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Editor's Note, Volume 9, No. 1

Welcome Volume 9 issue 1 of the Journal of Conflict Management and Sustainable Development.

The Journal continues to provide a platform for scholarly debate on thematic areas in the fields of Conflict Management and Sustainable Development. It is dedicated towards critically analyzing challenges and developments in these fields with a view to proposing solutions that will trigger the Sustainable Development agenda in Kenya and across the globe.

The Journal adheres to the highest level of academic standards and is peer reviewed and refereed so as to ensure credibility of information and validity of data.

Articles covered in this issue are combination of professional practice and knowledge from academia aimed at imparting practical skills to our readers. The topics covered include*: Resolving Oil and Gas Disputes in an Integrating Africa: An Appraisal of the Role of Regional Arbitration Centres; National Environment Tribunal, Sustainable Development and Access to Justice in Kenya; Protection of Cultural Heritage During War; The Role of Water in the attainment of Sustainable Development in Kenya; Collective Property Rights in Human Biological Materials in Kenya; Nurturing our Wetlands for Biodiversity Conservation; Investor-State Dispute Resolution in a Fast-Paced World; Status of Participation of Women in Mediation: A Case Study of Development Project Conflict in Olkaria IV, Kenya; The Business of Climate Change: An Analysis of Carbon Trading in Kenya and Critical Analysis of World Trade Organization's Most-Favored Nation (MFN) Treatment, Prospects, Challenges and Emerging Trends in the 21st Century.*

I wish to thank all those who have contributed towards publication of this Journal and in particular the Editorial Board, reviewers and authors. We welcome feedback from our readers to enable us continue improving the Journal and aligning it to the latest trends in academia.

We welcome submission of papers, commentaries, case reviews and book reviews in the fields of Conflict Management and Sustainable Development to be considered for publication in subsequent issues of the Journal. Submissions can be channeled to editor@journalofcmsd.net and copied to admin@kmco.co.ke

The Journal can be accessed online at https://journalofcmsd.net

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Editor, Nairobi,
September, 2022.

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He is the founding Principal at Dr. Mutubwa Law Advocates; teaches at the Kenya School of Law and at the Mt. Kenya University. He is also a course Director and Tutor in Arbitration and Mediation at CIArb-UK.

He is currently a member of the Task Force appointed by the Chief Justice of the Republic of Kenya on ADR and specifically mandated to roll out Court Annexed Mediation and other forms of Alternative Dispute Resolution (ADR).

He is an Arbitrator listed on London Court of International Arbitration (LCIA); Mauritius International Arbitration Centre (MIAC); the Nairobi Centre for International Arbitration (NCIA); the Kigali International Centre for International Arbitration; the African Arbitration Association (AAA); and the CIArb President's Panels. He also serves on the Arbitration Foundation of Southern Africa (AFSA) and Southern Africa Development Community (SADC) international Arbitration Panels.

He was recently appointed by the President of the Republic of Kenya to serve on the KNHR Commission Selection Panel, and by the Chief Justice of Kenya to serve as a Member of the Political Parties Disputes Tribunal. He was conferred with the exemplary recognition of the Order of the Grand Warrior of the Republic of Kenya by the President in the year 2021.

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 the subject in peer reviewed Journals.

In 2017, he was recognised by IArb Africa as one of the top 100 Arbitrators in Africa. In 2020 he was named as one of the Top 50 rising Arbitration Personalities in Africa.

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He became the first winner of the Inaugural CIArb (Kenya Branch) ADR Lifetime Achievement Award 2021. He was also the winner of the ADR Practitioner of the Year Award 2021 given by the Nairobi LSK and the ADR Publisher of the Year 2021 awarded by CIArb Kenya. He was the winner of the African Arbitrator of the Year 2022 award at the 3rd African Arbitration Awards held at Kigali Rwanda beating other competitors from Egypt, Mauritius, Ethiopia, Nigeria and Kenya. The African Arbitrator of the Year award is the highest and most prestigious ADR and Arbitration Award in Africa.

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He is passionate about this subject and continues to lend his knowledge and experience on the same as part of a consultancy team with the State Corporations Advisory Committee. He is also a senior lecturer with the University of Nairobi's School of Law. He teaches and supervises both

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Oseko is passionate about Energy, Environmental and Natural Resources Law, International Economic Law, Alternative Dispute Resolution, Intellectual Property Law and Commercial Law. Oseko has participated in different competitions, including the Dr. Kariuki Muigua ADR Essay Award, where the paper he co-authored emerged second best. He is a published scholar with over five published articles. These opportunities and roles have enabled him to develop and appreciate the significance of legal writing and research in promoting good governance, sustainable development, dispute resolution and the rule of law.

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1. Harmonisation of the Law on Conservation of Living Marine Resources of the Exclusive Economic Zone within the East African Community. This article has been accepted for publication in the *Eastern Africa Law Review Journal of Law and Development* Vol. 48 No. 1 June 2021;

2. Challenges of Transboundary Water Management within the Nile Basin Region. This article was accepted for publication in the *Law Society of Kenya (LSK) Journal*, 2021;
3. Implementing an Effective Benefit–Sharing Regime in the Extractives Sector: An Appraisal of Imperatives for the Turkana Oil Resources, published in the *Law Society of Kenya Journal*, 2016, Volume 12, No. 1, pp. 69 – 93;
4. Challenges of Prosecuting Inchoate Crimes in Kenya: The Case of Preparation to Commit a Felony. This article, co–authored with Mr Nelson Otieno, was submitted for publication to the *Jomo Kenyatta University of Agriculture (JKUAT) Law Journal*.

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Resolving Oil and Gas Disputes in an Integrating Africa: An Appraisal of the Role of Regional Arbitration Centres

By: ***Wilfred A. Mutubwa*** [*]
&
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Abstract

This paper will explore the nature of disputes in the realm of oil and gas in Africa. It will look into the recent continental and sub-regional developments in a bid to establish regional integration. Additionally, it will test the limits of intra-African trade and dispute resolution and the imperatives for the African regional courts and arbitration centres. In conclusion, it will offer an analysis of the common reliefs in oil and gas arbitration and highlight the leading cases in oil and gas in international arbitration from an African context.

Keywords: oil, gas, African regional courts, dispute resolution, arbitration centres.

1. Introduction

This Paper identifies and critically discusses the nature of disputes in the oil and gas sector in Africa. Central to this conversation is identifying the recent continental and sub-regional developments in establishing regional integration. The extractives sector cases account for 16 per cent of known investment disputes.[1] Africa, the world's second-largest and second most-

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[1] UNCTAD, Investment Dispute Settlement Navigator, https://investmentpolicy.unctad.org/investment-dispute-settlement (last accessed 2 June 2022). The count excludes disputes involving downstream and support activities.

populous continent, is endowed with significant oil and natural gas deposits that are critical to its economic development and sustainability ambitions. There are eight regional economic communities in Africa: the Arab Maghreb Union (AMU), the Community of Sahel-Saharan States (CEN-SAD), the Common Market for Eastern and Southern Africa and the Community of Sahel–Saharan States (COMESA), the Eastern African Community (EAC), the Economic Community of Central African States (ECCAS), the Economic Community of West African States and Economic Community of Central African States (ECOWAS), the Intergovernmental Authority on Development (IGAD), and the Southern African Development Community (SADC).[2] The significance of Africa cannot be underestimated since it accounts for 7.8% of the global oil production.[3] Additionally, Africa is in control of roughly 8.9 per cent of global oil exports.[4] Africa plays host to four of the world's top thirty oil-producing countries: Nigeria, Angola, Algeria, and Egypt.[5] Nigeria is the continent's top oil producer, followed by Algeria and Angola.[6] Africa also has significant natural gas reserves, accounting for 6.9 percent of the world's proven gas reserves. Nigeria has by far the most proven gas reserves in the region, followed by Algeria, Senegal, Mozambique, and Egypt.[7]

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[2] Poorva Karkare and Bruce Byiers, 'Making Sense Of Regional Integration In Africa - ECDPM' (*ECDPM*, 2019) https://ecdpm.org/talking-points/making-sense-of-regional-integration-in-africa/ accessed 10 June 2022.

[3] BP Statistical Review of World Energy 2021, 70th Edition, *https://www.bp.com/content/dam/bp/business-sites/en/global/corporate/pdfs/energy-economics/statistical-review/bp-stats-review-2021-full-report.pdf* (last accessed 10 June 2022), p. 18

[4] Ibid p.32

[5] Ibid p.20

[6] Ibid. p.18

[7] Matthew Goosen, 'Top 10 African Countries Sitting On The Most Natural Gas' (Energy Capital & Power, 2021) https://energycapitalpower.com/top-ten-african-countries-sitting-on-the-most-natural-gas/ accessed 10 June 2022.

2. Nature of Disputes in the realm of oil and gas in Africa

i. State-Investor Disputes

These refer to the disputes between governments and International Oil Companies concerning oil extraction, development, and production agreements. The primary cause of such disputes is legislation that seeks to change or interfere with the value of the project as previously evaluated. The oil industry is very sensitive to the fiscal and legislative framework which affects the commercial viability of previously evaluated projects.[8] Due to such matters, investors emphasize the importance of the legislative framework. Tax regulations and their stability in investment decision-making. The possibility and occurrence of state-investor disputes are incensed by the large amounts of money or property involved in the dealings. Moreover, the acquisition and disposal of interests in these projects either through the disposal of subsidiaries or direct asset sales may also cause conflicts between states and investors.

African states contributed to 135 cases out of the 613 reported cases to the ICSID Convention and Additional Facility Rules. 45% of these cases concerned states` consent in the BITs. Out of these cases, fifty-six involved investor-state disputes over oil and gas with African states contributing to twelve cases. African states continue to experience more investor-state disputes over oil and gas.[9]

ii. State-State Disputes

State to state disputes over oil and gas are not frequent but they occur. They primarily occur where the petroleum fields overlap international borders either offshore on onshore. The offshore disputes arise over who has sovereign power over the Exclusive Economic Zone.[10] Similarly, state-to-state disputes may be caused by differences over the transport fees charged

[8] Cristal Advocates, `Dispute Resolution in the Oils and Gas Industry: The Case of Uganda` (2019)
[9] Ignacio Torterola and Bethel Kassa, `Investor-State Disputes in Africa` (13 March 2020) Available at <*https://nairobilawmonthly.com/index.php/2020/03/13/investor-state-disputes-in-africa/*> Accessed on 27 May 2022.
[10] Ibid (n1)

through the cross-border oil and gas pipelines.[11] Further, terrorist attacks in one state may force the state to breach its agreements with another state or act in contrast to the terms of the agreement thus leading to disputes. For instance, the threats registered by the Al Shabaab terrorists in the Turkana region of Kenya led to Uganda cutting their financial support that facilitated the pipeline oil transport through the northern parts of Kenya to Lamu port at the coast.

iii. Community-State Disputes

Whereas the exploration of natural resources in a state ought to be beneficial and of various perks to the nationals of the state, African states have experienced an otherwise situation. Disputes over oil and gas occur between states and communities within states due to cultural and environmental concerns. A good illustration was evidenced upon the launching of oil extraction in Kenya, which was operated by Tullow Oil and Total international oil companies. A lot of tension existed between the local communities and the state, specifically the two abovementioned companies. Most of these local communities, who are pastoralists raised claims over land and land rights.

The primary cause of conflict between communities and states over oils and gas is due to lack of transparency and trust, and excessive corruption by government officials. In most cases, the government compulsorily acquires land for the extraction of natural resources with a guarantee of compensating the displaced communities. However, some of these communities end up not being compensated or insufficiently compensated. As a result, and due to this violation of the communities` constitutional rights, conflicts arise between them and the state. Such conflicts lead to high-security threats, low productivity, and destruction of infrastructure and material damage.

Another cause of community-state conflicts is the widespread corruption of government officials especially when it comes to the implementation of government policies. It is a requirement to submit duly and well-conducted environmental assessment reports indicating how the side effects of the

[11] Ibid

extraction of natural resources will be handled. Corruption leads to wrong assessments and thus poor and incompetent reports. This means that the local communities will suffer adverse impacts of the extraction such as air pollution and health risks. It is such disasters that spike bitterness among communities leading them to wage conflicts against the state.

iv. Disputes over sharing of revenue between national and county governments

v. It is a common practice for disputes to arise between national and county governments over revenue from oil and gas extraction and investment. According to the Kenya Civil Society Platform On Oil and Gas, improper revenue management causes conflicts since oil explorations mostly occur in areas prone to ethnic rivalry and competition such as the Northern parts of Kenya.[12] The revenue sharing system between national and county governments in Kenya depends on the formula aiming at equitable distribution[13] as opposed to equal distribution of revenue. This is because certain factors such as poverty levels, population size among others determine the amount of revenue a particular county requires. For a long time, most county governments have complained about insufficient revenue allocation by the national government thus causing disputes.[14] Although this has proved to be true on certain circumstances, the other side of the coin presents a different situation. It is understood that Kenya lacks a detailed procedure on how the county governments ought to spend the oil and gas revenue allocated to them. This poses challenges such as embezzlement of the revenue and corruption at the county levels. This would mean that the revenue will have been misappropriated and finished without any constructive development thus dire need for extra

[12] Kenya Civil Society Platform on Oil and Gas, `Settling the Agenda for the Development of Kenya`s Oil and Gas Resources: the Perspectives of Civil Society (2014)
[13] Vellah Kigwiru, `The Challenges Facing The Oil and Gas Sector in Kenya and The Way Forward`
[14] Ibid

allocation from the national government. Such demands highly likely cause disputes between the national and county government.

3. Recent Continental and Regional Developments

i. Application of Alternative Dispute Resolution Mechanisms

It suffices to say that most nationals and investors have lost confidence in the national courts. National courts are marred with a backlog of cases, and legal and procedural technicalities that cause unreasonable delays.[15] Instead of administering justice, the courts have furthered the infringement and violation of people`s rights. Similarly, the politicization of the national courts and corruption have interfered with judicial independence making the courts to be incompetent. Such flaws have led to the recognition and embrace of alternative dispute resolution mechanisms.

There are various alternative dispute resolution mechanisms including but not limited to arbitration, conciliation, mediation, negotiation, expert determination, and inquiry. These modes are recognized and engraved under the Charter of the United Nations as peaceful means of dispute resolution.[16] Africa is not a novice in matters of ADR. ADR has a long history and a track record in Africa, especially in Ghana, Ethiopia and Nigeria. The success of ADR in these countries has influenced other countries to embrace ADR in dispute resolution. Some forms of ADR give the disputants autonomy thus addressing concerns of common interest while trying to do away with power imbalance or positions that influence the outcome of the process.

ADR helps in bridging the gap between traditional forms of dispute resolution and the formal means of dispute resolution. This is essential owing to the fact that African countries never had formal means of dispute resolution before colonization. However, they had traditional means of dispute resolution, which form the greater part of the ADR. Further, ADR helps in building a stable justice system that ensures the prevention of

[15] Ernest Uwazie, `Alternative Dispute Resolution in Africa: Preventing Conflict and Enhancing Stability` (30 November 2011)
[16] The United Nations Charter, Article 33

violence and rebellion. It is to this end that Africa as a continent is embracing the use of ADR in conflict resolution, especially in commercial conflicts. [17]

ii. The emergence of the Gas frontier in East Africa

A good number of international investors have ignored East Africa for a long time. Since the 1960s, Mozambique and Tanzania have been known for gas, however, most investors were primarily interested in oil and thus ignored these regions. However, in the early 2000s most companies started exploring the maritime borders of Tanzania and Mozambique after obtaining exploration blocks along the offshore Rovuma Basin. Later in that decade, the interest in oil and gas in these regions improved significantly due to the discovery of large amounts of natural gas enough to support LNG Projects.[18] These new developments have incensed the interest for further developments with plans of establishing LNG trains in Mozambique by 2022 and liquefaction plants in the same region come 2024. Similarly, the general exploration of entire Africa has improved immensely leading to major discoveries in South Africa in 2019, the offshores of Senegal, Mauritania, etc.[19]

iii. Establishing Cooperation on regional public goods

A new development has been the signing of the Africa Continental Free Trade Area (AfCFTA) in 2018 in an attempt to create a single market in Africa. Forty-four states have signed to the AfCFTA thus registering the largest number of multilateral integration since the WTO. The Africa Economic Outlook 2019 focuses on developing regional public goods through fostering cooperation. It seeks to concentrate on the areas of peace

[17] African Business, `China-Africa Arbitration bodies sidestep international courts` (9 March 2017) Available at https://african.business/2017/05/technology-information/china-africa-arbitration-bodies-sidestep-international-courts/ Accessed on 3 June 2022.
[18] Philippe Copinschi, `New Gas Discoveries in sub-Saharan Africa: A Source of Development?` (21 February 2020) Available at *https://www.ispionline.it/en/pubblicazione/new-gas-discoveries-sub-saharan-africa-source-development-25097* Accessed on 1 June 2022.
[19] Ibid

and security, hard infrastructure such as roads, railways, ports, and corridors, and soft infrastructures such as logistics markets for mining and energy.[20]

Specifically, under mining, since most African states are moving towards a mineral-based industrialization era, there arises the need for coordination in the exploitation of minerals. This new law mandates the African Minerals Development Centre to assist in the development of a regional approach to track financial flows in extraction firms and in coordinating the fiscal regimes.[21]

iv. The Establishment of the Department of Economic Development, Trade, Industry and Mining under the AU

The African Union sought to redefine the scope and objectives of integration as registered in the African Integration Report 2021. Through the new report, the African Union establishes the Department of Economic, Trade, Industry and Mining to `` coordinate the development of continental policy, lead strategic partnerships for continental programs, and monitor, review, and evaluate progress in the implementation of continental policies in the areas of economic integration, monetary affairs, trade, industry, mining, oil, and gas, private sector development, investment, productive transformation, economic and trade agreements, and sustainable development. ``[22]

v. The Variation in Economic Outlook

Sub-Saharan Africa experienced an economic recovery in the 2nd half of 2021 with a positive progression from 3.7 percent in 2020 to 4.5 percent in 2021. Although this provided hopes of further improvement, these hopes were disabled by the Russia-Ukraine war, making Africa unable to respond

[20] Brookings, `The Africa Continental Free Trade Area: An opportunity to deepen cooperation on regional public goods` (4 March 2019) Available at *https://www.brookings.edu/blog/future-development/2019/03/04/the-africa-continental-free-trade-area-an-opportunity-to-deepen-cooperation-on-regional-public-goods/* Accessed on 1 June 2022.
[21] Ibid
[22] African Union, `2021 African Integration Report. ``Putting Free Movement of Persons at the centre of Continental Integration`` ` (14 March 2022) Available at *https://au.int/en/newsevents/20220314/2021-african-integration-report-putting-free-movement-persons-centre-continental* Accessed on 1 June 2022.

properly. The war caused a surge in oil prices which impacted the fiscal balances of the importing countries.[23]

Due to the challenges in sustaining the global shocks caused by the Covid-19 pandemic and the Russia-Ukraine war, the IMF recommends the establishment of a decisive policy action that will improve economic diversification, bring out the potential of private sectors, and remedy the problems caused by climate change. In an attempt to achieve this end, the International Monetary Fund has thus developed the Integrated Policy Framework to assist states in coming up with relevant policy responses to global shocks as the Russia-Ukraine effect on oil and gas production in Africa. This policy toolkit focuses on the interacting role of monetary, macroprudential, exchange rate, and capital flow management regulations while focusing on the African states whose exchange rates are flexible.

vi. The Rise in Commercial Arbitration

In order to improve its presence and raise knowledge of the ICC's dispute settlement system in the region, the ICC Court of Arbitration established an Africa Commission in 2018.[24] In May 2021, the ICC also established a new position for Regional Director for Africa, who would work closely with the ICC Africa Commission to develop ICC activities and raise awareness of ICC dispute resolution services in Sub-Saharan Africa.[25] Given the ICC's initiatives in Africa, the number of African parties resolving their issues through ICC arbitration may increase, implying an increase in African energy conflicts Given the ICC's initiatives in Africa, the number of African parties resolving their issues through ICC arbitration may increase, implying

[23] International Monetary Fund, `Regional Economic Outlook April 2022: A New Shock and Little Room to Maneuver` Available at *https://www.imf.org/en/Publications/REO/SSA/Issues/2022/04/28/regional-economic-outlook-for-sub-saharan-africa-april-2022* Accessed on 1 June 2022.

[24] 'Africa Commission - ICC - International Chamber Of Commerce' (ICC - International Chamber of Commerce, 2022) https://iccwbo.org/dispute-resolution-services/africa-commission/ accessed 10 June 2022.

[25] 'Regional Director Role To Bolster ICC Reach In Africa - ICC - International Chamber Of Commerce' (ICC - International Chamber of Commerce, 2022) https://iccwbo.org/media-wall/news-speeches/regional-director-role-to-bolster-icc-reach-in-africa/ accessed 10 June 2022.

an increase in African energy disputes. However, parties to energy contracts are not solely opting for ICC arbitration. Global energy and resource disputes constituted 26% of the caseload at the London Court of International Arbitration (LCIA) in 2020.[26]

4. Limits of the intra-African Trade and Dispute Resolution

Africa as a continent has made significant steps towards the prevention of conflicts and dispute resolution. There are several regional courts, arbitration centres and dispute resolution systems that advocate for the stability of African countries and promoting safe and healthy investments. Most recognizable bodies include the East African Court of Justice, ECOWAS, COMESA, etc. Despite the efforts and track record, certain limits pose hurdles towards dispute resolution and the promotion of healthy trade relations in Africa. This part seeks to discuss some of the noticeable limits of the intra-African trade and dispute resolution.

