful but that in exceptional cases are considered lawful under international law when used as an enforcement measure in reaction to unlawful acts of an adversary.[123]

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[119] Ibid, Rules 62&63.

[120]Article 37, *Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I)*, 8 June 1977, 1125 UNTS 3, available at: https://www.refworld.org/docid/3ae6b36b4.html [accessed 9 February 2022].

[121] Ibid.

[122] Customary IHL, *Rule 65. Perfidy* (*Ihl-databases.icrc.org*, 2022) https://ihl-databases.icrc.org/customary-ihl/eng/docindex/v1_rul_rule65 accessed 9 February 2022.

[123] Jean-Marie Henckaerts, *Customary International Humanitarian Law Volume I: Rules*, (2009, Cambridge University Press) p. 513

Rule 145 of CIHL states that where not prohibited by international law, belligerent reprisals are subject to stringent conditions.[124] The general trend by many States has been to outlaw reprisals altogether. This is because many states view it as an ineffective tool to countering the unlawful actions of an adversary. More often than not, reprisals may lead to escalation of tension through reprisals and counter-reprisals rather than aiding in ending the unlawful actions.

However, where reprisals are still legal, they are subject to five strict conditions:

i. *Purpose of Reprisals.* The reprisal may only be taken in reaction to a prior serious violation of international humanitarian law, and only to make the adversary cease the unlawful violation.
ii. *Measure of last resort*. Reprisals may only be carried out as a measure of last resort when no other lawful measures are available or have already been exhausted in making the adversary cease the violation.
iii. *Proportionality.* Reprisals must be proportionate to the violation it aims to stop. In the *Kappler Case,*[125]on 24th March 1944, 335 Italians were killed in a mass execution, known as the *'Fosse Ardeatine Massacre'*. The attack was carried out by Nazi occupation troops in reprisal for a partisan attack conducted on the previous day in Rome in which 33 German soldiers were killed. The Court held that the actions of the accused could not amount to reprisal as *inter alia,* it was not proportional to the violation alleged.
iv. *Decision at the highest level of government*. In the *Kupreskic Case,*[126] the ICTY held that the decision to resort to a reprisal must

[124] Customary IHL, *Rule 145. Reprisals* (*Ihl-databases.icrc.org*, 2022) https://ihl-databases.icrc.org/customary-ihl/eng/docindex/v1_rul_rule145 accessed 9 February 2022
[125] *The Prosecutor v. Herbert Kappler* [1948] The Supreme Military Court of Rome, 25 October 1960.
[126] *Prosecutor v Zoran Kupreskic & others* [2000] ICTY.

be taken at the highest political or military level and may not be decided by local commanders.

v. *Termination.* Reprisal action must cease as soon as the adversary complies with the law.

Civilian Protection Through Regulation of the Means & Methods of Warfare

Pursuant to Rule 17 of the CIHL, each party to the conflict has a mandate to take all feasible precautions in the choice of means and methods of warfare to avoid, and in any event to minimizing, incidental loss of civilian life, injury to civilians and damage to civilian objects.[127] This rule was established through state practice and soon became a norm in international law.[128]

This norm was included in the Additional Protocol to the Geneva Convention of 1949 and relating to the Protection of Victims of International Armed Conflicts (Protocol I) of 1977 article 57(2)(ii) and in several military manuals and supported by official statements and reported practice.[129] Article 7(b) of the second convention to the Hague Convention for the protection of Cultural Property requires parties in a conflict take all feasible precautions in the choice of means and methods of attack to avoid, and in any event to minimizing, incidental damage to cultural property.[130]Restrictions on the means of war focus on the particular weapons employed in warfare while the methods of warfare focus on the military tactics employed in warfare.

[127]Jean-Marie Henckaerts, *Customary International Humanitarian Law Volume I: Rules*, (2009, Cambridge University Press, CIHL).

[128] Ibid.

[129]Ibid.

[130] Article 7(b), *Convention for the Protection of Cultural Property in the Event of Armed Conflict*, 14 May 1954, available at: https://www.refworld.org/docid/40422c914.html [accessed 9 February 2022]

Means and methods of warfare are prohibited if they;[131]

a. Cause superfluous injury or unnecessary suffering

Restrictions and prohibitions on the usage of certain weapons were inspired by the desire to protect combatants from disproportionate harm and suffering.[132] The St Petersburg Declaration of 1868 stated that the use of particular weapons is only legitimate if it is aimed at weakening the military forces of the enemy and disable the greatest possible number of men.[133] This objective would have been exceeded by the employment of arms which uselessly aggravate the suffering of disabled men or render their death inevitable and therefore such an act would be contrary to the laws of humanity.[134] This is the reasoning behind the principle of prohibiting the employment of weapons, projectiles, and material and methods of warfare of a nature to cause superfluous injury or unnecessary suffering.[135]

The *Advisory Opinion of the ICJ on Nuclear Weapons* argues that the prohibition against causing superfluous injury or unnecessary suffering makes it unlawful to subject the combatants to harm greater than that unavoidable to achieve legitimate military objectives.[136] Where the same military advantage can be achieved through less harmful means,

[131] 'Customary IHL, *Rule 70. Weapons of A Nature to Cause Superfluous Injury or Unnecessary Suffering* (*Ihl-databases.icrc.org*, 2022) https://ihl-databases.icrc.org/customary-ihl/eng/docindex/v1_rul_rule70 accessed 9 February 2022.

[132] Nils Mezer, *International Humanitarian Law: A Comprehensive Introduction* (ICRC, 2016)

[133] *Declaration Renouncing the Use, in Time of War, of Explosive Projectiles Under 400 Grammes Weight* 1868.

[134] Ibid.

[135] Nils Mezer, *International Humanitarian Law: A Comprehensive Introduction* (ICRC, 2016)

[136] *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, I.C.J. Reports 1996, p. 226, International Court of Justice (ICJ), 8 July 1996, available at: https://www.refworld.org/cases,ICJ,4b2913d62.html [accessed 9 February 2022].

considerations of humanity would require the use of such means.[137] This is also official position of the ICRC.

b. Are indiscriminate in nature

This is based on the principle of distinction in general.[138] The laws on humanity prohibit indiscriminate attacks. Indiscriminate attacks involve the use of weapons that are by nature indiscriminate.[139] Weapons that either cannot be directed at a specific military objective or the effects of which cannot be limited as required by humanitarian law. Indiscriminate weapons include weapon systems that, as an inherent feature of the technology employed and their intended use, may be expected to inflict excessive collateral harm on the civilian population.

Like superfluous injury or unnecessary suffering, weapons of warfare have to be measured. These indiscriminate weapons have spurred the development of several treaties regulating specific weapons. Some weapons have been cited in practice as being indiscriminate in certain or all contexts, for example, chemical, biological and nuclear weapons.[140]

c. Cause severe or long-term damage to the environment

Laws of humanity prohibit the use of weapons that are intended or may be expected to cause widespread, long-term, and severe damage to the natural environment.[141] This principle has drawn focus to nuclear weapons because they almost inevitably cause damage to the environment that is widespread, long-term, and severe. In the 1996 ICJ advisory, *Legality of the Threat or Use of Nuclear Weapons,* the Court recognized that important environmental factors had to be considered in the implementation of IHL, but did not conclude that the use of nuclear weapons would necessarily be unlawful on

[137] Ibid.
[138] Nils Mezer, *International Humanitarian Law: A Comprehensive Introduction* (ICRC, 2016)
[139] Jean-Marie Henckaerts, *Customary International Humanitarian Law Volume I: Rules,* (2009, Cambridge University Press, CIHL).
[140] Ibid.
[141] Ibid

this account.[142] However, it found that such weapons would generally be contrary to other IHL rules.

1.1.7 Specifically Regulated Weapons

Based on the three principles above, numerous specific means of the ward are having been prohibited or restricted in separate treaties.
Below is a table of weapons and the regulating treaties

Weapon	**Regulating Treaties**
1. Poison	Hague regulations article 23(a) The Rome Statute Article 8(2)(b)(xvii) The Geneva Gas Protocol Customary International Humanitarian Law, Rule 72
2. Exploding bullets	1868 St Petersburg Declaration Customary International Humanitarian Law, Rule 78
3. Expanding bullets	Customary International Humanitarian Law, Rule 77
4. Non-detectable fragments	Customary International Humanitarian Law, Rule 79
5. Booby-traps and other remote- or timer-controlled devices	1996 amended protocol II on the Convention on Certain Conventional Weapons
6. Landmines	The Anti-Personnel Mine Ban Convention

[142] *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, I.C.J. Reports 1996, p. 226, International Court of Justice (ICJ), 8 July 1996, available at: https://www.refworld.org/cases,ICJ,4b2913d62.html [accessed 9 February 2022].

	Article 1 of The 1997 Anti-personnel Mine Convention The Amended Protocol II to the Convention on Certain Conventional Weapons (for the countries that are not party to the Anti-Personnel Mine Ban Convention) Customary International Humanitarian Law Rule 81, 82, 83
7. Incendiary weapons	Protocol III to the Convention on Certain Conventional Weapons
8. Blinding laser weapons	Protocol on Blinding Laser Weapons (Protocol IV to the 1980 Convention)
9. Cluster munitions	Convention on Cluster Munitions
10. Chemical weapons	1899 Hague Declaration concerning Asphyxiating Gases The 1925 Geneva Gas Protocol The 1993 Chemical Weapons Convention The Rome Statute
11. Biological weapons	1925 Geneva Gas Protocol 1972 Biological Weapons Convention
12. Nuclear weapons	It is not expressly banned in IHL The 1996 advisory opinion by the ICJ concluded that the use of nuclear weapons is contrary to the rules of IHL. States are obligated to conduct negotiations with the goal of nuclear disarmament.[143]

However, weapons that may incidentally cause the same effects as poison, exploding bullets, expanding bullets or non-detectable fragments containing

[143] Ibid.

plastic are not prohibited. Finally, despite IHL efforts to prevent the production of weapons that cause unnecessary suffering during armed conflict, states have been found to actively funding research and development in this sector, [144] especially the anti-aircraft bullets other exploding anti-materiel ammunition, and grenades lighter than 400 grams.

1.1.8 Methods of Warfare

International Humanitarian law limits the methods and means used to wage war.[145] These restrictions apply to the category of weapons used, the way they are used, and the general conduct of all those engaged in the armed conflict.[146] Methods of warfare encompass prohibition or restriction of how such weapons can be used or hostilities can be conducted.[147]

International Humanitarian Law has some prohibited methods of warfare. They include:

i. Prohibition of direct attacks against civilian objects, cultural property, and installations containing dangerous forces.
ii. Starvation as a method of warfare targeted towards civilians is banned.
iii. Using civilians or protected persons as human shields is forbidden
iv. Use of acts of violence, to cause terror among civilian populations
v. Indiscriminate attacks
vi. Any method of warfare that causes, long term harm or severe harm to the environment.

[144] Nils Melzer, *supra* note 92.
[145] International Committee of the Red Cross, *Methods and Means of Warfare* 2010 https://casebook.icrc.org/law/conduct-hostilities#_ftn_076 accessed 9 February 2022.
[146] Ibid.
[147] Nils Melzer & Kuster Etienne, *International Humanitarian Law. A Comprehensive Introduction* (2016).

1.1.9 Protection of Persons *Hors De Combat*

Article 41(1) (2) of the Additional Protocol I to the Geneva Conventions[148] and Rule 47 of Customary International Law (CIL), enshrine the principle that it is prohibited to attack persons considered *hors de combat*.[149] A *Hors de combat* is a person belonging to the opposite side who has expressed intentions to surrender or is incapable of self-defense due to wounds or sickness, shipwreck, unconsciousness. Further, this is someone who abstains from hostile acts or escapes.[150]

The protection of *hors de combatant* ceases if the person considered so attempts to escape or commits a hostile act.[151] Additionally, the Geneva Convention III provides that using any weapon against prisoners of war constitutes an extreme measure.[152]

1.1.10 Denial of Quarter

Simply put, denial of quarter refers to the refusal to spare the life of anybody up to and including persons who are classified as *Persons Hors De Combat*. Denial of a quarter is prohibited by international law Article 40 and 41 of the Additional Protocol I and Customary Rule 46 enshrines that it is prohibited to threaten an advisory on the basis that there will be no survivors.[153] There

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[148]Article 41, *Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I)*, 8 June 1977, 1125 UNTS 3, available at: *https://www.refworld.org/docid/3ae6b36b4.html* [accessed 9 February 2022]

[149] Customary IHL, *Rule 47. Attacks Against Persons Hors De Combat* (*Ihl-databases.icrc.org*, 2022) *https://ihl-databases.icrc.org/customary-ihl/eng/docindex/v1_rul_rule47* accessed 9 February 20227

[150] Nils Melzer & Kuster Etienne, *International Humanitarian Law. A Comprehensive Introduction* (2016)

[151] Ibid.

[152]*Geneva Convention Relative to the Treatment of Prisoners of War (Third Geneva Convention)*, 12 August 1949, 75 UNTS 135, available at: *https://www.refworld.org/docid/3ae6b36c8.html* [accessed 9 February 2022]

[153] Article 40 & 41, *Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts*

is no derogation of this principle. Any method of warfare utilized to achieve the extermination of adversaries, including the wounded and sick is prohibited. Surrender should be provided to those who choose to surrender.[154]

Autonomous Weapon Systems

Throughout history, there has been constant radical developments in the way battles are waged and the weapons used in warfare. This extraordinary predisposition of humans to develop new weapons has often shown itself in parallel with efforts to limit or regulate their use.[155] The advancement of technology has led to the development of new weapons systems such as cyber weapons, autonomous weapons, and Nano-weapons *inter alia*.[156] These new technologies in warfare are not specifically regulated by the Geneva Conventions or their Additional Protocols.

Autonomous weapon systems (AWS) pose particularly difficult challenges for IHL. First, there is no internationally agreed-upon definition of autonomous weapon systems. Secondly, while there are still no fully autonomous weapons, it is widely accepted that AWS is set to revolutionize how wars are fought. [157]This has seen commentators call for a total ban on autonomous weapons as the existing system of law is inadequate to regulate

(Protocol I), 8 June 1977, 1125 UNTS 3, available at: https://www.refworld.org/docid/3ae6b36b4.html [accessed 9 February 2022].

[154] Nils Melzer & Kuster Etienne, *International Humanitarian Law. A Comprehensive Introduction* (2016).

[155] Adjust Isabelle, Coupland Robin & Isohel Rikki, *New wars, and new weapons? The Obligation of States to assess the legality of means and methods of warfare* (2002, International Review of the Red Cross, 84(846)) p. 345–363.

[156] Backstrom A et al; He, *New capabilities in Warfare: An overview of contemporary technological developments and the associated legal and engineering issues in Article 36 weapons reviews* (2012, International Review of the Red Cross, Vol 886, 483).

[157] Robin Geiss, *The International-Law Dimension of Autonomous Weapon Systems* (2015).

these weapons.[158] It has been argued that the deployment of lethal autonomous robots "may be unacceptable because no adequate system of legal accountability can be devised and because robots should not have the power of life and death over human beings."

On the other hand, in making a case for autonomous weapons, Schmitt states that autonomous weapon systems have a place on the battlefield because whereas some conceivable autonomous weapon systems might be prohibited as a matter of law, the use of others will be unlawful only when employed in a manner that runs contrary to IHL's prescriptive norms.[159] Schmitt restates the position that the true value of these systems is not to provide a direct human replacement, but rather to extend and complement human capability by providing potentially unlimited persistent capabilities, reducing human exposure to life-threatening tasks, and, with proper design, reducing the high cognitive load currently placed on operators or supervisors.[160]

However, even those scholars who argue against such a complete ban agree that there is no existing regulatory framework governing the employment of autonomous weapons in the GCs or their Additional Protocols. Thus, there is an urgent need to revisit the current legal regime governing weapons, means, and methods of warfare in the conduct of hostilities to ensure that new weapons systems such as autonomous systems are specifically regulated by IHL and that decisions concerning their use in armed conflict are not left to the arbitrary judgment of military commanders.

Further, while Article 36 of Additional Protocol (AP) 1 imposes an obligation on the states party to determine whether the employment of a new

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[158] Human Rights Watch [HRW] &amp*; International Human Rights Clinic [IHRC], Losing Humanity: The Case Against Killer Robots.*

[159] Michael N. Schmitt, *Autonomous Weapon Systems and International Humanitarian Law: A Reply to Critics,* (2013, Harvard National Security Journal Features).

[160] Undersecretary of Defense for Acquisition, Technology, and Logistics, Memorandum in DEP'T OF DEF., *The Role of Autonomy in DOD Systems* (July 2012, Defense Science Board).

weapon, means, or method of warfare would, in some or all circumstances, be prohibited by international law,[161] the article does not provide the procedure or any practical guidelines on how reviews of new weapons are to be carried out. As a result, only a handful of states have developed mechanisms to review new weapons to ensure compliance with IHL.

Even for States that have adopted such measures, the novelty of the technology used in the design or deployment of certain new weapons can in some cases make the process of conducting legal reviews very difficult. Further, existing Article 36 reviews do not consider context as they should. Ultimately, these challenges lead one to conclude that the existing law is not sufficiently clear and thus there is a need to clarify IHL or develop new rules to deal with these challenges.

Conclusion

In spite of the many benefits that have been brought about by the institutionalization of IHL and the existing legal framework with regards to protection of civilians during hostilities, the fact that there is noncompliance with IHL remains a big challenge, which has had a long-lasting effect to civilians, their families and the communities they are part of.[162] Conflicts are inherently messy, complex and difficult to resolve. However, this should not be taken as an excuse to continue with the non-compliance of laws and therefore accept the devastating impact of conflict on civilians. A number of courses of action, mechanisms and processes can improve the protection of civilians, both on the normative as well as the operational level.[163]

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[161] Article 36 (1), *Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I)*, 8 June 1977, 1125 UNTS 3, available at: https://www.refworld.org/docid/3ae6b36b4.html [accessed 9 February 2022].

[162] Bugnion, F. *The International Committee of the Red Cross and the development of international humanitarian law,* (2004, Chi. J. Int'l L., 5, 191).

[163] Eva Svoboda & Emanuella-Chiara Gillard, *Protection of Civilians in Armed Conflict: Bridging the Gap Between Law and Reality* (2015) p. 8.

Upon occupation of a territory, an occupying power assumes responsibilities to ensure the protected persons' guarantees under the Geneva Convention IV and international humanitarian law are satisfied. When the civilian falls outside the protection by the Geneva Convention IV, protection can be derived from Article 75 of the Additional Protocol I. This ensures that civilians who find themselves in a form of occupation that is not exactly hostile within the definition of Article 42 of The Hague Regulations, such their state of nationality consents to the occupation, or where the occupying power is allies with their state of nationality, or when the occupying power is of their nationality. Additional Protocol II, Articles 4-6 has similar protections and guarantees to civilians in non-international conflicts.

Further, protection should also be accorded to the women, against rape, prostitution and indecent assault.[164] Any other forms of discrimination are also prohibited. The civilians can only be subjected to internment under adverse security reasons, and this should only be in accordance to Articles 41, 42, 43, 68 and 78 of the Geneva Convention IV. As a consequence, this paper presupposes that there is need for heightened prosecutions carried out against those who engage in activities that harm civilians, such as starvation of civilians during hostilities.[165]

[164] Ibid.

[165] Power, S. *Siege Warfare in Syria: Prosecuting the Starvation of Civilians*, (2016, Amsterdam LF, 8, 1).

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Investment Treaties and The Arbitrability of Illegal Contracts: A Review of the Arbitral Award World Duty Free Company Limited Versus the Republic of Kenya

By: ***Muthomi Thiankolu****

Key Terms: *Foreign Direct Investment. Corruption. Illegality. Arbitration. Arbitrability*

1. Introduction

Does the illegality of a contract affect an arbitration clause set out in the contract? Can a party to a contract with an arbitration clause resist the reference of a dispute arising from the contract to arbitration because the contract is void or illegal?[1] The typical arbitrator's technical answer to these questions is that the separability doctrine preserves the agreement to arbitrate (i.e., the arbitration clause), notwithstanding the illegality of the main contract. [2] However, this technical answer raises many conceptual challenges.

This article examines the arbitral award in *ICSID Case No. ARB/00/7: WORLD DUTY FREE Company Limited versus the Republic of Kenya* (**'the WDF case**'), in which illegality, arbitrability and many other issues arose. Part 2 of the article provides an overview of the WDF case. Part 3 explores

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1 Kreindler RH, 'Aspects of Illegality in the Formation and Performance of Contracts' International Arbitration Law Review (London) 6:1:1-24, 2003 pp. 1-2.
2 Ibid, at p. 7.

the critical issues raised in the WDF case. These include the jurisdiction of the International Centre for Settlement of Investment Disputes ('**ICSID**') and the validity of an arbitration agreement/clause contained in a contract that is tainted by corruption. The article examines the applicability of international law to an investment contract where the parties have chosen a particular national law within the meaning of Article 42 of the Convention on the Settlement of Investment Disputes between States and Nationals of Other states ('**the ICSID Convention**). The essay also examines whether an assignee or successor in the title can invoke an arbitration agreement signed by its predecessor.

2. Overview of the WDF Case

In 1989, a company called "*House of Perfume*" ("**the foreign investor**") concluded a contract ('**the contract**') with the Government of the Republic of Kenya ('**GoK**').[3] The object of the contract was the "*construction, maintenance and operation*" of duty-free complexes at Kenya's Nairobi and Mombasa international airports.[4] The contract provided, *among other things*, that the transaction to which it related was an "*investment*" within the meaning of the ICSID Convention and that the foreign investor was a national of the United Arab Emirates.[5] The contract also provided that the parties consented to (i) submit to the jurisdiction of ICSID and (ii) submit to ICSID for settlement by arbitration of all disputes arising from or relating to the contract or any investment made under the contract.[6] Further, the contract provided that any arbitral tribunal appointed to adjudicate disputes under the contract would apply English law.[7]

In 1990, the parties "*amended*" the contract by substituting "*WORLD DUTY FREE Company Limited*" ('**the Claimant**') for the foreign investor.[8] Under

3 See the Award in the WDF case, paragraph 62. Unless the context otherwise impels, all references to "Award" or "the Award" in this article are references to the Award in the WDF case.
4 Award, paragraph 62.
5 Ibid, paragraph 6.
6 Ibid.
7 Ibid.
8 Ibid, paragraph 63.

the contract (as amended), the Claimant constructed, maintained and operated excellent duty-free shops at Kenya's Nairobi and Mombasa international airports. For two years, the Claimant operated the duty-free shops without any interference from GoK.[9]

The Claimant's Chief Executive Officer ('**CEO**') covertly paid a "*personal donation*" of US$ 2 million to His Excellency Daniel Arap Moi ('**HEDAM**'),[10] the then President of the Republic of Kenya, to secure its substitution for the foreign investor.[11] The payment, a bribe, was intended to secure HEDAM's consent to the foreign investment and procure his assistance in obtaining regulatory and bureaucratic clearances. [12] Accordingly, the "donation" was not recorded in the documents signed by the parties.[13]

In 1992, HEDAM needed to finance his re-election campaign. [14] The Claimant came in very handy—by facilitating a massive fraud against the Kenyan treasury.[15] Under the scheme, commonly known as the Goldenberg Scandal, the Claimant was named the consignee of fictitious gold and diamond exports from Kenya in shipment documents.[16] HEDAM and other senior Kenyan politicians and government bureaucrats used a company linked to the Claimant to siphon funds out of the Kenyan treasury by claiming undeserved export compensation payments from the Central Bank of Kenya.[17]

9 Ibid, paragraph 67.
10 Award, paragraphs 66, 120, 130, 135 and 185.
11 Ibid, paragraph 66.
12 Ibid, paragraph 135.
13 Ibid, paragraph 185.
14 Award, paragraph 68.
15 Ibid.
16 Ibid. The Goldenberg scandal has been the subject of extensive but futile investigations, and prosecutions. Kenyan courts have, through somewhat controversial and highly technical decisions, exonerated key suspects condemned by a judicial commission of inquiry formed to investigate the scandal in 2003. For one of such decisions, see Republic versus Judicial Commission of Inquiry into the Goldenberg Affair & 2 Others Ex-Parte George Saitoti [2006] eKLR.
17 Award, paragraph 68.

The Goldenberg scandal was soon exposed to the public. The Claimant contended that GoK began to commit various transgressions after the exposure of the Goldenberg scandal. First, GoK maliciously instigated a takeover of the Claimant by a Mr Kamlesh Patni.[18] Next, Kenyan courts appointed a receiver over the Claimant at the instance of Mr Kamlesh Patni.[19] The receiver "*mismanaged and ran down*" the duty-free shops.[20] GoK unlawfully deported the Claimant's CEO to the United Arab Emirates to thwart opposition to the takeover.[21]

The Claimant contended that the actions of GoK constituted illegal expropriation.[22] The Claimant also argued that the GoK's appropriation acts resulted in the "*classic…investment dispute that ICSID was established to resolve.*"[23] Consequently, the Claimant prayed for an order for "*payment of full compensation*" against the Republic of Kenya.[24]

GoK was oblivious of the bribe to HEDAM and the Claimant's complicity in the Goldenberg Scandal. Specifically, GoK knew details of the bribe to HEDAM and the Claimant's complicity in the Goldenberg Scandal through the Claimant's witness statement.

GoK denied the alleged transgressions.[25] It raised objections on, *among other things*, the Tribunal's jurisdiction and the Claimant's capacity to institute the proceedings. On capacity, GoK contended that the Claimant had been struck off the Register of Companies at the Isle of Man, its place of incorporation, a year before the commencement of the arbitration proceedings.[26] That being the case, GoK contended that the Claimant did not exist in law. GoK challenged those who had filed the arbitral dispute to

18 Mr. Kamlesh Patni was the chief architect of Goldenberg Scandal.
19 Award, paragraph 71.
20 Ibid.
21 Ibid, paragraph 72.
22 Ibid, paragraph 74.
23 Award, paragraph 75.
24 Ibid, paragraphs 76-77.
25Ibid, paragraphs 80-87.
26 Ibid, paragraph 94.

demonstrate "*both the resurrection of the company [i.e., the Claimant] and its authorisation to commence the action."*[27]

After receiving a copy of the Claimant's Witness statement, GoK applied for summary dismissal of the Claimant's case.[28] The crux of GoK's application was that the contract was void and unenforceable because the Claimant procured it by bribery.[29] GoK submitted the contract was unenforceable as a matter of Kenyan and English law and *ordre public international.*[30] Besides, GoK had now avoided the contract.[31]

The Claimant made rejoinders. First, the bribe to HEDAM was a collateral agreement before and severable from the contract.[32] Accordingly, the contract was valid and enforceable.[33] Second, both parties were guilty of illegality since HEDAM was GoK's agent.[34] According to the Claimant, HEDAM was "*one of the remaining 'big men' of Africa, who, under the One-Party state Constitution was entitled to say, like Louis XIV, he was the state."*[35] The Claimant also contended that HEDAM was comparably more blameworthy. Therefore, dismissing the claim would have inequitably placed a "*one-sided burden*" on the Claimant.[36]

The Tribunal dismissed the claim because[37] the Claimant (i) had admitted to bribery in obtaining the contract; (ii) bribery was a serious offence under Kenyan and English law; and (iii) bribery of public officials offended *ordre public international* and various international conventions.[38]

27 Award, paragraph 94.
28 Ibid, paragraph 105.
29 Ibid.
30 Ibid, paragraph 105.
31 Ibid, paragraph 109.
32 Award, paragraphs 111-112.
33 Ibid.
34 Ibid, paragraph 114.
35 Ibid, paragraph 185.
36 Ibid, paragraphs 113 and 176.
37 Ibid, paragraph 192 (1).
38 Award, paragraphs 143-147.

3. Issues Raised in the WDF Case

(a) Jurisdiction and Arbitrability

The ICSID Convention provides for determination, by conciliation or arbitration, of any "*legal dispute arising directly out of an investment*" between the contracting states and nationals of other contracting states.[39] The ICSID Convention does not define either legal disputes or investment, but ICSID panels generally construe the terms liberally.[40] Although these terms are construed liberally, ICSID jurisdiction is dependent on the existence of a conflict of rights, i.e. the existence or scope of a legal right or obligation, as opposed to a mere conflict of interests.[41] Accordingly, ICSID's jurisdiction does not extend to moral, political, economic, or commercial disputes.[42]

GoK raised many objections to the jurisdiction of the arbitral tribunal in the WDF case. First, having been struck off the Register of Companies before the institution of the arbitration proceedings, the Claimant was not only non-existent but could not also institute the proceedings.[43] Second, the Claimant was a stranger to the arbitration agreement.[44] Accordingly, there was no consent to arbitrate within the meaning of Article 25 of the ICSID Convention.[45] Thirdly, GoK submitted that the dispute did not arise under the contract.[46] The upshot of GoK's objection was that all the three facets of

39 See Article 25 of the ICSID Convention. See also Lowenfeld A.F, International Economic Law (2nd ed.) Oxford, New York: Oxford University Press, 2008). , at p. 537.
40 Moses M.L, The Principles and Practice of International Commercial Arbitration (Cambridge University Press 2008) at p. 225 The drafters of the ICSID Convention chose not to define investment. See Tupman, M. W, Case Studies in the Jurisdiction of the International Centre for Settlement of Investment Disputes, 35 Int'l & Comp. L.Q. 813-838 (1986). at p. 816.
41 FEDAX N. V. versus The Republic of Venezuela 37 I. L.M. 1378 at 1381, paragraph 15.
42 Ibid.
43 Award, paragraph 98.
44 Ibid, paragraph 34.
45 Ibid. See also paragraph 75.
46 Ibid, paragraphs 34 and 82.

ICSID jurisdiction (i.e. *ratione personae*, *ratione materiae* and *ratione voluntatis*) were non-existent.

Although the Tribunal did not address the issue of jurisdiction, it is arguable that having been struck off the Register of Companies before instituting the arbitration proceedings, the Claimant did not exist in law.[47] Furthermore, the Claimant's court-appointed receiver, the only person who could lawfully have initiated the proceedings, disowned them.[48] Therefore, the registration of the request for arbitration in the WDF case suggests a possible administrative lapse. Rule 2 (2) of ICSID's Institution Rules provides, *among other things*, that a request for arbitration lodged by a juridical person shall be supported by documentation showing that the Claimant has taken all necessary steps to authorise the request. Rule 6 (2) (b) of ICSID's Institution Rules requires the Secretary-General to peruse a request for arbitration and refuse to register the request if he finds no jurisdiction. Since the Claimant was under receivership, ICSID's Secretariat ought to have perused the documents to determine whether the receiver had authorised or consented to the institution of the request for arbitration.

Back to the Claimant's legal existence, it is noteworthy that although Article 25 (2) (a) of the ICSID Convention requires natural claimants to be nationals of a contracting state on the date on which the parties consented to submit to conciliation or arbitration *"as well as on the date on which the request was registered,"* there is no similar requirement for Claimants who are juridical persons.[49] This might explain why the Tribunal was not overly concerned about the Claimant's legal existence when it filed the proceedings.

47 The Tribunal allowed the Claimant to apply to be reinstated to the Register of Companies. See inter alia paragraphs 95 and 101 of the Award.
48 The receiver wrote to the Tribunal requesting withdrawal of the proceedings. See inter alia paragraphs 20, 32, 94, 95, 98, 100 and 102 of the Award. The Directors, who had instituted the proceedings, were only permitted to act on behalf of the Claimant two years after institution of the proceedings.
49 Underlining and emphasis supplied. Article 25 (2) (a) of the ICSID Convention, however, was designed to oust natural persons with dual or multiple nationalities, or nationality of the host state. See Tupman, M. W. Op. Cit. at pp. 817 and 834.

Regarding *ratione voluntatis*, i.e., consent to arbitration, it was common ground that the Claimant was not a party to the contract at inception but rather acceded to it in 1990. GoK's objection went to whether a third party, successor in title or an assignee of a contract can claim the benefit of an arbitration clause contained in the contract. How, if at all, did the Claimant acquire any rights under the contract? The "amendment" of the contract to substitute the Claimant for *House of Perfume* did not, in our view, confer any rights on the Claimant.[50] One does not transfer contractual rights (and obligations) by amendment but by novation or assignment.[51] With novation, parties to a contract agree that a third party, who also agrees, shall stand in the relation of either of them to the other.[52] This tri-partite agreement extinguishes the old contract and establishes a new one between the third party and one of the parties to the original contract.[53] On the other hand, an assignment need not involve the consent of the three parties.[54] Unlike novation, the assignment does not extinguish the contract; it merely substitutes a third party for one of the parties.[55]

Since GoK sought to avoid the contract as originally signed, a prayer ultimately granted by the Tribunal, we may legitimately assume that the Claimant acquired the contract by assignment.[56] It seems the parties were unaware of the distinction between assignment and novation. The distinction is not academic. It can have significant practical consequences. If the Claimant had entered into the contract by novation, it would have been

50 For instances where jurisdiction was established notwithstanding that the Claimant was an assignee/successor in title rather than original signatory to the arbitration agreement, see *Holiday Inns versus Morocco and Amco versus Indonesia*, both discussed in Tupman, M. W. Op. Cit. at pp. 817-820 and 824-827.
51 Beale HG and Chitty J, *Chitty on Contracts.*, Vol 1 (30th Edition, Sweet & Maxwell 2010), paragraph 19-086.
52 Ibid.
53 Ibid, paragraph 19-088.
54 Ibid.
55 Ibid, paragraph 19-086.
56 See Award, paragraphs 52, 183, 188 and 192.

necessary to provide separate consideration for the transaction besides the consideration provided by the investor.[57]

However, the distinction between assignment and novation does not solve the jurisdictional issue of *ratione voluntatis* (i.e., consent to arbitrate). Whether viewed as novation or assignment, the "amendment" of the contract entailed a purported transfer of rights under an illegal contract—a logical impossibility. Furthermore, since the arbitration clause was legally a separate agreement from the contract, we cannot simply assume that it was also transferred through the 1990 "amendment." [58] Consequently, the jurisdictional requirement of consent in Article 25 (1) of the ICSID Convention was lacking.

We posit that the Claimant did not also establish the jurisdictional requirements of *ratione personae* and *ratione materiae*. As stated, having been de-registered before the institution of the proceedings, the Claimant was non-existent and hence could not have been a national of a contracting state under Article 25 of the ICSID Convention. Furthermore, the grievance that Mr Kamlesh Patni took over the Claimant was not backed by any evidence of complicity on the part of GoK. Indeed, the complaint only disclosed ownership battles (over the Claimant) between Messrs Nasir Ali and Kamlesh Patni. As GoK put it, the claim did not arise directly from an investment; it related exclusively to a dispute between two individuals.[59]

Arbitrability of Void, Illegal or Unenforceable Contracts

Questions often arise about the arbitrability of contracts tainted with illegality.[60] The concept of arbitrability goes to public policy limitations on

57 Beale HG and Chitty J. Op. Cit. at paragraph 19-088.
58 For a contrary view, see Holiday *Inns versus Morocco* (discussed in Tupman, M. W. Op. Cit. at pp. 817-820), where it was held that any party on whom rights and obligations under an agreement have devolved is entitled to the benefits and subject to the burdens of an arbitration clause contained in the agreement.
59 Award, paragraph 82.
60 Kreindler R. H Op. Cit. at pp. 1-2 and 7-8.

disputes capable of settlement by arbitration.[61] Generally, states regard disputes involving serious crimes (such as bribery) as unfit for settlement by arbitration.[62] However, the doctrine of arbitrability has limited applicability in foreign investment disputes.[63] The question of arbitrability of dispute arising from a foreign investment tainted by bribery or other serious crimes may arise either from the host state's domestic law or from principles of public international law.[64]

In the WDF case, admission of bribery went to the arbitrability of the dispute.[65] Article 41 of the ICSID Convention empowers a tribunal to judge its own competence/jurisdiction.[66] Since the contract was obtained by bribery, it was not arbitrable.[67] Although the Tribunal appreciated the relevance of corruption to the arbitrability of the contract, it held that "*no evidence was adduced*" to the effect that the bribe "*specifically*" procured the arbitration clause.[68] The Tribunal, invoking the separability doctrine, assumed that the parties' arbitration agreement remained subsisting, valid and effective.[69]

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61 Sornarajah M, *The Settlement of Foreign Investment Disputes* (Kluwer Law International 2000) at p. 178.

62 Ibid, at p. 174. Generally, family matters, patent regulation and issues of bankruptcy are not arbitrable in most states. See Moses, M. L. Op. Cit. at p. 68. See also Article 1 (5) of the UNCITRAL Model Law on International Commercial Arbitration, which recognizes the rights of states to decide the categories of disputes that may be submitted to arbitration.

63 Sornarajah, M. Op. Cit. at p. 179.

64 Ibid.

65 On situations when a foreign investment contract may not be arbitrable, see Sornarajah, M. Op. Cit. at pp. 180-185.

66 The doctrine of competence-competence gives arbitral tribunals a "residual" power to investigate their jurisdiction and, possibly, issue an award against jurisdiction. See Kreindler, R. H. Op. Cit. at p. 8.

67 See, for instance, ICSID Case No. ARB/03/26: *Inceysa Vallisoletana, S. L. versus Republic of El Salvador*, where it was held that there was no jurisdiction to arbitrate a contract obtained by fraud.

68 Award, paragraph 187.

69 Ibid.

Under the separability doctrine, the illegality of a contract does not necessarily invalidate an arbitration agreement/clause contained in the contract.[70] Therefore, an agreement to go to arbitration, contained in an arbitration clause to a contract, can be challenged "*only on grounds relating directly to that agreement."*[71] However, the separability doctrine can lead to logical and legal absurdity if taken too literally. If a contract is void, the logical/legal result is that there is no contract. A void contract is a bargain that, although containing all the indices of a standard contract, is in reality so defective as to be ineffectual in the eyes of the law.[72] Such a bargain, it is said, is empty from the outset, *void ab initio.*[73] Our view is that there cannot be a valid arbitration agreement regarding such a (non-existent) contract.[74] Be that as it may, the separability doctrine serves some functional, practical purposes. It precludes a party to an arbitration agreement, for instance, from avoiding arbitration by merely alleging that the underlying contract is invalid.[75]

Bribery & Applicable Law

What law ought to have been applied to the issue of bribery? Article 42 of the ICSID Convention requires arbitral tribunals to decide disputes under the law chosen by the parties. Absent such choice, tribunals are enjoined to apply the law of the state party to the dispute (including its conflict of law rules) and such rules of international law as may be applicable.

A textual reading of Article 42 suggests that ICSID tribunals cannot apply international law where the parties have chosen a particular national law as the applicable law. Assuming this is correct, it would follow that English law, as opposed to international law, applied to the issues raised in the WDF case—including bribery. The Tribunal, however, examined the validity and

70 Ibid.
71 Fili Shipping Co. Ltd & Others versus Premium Nafta Products Ltd & Others [2007] UKHL 40.
72 Award, paragraph 164.
73 Ibid.
74 *O'Callaghan versus Coral Racing Ltd* (unreported), The Times, 26/11/1998.
75 Kreindler, R. H. Op. Cit. at p. 7.

enforceability of the contract under international law.[76] Since the parties had chosen English law as the applicable law, it was erroneous for the Tribunal to apply international law. By using international conventions against corruption when it was not obliged to do so, the Tribunal arrogated the mandate of enforcing the conventions.[77]

So, what is the effect of bribery on a foreign investment contract? From the decision in the WDF case, where English law governs such a contract, it is voidable at the option of the innocent party.[78]

Responsibility for Bribery

According to the Claimant, HEDAM received the bribe as an agent of GoK.[79] On the other hand, GoK attributed the actions of Mr Ali, the bribe-giver, to the Claimant. GoK did not have to prove agency between Mr Ali and the Claimant since the latter had filed a witness statement saying that he had paid the bribe on behalf of the Claimant. Although the Claimant's agent was indisputably guilty of bribery, it was oppressive for the Tribunal to dismiss the claim. Where bribery is so endemic in a country that it is practically impossible to do business with that country without bribing its officials, it is oppressive to punish a foreign investor who has little choice in such circumstances.[80]

76 Award, paragraphs 129, 143, 146 and 157.

77 On why foreign investment arbitration may be unsuitable for cases touching on matters of general international concern, including bribery, see Sornarajah, M. Op. Cit. at pp. 184-187.

78 For a concise and superb summary on the distinctions between void and voidable contracts, see the opinion of Lord Mustill, excerpted at paragraph 164 of the Award.

79 The Tribunal correctly rejected this argument (Award, paragraph 185), because there is no principle in English law under which knowledge can be attributed to the state in respect of covert corrupt actions of its officers.

80 Award, paragraphs 130, 176 and 177. However, the Award is unimpeachable to the extent that the Tribunal merely gave effect to the law chosen by the parties.

Drafting and Pleading Competence

Two aspects of drafting and pleading arise in the WDF case. First, the Claimant introduced the issue of bribery.[81] The unnecessary introduction of this issue became fatal to the Claimant's case. Second, the WDF case shows the need for drafters of foreign investment contracts to consider that the host country's laws may be identical to English law or other laws commonly chosen as the applicable law in such contracts. Had the contract drafters checked, they might have discovered no difference between English and Kenyan law on contract.

Conclusion

The Tribunal in the WDF case ought to have dealt with or at least commented on the serious jurisdictional and other issues raised by the parties. Given the provisions of Article 42 of the ICSID Convention, it was unnecessary, if not objectionable, for the Tribunal to make an extensive foray into and apply international law. Despite the criticisms outlined in this article, the Award is a praiseworthy restatement of national and international law on bribery of foreign public officials. The award should encourage international investors to pursue their business goals within internationally accepted ethical standards. In this regard, it should be recalled that the Tribunal declined to consider the well-known fact that corruption was endemic within GoK at the time the bribery took place.[82]

81 Award, paragraphs 66, 68 and 184.
82 Award, paragraph 156.

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Charting a New Path for Environmental Management and Conservation in Kenya

By: ***Kariuki Muigua****

Abstract

This paper offers some practical recommendations on how Kenya can actualise the current progressive constitutional and statutory provisions that are meant to drive the country towards achieving the sustainable development agenda as well as improving the lives of communities in a way that makes them meaning players in the game of environmental management and conservation. The paper draws from the best practices internationally and while it acknowledges the uniqueness of Kenya's socio-economic context, the recommendations are broad enough to take care of the needs of all stakeholders. They can be tailored in a way that would make them applicable and largely acceptable to communities and other stakeholders. The major argument in the discussion is pegged on the notion that solutions facing the country's sustainability problems must come from scientific as well as indigenous knowledge and practices.

1. Introduction

Environmental management encompasses all activities geared towards the protection, conservation and sustainable components of the environment.[1] While the law provides for various approaches to environmental management and governance such as the command and control, market-based approaches, incentives (taxation and subsidies), Community Based Natural Resource Management (CBNRM) and traditional resource management institutions, among others, the actualisation of these

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[1] Sec. 2, Environmental (Management and Coordination) Act, No. 8 of 1999, Laws of Kenya.

approaches requires some innovative approaches to ensure that the same are fully adopted and implemented. Such innovation is important in overcoming the shortcomings that may be associated with each of the approaches.

This paper offers a brief yet detailed discussion on some topical issues on how Kenya can adopt an integrated approach to environmental management in Kenya for sustainability. While the paper acknowledges that law is a necessary tool in effective environmental management, the paper proposes some recommendations that go beyond the law in not only achieving the environmental rights of the citizens, but also ensuring that the State's and citizenry's duties towards sustainable environmental management and conservation are achieved.

2. Meaningful and Active Participation of Citizens in Environmental management

The sustainable development agenda envisages not only the participation of all stakeholders in environmental and natural resources governance and management, but also ensuring that the interests of all parties are satisfactorily taken care of while at the same time balancing such interests with sustainability requirements.

The importance of the Constitution of Kenya 2010 in its provisions on the obligations of the State with respect to the environment cannot be overstretched. The Constitution envisages the participation of all stakeholders, both as rights-holders as well as duty-bearers as far as environmental matters are concerned.[2]

While these are commendable provisions, their full realisation in terms of implementation and respect by the policy and legal stakeholders remains a mirage. There are no defined mechanisms yet to ensure that the same are meaningfully implemented. There is a need for the policy and lawmakers to develop stakeholder engagement and free prior and informed consent guidelines and toolkits. Communities, with the right information and sensitization on issues affecting the environment and the nation at large, can meaningfully engage other stakeholders by way of defining their immediate

[2] Article 69, Constitution of Kenya, 2010.

needs against the national policies on environmental management and conservation.[3] The call for written submissions via the print media as is mostly the case may not always work as some of the most affected communities and groups of persons may not even have the ability to read and write let alone accessing the newspapers and other news media.[4]

This calls for more forums where the stakeholders can engage such groups of persons one on one and get their views.The Constitution of Kenya requires a collaborative approach in environmental and natural resources governance and management, within the framework of the national values and principles of governance. If this is to be achieved, then there is a need for change of tact in collecting views. The most common argument from some quarters has always been that if all interested and affected groups of persons were to be given a forum to air their views, then some key development infrastructure and activities would never go on.[5] However, it must be acknowledged that some of these activities, especially mining activities are likely to change the lives of these communities permanently and even affect their generations to come. A relevant example is the alleged lead poisoning in Owino Uhuru, a slum area in Mombasa city adjacent to a lead battery recycling factory, which has led to protracted court battles.[6] It is reported that leakages from the

[3] See UN Environment, 'Managing Forests with Community Participation in Kenya' (*UN Environment*, 13 December 2019) <http://www.unenvironment.org/news-and-stories/story/managing-forests-community-participation-kenya> accessed 6 May 2020.

[4] UN Environment, 'Managing Forests with Community Participation in Kenya' (*UN Environment*, 13 December 2019) <http://www.unenvironment.org/news-and-stories/story/managing-forests-community-participation-kenya> accessed 6 May 2020.

[5] Some court cases have approved some projects based on this argument, arguing that elected leaders can give their consent on behalf of the represented communities or group of persons.

[6] Okeyo B. & Wangila A., "Lead Poisoning in Owino Uhuru Slums in Mombasa-Kenya," (Eco-Ethics International –Kenya Chapter, 2012). Available at https://www.cofek.co.ke/Lead%20Poisoning%20in%20Owino%20Uhuru%20Slums%20Mombasa.pdf [Accessed on 21/1/2020]; Zoë Schlanger, "A Kenyan mother, two disappearing Indian businessmen, and the battery factory that poisoned a village," Quartz Africa, March 18, 2018. Available at https://qz.com/africa/1231792/a-battery-recycling-plant-owned-by-indian-businessmen-caused-a-lead-poisoning-crisis-in-kenya/ [Accessed on 21/1/2020].

factory have significantly increased lead concentration in the slum's environment which poses environmental health risks especially to children living in the slum.[7] Further, studies have also indicated that this has contributed to soil pollution in the area.[8] Admittedly, and backed by research, the effects of lead on the environment and the people's health are bound to be long term.[9] Some writers have even rightly pointed out that the effects of lead poisoning are not usually detected in a short visit with a doctor.[10] It would therefore be not only a case of great environmental injustice but also a form of death sentence for any developer to engage in such projects that predispose a community and their future generations to lead poisoning and yet deny them a chance to participate in the approval process, in the name of their democratically elected leaders making the decision on their behalf.

It is therefore imperative that the constitutional and statutory provisions on public participation be fully implemented not just through calling for public comments on proposed projects but also ensuring that where such projects directly affect the livelihoods of a certain group of persons, the affected persons are fully engaged through such forums as public *barazas* where the Government should also ensure that health officials are invited to answer any

[7] Consumer Federation of Kenya, 'Lead Poisoning in Owino Ohuru Slums in Mombasa-Kenya' available at https://www.cofek.co.ke/Lead%20Poisoning%20in%20Owino%20Uhuru%20Slums%20Mombasa.pdf [Accessed on 6/5/2020].

[8] Caravanos, 'Conflicting Conclusions or Competing Methodologies? Documenting Soil Lead Pollution in Owino Uhuru, Kenya' Journal of Health & Pollution, Vol. 9, No. 21, March 2019.

[9] Cheng, Z., "Late attention to children's health under lead exposure: legacy of Flint water crisis?." PhD diss., University of Pittsburgh, 2018; Ravipati, E.S., Mahajan, N.N., Sharma, S., Hatware, K.V. and Patil, K., "The toxicological effects of lead and its analytical trends: an update from 2000 to 2018." *Critical reviews in analytical chemistry* (2019): 1-16; Yamauchi, Osamu. "Astrid Sigel, Helmut Sigel, Roland KO Sigel (Eds):"Lead: Its Effects on Environment and Health." Volume 17 of Metal Ions in Life Sciences." *Transition Metal Chemistry* 42, no. 6 (2017): 575-577; Assi, M.A., Hezmee, M.N.M., Haron, A.W., Sabri, M.Y.M. and Rajion, M.A., "The detrimental effects of lead on human and animal health." *Veterinary world* 9, no. 6 (2016): 660.

[10] Hanna-Attisha, M., Lanphear, B. and Landrigan, P., "Lead poisoning in the 21st century: the silent epidemic continues." (2018): 1430-1430.

of the community's concerns on possible health effects of the proposed projects.

It is important to entrench environmental democracy which is meant to empower the general public and enable them to meaningfully participate in environmental management.[11]

3. Enhancing the Effectiveness of the Regulatory Framework on Corporations' Environmental Liability

In recognition of the important role played by corporations in the society and their contribution to the economic development, it is arguable that the potential contribution of corporations in promoting sustainable environmental and natural resources management as far as their environmental liability is concerned cannot be ignored. This is in recognition of the fact while some are directly involved in natural resources extraction and other environmental resources as sources of their raw materials, even those that are concerned with other industrial activities have wastes and discharges which, if not properly dealt with can adversely affect the environment and the lives of communities living within their locality. If the local news over the last few years is anything to go by, there has been some evidence of laxity in holding these corporations liable for environmental pollution.[12] There is a need for more stringent measures to be taken as a way of curbing the blatant pollution of water bodies and the environment in general by the industries especially those dealing with chemical discharges. The National Environment Management Authority enforcement officers should work closely with the locals and the media to not only apprehend but also hold accountable those who flout environmental rules and regulations. There may also be a need to revisit the prescribed penalties in order to curb the vice.

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

[12] National Environment Management Authority, 'Factories Closed, Owners Arrested for Polluting the Environment' available at http://www.nema.go.ke/index.php?option=com_content&view=article&id=298:factories-closed-owners-arrested-for-polluting-environment&catid=10:news-and-events&Itemid=454 [Accessed on 4/5/2020].

As a way of using their corporate social responsibility (CSR) towards achieving sustainability, the corporations are also expected to contribute positively towards improving the livelihoods of the people. However, while the CSR is entirely pegged on the corporations' initiatives, the local content provisions that are now found within the mining and petroleum laws[13] in the country should be fully implemented in a way that ensures that any affected groups of persons have the legal backing as far as the accruing benefits are concerned.

Considering that Kenya is still at a nascent stage in exploring its extractives industry, building local capacity is critical if the full benefits of this industry are to be realised. The Government should invest in not only community empowerment but also expanding the capacity of local institutions of higher learning to offer specialized training and knowledge that is relevant for this part of the world. The stakeholders can work closely with other advanced countries in order to retain the requisite skills within the country; develop local capacities in the mining industry value chain through education, skills and technology transfer, research and development; and achieve the minimum local employment level across the entire mining industry value chain.[14]

It commendable that there are already in place legal, institutional and policy frameworks towards ensuring that there is safeguarding of the environment against the negative impact of extraction activities as well as improving the livelihoods of the communities. There is however a lot of good will that is required from the government agencies, communities as well as the private investors in order to ensure that the same works as intended.

4. Expediting the Approval of the Legislation on Benefit Sharing

While the theme of benefit sharing in natural resources and environmental goods features across most of the statutes and regulations governing the

[13] Energy Act, No. 1 of 2019, Laws of Kenya; Mining (Employment and Training) Regulations, 2017, Legal Notice No. 82, Laws of Kenya; Mining (Use of Local Goods and Services) Regulations, 2017, Legal Notice No. 83 of 2017, Laws of Kenya; Mining Act, No. 12 of 2016, Laws of Kenya; Petroleum Act, No. 2 of 2019, Laws of Kenya.

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

sector, it is pointing out that the single piece of legislation that is meant to provide substantive guidelines on benefit sharing has been pending for quite some time. The proposed *Benefit Sharing Bill 2018*[15] has been pending for several years due to some contentious issues as put forth by various stakeholders. There is a need to wrap up the discussion and have the Bill passed as law.

The law will come in handy considering that the State is supposed to manage these resources in trust for the people and must therefore ensure that they get to benefit from them in a bid to improve their living standards.

5. Creating Practical Platforms for use of Science and Indigenous knowledge

It is in the spirit of promoting meaningful inclusion and public participation that the theme of indigenous knowledge as a tool for promoting communities' participation features prominently in the Constitution of Kenya 2010. There is a need for the stakeholders to ensure that there is a complimentary application of the indigenous ecological knowledge alongside the scientific knowledge. The use of indigenous ecological knowledge not only make the communities own and appreciate the government's efforts in environmental management and conservation, it also enables the government to tap into the positive aspects of such community knowledge. It is common knowledge that communities have had some cultural environmental knowledge for centuries and have had a special relationship with their environment, which have made them diligently take care of it. If such practices are brought on board to form part of the government's knowledge for decision-making, it increases the chances of promoting sustainability backed by the communities. The Government's agencies charged with coming up with resilient varieties of crops should work closely with communities in order to incorporate their knowledge on the same.[16] Traditional knowledge is capable of yielding better results, technologically speaking, when placed within its environmental and social context. This is because sometimes, it has the most refined technologies,

[15] Natural Resources (Benefit Sharing Bill), 2018 (Government Printer, Nairobi, 2018).
[16] Ibid, Article 11.

other times, it is very simple but still more appropriate, ecologically compatible and locally manageable.[17] Furthermore, local people are the custodians of traditional systems and are therefore well informed about their own situations, their resources, what works and what does not work. They are also aware of the possible impact of a change in one factor on the other parts of the production system.[18]

The incorporation of traditional knowledge in crop production will not only enhance food security but will also be useful in afforestation and reafforestation since the knowledge will greatly contribute in identifying the most ecologically suitable trees in some regions where the most common and exotic varieties of trees would not grow.

6. Entrenching Integrated Pest Management in Agricultural Production in Kenya

While pests may have major impacts on crop production, the mode of control of these pests may potentially have even a bigger impact on biodiversity. Some of the chemicals used may lead to crop poisoning, water and soil pollution and consequently, have an adverse effect on the biodiversity thriving within the soil and water. In Kenya, use of pesticides has been promoted to expand agricultural production and increase productivity.[19]

The concept of Integrated Pest Management (IPM) was born in response to the discovery of pesticide resistance as well as the environmental and health impact of pesticide overuse, and IPM has greatly evolved and expanded.[20] IPM is associated with many advantages because it optimizes the cost of production (a benefit to the farmer) and the cost of food (a benefit to the

[17]United Nations Convention to Combat Desertification (UNCCD) (2005), 'Revitalizing Traditional Knowledge: A Compilation of Documents and Reports from 1997 – 2003', UNCCD, Bonn, Germany. 150 pp. at p. 11.

[18] Ibid.

[19] Macharia, I.N., MithÃ, M. and Waibel, H., "Potential environmental impacts of pesticides use in the vegetable sub-sector in Kenya." *African Journal of Horticultural Science* 2 (2009).