Limits of the AfCFTA

The AfCFTA has a jurisdiction limited to state parties.[27] Similarly, a dispute is defined under Article 1 of the Protocol as ` a disagreement between State Parties regarding the interpretation and/or application of the (AfCFTA) Agreement in relation to their rights and obligations. ` The Protocol further limits the application of the AfCFTA to disputes between State Parties concerning their rights and duties as to the extent of the AfCFTA Agreement. An interpretation of this is taken to mean that private entities do not have the locus standi to invoke the jurisdiction of the AfCFTA DSM procedures in case of a cross-border commercial dispute. Although the Economic Community of West African States, Common Market for Eastern and Southern Africa, and the East African Court of Justice have a system of rules

[26] 'LCIA News: Annual Casework Report 2020 And Changes To The LCIA Court And European Users' Council' (Lcia.org, 2022) https://www.lcia.org/News/lcia-news-annual-casework-report-2020-and-changes-to-the-lcia-c.aspx accessed 10 June 2022.
[27] AfCFTA, Article 20

governing cross-border disputes among private entities, they have not managed to address the abovementioned challenge.[28]

In the same regard, Emilia Onyema wonders whether African states can espouse claims of their citizens suppose these citizens suffer a loss due to the measures of the dispute resolution system.[29] It is worth noting that states may always raise diplomatic protection for their citizens and the WTO DSM does not prohibit this. Can African states use the DSM engraved in the AfCFTA to bring claims for their citizens? Whereas this is possible, most of such disputes fall under the category of commercial disputes, which necessitate the establishment of a system of pan-African Conflict of Laws.[30]

Implementation Shortcomings

Most African states face a lot of trivialities in implementing policies. For instance, scholars argue that FTA implementation disputes arise especially in transnational disputes, which are expensive and marred with procedural technicalities. Such challenges are highly likely to cause uncertainty for investments and trading relations.[31] It is to this end that Eurallya suggests that it is imperative for the CFTA to employ adequate modes of dispute prevention and resolution such as the use of ADR without necessarily duplicating the modes under the WTO.[32] She states that such mechanisms should be expeditious, efficient, quick to respond to the disputants, cost affordable and easy to use.[33]

[28] Eurallyah Akinyi, `Conflict of Laws and Intra-African Commercial Disputes: To What Extent Does (Lack of) A Harmonized Pan-African Conflict of Laws Regime Support the AfCFTA Liberalization Agenda?` (12 December 2021) Available at https://www.afronomicslaw.org/category/analysis/conflict-laws-and-intra-african-commercial-disputes-what-extent-does-lack Accessed on 9 June 2022.
[29] Ibid
[30] Ibid
[31] 2016 UNCTAD Report
[32] Ibid (n24)
[33] Ibid

Inadequate Representation of Africa in International Investment Arbitration

The 2017 Africa-Special Focus ICSID Caseload provides that Africa is only represented by an African state`s Attorney General and limited witnesses.[34] This presents various challenges such as the making of assumptions and inclinations among the arbitrators. Similarly, the competence and performance of African representatives are affected by discomfort in the new environment, language barrier, and unfamiliar attitudes of strange counsels.[35] Similarly, African countries have found themselves bound by inexplicable contracts concluded with foreigners. This is because the African public officials signing the contracts do not understand the technical complexities involved in the contractual terms. [36]This presents a danger of the African Officials being declared incompetent and negligent by Western arbitrators in case of disputes arising out of the contracts.[37]

5. The imperatives for the African courts and administration centres

Establishment of Pan-African Conflict of Laws

Conflict of laws facilitates the evaluation of the relationship of a country`s legal system with other countries legal systems since it has municipal and international constituents.[38] The exclusion of Africa from critical discussions on such matters has contributed to the stagnation of the development of private international law. Factors such as global transportation, technological advancement, investment and, international trade promote the development of conflict of laws. The isolation of Africa from these factors has huddled the development of a pan-African conflict of laws as Oppong states.

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[34] ICSID, `The ICSID Caseload Statistics: Special Focus Africa` (2017)
[35] Won Kidane, `The Culture of Investment Arbitration: An African Perspective` (2019) 34 ICSID Rev 411, 420.
[36] Ibid
[37] Ibid
[38] Eurallyah Akinyi, `Conflict of Laws and Intra-African Commercial Disputes: To What Extent Does (Lack of) A Harmonized Pan-African Conflict of Laws Regime Support the AfCFTA Liberalization Agenda?` (12 December 2021) Available at https://www.afronomicslaw.org/category/analysis/conflict-laws-and-intra-african-commercial-disputes-what-extent-does-lack Accessed on 9 June 2022.

Despite the promulgation of the AfCFTA, Africa still lacks a multilateral treaty that deals specifically with matters of conflict of laws. However, it has a good number of bilateral treaties regulating the enforcement of foreign courts` pronouncements. This does not however dilute the fact that conflict of laws has significant effects on certain African REC treaties.[39]

The rise of intra-African commercial disputes such as the Republic of *Mauritius v Polytol Paints and Adhesives Manufacturers Co. Ltd* calls for the development of the pan-African conflict of laws.[40]

Preference to Arbitration in Dispute Resolution

As investments in Africa continue to rise, it is understood that conflicts will arise thus the need for a stronger framework for dispute resolution. A recent report indicates an improved preference for arbitration over litigation and other modes of dispute resolution. The report by Herbert states that investments continue to improve despite the impacts of the Covid pandemic and that there are high chances for the use of arbitration in future in Africa.[41] For a long time, states and investor companies have preferred negotiation and commercial settlements over arbitration during conflicts thus utilizing the established avenues. However, the increase in foreign investment in the continent has elevated the formal means of dispute resolution, specifically arbitration.

Similarly, Laurence Franc-Menget states ``Even where litigation or arbitration takes place outside Africa, onshore litigation may still be required when seeking to enforce an international judgment or arbitral award against assets held in African jurisdiction, or when dealing with local regulators. ``[42]

[39] Ibid
[40] Ibid
[41] ICLG, `African arbitration centres on the rise` (25 March 2022) Available at https://www.google.com/url?sa=t&source=web&rct=j&url=https://iclg.com/alb/17761-african-arbitration-centres-on-the-rise/amp&ved=2ahUKEwjxNGtt574AhXNwQIHHcFrnoECAQQAQ&usg=AOvVaw0PUIgOiGwt1HZ2oITe09Vj Accessed on 7 June 2022.
[42] Ibid

Arbitration and other alternative dispute resolution mechanisms are obtaining wide recognition due to the challenges faced with litigation such as delays and technicalities. Although all the 54 countries in Africa use arbitration, South Africa, Ghana, Ethiopia and Tanzania have embraced it more and established more reforms to increase its efficiency.[43]

Enforcement of Intra-African Cross Border Arbitral Awards

There needs to be a reconsideration of the enforcement of intra-African cross border awards. 38 countries in Africa are members of the New York Convention for the Recognition and Enforcement of Foreign Arbitral Awards, 1958. This Convention facilitates the enforcement of awards given in another Convention state or one Convention state. However, African states have no equivalent body for the enforcement of judgments by foreign courts.[44] Therefore, should an African state obtain an arbitral award it will be difficult to enforce it in another African state? Could it be a time to embrace the enforcement value of national courts' pronouncements over cross-border arbitral awards?

State Versus State Dispute Settlement

Whereas the AfCFTA has tried to address the challenges experienced in this area, it is understood that a more detailed system would have sufficed. The EU has room for domestic courts to refer cases to the Court of Justice of the European Union for appeal while AfCFTA lacks this. Further, the EU allows private entities to seek enforcement of their rights under it while the AfCFTA lacks this direct effect principle. Other scholars have suggested that suppose the AfCFTA had a direct effect on national legal systems, it would have made obvious the need for major reforms on dispute settlement in investment matters.[45] Further, they contend that suppose the AfCFTA had a system like the EU, it would have dealt with any apprehension of protection of investors. They argue that the investor would have had an opportunity to file a suit in

[43] Ibid
[44] New York Convention 1958, Articles I and II respectively
[45] Alex Ansong, `International Economic Law in Africa: Is the African Continent Free Trade Area A Viable Project? ` Available at https://srn.com/abstract=3285290

a domestic court of the host state, which would have in turn referred the matter to the AfCFTA system for a preliminary ruling.[46]

6. A critical analysis of the common reliefs in oil and gas arbitration

Investment treaties are agreements between nations that govern how each signatory state treats investments made by individuals or companies that are nationals of the other signatory state or states. They can be standalone treaties or part of wider free-trade accords. They intend to stimulate cross-border investment by safeguarding international investments from political risk. They are categorized into two kinds: bilateral investment treaties (BITs), which are entered between two governments, and multilateral investment treaties (MITs), which are negotiated and agreed upon between more than two states (MITs).[47] The common reliefs in oil and gas arbitration are based on these.

The aim of some investment treaties making provisions obligating an investor to exhaust local remedies is to protect the sovereignty of the Host State. The principle of local exhaustion of remedies was originally underpinned in diplomatic protection, it was a compulsory condition that a home state of the investor could/would espouse a claim of its investor against the host state only after the exhaustion of local remedies*. This has changed over time with the formulation of the International Treaty of Arbitration. Some International Investment Agreements (IIAs) and contracts state the domestic courts as the exclusive forums for settling disputes. Such do not create pre-conditions to commencing international arbitration, they are exclusive forum choice clauses.[48]

[46] R v. Secretary of State for Transport ECJ [1990]2 Lloyds Rep 351, [1990]3 CMLR 1, C-213/89

[47] Nikos Lavranos, 'C. Mclachlan QC, L. Shore, M. Weiniger QC, International Investment Arbitration – Substantive Principles, 2Nd Ed. (Oxford University Press, 2017) Pp. 1–630, (Hardback)' (2017) 2 European Investment Law and Arbitration Review.

[48] Martin Dietrich Brauch, 'Exhaustion of Local Remedies in International Investment Law' IISD Best
Practices Series 33, 3.

Some treaties contain fork-in-the-road clauses that declare that once an investor selects a particular dispute resolution procedure, that choice precludes the investor from selecting any other dispute resolution procedure theoretically accessible under the treaty. It is expressed in the Latin maxim *una via electa non datur recursus ad alteram*, which means that once one path is selected, there is no turning back.[49] If a fork-in-the-road clause applies and the claimant seeks redress in a local court, the claimant will forfeit their ability to arbitrate in the same dispute.[50]

Common law remedies for breach of contracts are applicable in oil and gas arbitration. The remedy most claimed is Compensatory damages. Other remedies include specific performance and non-compensatory damages such as restitutory damages, nominal damages, exemplary damages and liquidated damages. Parties usually choose to stipulate the circumstances for recouping damages, as well as the categories and amounts of damages recoverable.[51] The applicable legal rules can be a national law or a convention, principles, or sets of rules – such as the Convention on Contracts for the International Sale of Goods (CISG)[52], UNIDROIT Principles,– that have been developed to reflect internationally accepted rules or principles or to achieve a compromise between various legal systems. Beyond national legislation, arbitral tribunals may take a transnational approach, resorting to general principles applicable to damages in international arbitration, such as a generally recognized responsibility to mitigate. However, such principles are not consistently identified or used.[53]

[49] Christoph Schreuer, 'Travelling the BIT Route' [2004] The Journal of World Investment & Trade vii, 240
[50] Campbell McLachlan, Laurence Shore and Matthew Weiniger, International Investment Arbitration (Oxford University Press 2017)64.
[51] C T Salomon, P D Sharp, 'Chap 10: Damages in International Arbitration', in J Fellas and J H Carter (eds), *International Commercial Arbitration in New York* (2nd ed., OUP New York 2016) para. 10.1; N Blackaby, C Partasides and others, *Redfern and Hunter on International Arbitration* (6th ed. OUP, 2015) para. 9.40.
[52] See Chapter 3 on Damages principles under the Convention on Contracts for the International Sale of Goods.
[53] See, Chapter 5 on principles of reducing damages

An investment tribunal may decline jurisdiction to consider a breach of contract action where the counterparty to the contract is a state-owned corporation or a state agency rather than the state itself.[54]

7. A highlight of the leading cases in oil and gas in international arbitration from an African perspective

The oil and gas industry is fundamentally divided into three segments; upstream, midstream and upstream. They are a representative of the four major activities necessary for the oil and gas industry which include producing, transporting, refining and selling at retail.[55] 'Upstream' refers to exploring for oil and gas reservoirs, drilling wells and producing hydrocarbons, also known as exploration and production. This is where exploration and development take place. It is the industry's largest segment.[56] The downstream section includes the refining, processing, distribution, and marketing of oil and gas products.[57] The transportation of oil and gas between the initial production and the end-user of the hydrocarbons is referred to as midstream.[58] These three categories are governed by different laws and are subject to different administrative and environmental standards.[59]

In the Nigerian setting, Dr Dayo Adaralegbe[60] outlines the various interests of various parties and how the occurrence of dispute is inevitable in the

[54] Paul Michael Blyschak, 'Arbitrating Overseas Oil and Gas Disputes: Breaches Of Contract Versus Breaches Of Treaty' (2010) 27 Journal of International Arbitration.
[55] Ernest E Smith, *International Petroleum Transactions* (2nd edn, Rocky Mountain Mineral Law Foundation 2000).
[56] See Diagram by the American Petroleum Institute, available at www.americanpetroleuminstitute.com/oil-and-natural-gas-overview/wells-to-consumer-interactive-diagram
[57] Ibid at footnote 12 above
[58] Ibid at footnote 12 above
[59] Claude Duval and others, *International Petroleum Exploration And Exploitation Agreements* (2nd edn, Barrows 2009).
[60] In a paper presented by Dr. Dayo Adaralegbe at IIPLEP OIL AND GAS WORKSHOP FOR NIIGERIAN JUDGES AND JUDICIAL OFFICERS ON 'Settlement of disputes arising from upstream oil and gas contract activities in Nigeria'. 16th-18th October, 2012.

petroleum industry. He contends that the Sovereign State is principally interested in:

- revenue from the exploitation activities in terms of tax, royalties,
- bonuses and other government takes
- work program that all increases oil production and increase revenue
- local content development
- Technological transfer

Host communities on the other hand are fundamentally concerned in, compensation where it has to be relocated from the land because of exploitation, a right to first, the second and third generation of human rights and the protection against environmental degradation, oil pollution and gas flaring.[61] The foreign investor is solely interested in a legal system that gives recognition to its property rights to exploit. The causal agents of disputes include Economic change, infrastructural needs, technical assumptions, political expectations and attitudinal change, economic crises, foreign investors caught up with domestic disputes, government change, and economically or politically unviable projects.

Africa related arbitrations are on an upward trajectory in the past decade. Within the precinct of the International Chamber of Commerce (ICC), Africa related ICC arbitrations are increasing significantly. Remarkably in 2017, the ICC recorded an all-time high of 87 cases with 153 parties emanating

https://webcache.googleusercontent.com/search?q=cache:9rG3NzOI1JgJ:https://www.international-arbitration-attorney.com/wp-content/uploads/dr-bayo-adaralegbell-m-dundee-ph-d-dundee-fciarbuk-feiuk-fcisukpartner-head-ene.pdf+&cd=1&hl=en&ct=clnk&gl=n Accessed on June 3, 2022.

[61] Samuel O Idowu, Stephen Vertigans and Adriana Burlea Schiopoiu, *Corporate Social Responsibility In Times Of Crisis* (1st edn. Springer International Publishing 2017).

from Sub-Saharan Africa.[62] Furthermore, there has been an increase in disputes under the London Court of International Arbitration (LCIA) rules from a mere two related Africa cases in 2002 to 8 percent of LCIA's new cases in 2016.[63] The African continent is deeply disadvantaged since many of its countries lack modern arbitration laws.[64] 42 out of Africa's 54 States are signatories to the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (The New York Convention).[65] African countries are presently a party to more than five hundred bilateral

[62] See Preliminary statistics for 2017 released by the International Court of Arbitration of the International Chamber of Commerce (ICC), available at https://iccwbo.org/media-wall/news-speeches/icc-announces-2017-figures-confirming-global-reach-leading-position-complex-high-value-disputes . In 2016, the ICC had cases involving 188 parties from Africa. See International Chamber of Commerce, '2016 ICC Dispute Resolution Statistics', ICC Dispute Resolution Bulletin 2017/No. 2 at p. 2

[63] See London Court of International Arbitration, Director General's Report 2002, at p. 2, available at www.lcia.org/LCIA/reports.aspx and LCIA, Facts and Figures – 2016: A Robust Caseload, at p. 9,
available at http://www.lcia.org/LCIA/reports.aspx

[64] About half of African countries have adopted modern arbitration legislation based on a model law: 10 countries in Africa have arbitration legislation based on the UNCITRAL Model Law *(www.uncitral.org/uncitral/en/uncitral_texts/arbitration/1985Model_arbitration_status.html)* and in Central and West Africa the 17 member states of the Organization for the Harmonization of Business Law in Africa (OHADA) have adopted the Uniform Act on Arbitration, which was revised in 2017, together with a new set of rules for the Common Court of Justice and Arbitration (see Armand Terrien, The New OHADA Arbitration and Mediation Framework: A Glass Half Full? (2018), available at http://arbitrationblog.kluwerarbitration.com/2018/02/18/new-ohada-arbitration-mediation-framework-glass-half-full/). However, other countries have backward-looking arbitration legislation. Examples are South Africa, Botswana, Namibia, Malawi, Lesotho and Swaziland which all retain arbitration statutes based on the now-repealed English Arbitration Act 1950. South Africa is expected to adopt a revised arbitration law soon, but the timing of that is not clear (see https://globalarbitrationreview.com/jurisdiction/1000205/south-africa).

[65] Battison A and Stebbing H, "Enforcement of Awards across Africa – 42 of Africa's 54 States Have Now Acceded to the New York Convention" (Inside Africa | Global law firm | Norton Rose Fulbright March 16, 2021)
https://www.nortonrosefulbright.com/en/inside-africa/blog/2021/03/enforcement-of-awards-across-africa--42-of-africas-54 states#:~:text=The%20New%20York%20Convention%20will,recent%20signatories%20prior%20to%20Malawi. accessed June 5, 2022

investment treaties (BITs) of which 17 include the protection for the investments of foreign investors and offer arbitration for the resolution of disputes between warring foreign investors and host governments under the International Center for Settlement of Disputes (ICSID) and other arbitral rules.[66] In the realm of Africa related, ICSID cases involve energy issues and a great percentage of cases involving energy issues are African countries related.[67]

Different Illustrations

Process and Industrial Developments Ltd. v. The Ministry of Petroleum Resources of the Federal Republic of Nigeria[68]

P&ID is an engineering and project management firm founded in 2006 by two Irish nationals to carry out an energy project in Nigeria. P&ID and Nigeria signed a 20-year natural gas supply and processing agreement in January 2010. Nigeria supplied P&ID with agreed-upon amounts of natural gas, which P&ID processed for use in Nigeria's national electric grid. In exchange, P&ID took valuable byproducts from the refining process for its own use. The agreement was "governed by and construed in accordance with the laws of the Federal Republic of Nigeria," disputes arising under the agreement were subject to arbitration under the rules of the Nigerian Arbitration and Conciliation Act, and the arbitration venue was London, England, unless the parties agreed otherwise.

P&ID launched arbitration proceedings in London in August 2012, alleging that Nigeria failed to produce the agreed-upon quantity of natural gas to P&ID as well as to construct the requisite pipeline infrastructure. In July 2014, the arbitral tribunal first declared that it had jurisdiction over the

[66] A myriad of investment treaties provide for arbitration under the ICSID Arbitration Rules, and some provide for arbitration under other rules, most often the UNCITRAL, ICC or Stockholm Chamber of Commerce (SCC) rules.
[67] "ICSID Releases 2021 Caseload Statistics" (ICSID February 2, 2022) < https://icsid.worldbank.org/news-and-events/comunicados/icsid-releases-2021-caseload-statistics> accessed June 5, 2022
[68] [2019] EWHC 2541

dispute, and then, in July 2015, it determined that Nigeria had breached the agreement.

Nigeria sought relief in English courts, requesting that the arbitral tribunal's liability determination be overturned, but the High Court of Justice in London denied Nigeria's application in February 2016 on the grounds that Nigeria had filed it more than four months after the deadline and that an extension was not warranted. Soon after, Nigeria requested a set-aside order in its courts, and the Federal High Court of Nigeria granted an order "setting aside and/or remitting for further consideration all or part of the arbitration Award" in May 2016. The set-aside ruling issued by the Nigerian court provided no reasons or explanation for its judgment.

Nonetheless, arbitration proceedings in London continued. After concluding that the Nigerian court lacked jurisdiction to overturn the responsibility judgment, the tribunal awarded P&ID roughly $6.6 billion in damages for lost earnings, plus interest. The arbitral award, with interest, is now worth more than $10 billion.

P&ID initially moved to enforce the award in England, and the English High Court of Justice ruled in August 2019 that the award was enforceable. In the meantime the, Nigeria had launched a criminal investigation into P&ID's procurement of the natural gas agreement and had applied to the High Court of Justice in December 2019 to extend the deadline for challenging the award based on what it described as new evidence of fraud in the arbitration and underlying contract negotiations. The request was granted by the English court because Nigeria had "developed a strong prima facie case" of P&ID's fraud and bribery in obtaining the agreement and during the arbitration processes. The English court has yet to overturn the arbitral ruling, and a trial on these matters is due to commence in January 2023.

Cortec Mining Kenya Limited, Cortec (Pty) Limited and Stirling Capital Limited v. the Republic of Kenya, ICSID Case No. ARB/15/29[69]
This case type was an International Investment Agreement and the applicable arbitration rules were the ICSID Convention-Arbitration Rules. The Claimants' claims are dismissed with costs to the Respondent in the sum of US $3,226,429.21 plus the US $322,561.14 in ICSID costs. The claim arose out of the Government's allegedly unlawful revocation of the claimant's mining license, following the discovery of new rare earth deposits by the claimant. The investor-state arbitral tribunal established under a bilateral investment treaty (BIT) held it lacked jurisdiction to hear a dispute concerning a mining project that the tribunal found did not comply with domestic environmental law. The area contains one of "the world's largest untapped niobium and rare earth resources," according to the claimants. The area is also home to abundant biodiversity and sacred sites for indigenous people, and it is protected as a forest reserve, a nature reserve, and a national monument under Kenyan legislation. The case's facts are intertwined with Kenyan election politics. The parties fought bitterly on the facts, and their examination accounted for a large chunk of the award. The claimants claimed that their investment was nationalized as a result of a "resource nationalism" strategy implemented during a government change. It was the contention of the respondent, among other things, that there was no protected investment in the first place because the mining license was obtained in violation of domestic law, and as such, it was void ab initio. The tribunal determined that the claimants bear the burden of demonstrating jurisdiction under the BIT and the ICSID Convention, including relevant facts that warrant jurisdiction. Furthermore, the tribunal ruled that in order for an investment to be protected on an international level, it must "be in substantial compliance with the significant legal requirement of the host state" and be made in good faith. Since the claimants were successful in demonstrating that they operated in good faith, the award did not hinge on this question.

The issue of compliance with domestic law, on the other hand, was fundamental to the tribunal's ruling. This case highlights the need to exhaust

[69] ICSID Case No. ARB/15/29. The claimants have since applied for annulment of the award.

local remedies. The tribunal held that, under Kenyan law and the terms of the prospecting license, several conditions were to be satisfied before investors could obtain a valid mining license, including requirements arising out of the special protected status of Mrima Hill as a forest reserve, a nature reserve, and a national monument. The award is noteworthy because it established that international investment treaties only guarantee investments made in accordance with local law, even where there is no explicit legality requirement in the applicable BIT. In this regard, the judgement draws on and expands on a considerable body of arbitral precedent addressing legal compliance issues in the context of investor-state dispute settlement.

Nigeria Niger Delta Oil Spill Cases

The Niger Delta region is located on the west coast of Africa[70], in South-South Nigeria, at the mouth of the Gulf of Guinea. It has a population of 31 million[71] people and accounts for 7.5 percent of Nigeria's total land area.[72] To date, 1,182 exploration wells have been sunk in the delta basin, with approximately 400 oil and gas fields of various sizes identified. [73]This region encompasses over 800 oil-producing villages, a vast network of over 900 active oil wells, and several petroleum-related infrastructures.[74]

According to an Amnesty International report, Eni has reported 820 spills in the Niger Delta since 2014, resulting in the loss of 26,286 barrels (4.1 million litres). Shell has reported 1,010 spills since 2011, with 110,535 barrels or 17.5 million litres lost. That's around seven Olympic-sized swimming pools.