[20] 'Integrated Pest Management: The Future of Agriculture?' (*FreshFruitPortal.com*, 5 May 2020) <https://www.freshfruitportal.com/news/2020/05/05/is-integrated-pest-management-the-future-of-agriculture/> accessed 5 May 2020.

consumer) without indirect environmental costs while also providing a long-term benefit for overall food production (a benefit to the environment).[21] Integrated pest management (IPM) is an ecological approach to pest management as it discourages the use of pest control methods that have negative effects to the non-target organisms.[22]

It is estimated that "90-95% of strawberry growers in California use predatory mites to manage pest mites, an example of inundative biological control in outdoor farming."[23]

There are some positive steps that Kenya has made towards promotion and achievement of IPM. In 2018, the Ministry of Agriculture, Livestock, Fisheries and Irrigation (MoALF&I) came up with the "Integrated Pest Management Plan (IPMP) For National Agricultural and Rural Inclusive Growth Project (NARIGP)" whose main objective are objectives of IPMP are to: establish clear procedures and methodologies for IPM planning, design and implementation of micro-projects to be financed under the Project; develop monitoring and evaluation systems for the various pest management practices for subprojects under the Project; to assess the potential economic, environmental and social impacts of the pest management activities within the micro-projects; to mitigate against negative impacts of crop protection measures; to identify capacity needs and technical assistance for successful implementation of the IPMP; to identify IPM research areas in the Project; and to propose a budget required to implement the IPMP.[24] This document on Integrated Pest Management

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[21] Ibid.

[22] Para. 17, *Integrated Pest Management Plan (IPMP) For National Agricultural and Rural Inclusive Growth Project (NARIGP)*, October, 2018.

[23] 'Integrated Pest Management: The Future of Agriculture?' (*FreshFruitPortal.com*, 5 May 2020) <https://www.freshfruitportal.com/news/2020/05/05/is-integrated-pest-management-the-future-of-agriculture/> accessed 5 May 2020.

[24] Para. 23, Republic of Kenya, Ministry Of Agriculture, Livestock, Fisheries And Irrigation National Agricultural And Rural Inclusive Growth Project (NARIGP), *Integrated Pest Management Plan (IPMP) For National Agricultural and Rural Inclusive Growth Project (NARIGP)*, October, 2018. Available at *http://www.kilimo.go.ke/wp-content/uploads/2019/02/NARIGP-INTERGRATED-PEST-MANAGEMENT-PLAN-IPMJANUARY-2019.pdf* accessed 5 May 2020.

(IPM) is meant to provide a strategic framework for the integration of climate change mitigation measures, smart agriculture, SLM practices and technologies, environmental and pest management considerations in the planning and implementation of the activities to be implemented within the National Agricultural and Rural Growth Project (NARIGP).[25]

The Ministry of Agriculture, Livestock, Fisheries and Irrigation (MOALF&I) is designated as the principal agency responsible for overall mitigation and monitoring of the adverse impacts of the pesticides including ensuring that the IPMP is followed under the NARIGP.[26]

Notably, the targeted micro-projects will use farmer groups and associations who are the project beneficiaries to undertake monitoring for instance in observing the pests in the farms, identifying weeds, and reporting as part of the surveillance to inform what sort of control measure to adopt. The farmer groups and associations will be trained on surveillance and best management practices in pesticide application and use.[27] In addition, the Agrochemical Association of Kenya (AAK) and distributors or wholesalers of pesticides will also be used to mitigate and monitor the adverse impacts. The agro-vet distributors will be trained to provide education and awareness to farmers on judicious pesticide use and application for the benefit of the environment and human health since they have constant contact with the farmers.[28]

The Pest Control and Product Board (PCPB) and the National Environment Management Authority (NEMA) are also to be included in the implementation.[29]

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[25] Para. 18, Integrated Pest Management Plan (IPMP) For National Agricultural and Rural Inclusive Growth Project (NARIGP), October, 2018.
[26] Para. 8, Integrated Pest Management Plan (IPMP) For National Agricultural and Rural Inclusive Growth Project (NARIGP), October, 2018.
[27] Para 10, Integrated Pest Management Plan (IPMP) For National Agricultural and Rural Inclusive Growth Project (NARIGP), October, 2018.
[28] Para. 11, Integrated Pest Management Plan (IPMP) For National Agricultural and Rural Inclusive Growth Project (NARIGP), October, 2018.
[29] Paras. 12 & 13, *Integrated Pest Management Plan (IPMP) For National Agricultural and Rural Inclusive Growth Project (NARIGP)*, October, 2018.

The above document rightly points out that in Kenya, Integrated Pest Management is not prioritized, particularly through government policies. In addition, though many solutions to pest problems exist, farmers tend to rely on pesticides as the first choice of pest control measure, particularly in high input agriculture experienced in horticultural sector.[30]

While the above Project was a step in the right direction, the same was targeted and hence it can only be hoped that the outcome of this project will be passed on to the target farmers who will in turn be used to reach out to other farmers in order to ensure that the lessons are replicated in other farms across the country. As it is now, most large and small scale farmers continue to engage in indiscriminate use of pesticides in crop and animal production.[31] For instance, the Kenya Plant Health Inspectorate Service (Kephis) reported in its 2018 annual report that there were pesticide residues in vegetable samples collected from various outlets and markets across the country. Some of the most affected vegetables included kales (94percent of 1,139 samples),

[30] Para. 18, *Integrated Pest Management Plan (IPMP) For National Agricultural and Rural Inclusive Growth Project (NARIGP)*, October, 2018.

[31] 'Kenyan Farmers Grapple with High Pesticide Use - Xinhua | English.News.Cn' <http://www.xinhuanet.com/english/2019-11/10/c_138544622.htm> accessed 6 May 2020; 'ATAMBA: Pesticides Used in Kenya Do More Harm than Good' (*Business Daily*) <https://www.businessdailyafrica.com/analysis/ideas/Pesticides-used-in-Kenya-do-more-harm/4259414-5260702-bcexptz/index.html> accessed 6 May 2020; 'Kenyan Farmers Cost for Using Europe's Poisoned Agrochemicals - News' <https://www.farmers.co.ke/article/2001339810/kenyan-farmers-cost-for-using-europe-s-poisoned-agrochemicals> accessed 6 May 2020; Macharia, I.N., MithÃ, M. and Waibel, H., "Potential environmental impacts of pesticides use in the vegetable sub-sector in Kenya." *African Journal of Horticultural Science* 2 (2009); Route to Food, "Pesticides in Kenya: Why our health, environment and food security are at stake," August, 2019. Available at https://routetofood.org/wp-content/uploads/2019/08/RTFI-White-Paper-Pesticides-in-Kenya.pdf accessed 6 May 2020; 'Regulation of Harmful Pesticides in Kenya – Kenya News Agency' <https://www.kenyanews.go.ke/regulation-of-harmful-pesticides-in-kenya/> accessed 6 May 2020; Duncan M Taiti, 'Effects of the Use of Pesticides on the Health of Farmers in Molo District Kenya' (Thesis, University of Nairobi, Kenya 2010) <http://erepository.uonbi.ac.ke/handle/11295/4956> accessed 6 May 2020; https://www.the-star.co.ke/authors/johnmuchangi, 'Farmers Use Killer Chemicals to Grow Food, Study Finds' (*The Star*) <https://www.the-star.co.ke/news/2019-08-21-farmers-use-killer-chemicals-to-grow-food-study-finds/> accessed 6 May 2020.

peas (76percent) and capsicum (59percent).[32] There is a need for stakeholders, including the legislators, to step in and curb the situation or at least ensure that the chemical pesticides on sale are highly regulated also and at par with the accepted international standards.[33]

It has been reported that two species of insect parasitoids, one form of biological control of pests, have been discovered in Kenya. They have found to be efficient biological control agents against two major maize pests: the *Cotesia typhae* to control the maize stemborer, *Sesamia nonagrioides*, which has invaded France, and *Cotesia icipe* to control the fall armyworm, *Spodoptera frugiperda*, in Africa.[34] These are good news for the farmers and the country in general as these will contribute in avoiding and eliminating chemical control of pests due to the chemicals' adverse environmental and economic effects. With the International Centre of Insect Physiology and Ecology (ICIPE) headquartered in Nairobi, there is a need for continued research towards discovering more non-destructive but ecologically beneficial species of insects that can contribute towards biological control of pests. Farmers also need to be sensitized fully on the possibility of adopting IPM in their farming activities. Traditional ecological knowledge of the various communities in Kenya should also be further exploited in order to streamline the positive aspects of such knowledge that may have a bearing on biological control of pests.

However, even as we move towards adoption of IPM, the Government agencies should also continue working on crop species that are fairly resistant to pests yet safe for the human use and consumption, such as the BT cotton, a genetically modified organism (GMO) or genetically modified

[32] 'ATAMBA: Pesticides Used in Kenya Do More Harm than Good' (*Business Daily*) <https://www.businessdailyafrica.com/analysis/ideas/Pesticides-used-in-Kenya-do-more-harm/4259414-5260702-bcexptz/index.html> accessed 6 May 2020.

[33] Gladys Shollei, 'Kenya Should Do Away with Harmful Pesticides' (*The Standard*) <https://www.standardmedia.co.ke/article/2001349775/kenya-should-do-away-with-harmful-pesticides> accessed 6 May 2020.

[34] Paul-andré Calatayud and Sevgan Subramanian, 'New Bugs, Found in Kenya, Can Help to Control Major Maize Pests' (*The Conversation*) <http://theconversation.com/new-bugs-found-in-kenya-can-help-to-control-major-maize-pests-134906> accessed 6 May 2020.

pest resistant plant cotton variety, which produces an insecticide to combat bollworm. [35] This will also contribute positively towards the gradual eradication of use of harmful pesticides in the agricultural sector and encourage the adoption of biological means of pest control.

7. Adoption of Greener Technologies in Infrastructural Development in Cities and Towns

The ever growing human population and the need for housing and other supporting amenities have often resulted in clearing of forests and other buffer zones, leading to pollution and affecting the efforts towards tackling climate change. However, some architects and engineers have been coming up with innovative ways to mitigate the loss.[36] The have been advocating for adoption of green technology as a tool to solve these problems with an orientation towards sustainable development at all levels.[37]

Green technology is considered to be very effective tool in modern urban planning which incorporates of all aspects of planning such as infrastructure and industry, energy, telecommunications, transportation and other vital areas in cities. These technologies are environment friendly inventions that often involve - energy efficiency, recycling, safety and health concerns,

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[35] 'Briefly on Farming and Agribusiness' (*Daily Nation*) <https://www.nation.co.ke/business/seedsofgold/Briefly-on-farming-and-agribusiness/2301238-5539566-l41yuq/index.html> accessed 6 May 2020; 'Kenya's Bt Cotton Approval Opens Door to Other GMO Crops' (*Alliance for Science*) <https://allianceforscience.cornell.edu/blog/2019/12/kenyas-bt-cotton-approval-opens-door-to-other-gmo-crops/> accessed 6 May 2020; See also 'Prospects Looking up for Cotton Farmers – Kenya News Agency' <https://www.kenyanews.go.ke/prospects-looking-up-for-cotton-farmers/> accessed 6 May 2020; MT KENYA STAR, 'Mwea BT Cotton to Unlock Billions - News' <https://www.farmers.co.ke/article/2001343003/mwea-bt-cotton-to-unlock-billions> accessed 6 May 2020; Muhammad Arshad, Rashad Rasool Khan and Asad Aslam and Waseem Akbar, 'Transgenic Bt Cotton: Effects on Target and Non-Target Insect Diversity' [2018] Past, Present and Future Trends in Cotton Breeding <https://www.intechopen.com/books/past-present-and-future-trends-in-cotton-breeding/transgenic-bt-cotton-effects-on-target-and-non-target-insect-diversity> accessed 6 May 2020.

[36] Chai-Lee Goi, 'The Impact of Technological Innovation on Building a Sustainable City' (2017) 3 International Journal of Quality Innovation 6.

[37] Laffta, S. and Al-rawi, A., "Green technologies in sustainable urban planning." In *MATEC Web of Conferences*, vol. 162, p. 05029. EDP Sciences, 2018.

renewable resources, and more.[38] Green technologies include several forms of technology that help to minimize negative effects on the environment and create new ways to achieve sustainable development.[39]

The technology is used to make production processes more efficient, finding solutions to various "threats" that may affect the ability of cities to compete, such as the use of soil and urban transport, waste management in the city, quality of air, cultural heritage of cities, urban information systems, sustainable energy, agriculture, and new building materials applied to urban development and sustainable water management.[40]

The various aspects of green technology can be incorporated into the spatial planning process to help find new ways to achieve sustainable development by reducing the negative impacts of various economic and human activities on the environment and ecosystems and guiding development towards adoption of green and eco-friendly ways of life in cities and urban areas through such means as promoting green transport to enhance access to services and help reduce pollution levels and health inequities of the city's population; the use of treated wastewater in public water and green gardens help to reduce overall water consumption. Cities should look at circular development models that recycle water and waste and produce energy in them, so that sewage can be used.[41]

While originally, “green” infrastructure was identified with parkland, forests, wetlands, greenbelts, or floodways in and around cities that provided improved quality of life or “ecosystem services” such as water filtration and flood control, now, green infrastructure is more often related to environmental or sustainability goals that cities are trying to achieve through a mix of natural approaches: “green” infrastructure and technological practices include green, blue, and white roofs; hard and soft permeable

[38] Ibid.
[39] Ibid.
[40] Ibid, p. 05029.
[41] Ibid; See also Bai, M., Zhou, S., Zhao, M. and Yu, J., "Water use efficiency improvement against a backdrop of expanding city agglomeration in developing countries—A case study on industrial and agricultural water use in the Bohai Bay Region of China." *Water* 9, no. 2 (2017): 89.

surfaces; green alleys and streets; urban forestry; green open spaces such as parks and wetlands; and adapting buildings to better cope with floods and coastal storm surges.[42] Applications of these green infrastructure approaches range in scale from individual buildings, lots, and neighborhoods to entire cities and metro regions.[43]

It is noteworthy that many cities and towns across the world have embraced the idea of green technologies in infrastructural developments.[44] The benefits of developing Eco-cities and Eco-Townships; which among other things, are largely green and eco-friendly include: efficient land-use, habitat preservation and restoration, effective transport management and energy efficiency, efficient use of resources, emissions and pollution control and enhanced quality of life for the occupants.[45]

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[42] Foster, J., Lowe, A. and Winkelman, S., "The value of green infrastructure for urban climate adaptation." *Center for Clean Air Policy* 750, no. 1 (2011): 1-52, at p.3; Goi, C.L., "The impact of technological innovation on building a sustainable city." *International Journal of Quality Innovation* 3, no. 1 (2017): 6.

[43] Ibid.

[44] Bertie Russell, 'This Small German Town Took Back the Power – and Went Fully Renewable' (*The Conversation*) <http://theconversation.com/this-small-german-town-took-back-the-power-and-went-fully-renewable-126294> accessed 10 May 2020; 'Small Towns May Hold the Key to India's Future of Sustainability' (*Times of India Blog*, 10 June 2019) <https://timesofindia.indiatimes.com/blogs/voices/small-towns-may-hold-the-key-to-indias-future-of-sustainability/> accessed 10 May 2020; 'Three Ways Cities Can Take the Lead on Climate Change — Quartz' <https://qz.com/1750042/three-ways-cities-can-take-the-lead-on-climate-change/> accessed 10 May 2020; 'The Case for ... Making Low-Tech "dumb" Cities Instead of "Smart" Ones | Cities | The Guardian' <https://www.theguardian.com/cities/2020/jan/15/the-case-for-making-low-tech-dumb-cities-instead-of-smart-ones> accessed 10 May 2020; 'To Fix Our Infrastructure, Washington Needs to Start from Scratch' <https://www.brookings.edu/research/to-fix-our-infrastructure-washington-needs-to-start-from-scratch/> accessed 10 May 2020; 'Truly Sustainable Cities Are All about Balance' <https://www.sustainability-times.com/in-depth/truly-sustainable-cities-are-all-about-balance/> accessed 10 May 2020; 'A 100 Percent Clean Future - Center for American Progress' <https://www.americanprogress.org/issues/green/reports/2019/10/10/475605/100-percent-clean-future/> accessed 10 May 2020.

[45] 'Eco-Innovations in Designing Eco-Cities and Eco-Towns' <https://www.thesmartcityjournal.com/en/articles/1042-eco-innovations-eco-cities-eco-towns> accessed 10 May 2020.

It is important that towns and cities in Kenya start not only embracing this idea but also implementing the same in larger scales, considering that the real estate in Kenya has been on upward trajectory in the last few years and the effect has been adverse on the environment.

The county and national governments should work closely with private investors and professionals such as engineers, architects and urban planners to incorporate green technologies into urban planning and management.[46]

8. Conclusion

An integrated approach to environmental and natural resources management in Kenya with practical application of diverse knowledge from science and traditional ecological knowledge would go a long way in ensuring that the various approaches to resource management are not only applied efficiently but also that the various aspects of the environment such as the flora and fauna are well taken care of.

The law, if applied alone will not be effective in addressing such challenges as pollution, environmental degradation, food insecurity, natural resource based conflicts and other social ills all of which pose some threats to environmental sustainability. For hundreds of years, local communities have acknowledged and indeed observed the ecological approaches to conservation. However, rising levels of poverty and the ever shrinking parcels of land due to the commercialization of land in the country have often

[46] 'Invest in Technologies That Convert Waste into Energy and Fuel, CS Macharia Challenges Counties – Kenya News Agency' <https://www.kenyanews.go.ke/invest-in-technologies-that-convert-waste-into-energy-and-fuel-cs-macharia-challenges-counties/> accessed 10 May 2020; See also Hermelin, B. and Andersson, I., "How green growth is adopted by local policy–a comparative study of ten second-rank cities in Sweden." *Scottish Geographical Journal* 134, no. 3-4 (2018): 184-202; Hammer, S.et al.(2011), "Cities and Green Growth: A Conceptual Framework", OECDRegional Development Working Papers2011/08, OECD Publishing.http://dx.doi.org/10.1787/5kg0tflmzx34-en; cf. Zuniga-Teran, A.A., Staddon, C., de Vito, L., Gerlak, A.K., Ward, S., Schoeman, Y., Hart, A. and Booth, G., "Challenges of mainstreaming green infrastructure in built environment professions." *Journal of Environmental Planning and Management* 63, no. 4 (2020): 710-732.

made them lean more towards anthropocentricity at the expense of sustainability. However, all hope is not lost as the government agencies can work closely with them to address the challenges through integrated approaches to poverty alleviation, agriculture, animal husbandry, and generally the realisation of the sustainable development agenda. This is the only way that will ensure that anthropocentric approaches coupled with ecocentric approaches are adopted in order to strike a balance in safeguarding environmental, social and economic interests of the country. This is the only way that the global *2030 Agenda for Sustainable Development*[47] which is a plan of action for people, planet and prosperity, will be achieved.

Charting a new path for Environmental Management and Conservation in Kenya is absolutely necessary. We have to explore new paradigms in order to achieve the goal of effectively managing the environment for the present and future generations.

[47] *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.

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'Kenyan Farmers Grapple with High Pesticide Use - Xinhua | English.News.Cn' <http://www.xinhuanet.com/english/2019-11/10/c_138544622.htm> accessed 6 May 2020.

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The Law and Emerging Jurisprudence on the Jurisdiction of Political Parties Dispute Tribunal (PPDT) of Kenya

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&

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Abstract

The article is a reflection on the evolution of the pre-election dispute resolution jurisdiction of the Political Parties Disputes Tribunal (PPDT) in the last decade from 2011 to 2021. It reviews the challenges, prospects and problems that have faced the PPDT over the year as it grew from a five (5) member body to the twenty-five (25) member quasi-judicial body it is today. The efforts by the Tribunal and the Courts to carve and demarcate its mandate and jurisdiction are reflected upon as well as the legislative interventions that appear to come up in every election season to expand the jurisdiction as well as the membership of the Tribunal. The wisdom of engaging and training eighteen (18) ad-hoc members who become functus officio after one year is put to question. It is recommended that the Parliament considers enacting a separate Act that addresses itself on the PPDT mandate including its establishment, composition, duties, jurisdiction and its powers. Relatedly, there is concluded that there is need to review of policy and legislative reform related to elections to create enabling legal and policy framework for effective electoral dispute resolution (EDR).

1.0 Introduction

In every democracy, electoral disputes resolution is a necessity for purposes of appealing and reviewing electoral actions or procedures to uphold the integrity of the electoral process and manage election conflicts.

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The effectiveness of Electoral Dispute Resolution (EDR) is a key is determinant of the extent to which elections are considered free, fair peaceful and credible."[1] In this regard, resolution of electoral disputes take three approaches, namely, internal dispute resolution mechanisms by political institutions, appeals to the judicial and quasi-judicial system and alternative systems of resolution of electoral disputes depending on the stages in the electoral cycle that it occurs as elections are not a single event but myriad events and process. In other words, EDR processes take the form of judicial, administrative and alternative dispute resolution[2] but the common thread is the need to ensure the efficient protection and effective enforcement of the political rights to elect or to be elected and uphold the will of the voters.[3]

There is emerging shift of EDR from focus on judicial consideration towards embracing quasi-judicial administrative and alternative mechanisms owing to the realization that election disputes occur at different stages of the election process and the resolution of disputes before the actual election have huge potential to impact the overall character of the election as well as the disputes that eventually end up becoming election petitions. This is what the approach taken by Judiciary of Kenya starting in 2012 in addressing potential election disputes backlog in placing emphasis on effective handling of pre-election disputes in order to alleviate subsequent litigation via election petitions.[4]

2.0 The Origins and Mandate of the Political Parties Disputes Tribunal

The origins of the PPDT trace back to the aftermath of the 2007/8 post-election violence (PEV) which revealed that unresolved tension in the

[1] The Judiciary Working Committee on Election Preparations, "Pre-election Dispute Management: Between Judicial and Administrative Dispute Management Mechanisms," (September 2012), < http://kenyalaw.org/kenyalawblog/pre-election-dispute-management-between-judicial-and-administrative-dispute-management-mechanisms/> (accessed on 17 April 2022).

[2] Ibid.

[3] ACE Electoral Knowledge Network, "Electoral Dispute Resolution," (ACE, 2012), Available at: https://aceproject.org/ace-en/topics/lf/lfb12/lfb12a/default (accessed on 17 April 2022).

[4] The Judiciary Working Committee on Election Preparations, *Ibid.*

electioneering period could trigger violence in the post-election period. The Independent Review Committee (Kriegler Commission) established to review electoral environment in Kenya[5] recommended in its final report "the establishment of a special Electoral Dispute Resolution Court to handle appeal matters from the initial stages of dispute resolution by the ECK."[6]
In turn, the promulgation of the Constitution of Kenya entrenched the political rights of every citizen to make political choices including the right to form a political party and to participate in the activities the political party and to vie and be elected to any office of the political party.[7] Where the actions of a political party or a party official infringes or threatens one's political rights, they are entitled to seek redress from the party through its internal dispute resolution mechanism, engage the IEBC for resolution of the dispute or lodge their dispute with the Political Parties Disputes Tribunal (PPDT).

The mandate to handle pre-election dispute in Kenya is established and vested by the Constitution and by statute under Article 87 of the Constitution on the political parties' internal disputes resolutions mechanisms (IDRMs), the Independent Electoral and Boundaries Commission (IEBC) and the Political Parties Disputes Tribunal (PPDT).[8] While the resolution of electoral disputes touching on political parties is mainly the mandate of the Political Parties Disputes Tribunal (PPDT), other mechanisms such as IEBC Dispute Resolution Committee enjoy concurrent jurisdiction in some aspects.
The PPDT is established under section 39 of the Political Parties Act, 2011 with a mandate to fairly and expeditiously resolve disputes arising from

[5] The Elephant, 'Summary of the Kreigler Commission Report 2007 Election Report.' (2018) <*https://www.theelephant.info/wp-content/uploads/2018/04/Elephant-Kriegler-Table.pdf*> accessed on 29 March 2022.
[6] IREC, "Kriegler Commission Report Summarized Version," Available at: <*https://www.kas.de/c/document_library/ get_file?uuid=d8aa1729-8a9e-7226-acee-8193fd67a21a&groupId=252038*> accessed on 29 March 2022.
[7] Article 38(1) and (2) of the Constitution of Kenya, 2010.
[8] ICJ Kenya, Ibid.

political parties' activities.[9] It is an independent tribunal envisioned under Articles 87 (1) of the Constitution which enjoins Parliament to "establish mechanisms for timely settling of electoral disputes" and 169 (1) (d) of the Constitution which makes provision for Tribunals in the justice system ranking as subordinate court.[10] Currently, out of a total of more than 50 Tribunals in Kenya, the PPDT is one of the about two (2) dozen tribunals that have transited to be under the Judicial Service Commission as envisaged under the Constitution.[11]

Previously, section 40(2) of the Political Parties Act, 2011 provided that PPDT shall not hear or determine any dispute except appeals from the decisions of registrar of political parties unless the dispute has been heard and determined by the internal political party dispute resolution mechanisms. Effectively, this introduced the requirement to exhaust the political parties internal dispute resolution mechanism until the Political Parties Act (Amendment), 2016 expanded the jurisdiction of the PPDT to include handling disputes touching on political parties' primaries. However, this amendment omitted to include the requirement that such disputes exhaust the IDRM necessitating the recent amendment which introduced section 38B of the Political Parties (Amendment) Act, 2022 to entrench the jurisdiction of political parties internal disputes resolution mechanism (IDRMs) with regard to party nominations.[12] The political party IDRM is required to resolve any dispute arising out of the party nominations within thirty days after the date of the party nominations after which appeals lie at the PPDT. However, a

[9] Electoral Institute of Sustainable Democracy in Africa, 'Kenya: Political Parties Disputes Tribunal,' African Democracy Encyclopedia Project < https://www.eisa.org/wep/kentribunal.htm> accessed on 29 March 2022.

[10] The Kenyan Section of the International Commission of Jurists (ICJ Kenya) and the Political Parties Disputes, 'Policy Brief: Stakeholders' Evaluation Report on the Performance of the PPDT in the 2017 Party Nominations,' (PPDT, 2019) < https://icj-kenya.org/?smd_process_download=1&download_id=5102> accessed on 29 March 2022.

[11] The Judiciary, 'Know Your Tribunals,' (Kenya Law, 2022) < http://www.kenyalaw.org/kl/fileadmin/pdfdownloads/ RevisedKnowYourTribunalsAdvert.pdf> accessed on 29 March 2022.

[12] Section 38(1)(a) of the Political Parties (Amendment) Act, 2022.

party just needs to show evidence of having engaged the IDRM and need not have exhausted to refer a dispute to PPDT.[13]

3.0 The Political Parties Dispute Tribunal as a Quasi-Judicial Body

Article 1(3) (c) of the Constitution recognizes "the Judiciary and independent tribunals" as the State organs vested with exercise of the judicial authority on behalf of the people of Kenya.[14] This is reiterated in Article 159(1) of the Constitution which vests judicial authority in the courts and tribunals established under the Constitution.[15] Tribunals are considered key for access to justice as they play an important role within the justice system in Kenya of reducing pressure on courts and ensuring people access justice in an expeditious way especially in commercial matters. Tribunals also enhance the capacity of the formal conflict management institutions in the country especially now that they are placed under the Judiciary and delinked them from the executive control. Tribunals facilitate faster management and settlement of disputes and allow for specialization in jurisdiction and membership. [16]

PPDT is coordinated by the Office of Registrar Tribunals established by the Judicial Service Commission (JSC) [17] which recruits its Members and recently it filled vacancies of the eighteen (18) ad hoc PPDT members after amendment expanding the membership of the Tribunal to handle the anticipated workload in the 2022 election season. As currently constituted, the PPDT has been described as Quasi-Judicial Body, defined by H.W. R.

[13] Section 38I of the Political Parties (Amendment) Act, 2022.
[14] Article 1(3) (c) of the Constitution of Kenya.
[15] Article 159(1) of the Constitution of Kenya.
[16] Muigua, K., Tribunals within the Justice System in Kenya: Integrating Alternative Dispute Resolution in Conflict Management, (KMCO, 2019) Available at: <http://kmco.co.ke/wp-content/uploads/2019/04/Tribunals-within-the-Justice-System-in-Kenya-Integrating-Alternative-Dispute-Resolution-in-Conflict-Management-Kariuki-Muigua-30th-April-2019.pdf>, accessed on 29 March 2022, p. 7.
[17] The Judiciary, "Political Parties Disputes Tribunal," Web Page: <https://www.judiciary.go.ke/political-parties-disputes-tribunal-ppdt/> accessed on 29 March 2022.

Wade as a body with "powers which can be exercised only when certain facts have been found to exist."[18] PPDT is limited to addressing disputes involving political parties, with other political parties, their coalition partners, their members, independent candidates, registrar of political parties and the public. The Chief Justice, describes PPDT as "a democracy enhancing institution … through the resolution of the inter-core disputes that arise before elections…"[19] PPDT has a key role in protecting Kenya's democracy and the rights of Kenyans to vote in free and fair elections.[20]

4.0 Membership of the Political Parties Disputes Tribunal (PPDT)

The PPDT went from dealing with only 33 cases in the 2013 pre-election season to adjudicating over 540 EDR matters in 2017 comprising 306 disputes arising out of party primaries and 234 disputes arising from party lists nominations within very stringent timelines. This surge in number of cases handled by PPDT has been attributed to its increased popularity among aspirants is what triggered the amendment to the Political Parties Act under the Political Parties (Amendment) Act, 2022 to expand the tribunal membership.[21]

The Tribunal is constituted of Chairperson, Vice Chairperson and Members appointed on Part-time basis. The Vice Chairperson of the Tribunal under the 2022 amendment is elected by the Members of the Tribunal. Both the

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[18] H.W.R. Wade, 'Quasi-Judicial and Its Background, ' (Cambridge University Press, 16 January 2009) < https://www.cambridge.org/core/journals/cambridge-law-journal/article/abs/quasijudicial-and-its-background/42FFEC5299ED56A01C94B7A54BC27F7B> accessed on 29 March 2022.

[19] Baraza, S. and Grace, B., "Political Parties Disputes Tribunal Members Sworn in," Kenya News Agency, Available at: <https://www.kenyanews.go.ke/political-parties-disputes-tribunal-members-sworn-in/> accessed on 29 March 2022.

[20] The Judiciary, "Three more new members join the Political Parties Disputes Tribunal," (Judiciary, 2021), Available at: <https://www.judiciary.go.ke/23464-2/> accessed on 29 March 2022.

[21] Office of the Registrar of Political Parties (ORPP), "Communique on the Political Parties Act, 2011 as Amended as Amended by the Political Parties (Amendment) Act, 2022," Available at: *<https://www.orpp.or.ke/images/downloads/HighlightsofthePoliticalPartiesAmendmentAct2022_.pdf>* accessed on 29 March 2022.

Chairperson and the Vice Chair are to be Advocates of the High Court of Kenya. The Chairperson must be an Advocate of more than 10 years standing who is qualified to be appointed as a judge of the High Court while the Vice Chair is one of the three Advocates who are part-time members of the Tribunal who are Advocates of at least seven (7) years standing.[22] In addition to the four (4) members who are Advocates including the Chairperson and the Vice Chair, the Tribunal has three (3) other members who are professionals with outstanding governance, administrative, social, political, economic and other record.[23]

Notably, the PPDT was originally made of five (5) members who included the Chair and four (4) other members but this created a dilemma as the quorum of the Tribunal is three (3) members as meaning it could not hold more than one sitting at the same time.[24] Thus, vide the Political Parties (Amendment) Act, Act No. 21 of 2016, the membership was expanded to seven (7) members including the chair and six (6) members who are three (3) advocates and three (3) professional to handle the projected surge of disputes in the 2017 election season.[25] Still, this proved not enough and the 2022 Amendment effectively quadrupled the membership of the PPDT by allowing the appointment of not more than eighteen (18) ad hoc members, nine (9) advocates and nine (9) professionals, within six months to the General Election to hold office for a term not exceeding one (1) year and report to the Chairman. The JSC announced the vacancies of the eighteen (18) of the inaugural ad hoc PPDT members on 9th February 2022 to beat the

[22] Section 25 of the Political Parties (Amendment) Act, 2022.
[23] Section 39(2) of the Political Parties Act, 2011.
[24] See the Original Political Parties Act, 2011 here: <http://kenyalaw.org/kl/fileadmin/pdfdownloads/ Acts/ PoliticalPartiesAct.pdf> accessed on 29 March 2022.
[25] Section 18 of the Political Parties (Amendment), 2016, available at: <http://kenyalaw.org/kl/fileadmin/pdf downloads/Acts/2016/No._21_of_2016.pdf> accessed on 29 March 2022.

six (6) months to General Election deadline[26] and the Chief Justice gazetted the new members by 15th March 2022.[27]

5.0 The Mandate and Jurisdiction of the PPDT

The mandate of the PPDT has been described as "resolving disputes arising from the activities of political parties in Kenya."[28] Section 40 of the Political Parties Act, 2011 originally provided that Tribunal has jurisdiction to determine disputes between the members of a political party, disputes between a member of a political party and a political party, disputes between political parties, disputes between an independent candidate and a political party, disputes between coalition partners and appeals from decisions of the Registrar of Political Parties under the Political Parties Act.[29]

The 2016 amendment enhanced the jurisdiction of the Political Parties Disputes Tribunal to include "disputes arising from party primaries" to address the need for clarity as to whether party primaries were part of the jurisdiction of the PPDT as part of "disputes between the members of a political party and disputes between a member of a political party and a political party." However, the Political Parties (Amendment) 2016, failed to include "disputes arising from party primaries" as one requiring exhausting political parties IDRM for the jurisdiction of the PPDT to come into play.

The Political Parties (Amendment) 2022 clarified the jurisdiction of the PPDT further by making it possible to handle disputes between "a political party and the political party" of which it is a Coalition owing to the amendment allowing for corporate membership of parties in a Coalition

[26] Sam Kiplangat, "JSC to Hire 18 People to the Political Disputes Tribunal Ahead of the Polls," (Business Daily, 9th February 2022), <https://www.businessdailyafrica.com/bd/news/jsc-to-hire-18-political-disputes-tribunal-ahead-of-polls-3710160> accessed on 29 March 2022.

[27] Laban Wanambisi, "CJ Koome Gazettes 18 Ad-Hoc Members of the Political Parties Disputes Tribunal (Capital FM, 20th March, 2022), <https://www.capitalfm.co.ke/news/2022/03/cj-koome-gazettes-18-ad-hoc-members-of-the-political-parties-dispute-tribunal/> accessed on 29 March 2022.

[28] ICJ Kenya, *Ibid.*

[29] Section 40, Political Parties Act, 2011.

Party. Further, the Amendment replaced disputes arising from party primaries with "disputes arising from party nominations" to put the whole spectrum of activities around nomination of political party candidates under the jurisdictional ambit of the PPDT.

More importantly, the 2022 amendment amended Section 40(2) of the Political Parties Act, 2022 from a requirement that a party exhaust the party IDRM to a require that a party attempts to subject the dispute to IDRM. In particular, section 40(2) provided that the Tribunal shall not hear or determine a dispute "unless the dispute has been heard and determined by the internal political party dispute resolution mechanisms." It was replaced with the provision that the Tribunal shall not hear or determine such dispute "unless a party to the dispute adduces evidence of an attempt to subject the dispute to the internal political party dispute resolution mechanisms."

The foregoing requirement, coupled with the introduction of strict time frame of 30 days within which a political party internal dispute resolution mechanism has to conclude handling a disputes arrests the potential mischief of political parties thwarting the jurisdiction of PPDT by failing to hear or failing to determine a dispute purposely to limit the Tribunal's jurisdiction. This amendment aligns with the jurisprudence of PPDT which had been consistent rejecting invitations to hold that non-compliance with a party's internal procedural rules can deprive it of the jurisdiction to do substantive justice between the litigants.

In Ibrahim Abdi Ali v Mohammed Abdi Farah & Another,[30] the Tribunal held that the provisions of section 40(2) of the Political Parties Act 2011 *"does not mean that an individual must always wait for a hearing and final determination from his party's internal dispute resolution mechanisms before the can come to the Tribunal."* It suffices for one to *"show that he made honest attempts at resolving the dispute within the party but the party's process was not satisfactory for such reasons as delay, the individual cannot be faulted for moving to the Tribunal even where his arty has not concluded*

[30] Ibrahim Abdi Ali v Mohammed Abdi Farah & Another Complaint No. 29 of 2015.

a hearing and determination of his matter." In *John Mruttu v Thomas Ludindi Mwadeghu & 2* others, the Tribunal that finding failure to comply with the party's procedural rules automatically ousts its jurisdiction would be "hoisting procedural technicalities above the need to do substantive justice*"*[31]

In *Erick Kyalo Mutua v Wiper Democratic Movement, Kenya & Another*,[32] and *Wiper Democratic Movement, Kenya v Cornelius Ngumbau Muthami*,[33] the High Court rejected party nomination rules which seemed to limit the parties from activating their rights at the Tribunal. The Tribunal decided in *Moses Saoyo Kusero v Jubilee Party of Kenya & Another*[34] that it adjudicates claims between independent candidates and political parties. It stated that its jurisdiction over the matter is not affected by the change in status from party-member to independent candidate in a dispute relating to party primaries.

Definitely, with the requirement that one shows an attempt to subject the dispute to the party's IDRM means, at the very minimum, it is necessary to show that the party was alerted of the dispute in question and invited to propose or take remedial action before aggrieved party proceeded to the PPDT. In *George Odede vs Orange Democratic Movement & Another*,[35] the PPDT struck out a Complaint where the Complainant had not attempted IDRM before approaching the tribunal. The PPDT places lots of importance of jurisdiction and in the Mruttu Case it stated that the question of whether it has jurisdiction or not can be raised at any time including by the Tribunal itself provided where the Tribunal raises it *suo motu*, parties are accorded an opportunity to be heard.

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[31] Para. 17 and 18, *John Mruttu v Thomas Ludindi Mwadeghu & 2 others [2017] eKLR.*

[32] Complaint No. 306 of 2017, *Eric Kyalo Mutua v Wiper Democratic Movement & another [2017] eKLR.*

[33] *Wiper Democratic Movement v Cornelius Ngumbau Muthami [2017] eKLR.*

[34] Complaint No. 217 of 2017, *Moses Saoyo Kusero v Jubilee Party of Kenya & another [2017] eKLR.*

[35] [2017] eKLR.

6.0 The Powers and Remedies Available to PPDT

The PPDT has jurisdiction to grant any order that is just and equitable provided that it is an effective remedy and the most appropriate in the circumstances of the case. The tribunal affirmed this position in *John Mruttu v Thomas Ludindi Mwadeghu & 2 others*[36] where it was dealing with the question of whether it could tell political parties what to do or can only make declaratory orders or issue non-binding advisory opinions for optional consideration by the political parties.[37] It held that the Tribunal can grant any order that is just and equitable in accordance with section 11(1) of the Fair Administrative Action Act, 2015.

In *Wanjiku Muhia v Faith Wairimu Gitau & another*,[38] the Court of Appeal held that section 40 (1) of the Act identifies the types or categories of disputes over which the PPDT can exercise jurisdiction but it does not address the question of the nature of reliefs or remedies it can grant. Unlike the express powers conferred upon an election court under Section 80 of the Elections Act, the Political Parties Act, 2011 is silent on the powers exercisable by the PPDT but that to mean that the PPDT is devoid of powers to grant appropriate remedies. In its view, where, for instance, a party in proceedings before the PPDT seeks a recount of ballots cast, and the PPDT upon recount of the ballots case concludes that the winner is apparent, the Court did not see why the PPDT cannot by order direct the political party to issue the nomination certificate to such person.

In *Mary Seneta vs Jubilee Party & Another*[39] the PPDT declared the nomination certificate which was already issued null and void and ordered a retally of votes in specific polling stations in Kajiado East Constituency within 24 hours. Recount was ordered also in *Melvin K. Kutol vs Nixon Kirpotich Morogo & Another*.[40] In *James Kerogo Onkagi vs Amani National*

[36] *Complaint No. 40, [2017] eKLR.*
[37] *John Mruttu v Thomas Ludindi Mwadeghu & 2 others [2017] eKLR,* Para. 37.
[38] *Faith Wairimu Gitau v Wanjiku Muhia & another [2017] eKLR.*
[39] Complaint No. 226 of 2017, *Mary Seneta v Jubilee Party National Appeals Tribunal & 2 Others [2017] eKLR.*
[40] [2017] eKLR.

Congress & Another[41] the decision of the Amani National Congress to award direct nomination to the candidate was found to be unfair and unjust since there was more than one contestant. The nomination certificate was declared null and void and a fresh nomination exercise ordered.

The PPDT can also make a declaration that a candidate be issued with a nomination Certificate. In *Hillary Wasonga Soro vs Orange Democratic Movement & Another*,[42] the PPDT ordered for nullification of a certificate already issued and ordered that the political party issue a nomination certificate to another candidate. In *Yasir Noor Mohamed Noor vs Jubilee Party & Another*[43] the Tribunal ordered fresh nomination where it found that the impugned exercise in Nyali Constituency had been marred with irregularity, non-compliance with the law as well as breach of party nomination rules and the code of conduct. In *David Ogega Oyugi vs J.B. Momanyi & Another*,[44] the PPDT found that the nomination exercise was not conducted in compliance with the law and Constitution, declared the exercise declared null and void and directed that fresh nomination be held within the 48 hours of the Judgment.

The PPDT can also make a declaration in relation to the membership of a political party. In *Moses Saoyo Kuseor v Jubilee Party of Kenya & Another*[45] where a candidate had taken steps to revoke his membership and seek nomination as an independent candidate, the PPDT stated that the candidate could reclaim his membership of the political party but was effectively barred from contesting as a candidate or rescinding an earlier resignation. The PPDT has also nullified nominations where it was proved the political

[41] Complaint No. 233B of 2017, *James Kegoro Onkangi v Amani National Congress Party & Another [2017] eKLR.*
[42] Complaint No. 230 of 2017, *Hillary Wasonga Soro v Orange Democratic Movement [2017] eKLR.*
[43] Complaint No. 244 of 2017, *Yasir Noor Mohamed Noor v Jubilee Party [2017] eKLR.*
[44] Complaint No. 34 of 2017, *David Ogega Oyugi v J. B. Momanyi & Another [2017] eKLR.*
[45] Complaint No. 217 of 2017, *Moses Saoyo Kusero v Jubilee Party of Kenya & another [2017] eKLR.*

party breached its nomination rules or party constitution. This was the case in *Denis Mugendi & 3 Others vs Party of National Unity*.[46] In the case of *Alphonce Mbindwa vs John Okemwa Anunda & Party of National Unity*,[47] the Tribunal also nullified improper exercise of party authority by the governing organs of political parties.

The PPDT has also made declaration on the composition of Election Boards and allegations of bias on their part. In *Patrick Kabundu vs Jubilee Party & 5 Others*,[48] failure to regularly constitute and election board resulted in or largely contributed to the faulty nomination resulting in the nullification of the exercise. In *Daniel Okiddy Ojwang vs William Owiti & Another*[49] the Tribunal found that the Election Board acted arbitrarily in issuing a certificate to a different candidate in contravention of the declaration by the duly appointed Returning Officer. The Respondents were directed to issue the Claimant with the final nomination Certificate for Member of the County Assembly, East Asembo Ward, Rarieda Constituency and to send notification to the IEBC.

The PPDT has also pronounced itself on the limitation on PPDT powers with respect to remedies. In *James Kariuki Karanja alias Karis vs John Kamangu Nyumu & 2 Others*,[50] the Tribunal declined to order expulsion of a member from the political party. In *Erick Omondi Anyanga vs Orange Democratic Movement & Another*[51] the question arose whether the jurisdiction of the Tribunal was extinguished when a nomination had been presented to the IEBC in accordance with Section 13(2) of the Elections Act, 2011. The

[46] Complaint No. 34 of 2017, *Denis Mugendi & 3 Others vs Party of National Unity*, [2017] eKLR.
[47] [2016] eKLR.
[48] Complaint No. 538 of 2017, *Jubilee Party of Kenya v Patrick Kabundu Mukiri & another [2017] eKLR.*
[49] Complaint No. 159 of 2017, *Daniel Okiddy Ojwang v William Owiti & another [2017] eKLR.*
[50] Complaint No. 59 of 2017, *James Kariuki Karanja alias Karis V John Kamangu Nyumu & 7 others [2017] eKLR.*
[51] Complaint No. 104 of 2017, *Edick Omondi Anyanga vs Orange Democratic Movement & Another* [2017] eKLR.

PPDT determined that it had jurisdiction even after a nomination had been presented to the IEBC.

7.0 Emerging Jurisprudence of PPDT on Key Issues

7.1 Jurisdiction Requiring Party IDRM to be Exhausted First

In *Gabriel Bukachi Chapia v Orange Democratic Movement & Another*,[52] the PPDT underscored the need to exhaust party internal dispute resolution mechanism (IDRM) before engaging its jurisdiction as a necessity for the promotion and protection of the national values and principles of governance including multi-party democracy. The Tribunal cited its verdict in *Hezron J Opiyo v Peter Anyang Nyong'o & others*[53] to emphasize the need to exhaust internal party mechanisms where it noted "*there is need for everyone, this Tribunal included, to promote and protect the multi-party system in our country. This is the rationale of section 40 of the Political Parties Act, 2011; promotion of internal parties internal democracy and autonomy."*

In essence, once the Tribunal found that a Claimant has exhausted the party's internal dispute resolution mechanism his cause turns into a justiciable claim before this Tribunal. The Tribunal held in the *Caroli Omondi v Hon. John Mbadi & 2 Others*[54] that direct nominations is not a new nomination process which ought to be subjected to fresh internal dispute resolution mechanisms. Under the 2022 Amendments of the Political Parties Act, 2011, all a claimant needs to prove is evidence of attempt to apply the respective Party's IDRM for the Tribunal to have jurisdiction over their case.

The Political Parties (Amendment) Act, 2022 provides that evidence of effort to exhaust Party IDRM is sufficient to trigger the jurisdiction of PPDT. This aligns with the ruling of PPDT in *Jared Kaunda Chokwe Barns V. Orange Democratic Movement & 2 Others*[55] that if the Complainant made an attempt

[52] Complaint No 237 Of 2017.
[53] Complaint No 47 of 2017.
[54] Complaint No. 42 of 2017.
[55] Complaint No. 259 of 2017.

to engage the Party internal dispute mechanism, it has jurisdiction to determine this complaint. ' The Tribunal stated:

> *'In light of this we find that by writing to the Party, the Complainant made an attempt to engage the Party in resolving the dispute. Indeed, if the 1st Respondent was to act on the dispute the presumption is, the same would have been resolved. We therefore find that the Complainant made an attempt to engage the Party internal dispute mechanism and thus, we have the jurisdiction to determine this complaint.'*

7.2 Overlap in Jurisdiction Between PPDT and IEBC

Article 88 of Constitution and IEBC Act vest IEBC with jurisdiction to resolve nomination disputes. Parliament acknowledged the concurrent jurisdiction of the two bodies, IEBC and PPDT, when enacting Section 40(1) (fa) of the Political Parties Act introduced through the Political Parties (Amendment) Bill, 2016. Under Clause 19 of the memorandum of objects and reasons it was indicated that the object of amending the Political Parties Act to introduce Section 40(1) (fa) was to address *"the challenge of concurrent jurisdiction with other bodies handling electoral disputes*."

There are several cases have dealt with the issue of the overlapping jurisdiction between PPDT and IEBC. In the High Court Judicial Review Case *Republic vs. IEBC & 3 Others Ex-Parte Hon. Wavinya Ndeti*,[56] the learned judge (Odunga J) allowed the application for Judicial Review holding *inter alia* that the issue before the court was not *res judicata* because although the dispute before the PPDT and IEBC committee were substantially similar the issue before the PPDT was whether or not Hon. Wavinya was a member of Wiper Party while the issue before the IEBC committee was Hon. Wavinya's alleged dual party membership and the disputes involved different complainants. Odunga J stated:

> *119. It is now clear that the PPDT deals with disputes arising from party primaries and this is clear from its jurisdiction. The IEBC on*

[56] *Nairobi Hc Misc. App. No. Jr 301/2017*

> *the other hand, it is my view, deals with nomination disputes that do not fall within the jurisdiction of the PPDT since appeals from the PPDT do not lie to the IEBC but to the High Court. If it were the position that the IEBC Committee would be free to determine issues which had already been determined by the PPDT without an appeal being preferred to the High Court, that position would amount to elevating the IEBC to an appellate Tribunal over the decisions of the PPDT. That scenario would also imply that even where a decision of the PPDT has been the subject of the High Court's appellate jurisdiction, the IEBC might still be at liberty to entertain such a matter under the guise of resolving a nomination dispute. To my mind that would clearly be contrary to the principle of judicial hierarchy and would be incongruous to the statutory scheme and subversive of the true legislative intent."*

The Court of Appeal (Githinji, Okwengu, J.Mohammed JJA) in *Kyalo Peter Kyulu V. Wavinya Ndeti & 3 Others,*[57] being an appeal from decision of Odunga J above, stated, *"…These were issues that fell within the IEBC committee's ostensible jurisdiction and ….within the jurisdiction of PPDT…the issues were substantially similar and if the tribunal could deal with one there was no reason why it could not deal with other issue.*

In the Court of Appeal case of *Fredrick Odhiambo Oyugi V Orange Democratic Movement & 2 Others*[58] held that there is no doubt that both the IEBC and the PPDT are clothed with the power to deal with disputes arising from nominations. However, the conferment of jurisdiction on the PPDT to hear and determine disputes relating to party primaries under the Political Parties Act cannot oust the jurisdiction of the IEBC to adjudicate over a dispute arising from nominations provided such jurisdiction is properly invoked. Neither can that jurisdiction be taken away from IEBC by a memorandum of understanding. The Political Parties Act has since been amended to provide that the PPDT has jurisdiction to deal with Party

[57] [2017] eKLR.
[58] [2017] eKLR, Court of Appeal (Okwengu, Gatembu Kairu, Murgor JJA)

Nomination but it is not clear if this is enough to deal with this issue of concurrent jurisdiction which has been subject to abuse by mischievous litigants.

In *Eric Kyalo Mutua vs. Wiper Democratic Movement And Another*[59], the Court of Appeal further stated that, there is *"an urgent need for law reform with a view to providing a clear and orderly framework for resolution of disputes arising from or relating to nominations so as to avoid a conflict or clash of jurisdictions between the IEBC under Article 88(4)(e) of the Constitution and that of the PPDT under Section 40 of the Political Parties Act" so as "to avoid parallel streams of adjudication of disputes arising from nominations that might lead to confusion and conflicting approaches and decisions, and for good order."*

8.2 The Contempt Jurisdiction of the PPDT

Section 41(3) of the *Political Parties Act*, provides that '*a decision of the Tribunal shall be enforced in the same manner as a decision of a Magistrates Court. '* The High Court in *David Odhiambo Ofuo v Orange Democratic Movement Party & 2 Others*[60] stated in the above cases that it has no jurisdiction to enforce the orders of the PPDT as that power vested in the Tribunal itself and that it can only deal with an appeal arising from PPDT's orders in contempt proceedings. Justice Muchelule stated:

> *"Under* ***section 41(3)*** *of the* ***Act*** *the Tribunal has powers to enforce its decisions in the same manner a magistrate's court can enforce its decisions. Under* ***section 10*** *of the* ***Magistrate's Courts Act (no. 26 of 2015)*** *a magistrate's court has powers to punish any person who is in wilful disobedience of its judgment, decree, order or direction. This means that the Tribunal can punish the respondents if it finds that they have disobeyed its orders. This court can only deal with an appeal arising from the Tribunal's orders in the contempt proceedings."*

[59] Civil Appeal No. 173 Of 2017
[60] (Election Petition Appeal No 11 Of 2017), Para 5.

However, in *Secretary General & Another V. Salah Yakub Farah*[61] the High Court took a conflicting position and held that:

> *In the end, I am not convinced that the PPDT had any jurisdiction to punish for contempt in the face of the court or any other form of contempt save contempt on the face of the court. The PPDT however in the instant case convicted the two officials of KANU for contempt which falls in the realm of indirect contempt. This is evident on the fact that the court had to be prompted through a motion filed by the Respondent. In proceeding as it did, the PPDT in my humble view obtained its jurisdiction in this respects 'through craft'. It overarched. It could not convict the Appellants for want of jurisdiction. The appeal succeeds to that extent.*

In *Robert Pukose v Alvin Chepyagan Sasia & 3 others*,[62] the High Court had a similar holding to the Case of *Salah Yakub Farah*. The High Court held that under Section 6 of the Contempt of Court Act, the subordinate courts, and by extension the Tribunal, could only punish for contempt on the face of the court but not contempt away from the face of the court or for breach judgment and decrees committed outside the court or tribunal.

In *Bernard Muia Tome Kiala v Wiper Democratic Movement-Kenya & another*,[63] the PPDT relied on Article 3(c) of the Constitution as the basis for which the Tribunal's power to punish for contempt originates. It however observed that since there was application to punish the defaulting parties, then it was going to remain silent on the matter. The Tribunal therefore took the view that the power to enforce its orders was inherent in its powers and proportionate to the requirement to achieve justice in each instance. It

[61] Secretary General & another v Salah Yakub Farah [2017] eKLR, Election Petition Appeal No 17 of 2017.
[62] Robert Pukose v Alwin Chepyagan Sasia & 2 others [2017] eKLR, Election Petition Appeal No 83 of 2017.
[63] Complaint No. 40 of2017, Benard Muia Tom Kiala v Wiper Democratic Movement – Kenya & another [2017] eKLR.

reiterated that the orders of the tribunal were not made in vain and were meant for compliance.

7.3 Reviews of PPDT Decisions

The PPDT (Procedure) Regulations, 2017 provide that the Tribunal may, of its own motion or upon application by an aggrieved party, review its decisions or orders and further provides that an aggrieved party may, within fourteen days from the date of the decision or order apply for review to the Tribunal and that the law applicable in Civil matters shall with the necessary modifications apply in reviews before the tribunal. In *Joan Ogada v Orange Democratic Movement & Another*,[64] PPDT allowed review for material non-disclosure finding that information withheld was needed to enable the Tribunal to make an informed decision ought to have been availed. The applicant had sought a review of the PPDT orders on the basis that the IDRM decision based on which the 1st Respondent had successfully applied for review, had been obtained without disclosing that there was an earlier decision in respect of the same matter. The PPDT held that the determination of who was the rightful holder of the certificate was a key concern at each stage of decision making and all information that was needed to enable the Tribunal to make an informed decision ought to have been availed. Thus, the information availed through the review application was crucial as it was the key party officials who could assist the Tribunal determine the issue with finality. The review application was therefore allowed.

7.4 Appeals from Decisions of the PPDT

The PPDT (Procedure) Regulations, 2017 provide that a person aggrieved by a decision of the Tribunal may within thirty days from the date of the decision or order, appeal to the High Court. In the case of *Erick kyalo Mutua v Wiper Democratic Movement, Kenya & another*, the Appellant's extended argument was that the court on appeal may not correct an order or issue any other order. The High Court held that on appeal from decision of PPDT, the

[64] Elphas Odiwour Omondi v Joan Minsari Ogada & 3 others [2017] eKLR, Election Petition Appeal No. 51 and 52 of 2017.

court may make any order it deems efficacious for purposes of settling and definitely determining the issues in dispute. The Court stated:

> *"58. The Appellant's extended argument was also that this court on appeal may also not correct other order or issue any other order. My brief answer to the Appellant n this is that Order 42 Rule 32 of the Civil Procedure Rules is relatively clear on the powers of an appellant court. It stipulates thus: "The Court which the appeal is preferred shall have power to pass any decree and make any order which ought to have been passed or made and to pass or make such further or other decree or order as the case may require, and this power may be exercised by the court notwithstanding that the appeal is as to part only of the decree and may be exercised in favour of all or any of the Respondents although such Respondents may not have field any appeal or cross-appeal."*

8.0 Conclusion and Proposals for Reforms On PPDT

The recent amendments to the Political Parties Act, 2011 to allow for Coalition Political Parties is bound to bring in its wake more intense and complex activity at the Political Parties Disputes Tribunal (PPDT). However, the expansion of the PPDT following the infusion of the *ad hoc* members will likely help to cushion against many of the potential challenges especially as relates to workload. However, provision that the ad hoc members be appointed six (6) months to the election limits the extent of capacity building that can be undertaken to equip them for the task ahead. It also beats logic every election season to appoint and train new ad hoc members. It would be better to have the ad hoc members serving on need basis or eligible for future re-appointment.