[70] Doust H. Petroleum Geology of the Niger-Delta. Geological Society, London Special Publications. 1990

[71] E. M Young, Food and Development (Routledge 2012).

[72] Aniefiok E. Ite and others, 'Petroleum Exploration and Production: Past and Present Environmental Issues In The Nigeria'S Niger Delta' (2013) 1 American Journal of Environmental Protection.

[73] Obaje N, Geology and Mineral Resources of Nigeria (Springer 2009).

[74] Leo?C. Osuji and Chukwunedum?M. Onojake, 'Trace Heavy Metals Associated With Crude Oil: A Case Study Of Ebocha-8 Oil-Spill-Polluted Site In Niger Delta, Nigeria' (2004) 1 Chemistry & Biodiversity. P.p 1708-1715.

These are enormous figures, but the truth may be considerably worse. [75]Not long ago shell admitted liability for two operational spills in Bodo.[76]
In a landmark ruling in 2021, The Hague Court of Appeal in the case of **Friends of the Earth Netherlands (Milieudefensie) v Royal Dutch Shellf.**

[77]The action was brought by a group of Nigerians, with the backing of the Dutch NGO Milieudefensie, concerning three distinct oil leaks from Shell pipelines and wellheads near the Oruma, Goi, and Ikot Ada Udo villages in the Niger Delta. The claimants held Shell Nigeria and its parent company, Royal Dutch Shell, accountable for harm to their farmlands and fishing areas, claiming that the corporations were negligent in maintaining the pipelines, mitigating spills, and cleaning the contaminated environment thereafter. The Court of Appeal ruled in a groundbreaking decision that Shell Nigeria was strictly liable for the damage caused by two of the incidents (the Oruma and Goi cases), Shell will pay an unspecified amount in damages to the farmers, who claimed the leaks destroyed their livelihoods. Additionally, the corporation was forced to put leak detection equipment in its pipelines.

[75] Report AI, "Niger Delta Negligence - Amnesty International" (Amnesty International, March 16, 2018) *https://www.amnesty.org/en/latest/news/2018/03/niger-delta-oil-spillsdecoders/#:~:text=Since%202014%20Eni%20has%20reported,reality%20may%20be%20even%20worse*. accessed June 9, 2022
[76] John Vidal, 'Shell Faces Payouts In Nigerian Oil Spill Case' (*the Guardian*, 2022) https://www.theguardian.com/environment/2014/jun/20/shell-faces-payouts-nigerian-oil-spill-case accessed 9 June 2022.
[77] Friends of the Earth Netherlands (Milieudefensie) v Royal Dutch Shell, District Court The Hague, Judgment of 26 May 2021.

National Environment Tribunal, Sustainable Development and Access to Justice in Kenya

By: ***Kariuki Muigua****

Abstract

The paper discusses the role played by the National Environment Tribunal (NET) in promoting access to justice and enhancing the principles of sustainable development in Kenya. The paper also discusses establishment of the National Environment Tribunal and its jurisdiction. It further analyses the role played by NET towards environmental protection and conservation in Kenya and promotion of human rights. The paper also highlights some of the challenges facing the tribunal and proposes recommendations towards enhancing the effectiveness of the tribunal.

1. Introduction

Tribunals are an integral component of the justice system in Kenya and play an important role in reducing pressure on courts and facilitating expeditious access to justice.[1] They have the potential to facilitate faster management of disputes and deal with specialised matters under different statutes.[2] The Constitution recognises tribunals as part of subordinate courts in the judicial hierarchy.[3] Constitutional recognition of tribunals as part of the judiciary demonstrates their importance in the administration of justice in Kenya. Under the previous constitutional dispensation, tribunals were under the

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[1] Muigua.K., Tribunals within the Justice System in Kenya: Integrating Alternative Dispute Resolution in Conflict Management, available at http://kmco.co.ke/wp-content/uploads/2019/05/Presentation-Tribunals-within-the-Justice-System-in-Kenya-Integrating-Alternative-Dispute-Resolution-in-Conflict-Management-Kariuki-Muigua-23rd-May-2019.pdf (Accessed on 27/02/2020)
[2] Ibid
[3] Constitution of Kenya, 2010, Article 169 (1) (d), Government Printer, Nairobi

respective ministries.[4] This posed several challenges such as undermining the independence of tribunals. Consequently, under the new constitutional dispensation, the judiciary is undertaking measures towards integrating tribunals as part of the judiciary. The purpose of transitioning tribunals is to delink them from the executive and integrate them into the judiciary in order to enhance their independence.[5] With independence, tribunals are able to discharge their mandate in facilitating the administration of justice and enhancing access to justice by reducing pressure on courts.

The National Environment Tribunal (NET) is established under the Environmental Management and Co-Ordination Act (EMCA).[6] The jurisdiction of the Tribunal is set out under section 125 of the Act. The Tribunal hears and determines appeals concerning: *grant of a licence or permit or refusal to grant a licence or permit*; *imposition of any condition, limitation or restriction on a licence; revocation, suspension or variation of a licence; the amount of money required to be paid as fee under the Act or imposition against the person of an environmental restoration order or environmental improvement order by the Authority under the Act or its regulations* (emphasis added).[7] The Act requires appeals to be lodged with the Tribunal within sixty days of the occurrence of the event which a person is dissatisfied with.[8] In addition, the jurisdiction of the Tribunal extends to appeals against decisions of the Director General of the National Environment Management Authority (NEMA), the Authority, committees of the Authority or its agents.[9] In interpreting NET's jurisdiction, the Environment and Land Court in *Simba Corporation Limited v Director*

[4] The Judiciary of Kenya, *State of the Judiciary and the Administration of Justice Annual Report, 2017 – 2018*, March 2019, Available at https://www.judiciary.go.ke/wp-content/uploads/sojar20172018.pdf p. 66, Accessed on 09/03/2020
[5] Ibid
[6] Environmental Management and Co-Ordination Act, No. 8 of 1999, S 125, Government Printer, Nairobi
[7] Ibid, S 129 (1)
[8] Ibid
[9] Ibid, S 129 (2)

General, National Environment Management Authority (NEMA) & Another[10], held that:

> *'In the jurisprudence interpreting the two categories of appeals filed to the NET under* ***Sections 129 (1) and (2)*** *the NET and the superior courts of record have held that the framework in* ***Sections 129 (1) and 129 (2)*** *relate to two different categories of appeals: the framework in* ***Section 129 (1)*** *relates to an appeal by a person who was a party to a decision or determination made by NEMA within the framework of EMCA; and* ***Section 129 (2)*** *provides a framework for an appeal by a person who was not a party to a decision or determination made by NEMA within the framework of EMCA.'*

Upon hearing an appeal, the Tribunal may: *confirm, set aside or vary the order or decision in question, exercise any of the powers that could have been exercised by the Authority; make orders as to costs and those necessary to enhance the principles of sustainable development; make orders maintaining the status quo of any matter or activity which is the subject of an appeal until the appeal is determined or review its orders upon application by a party (emphasis added)*.[11] This provision demonstrates that the jurisdiction of the tribunal is wide and it enjoys important powers of enhancing the principles of sustainable development in Kenya. The tribunal can upon hearing an appeal, exercise powers that would ordinarily be done by the National Environment Management Authority (NEMA) such as grant of an Environmental Impact Assessment (EIA) Licence and environmental restoration orders.[12]

2. Net and Sustainable Development

Courts and tribunals in exercising judicial authority are mandated to be guided by several principles which include the protection and promotion of

[10] *Simba Corporation Limited v Director General, National Environment Management Authority (NEMA) & Another ELC Civil Appeal No. 100 of 2015, (2017) eKLR*
[11] EMCA, S 129 (3)
[12] Ibid

the purpose and principles of the Constitution.[13] Among these principles is sustainable development.[14] Sustainable development has been defined as that which meets the needs of the present generation without compromising the ability of future generations to meet their own needs.[15] EMCA defines sustainable development as development that meets the needs of the present generation without compromising the ability of future generations to meet their needs by maintaining the carrying capacity of the supporting ecosystems.[16] It has further been pointed out that sustainable development seeks to address *intra generational equity*; which is equity among present generations and *inter-generational equity;* which is equity between generations.[17] In the case concerning the *Gabcikovo-Nagymoros Project*, it was opined that sustainable development reaffirms the need for both development and environmental protection, and that neither can be neglected at the expense of the other.[18] It reconciles the human rights to development and protection of the environment by ensuring that the right to development resonates with the reasonable demands of environmental protection.[19]

In Kenya, courts are key actors in the sustainable development discourse in terms of developing environmental jurisprudence geared towards environmental protection and conservation.[20] The Constitution of Kenya, 2010 enshrines both the human rights to development and environmental protection.[21] Consequently, it obligates the state to ensure sustainable

[13] Constitution of Kenya, 2010, Article 159 (2)
[14] Ibid, Article 10 (2) (d)
[15] Report of the World Commission on Environment and Development: Our Common Future, available at *https://sustainabledevelopment.un.org/content/documents/5987our-common-future.pdf* (Accessed on 09/03/2020)
[16] EMCA, S 2
[17] Weiss, E.B., "In Fairness to Future Generations and Sustainable Development" *American University International Law Review*, Vol. 8, 1992.
[18] *Hungary v Slovakia, 1997 WL 1168556 (I.C.J-1997)*
[19] Ibid
[20] Muigua.K., Wamukoya.D & Kariuki.F., 'Natural Resources and Environmental Justice in Kenya' Glenwood Publishers Ltd, 2015; See also the case of *Peter K. Waweru v Republic (2006) eKLR*
[21] Constitution of Kenya, 2010, Chapter Four on Bill of Rights, Articles 42 and 43, Government Printer, Nairobi

exploitation, utilisation, management and conservation of the environment and natural resources, and ensure the equitable sharing of the accruing benefits.[22] This position was succinctly captured in the case of *Patrick Musimba vs National Land Commission& 4 Others (2016) eKLR*, where the Court stated as follows:-

> *"....the State under Article 69 of the Constitution is enjoined to ensure sustainable development. (See also the preamble to the Constitution).The State is also to ensure that every person has a right to a clean and health environment. However, physical development must also be allowed to foster to ensure that the other guaranteed rights and freedoms are also achieved. Such physical development must however be undertaken within a Constitutional and Statutory framework to ensure that the environment thrives and survives. It is for such reason that the Constitution provides for public participation in the management, protection and conservation of the environment. It is for the same reason too that the Environmental Management and Coordination Act ("the EMCA") has laid out certain statutory safeguards to be observed when a person or the State initiates any physical development*."[23]

The Constitution further provides a framework for enforcement of environmental rights through an application to court which may make any order, or give any directions, it considers appropriate to prevent, stop or discontinue any act or omission that is harmful to the environment; to compel any public officer to take measures to prevent or discontinue any act or omission that is harmful to the environment; or to provide compensation for any victim of a violation of the right to a clean and healthy environment.[24]
NET plays a central role in the sustainable development discourse in Kenya. Under EMCA, upon any appeal, the Tribunal may grant several remedies including *orders to enhance the principles of sustainable development*

[22] Ibid, Article 69 (1) (a)
[23] *Patrick Musimba vs National Land Commission& 4 Others, Petition No. 613 of 2014, (2016) eKLR*
[24] Ibid, Article 70

(emphasis added).[25] In discharging this mandate, NET has on several occasions issued orders such as revocation of Environmental Impact Assessment (EIA) Licenses and subsequent cancellation of projects which do not adhere to sustainable development principles including public participation. In *Save Lamu & 5 others v National Environmental Management Authority (NEMA) & Another,* the Tribunal while setting aside the decision by the National Environment Management Authority (NEMA) to issue an EIA Licence held as follows:

> *'The purpose of the Environment Impact Assessment (EIA) process is to assist a country in attaining sustainable development when commissioning projects. The United Nations has set Sustainable Development Goals (SDGs), which are an urgent call for action by all countries recognizing that ending poverty and other deprivations must go hand-in-hand with strategies that improve health and education, reduce inequality, and spur economic growth – all while tackling climate change and working to preserve our oceans and forests. (emphasis added) '*[26]

Further, in *Narok County Council & another vs National Environment Management Authority & another,*[27] the Tribunal quashed the decision of NEMA to approve development activities on several parcels of land in Narok County. It further, directed the proponent to prepare a full Environmental Impact Assessment study report in accordance with EMCA and its Regulations, and stop any development activities on the project site until the report was approved by NEMA.

These examples illustrate the central role played by NET in fostering sustainable development in Kenya. When environmental management institutions fail to discharge their obligations in accordance to the law, the

[25] EMCA, S 129 (3) (c)
[26] *Save Lamu & 5 others v National Environmental Management Authority (NEMA) & Another, Tribunal Appeal No. NET 196 of 2016, (2019) eKLR*
[27] *Narok County Council & another vs National Environment Management Authority & another, Tribunal Referral NET 07/2006, (2006) eKLR*

tribunal has acted by issuing orders aimed at enhancing sustainable development and promoting environmental conservation in Kenya.

3. Net and Access to Environmental Justice

Access to justice has been described as a situation where people in need of legal redress find effective solutions from justice systems that are accessible, affordable, comprehensible to ordinary people, and which dispense justice fairly, speedily and without discrimination, fear or favour and offer a greater role for alternative dispute resolution.[28] It has also been used to refer to judicial and administrative remedies and procedures available to a person who is aggrieved or likely to be aggrieved by an issue.[29] The Constitution enshrines the right of access to justice.[30] Access to justice is also one of the pillars of the Agenda 2030 on Sustainable Development Goals (SDGs). SDG Goal 16 seeks to *'promote peaceful and inclusive societies for sustainable development, provide access to justice for all and build effective, accountable and inclusive institutions at all levels* (emphasis added).' [31]

Access to justice has an environmental dimension. Environmental justice is associated with two elements of justice which are: *procedural justice* and *distributive justice*. Procedural environmental justice is concerned with environmental decision making and encompasses the concept of participation.[32] Distributive environmental justice acknowledges the right of every person to a clean and healthy environment.[33]

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[28] Ladan. M., 'Access to Justice as a Human Right under the ECOWAS Community Law' available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2336105 (Accessed on 11/03/2020)

[29] Muigua.K., Wamukoya.D & Kariuki.F., 'Natural Resources and Environmental Justice in Kenya', Op Cit, page 59

[30] Article 48 of the Constitution of Kenya, 2010 provides that the State shall ensure access to justice for all persons and, if any fee is required, it shall be reasonable and shall not impede access to justice.

[31] UNDP, Sustainable Development Goals, 2015, available at *https://www.undp.org/content/undp/en/home/sustainable-development-goals.html* (accessed on 13/03/2020)

[32] Muigua.K., Wamukoya.D & Kariuki.F., 'Natural Resources and Environmental Justice in Kenya', Op Cit, page 30

[33] Constitution of Kenya, 2010, Article 42, provides that 'Every person has the right to a clean and healthy environment, which includes the right to have the environment

NET facilitates both distributive and procedural justice by providing a framework through which the right to a clean and healthy environment can be enforced. Through some of its decisions, the Tribunal has ensured that the state's obligations in respect of the environment enshrined under the Constitution have been undertaken.[34] These include *public participation, environmental impact assessment and environmental audits* (emphasis added).[35] The tribunal further promotes access to justice by providing an avenue through which persons who are aggrieved by some of the decisions of NEMA can seek recourse.[36]

NET is thus an integral tribunal in Kenya. It is supposed to enhance the principle of sustainable development enshrined under the Constitution. It should further promote the right of access to justice stipulated under article 48 of the Constitution.

4. Challenges

In discharge of its mandate, the National Environment Tribunal has been faced with certain challenges that threaten to undermine its efficiency. Some of these challenges include:

a. Jurisdiction

Despite the wide mandate granted to the National Environment Tribunal under the Constitution and EMCA, courts have often adopted a narrow interpretation of its jurisdiction. In *Republic v National Environmental*

protected for the benefit of present and future generations through legislative and other measures, particularly those contemplated in Article 69; and to have obligations relating to the environment fulfilled under Article 70.The right to a clean and healthy environment is a justiciable right which is enforceable under article 70 of the Constitution. Under article 70 (3) of the Constitution and section 3 (4) of EMCA, there is no requirement of *locus standi* in enforcement of the right to a clean and healthy environment.

[34] See for example the cases of *Save Lamu & 5 others v National Environmental Management Authority (NEMA) & Another, Tribunal Appeal No. NET 196 of 2016, (2019) eKLR*, Op Cit

[35] Constitution of Kenya, 2010, Article 69 (1) (d) (f), See also EMCA, s 57A on strategic environmental assessment on environmental audits.

[36] EMCA, S 129 (1)

Tribunal & 2 others ex-parte Athi Water Services Board, [37] the court held that:

> *'It is therefore clear that a Tribunal's power must be conferred by the Statute establishing it which statute must necessarily set out its powers expressly since such Tribunals have no inherent powers. Unless its powers are expressly donated by the parent statute, it cannot purport to exercise any powers not conferred on it expressly.'*

Further, in *Republic vs National Environmental Tribunal & 3 Others Ex-Parte Overlook Management Ltd and Silvers and Camping Site Limited*,[38] the court held that:

> "*……..the powers of the Respondent Tribunal are not unrestricted. The Tribunal's powers to entertain appeals are limited to decisions made under powers given to NEMA (Authority) or to NEMA's Director General or Committee of NEMA… This is about where the jurisdiction of the Respondent Tribunal ends...On the other hand, the High Court has both an original and appellate jurisdiction commencing from the provisions of Section 3(3) of the Act which for the purposes of emphasis I set out again.*"

This restricted interpretation of NET's jurisdiction has seen some of its decisions being overturned by the High Court through judicial review or the Environment and Land Court on Appeal. However, with the 2015 amendments, EMCA was aligned with the new constitution with consequently saw the jurisdiction of NET being enhanced. Under EMCA, the Tribunal can *inter alia* exercise any of the powers which could have been exercised by NEMA and *make any orders to enhance the principles of sustainable development* (emphasis added).[39] These are wide powers which

[37] *Republic v National Environmental Tribunal & 2 others ex-parte Athi Water Services Board, (2015) Eklr.*
[38] *Republic vs National Environmental Tribunal & 3 Others Ex-Parte Overlook Management Ltd and Silvers and Camping Site Limited, Miscellaneous Application Number 391 of 2006.*
[39] EMCA, S 129 (3)

make the Tribunal a vital component of the sustainable development and environmental justice discourse in Kenya. The jurisdiction of the tribunal needs to be broadly interpreted and upheld in order to enable it discharge its functions effectively.

b. Capacity

The Tribunal is composed of persons appointed under section 125 (1) of EMCA. Its staff is derived from either the judiciary or the Ministry of Environment and Forestry. This poses a challenge when it comes to supervision as well as the appraisal of staff.[40] This coupled with other problems facing tribunals in Kenya including budgetary constraints and inadequate space may hinder the operational capacity of the National Environment Tribunal. Data from the judiciary shows that there were a number pending cases before the Tribunal at the end of the Financial Year 2018/2019.[41] It is important to address these capacity constraints in order to enhance the capacity of the National Environment Tribunal to promote access to environmental justice in Kenya.

5. Way Forward

a. Capacity Building

There is need for continued development of skills and competency of members of the Tribunal in environmental matters. With emerging environmental issues such as climate change, the role of NET in promoting sustainable development becomes more critical. It is thus important for members of the tribunal to be equipped with relevant skills on such areas to enhance their capacity in handling environmental matters. There is also need for appraisal of the Tribunal's staff seconded from the judiciary and the ministry in order to further promote competence at the tribunal.

[40] Judiciary, 'State of the Judiciary and the Administration of Justice Annual Report: 2018/2019' available at https://www.judiciary.go.ke/resources/reports/ (accessed on 12/03/2020)

[41] Ibid

b. Upholding NET's Jurisdiction

The foregoing discussion has demonstrated some of the jurisdictional pitfalls faced by the Tribunal. Some of its decisions have been subject of appeals to the Environment and Land Court and judicial review proceedings before the High Court. These courts have often not fully appreciated the Tribunal's jurisdiction as demonstrated by the above decisions. There is need for recognition of the importance of tribunal as part of the justice system and its role in easing pressure from the courts, promoting sustainable development and ensuring access to environmental justice is realised.

c. Public Awareness

Despite the important role being played by NET in Kenya, there is limited public awareness on its existence and operations. There is a limited number of cases being lodged in the Tribunal with many being filed in courts.[42] NET can assist in enhancing sustainable development and environmental conservation in Kenya.[43] There is need for public awareness on the role of NET due its importance. Through this, many of the cases currently being filed at the Environment and Land Court will end up in the tribunal which will enable it to further develop environmental jurisprudence in Kenya and enhance the principles of sustainable development.

d. Integrating the Use of Alternative Dispute Resolution in Case Management

The Constitution mandates courts and tribunals to promote alternative forms of dispute resolution in exercising judicial authority.[44] Alternative Dispute Resolution (ADR) mechanisms refer to the set of mechanisms that are utilised to manage disputes without resort to the often costly adversarial litigation.[45] These mechanisms include negotiation, mediation, arbitration

[42] Judiciary, 'State of the Judiciary and the Administration of Justice Annual Report: 2017/2018' available at https://www.judiciary.go.ke/resources/reports/ (accessed on 12/03/2020)

[43] Under section 129 (3) (c) of EMCA, upon any appeal, the Tribunal may make such other orders to enhance sustainable development.

[44] Constitution of Kenya, 2010, Article 159 (2) (c)

[45] Muigua.K., Alternative Dispute Resolution and Access to Justice in Kenya, Glenwood Publishers Kenya Limited, 2015

and Traditional Dispute Resolution (TDR) mechanisms. Some of these mechanisms have been hailed for their advantages which include expeditious dispute resolution, flexibility, cost effectiveness and addressing the root causes of conflicts.[46]

It has been asserted that increased application of ADR can lead to faster dispensation of cases, particularly in tribunals. [47] However, these mechanisms have also been criticised for their shortcomings such as the inability to grant urgent remedies such as injunctions, power imbalances and enforceability of decisions.[48] Due to the important role played by NET in promoting environmental conservation and enhancing sustainable development, application of ADR would lean towards a mechanism that can guarantee enforceability of decisions, grant interim remedies necessary for environmental conservation while promoting other principles such as expediency. However, not all matters filed before the Tribunal may be suitable for ADR. This calls for a case to case analysis of matters before the tribunal to determine the most appropriate mechanism for their disposal depending on the facts and issues in dispute.[49] There may be need for an enabling legal and institutional framework to entrench the use of ADR mechanisms within the justice system which includes tribunals. Adoption of the ideals of the Alternative Dispute Resolution policy can go a long way towards achieving this aim.[50]

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[46] Ibid

[47] Muigua.K., Tribunals within the Justice System in Kenya: Integrating Alternative Dispute Resolution in Conflict Management, Op Cit

[48] See generally Owen Fiss, "Against Settlement", 93Yale Law Journal 1073(1984)

[49] Muigua.K., Tribunals within the Justice System in Kenya: Integrating Alternative Dispute Resolution in Conflict Management, Op Cit

[50] See the Alternative Dispute Resolution Policy (Zero Draft), available at *https://www.ncia.or.ke/wp-content/uploads/2019/08/ZERO-DRAFT-NATIONAL-ADR-POLICY_P.pd*f (accessed on 12/03/2020). The formulation of an ADR policy is ongoing. This is against the backdrop of important international developments such as the coming into force of the Singapore Convention on International Settlement Agreements Resulting from Mediation and the UNCITRAL Model Law on Mediation and Conciliation.

e. Promotion of Human Rights

The right to clean and healthy environment is a fundamental right and a prerequisite for full enjoyment of all the other rights.[51] This right is interwoven with the realisation and enjoyment of other fundamental rights such as the right clean water, housing, food and health.[52] In the absence of a clean and healthy environment, it is difficult to enjoy the other human rights. To this extent, the right to a clean and heathy environment has been equated to the right to life.[53] Thus, while promoting the right to a clean and healthy environment, NET is also fostering other human rights including the right to health, clean water, food and housing. NET should never forget its role a promoter of human rights and should actively uphold the same.