There are areas that have been identified as requiring immediate reform to enable smooth running of the affairs of PPDT. In the first place, the mandate and jurisdiction of the PPDT need to be made clear and separate from other state organs like IEBC and Office of the Registrar of Political Parties (ORPP). In this regard, it is recommended that the Parliament should enact a separate act that clearly deals with PPDT from its establishment,

composition, duties, jurisdiction and its powers. Relatedly, there is also need to support the review of policy and legislative reform related to elections to create enabling legal and policy framework for effective dispute resolution. Further, there should be a mechanism put in place to educate the public about PPDT to continue enhancing the awareness as to its activities, jurisdiction and role in the election process and election dispute resolution (EDR). There is also need for strengthening the capacity of the relevant mechanisms for efficient electoral dispute resolution so that the credibility of these institutions as arbiters of disputes is enhanced. The strengthening of these institutions will ultimately lead to sustainable peace, the entrenchment of democratic electoral outcomes in Kenya, and continued equitable socio-economic development in the country. In addition, there is need to bring together multiple stakeholders to undertake legislative and institutional reforms on elections and dispute resolution management. In terms of training, it is necessary to provide training for judges, magistrates and other Judicial officers working on electoral dispute resolution. This may call for the embedding of training curricula in the Judicial Training Institute to provide continuous and updated skills on electoral dispute resolution.

An Analysis of the Right of Refugees to Access Public and Private Services in Kenya

By: *Leah Aoko* [*]

Abstract

This paper discusses the right of refugees to access public and private services in Kenya. It explores this right against the international, regional and national obligations in handling refugee affairs.

The first part is introductory, setting the scene for the presence of refugees in Kenya and the need for their socio-economic integration through recognition of their Refugee ID.

The second part delves into the legal framework, extrapolating relevant provisions that buttress the right of refugees to access these services at the international, regional and national level.

The third part discusses the situational analysis on access of public and private services for refugees in Kenya.

The forth part provides recommendations to the foregoing situational analysis in access of public and private services for refugees in Kenya.

The fifth part concludes the paper emphasizing the urgent need of refugees to access public and private services as this is crucial to their socio-economic integration.

1.1. Introduction

According to the 1951 Refugee Convention, refugees are persons fleeing persecution or violence owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group

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or political opinion.[1] The said persons flee outside the country of their nationality and are unable or, owing to such fear, unwilling to avail themselves of the protection of their country.[2]

Currently there are more than 550,000 refugees in Kenya with the number growing due to civil strife in the neighboring countries such as Somalia and South Sudan.[3] These refugees are spread across the two main refugee camps, Dadaab and Kakuma as well as urban areas such as Nairobi. When crossing the borders these refugees are at their most vulnerable state and need as much assistance as can be accorded them.[4] The principle of non-refoulment prohibits countries from returning refugees to their place of torment, which is often their country of origin.[5] Subsequently, most of them stay in the host country for extended periods with some even beginning a completely new life within the refugee camps. During this period, refugees in Kenya are issued with refugee identity (ID) cards by the authorities. Unfortunately, these refugee ID cards do not have the same status as the Kenyan national ID cards and are largely restrictive when it comes to ensuring that the refugees access public and private services such as; government e citizen portal services, private services such as MPESA and work permits and opening bank accounts.[6] Refugee ID cards are often not recognized as one of the means of formal identification as is the national ID. As a result, refugees are unable to services, which are crucial to restoring them to a dignified socio-economic life.

[1] UN General Assembly, *Convention Relating to the Status of Refugees*, 28 July 1951, United Nations, Treaty Series, vol. 189, p. 137, art 1; available at: https://www.refworld.org/docid/3be01b964.html [accessed 12 May 2022]

[2] https://www.unhcr.org/what-is-a-refugee.html accessed 12/5/2022

[3] Fact sheet, European Civil Protection and Humanitarian Aid Operations, 2022.

[4] Majidi, Nassim, Devolution a Kenya: Transitional Solutions for Refugees in Kenya? (2015).

[5] Ranja, Titus W, The Kenyan law on refugees and its compliance with the principle of non refoulement, 2015 (Masters Thesis, University of Nairobi)

[6] *https://privacyinternational.org/video/4412/when-id-leaves-you-without-identity-case-double-registration-kenya#:~:text=Today%2C%20those%20who%20apply%20for,aware%20of%20this%20ongoing%20issue.* accessed 12/5/2022

1.2. Legal framework on the right of refugees to access public and private services in Kenya

Refugees form part Kenya's population and thus the state has obligations towards them under international, regional and national law. Part of its obligations is to ensure that they are able to secure services that enable them lead dignified lives.[7] Presently, this is not entirely possible because they cannot use the state issued refugee identity cards to access fundamental government services and private services as well. Ultimately, this violates their rights under international, regional and national legal framework.[8]

1.2.1. International Framework

1.2.1.1. Universal Declaration on Human Rights (UDHR)

The UDHR is a globally recognized milestone document that provides for human rights, which ought to be enjoyed by all persons with no discrimination. Article 1 of the UDHR emphasizes that human beings are born free and equal in dignity and rights.[9] This provision underscores the dignity for every human being. Refugees are not able to live dignified lives if they are unable to access fundamental e services on the government portal due to non-recognition of their identification documents. Further, refugees are not able to live a dignified life where they cannot use their cards to access private services such as the common use of MPESA to send and receive money, opening bank accounts or have access to work permits readily.

Articles 2 and 7 of the UDHR highlights the fact that persons are to enjoy their rights with no discrimination on their background, class, or origin.[10] Refugees in Kenya are discriminated upon by virtue of not being able to use their identification document to access public and private services. They are

[7]Muigua K., Protecting Refugees Rights in Kenya: Utilising International Refugee Instruments, The Refugee Act 2006 and The Constitution of Kenya as Catalysts.
[8] RCK, Asylum under threat: Assessing the protection of Somali refugees in Dadaab, 2012.
[9] UN General Assembly, Universal Declaration of Human Rights, 10 December 1948, 217 A (III), available at: *https://www.refworld.org/docid/3ae6b3712c.html* [accessed 12 May 2022]
[10] Jeon, Hayoung, Humanitarian Affairs and Refugees under the UN Human Rights: the case of Somali refugees' crisis and the dilemma of Dadaab Camp, Kenya (2017).

unable to enjoy socio economic services such as are enjoyed by the holders of the National ID.

In article 13, the UDHR provides for everyone's right to leave any country, including their own, and to return to their country. Refugees in Kenya cannot apply for a passport on the e services portal as their identification documents are not recognized as one of the drop down options. This means that they are unable to leave the country or travel within the country at will even for valid reasons. The documentation process for them to get permission to leave the country points to the difficulties they face when acquiring travel documents in Kenya.[11]

According to article 17 of the UDHR, everyone has the right to own property alone as well as in association with others. In Kenya, Refugees are not able to easily own property as the acquisition process requires recognition of their identification documents and access to services on the government portal including the Kenya Revenue Authority.[12] This then means that they have to use proxies to own property or establish businesses through companies. For this right to be respected, their identification documents should be recognized as official documents as well under the e services portal and private serves for financial transactions.

Article 23 of the UDHR states that everyone has the right to work, to free choice of employment, to just and favorable conditions of work and to protection against unemployment. When refugees' documentation is not recognized in the government e services portal, they are unable to apply for employment opportunities with the government. Such employment opportunities often require documentation such as Police good conduct and EACC report, HELB Clearance etc. that is daunting to acquire with the refugee identification document. Further, refugees are unable to access their

[11] NRC, Recognising Nairobi's Refugees; The Challenges and Significance of Documentation Proving Identity and Status, 2017.
[12] KNHRC, out of the shadows towards ensuring the rights of stateless persons and persons at risk of statelessness in Kenya, 2010.

work permits (Class M for refugees) readily, which places them at a socioeconomic disadvantage.[13]

1.2.1.2. International Covenant on economic, social and cultural rights (ICESCR)

The International Covenant on economic, social and cultural rights is an instrument outlining rights relating to the socio-economic wellbeing of an individual.[14] These rights include the right to health, social security, adequate standards of living, education and cultural life. Kenya ratified the ICESCR in 1972 making it part of the laws of the country. Articles 6 and 7 of the ICESCR requires state parties to recognize the right to work for all persons, which includes the right of everyone to the opportunity to gain their living by work.[15] This is definitely a daunting task for refugees who may not have the requisite documentation for making job applications in Kenya.

1.2.1.3. 1951 Convention on Refugees

Article 3 of the 1951 Convention on Refugees obliges States parties to apply its provisions without discrimination as to race, religion or country of origin.[16] Non-discrimination is a core principle of international law and the foundation of all human rights treaties. Discrimination is prohibited, whether based on race, color, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.[17] The exclusion of refugees identification documents from the government's e services portal amounts to a form of discrimination based on their identity as refugees since by implication, they are not able to apply for government e services including accessing work permits on the portal. Further, their exclusion from private services such as MPESA also makes it difficult for them to conduct financial transactions unlike individuals with national IDs.

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[13] K.Hargrave and I. Mosel with A. Leach, Public narratives and attitudes towards refugees and other migrants: Kenya country profile, 2020.

[14] UN General Assembly, International Covenant on Economic, Social and Cultural Rights, 16 December 1966, United Nations, Treaty Series, vol. 993, p. 3, available at: *https://www.refworld.org/docid/3ae6b36c0.html* [accessed 12 May 2022]

[15] Ibid.

[16] Ibid n 1.

[17] UNHCR, A Guide to International refugee protection and building state asylum systems, 2017.

Article 13 of the Convention provides for the acquisition of movable and immovable property. Acquisition of property in Kenya requires valid identity documents recognized by the government coupled with access to financial services. This is hindered by the non-recognition of the Refugee cards on the government e –services portal that then means that they cannot access property related services under the Ministry of Lands and Planning. This also speaks to their ability to access financial services to complete transactions through MPESA, which is hampered by the status of their ID.

Article 17 and 18 of the Convention highlights the right to a wage-earning employment and self-employment for refugees. States should accord refugees lawfully staying in their territory the most favorable treatment accorded to nationals of a foreign country in the same circumstances, as regards the right to engage in wage-earning employment. In Kenya, refugees are not able to apply for jobs easily as they are not able to get work permits readily. Further, some of the documentation required when making job can only be accessed on the e citizen portal where their Refugee IDs are not recognized. These documents are such as the Police good conduct certificate. For access to the portal, one needs to have their ID. The Refugee ID is not placed among the options for valid identification on the e services portal unlike the National ID card.[18]

Article 28 emphasizes that recognized refugees should be able to access travel documents to make it possible for the refugee to travel (for instance for family visits, education, employment, health care, etc.) and to return to the country of asylum. Presently, the passport application process on the government's e services portal does not recognize the refugee identification card as one of the drop down options to apply for this crucial travel document.[19]

[18] https://www.rckkenya.org/refugees-and-asylum-seekers-lament-limited-access-to-work-permits-in-kenya/ accessed 12/5/2022.

[19] https://dis.ecitizen.go.ke/applications/5586085/edit?step=2 accessed 12/5/2022.

1.2.2. Regional framework

1.2.2.1. African Charter on Human and Peoples' Rights (Banjul Charter)

The Banjul charter is the primary framework for human rights in Africa.[20] The Charter was ratified by Kenya in 1992 and is thus applicable within its jurisdiction. Article 2 of the Charter provides that every individual shall be entitled to the enjoyment of the rights and freedoms without distinction of any kind such as race, ethnic group, color, sex, language, religion, political or any other opinion, national and social origin, fortune, birth or any status. As aforementioned, refugees are discriminated upon on basis of their identity, when their documentation is not recognized in access of public and private services as compared to the National ID.

As an emphasis to the UDHR, article 5 of the Banjul Charter states that, every individual shall have the right to the respect of the dignity inherent in a human being and to the recognition of their legal status. Without the official recognition of their identification documents, refugees cannot lead dignified socio-economic lives.

According to article 12, every individual has the right to freedom of movement and residence within the borders of a state provided he/she abide by the law. This includes the right to leave and return to a country. Refugees in Kenya cannot leave the country easily let alone have free movement within the country. This is because the passport acquisition process excludes the identification of the Refugee ID as a valid document that can be used to access this service.

Despite the fact, that article 14 provides for the right to property, refugees in Kenya do not enjoy it when they cannot access the property related services under the government portal and financial transactions.[21] This is the same for

[20] Organization of African Unity (OAU), *African Charter on Human and Peoples' Rights ("Banjul Charter")*, 27 June 1981, CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982), available at: https://www.refworld.org/docid/3ae6b3630.html [accessed 12 May 2022]

[21] Betts, A., N. Omata, O. Sterck, Refugee Economies in Kenya. Refugee Studies Centre, University of Oxford, Oxford (2018).

article 15 where the right to work is guaranteed. Refugees cannot readily apply for government jobs when they do not have the means to access the required documentation for the job application process, thus being deprived of this right. This also impedes their socio-economic development in Kenya. The violation of these rights ultimately contravenes article 22 of the Charter that intends for all people including refugees, to have the right to their economic, social and cultural development with due regard to their freedom and identity.

1.2.2.2. Convention Governing the Specific Aspects of Refugee Problems in Africa

This convention is the main text when addressing the welfare of refugees in Africa. It was ratified in Kenya in 1992 and thus form part of its applicable laws.[22] Article IV of the Convention requires member states to uphold the rights of the refugees without any discrimination on any grounds.[23] This if course cannot be the case when they are not able to access certain services using their issued Identity cards. It amounts to a form of discrimination based on the Refugees are not able to access certain public and private services and this amounts to discrimination based on their identity and status as refugees.[24]

Article VI focuses on the right to obtain travel documents for refugees within states in accordance with the United Nations Convention relating to the Status of Refugees. In Kenya, refugees are not able to easily apply for passports as essential travel documents, using their Refugee card, as the government portal does not recognize their official identification documents.

[22] 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 12 May 2022]

[23] Cantor, David & Chikwanha, Farai, Reconsidering African Refugee Law. International Journal of Refugee Law (2019). 31. 10.1093/ijrl/eez032.

[24] Ibid n 22.

1.2.3. National framework on the right of refugees to access public and private services

1.2.3.1. Constitution of Kenya 2010

The Constitution is the grundnorm for any country. In Kenya, it contains fundamental rights and freedoms that are applicable to those within the country's jurisdiction including refugees. Article 27(4) of the Bill of rights prohibits discrimination any ground, including race, sex, pregnancy, marital status, health status, ethnic or social origin, color, age, disability, religion, conscience, belief, culture, dress, language or birth.Despite this robust provision, refugees are not able to access public, private services with their government issued documentation, and this amounts to discrimination based on their social origin as refugees.[25]

According to article 28 of the Constitution every person including refugees, has inherent dignity and the right to have that dignity respected and protected. This right cannot be enjoyed when refugees are not able to build themselves up socio economically due to limited employment opportunities that is further complicated when their documentation is not recognized properly in accessing public and private services.[26]

The freedom of movement that is provided for under article 39(1) (2) cannot be equally enjoyed by refugees since their documentation curtails this. This is evidenced in the drop down checklist for passport application on the government's e services portal that does not include the Refugee identification card as a valid document for the application process. Since refugees are unable to apply for the passports on the e government portal, it impedes their freedom of movement and the right to leave Kenya.[27]

[25] J. Foni, Civil Society Input to EU Africa Cooperation on Migration: The Inclusion of Refugees in Kenya, ECRE Working Paper 10; 2020.
[26] Aleinikoff, T.A. From Dependence to Self-reliance: Changing the Paradigm in Protracted Refugee Situations. Policy Brief. May. Transatlantic Council on Migration (2015) (A Project of the Migration Policy Institute), Washington, DC.
[27] N. Omata, Refugee livelihoods: A comparative analysis of Nairobi and Kakuma Camp in Kenya, 2020.

Even though under article 40, every person has the right, either individually or in association with others, to acquire and own property in Kenya.Most refugees are not able to access property related services on the e services portal. This unjustly restricts their right to property.

According to article 41, every person has the right to fair labor practices. The inability to apply for government jobs by getting work permits amounts to unfavorable labor practices for refugees, hampering their economic development.[28]

Finally, article 56(b) mandates the state to put in place affirmative action programs designed to ensure that minorities and marginalized groups are provided special opportunities in educational and economic fields and are provided special opportunities for access to employment.

Being a marginalized group, refugees are not able to access favorable educational and economic opportunities. [29] The inability to access government and private services places them a more disadvantaged plane that should be addressed practically and adequately.

1.2.3.2. Refugee Act of 2021

The Refugees Act came into force in February 2022 as the Refugees Act 2021. The new Act provides robust protection whilst empowering refugees for durable solutions.[30] It acknowledges that refugees in Kenya have rights like everyone else and establishes government institutions tasked with the responsibility of managing refugee affairs. Further, it also seeks to provide a safe asylum space for refugees especially the most vulnerable groups such as women, children, persons with disabilities and unaccompanied minors.
The Refugees Act 2021 has the potential of providing a legal environment for refugees in Kenya to not only survive but to also thrive. Most importantly, the new Act domesticates the three durable solutions to the

[28] Ibid.
[29] Alloush, M., J.E. Taylor, A. Gupta, R.I. Valdes, E. Gonzalez-Estrada 'Economic life in refugee camps'. World Development. (2017) 95(C). pp. 334– 347.
[30] https://www.voanews.com/a/refugees-in-kenya-welcome-new-law-allowing-them-to-integrate-into-economy-society-/6334009.html accessed 12/5/2022.

refugee crisis i.e. local integration, resettlement and voluntary repatriation. The adoption of these three durable solutions ensures that Kenya, as a state party to the 1951 UN Convention Relating to the Status of Refugees, the 1967 Protocol Relating to the Status of Refugees and the 1969 OAU Convention Governing the Specific Aspects of Refugee Problems in Africa, complies fully with the principle of non-refoulement which binds state parties such as Kenya not to forcefully return refugees to their countries of origin.

With the passing of the Refugees Act, 2021, which affords refugees and the Refugee Identity Card broader rights, particularly in Section 28, it is imperative that the Refugee Identity Card be recognized as a valid form of identification in all government applications that refugees are eligible for, including in online forms. This indicates that the refugee identity card shall at a minimum have similar status to the Foreign National Registration Certificate for purposes of accessing rights and fulfilling obligations under the law.[31]

Further, observing that section 28 (7) of the Refugees Act, 2021 establishes that the Refugee Identity Card ***"shall at a minimum have a similar status to the Foreign National Registration Certificate,"*** the Refugee Identity Card should render the same privileges as a Foreign National Registration Certificate in regards to identification, and at a minimum be listed and accepted as a valid form of identification on all government and private applications that refugees are eligible to apply for where the Foreign National Registration Certificate is listed and accepted, including on online forms.

Specifically, section 28(6) establishes that refugees have a "right to identification and civil registration documents and such documents shall be sufficient to identify a refugee or asylum seeker for the purposes of access to rights and services;" and Section 28(7) establishes that "the Refugee Identity Card shall at a minimum have a similar status to the Foreign National Registration Certificate." Refugees therefore should theoretically be able to apply for government applications, including on online forms,

[31] UNHCR Guidance on Registration and Identity Management.

using their Refugee Identity Card as a valid form of identification. According to the drop down option of identification on the e services portal to applications for work permits and access to financial services such as MPESA, opening of bank accounts, setting up companies and business entities, it is apparent that there is lack of recognition of refugee documentation in public and private services in Kenya.

From the foregoing, the inability to access the government services and private services impedes social economic inclusion of refugees into the Kenyan economic and social spectrum.[32] It also violates the provisions of the Refugee Act 2021.

1.3. Situational analysis of the right of refugees to access public and private services in Kenya

As at 2022, Kenya hosts over 550,000 refugees and asylum-seekers mainly living in the Dadaab and Kakuma refugee camps as well as urban areas, including the capital, Nairobi.[33] Upon arrival, the refugees are required to apply for documentation to identify their status.[34] This application process is tedious and often experiences long delays.

The issuance of identity documents for refugees is the primary responsibility of the government of the host state. In the framework of the Comprehensive Refugee Response Framework (CRRF) and of SGD 16.9 (legal identity for all), UNHCR advocates for documents to be issued by the national identification registration authority with the same design and specifications applied to identity documentation issued to nationals.[35] Identity documents issued by national authorities should ensure that the identity and status of refugees are formally recognized in the country of asylum, facilitating access to rights, protection, services and opportunities afforded to them as refugees.[36] Despite a legal and policy framework that promotes integration,

[32] Campbell, E. 'Urban refugees in Nairobi: problems of protection, mechanisms of survival, and possibilities for integration'. Journal of Refugee Studies. (2006) 19(3). pp. 396– 413.
[33] *https://data2.unhcr.org/en/country/ken accessed* 12/5/2022.
[34] *https://www.unhcr.org/ke/registration accessed* 12/5/2022.
[35] UNHCR Guidance on Registration and Identity Management
[36] Ibid.

empowerment and self-determination of refugees through durable solutions, the lived realities of refugees is incongruent with the rights that accrue from their legal status.

Even when refugees are duly registered and possess identification documents, they are still effectively unable to access basic services such as work, banking, education, healthcare, online government services etc. The inaccessibility to services prevents refugees from being contributing members to the Kenyan economy and society, draining Kenyan resources as opposed to contributing to it.

This status of refugee documentation has been further ascertained through a research project launched by Kituo cha Sheria-Legal Advice Centre[37] to analyze the experiences of refugees in relation to durable solutions. The project sought to establish the greatest administrative challenges that refugees face in accessing services and contributing towards the growth of the Kenyan economy and society.[38] Preliminary findings from the data collection revealed that refugees are often unable to complete online government applications, including KRA PINs and Class M work permits which refugees have a right to access, because their Refugee Identity Card is not recognized as a valid form of identification.

Even after receiving the Refugee ID, refugees are still unable to access certain public and private services such as the government e-services because their ID is not recognized as official documentation in Kenya. These government services on e-citizen, only recognizes National ID and Foreigner ID thus the refugees' documentation cannot easily access such public services and private services such as MPESA, banking services, establishing businesses etc. that is crucial in Kenya's financial economy.

The government's e citizen portal is often used to apply for business permits, good conduct, establishing a company, application for a passport etc.

[37] Kituo cha Sheria is a Non-Governmental organization in Kenya which handles refugee matters.

[38] http://kituochasheria.or.ke/our-programs/forced-migration-programme/ accessed 12/5/2022.

Without the recognition of their refugee identification, refugees cannot easily apply for government jobs, acquire property, establish corporate entities, apply for e passports, apply for trade licenses and permits, use the Kenya Revenue Authority services, and apply for recognition, equation and verification of their professional qualifications.[39] This has not been the case as refugees identification documents in Kenya are still largely excluded from public and private services. Refugees in Kenya are not systematically included in national surveys and, as a result, there is a lack of data on refugee welfare and poverty that is comparable to the national population.[40] This further exacerbates their socio economic plight.[41]

1.4. Recommendations on the implementation of the right of refugees to access public and private services in Kenya

From the foregoing narrative, it is evident that Kenya has a solid legal and policy framework on the welfare of refugees. However, this has not been adequately implemented to ensure that more gains are made for the identification of refugee cards to access public and private services.

The government through the Ministry of ICT, needs to include refugee cards as valid identification on the e services portal. It should also issue a directive on the status of the refugee card as being equal to that of a national card to enable them access both public and private services. This will tap into the great potential that refugees have in achieving the sustainable development goals and improving their lives socio economically instead of relying on periodic handouts. It will also give great opportunities to skilled refugees who can actively participate in Kenya's labor force to do so.

The government, through the Ministry of Interior and Coordination of National Government, should also see to it that refugees are able to open

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[39] *https://www.refugeesinternational.org/reports/2021/11/19/if-given-the-chance-refugees-can-help-kenyas-economic-growth-and-recovery* accessed 12/5/2022.

[40] UNHCR, Understanding the Socioeconomic Conditions of Refugees in Kalobeyei, Kenya Results from the 2018 Kalobeyei Socioeconomic Profiling Survey, 2018.

[41] *https://www.worldbank.org/en/news/feature/2018/09/27/in-kenya-refugees-are-opening-up-frontiers-the-pull-of-investing-in-underserved-areas* accessed 12/5/2022.

businesses, engage in financial transactions, own property and get commercial permits using their ID cards, as it is currently difficult for them to do so.

1.5. Conclusion

The inclusivity and integration of refugees remains fundamental to ensuring that they are able to participate in the economy of their host country. This can only become a reality if they are able to access public and private services using their issued ID Cards without impediment.[42]

[42] *https://www.refugeesinternational.org/reports/2022/4/29/what-does-kenyas-new-refugee-act-mean-for-economic-inclusion* accessed 12/5/2022.

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Managing Water Scarcity in Kajiado County Berita Musau

By: ***Berita M. Musau***

Abstract

Kajiado County is classified as an acute water scarce region due to its low access to water both for domestic and agricultural use. Water access in the county still remains low. In most parts of Kajiado County, the average distance to the nearest portable water point is 15 km to 10 km during the dry season and 5km in the wet season (Gathagu & Agwata, 2014: 1052). This lies below the World Health Organization's (WHO, 1997) standards, which maintain that access to safe drinking water refers to averages of 20 litres per person per day within one kilometer walking distance from the household. Lack of water supply from the county government has led to privatization of the resource and consequently immense exploitation of residents by private water vendors and cartels. Furthermore, the county government has no policy that regulates water resource management, worsening the already bad situation. This paper therefore seeks to fill that gap and propose a policy for managing water scarcity in the county.

Introduction

Kajiado County is located in the Rift Valley of Kenya. The county boarders Narok County to the West, Nakuru County, Kiambu County and Nairobi County to the North, Machakos County, Makueni County and Taita Taveta County to the East, and the Republic of Tanzania to the South and covers an area of about 21,901 km^2 (GOK, 2022). It has seven sub counties namely: Kajiado Central, Kajiado West, Kajiado North, Kajiado South and Isinya, Mashuru and the recently created Oloililai Sub county, created in 2020 (Marindany, 2020).

It is a semi-arid county. Thus, several of its streams in are seasonal and only a few are perennial. The perennial streams are found at the foot slopes of Kt. Kilimanjaro, Ngong, hills, Ngurumani escarpment and Namanga Hills (Gathagu & Agwata 2014). Other sources of water in the county include boreholes, dams, ground catchments/pans, wells, water holes, springs, roof catchments, and rock catchments (Gathagu & Agwata 2014).

There are four water and sewerage companies in Kajiado County namely: Oloolaiser, Olkejuado, Oldonyo Orok and Nolturesh in Oloitoktok. However, these companies have had several challenges including water pilferage, lack of reliability and mismanagement. Water from these companies only benefits a few while a great number of the county population is left suffering. In deed the county governor Mr. Ole Lenku established the Kajiado Water and Sewerage Company (KWSC) as a single entity in 2018 and appointed former Kenya Airways boss Titus Naikuni, maintaining that this was meant to improve water access in the county (Siele, 2018). He pointed out that the other water and sewerage companies above would be collapsed so as to bring water management under one entity for effectiveness and accountability. However, by the end of the year 2018, the company was still at the establishment stage and not yet operational.

Water Scarcity in Kajiado County

Residents of Kajiado County have grappled with the problem of water scarcity for a long time. In big towns of Kajiado County such as Kajiado town itself and Kitengela among others, the sight of donkeys pulling hand carts full of jerry cans of water as well as water boozers cannot be swept under the carpet.

Hand carts packed with jerry cans at a borehole in Kitengela during a biting water shortage in 2018. Source: Githaiga, 2019, *Standard Media.*

The areas that are hardest hit include towns mainly along Namanga Road. Towns such as Kitengela, Isinya and Kajiado. They rely on fresh water supply from the Export Processing Zone Authority (EPZA) in Athi River which procures it from the Nairobi Water and Sewerage Company. The EPZA water is shared with Mavoko Water Company that supplies the EPZA factories as a priority and the surplus is then sold to residents. This leaves very little water available for residents.

In order to survive, residents of Kajiado County have resorted to sinking of boreholes. Most of the boreholes however have hard water. Private individuals sink boreholes and sell the water at high prices. The county government has also not been keen to regulate the way the boreholes are distributed. Bore holes are sunk within close proximity. This has led to several boreholes drying up. Moreover, there are hardly any measures taken to establish whether the water from the boreholes is chemically safe for human consumption.

Factors Contributing to Water Scarcity in Kajiado County

An analysis of the water scarcity problem in Kajiado County unearths the following factors that contribute to the problem.