6. Conclusion

Tribunals in Kenya have been critical in facilitating access to justice. The National Environment Tribunal however plays a more important role of enhancing the principles of sustainable development and promoting human rights. Its jurisdiction therefore flows from the Constitution which enshrines sustainable development as a principle of governance.[54] However, NET's jurisdiction has on several instances been narrowly interpreted thus posing a threat to its role. This coupled with other problems such as its capacity and limited funding are hindrances to the effectiveness of the tribunal. There is an urgent need to deal with these challenges. Creating an ideal environment that will enable NET to enhance sustainable development, promote human rights and enable access to justice is an imperative whose time has come.

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[51] Muigua.K., 'Reconceptualising the Right to Clean and Healthy Environment in Kenya' available at *http://kmco.co.ke/wp-content/uploads/2018/08/RIGHT-TO-CLEAN-AND-HEALTHY-ENVIRONMENT-IN-KENYA.docx-7th-september-2015.pdf* (Accessed on 14/03/2020)

[52] Ibid

[53] See the Indian case of *K. Ramakrishnan and Others Versus State of Kerala and Others* (smoking case), AIR 1999 Ker 385

[54] Constitution of Kenya, 2010,Article 10 (2) (d) 'National values and principles of governance include sustainable development'

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Protecting Cultural Heritage in Times of War: A Case for History

By: ***Kenneth Wyne Mutuma****

1.0 Introduction

Historically, war has been one of the greatest catalysts for destruction of cultural property. This destruction often occurs as collateral damage, through the ancient practice of taking plunder and through cultural cleansing, that is, the intentional eradication or destruction of customary or religious artifacts with the intent of exterminating the material symbols of a religious or ethnic group.[1] One of the great scholars recorded to have strongly criticized the desolation of cultural property was Emer de Vattel.[2] He viewed such destruction as an appalling act of an arch enemy to the human race do deny it the privilege of "*monuments of the arts and models of taste*".[3] Instigating cultural damage deprives future generations of an opportunity to fully comprehend who they are and where their roots or origins lie.[4] Notably, protecting cultural property has international significance as it plays an

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[1] Neil Broode, 'Stolen History: looting and illicit trade ' in Isabelle Vinson (ed.),' *Facing history: Museums and Heritage in Conflict and Post-conflict Situations*,' Museum International, Vol LV, n°3-4, December 2003.

[2] Emer de Vattel was an international lawyer. He was born in Couvet in Neuchâtel in 1714 and died in 1767. He was largely influenced by Dutch jurist Hugo Grotius. He is most famous for his 1758 work The Law of Nations.

[3] Emer de Vattel, *Le Droit des Gens, ou Principes de la Loi Naturelle, appliqués à la Conduite et aux Affaires des Nations et des Souverains* (text of 1758) (Carnegie Institution, 1916), book III, 143–4 [173]. Translations by Roger O'Keefe in , 'Protection of Cultural Property under International Criminal Law,' *Melbourne Journal of International Law* , Vol 11.

[4] Hirad Abtahi, 'The Protection of Cultural Property in Times of Armed Conflict: The Practice of the International Criminal Tribunal for the Former Yugoslavia,' *14 Harvard Human Rights Journal* 1, 2001.

important role in encouraging appreciation of cultural diversity and in the attainment of knowledge of human origin.[5] Destroying the cultural heritage of victims of war negatively the understanding of their identity and consequently how they maneuver their daily lives.[6]

Moreover, according to history, some nations no longer exist while others have had their identity permanently altered.[7] Additionally, going by the experience of UNESCO in Afghanistan, Cambodia, Middle East, South-Eastern Europe, and East Timor (today Timor-Leste), among other places, further entrenches the need for having in place a programme for the preservation of cultural heritage.[8]

2.0 Evolution of international legal framework for protection of cultural heritage

The inception of the protection and conservation of cultural heritage dates back to the 15th century. Sweden was the first to develop legislation to protect national monuments in 1666.[9] Subsequently, other European nations developed legislations to protect archeological sites.[10] In the year 1863, the Lieber Code was enacted following the civil war in the United States. The international community codified these rules into the Brussels Declaration of 1874 which did not pass the adoption stage.[11] Afterwards, they developed the Hague Conventions of 1899 and 1907. Despite these instruments, the

[5] Erika Techera,' Protection of Cultural Heritage in Times of Armed Conflict: The International Legal Framework Revisited,' *MqJICEL* Vol 4L, 2007.
[6] Abtahi, *Supra* note 4.
[7] Ibid.
[8] Isabelle Vinson (ed.),' Facing history: Museums and Heritage in Conflict and Post-conflict Situations,' *Museum International*, Vol LV, n°3-4, December 2003.
[9] Bassiouni, C. Reflections on Criminal Jurisdiction in International Protection of Cultural Property.: http://surface.syr.edu/cgi/viewcontent.cgi?article=1148&context=jilc accessed on 18/03/2021.
[10] Merryman, J. H. Two ways of Thinking about Cultural Property. <http201://minervapartners.typepad.com/readings/MerrymanTWOways> accessed on 18/3/2021.
[11]Katerina Papaioannou, 'THE INTERNATIONAL LAW ON THE PROTECTION OF CULTURAL HERITAGE' [2017] IJASOS- International E-journal of Advances in Social Sciences.

effects of the world wars on cultural heritage were immeasurable.[12] Therefore, UNESCO convened a meeting at Hague in 1954 which culminated in the *Convention for the Protection of Cultural Property in the Event of Armed Conflict* (hereinafter referred to as the Hague Convention 1954).

2.1 The Hague Convention 1954

It was adopted because of the extensive destruction of cultural property in the wake of the Second World War. Its scope covered both movable and immoveable cultural property, for example, works of art, manuscripts, books, history and scientific collections.[13] It contains obligations which the state parties are required to observe both during peacetime and wartimes. They apply to both the attacking and occupying states. The Convention in Article 3 provides that, state parties are required to safeguard against the contingent repercussions of armed conflicts on cultural property in their countries by making preparations that they consider appropriate during times of peace.

In Article 4, the Convention sets minimum standards of respect that state parties are required to observe. They are obligated not to attack, misappropriate or remove cultural property from their territory of origin with the exception of "military necessity'.[14] The treaty has been criticized for failing to define 'military necessity'. The Convention in Article 4(3) also places upon member states the mandate of prohibiting, preventing and stopping any kind of misappropriation, pillage, theft, and vandalism on cultural chattels. Article 5 states that the occupying authorities have the obligation to revere the cultural heritage of the occupied states. They should aid local authorities where possible to help preserve such property and repair them if necessary.

[12] Strati, A. (1995). The Protection of the Underwater Cultural Heritage: An Emerging Objective of the Contemporary Law of the Sea, edit. Martinus Nijhoff Publishers, The Hague/London/Boston.
[13] Hague Convention 1954, Art 1.
[14] Ibid, Art 4(2).

2.2 Protocol 1

This protocol refers specifically to movable cultural chattels. It prohibits the occupying parties from exporting movable cultural property from the subdued territories. Likewise, it mandates the occupying states to put back such chattels to their original territories in case they are moved, once the hostilities end.[15] The offending parties may be required to indemnify the states whose cultural property was taken during hostilities.

2.3 Protocol 2

This protocol broadens the scope of the Hague Convention 1954 to include new developments concerning international humanitarian law and cultural protection. It provides for enhanced protection in chapter three. This means that relevant property shall be protected from destruction the moment they are included in the List of Cultural Property under Enhanced Protection. Article 14 of the Protocol provides that destruction of cultural property which enjoys enhanced protection can only be excused if such property becomes a military objective. Article 1(f) defines military objective as 'a chattel which effectively contributes to military action and whose destruction at the time offers a military edge'. The protocol establishes individual criminal responsibility. Also, it applies to non-international armed conflicts.

3.0 Systems of Protection

3.1 General Protection

General Protection entails conservation and respect of cultural property.[16] Conservation requires states during peace time to take measures within their jurisdictions to guard against the effects of warfare.[17] Respect of cultural property requiring states firstly, to desist from using cultural property, its nearest environs or instruments installed for its protection in any manner likely to leave cultural property vulnerable to destruction. Additionally, states are required to desist from projecting any hostilities toward cultural

[15] Protocol 1 to the Hague Convention, Art 1.
[16] Convention for the Protection of Cultural Property in the Event of Armed Conflict 1954, Art.2.
[17] Ibid, Art.3.

property.[18] Further, states are required to outlaw pilfering of cultural property, in addition to desisting from sequestrating cultural property of another state.[19] For cultural property in an occupied jurisdiction, occupying authorities are mandated to assist local authorities to ensure conservation of cultural property.[20] Occupying powers are also required to outlaw sequestration of cultural property from the jurisdiction they occupy. However, where this has happened, occupying powers are required to facilitate their return.[21]

Occupying powers are obligated to stop any illegal sale of cultural chattels and archaeological excavation except where it is necessary to conserve cultural property and lastly they have an obligation to prevent any attempts at modifying cultural property with the aim of sabotaging historical evidence.[22] However, if any of the aforementioned must be performed by occupying powers in the interest of cultural property, then the convention mandates that the action be performed in collaboration with the local authorities.[23] Military necessity can be asserted in waiving the general protection regime.[24] The host state can utilize protected cultural heritage for military intentions where there is no conceivable fall-back option to achieve a comparable military edge.[25] The hostile party is permitted to direct militant activity on protected cultural heritage only where it has been converted into a military objective and there is no workable possibility to achieve a comparable military edge.[26]

3.2 Special Protection

The special protection regime is complementary and is aimed at providing an advanced level of protection to cultural property. This protection level

[18] Ibid, Art.4 (1).
[19] Ibid, Art. 4(3).
[20] Ibid, Art. 5.
[21] Protocol for the Protection of Cultural Property in the Event of Armed Conflict 1954, Art. I (3).
[22] Second Protocol to the Convention for the Protection of Cultural Property 1999, Art.9 (1).
[23] Ibid.
[24] Techera, *Supra* note 5.
[25] Supra, note 22 Art. 6.
[26] Ibid.

grants immunity to cultural property from acts of militancy projected to it and from utilization for any military purposes.[27] This protection is granted to safe havens providing safety to cultural property during hostilities. These safe havens must be found at a prudent reach from military objectives and must not be utilized for military intentions.[28] However, where a safe haven is located near a military objective, special protection can still be accorded to them if the state seeking its special protection agrees to refrain from using it for military purposes.[29] Properties under special protection are identified by a distinctive emblem that is shaped as a shield pointing downward that is repeated thrice.[30]

3.3 Enhanced Protection

Enhanced protection grants immunity to cultural property from being the subject of hostile attack and both the use and their environs to advance military action.[31] No exception is acceptable with respect to this duty imposed on state parties.[32] This protection is accorded to cultural property that satisfies the following standard: the cultural property must be of substantial cultural significance to mankind, be safeguarded by ample local laws and administrative mechanisms aimed at ensuring greater protection which demonstrates the property's extraordinary cultural and historic significance and lastly that the property is not utilized for any military intentions and further that the state party hosting the property has declared that the property shall not be used for military intentions.[33]

Enhanced protection is accorded by the Committee for the Protection of Cultural Property in the Event of Armed Conflict, at the behest of a member state or of the International Committee of the Blue shield or other NGOs with the appropriate competence.[34] There is an exception for cultural property

[27] Supra, note 16 Art. 9.
[28] Ibid, Art. 8.
[29] Ibid, Art. 8(5).
[30] Ibid, Art. 17 (a).
[31] Supra, note 22 Art. 12.
[32] ICRC, *Cultural Property fact sheet* (ICRC Advisory service on International Humanitarian Law, 2014).
[33] Supra, note 22 Art. 10.
[34] Ibid, Art.11 (3).

granted special protection on grounds of military necessity.[35] Cultural heritage accorded amplified protection lose their protection and consequently be the object of hostile engagement where it is the only workable means to prevent its use for military intentions. However all practicable safeguards must be taken to diminish damage to the property.[36]

4.0 Shortcomings of the Legal Framework in the Protection of Cultural Heritage

4.1 The Hague Convention 1954

The Convention on the Protection of Cultural Property in the Event of Armed Conflict, 1954 provided an exhaustive legal framework for cultural property preservation and protection during international and civil wars and covered both immovable and movable property. The meaning attributed to Cultural Property is viewed to be narrow as compared to that of Cultural heritage in relation to tangible property. This leaves out spiritual sites like shrines that are neither archeological sites, nor movable or immovable property from protection by the Convention.

Article 8 of the Convention provides for unique protection that is only given to property that are located away from industrial areas and that which is not to be used for any military activities.[37] Further, property with special protection should be registered in the International Register of Cultural property under Special Protection. This makes it hard to utilize the protection due to the practical difficulties and stringent requirements. There is also no proper definition of *military necessity* therefore many countries use it as an excuse or defense in case cultural heritage is damaged from the activities of the military.[38] The Convention has not provided for an overriding body to ensure the implementation of the Convention. There is no mechanism set by the Convention that makes it possible for the crimes to be brought forward before international courts because it is not a war crime.[39]

[35] Techera, *Supra*, note 5.
[36] Supra, note 22 Art.13.
[37] Supra, note 13.
[38]Techera, *Supra* note 5.
[39] Supra, note 13 Article 28.

4.2 Protocol I and II of the Geneva Convention 1949

Protocol I and II of the Geneva Convention 1949 are also called Geneva P1 and Geneva PII respectively were ratified following the Vietnam War. These Protocols refer to cultural property as civilian property. One of the main setbacks is that they did not give cultural property a better protection as compared to civilian property. The UNESCO and other organizations came up with a report after reviewing the Hague convention. The Boylan Report led to the development of a protocol, *Lauswolt Document* which then became the Second Protocol to the Hague Convention 1954.[40]The Hague P2 was more precise with the definition of military necessity also established individual criminal responsibilities for those who breach the provisions of the Protocol.

5.0 Special Protection of the Environment

The effects of warfare today go beyond human suffering or damage to infrastructure. While the main focus of IHL is the safety of people during warfare, the environment which is of great importance to everyone is also subject to protection during warfare.[41] The environment is protected during war for various reasons. One, to guarantee the survival and protection of the population, the environment has to be protected too in order to ensure human survival.[42] Two, for humanitarian law to effectively cater to the protection of the special groups such as the wounded, the sick or the prisoners of wars, the environment has to be safe.[43] Thirdly, when the environment and its resources are destroyed during war, peace becomes hard to achieve because people revert to conflicts over the limited resources that remain to be shared among the population.[44]

In war, the environment has always been protected according to customary international humanitarian law in regards to the principles on conduct of

[40] Patrick Boylan, 'Implementing the 1954 Hague Convention and its Protocols; Legal and Practical implications' pg. 3.
[41] Sharp Walter, 'The Effective Deterrence of Environmental Damage during Armed Conflict: A Case Analysis of the Persian Gulf War', 37 Mil. L. Rev. 1 (1992).
[42] Jahidul Islam, 'The Protection of Environment during Armed Conflict: A Review of International Humanitarian Law (IHL)', 2019.
[43] Ibid.
[44] Ibid.

hostilities.[45] The environment has always been regarded as civilian object and as such cannot be the target unless turned into a military objective, and even so the principle of proportionality is applied in military necessity.[46] Concerns over targeting the environment during war, first peaked during the Vietnam War in 1961/1971. The use of Agent Orange by the USA led to massive deforestation and chemical contamination. The international outcry saw the creation of instruments that sought to protect the environment. The ENMOD Convention of 1977 together with The Additional Protocol I, prohibit the use of warfare that damages the environment.

The massive destruction of over 600 oil reservoirs during the Persian Gulf War called out the implementation of the instruments put in place to protect the environment. Actions by Iraqi army led to extensive pollution, resulting to the largest oil spill in history.[47] The devastating effects of the oil spill are considered to be ecological terrorism because of the harmful pollutants it left in the environment.[48] In 1992, after the Persian Gulf War, United Nations General Assembly debated environmental protection during war and concluded countries must put in place necessary measures to guarantee adherence to the provisions of environmental conservation during armed conflict by the military.[49] After the debate the ICRC issued guidelines in 1994 that were to be incorporated in military manuals and national legislations, to ensure there is adequate awareness on environmental conservation during armed conflict.

In the 21st century, environmental destruction still happens even with the rules that guide environmental protection. The conflict between Israel and Lebanon saw the disposal of approximately 15000 tons of oil into the

[45] Yoram Dinstein, 'The Conduct of Hostilities under the Law of International Armed Conflict' (3rd edn, Cambridge University Press, 2016).
[46] Tara Smith, 'Critical perspectives on environmental protection in non-international armed conflict: Developing the principles of distinction, proportionality and necessity. Leiden Journal of International Law', 32(4), 759-779.
[47] Thomas M. Hawley, 'Against The Fires of Hell: The Environmental Disaster of the Gulf War' (Harcourt Brace Jovanovich, 1992).
[48] Jacqeline Michel, 'Gulf War Oil Spill' *in Oil Spill Science and Technology*, Gulf Professional Publishing, 2010, p.1127.
[49]United Nations General Assembly 47/37 (9th Feb 1993) UN DOC A/RES/47/37.

Mediterranean Sea.[50] Lebanon was left facing major long term public health hazards. [51] Such situations indicate that with existing legal provisions on environmental conservation during armed conflict, enforcement remains an issue.

6.0 Protection of the Environment during Armed Conflict

Since its early development, the law of war has concentrated on restraining belligerents' conduct to abate human injury and fatalities.[52] However, the results of war are rarely confined to human fatalities, as evident in the wake of events like the Persian Gulf War.[53] As such, since the 20th century, IHL has provided conservation of the environment during war. Crucially, the protection of the natural environment also follows the general obligations of states under international law. As articulated by the ICJ in its Advisory Opinion on the *Legality of the Threat or Use of Nuclear Weapons*, "the existence of the general obligation of States to ensure that activities within their jurisdiction and control respect the environment of other States or of areas beyond national control is now part of the corpus of international law relating to the environment."[54] Accordingly, this section outlines how the environment is protected during armed conflicts, first by treaty law, then by customary IHL.

6.1 Treaty Law

6.1.1 The Fourth Geneva Convention 1949

The Fourth Convention concerning the Protection of Civilians provides for environmental conservation during armed conflict. Article 53, for example,

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[50] Andriy Shevtsov, "Environmental Implications the 2006 Israel-Lebanon conflict" ICE Case Studies, No. 216, 2007. http://www1.american.edu/ted/ice/lebanon-war.htm.

[51] Ibid.

[52] Arie Afriansyah, 'The Adequacy of International Legal Obligations for Environmental Protection during Armed Conflict' (2013) 1 Indonesia Law Review 55.

[53] Christopher C. Joyner and James T. Kirkhope, 'The Persian Gulf War Oil Spill: Reassessing the Law of Environmental Protection and the Law of Armed Conflict' (1992) 4 Case W. Res. J. Int'l L. 29.

[54] Roman Reyhani, 'Protection of the Environment During Armed Conflict' (2006) 14 Mo. Envtl. L. & Pol'y Rev. 323.

states that "any destruction by the occupying power of real or personal property belonging individually or selectively to private persons, or to the state, or to other public authorities, or to social or co-operative organizations, is prohibited, except where such destruction is rendered absolutely necessary by military operations." Article 147 also prohibits the "extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly." The inclusion of 'real property', which includes land and anything affixed to it, as well as collectively owned property like forests, provides some protection for the environment during war.

6.1.2 Convention on the Prohibition of Military or any other Hostile Use of Environmental Modification Techniques (ENMOD) 1977

This Convention protects the environment by proscribing the utilization of environmental modification techniques having 'extensive, severe or long-lasting effects',[55] as a weapon during armed conflict. "Widespread" means a region of several hundred square kilometers; "long-lasting" means a number months or a season; and "severe" means grave or substantial interference or injury to life, or economic or natural resources. Article 2 provides that 'environmental modification techniques' are any methods for altering, through the intentional modification of natural processes, the structure, composition or dynamics of the Earth, comprising its outer space, hydrosphere, atmosphere and biota. This Convention's negotiation and taking effect were triggered by the indignation over the US's use of chemical herbicides to remove forest and plant cover to enhance visibility and sever enemy supply lines, termed as defoliation, in the Vietnam War.[56] Even after the Convention, such as in the Persian Gulf War in 1991, belligerents still resorted to using the environment as a weapon through such techniques, which accentuates the Convention's necessity.[57] ENMOD, by prohibiting such actions with 'extensive, severe or long-lasting effects', provides for environmental protection during war.

[55] ENMOD Convention 1977, Article 1.
[56] Reyhani, *Supra* note 54.
[57] Joyner & Kirkhope, *Supra* note 53.

6.1.3 Additional Protocol I, 1977 to the Geneva Convention

Articles 35(3) and 55 of the Protocol present a positive step in IHL, by expressly forbidding the environment from being a military target for the first time. Article 35(3) forbids the use of means or methods of war which are planned, or are expected, to produce "widespread, long-term and severe" harm to the environment. Article 55 obliges belligerents to take precaution in war to shield the environment from "widespread, long-term and severe" harm. The Article also proscribes attacks "against the natural environment by way of reprisals".

It suffices to note that the Protocol sets a higher threshold for the environmental damage needed to prohibit certain attacks or methods/means of war.[58] ENMOD states that techniques causing "widespread, long-lasting or severe" effects are forbidden, while Additional Protocol I uses the terms "widespread, long-term and severe damage". The use of "and" implies that all 3 elements should be fulfilled for the Protocol to apply, which is alleged to be the reason Iraq's forces cannot be brought to books for their actions in the Gulf War.[59] Further, the Protocol also defines 'long-term' as 10 years, which is higher than ENMOD's definition of 'long-lasting' as months or a season; while it lacks a clear definition of the terms widespread and severe, unlike ENMOD. Nonetheless, the Protocol is a vital development in international humanitarian law as pertains environmental protection.

6.1.4 Certain Conventional Weapons Convention, 1981 and its Protocols

This Convention's first mention of the environment is in the preamble, which reiterates, in similar terms to Article 35(3) of Additional Protocol I, the proscription of means and methods of warfare which are planned or expected to produce "widespread, long-term and severe" environmental harm. The similarity in wording suggests that the conservation of the environment during war is emerging as a principle of customary international law as well. Regrettably, the insertion of this obligation in the preamble resulted in two countries, the US & France, to express a reservation to the Convention.[60] As

[58] Nils Melzer & Etienne Kuster, *International Humanitarian Law: A Comprehensive Introduction* (International Committee of the Red Cross, 2019) 96.
[59] Afriansyah, *Supra* note 52.
[60] Reyhani, *Supra* note 54.

such, this provision in the Preamble, as well as its counterpart in Additional Protocol I, does not apply universally, which is inauspicious for environmental protection. Its Third Protocol, in Article 2(4), also forbids States from making plant and forest cover the objects of "attack by incendiary weapons" unless in cases where the plant/forest cover are used for or are themselves a military objective.[61] This provides an additional measure of environmental preservation in times of armed conflict.

6.1.5 Rome Statute, 1998

The Rome Statute, which outlines the four core international crimes falling under the ICC'S jurisdiction: genocide, war crimes, crimes of aggression and crimes against humanity, [62] also contains environmental protection provisions during war. Specifically, Article 8 recognizes that deliberately initiating combat knowing that such attack will culminate in "widespread, long-term and severe" environmental harm, which would be manifestly unproportional to the expected military advantage, as a war crime. As such, the Statute imposes individual criminal responsibility for attacks causing environmental harm, thereby providing an enforcement mechanism, through the ICC, for those who violate the provision.[63]

6.2 Customary IHL

The International Committee of the Red Cross (ICRC) has also identified several rules of customary IHL relating to the natural environment. These include:

6.2.1 Rule 43: Principles on the Conduct of Hostilities to Apply to the Environment

As ICRC notes, state practice indicates that this rule has attained the status of customary international law, in both non-international and international armed conflicts.[64] The principles on the conduct of hostilities which apply to protect the environment include distinction, necessity and proportionality.

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[61] Ibid.
[62] Rome Statute of the International Criminal Court 1998, Article 5.
[63] Reyhani, *Supra* note 54.
[64] Jean-Marie Henckaerts & Louise Doswald-Beck, *Customary International Humanitarian Law. Volume I: Rules* (Cambridge University Press 2005) 143.

Regarding distinction, this principle obliges belligerents to distinguish military objectives from civilians, and consequently, to target their operations only against military objectives.[65] The natural environment is to be regarded as a civilian object, and as such, cannot be targeted unless it meets the requirements of a military objective. This is also reflected in the Guidelines on the Protection of the Environment in Times of Armed Conflict, which the UNGA advises all UN member states to integrate into their military manuals.[66] The obligation not to target or use the environment unless it is a military objective is also reflected in treaties, including Protocol III to the 1981 Certain Conventional Weapons Convention.

As regards necessity, this principle requires belligerents to only undertake actions and use means/methods of war that are reasonably requisite to attain military objectives. [67] According to state custom, this principle applies similarly to the natural environment, and is reflected in the Guidelines on the Protection of the Environment in Times of Armed Conflict, alongside the national laws and military manuals of numerous states.[68] Article 53 of the Fourth Geneva Convention, as previously indicated, also contains an identical provision. As regards to proportionality, this principle requires belligerents to avoid attacks causing incidental harm to civilians and/or civilian objects if the damage is manifestly disproportionate to the anticipated military advantage.[69] As evidence of its practice, this principle is recognized in the Guidelines on the Protection of the Environment in Times of Armed Conflict, and is also contained in treaty law, such as Article 8 of the Rome Statute. Further, in the ICJ's *Nuclear Weapons* Advisory Opinion, the Court stated that States should consider environmental concerns when assessing what is proportionate and necessary in the pursuit of justified military objectives.[70]

[65] Additional Protocol I 1977, Article 48.
[66] Henckaerts & Doswald-Beck, *Supra* note 64.
[67] Melzer & Kuster, *Supra* note 58.
[68] Henckaerts & Doswald-Beck, *Supra* note 64.
[69] Melzer & Kuster, *Supra* note 58.
[70] Nuclear Weapons case, *Advisory Opinion* [1996].

6.2.2 Rule 44: Precautions to Minimize Environmental Harm

State practice indicates that this rule, which applies in both non-international and international armed conflicts, has three components. The first obliges states to ensure that they use means and methods of war with appropriate regard to the preservation and protection of the environment. This obligation's general acceptance is reflected in several military manuals, as well as international agreements like the Rio Declaration, and the Guidelines on the Protection of the Environment in Times of Armed Conflict.[71]

The second component requires States to take precautionary measures to reduce environmental destruction in their military undertakings. This principle is also contained in the military manuals of countries like the US.[72] The third component, termed as the precautionary principle, states that the lack of scientific proof regarding the environmental impacts of specific military operations does not release belligerents from the obligation of implementing appropriate measures to avert unnecessary damage. [73] . Regarding its practice, in the ICJ's *Nuclear Weapons Case* advisory opinion, the court stated that the precautionary principle applies in armed conflicts, including in the use of nuclear weapons.[74]

6.2.3 Rule 45:

(i) the use of means/methods of war that are planned or expected to produce "widespread, long-term and severe" environmental harm is proscribed.

(ii) destruction of the environment should not be used as a weapon.

The ICRC notes that this rule has attained the status of customary international law in both non-international and international conflicts. As regards the first part of the rule, it is reflected in Additional Protocol I Article 35(3), and is also incorporated into the military manuals of countries like Argentina, Italy and Spain.[75] However, certain States, including the US, UK

[71] Ibid.
[72] Ibid 149.
[73] Ibid 150.
[74] Ibid.
[75] Henckaerts & Doswald-Beck, *Supra* note 64.

and France, are persistent opposers with reference to the operation of this part of the rule to the usage of nuclear weapons.[76] Accordingly, they expressed reservations to this provision when ratifying Additional Protocol I, and as such, Article 35(3) of Additional Protocol I is only of a customary status to these states with regard to conventional weapons, but not nuclear weapons.[77]

Pertaining to the second part of this rule, state custom shows that the prohibition of environmental destruction as a weapon has attained customary international law status. This is also reflected in the Guidelines on the Protection of the Environment in Times of Armed Conflict.[78] This rule is also manifest in the ENMOD Convention, which proscribes the usage of environmental manipulation techniques having 'extensive, severe or long-lasting effects',[79] as a means of harm during armed conflict. While there is no certainty as to whether the Convention's provisions have attained the status of customary international law, there is enough consensus and uniform practice that destroying the environment as a weapon is prohibited.[80]

7.0 Conclusion

Notably, cultural heritage is at the heart of human existence. Its preservation even in times of war is sacrosanct. Indeed, the culture of a people is the mooring to which their identity is anchored, without which they are lost. Besides, how can a community know where they are going, if they do not know where they are coming from. It is thus critical for states to take positive and tangible steps to ensure environmental conservation and protection during war within the ambit of the existing international legal framework.

[76] Ibid 151.
[77] Reyhani, *Supra* note 54.
[78] Henckaerts & Doswald-Beck, *Supra* note 64.
[79] Supra, note 55 Article 1.
[80] Henckaerts & Doswald-Beck, *Supra* note 64.

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The Role of Water in the attainment of Sustainable Development in Kenya

By: ***Jack Shivugu****

Abstract

The paper seeks to critically evaluate the role of water in the attainment of sustainable development in Kenya. The paper argues that water plays a critical role in the attainment of the sustainable development goals both in Kenya and at the global stage. Sustainable Development goal number 6 recognises the role of water in the Sustainable Development agenda and seeks to ensure the availability and sustainable management of water and sanitation for all. The paper argues that water is critical in the Sustainable Development agenda by unlocking other goals such as health, education, poverty reduction, food security and affordable, clean energy and climate change mitigation.

It interrogates some of the water and Sustainable Development concerns in Kenya including water pollution, water scarcity and climate change. It then suggests practical ways through which the role of water in the Sustainable Development agenda can be enhanced. This includes integrated water management, pollution control, education, training and awareness, institutional support and the use of science and technology.

1. Introduction

The importance of Sustainable Development as a concept has become more pronounced in the 21st Century. The concept however received global attention following the publication of the *Report of the World Commission on Environment and Development: Our Common Future* which defined Sustainable Development as that which meets the needs of the present generation without compromising the ability of future generations to meet

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their own needs[1]. Sustainable development entails a combination of elements including environmental protection, economic development and social concerns[2]. It seeks to address intra-generational equity, that is equity among the present generation and inter-generation equity which is equity between the present and future generations [3]. Sustainable Development was considered in the case concerning the *Gabcikovo-Nagymaros Project, (Hungary v Slovakia)*[4] where the International Court of Justice emphasized the need to reconcile economic development with protection of the environment for the benefit of present and future generations.

The importance of this concept has led to the adoption of the Sustainable Development goals as the global blueprint for development. The 2030 Agenda for Sustainable Development which was adopted by all United Nations member states in 2015, entails a shared blueprint for peace and prosperity for people and the planet for both the present and future generations [5]. The Sustainable Development Goals define Sustainable Development broadly to entail issues such as poverty reduction, reducing inequalities, promoting gender equality, education and health, addressing the effects of climate change and environmental protection [6]. This approach contains both an anthropocentric approach that focuses on human development and an ecocentric approach that focuses on environmental conservation and further incorporates elements of inter and intra generational equity [7]. The Rio Declaration captures the concept of inter and intra generation equity and sets out that the right to development must be fulfilled

[1] World Commission on Environment and Development, *Our Common future*. Oxford, (Oxford University Press, 1987).
[2] Fitzmaurice, M., 'The Principle of Sustainable Development in International Development Law' *International*
Sustainable Development Law, Vol. 1
[3] Ibid
[4] Case Concerning the *Gabcikovo-Nagymaros Project, (Hungary v Slovakia* 1997 WL 1168556 (ICJ)
[5] United Nations, Department of Economic and Social Affairs, 'Sustainable Development' available at https://sdgs.un.org/goals (accessed on 26/04/2022)
[6] Ibid
[7] Muigua. K., 'Nurturing Our Environment for Sustainable Development' Glenwood Publishers Kenya Limited, 2016

in order to equitably developmental and environmental needs of present and future generations[8].

In Kenya, the importance of the concept of Sustainable Development has also been recognised. The Constitution captures it as one of the national values and principles of governance[9]. The state and all persons are mandated to be guided by the principle of Sustainable Development in all matters including interpretation of any law and implementing public policy decisions[10]. It is also captured under the Environmental Management and Co-ordination Act which defines Sustainable Development as that which meets the needs of the present generation without compromising the ability of future generations to meet their needs by maintaining the carrying capacity of the supporting ecosystems [11] . The country's development blueprint, Vision 2030, further acknowledges the importance of Sustainable Development and seeks to achieve a nation that has a clean, secure and sustainable environment by 2030 through inter alia promoting environmental conservation[12].

The concept of Sustainable Development has also received judicial pronouncement in Kenya. In *John Muthui & 19 others v County Government of Kitui & 7 others* [13] the Court observed as follows with regards to Sustainable Development:

> *'The four (4) recurring elements that comprise the concept of 'Sustainable Development' is the need to preserve natural resources for the benefit of future generations (the principle of intergenerational equity); exploiting natural resources in a manner which is*

[8] Rio Declaration on Environment and Development' Principle 3
[9] Constitution of Kenya, 2010, Article 10 (2) (d)
[10] Ibid, Article 10 (1)
[11] Environmental Management and Co-ordination Act, No. 8 of 1999 (Rev 2019), S 2.
[12] Kenya Vision 2030, available at *http://vision2030.go.ke/wp-content/uploads/2018/05/Vision-2030-Popular-Version.pdf* (accessed on 30/06/2022)
[13] John Muthui & 19 others v County Government of Kitui & 7 others, ELC Petition No. E06 of 2020, (2020) eKLR

> *'sustainable', 'prudent', 'rational', 'wise' or 'appropriate' (the principle of sustainable use); the 'equitable' use of natural resources, and the need to ensure that environmental considerations are integrated into economic and other development plans, programmes and projects, (the principle of integration).'*

The Court further noted that Sustainable Development is a principle with a normative value, demanding a balance between development and environmental protection, and as a principle of reconciliation in the context of conflicting human rights, that is the right to development and the right to protecting the environment[14].

It is thus evident that Sustainable Development is a principle that has been given utmost importance at both the global and national stage. This paper seeks to critically discuss the role of water in the attainment of Sustainable Development in Kenya. Towards this end the paper will discuss the nexus between water and Sustainable Development; examine the challenges facing attainment of Sustainable Development in Kenya and explore the role of water as a tool of attaining Sustainable Development in Kenya.

2. The Nexus between Water and Sustainable Development

Sustainable Development goal number 6 recognises the role of water in the Sustainable Development agenda and seeks to ensure the availability and sustainable management of water and sanitation for all[15]. The inclusion of this goal recognizes that water is at the heart of all aspects of Sustainable Development[16]. It has been correctly argued that there is a clear link between properly managed water resources, economic development and social

[14] Ibid

[15] United Nations, Department of Economic and Social Affairs, Sustainable Development goal 6- clean water and sanitation, available at *https://sdgs.un.org/goals/goal6* (accessed on 30/06/2022)

[16] Ait-Kadi.M., 'Water for Development and Development for Water: Realizing the Sustainable Development Goals (SDGs) Vision' *Aquatic Procedia* 6 (2016) 106 – 110

wellbeing which are key pillars of the Sustainable Development agenda[17]. According to the United Nations Environment Programme (UNEP), sustainable management of water resources and access to safe water and sanitation are essential for unlocking economic growth and productivity, and providing significant leverage for existing investments in health and education[18]. UNEP further opines that improving water management makes national economies, the agriculture and food sectors more resilient to rainfall variability and able to fulfil the needs of growing populations[19].

Water is thus essential to the Sustainable Development agenda by unlocking other goals such as health, education, poverty reduction, food security and affordable and clean energy. It is necessary for domestic use, agricultural activities geared towards food production, industrial uses and hydroelectric generation which is a key component of the quest towards access to clean and affordable energy. Water thus affects the entire development agenda[20]. It is embedded in almost all the Sustainable Development goals especially those dealing with food, the environment and energy. This therefore means that attainment of the Sustainable Development goals is only plausible where the goal relating to water is achieved[21].

Studies have also placed water at the center of economic development by establishing the relationship between water and development. It is asserted that water is essential for sustainable socio-economic development and, in turn, that development provides the necessary resources to invest in

[17] Koudstaal.R et al., 'Water and Sustainable Development' available at *https://www.ircwash.org/sites/default/files/210-92WA-11000.pdf* (accessed on 30/06/2022)
[18] United Nations Environment Programme, 'Goal 6: Clean Water and Sanitation' available at *https://www.unep.org/explore-topics/sustainable-development-goals/why-do-sustainable-development-goals-matter/goal-6* (accessed on 30/06/2022)
[19] Ibid
[20] Ait-Kadi.M., 'Water for Development and Development for Water: Realizing the Sustainable Development Goals (SDGs) Vision, Op Cit
[21] Ibid

improving water security, water infrastructure and water institutions[22]. The role of water in development is critical especially in developing countries located in arid and semiarid area[23]. Water scarcity in such countries has affected the socio-economic development agenda including food security, access to health and education in most cases resulting in underdevelopment. This has created the awareness of the critical importance of efficient water management for Sustainable Development in these countries[24].

In Kenya, the Constitution recognizes the right to clean and safe water in adequate quantities as an essential economic and social right[25]. The Constitution further calls upon the national government to protect the environment and natural resources with a view of establishing a durable and sustainable system of development through inter alia protection of water and water resources[26]. The Water Act further recognizes the role of water in sustainable development and provides for the legal framework for the regulation, management of water and water resources in accordance with the Constitution[27]. Water is thus an essential part of the Sustainable Development agenda both in Kenya and at the global stage.

3.0 Water and Sustainable Development Concerns in Kenya

3.1 Water Scarcity

Despite its importance in sustaining life and economic development, the problem of water scarcity continues to be experienced in Kenya and the world at large[28]. The United Nations estimates that water scarcity affects

[22] Sadoff, C, et al Securing Water, Sustaining Growth. Report of the GWP/OECD Task Force on Water Security and Sustainable Growth. Oxford, UK: University of Oxford (2015).

[23] Biswas. A., 'Water for sustainable development in the 21st century: A global perspective' available at h*ttps://thirdworldcentre.org/wp-content/uploads/2015/05/Water-for-sustainable-development-in-the-21st-century.pdf* (accessed on 30/06/2022)

[24] Ibid

[25] Constitution of Kenya, 2010, Article 43 (1) (d)

[26] Ibid, Fourth Schedule, Part 1 (22) (c)

[27] Water Act, Cap 372, Laws of Kenya, S 3

[28] Muigua.K., Wamukoya.D & Kariuki.F., 'Natural Resources and Environmental Justice in Kenya' Glenwood Publishers Kenya Limited, 2015, P 178

more than 40 percent of the global population with the figure expected to rise due to the adverse effects of climate change[29]. A country is classified as water scarce if the per capita water availability is below 1700 cubic meters per year[30]. Kenya is categorized as a water scarce country with per capita availability of below 1000 cubic meters annually[31]. The problem of water scarcity that is prevalent especially in developing countries has been attributed to several factors including rapid increase in population, economic development and urbanization.

Water scarcity in Kenya and across the globe hinders the attainment of Sustainable Development by affecting socio-economic activities, attainment of food security, health, education and climate change mitigation[32]. It results in poor sanitation and hygiene habits posing substantial health risk thus curtailing the attainment of sustainable goal number 3 geared towards ensuring good health and wellbeing for all[33]. It also affects agricultural and food production activities thus curtailing the attainment of Sustainable Development goal number 2 geared towards attainment food security[34]. Water scarcity also affects attainment of Sustainable Development goal number 4 geared towards quality education especially in arid and semi-arid regions since children miss out from attending school in search of water. Water scarcity is thus a critical concern in the Sustainable Development debate. Addressing this issue is important in the quest towards attainment of Sustainable Development both in Kenya and at the global stage.

3.2 Water Pollution

The Water Act defines water pollution as any direct or indirect alteration of the physical, thermal, chemical or biological properties of the water resource

[29] United Nations Development Programme, 'Sustainable Development Goals, Goal No.6' available at *https://www.undp.org/content/dam/undp/library/corporate/brochure/SDGs_Booklet_Web_En.pdf* (accessed on 01/07/2022)

[30] Mulwa. F et al., 'Water Scarcity in Kenya: Current Status, Challenges and Future Solutions' available at *https://www.scirp.org/pdf/oalibj_2021011916254447.pdf* (accessed on 01/07/2022)

[31] Ibid

[32] Ibid

[33] United Nations, Department of Economic and Social Affairs, Op Cit goal no.3

[34] Ibid, goal no. 2

so as to make it less fit for any beneficial purpose for which it is or is reasonably be expected to be used; or harmful or potentially harmful to the welfare, health or safety of human beings; any aquatic or non-aquatic life or property or the environment[35]. Water pollution is a major concern in Kenya. This is caused by various factors including rapid urban development, agricultural activities which result in discharge of organic matter, agrochemicals and drug residues into water bodies, improper sewage disposal and oil spills[36]. Water resources such as rivers and lakes are polluted on a daily basis from industrial and domestic waste. A good example is the Nairobi River that is polluted by among others industries which dump waste directly into the river without treatment[37]. The river is filled with all sorts of contaminants to an extent that it is difficult to spot aquatic life in it[38].

Pollution of water and water resources undermines the attainment of Sustainable Development. It has severe consequences on both humans and the environment. It possess health hazards such as waterborne diseases and cancer as result of radioactive wastes[39]. It also has effects on the environment through death of aquatic life and an imbalanced ecosystem[40]. The 2030 Agenda for Sustainable Development seeks to improve water quality by reducing pollution, eliminating dumping and minimizing release of hazardous chemicals and materials, halving the proportion of untreated wastewater and substantially increasing recycling and safe reuse globally[41]. The Water Act recognizes the effects of water pollution and seeks to promote proper regulation, management and development of water resources by

[35] Water Act, Cap 372, S 2

[36] African Researchers Consortium., *'The Water Pollution Crisis in Kenya: What we need to do to avert this situation'* available at https://researcharc.org/the-water-pollution-crisis-in-kenya-what-we-need-to-do-to-avert-this-situation/ (accessed on 01/07/2022)

[37] Earth 5 R., 'Nairobi River Pollution: Scope for the Future' available at https://earth5r.org/fighting-communities-nairobi/ (accessed on 01/07/2022)

[38] Ibid

[39] African Researchers Consortium., *'The Water Pollution Crisis in Kenya: What we need to do to avert this situation,* Op Cit

[40] Ibid

[41] United Nations 2030 Agenda for Sustainable Development, available at *https://sustainabledevelopment.un.org/content/documents/21252030%20Agenda%20for%20Sustainable%20Development%20web.pdf* (accessed on 01/07/2022)

providing a legal framework to conserve and preserve water and water resources from pollution[42]. Attainment of Sustainable Development thus calls upon conserving and protecting water resources from pollution.

3.3 Climate Change

Climate change as defined by the United Nations Framework Convention on Climate Change (UNFCC) means a *'change of climate which is attributed directly or indirectly to human activity that alters the composition of the global atmosphere and which is in addition to natural climate variability observed over comparable time periods'*[43]. The Climate Change Act on the other hand defines climate change as a *'change in the climate system which is caused by significant changes in the concentration of greenhouse gases as a consequence of human activities and which is in addition to natural climate change that has been observed during a considerable period.'*[44] Climate change is arguably the most fundamental global concern in the 21st century. The Sustainable Development agenda calls for urgent action to combat climate change and its impacts[45]. It sets an ambitious target to limit the increase in global mean temperature to two degrees Celsius above pre-industrial levels in order to avoid the worst effects of climate change[46]. This has seen the adoption of the Paris Agreement by most countries which calls for concerted efforts to strengthen the global response to the threats of climate change through inter alia holding increase in global temperatures; fostering climate resilience and making finance flows towards low greenhouse gas emissions and climate resilient development[47].

It is argued that the effects of climate change are more prevalent in developing economies where populations are most vulnerable and less likely

[42] Water Act, Cap 372, S 2

[43] United Nations Framework Convention on Climate Change (United Nations, 1992), Article 1 (2), available at *https://unfccc.int/files/essential_background/background_publications_htmlpdf/application/pdf/conveng.pdf* (accessed on 01/07/2022)

[44] Climate Change Act, No. 11 of 2016, Laws of Kenya, S 2.

[45] United Nations, Department of Economic and Social Affairs, Op cit goal 13

[46] Ibid

[47] Paris Agreement, Article 2, available at *https://unfccc.int/sites/default/files/english_paris_agreement.pdf* (accessed on 01/07/2022)

to adapt to the effects of climate change[48]. Climate change can thus affect the potential of development in such countries. Climate change is pertinent in the Sustainable Development debate since its effects can curtail the attainment of Sustainable Development goals including combating poverty, food security, health, employment and gender equality[49]. Attainment of Sustainable Development thus calls upon efforts towards climate change resilience, mitigation and adaptation.