Environmental factors

Kajiado County lies in the arid and semi arid lands (ASAL) of Kenya, where access to clean water remains a primary challenge. The county has a bimodal rainfall pattern with long rains falling between March and May while short rains fall between October and December (Gathagu & Agwata 2014). The rainfall ranges from 1250 mm to less than 500 mm per annum while temperatures vary with altitude to a mean of 34 ^{0}C to 22 ^{0}C (GOK, 2008). Most of the time, the rain is unreliable. This has been exacerbated by climate change which has led to long periods of drought and unpredictability of the rains. Furthermore, with most of the rivers in the county being seasonal, there is very limited availability of surface water.

Hydropolitics

Water politics play a major role in worsening the already bad situation in Kajiado County. Kenya is classified by the United Nations as a chronically water scarce country based on the fact that it has one of the lowest water replenishment rates (Koech, 2018). Amid this scarcity, hydropolitics have set in and exacerbated the problem especially with Kenya's new constitution adopted in 2010 that divided the country into counties. People in various counties are increasingly recognizing and claiming rights over resources in their counties. Water, as a natural resource is bound to be shared across counties.

Politicization of access to waters cuts across counties in Kenya. For instance Nairobi County is served by water from Ndakaini Dam in Muran'ga County. There have been growing concerns in which residents as well as political leaders from Muranga claim that their county has been supplying water to Nairobi leaving them with nothing to show for a resource that is in their county (Koech, 2018). They also called for Nairobi County to pay for the water. These politics have also affected water supply in Kajiado County due to rationing of water from Nairobi Water Company to the EPZA in Athi River, the main supplier of fresh water to Kajiado residents especially in Kitengela and other areas along Namanga road.

Water politics have also pervaded between Kajiado County and the neighboring counties particularly Makueni and Machakos counties mainly concerning the water from the Nolturesh water dam and pipeline (Githaiga & Muchiri, 2017). The source of the dam is at the foot of Mt. Kilimanjaro in Kajiado County but its water is shared by Kajiado, Makueni and Machakos counties Githaiga & Muchiri, 2017). Kajiado County accuses Machakos and Makueni counties for sidelining the Maasai community regarding the access and management of water from Nol Turesh dam, despite the dam being in Kajiado County (Koech, 2018, Marindany, 2018). The governor further argued that residents of Kajiado County did not benefit from Nolturesh water (Ngunjiri, 2017). Hydropolitics have also affected the supply of fresh water from the EPZA. The EPZA supplies residents of Machakos and Kajiado County with fresh water. The county government of Machakos claimed that since the EPZA is situated in Athi River which is in Machakos County,

priority should be given to Machakos county residents. This adversely reduced the supplies of fresh water to Kajiado county residents.

Unequal/ unregulated distribution of available water

At the heart of the water scarcity problem in Kajiado County is lack of reliable water supply which is occasioned by mismanagement of the little water that is available. Water supply in many parts of Kajiado County is mainly done by private business people who own private boreholes. This to a great extend is occasioned by the failure of the four water companies in the county. There is no county water supply.

The Nolturesh –Athi River –Kajiado water pipeline for instance is used for irrigation of private flower farms in Makueni and Kajiado counties. This leaves the section of the Kajiado population that was supposed to be served by that pipeline without water for domestic use while individual owners of the flower farms benefit.

Corruption and mismanagement of funds set aside for water supply

The four main water companies in Kajiado: Oloolaiser, Olkejuado, Oldonyo Orok and Nolturesh in Oloitoktok are said to have been marred with corruption and mismanagement. A survey conducted by the Kajiado County on water mismanagement established that mismanagement of water providers' entities has resulted to massive corruption, unskilled personnel, and huge salaries eventually making the entities unable to run maintenance work and pay their bills running into millions of shillings (Kamunde, 2018). Ole Kejuado water and Sewerage Company has become dormant and non-functional while Nolturesh Water and Sanitation Company has been making losses of up to 31 million monthly and the company has been unable to pay its staff leading to them going constantly on strike (Koech, 2018). In addition to these, embezzlement of funds set aside for water supply has pervaded at the county level. For instance, it was reported that in 2018, the county lost 1.4 billion earmarked for boreholes with reports indicating that 53 boreholes had been sunk while that remained only on paper since there was nothing to show on the ground (Koech, 2018).

Water privatization

The fact that there is no water supply from the county has led to privatization of the resource. Thus, water scarcity in Kajiado County has been attributed to water vendors and cartels who take advantage of water shortages to make money. In one of his speeches, the county governor Mr. ole Lenku referred to them as "merchants of misery" (CGK, 2018). For instance in Kitengela, it was alleged that the water shortage in the town was actually a creation of the EPZA and some cartels who wanted to enrich themselves by selling water at exorbitant prices which are not within the government tariffs (Githaiga, 2018).

Efforts to Address Water Scarcity in Kajiado and Inherent Gaps

Aware of the water scarcity issue in the county, the county government has carried out various efforts to address the issue. The efforts are based on the county's strategic plan to achieve a 60 percent water access coverage from the current 35 percent (CGK, 2018).The following are some of the efforts by the county government of Kajiado to address water scarcity:

Most of the rivers in Kajiado County are seasonal while the permanent ones dry up owing to long periods of drought. Thus the county government resorted to sinking boreholes so as to harvest underground water. Recently, in 2018, during an event, the governor announced that the county intended to take measures to provide fresh and clean water noting that "*maji si maji tu*" which implied the intention of providing Kajiado residents with healthy water (CGK, 2018). He noted that most of the boreholes in the county have saline water and pointed out that this was a major concern and a threat to human health. He declared sale of salty water in the county illegal and directed the county department of water to start the process of desalinating water from boreholes constructed by the county government. He also issued a directive in November 2018 for those selling or intending to sell water for public consumption to desalinate it to make it clean and fresh (Githaiga, 2019). This raised a major outcry among private water vendors in the county. In spite of this directive, saline water is still being sold to residents of the county.

The county has also decided to work together with Makueni and Machakos County to revive Nol-Turesh water and Sanitation Company to enhance effective water supply. Other measures include measures to cap prices to protect residents from exploitation by exploitative water vendors as well as increased county budgetary allocations.

The county government holds an annual event known as "*Maji Awards*". The event is aimed at encouraging citizens to be part of the solutions to water scarcity in the county. During the event, the county awards projects that have adopted strategies to improve water sustainability in the county (CGK, 2018). The top most awards go to the best managed water projects in both rural and urban areas in the county.

In spite of the above efforts from the county government, there exist inherent gaps that underpin scarcity of water in the county. The main gap lies in the fact that the county has no legal and institutional framework upon which management of water scarcity hinges. Most of the plans, promises and directives are proclaimed during public rallies but implementation remains wanting. A good case in point is the directive for private water dealers to desalinate water, which has not been heeded. Water problems in Kajiado County seem to take priority theoretically while practically, they remain in the periphery.

The Need for a Water Policy in Kajiado County

In spite of the dire scarcity of water that is very evident, Kajiado County lacks legal and institutional framework that concerns water resources. The county neither has a policy nor an Act that guides planning, implementation and management of water resources. In deed the department of water, irrigation, environment ad natural resources which is in charge of water in the county has paid little attention to addressing water scarcity. The main focus has been laid on waste management, regulation of sand harvesting and charcoal burning (CGK, 2018). The neighboring countries have already established some legislation to guide water management. Machakos county for instance has a legislation known as Machakos County Water and Sanitation Act, 2014 (GoK, 2014). A policy for the management of water scarcity in Kajiado County is therefore urgently necessary.

Policy Recommendations for Managing Water Scarcity in Kajiado County

The perennial water problem in Kajiado County can be addressed by establishing a sustainable water access strategy. It should be coupled with a supply strategy to enhance equitable distribution to the population of the entire county. These should be anchored on a policy that guides the entire exercise. This paper proposes the following policy recommendations to guide the establishment of a policy for managing water scarcity in Kajiado County.

Proper management of the Kajiado County Water and Sewerage Company: The establishment of the Kajiado County Water and Sewerage Company is a step in the right direction which can lead to better supply of water in the county. The county water policy should have provision for investment in building a strong financial and technical capacity for the company in order to enhance its effectiveness and efficiency in supplying water in the county. This would go a long way in reducing overreliance on private business people for water supply.

Addressing Hydro politics: The fact that water catchment and water resources are shared across the counties makes water politics inevitable. The county water policy should provide guidelines for managing water politics that ensue between the county and other counties with whom they share water resources particularly Machakos and Makueni. Most of the politics have been played in public political rallies thus heightening feuds. Others have been sporadic in response to public outcries. The policy should entail strategies of diplomatically managing the conflicts way before they escalate to the point of disrupting water supply and hinder access. These could even entail joint activities such as inter county sports that enhance the value of cooperation across the counties for better access to shared water resources. To this end, the county could also find ways of incorporating women groups. Women are the ones mostly charged with the responsibility fetching water for domestic use and any politics hindering access to water strongly affect them. They would therefore be more motivated to participate in efforts that enhance peace among the counties and consequently harmonious sharing of water resources.

Regulation of boreholes is also a key concern. The policy should provide clear guidelines to regulate sinking of boreholes especially by private investors. Boreholes have been sunk in close proximity leading to others drying up. In addition, most of the water from the boreholes is hard, and measures are not taken to establish whether the minerals contained in the water are safe for human consumption. The governor of Kajiado County noted that the main issue exacerbating water scarcity is partly the fact that the water especially from boreholes is saline which makes it unsafe for drinking. He prohibited the selling of saline water and directed private owners of boreholes to desalinate their water before selling. This raised a major outcry. If this had been anchored in a policy, it would have been easier for the governor to address the outcry since it would just entail calling on people to comply with the policy.

The policy should address the problem of cartels and water vendors. Residents of Kajiado County have suffered in the hand of cartels that exploit the water scarcity and sell water at exorbitant prices. This can only be addressed through a clear policy which would set standards and also regulate prices so that residents are not exploited.

Rain water harvesting is very important. A lot of water goes to waste whenever it rains in Kajiado. Thus the policy could make provisions for harvesting rain water. This could be through construction of dams along big rivers such as Olkejuado River, and other seasonal rivers in the county. It could also be done through promotion of institutional and household level water harvesting.

Above all, the policy should have provisions for cooperation with the national government which has the main institutional and legal frameworks for management of water resources. Some of these frameworks include the Water Act 2002, Water Appeal Board (WAB), Water Services Regulatory Board (WASREB), and Water Resources Management Authority (WRMA) among others.

Conclusion

Water scarcity is a problem that has tormented Kajiado County residents for a long period. Lack of county water supply coupled with absence of legal and institutional framework for the county has left residents suffering in the hands of private water vendors and cartels. Water being a basic human need, the county government should step in to assist its residents so as to win their legitimacy. A policy for managing water scarcity in the county is therefore an urgent necessity for the county.

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Military Siege: A Contemporary Analysis of its Effects on Civilian Protection During Armed Conflict

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Abstract

The concept of a "military siege" or "encirclement" is an old practice under International Humanitarian Law (IHL), in fact, it is as old as military warfare. However, the current international humanitarian law framework does not define what the term military siege is, despite its repercussions. This paper seeks to undertake a surgical review of the different sets of rules and principles of International Humanitarian Law that are relevant to sieges. First, the conduct of hostilities in general will be discussed, in which the paper argues that it is not prohibited under IHL to attack military objectives within a besieged area, provided such attacks are carried out in conformity with the principles of: distinction; proportionality; precautions, among other fundamental IHL principles.

Secondly, this paper conceptualizes the prohibition of starvation of civilians as a method of warfare, along with the rules regulating humanitarian relief operations. This is informed by the fact that the ultimate aim of a siege is usually to force the enemy to surrender, historically through starvation and thirst, though in contemporary conflicts, besieging forces usually attempt to capture the besieged area through hostilities.

Lastly, the paper discusses the principles relating to the evacuation of civilians. Despite the fact that it is prohibited to prevent the evacuation of civilians, this paper argues that it is not prohibited to besiege an area where there are only enemy forces or to block their reinforcement or resupply, including achieving their surrender through starvation. The paper will conclude by making recommendations on the best practices aimed at the protection of civilians during a military encirclement.

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Introduction

From the mid-19th century, requirements for reaching agreements between and among countries with regards to armed conflicts were initiated.[2] The purpose of the institutionalization of IHL is a purely humanitarian objective, whose major objective is to limit the suffering caused as a result of ongoing hostilities.[3] International Humanitarian Law applies to the belligerent parties, irrespective of the reasons for the conflict, or the justness of the causes for which they are engaged hostilities. This is premised on the fact that if it were otherwise, implementing the law would literally be impossible, because every party would claim the victim of aggression, hence the justification for retaliation.[4]

In short, IHL or *Jus in bello,* is the law that governs the way in which warfare is conducted, and it is independent from questions for the justification or reasons for the war, or its prevention, which is primarily covered by *Jus ad bellum.*[5] It can, therefore, be conclusively assumed that IHL is intended to protect victims of armed conflict regardless of party affiliation, and as a result, this is the primary reason why *Jus in bello* must remain independent of *Jus ad bellum.*[6]

Pursuant to Article 22 of the Hague Regulations,[7] belligerents cannot adopt unlimited options when seeking to cause harm to the enemy. As a result, IHL

[2] Cooper, J. R. *Another view of the revolution in military affairs,* (1994, Diane Publishing).
[3] Ferraro, T. *The ICRC's legal position on the notion of armed conflict involving foreign intervention and on determining the IHL applicable to this type of conflict*, (2015, International Rev. Red Cross, 97, 1227).
[4] International Committee of the Red Cross, *What Are Jus Ad Bellum And Jus In Bello?*' (2021) https://www.icrc.org/en/document/what-are-jus-ad-bellum-and-jus-bello-0 accessed 16 April 2021.
[5] Stahn, C. *'Jus ad bellum,' 'jus in bello'..'jus post bellum'?–Rethinking the Conception of the Law of Armed Force,* (2006, The European Journal of International Law, 17(5)) pp. 921-943.
[6] Moussa, J. *Can Jus ad bellum override jus in bello? Reaffirming the separation of the two bodies of law,* (2008, International Rev. Red Cross, 90, 963.
[7] Article 22, The Hague Convention (IV) Respecting the Laws and Customs of War on Land and Its Annex: Regulations Concerning the Laws and Customs of War on Land, 18 October 1907,

is primarily guided by several tenets, such as the principle of distinction, as enunciated under Articles 48 and 52 of Additional Protocol 1 of 1977,[8] which are collectively to the effect that only combatants may be targeted and the stipulation that attacks on civilians or civilian objects are recognized as war crimes, which is effectively codified as one of the four major crimes that the International Court of Justice can exercise its jurisdiction over, pursuant to Article 8 of the Rome Statute.[9] In the *Advisory opinion on the legality of the threat or use of nuclear weapons,*[10] the ICJ opined that deliberate attacks on civilians and civilian objects is expressly prohibited under International Humanitarian Law.

In IHL, the civilian population is negatively defined as comprising all persons who are neither members of the armed forces of a party to the conflict nor participants in a *levée en masse*.[11] This definition also includes civilians accompanying the armed forces without being incorporated in the war, for example, war correspondents who are journalists who cover stories first-hand from a war-zone.[12] If there is any doubt about a person's civilian status, that person must be considered a civilian, as espoused under Article

available at: https://www.refworld.org/docid/4374cae64.html [accessed 19 May 2021].

[8] Articles 48 & 53, Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977, 1125 UNTS 3, available at: https://www.refworld.org/docid/3ae6b36b4.html [accessed 19 May 2021].

[9] Article 8, Rome Statute of the International Criminal Court (last amended 2010), 17 July 1998, ISBN No. 92-9227-227-6, available at: https://www.refworld.org/docid/3ae6b3a84.html [accessed 19 May 2021].

[10] *Legality of the Threat or Use of Nuclear Weapons*, ICJ Advisory Opinion, 8 July 1996, [1996] ICJ Rep. 226, at 257 (para. 78).

[11] Art. 50(1) and (2), Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977, 1125 UNTS 3, available at: https://www.refworld.org/docid/3ae6b36b4.html [accessed 19 May 2021], & 'Customary IHL - Rule 5. Definition Of Civilians' (Ihl-databases.icrc.org, 2021) https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_cha_chapter1_rule5 accessed 19 May 2021.

[12] Melzer, N. *International Humanitarian Law: a comprehensive introduction*, (2016, International Committee of the Red Cross).

50(1) of Additional Protocol 1. [13] In the judgment of the case of *Prosecutor v Tihomir Blaskic,* the International Criminal Tribunal of the Former Yugoslavia (ICTY) also defined civilians as "persons who are not, or no longer, members of the armed forces."[14]

Despite the many benefits that have been brought about by the institutionalization of IHL, as well as the existing legal framework with regards protection of civilians during hostilities, the fact that there is non-compliance with IHL remains a big challenge, which has had a long-lasting effect to civilians, their families and the communities they are part of.[15] It is, therefore, imperative that we take a closer examination of the concept of protection of civilians in armed conflicts with the sole purpose of advancing jurisprudence on how to best achieve the main objective of IHL. Based on the fact that there are numerous undertakings that take place during hostilities, this paper will focus on the concept of military sieges during armed conflicts, and its effect on civilian protection.

Defining and Conceptualizing a Military Siege

There currently exists no universally accepted definition of the term military siege, under the international humanitarian law framework, be it the four Geneva Conventions of 1949, or their subsequent protocols. The only international law framework that has come close to enhancing the concept of a military siege is the 1907 Hague Regulations, which at Article 27 states that,

[13] Art. 50(1), Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977, 1125 UNTS 3, available at: https://www.refworld.org/docid/3ae6b36b4.html [accessed 19 May 2021].

[14] *Prosecutor v Tihomir Blaskic (Trial Judgement),* IT-95-14-T, International Criminal Tribunal for the former Yugoslavia (ICTY) 3 March 2000, available at https://www.refworld.org/cases,ICTY,4146f1b24.html accessed 24 March 2021.

[15] Bugnion, F. *The International Committee of the Red Cross and the Development of International Humanitarian Law,* (2004, Chi. J. Int'l L., 5, 191).

> *In sieges and bombardments, all necessary steps must be taken to spare, as far as possible, buildings dedicated to religion, art, science, or charitable purposes, historic monuments, hospitals, and places where the sick and wounded are collected, provided they are not being used at the time for military purposes.*

However, this does not define the concept with certainty, and calls for conjecture. As a consequence, this paper relies on the definition(s) advanced by the writings of highly qualified publicists, whose opinions by virtue of Article 38 (1) (d) of the International Court of Justice Statute,[16] can be relied upon in the advancement of international law principles.

Despite the failure to have a definitive definition of the term military siege within the mainstream international Humanitarian Law framework, there has been attempts to define and conceptualize the term. For instance, the International Committee of the Red Cross (ICRC) argues that; "a siege can be described as a plan or undertaking, through which an armed force encircles the enemy's armed forces, with the objective of either preventing their free movement from the encircled area, or with a view of cutting off their supplies and supply channels, in order to force them to surrender."[17] Professor Elżbieta Mikos-Skuza, a Research Professor at the Institute of International Law at the University of Warsaw on the other hand argues that:

> *…the term "siege" derives from a Latin word "sedere" ("to sit") and means military encirclement of a village, town, city or just*

[16]Article 38 (1) (d), The Statute of the International Court of Justice, 33 UNTS 993, 18th April, 1946, available at: https://www.refworld.org/docid/3deb4b9c0.html [accessed 19 April 2021].

[17]International Committee of the Red Cross, *International Humanitarian Law And The Challenges Of Contemporary Armed Conflicts: Recommitting to Protection in Armed Conflict on The 70th Anniversary of The Geneva Conventions,* (International Review of the Red Cross, 2019) https://international-review.icrc.org/sites/default/files/pdf/1590391258/irc101_2/S1816383119000523a.pdf accessed 19 April 2021.

> *military installations or an area of land,*[18] *in order to impose isolation, to prevent the enemy from having contact with the outside world and thus reduce his resistance and enforce surrender.*[19]

From the above arguments, the following key points can be qualified. First, the art of military siege is as old as the institution of military warfare. The practice entails a military army surrounding and encircling the enemy from a two-pronged perspective; when the army is not in a position to enter an urban area, and where the enemy has refused to surrender.[20] In theory, the concept entails two key elements; encirclement and bombardment. The main purpose of the former is to isolate the area under focus, while the latter is the main definitive characteristic of a siege.[21]

Having established that military sieges entail tactics to encircle an enemy's armed forces, in order to prevent their movement or cut them off from support and supply channels,[22] this paper consequently argues that the ultimate aim of a siege is usually to force the enemy to surrender, historically through starvation and thirst, though in contemporary conflicts, besieging forces usually attempt to capture the besieged area through hostilities.

Additionally, sieges or other forms of encirclement may also be part of a larger operational plan. For instance, they can be used to isolate pockets of

[18] Mikos-Skuza, E. *Siege Warfare in the 21st Century from the Perspective of International Humanitarian Law,* (2018, Wroclaw Review of Law, Administration & Economics, 8(2)) pp. 319-330.

[19] Mikos-Skuza, E. *Siege Warfare in the 21st Century from the Perspective of International Humanitarian Law,* (2018, Wroclaw Review of Law, Administration & Economics, 8(2)) pp. 319-330.

[20] Jensen, E. T. *Shelling in Urban Area: When Does Imprecision Become Indiscriminate? In Proceedings of the 16th Bruges Colloquium, Urban Warfare* ((2015, December, Vol. 129, pp. 16-26).

[21] Chatham House., *Military Sieges, The Law And Protecting Civilians,* (2021) https://www.chathamhouse.org/sites/default/files/publications/research/2019-06-27-Sieges-Protecting-Civilians_0.pdf accessed 19 April 2021.

[22] *International Humanitarian Law and the Challenges of Contemporary Armed Conflicts*, (2015, 32IC/15/11), pp. 52–53; available at https://www.icrc.org/en/download/file/15061/32ic-report-on-ihl-and-challenges-of-armed-conflicts.pdf. Accessed 19th April, 2021.

enemy forces left behind during an invasion. Ördén Hedvig argues that a siege that does not involve attempts to capture an area through assault may be aimed at obtaining a military advantage in relative safety for the armed forces of the besieging party. It avoids the hazards of urban fighting for the besieging party and may also be a means to limit the heavy civilian casualties often associated with urban fighting.[23]

Analysis of the International Legal Framework on the Protection of Civilians During a Military Siege

Despite the fact that the existing legal framework has not codified with certainty the concept of military siege, there are several provisions within the framework that discuss the concept, though in passing. For a start, Article 27 of the Regulations annexed to the Convention (IV) Respecting the Laws and Customs of War on Land adopted in The Hague in 1907,[24] commonly referred to as "The Hague Regulations of 1907," provides for and enhances the protection of civilian objects during a military siege. As a result, this provision places an obligation on the besieged party to ensure that the presence of such installations is distinctively identifiable through visible signs.

This was discussed in the case of *The Prosecutor v. Bosco Ntaganda,*[25] where the ICC Appeals chamber opined that, "*willful attacks on property of exceptional religious, historical or cultural value is deemed as an attack on civilian installations, which consequently is tantamount to war crimes*." This in consequence can be said to relate directly to the principle of distinction,

[23] Ördén, Hedvig. *Cities under siege: the new military urbanism*, (2013) pp. 398-401.

[24] Article 27, The Hague Convention (IV) Respecting the Laws and Customs of War on Land and Its Annex: Regulations Concerning the Laws and Customs of War on Land, 18 October 1907, available at: https://www.refworld.org/docid/4374cae64.html [accessed 19 May 2021].

[25] Situation in the Democratic Republic of the Congo, *Prosecutor v Ntaganda (Bosco)*, Judgment on the prosecutor's appeal against the ... 904 (ICC 2006), 13th July 2006, International Criminal Court [ICC]; Appeals Chamber [ICC] Case no ICC-01/04-169.

as stipulated under Articles 48, 51(2) and 52(2) of Additional Protocol 1,[26] which cumulatively are to the effect that only military objects are to be attacked. In interpreting and enhancing the principle of distinction with regards to civilians and civilian installations, the ICTY in the case of *Prosecutor v. Martić,*[27] held that;

> *…religious and educational institutions are protected as long as they meet the special requirement of "cultural heritage of people", meaning "objects whose value transcends geographical boundaries, and which are unique in character and are intimately associated with the history and culture of a people"*[28]

Article 15 of Geneva Convention I[29] provides for evacuation of civilians or wounded casualties on a besieged area in the field, while Article 18 of Geneva Convention II[30] provides for evacuation of the sick and the wounded from a besieged area in the sea, such as a ship. Consequently, Article 17 of Geneva Convention IV[31] puts an obligation on the parties to a conflict to arrive at local agreements, which has been interpreted by different scholars

[26] Articles 48, 51 (2) & 52 (2), Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977, 1125 UNTS 3, available at: https://www.refworld.org/docid/3ae6b36b4.html [accessed 20 May 2021].

[27] *Prosecutor v. Martić, Case No. IT-95-11),* ICTY T. Ch. Judgement of 12 June 2007, para. 97).

[28] Commentary Rome Statute: Part 2, Articles 5-10: Case Matrix Network' (Casematrixnetwork.org, 2021) https://www.casematrixnetwork.org/cmn-knowledge-hub/icc-commentary-clicc/commentary-rome-statute/commentary-rome-statute-part-2-articles-5-10/#c1975 accessed 20 April 2021

[29] Article 15, Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (First Geneva Convention), 12 August 1949, 75 UNTS 31, available at: https://www.refworld.org/docid/3ae6b3694.html [accessed 19 May 2021].

[30] Article 18, Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea (Second Geneva Convention), 12 August 1949, 75 UNTS 85, available at: https://www.refworld.org/docid/3ae6b37927.html [accessed 19 May 2021].

[31] Article 17, Geneva Convention Relative to the Protection of Civilian Persons in Time of War (Fourth Geneva Convention), 12 August 1949, 75 UNTS 287, available at: https://www.refworld.org/docid/3ae6b36d2.html [accessed 19 May 2021].

to signify the need to end the conflict, which as a result enhances the protection of besieged civilians and civilian objects.[32]

The Protection of Civilians Leaving or Being Evacuated from a Besieged Area

When it comes to an encircled area, civilians have two options: one, flee the said area, or two, be voluntarily evacuated. In the 21st century, a siege will only be termed as lawful, only when it has been directed on the enemy forces exclusively, in strict compliance with the principle of distinction.[33] This draws inspiration from the fact that shooting at or otherwise attacking civilians who are fleeing a besieged area would in consequence be deemed as a direct attack on civilians and is absolutely prohibited.

Secondly, it is the position of this paper that IHL rules and principles effectively apply to the conduct of hostilities during sieges. Pursuant to Rule 22 on Customary IHL, *the parties to the conflict must take all feasible precautions to protect the civilian population and civilian objects under their control against the effects of attacks.*[34] In effect, this rule requires both parties to allow civilians to leave the besieged area whenever possible or convenient to do so. In particular, constant care must be taken to spare the civilian population in all military operations, and all feasible precautions must be taken, notably in the choice of means and methods of warfare, to avoid or minimize incidental loss of civilian life, injury to civilians and damage to civilian objects. In a besieged area where hostilities are taking place, and in view of the risk that poses to them, one obvious precautionary

[32] Mikos-Skuza, E. *Siege Warfare in the 21st Century from the Perspective of International Humanitarian Law,* (2018, Wroclaw Review of Law, Administration & Economics, 8(2)) pp. 319-330.

[33] *International Humanitarian Law and the Challenges of Contemporary Armed Conflicts*, (2015, 32IC/15/11), pp. 52–53; available at https://www.icrc.org/en/download/file/15061/32ic-report-on-ihl-and-challenges-of-armed-conflicts.pdf, Accessed 19th April, 2021.