Water is inextricably linked to the climate change debate. It has been asserted that climate change has been linked with changes in the global hydrological cycle such as increased atmospheric water content and changes in precipitation patters[50]. Due to the adverse effects of climate change, there have been massive degradation of water catchment areas and drying up of rivers. Water sources are among part of the ecosystem that is most sensitive to climate change as evidenced by drying of rivers and lakes and rise in ocean levels due to the adverse effects of climate change[51]. Further soil erosion due to flooding has resulted in siltation of dams which are critical in the supply of water resulting in deterioration of water quality thus affecting water supply. This hinders attainment of Sustainable Development goals such as food security, health and access to clean and safe water.

Water plays an important role in enabling human adaptation to climate change[52]. The Water Act advocates for incentive programmes for water

[48] Muigua. K., 'Nurturing Our Environment for Sustainable Development' Op Cit
[49] Muigua.K., Wamukoya.D & Kariuki.F., 'Natural Resources and Environmental Justice in Kenya' Op Cit
[50] Glenn.W et al., 'Climate change and water in the UK – past changes and future prospects' available at *http://pureoai.bham.ac.uk/ws/files/28288312/Watts_et_al_Climate_change_water_2015_Progress_Physical_Geography.pdf* (aceessed on 03/07/20222)
[51] Ibid
[52] Taylor.G., et al, *'Ground water and climate change'* available at *https://d1wqtxts1xzle7.cloudfront.net/37998805/Taylor_etal_2012_nclimate1744-with-cover-page v2.pdf?Expires=1656857354&Signature=fmvtKECAZW9CVXMSkwYvTf0B~Jt1CAQt50RZu~o8BMybVuqO4bZ86rS3pnlOl4GDQcWILmIXcLlth~KeaeckOacJZzKkqW7C71w6esVqot0id2c-2zrgcbj~vlFZd52w8SNa1ZCHYgTXGEjx4oRzM5RohChT1FIvGIhQumIWmJPNxRK0PO~t62UWoiQMBoQAYlKGj6OfyZOZ226d8M~tufF08siCpI1L8~L8Zg~59wm*

resources management towards climate change adaptation and mitigation[53]. Clean water policies are essential in climate change mitigation especially from the water-energy perspective[54]. Implementation of the Sustainable Development goal 6 targets towards water access and waste water treatment results in minor impacts on the energy sector which is crucial in the climate change debate[55]. Further, the increased adaptation of solar and wind technologies results in reduction of carbon and water intensity of electricity aiding in climate change mitigation[56]. Water is thus crucial in the climate change debate.

4.0 Way Forward

The foregoing discussion demonstrates that water is critical in the Sustainable Development agenda. However, challenges related to water such as water scarcity, water pollution and climate change hinder the effective attainment of the Sustainable Development goals. The following can be done to enhance the role of water in the attainment of Sustainable Development in Kenya.

4.1 Efficient Management of Water and Water Resources

At the heart of the Sustainable Development goal 6 geared towards ensuring availability and sustainable management of water and sanitation for all is the concept of integrated water resources management at all levels including through transboundary cooperation[57]. Integrated water resources management is a concept that embraces all users of water and is aimed at understanding how water resources link with different sectors of the society[58]. It recognizes the fact that decisions in one sector affect other sectors and emphasizes making changes in decision/policy making processes

Wrq~pNFRDaHN6HEIZOctrGay0hRuSF5wXDmgZvw0S2qmTb6ckNWrwopB33p odMPMOHu2bl3at-KXkuO9CZdNlpMQqMSXTtmHiNLwOo9WRKA__&Key-Pair-Id=APKAJLOHF5GGSLRBV4ZA (accessed on 03/07/2022)

[53] Water Act, Cap 372, S 116 (1) (i)

[54] Parkinson. S et al., 'Balancing clean water-climate change mitigation trade-offs' Environ. Res. Lett. 14 (2019)

[55] Ibid

[56] Ibid

[57] United Nations 2030 Agenda for Sustainable Development, Op Cit

[58] Ait-Kadi.M., 'Water for Development and Development for Water: Realizing the Sustainable Development Goals (SDGs) Vision, Op Cit

and governance perspectives in order to improve equity and human welfare and promote sustainable development [59] . Integrated water resources management covers the manner in which roles and responsibilities are exercised in the management of water and encompasses both formal and informal institutions[60]. It thus calls for effective governance of water in manner that promotes inclusiveness and accountability[61]. There is thus need to adopt integrated water resources management as a viable alternative to the hitherto traditional approaches to water and water resources governance.[62] The government and policy makers should embrace and accept this interconnectedness and adopt an integrated approach towards water resources management.

4.2 Pollution Control

One of the major challenges facing the water sector is the pollution menace. This hinders the attainment of the Sustainable Development goals. Pollution control can be achieved through an integrated approach geared towards prevention of emissions and effective waste management in order to protect water sources and the environment[63]. Industries should be encouraged to treat industrial waste before discharging it in order to prevent water pollution. Further, section 72 of the Environmental Management and Co-Ordination Act should be actualized. The section makes it an offence to discharge pollutants including poison, toxic, noxious or obstructing matter, radioactive waste into the aquatic environment in contravention of the water pollution control standards[64]. A person found guilty under the section is liable to imprisonment for a term not exceeding two years or to a fine not exceeding one million shillings or to both[65]. Such efforts are critical in ensuring that water and water resources are utilized in a sustainable manner towards attainment of the Sustainable Development goals.

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[59] Ibid
[60] Muigua.K., Wamukoya.D & Kariuki.F., 'Natural Resources and Environmental Justice in Kenya' Op Cit
[61] Ibid
[62] Ibi
[63] Ibid
[64] Environmental Management and Co-Ordination Act, No. 8 of 1999, S 72 (1)
[65] Ibid

4.3 Education, Training and Awareness

Some of the challenges in the water sector such as pollution and poor management of water is a result of ignorance. It is thus important to create awareness on the need for efficient use of water resources through education and training[66]. This should target all players including the public, the private sector and policy makers. Training of water resources managers is instrumental in passing on the concept of integrated water management and providing them with the tools for implementation of this concept[67]. Training of the public is important is crucial in promoting good water management practices such as reusing and recycling water and pollution control.

4.4 Institutional Support

Management of water and water resources can only be effective if the institutions responsible for such management are efficient[68]. It is thus essential to strengthen the capacity of water management institutions in order to make them better equipped to discharge their mandate. In Kenya, the Water Resources Authority is established under the Water Act to safeguard the right to clean water by ensuring that there is proper regulation of the management and use of water resources[69]. There is need to support the activities of this institution among other regional water management institutions in order to attain sustainable development in Kenya.

4.5 Use of Science and Technology

Science and technology can offer effective solution to most environmental concerns affecting the world[70]. Science and technology can aid in environmental management through an analysis of the mechanisms and processes underlying human interaction with the environment and application of scientific knowledge through actions geared towards

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[66] Koudstaal.R et al., 'Water and Sustainable Development, Op Cit

[67] Ibid

[68] Biswas. A., 'Water for sustainable development in the 21st century: A global perspective' Op Cit

[69] Water Act, Cap 372, S 12

[70] Huesemann. M.H., 'Can Pollution Problems Be Effectively Solved by Environmental Science and Technology? An Analysis of Critical Limitations, Ecological Economics, Volume 37, Issue 2, May 2001, pg 271-287

environmental protection and conservation. [71] However, science and technology has not been effectively adopted as a tool of environmental management in Kenya due to factors such as lack of awareness and knowledge of such technologies; inadequate funding; limited technical competence and slow adoption of modern technological options[72]. There is thus need for adoption of science and technology in water management in Kenya. Some of these technologies include industrial waste treatment, green and clean technologies and climate change mitigation strategies[73].

5.0 Conclusion

Water plays an important role in the attainment of Sustainable Development in Kenya. It is embedded in almost all the Sustainable Development goals and contributes towards unlocking goals such as health, education, poverty reduction, food security and affordable and clean energy. Water is thus central to the Sustainable Development agenda. However, concerns such as water scarcity, water pollution and climate change hinder the role of water in the Sustainable Development agenda in Kenya. There is thus need to address these concerns through integrated water management, pollution control, education, training and awareness, institutional support and the use of science and technology. Effective use and management of water and water resources in Kenya for Sustainable Development is an ideal that can be achieved.

[71] Voulvoulis.N., & Burgman.M.A., The Contrasting Roles of Science and Technology in Environmental
Challenges, Critical Reviews in Environmental Science and Technology, Volume 49, 2019, issue 12

[72] National Environment Management Authority, 'The National Solid Waste Management Strategy', available at *http://meas.nema.go.ke/pops/download/National-Solid-Waste-Management-Strategy-_2.pdf* (accessed on 12/07/2022)

[73] Muigua. K., 'Utilising Science and Technology for Environmental Management in Kenya' available at *http://kmco.co.ke/wp-content/uploads/2020/04/Utilising-Science-and-Technology-for-Environmental-Management-in-Kenya.pdf* (accessed on 12/07/2022)

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Taylor.G., et al, *'Ground water and climate change'* available at *https://d1wqtxts1xzle7.cloudfront.net/37998805/Taylor_etal_2012_nclimate1744-with-cover-pagev2.pdf?Expires=1656857354&Signature=fmvtKECAZW9CVXMSkwYvTf0B~Jt1CAQt50RZu~o8BMybVuqO4bZ86rS3pnlOl4GDQcWILmIXcLlth~KeaeckOacJZzKkqW7C71w6esVqot0id2c-2zrgcbj~vlFZd52w8SNa1ZCHYgTXGEjx4oRzM5RohChT1FIvGIhQumIWmJPNxRK0PO~t62UWoiQMBoQAYlKGj6OfyZOZ226d8M~tufF08siCpI1L8~L8Zg~59wmWrq~pNFRDaHN6HEIZOctrGay0hRuSF5wXDmgZvw0S2qmTb6ckNWrwopB33podMPMOHu2bl3at-KXkuO9CZdNlpMQqMSXTtmHiNLwOo9WRKA__&Key-Pair-Id=APKAJLOHF5GGSLRBV4ZA*

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Collective Property Rights in Human Biological Materials in Kenya

By: ***Paul Ogendi****

1. Introduction

This article reflects on property rights in relation to human biological materials obtained from research participants participating in genomic research. Property rights are crucial in genomic research because they can help avoid exploitation or abuse of such precious material by researchers. Furthermore, the property rights model preferred by a country may restrict or expand access to such materials for research and innovation. The concept of distributive justice is particularly instructive in choosing an appropriate model for property rights in human biological materials. Jefferson notes in this regard that 'various alternative paradigms for ownership … have attempted to balance competing interests between exclusion and access; private and public; altruism and ownership; and individual and community'.[1] Exclusion and access are emphasised in this article.

It is important to clarify that property rights can be conceptualised differently – including individually or collectively/communally. The former approach is mostly emphasised in Western jurisdictions and the latter in developing countries, including in Africa. Individual property rights therefore conform to the Western notion of property rights and Feldman aptly observes that 'modern property law scholars think of property as a bundle of rights with four key attributes: use, possession, exclusion and disposition'.[2] Individual property rights therefore are premised on exclusion among other things, and may not achieve as much in terms of distributive justice.

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[1] David J. Jefferson 'Biosociality, Reimagined: A Global Distributive Justice Framework for Ownership of Human Genetic Material' (2015) 14 Chi-Kent J Intell Prop 357, 358.

[2] Robin Feldman 'Whose body is it anyway? Human cells and the strange effects of property & intellectual property law' (2011) 63:6, 1377 Stanford Law Review 8.

Individual property rights in human biological materials are contested for various reasons. Feldman observes that the law is relatively clear on ownership of 'concrete items, such as automobiles, jewelry, or a plot of land, to more abstract concepts such as our labor, our writings, our innovations, and even our commercial image'.[3] However, regarding human biological material, Feldman further observes that 'we are fast approaching the point at which just about anyone can have property rights in your cells, except you'.[4] He believes that '[t]he logical person for initial ownership of cells is the person from whose body the cells originated. For public policy reasons, society may want to restrict people from using, selling or disposing of those cells in certain ways'.[5] The lack of enthusiasm in this area is mainly external and some of the reasons include cultural, religious or humanistic reasons. Accordingly, Martinez states: '[i]f we say these things are property, then we run the risk of sanctioning a free market in them, an outcome which for religious, cultural or humanistic reasons we may find unacceptable.'[6]

The other side of the property rights debate in the human biological materials discourse does not focus on the individual but the collective. In this paradigm, the key concern is not exclusion but access. As contended by Jefferson:

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[3] Robin Feldman 'Whose body is it anyway? Human cells and the strange effects of property & intellectual property law' (2011) 63:6, 1377 Stanford Law Review 1.

[4] Robin Feldman 'Whose body is it anyway? Human cells and the strange effects of property & intellectual property law' (2011) 63:6, 1377 Stanford Law Review 1. Interestingly, Feldman makes a very interesting observation with regard to the human body: 'Whatever else I might own in this world, however, it would seem intuitively obvious that I own the cells of my body. Where else could the notion of ownership begin, other than with the components of the tangible corpus that all would recognize as "me"'? In another interesting example, Feldman observes as follows: 'From a more graphic perspective, suppose a man severs his finger while sawing wood in his backyard. One would expect that person to have the right to ask that the finger be re-attached, as opposed to any other potential uses or modes of disposition, including use for research. The person's priority right to those cells cannot possibly be connected to rights of privacy, nondisclosure, or informed consent. The man would claim the finger, not because it contains information that should be kept private or because he did not properly obtain his own consent before slicing off his finger. He would claim the finger because it is his. See Ibid, 9-10.

[5] Feldman above, 10.

[6] Martinez J. 'A Cognitive Science Approach to Teaching Property Rights in Body Parts' (Social Science Research Network 1992) SSRN Scholarly Paper 1593768, 295-296 <*https://papers.ssrn.com/abstract=1593768*> accessed 13 May 2022.

[i]n order to begin to realize distributive justice in the context of biotechnological development, we must question the Western notion that the rights associated with property ownership are vested primarily in private individuals. Instead, we might imagine that for certain forms of property, models of ownership which locate rights in groups or collectives would be more appropriate.[7]

I therefore argue for a collective approach to property rights in human biological material. This model is particularly attractive for the genomic research landscape because it does not prevent the recognition of property rights over genomic data generated by private companies or the registration of innovations. The main positive point of this approach is that it ensures that human biological material is publicly owned by the state on behalf of the collective and can be used for public interest projects. It is not privatised in favour of any particular entity and is therefore not difficult to access. For a continent or a country that is yet to develop sufficient capacity for genomic research, especially in the private sector, publicly owned human biological material makes more sense and secures the future of the sector. Local companies and researchers will in future be able to tap into the available human biological material resources to do their research and innovation – without having to collect new material or purchase it from private entities who may even opt to make it unavailable by using trade secrets. In natural resources law, this approach is actually preferred and has been emphasised in many instruments in order to protect developing countries.[8]

2. The general trend in Kenyan laws in relation to property rights in human beings

Although this section is not directly relevant to understanding the topic of property rights in human biological material, it is nevertheless important in

[7] David J. Jefferson 'Biosociality, Reimagined: A Global Distributive Justice Framework for Ownership of Human Genetic Material' (2015) 14 Chi-Kent J Intell Prop 357, 374.

[8] See, generally, the Nagoya Protocol on access to genetic resources and the fair and equitable sharing of benefits arising from their utilization in the Convention on Biological Diversity, 2011. The preamble states: '[r]eaffirming the sovereign rights of States over their natural resources and according to the provisions of the Convention'.

assessing the general trend in Kenyan laws. This analysis will then inform the central thesis of this article, which is that Kenya may be more amenable to recognising collective property rights than individual property rights, since individuals have historically, by law, been denied the opportunity to trade in their body parts, organs and tissues. This section explores the broad subjects of property rights in: slavery and slave-like practices; dead bodies; and body parts, organs and tissues.

2.1 Slavery and slavery-like practices

In the past, owning a human being was allowed by law, especially in Western countries. The slaves were taken from other countries including Africa to work on farms and were subjected to all forms of human exploitation because their status as 'things' meant that they had no rights – the same as a cow or a table. In the post-slavery period, however, it is now firmly established 'that there are no longer any property rights over another living human being'.[9] This means that no human being can own another person as his or her property. Efforts to change ownership of another human being have been driven internationally with the adoption of the 1926 *Slavery Convention.*[10] Article 1(1) of the *Slavery Convention* defines slavery as 'the status or condition of a person over whom any or all of the powers attaching to the right of ownership are exercised'. Sub-article 2 defines slave trade:

The slave trade includes all acts involved in the capture, acquisition or disposal of a person with intent to reduce him to slavery; all acts involved in the acquisition of a slave with a view of selling or exchanging him; all acts of disposal by sale or exchange of a slave acquired with a view to being sold or exchanged, and, in general, every act of trade or transport in slaves.

Slavery allowed for property rights in human beings. Kenya has neither ratified nor acceded to the Convention.[11] This may be because Kenya did not practise slavery and may instead have been a victim of slavery.

[9] Gerald Dworkin & Ian Kennedy 'Human Tissue: Rights in the Body and its Parts' (1993) 1 Med L Rev 291, 293.

[10] 'Convention to Suppress the Slave Trade and Slavery' Signed on 25 September 1926, Geneva,
Entered into Force on 9 March 1927, in accordance with Article 12, <*https://lawphil.net/international/treaties/patcsg.html*> accessed 27 May 2022.

[11] 'United Nations Treaty Collection'

Over the years, other 'slavery-like practices' such as apartheid have also been outlawed by international law. The 1974 *International Convention on the Suppression and Punishment of the Crime of Apartheid*[12] is instructive in this regard. Kenya signed the Convention on 2 October 1974 but has not yet ratified or acceded to it.[13] Apartheid manifested mainly in South Africa and not in Kenya. This may be why Kenya has not yet acceded to the Convention. Furthermore, at the start of the 21st century, the law of human exploitation expanded beyond slavery and apartheid to include, inter alia, anti-trafficking conventions and the Rome Statute of the International Criminal Court (which also criminalises enslavement).[14] The Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others was adopted by the UN General Assembly in 1949, but Kenya has not signed it.[15] Kenya has however acceded to the *United Nations Convention Against Transnational Organized Crime* and its *Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children* on 16 June 2004 and 5 January 2005 respectively.

From the above analysis, the international law has taken leadership in outlawing ownership or the exploitation of another human being. Even though Kenya has not acceded to some of the instruments, some of the norms espoused in those instruments have achieved a status of customary international law, and they are therefore binding on Kenya. It therefore does not matter whether Kenya is a party or not.

<*https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XVIII-3&chapter=18&clang=_en*> accessed 20 July 2022.

[12] G.A. res. 3068 (XXVIII), 28 U.N. GAOR Supp. (No. 30) at 75, U.N. Doc. A/9030 (1974), 1015 U.N.T.S. 243, entered into force 18 July 1976.

[13] 'United Nations Treaty Collection' <*https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=IV-7&chapter=4&clang=_en*> accessed 20 July 2022.

[14] Jean Allain 'The international legal regime of slavery and human exploitation and its obfuscation by the term of art: "Slavery-like practice"' (2012) *Cahiers de la recherché sur les droits fondamentaux* 27

[15] 'University of Minnesota Human Rights Library' <*http://hrlibrary.umn.edu/research/ratification-kenya.html*> accessed 20 July 2022.

2.2 Property rights in dead bodies

In this section, the common law 'no property rule' is discussed because it applies in Kenya, and Kenyan laws are also canvassed.

2.2.1 English common law 'no property' rule

Perhaps a more relevant analysis when it comes to property rights in human biological material can be found in the property rights in dead bodies. This is because the development of property rights over human biological materials 'evolved primarily from laws governing the disposition of corpses, organs, and replenishable tissues'.[16] Given colonisation, the law in Kenya is not remote from that in England. In fact, common law is applicable in Kenya pursuant to section 3 of the *Judicature Act.*[17] The historical or common law position in England is that dead bodies are incapable of property ownership.[18] This is the 'no-property' rule as mentioned in the 1979 English case of *Exelby v. Handyside.*[19] According to Skegg, the common law 'no-property rule' does not preclude recognition of some quasi-property rights in England including permanent possession of parts of corpses, in accordance with the Human Tissue Act 1961 (s. 1) or the Anatomy Act 1984 (s. 6).[20] The right to possession of a dead human body is also manifest when a spouse or next of kin is granted, by law, the right to take possession of a dead body for burial.[21] The courts have however not clearly defined the property rights available in a dead body when faced with contentious cases.[22] Consequently,

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[16] Marylon Ballantyne, Note, *One Man's Trash is Another Man's Treasure: Increasing Patient Autonomy Through Limited Self-Intellectual Property Rights*, as quoted in Megan L. Townsley 'Is There Anybody out There – A Call for a New Body of Law to Protect Individual Ownership Interests in Tissue Samples Used in Medical Research' (2015) 54 Washburn LJ 683, 700.

[17] Cap 8 Laws of Kenya.

[18] Gerald Dworkin & Ian Kennedy 'Human Tissue: Rights in the Body and Its Parts' (1993) 1 Med L Rev 291, 294.

[19] (1749) 2 East PC 652 (CCP).

[20] Skegg PDG 'Medical Uses of Corpses and the "No Property" Rule' (1992) 32 Medicine, Science and the Law 311 <*https://doi.org/10.1177/002580249203200405*> accessed 27 May 2022.

[21] 'Rights and Obligations as to Human Remains and Burial | Stimmel Law' <*https://www.stimmel-law.com/en/articles/rights-and-obligations-human-remains-and-burial*> accessed 27 May 2022.

[22] Skegg PDG 'Medical Uses of Corpses and the "No Property" Rule' (1992) 32 Medicine, Science and the Law 311

the general obligations under common law are that those in possession of a dead body should dispose of it decently.[23]

Consequently, in England, it is apparent that the common law position does not allow for property rights in dead bodies. However, one can acquire quasi-property rights in accordance with the applicable legislation. The Kenyan position therefore follows the common law approach – assuming there is no legislation to the contrary. As will be seen later, Kenya also has its own legislation in this area.

2.2.2 Kenyan laws and jurisprudence on dead bodies

The Kenyan law appears to recognise some form of restricted property rights over dead bodies. The restriction is usually in favour of public health. For starters, the *Public Health Act*[24] makes it unlawful to exhume dead bodies without permission. Section 146 thus provides that:

it shall not be lawful to exhume anybody or the remains of anybody which may have been interred in any authorised cemetery or in any other cemetery, burial ground or other place without permit granted in manner hereinafter provided.

What is more, even the right to possess a body for burial is not absolute. The court may decide who exercises that right and in some cases it has decided against the wife of a deceased person. In *Virginia Edith Wamboi Otieno v Joash Ochieng Ougo & Omolo Siranga*.[25] the courts, relying on customary law, found 'that the question with regard to the place a deceased person is to be buried is a matter for the family of the deceased who, if need be, may involve other members of their clan'. The general trend is that there are no property rights in dead bodies and the state through the courts can decide who can have possession of the body for burial purposes. During the Covid-19 period, the state exercised a greater degree of control of the time and

<*https://doi.org/10.1177/002580249203200405*> accessed 27 May 2022.

[23] Gerald Dworkin & Ian Kennedy 'Human Tissue: Rights in the Body and its Parts' (1993) 1 Med L Rev 291, 294.

[24] Cap 242.

[25] Civil case No. 4873 of 1986 *Wamboi Otieno v Joash Ochieng Ougo & another* (1987) eKLR.

manner in which dead bodies were to be buried, and sometimes the regulations conflicted with cultural norms. A public health consideration is therefore paramount – and not property rights.

The courts have also made it clear that having possession of a dead body is not relevant in terms of inheritance. In *Anne Nyathira v Samuel Mungai Mucheru & 3 Others*,[26] the courts found that being in possession of a dead body is not an advantage in terms of inheritance. The Kenyan Court of Appeal observed as follows in this regard: 'Parties were all in agreement, and the judge was emphatic that there is no property in a dead body and burying a deceased person does not give any party any priority or advantage as regards inheritance rights of a deceased estate'.[27]

Nevertheless, recent High Court jurisprudence appears to suggest that there may be restricted property rights over dead bodies. Accordingly, the court in *Joan Akoth Ajuang & Another v. Michael Owuor Osido the Chief of Ukwala Location & 3 Others; Law Society of Keya & Another* observed as follows:[28] The right to possession of a dead human body for the purpose of burial is, under ordinary circumstances, in the spouse or other relatives of the deceased ... However, an unrestricted *property right* does not exist in a dead body. The matter of the disposition of the dead is so involved in the public interest, including the public's health safety, and welfare, that it is subject to control by law instead of being subject entirely to the desires, whim, or caprice of individuals. (my emphasis)

If the above is anything to go by, Kenya therefore recognises a restricted form of property rights over dead bodies and this right is usually recognised in favour of the wife and close relatives.

[26] Civil Appeal No. 68 of 2015 *Anne Nyathira v Samuel Mungai Mucheru & 3 Others* [2016] eKLR.
[27] As above, paras 22-23.
[28] [2020]eKLR, para. 175.

2.3 Property rights in tissues and body parts

The Kenyan law appears to allow for the donation of tissues and body parts for various purposes. Under the *Human Tissues Act,*[29] it is possible to make a request for your body to be used for therapeutic purposes or for medical education or research. Section 2 thus states:

[i]f any person, either in writing at any time or orally in the presence of two or more witnesses during his last illness, has expressed a *request* that his body or any specified part of his body be used after his death for therapeutic purposes or for purposes of medical education or research, the person *lawfully in possession* of his body after his death may, unless he has reason to believe that the request was subsequently withdrawn, authorize the removal from the body of any part or, as the case may be, the specified part, for use in accordance with the request. (my emphasis)

Furthermore, under the *Health Act* section 81(1)(a), one can now make a will to '*donate* his or her body or any specified tissue thereof to be used after his or her death'. (my emphasis) Section 81(1)(b) requires that the person who makes a donation in this manner must nominate an institution or person contemplated under the Act. Section 81(2) provides that:

In the absence of a donation under subsection (1)(a) or of a contrary direction given by a person whilst alive and upon death the person's body remains unclaimed under any other law, the spouse or spouses, elder child, parent, guardian, eldest brother or sister of that person, in the specific order mentioned, may, after that person's death, donate the body or any specific tissue of that person to an institution or a person contemplated in this subsection.

The purpose of donation is stated under section 82 as follows: training of students in health sciences; health research; advancement of health sciences; therapeutic purposes, including the use of tissue in any living person; or the production of a therapeutic, diagnostic or prophylactic substance. Under section 83, '[a] donor may, prior to the transplantation of the relevant organ into the donee, revoke a donation in the same way in which it was made or,

[29] Cap 252.

in the case of a donation by way of a will or other document, also by the intentional destruction of that will or document'.

Lastly, removing body parts is criminalised in Kenya. Section 13 of the *Anatomy Act*[30] makes it illegal to remove body parts from a dead body as follows:

Any person who-

(a)Takes or removes from a dead body any part of the body before the body is received into an approved school of anatomy; or
(b)Takes or removes from an approved school of anatomy, except for cremation or burial, any part of a dead body; or
(c)Receives part of a dead body which has been taken or removed in contravention of this section,
Shall be guilty of an offence and liable to a fine not exceeding three thousand shillings or to imprisonment for a term not exceeding three months or to both such fine and such imprisonment.
Provided that this section shall not apply to a licensee who has been authorized in writing by the Director of Medical Services to take or remove, or to receive, a part of a dead body for educational, scientific or research purposes.

2.4 Donation of blood, tissues or gametes

Under Kenyan law, apart from organs harvested from a deceased person, the other thing a living human being can donate is blood, tissues or gametes. The Health Act under s 85(1) contemplates that Parliament would put in place an Act to create a body known as the Kenya National Blood Transfusion Services. Under subsection (3) '[t]he Service shall be charged with the mandate of developing a comprehensive and coordinated national blood service based on voluntary *non remunerated* blood donations so as to guarantee availability of adequate and safe blood'. From this section, the use of the words 'voluntary non remunerated' exposes the general position of the law, which does not favour recognition of property rights in blood.

[30] Cap 249.

In Kenya, the law also bans the sale or purchase of body parts including tissues and gametes. Kenya's Health Act No. 21 of 2017 provides:[31]

No person shall remove tissue or gametes from a human being for transplantation in another human being or carry out the transplantation of such tissue or gametes except in a duly authorized health facility for that purpose.

Even though not expressly stated, one cannot sell a tissue or gamete. The Health Act further provides that '[a]ny person who contravenes the provisions of this section fails to comply herewith or who charges a fee for a human organ commits an offence'.[32] It is clear therefore that such tissues and gametes should be donated freely and cannot be sold or purchased in Kenya. The penalty for contravening this section has been set to a fine not exceeding ten million shillings or to imprisonment for a period not exceeding ten years, or to both a fine and imprisonment.[33]

The general position of the law in Kenya is supported by 'a broad consensus in international regulatory documents'.[34] In this regard, the *World Health Organization (WHO) Guiding Principles on Human Cell, Tissue and Organ Transplantation*[35] guiding principle 5 provides as follows:[36]

[31] See s 80(1).
[32] See s 80(4)(a).
[33] See s 80(4)(b).
[34] Hurst SA 'To Ban or Not to Ban: The Ethics of Selling Body Parts' in Jean-Daniel Rainhorn and Samira El Boudamoussi (eds) *New Cannibal Markets : Globalization and Commodification of the Human Body* (Éditions de la Maison des sciences de l'homme 2017) <*http://books.openedition.org/editionsmsh/10744*> accessed 26 May 2022.
[35] WHO/HTP/EHT/CPR/2010.01, *https://apps.who.int/iris/bitstream/handle/10665/341814/WHO-HTP-EHT-CPR-2010.01-eng.pdf?sequence=1*. The Guiding Principle 5 is meant to 'provide an orderly, ethical and acceptable framework for acquisition and transplantation of human cells, tissues and organs for therapeutic purposes'.
[36] Catherine M. Valerio Barrad 'Genetic Information and Property Theory' (1992-1993) 87 Nw U L Rev 1037, 1053.

[c]ells, tissue and organs should only be donated freely, without any monetary payment or other rewards of monetary value. Purchasing, or offering to purchase, cells, tissues or organs for transplantation, or their sale by living persons or by the next of kin for deceased persons, should be banned.

The prohibition on sale or purchase of cells, tissues and organs does not preclude reimbursing reasonable and verifiable expenses incurred by the donor, including loss of income, or paying the costs of recovering, processing, preserving and supplying human cells, tissues or organs for transplantation.

From the above excerpt, one is allowed to make donations but should not receive payment in monetary terms or be rewarded with something having monetary value. However, reimbursement for 'reasonable and verifiable' expenses is permissible.

The commentary on Guiding Principle 5 is interesting because it reveals the philosophy behind the prohibition on sale or purchase of human organs. The commentary states:

[p]ayment for cells, tissues and organs is likely to take unfair advantage of the poorest and most vulnerable groups, undermine altruistic donation, and leads to profiteering and human trafficking. Such payment conveys the idea that some person *lack dignity*, that they are mere objects to be used by others. (emphasis mine)

From the commentary, there are disadvantages associated with the sale of human organs, including the fact that it 'conveys the idea that some person lacks dignity'.

3. Property rights models

The models discussed her are categorised into non-market and market models for ease of reference. Generally speaking, the non-market models tend to emphasise collective property rights while the market models emphasise individual property rights as theorised in Western countries.

3.1 Non market models

Under this category, there are several models, including free access, common heritage, state ownership, and open access.

3.1.1 Common heritage

In the 1960s, the concept of common heritage became popular internationally. Accordingly, this concept has been used by developing states in efforts to shape international law relating to common areas (there are four 'global commons' managed by the international community: Antarctica; the high seas and seabed beyond areas of national jurisdiction; the atmosphere; and outer space). While developed in relation to common areas, the common heritage of mankind approach can be adapted to common resources.[37]

In relation to genetic resources (which arguably includes human biological materials), the common heritage model would mean that: resources would not be subject to appropriation and would be managed in line with universal interests; any economic (or other) benefits arising from their exploitation would be shared internationally; their use would be limited to exclusively peaceful purposes; and scientific research using genetic resources would be conducted for the benefit of all.[38]

Common heritage as a concept emanated from the doctrine of *res communis* which means that resources that are obtained from common heritage territories should not be possessed, monopolised or owned by individuals, communities or states.[39] Rather, the use of such common resources should be subjected to the interests and rights of all mankind. This concept deals with common resources such as celestial bodies, the sea and subsoil obtained from common heritage. There is nothing precluding the application of the same concept to human biological material.

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[37] Rhodes Catherine 'Potential International Approaches to Ownership/Control of Human Genetic Resources' (2016) 24 Health Care Analysis 260 <*https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4987399/*> accessed 19 July 2022.

[38] Ibid.

[39] Dauda B., Dierickx K. Benefit sharing: An exploration on the contextual discourse of a changing concept (2013) 14 *BMC Med Ethics* 36.
< *https://doi.org/10.1186/1472-6939-14-36*> accessed on 21 July 2022.

Equitable sharing of resources entails equal distribution of resources and global policies that cultivate a homogenous state of affairs in relation to common heritage resources. Developing countries have envisaged this benefit sharing as a means of providing solutions to the disparities between developing and developed states. Hence, it has been advocated that the benefit sharing of the common heritage of humankind should be extended beyond the sharing of tangible resources to other possible goods.[40] In relation to genetic resources, therefore, this means that such resources would be managed in accordance with universal interests and they would not be subject to appropriation. Additionally, any scientific research using genetic materials would be conducted for the benefit of all and would be shared internationally.[41]

The ethical appeal of benefit sharing in the common heritage of humankind is targeted at achieving equality among all states with regard to resource distribution. The founder of the concept of the common heritage of humankind, Arvid Pardo,[42]clearly indicates this equality in a statement that: the common heritage of humankind challenges the structural differences between rich and poor countries and revolutionizes international relations towards equality among countries.[43]

3.1.2 Free access

In this model, '[w]here a free access approach is applied to genetic resources, anyone is free to access them, to use them as they choose, and to subsequently claim proprietary rights over them (excluding others from access/use if they choose to do so).'[44] This model was generally preferred internationally before it was replaced by the state sovereignty model in the

[40] Basler K *The concept of the common heritage of mankind in International Law*. The Hague: Martinus Nijhoff Publishers; 1998:96–97.
[41] Ibid
[42] Holmila E Common heritage of mankind in the Law of the Sea (2005) 1 *Acta Societatis Martensis* 187-205.
[43] Ibid.
[44] Rhodes Catherine 'Potential International Approaches to Ownership/Control of Human Genetic Resources' (2016) 24 Health Care Analysis 260 <*https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4987399/*> accessed 19 July 2022.

early 1990s.[45] This approach is a default position in the event where no rules have been established and usually it still operates for certain genetic resources located in marine genetic resources in seabeds or high seas beyond state jurisdiction. The wealth of material and the ease with which genetic resources can be found, probed, and analysed is astounding. Equally remarkable is that most of these genetic resources are available to everyone for free.[46]

However, free access to these genetic resources is a boon to science, but it has some risks. For example, among the genome sequences freely available on the internet are those for more than 100 pathogens, including for the organisms that cause anthrax, botulism, smallpox, Ebola hemorrhagic fever, and plague. It is possible that a government, a terrorist organisation, or even an individual could use data from these repositories to create novel pathogens that could be used as weapons.[47] Moreover, free access is controversial since it tends to favour those with expertise and particular knowledge, and financial and technological means to access and exploit resources. As a result, the benefit of genetic research is concentrated in only a few individuals, states and groups – regardless of where the genetic resources are sourced.[48]

It is worth noting that free access to all human biological material generated by genetic research projects should and even must be made freely available.[49] This will ensure that the redistribution of genetic data remains free of royalties, and that research and development will be encouraged to maximise its benefit to society.

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[45] Ibid.

[46] The Lancet. Keep genome data freely accessible (2004) Lancet 1;364(9440):1099-100. <*https://doi:10.1016/S0140-6736(04)17112-2.PMID:15451200; PMCID: PMC7134670*> accessed 21 July 2022.

[47] Ibid.

[48] National Research Council (US) Committee on Intellectual Property Rights in Genomic and Protein Research and Innovation; Merrill SA, Mazza AM, editors. *Reaping the Benefits of Genomic and Proteomic Research: Intellectual Property Rights, Innovation, and Public Health*. Washington (DC): National Academies Press (US); 2006. 1, Introduction <*https://www.ncbi.nlm.nih.gov/books/NBK19858/*> accessed 21 July 2022.

[49] Ibid.

3.1.3 State ownership

According to Jefferson, this approach is popular in countries with large government-funded biobanks such as is in Europe and a number of other industrialised countries/regions including Austria, Estonia, France, United Kingdom, Germany, Iceland, Latvia, Norway, Singapore, Sweden, and Quebec (Canada).[50] In this model, the ownership of biobanks may even be in the hands of the private sector but the right to the human biological material is publicly owned by the state and in this regard this model differs from the Moore Model.[51] In China, the newly released draft Detailed Rules for the Implementation of the Regulation on the Management of Human Genetic Resources appears to have integrated this approach in the management of its human genetic resources.[52] According to Rhodes, 'State sovereign rights have been applied to genetic resources by the international community since the early 1990s, and are now the dominant international approach to genetic resources ownership/control.'[53]

While not yet explicitly extended to human genetic resources, sovereign rights were extended to viral genetic resources in 2011 on quite spurious grounds,[54] and so while their extension to human genetic resources seems inappropriate, it is not implausible. Statements of state sovereignty over genetic resources in international law generally use words like states have

[50] David J. Jefferson 'Biosociality, Reimagined: A Global Distributive Justice Framework for Ownership of Human Genetic Material' (2015) 14 Chi-Kent J Intell Prop 357, 366.
[51] Ibid.
[52] 'Human genetic resources in China: New Draft Regulation' *China Briefing* 4 May 2022, *https://www.china-briefing.com/news/human-genetic-resources-in-china-regulation-new-draft-rules/.* The first regulations on human genetic resources in China were the *Interim Measures for the Management of Human Genetic Resources* in 1998, followed by the draft *Regulations on the Management of Human Genetic Resources* in 2005.
[53] Rhodes C 'Potential International Approaches to Ownership/Control of Human Genetic Resources' (2016) 24 Health Care Analysis 260 <*https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4987399/*> accessed 19 July 2022.
[54] Rhodes C. Sovereign wrongs: Ethics in the governance of pathogenic genetic resources (2013) 3(103) Ethics in Biology, Engineering and Medicine, An International Journal 97-114.

the authority to determine access to genetic resources which rests with the national governments and is subject to national legislation.

The use of a sovereign rights approach does not necessarily preclude subsequent claims of intellectual property rights being made by the user – it will depend on the terms agreed between the user and provider state. Notably, access and benefit-sharing arrangements based on state sovereignty are generally made through use of standard material transfer agreements which form a contract between the provider and the user.[55] In the context of genetic resources, states hold a sovereign right over their genetic resources and can grant access to those that need to use such resources under a condition of Prior Informed Consent (PIC) and Mutually Agreed Terms (MAT) of appropriate benefit sharing.[56]

Recommendations for the content of these agreements are generally set out in the relevant treaty, and in model contracts which are usually provided by the relevant international organisation. Often, within provisions on access and benefit-sharing, there is provision on incorporation of respect for the rights of individuals, local and indigenous communities over genetic resources and associated knowledge, which they traditionally hold or have played a key role in developing. States are expected, for example, to ensure such groups are involved in consent processes and benefit-sharing negotiations.[57]

However, the duty to preserve and sustain resources does not imply that resources are a common heritage for all; rather, resources are the property of the states.[58] Additionally, by virtue that distributive justice entails how individuals and communities distribute benefits and burdens in a just or moral manner, most States give the reason that there is need to guarantee access to human biological materials for the sole purpose of biotechnology development in their countries. There is a widespread recognition that biotechnology development creates technological presuppositions of a new

[55] Ibid.
[56] Rhodes, n. 53.
[57] Ibid.
[58] Ibid.

possibility of justice: the just distribution of both social (for example, income, wealth) and natural (for example, rationality, intelligence) common goods.[59] Through distributive justice, all individuals will have access to the outcomes of medicine development as a result of human genomics research. For this reason, the government is mandated to provide biotechnology development.

3.1.4 Open access

Open access models may retain the basic *Moore* framework; however, they also emphasise the importance of, at least, allowing for open, unrestricted access to data generated by research that has used donated DNA.[60] The broad sharing of data generated by genomic research through open access has maximised the utility of the data and public benefit through the creation of a culture of openness in genomic research.[61] Initially, protecting participants' privacy when human genomic material was shared in open access, solely rested on 'de-identification' of the data by stripping them of all recognisable annotation before sharing.[62] Currently, however, data sharing policies require researchers to obtain approvals from their institutions before sharing genomic data through open access. Additionally, guidance is provided by institutions to ensure compliance and the adequacy of informed consent documents.

Understandably, each successive policy decision to further restrict access to genomic data has received some pushback, with critics arguing that each was an overreaction and would unnecessarily impede science.[63] Nonetheless, limiting access to increasing amounts of data continues to be the primary

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[59] Rawls J. *A Theory of Justice.* Oxford: Oxford University Press; 1971. *https://www.taylorfrancis.com/chapters/edit/10.4324/9780203495667-33/theory-justice-john-rawls*> accessed 19 July 2022.

[60] Rhodes C 'Potential International Approaches to Ownership/Control of Human Genetic Resources' (2016) 24 Health Care Analysis 260 <*https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4987399/*> accessed 19 July 2022.

[61] Pereira S, Gibbs RA, McGuire AL. Open access data sharing in genomic research (2014) Genes (Basel) 5(3):739-47. doi: 10.3390/genes5030739. PMID: 25178093; PMCID: PMC4198928.

[62] Ibid.

[63] Ibid.

policy response to mounting privacy concerns. Arguments against restricted access and for more open data-sharing policies must balance the social and scientific benefits of unrestricted access to and the use of data, with adequate protection of the rights and interests of individuals who contribute biological specimens and information to research. The almost exclusive focus on restricting access to genomic data as a matter of policy, however, impedes research and fails to respect the autonomy of those who choose to share their information openly. It has been observed that data in controlled access databases are used less frequently than data in open access databases, and as Rodriguez et al[64] remind us, researchers and other custodians have an ethical responsibility not only to minimise the risk of harm to participants, but also to maximise the utility of generated data.

Regardless of mechanism, if genomic data are made publicly available, then the individuals from whom those data originate ought to be protected against the misuse of that information.[65] One way of providing some protection for these participants could be the use of 'click-through' data use agreements. In this model, the person accessing the data would have to read and agree to a list of conditions of use of the data, including agreeing to not attempt to identify the individuals from whom the data were sourced. However, while this may require those accessing the data to recognise that attempting identification would be a violation of the use of the data, such click-through data-use agreements are not enforceable and, as such, may not provide adequate protection.[66]

3.2 Free market models

Free market models can be discussed under two subcategories: market inalienability and hybrid market models. The two are discussed separately below.

[64] Rodriguez L.L., Brooks, L.D., Greenberg J.H., Green, E.D. The complexities of genomic identifiability (2013) 339 Science 275–276.
[65] Ibid.
[66] Gilbert N. Researchers criticize genetic data restrictions <http://www.nature.com/news/2008/080904/full/news.2008.1083.html> accessed 21 July 2022.

3.2.1 Market inalienability

In this section, I discuss inalienability rules, personhood property and market inalienability concepts.

3.2.1.1 Inalienability rules

Generally, the proponents of inalienability rules and market inalienability try to provide clarity on why human body parts and/or human biological material may be excluded from being traded freely in markets like other commodities. The idea of inalienability rules was first introduced by Calabresi and Melamed who offered a framework of property rules, liability rules, and inalienability rules.[67] Calabresi and Melamed contended that the state had the responsibility to decide whom to entitle, how to protect the entitlement, and whether selling or trading the entitlement is allowed.[68] In doing so, property rules, liability rules and inalienability rules may be applicable.[69] First, property rules, give rise to the least amount of state intervention since 'someone who wishes to remove the entitlement from its holder must *buy* it from him in a *voluntary transaction* in which the value of the entitlement is agreed upon by the *seller*' (my emphasis). Property rules therefore sanction the parties themselves to enter into voluntary transaction and to agree on the value of an entitlement without the interference of third parties, as is the case in commodities capable of being freely traded in markets.

Secondly, liability rules require some level of state intervention in that '[w]henever someone may destroy the initial entitlement if he is willing to pay an objectively determined value for it … This value may be what it is thought the original owner of the entitlement would have sold it for.' Therefore, under liability rules, 'not only are entitlements protected, but their transfer or destruction is allowed on the basis of a value determined by some

[67] Guido Calabresi & A. Douglas Melamed 'Property Rules, Liability Rules, and Inalienability: One View of the Cathedral' (1972) 85 Harv L Rev 1089.
[68] Ibid, 1049.
[69] Ibid, 1093. The authors for example note that in some goods these entitlements may be mixed: 'Taney's house may be protected by a property rule in situations where Marshall wishes to purchase it, by a liability rule where the government decides to take it by eminent domain, and by a rule of inalienability in situations where Taney is drunk or incompetent.'

organ of the state rather than by the parties themselves.' In liability rules, free trade is not sanctioned because the value of an entitlement is not decided between the parties themselves – but by a third party.

Lastly, inalienability rules require the greatest intervention by the state in that '[a]n entitlement is inalienable to the extent that its transfer is not permitted between a willing buyer and a willing seller'. [70] Under inalienability rules, '[t]he state intervenes not only to determine who is initially entitled and to determine the compensation that must be paid if the entitlement is taken or destroyed, but also to forbid its sale under some or all circumstances.'[71] Unlike the first two rules, it appears that inalienability rules are more intrusive in that the parties' freedom is strictly curtailed.
To sum up on the rules, Calabresi and Melamed state:[72]

Whenever society chooses an initial entitlement it must also determine whether to protect the entitlement by property rules, by liability rules, or by rules of inalienability. In our framework, much of what is generally called private property can be viewed as an entitlement which is protected by a property rule. No one can take the entitlement to private property from the holder unless the holder sells it willingly and at the price at which he subjectively values the property. Yet a nuisance with sufficient public utility to avoid injunction has, in effect, the right to take property with compensation. In such a circumstance the entitlement to the property is protected only by what we call a liability rule: an external, objective standard of value is used to facilitate the transfer of the entitlement from the holder to the nuisance. Finally, in some instances we will not allow the sale of the property at all, that is, we will occasionally make the entitlement inalienable.