[34] Rule 22, Customary IHL., *Principle of Precautions Against The Effects Of Attacks,* (*Ihl-databases.icrc.org*, 2022) https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_rul_rule22 accessed 31 January 2022.

measure is to evacuate civilians, or at least allow them to leave.[35] Parties must also give effective advance warnings of attacks that may affect the civilian population, the purpose of which is precisely to enable civilians to take measures to protect themselves.[36]

On the other hand, the besieged party has obligations, too. Article 17 of the Fourth Geneva Convention states that Parties "shall endeavor to conclude local agreements for the removal from besieged or encircled areas" of protected persons.[37] For a start, it must take all feasible precautions to protect the civilian population under its control from the effects of attacks. This can entail allowing civilians to leave or otherwise removing them from the vicinity of military objectives, for example by evacuating them from a besieged area where hostilities are ongoing or expected to take place.[38] According to the ICRC, the besieged party might be tempted to prevent the civilian population from leaving because having a besieged area cleared of civilians would make it easier for the besieging forces to starve out the besieged forces or give the former more leeway when attacking military objectives in the besieged area.[39] However, IHL categorically prohibits using the presence of civilians to render certain areas immune from military operations, for instance, in attempts to impede the military operations of the besieging forces. Article 28 of the fourth Geneva Convention states that, "the presence of a protected person may not be used to render certain points or

[35] Muhammedally, S. *Minimizing civilian harm in populated areas: Lessons from examining ISAF and AMISOM policies*, (2016, International Review of the Red Cross, *98*(901)) pp. 225-248.
[36] Rule 20, Customary IHL., *Advance Warning*, (Ihl-databases.icrc.org, 2022) https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_rul_rule20 accessed 31 January 2022
[37] Article 17, *Geneva Convention Relative to the Protection of Civilian Persons in Time of War (Fourth Geneva Convention*), 12 August 1949, 75 UNTS 287, available at: https://www.refworld.org/docid/3ae6b36d2.html [accessed 31 January 2022].
[38] Melzer, N. *International Humanitarian Law: a comprehensive introduction*, (2016, International Committee of the Red Cross).
[39] Amarasinghe, K. *The shape of war in the 21st Century: An analysis of the challenges posed by the contemporary armed conflicts with reference to international humanitarian law*, (2021).

areas immune from military operations."[40] This would amount to using the civilian population as human shields, [41] which pursuant to Article 8(2)(b)(xxiii) of the Rome Statute amounts to constitutes a war crime in international armed conflicts.[42]

With regards to the starvation of civilians as a method of warfare, Article 54(1) of Additional Protocol I[43] read with Article 14 of the 1977 Additional Protocol II[44] are to the effect that starvation of civilians as a method of combat is prohibited. This is further enunciated under Article 8(2)(b)(xxv) of the Rome Statute,[45] which provides that, "[i]intentionally using starvation of civilians as a method of warfare by depriving them of objects indispensable to their survival, including willfully impeding relief supplies as provided for under the Geneva Conventions" and is tantamount to a war crime in international armed conflicts.

The Rome Statute provision was as a result of an amendment to the Rome Statute proposed by Switzerland in 2019, due to the effects that result from starvation of civilians in conflict.[46] This led to adoption of *UNSC Resolution*

[40] Article 28, *Geneva Convention Relative to the Protection of Civilian Persons in Time of War (Fourth Geneva Convention*), 12 August 1949, 75 UNTS 287, available at: https://www.refworld.org/docid/3ae6b36d2.html [accessed 31 January 2022].
[41] Watts, S. *Under Siege: International Humanitarian Law and Security Council Practice Concerning Urban Siege Operations*, (2014, Available at SSRN 2479608).
[42] Article 8(2)(b)(xxiii), *Rome Statute of the International Criminal Court (last amended 2010)*, 17 July 1998, ISBN No. 92-9227-227-6, available at: https://www.refworld.org/docid/3ae6b3a84.html Accessed 31 January 2022.
[43] Article 54(1), Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977, 1125 UNTS 3, available at: https://www.refworld.org/docid/3ae6b36b4.html [accessed 19 May 2021]
[44] Article 14, Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), 8 June 1977, 1125 UNTS 609, available at: https://www.refworld.org/docid/3ae6b37f40.html [accessed 19 May 2021].
[45] Article 8(2)(b)(xxv), Rome Statute of the International Criminal Court (last amended 2010), 17 July 1998, ISBN No. 92-9227-227-6, available at: https://www.refworld.org/docid/3ae6b3a84.html [accessed 19 May 2021].
[46] Assembly of Parties, *Report of The Working Group on Amendments*, (ICC-ASP/18/32, Eighteenth session The Hague, 2-7 December 2019, *Asp.icc-cpi.intl.*)

74/149 of 2019 on the right to food.[47] As a result, *UNSC/Res/74/149/2019* enunciates factors that are tantamount to starvation of civilians, to include factors such as; "to attack, destroy, remove or render useless, for that purpose, objects indispensable to the survival of the civilian population, such as foodstuffs, agricultural areas for the production of foodstuffs, crops, livestock, drinking water installations and supplies, and irrigation works."[48] In the Article, *Seventy Years of the Geneva Conventions; What of the Future?,* the ICRC contends that, "there is general agreement that the term 'starvation' should be given a wide interpretation that goes beyond just deprivation of food and water, to include deprivation of other goods essential to survival in a particular context, such as heating oil or blankets.[49]"

Having established that starvation as a method of warfare is by its own right outrightly impermissible, the question that then begs an answer is, does prohibition of starvation as a method of warfare extend to combatants? For instance, in order to fight the rebels of Jonas Savimbi's UNITA movement, it was established that the Angolan government had been using famine as its preferred weapon in its long final assault against the rebels.[50] Ayad Christophe argues that; "determined to cut UNITA's supply lines, the Angolan armed forces have had no compunction about razing entire villages and forcing the inhabitants to gather in closely guarded camps."[51]

https://asp.icc-cpi.int/iccdocs/asp_docs/ASP18/ICC-ASP-18-32-ENG.pdf accessed 31 January 2022.

[47] *UNSC Res/74/149 of 2019,* (The sUnited Nations Digital Library, 2019) https://undocs.org/en/A/RES/74/149 accessed 20 May 2021

[48] Ibid.

[49] Chatham House, *Sieges, Starvation Of Civilians As A Method Of Warfare, And Other Practices That May Deprive Civilians Of Objects Indispensable To Their Survival,* (International Affairs Think Tank, 2021) https://www.chathamhouse.org/2020/03/seventy-years-geneva-conventions/sieges-starvation-civilians-method-warfare-and-other accessed 20 May 2021.

[50] Online Casebook, *Angola, Famine as A Weapon | How Does Law Protect in War?* (Casebook.icrc.org, 2021) https://casebook.icrc.org/case-study/angola-famine-weapon accessed 20 May 2021.

[51] Ayad Christophe, *L'arme de la famine en Angola", in Libération, Paris*, (28 June 2002, Original in French, unofficial translation).

In his 1970 report, the then Secretary General of the United Nations, U Thant,[52] while emphasizing the need for distinction of combatants and civilians in using starvation as a method of warfare was very categorical in quoting a noteworthy statement by Castrin and Moore, whereby in 1924 they argued that:

> *It is hard to believe that the world is prepared to concede that, in the next war, the first and legitimate measure of the belligerent forces will be to bomb or otherwise destroy producers of foodstuff and other contributory classes heretofore considered as non-combatant; and yet if the distinction between combatants and non-combatants has ceased to exist, such a measure would be legally justified and strategically correct ... No one contributes more to this essential military gesture than the grower of grain ... The most dangerous fighter is the tiller of the soil. It is, however, gratifying to reflect upon the fact that there is not a single government today that is either accepting or supporting such a theory.*[53]

In his article, *Starvation as a Method of Warfare; Conditions for Regulation by Convention,* Esbjorn Rosenblad argues that:

> *Current international law sanctions the starving out of combatants with a view to forcing them to capitulate… a prohibition by Convention, of the starvation of combatants would not appear to be an urgent necessity. Such a prohibition would hardly be feasible. In a suitable context-e.g., the preamble to Additional Protocols to the 1949 Geneva Conventions-it might be possible to affirm that the only legitimate object which States should endeavour to accomplish during war is to weaken the military forces of the enemy. The aim is to win the war, not to cause suffering which is unnecessary for its successful prosecution. It follows that the object of starving out*

[52] The UN Secretary General, 'Respect for Human Rights in Armed Conflicts: Report of The Secretary-General A/8052' (UN Digital Library, 1970) https://digitallibrary.un.org/record/647214?ln=en accessed 20 May 2021.

[53] Eagleton, C. *of the Illusion that War does not Change,* (1941, American Journal of International Law, 35(4)) pp. 659-662.

> *combatants is to force a capitulation and not to starve them to death.*[54]

As a result, therefore, this paper contends that the starvation of combatants within the confines of the principle of military necessity is permissible, as a way of weakening the military forces. In the words of former British Foreign Secretary Michael Stewart in the House of Commons; "we must accept that, in the whole history of warfare, any nation which has been in a position to starve its enemy out has done so."[55] The only problem with this is that it may lead to starvation of civilians within the encircled areas by the besieging party, through their cut-off supplies such as naval blockades against the besieged party. For instance, this was witnessed during the 900-day siege of Leningrad, in which more than a million Russian civilians died of starvation, while the intention was actually to starve the Russian army, by the Nazi German Army. [56]

This paper opines that even where the besieging army uses starvation of combatants as a strategy to achieve their ultimate surrender, the civilians do not have to suffer. In this case, the paper suggests that the besieging army balance the competing interests, and put the interests of the civilians first, by allowing humanitarian relief access to the besieged area, under the confines of IHL. This paper acknowledges how difficult it is to balance the said interests, since there has been evidence of the besieging parties actually going to steal the supplies given to civilians in order not to starve, as evidence in the siege of Leningrad. However, it is the position of this paper that the principles of necessity and proportionality must be given special consideration in this case, such that the practice minimizes to its level best the consequences on the starvation on civilians.

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[54] Rosenblad, E. *Starvation as a method of warfare—conditions for regulation by convention*, (1973, The International Lawyer) pp. 252-270.

[55] The United Kingdom House of Commons Parliament Hansard, (Scholar.smu.edu, 1971) https://scholar.smu.edu/cgi/viewcontent.cgi?article=3931&context=til accessed 20 May 2021.

[56] Union, S., von Leeb, W. R., von Küchler, G., Mannerheim, C. G. E., Heinrichs, E., Popov, M., ... & Meretskov, K. (1941). *Siege of Leningrad*, (1942, Timeline, 7(7.2)).

Arising Issues Under the Concept of Military Sieges

Having conceptualized and analyzed the legal framework when it comes to military sieges, this paper surmises that the concept has been engulfed with numerous issues when it comes to protection of civilians during hostilities, which due to the contemporary nature of warfare as well as the dynamism resulting thereof, calls for attention on some of the issues that come with the practice. Among many other arising key issues, this paper focuses on two key areas; the urbanization of armed conflicts and the effective protection of the civilian population during sieges/encirclements.

1.1.11 The Urbanization of Armed Conflicts

In the contemporary society, the development of cities has come with the close intermingling between military personnel and civilians. As a result, the association comes with many challenges, both in military terms and avoiding civilian harm, when the parties are engaged in hostilities. At the 70th Anniversary of the 1949 Geneva Conventions, a report tabled by ICRC was to the effect that;

> *…because urban warfare endangers civilians in ways particular to it, the protection afforded by the principles and provisions of IHL is critical. Policies can also be an effective tool to protect civilians and limit the effects of urban warfare, but they must not be used to offer protection to civilians that would be weaker or less than that afforded by IHL.*[57]

There are many challenges that are faced by attacks in urban areas. A 2015 report by ICRC, *Urban Services during Protracted Armed Conflict: A Call for a Better Approach to Assisting Affected People,*[58] argues that services essential to the civilian population in urban areas rely on a complex web of interconnected infrastructure systems. The most critical infrastructure nodes within a system enable the provision of services to a large part of the

[57] Amarasinghe, K. *The shape of war in the 21st century: An analysis of the challenges posed by the contemporary armed conflicts with reference to international humanitarian law*, (2021).
[58] People, T. A. A. *Urban Services During Protracted Armed Conflict*, (2015).

population and damage to them would be most concerning when it causes the whole system to fail. Given this complexity and interconnectedness of essential service systems, it is particularly important to consider not only incidental civilian harm directly caused by an attack but also reverberating effects, provided they are foreseeable.[59]

In the case of *The Prosecutor v S. Galić,*[60] the ICTY rendered itself thus;

> *The Sarajevo Romanija Corps directed shelling and sniping at civilians who were tending vegetable plots, queueing for bread, collecting water, attending funerals, shopping in markets, riding on trams, gathering wood, or simply walking with their children or friends. People were even injured and killed inside their own homes, being hit by bullets that came through the windows. The attacks on Sarajevo civilians were often unrelated to military actions and were designed to keep the inhabitants in a constant state of terror. Because of the shelling and sniping against civilians, the life of every Sarajevo inhabitant became a daily struggle to survive. Without gas, electricity or running water, people were forced to venture outside to find basic living necessities. Each time they did, whether to collect wood, fetch water or buy some bread, they risked death. In addition to the sheer human carnage that the shelling and sniping caused, the endless threat of death and maiming caused extensive trauma and psychological damage to the inhabitants of Sarajevo.*

As evidenced in the above case, displacement within cities, or to other areas, is one of the many harmful effects on civilians of urban warfare.[61] In addition to the threat to civilian lives coupled with the disruption of essential urban

[59] Cullen, A. *The characterization of remote warfare under international humanitarian law,* (2017, *Research* Handbook on Remote Warfare, Edward Elgar Publishing).
[60] No. IT-98-29-1.
[61] ICRC, D*isplaced in Cities: Experiencing and Responding to Urban Internal Displacement Outside Camps*, ICRC, 2018, available *https://shop.icrc.org/displaced-in-cities-experiencing-and-responding-to-urban-internaldisplacement-outside-camps-2926.html* accessed 7 March 2021.

services, one of the key drivers of long-term displacement is the damage or destruction of civilian homes, typically caused by the use of heavy explosive weapons. While displacement is not expressly mentioned under the principles of proportionality and precautions as a relevant type of civilian harm, depending on the circumstances, it may increase the risk of death, injury or disease. More generally, the displacement of civilians expected when incidentally damaging their homes will affect the weight to be given to that damage under these principles.[62]

1.1.12 The Protection of the Civilian Population During Sieges/Encirclements

First and foremost, a siege that does not involve attempts to capture an area through assault may be aimed at obtaining a military advantage in relative safety for the armed forces of the besieging party, and in doing so, it must seek to avoid the hazards of urban fighting for the besieging party, and also be a means to limit the heavy civilian casualties often associated with urban fighting.[63] This stems from the fact that civilians are often trapped within when entire towns or other populated areas are besieged, causing unspeakable suffering. IHL offers vital protection to these civilians by imposing limits to what the parties can do during such sieges. While it may go too far to say that it is now impossible to conduct a siege that complies with IHL, the significant vulnerability of civilians caught up in sieges puts particular emphasis on the need for both besieging and besieged forces to comply scrupulously with the legal provisions for the protection of civilians and to conclude agreements for their evacuation.[64]

On the other hand, sieges that do involve attempts to capture an area through assault may increase the intensity of the fighting and the associated risks of

[62] *International Humanitarian Law and the Challenges of Contemporary Armed Conflicts*, (2015, 32IC/15/11), pp. 52–53; available at https://www.icrc.org/en/download/file/15061/32ic-report-on-ihl-and-challenges-of-armed-conflicts.pdf, Accessed 19th April, 2021.

[63] Ördén, H. *Cities under siege: the new military urbanism*, (2013).

[64] Hamilton, P., Klappe, B., Heffes, E., & Gillard, E. C. *Discussion on challenges raised by contemporary urban conflicts in humanitarian action*, (2020, The Military Law and the Law of War Review, Vol. 58(2)) pp. 206-208.

incidental harm for civilians. This is particularly the case if the besieged forces are left with no option other than to fight or surrender.[65] Under IHL, it is not prohibited to besiege an area where there are only enemy forces or to block their reinforcement or resupply, including to achieve their surrender through starvation.[66] It is also not prohibited to attack military objectives within a besieged area, provided such attacks can be carried out in conformity with the principles of distinction, proportionality and precautions.[67] Unfortunately, civilians are often trapped within when entire towns or other populated areas are besieged, causing unspeakable suffering. IHL offers vital protection to these civilians by imposing limits to what the parties can do during such sieges. Civilians may flee a besieged or an otherwise encircled area or be voluntarily evacuated. Today, sieges are lawful only when directed exclusively against an enemy's armed forces.[68]

For instance, the Grozny military siege of 1994-1995, in Grozny, Chechnya, resulted in the death of at least 35,000 inhabitants of the city,[69] while the siege of Sarajevo during the Bosnian war of 1992-1996 resulted in the death of some 10,000 of the city inhabitants and many more wounded and injured.[70] As a matter of fact, in 2003, the ICTY in subsequent case of *Prosecutor v Stanilav Galić*[71] found that Sarajevo had been effectively

[65] Fenrick, W. J. *Attacking the Enemy Civilian as a Punishable Offense*, (1996, Duke J. Comp. & Int'l L., 7, 539).
[66] Amarasinghe, K. *The shape of war in the 21st Century: An analysis of the challenges posed by the contemporary armed conflicts with reference to international humanitarian law,* (2021).
[67] Petersen, L. I. R. *Siege Warfare and Military Organization in the Successor States (400-800 AD): Byzantium, the West and Islam*, (2013, Bill).
[68] Petersen, L. I. R. *Siege Warfare and Military Organization in the Successor States (400-800 AD): Byzantium, the West and Islam*, (2013, Bill).
[69] McCAFFERTY, C. S. *Lessons Learned from The Battle of Grozny, 1994-1995*, (2000, United States Military Academy. H, 1386).
[70] T Jaques, *Dictionary of Battles and Sieges: A Guide to 8500 Battles from Aniquity through the Twenty-first Century, 3 Volumes, (2006); PN Stearns, The Encyclopedia of World History: ancient, medieval, and modern* (6th ed. 2001, C Townshend, The Oxford History of Modern War, 2000).
[71] *Prosecutor v. Stanilav Galic (Trial Judgement and Opinion)*, IT-98-29-T, International Criminal Tribunal for the former Yugoslavia (ICTY), 5 December 2003, available at: https://www.refworld.org/cases,ICTY,4147fb1c4.html [accessed 18 April 2021].

besieged, in spite of the fact that there were very limited possibilities for the civilians to leave the city. This is premised on the fact that the very few possibilities for leaving the city were marred with lots of danger, in which the civilians were prone to attacks by the besieging party, and hence the qualification for an effective besieging of the area.

In effect, it is, therefore, the position of this paper that whereas the civilians may be able to leave he besieged area, if the possibilities of civilians leaving the besieged area are encompassed with danger of attack from either the besieging or besieged party, then this is tantamount to prevention of civilians evacuating from the besieged area. As a consequence, both the besieging and the besieged party have obligations towards the protection of civilians during a military siege, by allowing for evacuation and supplies of relief utilities specifically for the civilians thereof.

Recommendations

First, in spite of the fact that the importance of the proportionality principle is uncontested, the key concepts on which it relies, such as, incidental civilian harm, military advantage, and excessiveness would benefit from further clarification.[72] Where conditions allow, advance warnings must be given of attacks that may affect the civilian population. Most attacks in urban areas may well do so.

This paper opines that the effectiveness of a warning should be assessed from the perspective of the civilian population that may be affected. It should reach and be understood by as many civilians as possible among those who may be affected by the attack, and it should give them time to leave, find shelter, or take other measures to protect themselves. Advance warnings do not relieve the party carrying out the attack from the obligation to take other precautionary measures, and civilians who remain in the area that will be affected by the attack – whether voluntarily or not – remain protected.[73] It is,

[72] Gillard, E. C. *Proportionality in the conduct of hostilities: the incidental harm side of proportionality assessments*, (2018).
[73] Quéguiner, J. F. *Precautions under the law governing the conduct of hostilities*, (2006, International Review of the Red Cross, 88(864)), 793-821.

therefore, the position of this paper that the principles of distinction, proportionality and precautions are complementary, and all three must be respected for an attack to be lawful.

Secondly, during a siege, the parties continue to be bound by IHL obligations relating to relief operations and humanitarian access. IHL provides that impartial humanitarian organizations have a right to offer their services in order to carry out humanitarian activities, in particular when the needs of the population affected by the armed conflict are not being met. Once impartial humanitarian relief operations have been agreed to, the parties to the armed conflict – which retain the right to control the humanitarian nature of relief consignments – must allow and facilitate rapid and unimpeded passage of these relief operations.

This is in compliance with Article 23 of the Fourth Geneva Convention (1949),[74] in which parties to the conflict are obliged to ensure the passage of consignments of foodstuff and medicines intended for children under the age of fifteen and pregnant women. Article 70 of Additional Protocol I ensures that priority is given to the distribution of relief consignments to pregnant women and children, but in addition, parties to the conflict must "allow and facilitate rapid and unimpeded passage of all relief consignments, equipment and personnel...even if such assistance is destined for the civilian population of the adverse Party.[75] In the case of in *AlBassiouni v Prime Minister of Israel*,[76] the Israeli High Court of Justice accepted the application of Article 70 Additional Protocol I together with Article 54 Additional Protocol I as customary international law.

Lastly, there should be prosecutions carried out against those who engage in activities that harm civilians, such as starvation of civilians during

[74] Article 23, *Geneva Convention Relative to the Protection of Civilian Persons in Time of War (Fourth Geneva Convention)*, 12 August 1949, 75 UNTS 287.
[75] Article 70, Additional Protocol I, 8th June 1977, 1125 UNTS 3.
[76] HCJ 9132-07, 2008.

hostilities.[77] In the case of *The Prosecutor v Stanilav Gall*,[78] the ICTY found that attacks on the civilian population during the siege of Saijevo included both direct and disproportionate attacks, which amounted to "unlawfully inflicting terror upon civilians".

Conclusion

This paper concludes first by asserting the three most fundamental maxims of IHL relevant to the conduct of hostilities, especially during military sieges. The first one is pursuant to the St. Petersburg Declaration of 1868, which is to the effect that, "the only legitimate object which States should endeavor to accomplish during war is to weaken the military forces of the enemy."[79] Secondly, in pursuing this aim, The right of the Parties to the conflict to choose methods or means of warfare is not unlimited, as provided for under Article 22 of the 1907 Hague Regulations[80] read with Article 35(1) of Additional Protocol 1[81] and lastly, the civilian population and individual civilians are mandated to enjoy general protection against dangers arising from military operations, as provided for under Article 51 (1) of Additional Protocol I.[82]

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[77] Power, S. *Siege Warfare in Syria: Prosecuting the Starvation of Civilians*, (2016, Amsterdam LF, 8, 1).

[78] *Prosecutor v. Stanilav Galic (Trial Judgement and Opinion)*, IT-98-29-T, International Criminal Tribunal for the former Yugoslavia (ICTY), 5 December 2003, available at: https://www.refworld.org/cases,ICTY,4147fb1c4.html [accessed 7 March 2021].

[79] ICRC., *Declaration Renouncing the Use, in Time of War, of Explosive Projectiles Under 400 Grammes Weight*, (Saint Petersburg, 29 November / 11 December 1868).

[80] Article 22, *Hague Convention (IV) Respecting the Laws and Customs of War on Land and Its Annex: Regulations Concerning the Laws and Customs of War on Land*, 18 October 1907, available at: https://www.refworld.org/docid/4374cae64.html [accessed 31 January 2022]

[81] Article 35(1), *Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (First Geneva Convention)*, 12 August 1949, 75 UNTS 31, available at https://www.refworld.org/docid/3ae6b3694.html [accessed 31 January 2022]

[82] Article 51(1), *Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (First Geneva Convention)*, 12 August 1949, 75 UNTS 31, available at: https://www.refworld.org/docid/3ae6b3694.html [accessed 31 January 2022]

Further, the basis of International Humanitarian Law is to protect the civilian population from the effects of hostilities and mores so during military sieges. This is guided by the principle of distinction, which provides that belligerents must "*at all times distinguish between the civilian population and combatants and between civilian objects and military objectives and accordingly shall direct their operations only against military objectives*."[83] The protective purpose of this principle can only be achieved if civilians and combatants, and civilian objects, and military objectives are well defined, and if the scope and conditions of the protection afforded to civilians and civilian objects are clear, and the rules of IHL during military sieges must be adhered to the latter, and proscriptive measures taken against those who commit atrocities against civilians during military sieges.

[83] Article 48, Article 51(1), *Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (First Geneva Convention)*, 12 August 1949, 75 UNTS 31, available at: https://www.refworld.org/docid/3ae6b3694.html [accessed 31 January 2022]

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Accountability – The Bloodline of Universal Health Coverage

By: Oseko Louis D Obure*

Abstract

Accountability has become and is the beating heart of Health Care. This is particularly so when it comes to implementing Universal Health Coverage. Accountability involves the procedures and processes by which a party may justify his actions or be held responsible for their actions. Under health, accountability is three-pronged. To begin with, accountability under health is about who is to be held accountable; that is, the responsible parties. Second, it entails the domains under which one can be held accountable. For instance, one could be held accountable based on professional competence, legal and ethical conduct, financial performance, adequacy of access, public health promotion, and community benefit. Lastly, accountability entails the procedures and mechanisms for enforcement mechanisms. Granted, realising Universal Health Coverage demands the incorporation of accountability. This paper seeks to examine the role and efficacy of the accountability mechanisms in implementing Universal Health Coverage in Kenya.

1.0 Introduction

Accountability cannot be divorced from service delivery. Individuals with obligations and mandates must be held accountable for their actions and obligations. This includes the State by virtue of the social contract theory. The social contract theory is a system where members of a society have the reason to endorse and oblige to fundamental rules, principles, and institutions

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that govern the society they live.[1] Simply put, through the social contract theory individuals give up their autonomy to a political body which determines rules and govern over them and in exchange for getting services. It follows that the people who give up this power have a legitimate expectation on the part of the political class and must hold to account those tasked with these roles. Today, accountability has stretched its roots into the realization of the objects of Universal Health Coverage. Including accountability mechanisms in the operationalization of UHC will bring us closer to achieving its objectives. This is the case that this paper seeks to make; that accountability is the beating heart of universal health coverage.

This work will first unpack what the UHC entails, its characteristics, and interplay with the right to health as provided for in the constitution of Kenya 2010. Secondly, this essay will analyze accountability as the backbone to realizing and implementing the UHC. This will be done by looking at the multiple accountability mechanisms such as legal, social, hierarchical, and professional that have been put in place in pushing for Universal Health Coverage. Lastly, the paper shall do a comparative analysis between Kenya and South Africa through the lenses of UHC before concluding.

2.0 Unpacking Universal Health Coverage

Universal Health Coverage has been on the global health agenda for several years. In 2015, the momentum increased after the formulation of Sustainable Development Goals, particularly SGD number 3, which focuses on ensuring healthy lives and promoting the well-being for people of all ages [2] The desire to realize the operationalization of Universal Health Coverage has also been reflected in the Big Four Agenda by the Kenyan government.[3] This action

[1] Fred D'Agostino, Gerald Gaus and John Thrasher, 'Contemporary Approaches to the Social Contract' in Edward N Zalta (ed), *The Stanford Encyclopedia of Philosophy* (Winter 2021, Metaphysics Research Lab, Stanford University 2021) <https://plato.stanford.edu/archives/win2021/entries/contractarianism-contemporary/> accessed 2 June 2022.

[2] 'Goal 3 | Department of Economic and Social Affairs' <https://sdgs.un.org/goals/goal3> accessed 2 January 2022.

[3] 'Towards 2030 | Kenya Vision 2030' <https://vision2030.go.ke/towards-2030/> accessed 10 December 2021.

plan by the Kenyan government was geared towards achieving affordable healthcare for all by scaling up the National Health Insurance Fund (NHIF) coverage. At the crux of UHC is ensuring that citizens have access to affordable and quality health services. Essentially, accessibility should depend on the level of need and not on who can afford it.

It is important to note that achieving Universal Health Coverage is a purely political process. It calls for investment and commitments from governments and global health actors to help build capacities for effective engagement with the relevant stakeholders.

1.1 Characteristics of Health Services under Universal Health Coverage

Under the UHC program, healthcare services encompass access to key promotive, preventive, curative, and rehabilitative services in an affordable manner that ensures equity.[4] The preventive aspect appreciates the definition of health as provided by law to not only include the absence of disease but the complete social, mental, and physical being of an individual.[5] Access is an essential parameter, and it must be without discrimination and within a geographical coverage of five (5) kilometers from the people.

Promotive health services are mechanisms and services that focus on the root cause of illness. The role of promotive healthcare services is to ensure that people take control of their health. This is achievable through good health governance that incorporates measures that prevent people from getting ill.[6] This would include regulation of beverages such as alcohol, et cetera. Admittedly, promotive health services are a cornerstone in realizing holistic universal health coverage.

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[4] 'Universal Health Coverage (UHC)' <https://www.who.int/news-room/fact-sheets/detail/universal-health-coverage-(uhc)> accessed 2 June 2022.
[5] Health Act 2017, Section 2.
[6] Netsanet Fetene Wendimagegn and Marthie C Bezuidenhout, 'Integrating Promotive, Preventive, and Curative Health Care Services at Hospitals and Health Centers in Addis Ababa, Ethiopia' (2019) 12 Journal of Multidisciplinary Healthcare 243 <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC6454996/> accessed 10 December 2021.

On the contrary, preventive health services work to reduce the risk of exposure to illness. This approach has become popular for diseases without cures. The Kenyan government has adopted in curbing the spread of the coronavirus,[7] notably the banning gatherings, mandatory vaccination, and social distancing which are preventive measures that protect the masses from contracting the coronavirus. Preventive health care works to lessen the burden of treating individuals with the already trained resources heavy curative health services.

1.2 Universal Health Coverage: A Human Rights Perspective

1.2.1 Legal Basis for the Right to Health

Universal Health Coverage is primary in the fulfillment of the right to health. The constitution stipulates that every individual is entitled to the highest attainable standard of health, including the right to reproductive health care services.[8] In addition, no person shall be denied emergency medical services.[9] By virtue of Article 2,[10] Kenya is bound by international instruments such as Universal Declaration of Human Rights (UDHR), which entitles everyone to a living standard that is adequate for their health and well-being.[11] This is restated in the World Health Organization Constitution and the International Convention on Economic Social and Cultural Rights.[12] In Africa, the African Charter on Human and People's Rights provides for and protects the right to health.[13] Evidently, Kenya has a raft of both local and international laws that protect and guarantee the right to health for her citizens.

[7] 'Government of Kenya Announces New Restrictions (18 June, 2021)' (*U.S. Embassy in Kenya*, 21 June 2021) <https://ke.usembassy.gov/government-of-kenya-announces-new-restrictions/> accessed 10 December 2021.
[8] Constitution of Kenya 2010, Article 43(1)(a).
[9] Constitution of Kenya 2010, Article 43(2).
[10] Constitution of Kenya 2010, Article 2(5) and 2(6).
[11] Universal Declaration for Human Rights (Adopted 1948), Article 25.
[12] See Article 12 (1) & (2).
[13] See Article 16.

1.2.2 Interplay Between Universal Health Coverage and the Right to Health

Universal Health Coverage is about providing health services that are accessible, acceptable, and affordable. It is worth noting that affordability here is premised on the principle of equity and equality; that is, it is not a question of who can afford it but who is in need. Even the 'Agenda 4' framework is to make health services affordable by achieving full coverage by the NHIF.

The interplay between the right to health and universal health coverage is that the UHC program brings us closer to fulfilling the right to health care. Most states have adopted the UHC program because it brings them a step closer to fulfilling the right to health, and Kenya is no exception.[14] However, it is noteworthy that the right to health is resource-intensive, and even the constitution acknowledges this fact under Article 20(5).[15] The resource-intensive nature of the right to health can be examined using the "AAAQ" framework (Availability, Affordability, Accessibility, Quality). Firstly, fulfilling the right to health encompasses the availability of facilities and personnel. This implies that funds must be set aside for the remuneration of personnel and the construction of state-of-the-art facilities that meet the needs of the patients. Secondly, affordability entails the subsidization of costs for persons who need health services but cannot pay. Currently, most services offered are paid at an out-of-pocket rate that is difficult for many households to raise. Thirdly, accessibility, particularly geographical accessibility, calls for the construction of roads to health facilities which must be within a five (5) kilometer radius to the patient. Lastly, quality is about recruiting highly skilled personnel, developing infrastructure with Intensive Care Units, which was lacking in Kenya in the wake of the covid-19 pandemic, and even the purchase of dialysis machines. Admittedly, the right to health is resource-intensive and expensive for the patient calling for the State's indulgence in ensuring its affordability.

Owing to the affordability costs and accessibility issues for persons who live in economic hardship, the UHC program was enrolled. Its main goal was to

[14] Constitution of Kenya 2010, Article 21.
[15] Constitution of Kenya, 2010.

make health care affordable for all without discrimination. In so doing, it makes the right to health an achievable dream to many as they can now access key promotive, preventive, and curative health services.[16] Therefore, in unpacking the right to health, the inclusion of the Universal Health Coverage program must be deliberate.

1.2.3 The State's Obligation in Respect of the Right to Health and UHC

The constitution of Kenya places a duty on the State to promote, protect, preserve, and fulfil the Bill of Rights.[17] The right to health is a positive right that must be fulfilled by the State. This means that the State is under the obligation to put in place measures that will help in the realization of the right to health. Some of these measures could include progressive policies that provide for the equitable distribution of resources or on health coverage to lower the economic burden when enjoying this socio-economic right.[18] However, the right to health, especially UHC is resource intensive and cannot be fulfilled overnight, as such the State's obligation is that of progressive and not retrogressive realization. Also, in enforcing this right the duty lies on the State to show that they do not have enough resources to facilitate full realization of this right.[19] Granted, the duty bearer who should account is the State.

3.0 Accountability as a Core Pillar of Universal Health Coverage

The object of the UHC is to curb health inequalities. These inequalities are ever so often influenced by social and political determinants, which dictate who is to be included and who is to be excluded. Therefore, addressing these determinants is critical in addressing health inequalities. One of the ways of dealing with this challenge is social inclusion. It has been argued that social inclusion is one of the effective ways of ensuring accountability. [20]

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[16] 'High-Performance Health Financing for Universal Health Coverage (Vol. 2): Driving Sustainable, Inclusive Growth in the 21st Century (English)' (*World Bank*) <https://documents.worldbank.org/en/publication/documents-reports/documentdetail> accessed 10 January 2022.

[17] Constitution of Kenya, 2010 Article 21.

[18] Constitution of Kenya 2010, Article 43.

[19] Constitution of Kenya 2010, Article 20(5).

[20] Sara Bennett and others, 'Strengthening Social Accountability in Ways That Build Inclusion, Institutionalization and Scale: Reflections on FHS Experience' (2020) 19

Accountability is about ensuring decision-makers honour their commitments, insisting on obligations, and demanding that their actions and investments translate into long-term goals. It is in the best interest of all the champions of UHC to rally together in developing strategies that are necessary for expanding and protecting the civic space and freedoms that promote inclusive decision-making and social accountability on spending and prioritization.

3.1 Kenya's Accountability Mechanisms under Universal Health Coverage

There are various mechanisms that have been put in place to aid in the actualization of the objectives of Universal Health Coverage. These strategies include planning mechanisms, transparent monitoring systems, systematic reporting systems at different levels, and external accountability measures for non-state actors in the health sector.

Kenya's accountability mechanisms can be grouped as hierarchical, legal, professional, and social accountability mechanisms. These mechanisms have stretched their roots and are applicable even in the implementation of UHC.

3.1.1 Hierarchical Accountability Mechanisms

Hierarchical accountability is an example of vertical accountability. This system offers a system of checks where the junior officers are held accountable by their superiors.[21] This can be done through performance targets and compliance with strategic planning. Hierarchical accountability can be seen at work since the devolution of health services to the county governments.[22] The governor is placed as the principal accounting officer all the way down to the hospital administrator.[23] It is noteworthy that devolving

International Journal for Equity in Health 220 <https://doi.org/10.1186/s12939-020-01341-x> accessed 10 January 2022.

[21] Mark Bovens and Robert Goodin (eds), *The Oxford Handbook of Public Accountability* (Oxford University Press 2014) <https://www.oxfordhandbooks.com/view/10.1093/oxfordhb/9780199641253.001.0001/oxfordhb-9780199641253> accessed 2 June 2022.

[22] Constitution of Kenya 2010, Fourth Schedule and County Government Act, 2012.

[23] Oscar Otieno Agoro, Ben Onyango Osuga and Maureen Adoyo, 'Supportive Supervision for Medicines Management in Government Health Facilities in Kiambu

health has continued to act as a mechanism for the realization of the right to health and, in particular, the operationalization of the Universal Health Coverage program, which is to provide affordable health services to all.[24] Devolution brings these services closer to the people, thus helping with equitable distribution of health services to all.

Sometimes they are to verify whether the health facilities are equipped and are offering high-quality services to the patients. It is not enough that a health facility has been constructed; it must meet the minimum acceptable standard for service delivery that it offers the citizens. This is because UHC is not just about affordability, accessibility, and acceptability but also quality. These visits are usually conducted by the county and national management teams.[25] Aside from the hierarchical reporting system, there is also financial accountability that brings into play even the senate that grills county governors who are deemed to have misappropriated funds. The use of public funds must be in accordance with the Finance Management Act, 2012.[26] Sadly, a number of county governments have been under fire for misappropriation of funds in the name of improving health facilities. For instance, Meru county purchased curtains worth 7.8 million Kenyan shillings.[27] instead of putting that money towards better use like purchasing

County, Kenya: A Health Workers' Perspective' (2015) 20 The Pan African Medical Journal 237 <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4919672/> accessed 11 January 2022.

[24] Timothy Oketch, 'Devolution And Universal Health Coverage In Kenya: Situational Analysis Of Health Financing, Infrastructure & Personnel' 6 <http://erepo.usiu.ac.ke/xmlui/bitstream/handle/11732/3016/4564.pdf?sequence=1&isAllowed=y> accessed 11 January 2021.

[25] Kenneth Karumba, 'Competing Multiple Accountability Mechanisms and Public Administartors' Responses in the Health Sector in Kenya' (LLM Thesis, Univesity of Nairobi 2018) <http://erepository.uonbi.ac.ke/bitstream/handle/11295/105385/Karumba_Competing%20Multiple%20Accountability%20Mechanisms%20And%20Public.pdf?sequence=1> accessed 10 January 2021.

[26] Please see sections 164-168.

[27] Benjamin Wafula, 'Uproar over Meru General Hospital Sh7.8M Curtains' (*Citizen Digital*, 22 September 2015) <https://www.citizen.digital/news/uproar-over-meru-general-hospital-sh7-8m-curtains-101271> accessed 10 January 2022.

dialysis machines, more medical supplies, or paying the medical staff who often strike[28] for better working conditions and pay.

Hierarchical accountability is primary if Kenya wants to achieve Universal Health Coverage for all at an affordable rate. It ensures that the key individuals tasked with the mandate of delivering health care services are held to account for their acts that influence and affect the implementation of this program. Without accountability, then the health system under devolution would be run to the ground, as we have seen in the case of Meru County, where there was misprioritization of funds meant for health services.[29]

3.1.2 Professional Accountability Mechanisms

The quality of health services given to patients is dependent on the kind of skilled medical personnel that provides the service. These personnel comprise specialists, medical officers, pharmacists, dentists, et cetera. These professionals are guided by their training and professional standards, regulations, and guidelines that dictate how they should discharge their duties. Such guidelines include the Hippocratic oath, which stipulates that a medical doctor at all times shall not do any harm[30] and maintaining the highest professional standards.

There are also professional bodies that hold accountable their members. These bodies include the Kenya Medical and Dental Practitioners Board, Pharmacy and Poisons Board, and the Clinical Officers Council. These bodies are critical in enforcing professional standards. For instance, the

[28] David Muchui, 'Meru Health Workers Vow to Go on Strike Tomorrow' (*Business Daily*, 11 November 2020) <https://www.businessdailyafrica.com/bd/news/counties/meru-health-workers-vow-to-go-on-strike-tomorrow-3018570> accessed 10 January 2022.

[29] Benjamin Wafula, 'Uproar over Meru General Hospital Sh7.8M Curtains' (*Citizen Digital*, 22 September 2015) <https://www.citizen.digital/news/uproar-over-meru-general-hospital-sh7-8m-curtains-101271> accessed 10 January 2022.

[30] Rachel Hajar, 'The Physician's Oath: Historical Perspectives (2017) 18 Heart Views: The Official Journal of the Gulf Heart Association 154 <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC5755201/> accessed 10 January 2022.

Kenya Medical and Dentist Practitioners Board conducts preliminary inquiries on professional conduct and medical malpractice.

Professional accountability is imperative because the UHC and the right to health under the constitution entitle an individual to the highest attainable standard of health.[31,32] The highest attainable stand is achievable only when the professionals are highly skilled and where malpractice arises, they should be answerable to these bodies and take responsibility for their actions.

The professional standards in the Kenya healthcare system are wanting and characterized by rude nurses who violate article 28[33] when dealing with patients. Additionally, the issue of monopoly of knowledge and protecting "one of your own" makes it difficult to see cases of medical malpractice resolved with fairness. Professional regulation in Kenya takes the form of self-regulation. Although self-regulation has the benefit of ensuring better and specific regulation because the professionals tasked with regulation understand the industry, there is a risk of abuse to promote the interest of the professionals. This is one of the shortcomings of professional accountability as a mechanism for promoting affordable high standard health services per the objects of the Universal Health Coverage Program.

Other than professional specific standards for the health workers and medical professionals, there are other employees such as hospital administrators who are bound by the professional accountability standards. A good starting point is the Constitution of Kenya which provides for the values and principles that dictate the public services[34] including health services offered in public hospitals. This provision lays emphasis on professional ethics, efficiency, responsiveness, and, most importantly, accountability. Additionally, there is the Public Service Act of 2015, which buttresses the provisions of article 232 of this constitution. Another statute that plays a critical role in ensuring professional accountability is the Leadership and Integrity Act which was

[31] Constitution of Kenya 2010, Article 43
[32] 'Universal Health Coverage (UHC)' <https://www.who.int/news-room/fact-sheets/detail/universal-health-coverage-(UHC)> accessed 10 January 2022.
[33] Constitution of Kenya, 2010.
[34] Constitution of Kenya 2010, Article 232.

enacted in 2012 per article 75 of this constitution. Institutionally, the Ethics and Anti-Corruption Commission ensure compliance with ethical standards for professionals[35] while the Public Service Commission is mandated to receive complaints and investigate the misconduct of public officers, which includes health administrators.[36]

3.1.3 Legal Accountability Mechanisms

There are various legal obligations that are imposed on all stakeholders in the health sector. The constitution of Kenya provides for the right to health of the highest attainable standards.[37] This is also provided for under the Health Act 2017. Furthermore, article 27 of this constitution provides for non-discrimination in the delivery of services. UHC's primary goal is all about affordability and accessibility to healthcare for all. This equality plays a crucial role because it brings about equity in the distribution of health resources in a manner that lessens the economic burden when one is seeking primary medical care services. Compared to other accountability mechanisms, legal accountability mechanisms come with sanctions[38] and are justiciable in courts of law.

The courts have, on many occasions, determined issues regarding the right to health care. This can be seen from the jurisprudence that is emerging from the courts. The approach of the courts has been that of looking at the right to health as a contract between the State and right bearers. This is in light of the social contract theory under jurisprudence that proffers the argument that the existence of the State is the offspring of all individuals agreeing to be subject to a collective that has obligations towards them.[39]

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[35] Ethics and Anti-Corruption Act 2011, section 13.
[36] The Public Service (Values and Principles) Act 2015, Section 13.
[37] Constitution of Kenya 2010, Article 43(1)(a).
[38] Kenneth Karumba, 'Competing Multiple Accountability Mechanisms and Public Administartors' Responses in the Health Sector in Kenya' (LLM Thesis, Univesity of Nairobi 2018) <http://erepository.uonbi.ac.ke/bitstream/handle/11295/105385/Karumba_Competing%20Multiple%20Accountability%20Mechanisms%20And%20Public.pdf?sequence=1> accessed 10 January 2021.
[39] Fred D'Agostino, Gerald Gaus and John Thrasher, 'Contemporary Approaches to the Social Contract' in Edward N Zalta (ed), *The Stanford Encyclopedia of*

Some of the key decided cases when it comes to enforcing the right to health include the ***Luco Njagi & 21 others v Ministry of Health & 2 others.***[40] The petitioner, in this case, sought renal dialysis treatment at Kenyatta National Hospital, but there were no machines. As a result, they had to seek the service from private hospitals, and now they wanted the State to carter for those medical services they underwent. The petitioners argued that the cost of dialysis was Kshs 5000, and the National Health Insurance Fund could barely carter for half of the charge. Thus, the expensive nature of the treatment was an infringement of their right to health services. Although the prayers for the reimbursement failed, Justice Mumbi Ngugi stated that there is a minimum score that the State must meet. In this case, the State had put in place the NHIF as well as purchasing 20 dialysis machines even though only six were working at Kenyatta National Hospital. This case goes to show that the State is a duty bearer to the citizen who can hold them accountable in enforcing their right to health.

The challenge with legal accountability stems from how resource-intensive the implementation is. This makes it difficult for the courts to outrightly make a declaration. Therefore, they are only bound to consider how progressive the policies[41] that have been put in place are and whether the State has achieved the minimum core standard for the delivery of health services. Also, since this is policy making, it has raised the political doctrine question where the courts are seen as interfering with the policy making process of executive arm of the government and are now acting as policymakers.

3.1.4 Social Accountability

Moving towards UHC is a political process that involves the engagement and negotiations between different interest groups such as the government, private sector, and community. Often it is difficult to have the community represented, seeing as not all members of the community can get the chance

Philosophy (Winter 2021, Metaphysics Research Lab, Stanford University 2021) <https://plato.stanford.edu/archives/win2021/entries/contractarianism-contemporary/> accessed 10 January 2022.

[40] [2015] eKLR.

[41] Constitution of Kenya 2010, Article 21 and 20(5).

to voice their opinions in forums discussing UHC. Consequently, they are ever so often represented by civil societies.

In Kenya, Civil Society Organizations (CSOs) have been at the forefront of representing communities, the disease-laden, key populations, and the vulnerable by pushing for more equitable distribution of health resources and services across Kenya.[42]

Social accountability is a participatory process where the citizens are engaged to hold political leaders, policymakers, and public officials accountable for the services that they provide.[43] Social accountability has been used in other sectors to ensure accountability in service delivery; however, the use of social accountability in the health sector has been limited, and there is little evidence of its use.[44] This is despite the promises that it bears.

The national values and principles that govern the people of Kenya include public participation[45] which is at the centre of what social accountability represents. Also, the United Nations' SDG 16 outlines principles such as effectiveness, accountability, and inclusivity at all levels in institutions as essential elements of sustainable development. However, there have been challenges that have hindered the realization of the full benefits that come with social accountability.

First and foremost, despite the enabling legal provisions, the citizens are still unmotivated to participate in the policy-making process. This has sometimes

[42] waci, 'Enhancing Social Accountability in Kenya's Health Sector: A UHC Perspective – WACI Health' <https://wacihealth.org/enhancing-social-accountability-in-kenyas-health-sector-a-uhc-perspective/> accessed 10 January 2022.
[43] 'What Is Social Accountability? | Mainstreaming Social Accountability in Mongolia Project' <http://www.irgen-tur.mn/en/what-is-sa> accessed 2 June 2022.
[44] Georges Danhoundo, Khalidha Nasiri, and Mary E Wiktorowicz, 'Improving Social Accountability Processes in the Health Sector in Sub-Saharan Africa: A Systematic Review' (2018) 18 BMC Public Health 497 <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC5899409/> accessed 10 January 2022.
[45] Constitution of Kenya 2010, Article 10.

been attributed to the fear of reprisal for speaking out, lack of funding and strategic expertise, and the amount of time taken to develop, plan and implement social accountability.[46] Moreover, a study[47] has shown that the participation is often done at a secondary stage rather than at the inception stage of the said policy that is to ensure better delivery of health services as well as the efficient operationalization of the Universal Health Coverage.

4.0 Comparative Study on the Accountability Mechanisms in the Implementation of UHC

Kenya has made strides towards the realization of UHC. Firstly, this has been achieved by devolving health services to bring them closer to the people that need these services, as well as the introduction of the National Insurance Health Fund. However, there have been some claw-backs with the cover being amended to exclude services such as the treatment of cancer. This threatens the right to health of those who are battling cancer and are not in a position to bear the economic burden that comes with the treatment of cancer.[48] To ensure that these efforts are not retrogressive, Kenya has adopted a multiple approach in holding relevant players to account. This includes legal, professional, social, and hierarchical accountability mechanisms that help in the realization of this right.

South Africa also supports the World Health Organization's UHC program, and they have made steps as well to ensure its realization. South Africa has the National Health Insurance (NHI) that helps bridge the inequality gap created by economic statuses. On matters accountability, particularly on legal accountability, the South African constitution provides for the right to health, and the courts have been at the forefront of enforcing this social-

[46] Georges Danhoundo, Khalidha Nasiri, and Mary E Wiktorowicz, 'Improving Social Accountability Processes in the Health Sector in Sub-Saharan Africa: A Systematic Review' (2018) 18 BMC Public Health 497 <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC5899409/> accessed 13 January 2022.
[47] *Ibid.*
[48] Gilbert Kimutai, 'County First Ladies Urge NHIF to Fully Cover Cancer Treatment' (*The Standard*) <https://www.standardmedia.co.ke/rift-valley/article/2001423129/county-first-ladies-urge-nhif-to-fully-cover-cancer-treatment> accessed 27 January 2022.

economic right, as was seen in the case of ***Soobramoney v Minister of Health, KwaZulu-Natal.*** [49] Also, South Africa uses hierarchical accountability mechanisms since their system of governance is devolved, just as the situation is in Kenya.[50] What this does is that accountability systems run from the local level to the provincial level and finally the national level.[51] This ensures that a superior can check and hold responsible those in the lower cadre for their actions and obligations. Lastly, the role of social accountability has been appreciated in the making of policies regarding health services and coverage. Social accountability is akin to public participation in the decision and policy-making process. It is also a constitutional right in South Africa.[52] From the foregoing, it is clear that there are similar accountability mechanisms between Kenya and South Africa in the operationalization of UHC.

5.0 Conclusion

From the foregoing, accountability offers a basic foundation through which the government and other stakeholders can be held to account when implementing Universal Health Coverage. For instance, legal accountability mechanisms such as litigation offer an avenue where individuals can petition the court to protect their right to health of the highest attainable standards and, in turn, UHC. This is because UHC cannot be divorced from and is a core pillar of the right to health as it ensures affordability to primary health care services. Also, through these mechanisms, it is easier to identify who is responsible or who is the duty bearer. For example, professional accountability places a duty on professionals like health administrators and medical professionals in the course of offering health services. Generally, from the comparative study, it is evident that Kenya is headed in the right direction by embracing accountability mechanisms in the implementation of

[49] 1998 (1) South Africa Law Reports 765 (CC) (1997).
[50] Nonhlanhla Nxumalo and others, 'Accountability Mechanisms and the Value of Relationships: Experiences of Front-Line Managers at Subnational Level in Kenya and South Africa' (2018) 3 BMJ Global Health e000842 <https://gh.bmj.com/content/3/4/e000842> accessed 27 January 2022.
[51] *Ibid n50.*
[52] N Maphazi and others, 'Public Participation: A South African Local Government Perspective' <https://repository.up.ac.za/handle/2263/58056> accessed 27 January 2022.

UHC. However, there are challenges that threaten this accountability mechanism, such as fear when it comes to social accountability and monopoly of knowledge under professional accountability.

6.0 Recommendations

The challenges that stem from social accountability, such as the fear of voicing out opinions and the indulgence of the public at a secondary stage, can be remedied by enacting the Public Participation Bill of 2019that bolsters the involvement of the public in the decision-making process. This will be helpful because the implementation of UHC calls for the perspective of the community, who are the intended beneficiaries of this project.

Institutions that are tasked with professional accountability should be strengthened, and a member of the public included because challenges to do with the monopoly of knowledge and protecting the notion of "protecting one of our own" has watered down the faith that people have in the efficacy of these bodies like the Kenya Medical and Dentist Board which investigates and enforces the professional standards for doctors and practitioners.

Although the strategic litigation under legal accountability brings about the political doctrine question, the judiciary should not shy away from horizontally holding accountable the state in a manner that ensures the state does not pass retrogressive policies that erode the minimum core requirements for the right to health and UHC. The accountability role of the judiciary calls for the protection of judicial independence which continues to be shaken through budget cuts by the executive.

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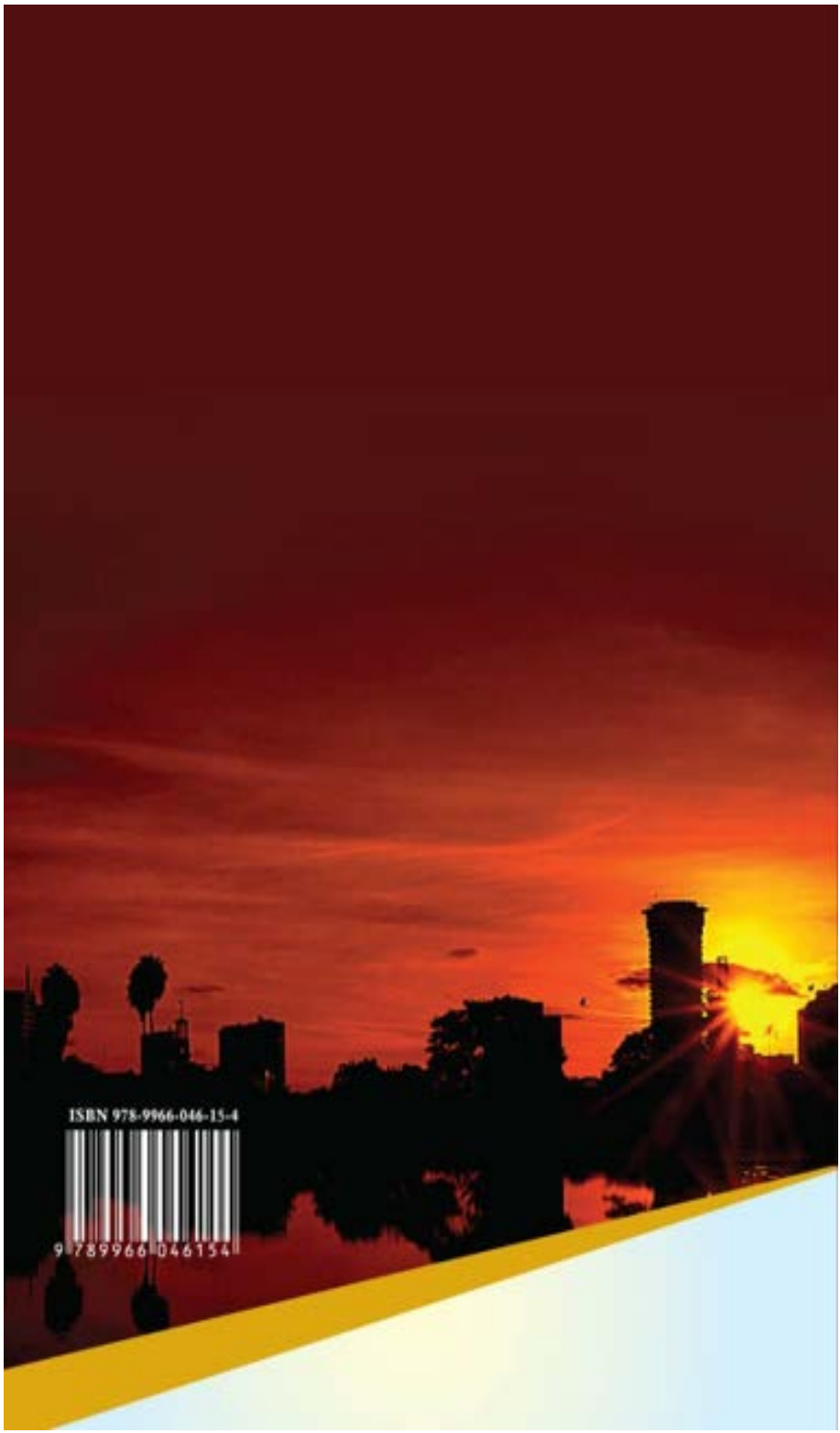
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