It appears from the above that inalienability rules may prevent transactions in certain things in that no subjective or objective standard of value may be set for its transfer. Accordingly, inalienability rules often arise as a result of

[70] Ibid, 1092.
[71] Ibid, 1092-1093.
[72] Ibid, 1105-1106.

certain external costs, which may 'not lend themselves to collective measurement which is acceptable and nonarbitrary'.[73]

3.2.1.2 Property and personhood

Calabresi and Melamed's work influenced many other property rights scholars at various levels. In relation to inalienability rules, Radin relied on this framework to develop a market inalienability framework. Before delving into this concept of market inalienability, Radin's work on property and personhood appears to have set the stage for its development. Accordingly, the author contended that 'to achieve proper self-development – to be a person – an individual needs some control over resources in the external environment' and that 'the necessary assurances of control take the form of property rights'.[74] The author categorised property as personal and fungible – the former allows a thing to be bound up with a person in some constitutive sense, and the latter allows property to be held purely instrumentally.[75] Since personal property is important – the author argues that broad liberty with respect to control should be afforded.[76] In applying the idea of personal property, the author noted that 'on the embodiment theory of personhood, the body is quintessentially personal property because it is literally constitutive of one's personhood'.[77] She however noted that the body may present some interesting paradoxes because some body parts can be fungible if they are removed from the body or separated. She posits:

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[73] Ibid, 1111-1112. The example provided by the authors illustrates the point made regarding moralism as an external cost: 'If Taney is allowed to sell himself into slavery, or to take undue risks of becoming penniless, or to sell a kidney, Marshall may be harmed, simply because Marshall is a sensitive man who is made unhappy by seeing slaves, paupers, or persons who die because they have sold a kidney. Again Marshall could pay Taney not to sell his freedom to Chase the slave owner; but again, because Marshall is not one but many individuals, freeloader and information costs make such transactions practically impossible. Again, it might seem that the state could intervene by objectively valuing the external cost to Marshall and requiring Chase to pay that cost. But since the external cost to Marshall does not lend itself to an acceptable objective measurement, such liability rules are not appropriate.'

[74] Margaret Jane Radin 'Property and Personhood' (1982) 34 Stan L Rev 957.

[75] Ibid, 960.

[76] Ibid.

[77] Ibid, 966.

In some cases, bodily parts can become fungible commodities, just as other personal property can become fungible with a change in its relationship with the owner: Blood can be withdrawn and used in a transfusion; hair can be cut off and used by a wigmaker; organs can be transplanted. On the other hand, bodily parts may be too "personal" to be property at all. We have an intuition that property necessarily refers to something in the outside world, separate from oneself. Though the general idea of property for personhood means that the boundary between person and thing cannot be a bright line, still the idea of property seems to require some perceptible boundary, at least insofar as property requires the notion of thing, and the notion of thing requires separation from self. This intuition makes it seem appropriate to call parts of the body property only after they have been removed from the system.

According to the above quotation, if a body part is removed from the body or is separated from its owner it may lose personhood status and become fungible as opposed to personal property because it acquires the status of a 'thing'. This idea is not consistent with Radin's initial position that one can have personal property over a thing, like a house or a ring. I do not believe the criteria should be removal or separation from a body, but perhaps the idea of something being bound with a person in some constitutive sense is more plausible. Notwithstanding the above concern, the idea of personal and fungible property is important, because it 'depends partly on the subjective nature of the relationships between person and thing'. [78] This then presupposes an obligation on the state to apply inalienability rules to such entitlements. One such obligation is market inalienability, which is also a subject of Radin's work.

3.2.1.3 Market inalienability

Radin's work on market inalienability is relevant when one considers property rights and human biological material. Even though the discussion appears to focus on human body parts, the same can be applied to human biological material. Radin developed the 'non-salability' idea that was

[78] Ibid, 966. According to Radin, '[m]any relationships between persons and things will fall somewhere in the middle of this continuum. Perhaps the entrepreneur factory owner has ownership of a particular factory and its machines bound up with her being to some degree.'

introduced by Calabresi and Melamed in their work discussed earlier in relation to state intervention under inalienability rules.[79] Accordingly, Radin introduces the idea of market inalienability as a species of inalienability rules. She posits: '[s]omething that is market inalienable is not to be sold, which in our economic system means it is not to be traded in the market'.[80]

She in particular gives an example of blood and babies and notes that controversy persists about whether they can be bought and sold.[81] According to Radin, market-inalienability precludes sales but not gifts and to this extent it places some things outside the market place (for selling) but not outside the realm of social intercourse (gifting). [82] Therefore, '[u]nlike the inalienabilities attaching to welfare entitlements or political duties, market-inalienability does not render something inseparable from the person, but rather specifies that market trading may not be used as a social mechanism of separation.'[83] What the author seems to be alluding to is that there are some things that may not be traded in the market whatsoever, either through buying or selling, but they can be given freely through donations using other avenues. As also alluded to by Thorne, in the United States trade in elephant tusks and endangered species is banned altogether but the market 'in children, sexual favors, and human organs are characterized by a desire that supply flourish, but strictly on a donative, non-commercial basis'.[84] This understanding is important, for instance when one considers altruistic donations. In this regard, Radin argues that '[m]arket-inalienability posits a nonmarket realm that appropriately coexists with a market realm, and this implicitly grants some legitimacy to market transactions, contrary to the noncommodifier's premise'. [85] Thorne also notes that market-inalienable

[79] Margaret Jane Radin 'Market-Inalienability' (1987) 100 Harv L Rev 1849.
[80] Ibid, 1850.
[81] Ibid.
[82] Ibid, 1853.
[83] Ibid, 1854.
[84] Emanuel D. Thorne 'When Private Parts Are Made Public Goods: The Economics of Market-Inalienability' (1998) 15 Yale J on Reg 150.
[85] Margaret Jane Radin 'Market-Inalienability' (1987) 100 Harv L Rev 1875.

goods are not capable of being sold in markets but they can donate such goods freely to any recipient of their choice.[86]

Perhaps Thorne's work, apart from defending Radin's concept of market inalienability, is more important in terms of the idea of exhortation, which he observes is:

the non-price efforts used to secure market-inalienable goods and services. Exhortation includes efforts to inform and persuade all participants in the donative system who cannot be paid for what they supply. In the case of organs, exhortation includes efforts by procurement organizations to get next-of-kin to donate organs, and also efforts directed at physicians and hospital staff to identify, without remuneration, potential donors. In fact, exhortation is often used to secure what can be neither bought nor commanded, such as loyalty, friendship, devotion, and even love.[87]

Thorne further notes that the motivation of donors in terms of responding to exhortation may include 'a sense of duty, responsibility, love, and other psychological rewards'. [88] Accordingly, Thorne argues that when one engages in exhortation, you are supplying information as a procurer, and the number of organs available in a situation where there is a market ban will depend on the level of effort expended on exhortation.[89] Thorne further notes that one can enlarge the supply of market-inalienable goods because fundamentally they are 'like common property, such that exhorting donations of market-inalienable goods is analogous to fishing in common property waters'.[90] Thorne posits as follows:

Because a market-inalienable good (and its economic value) will belong not to the owner but to the party to whom the good is donated, the good appears as common property from the perspective of those who want it. Someone

[86] Emanuel D. Thorne 'When Private Parts Are Made Public Goods: The Economics of Market-Inalienability' (1998) 15 Yale J on Reg 164.
[87] Emanuel D. Thorne 'When Private Parts Are Made Public Goods: The Economics of Market-Inalienability' (1998) 15 Yale J on Reg 157.
[88] Ibid.
[89] Ibid, 159.
[90] Ibid, 163.

who wants the market-inalienable good will engage in activities to obtain it that are remarkably similar to the activities of someone "fishing" in common property waters. A fisherman will invest his labor and capital to catch a fish by dangling a worm before it. If the fisherman is successful, the fish itself is free to him even though the fishing effort may have been costly.[91]

The point Thorne was trying to make here is that because something is market-inalienable does not mean that its supply will be affected. In fact, Thorne argues that the supply will depend on the level of exhortation employed which may be costly – but the reward is getting the goods for 'free'.[92]

Suffice to say, the United States and many other countries have historically applied this approach in their donation model for research participation, as confirmed by the *Moore* decision.[93] According to Jefferson, 'the Moore model is predicated on the furtherance of economic rationale – such as incentivization of innovation – rather than on public or collective rights.'[94]

3.2.2 Hybrid market models

Several models propose a hybrid approach. These models appear to negotiate a middle ground between donative models and a free market for human biological material. Three models developed by Gitter, Harrison and Quigley stand out:

3.2.2.1 Gitter's model

Richard Posner is the key proponent of universal commodification and in his work has argued for the commodification of everything – including babies and sex. Apart from the authors who support market inalienability, some authors such as Gitter advocate trading of human biological material in the market. According to her, 'proponents of the market-inalienability model overestimate the negative impact that recognition of the property rights of

[91] Ibid, 164.
[92] Ibid.
[93] David J. Jefferson 'Biosociality, Reimagined: A Global Distributive Justice Framework for Ownership of Human Genetic Material' (2015) 14 Chi-Kent J Intell Prop 357, 365.
[94] Ibid, 366.

human research participants would have on biomedical research. In addition, they fail to consider fully that research participants contribute considerable value to the research process, and therefore merit compensation.'[95] She also believes that those who are opposed to recognising property interest in human tissues still wrongly believe that they are not yet commodified, since currently biotech stakeholders and researchers are profiting from the process.[96] Gitter also notes that price tags are not the only measure of the worth of human biological material.[97] She argues that setting a price might actually enhance the dignity of the human tissue in some cases.[98] In this regard, Gitter posits: '[I]f property is viewed more accurately, in terms of control over one's body, these criticisms [regarding commodification of the human body] may be inapt. If property confers exclusive control to people over their own bodies, then their dignity is enhanced, not diminished.'[99] Consequently, her proposal to Congress is:

Congress implement a hybrid property rights/liability model that: (1) recognizes that individuals possess 'property rights in their tissue and therefore have the right to exchange it for valuable consideration, or to waive such rights if they prefer to make a gratuitous donation; 371 and (2) permits individual research participants to maintain an action for conversion of their tissue in the event that: (a) they were not informed that researchers were using their tissue for commercial purposes; or (b) they did enter into an agreement regarding the use of the tissue that is voidable under the doctrines of fraud, duress, undue influence, or mutual mistake.[100]

Gitter appears to favour both property rules and liability rules in different contexts. She provides a guidance to Congress as follows:

[95] Donna M. Gitter 'Ownership of Human Tissue: A Proposal for Federal Recognition of Human Research Participants' Property Rights in their Biological Material' (2004) 61 Wash & Lee L Rev 294.
[96] Ibid, 300.
[97] Ibid, 302.
[98] Ibid, 303.
[99] Ibid.
[100] Ibid, 339.

In light of the fact that a market in human tissue already exists, this Article advocates congressional enactment of a hybrid approach to property rights in human tissue. The law should entitle plaintiffs to invoke a property rule where they negotiated in advance for rights in their tissue and, when necessary, to invoke a liability rule in the form of an action for conversion when researchers withheld from them vital information that would have facilitated their ability to bargain for such rights.[101]

3.2.2.2 Harrison's model

There are also authors who reject both market inalienability and property rights for human biological material. One such author is Harrison, who notes that '[t]he creation of a market in human tissue, which appears to follow inevitably from a private property model, would entail its own formidable ethical and practical problems. Neither the Moore-based donation paradigm nor the market-based alternative is sufficiently satisfactory to quiet professional and social concerns.'[102] According to Harrison, '[i]n particular, it is time to consider alternatives that represent a middle course between regimes of donation and private property. One such alternative would take a hybrid approach: maintain a general rule of donation for research tissue at the time it is acquired and provide an objective, non-market mechanism for compensation after research use for unusual cases in which samples prove to have significant commercial utility.'[103] Interestingly, Harrison argues that payment for tissue samples for research can be justified because '[i]n our present society, however, people can freely exploit their natural beauty, talent or scientific genius, and can even be paid for material contributions to a blood or sperm bank for purposes other than research. Unless current conditions change, an argument based on equality cannot justify denying payment to contributors of tissue samples for research.'[104] She further notes that the current system of donation of tissues and commercialisation of use relies on public ignorance and as such 'the system has come under criticism for failing to respect the dignity and autonomy of contributors'.[105] The

[101] Ibid, 345.
[102] Charlotte H. Harrison 'Neither Moore Nor the Market: Alternative Models for Compensating Contributors of Human Tissue' (2002) 28 Am JL & Med 78.
[103] Ibid.
[104] Ibid, 82.
[105] Ibid, 84.

argument of price as an enhancer of dignity was also alluded to by Gitter, as discussed above. Harrison therefore suggests a balanced solution:

A more balanced solution would seek efficiencies through appropriately timed non-market mechanisms for assessing value and transferring compensation to contributors of human tissue. Both contributor and corporate interests could be served if values were determined according to predictable standards, after the commercial usefulness of a given tissue sample had been demonstrated in research and development – and only for those relatively few samples demonstrating a certain level of utility. Standards for evaluating utility could be set through the political process and interpreted in particular circumstances by an administrative agency or tribunal … Researchers' rights to use a material would be settled once the contributor gave informed consent. Companies' rights of use, however, would be subject to an obligation to pay a reasonable share of profits to contributors of samples that met the requisite criteria.[106]

In relation to the worth of an individual, which is key to human dignity, Harrison notes that:

Replacing the direct market approach with a liability rule, which involves an arrangement for compensation to be determined at a later date and by a neutral third party, could address each of these concerns. If the possibility of receiving compensation were delayed and placed beyond the control of patients and their doctors or researchers, concerns about both professional relationships and individual injury or unfairness could be reduced substantially. Professionals and their patients or research participants would not have to argue over the "worth" of the body part. Further, the highly contingent nature of the financial reward should make it less powerful an incentive to have a sample removed under circumstances that might not be in a contributor's medical or privacy interest.[107]

[106] Ibid, 89.
[107] Ibid, 92.

3.2.2.3 Quigley's model

The proposal propounded by Harrison is not very different from the one made by Quigley. Quigley for instance notes that donation involves exercising the rights of 'use' and 'control', which are characteristics of property.[108] Accordingly, Quigley states that there is need to separate the 'power of control, which may include the power to transfer' from 'the right to derive income from such transfers'. Harrison's model appeared to have done that, in that it allowed for only conditional benefits from one's biological material at a later stage – once its use has been determined. Thus, Quigley defines a different characterisation of property which focuses on 'use' and 'control' as its defining features, and notes the following:

[w]hat is at issue when we engage in property discourse are these rights; that is, people's interests in using and controlling the uses and abuses of particular objects or resources; the full-blooded owner is "entirely free [subject to property independent prohibitions] to do what he will with his own, whether by use, abuse, or transfer".[109]

For Quigley, donations and gifting also qualify under this characterisation because:

the power to alienate one's property, that is, divest oneself in toto of all of one's rights with respect to a particular object, represents the ultimate disposition of those rights. Arguably this necessarily encompasses gifting, and as such donation, as an exercise of a person's power to transfer. Yet the alienability of one's property (rights) by transfer need not include market alienability.[110]

Accordingly, '[s]eparating the powers of control from the right to income allows us to admit property, without necessarily having to permit biomaterials, to be traded on the market (tout court)'.[111] In conclusion,

[108] Muireann Quigley 'Propertisation and Commercialisation: On Controlling the Uses of Human Biomaterials' (2014) 77 Mod L Rev 677.
[109] Ibid, 692.
[110] Ibid, 693.
[111] Ibid, 700.

Quigley observes that full ownership does not analytically demand the right to contract to the transfer of property in exchange for income or some other value in kind. If we are to oppose commercial activities relating to human biomaterials, it ought not to be on the basis that they are not the appropriate objects of property. We already engage in activities, such as tissue donation, which arguably rely on them being such.[112]

4. Why collective property rights in terms of state ownership of human biological material are desirable for Kenya

Obviously, Kenya like many other countries, does not apply market models to human body parts and it is doubtful that they would be amenable to apply the same to human biological material. In this regard, the realistic model that may be applicable in Kenya must first be that which does not sanction free markets in human biological material. In this regard, several options are available – including open access and human heritage. However, I believe the most attractive model is the state ownership model as developed by Jefferson.[113] In Africa, the key genomic research need is to advance biotech innovation. It is therefore important that any human biological material that is available should be made accessible to the private sector – to allow for ease of access. Restricting ownership to either an individual research participant or a private company may not be desirable since the material will become inaccessible. However, if the state retains ownership, the state can ensure that all stakeholders play a role in producing appropriate innovations, which can then be owned by those institutions, and then an appropriate framework for benefit sharing can be developed. Furthermore, I believe that given the need to respect the autonomy of the individual and the need to ensure that human biological material is not abused by both the state and the private sector, appropriate informed consent criteria should be developed and strictly enforced. In this manner, informed consent coupled with state ownership of human biological material should be able to facilitate genomic research in Kenya for the benefit of the country.

[112] Ibid, 702.
[113] David J. Jefferson 'Biosociality, Reimagined: A Global Distributive Justice Framework for Ownership of Human Genetic Material' (2015) 14 Chi-Kent J Intell Prop 357.

5. Conclusion

The issue of property rights over human biological material is indeed complex. In some Western jurisdictions, the approach has been to understand property rights from an individual point of view. In this regard, the market rhetoric has been emphasised in all the models discussed. However, there are also property rights models that are not focused on the market as a key node. In this paradigm, the emphasis has been on the common good or collective property rights. The role of the individual has been downplayed and there has been more emphasis on property rights. Such models, including open access, human heritage and state ownership are important – particularly in African states including Kenya. The state as an institution can assume property rights over human biological material collected in its jurisdiction and can ensure that the same is properly distributed to the private sector for research and innovation. The private sector may then claim ownership of data generated from such material and patent any innovations they come up with. The same data can then be made accessible to others since it is owned by the state and anyone can be licensed to use it – subject to satisfying all the applicable regulatory requirements. This is the best option for Kenya. It is best because it adds an additional layer of rights or property rights beyond the privacy and informed consent requirements. As Kapp notes, the current source of human biological material rights 'are concentrated in the initial informed consent process and the applicable privacy protections'.[114]

[114] Marshall B. Kapp 'A Legal Approach to the Use of Human Biological Materials for Research Purposes' (2013) 10 Rutgers J L & Pub Pol'y 1, 24.

Nurturing our Wetlands for Biodiversity Conservation

By: ***Kariuki Muigua****

Abstract

Wetlands have a vital role in not just delivering ecological services to meet human needs, but also in biodiversity conservation. Wetlands are vital habitat sites for many species and a source of water, both of which contribute to biodiversity protection. This paper examines the role of wetlands in biodiversity conservation and how these wetland resources might be managed to improve biodiversity conservation.

1. Introduction

Biodiversity conservation is frequently related with a biocentric perspective, in which all life on Earth has intrinsic value.[1] This paper is based on both ecocentric and anthropocentric reasons for taking care of wetlands, for purposes of meeting human needs as well as protecting biodiversity resources therein. This is because wetlands' ecological services are linked to an anthropocentric viewpoint in which biodiversity has instrumental value since it contributes to services that benefit human well-being.[2] Wetlands are split into two types: coastal/tidal and inland/non-tidal, and both provide essential habitat for a range of aquatic and terrestrial species.[3]

PhD in Law (Nrb), FCIArb (Chartered Arbitrator), LL. B (Hons) Nrb, LL.M (Environmental Law) Nrb; Dip. In Law (KSL); FCPS (K); Dip. In Arbitration (UK); MKIM; Mediator; Consultant: Lead expert EIA/EA NEMA; BSI ISO/IEC 27001:2005 ISMS Lead Auditor/ Implementer; Advocate of the High Court of Kenya; Senior Lecturer at the University of Nairobi, School of Law [December 2021].

[1] Reyers, B., Polasky, S., Tallis, H., Mooney, H.A. and Larigauderie, A., 'Finding Common Ground for Biodiversity and Ecosystem Services' (2012) 62 BioScience 503.

[2] Ibid.

[3] 'Wetland Conservation and Its Impact on Biodiversity' (Planet Forward) *<https://www.planetforward.org/idea/wetland-conservation-biodiversity>* accessed 28 December 2021.

The United Nations Charter for Nature (1982) promotes an ecocentric approach to biodiversity protection, stating that "every form of life is unique, deserving of respect regardless of its value to man....In accordance with national legislation, all persons shall have the opportunity to participate, individually or in groups, in the formulation of decisions directly affecting their environment, and shall have access to measures of redress if their environment has been damaged or degraded."[4] This paper adopts both ecocentric and anthropocentric reasons for nurturing our wetlands as a step towards biodiversity conservation and this is justified by the notion that 'where mutually beneficial relationships between biodiversity and ecosystem services exist (win–win), there will be much larger and more powerful sets of potential partners in conservation'.[5]

This page provides a crucial argument on the link between nurturing wetlands resources and supporting successful biodiversity conservation as a means of guaranteeing the future, both for humans and all other living things that inhabit wetlands.

2. Wetlands, Biodiversity Conservation and Sustainable Development Agenda

Wetlands play an important role in hydrological and biogeochemical cycles because they provide a wide range of ecosystem goods and services to humans, including the ability to retain water during the dry season and keep the water table high and moderately stable, the ability to regulate a microclimate, and many ecosystem services that are critical to reducing community vulnerability to climate change and extreme weather events in particular.[6] As a result, they serve a key ecological function that is essential

[4] UN General Assembly, *World Charter for Nature.*, 28 October 1982, A/RES/37/7, Preamble; Principle 23.

[5] Reyers, B., Polasky, S., Tallis, H., Mooney, H.A. and Larigauderie, A., 'Finding Common Ground for Biodiversity and Ecosystem Services' (2012) 62 BioScience 503.

[6] Dinsa TT and Gemeda DO, 'The Role of Wetlands for Climate Change Mitigation and Biodiversity Conservation' (2019) 23 Journal of Applied Sciences and Environmental Management 1297, at 1297; see also 'Wetland Conservation and Its Impact on Biodiversity' (Planet Forward) *<https://www.planetforward.org/idea/wetland-conservation-biodiversity>* accessed 28 December 2021.

for biological survival and human development.[7] They also offer a wide range of leisure activities, including fishing, hunting, photography, and animal observation.[8]

The *Convention on Wetlands of International Importance especially as Waterfowl Habitat*[9] (Ramsar Convention on Wetlands) acknowledges the fundamental ecological functions of wetlands as regulators of water regimes and as habitats supporting a characteristic flora and fauna, especially waterfowl in its preamble.

Biodiversity is an important part of the efforts towards achieving Sustainable Development agenda as it is the source of all life and all raw materials required to meet human needs. Any efforts to secure human life for both the present and future generations must, therefore, include conservation of biodiversity as a matter of necessity. Conserving Biodiversity for a Better Future is thus an idea that we must deeply reflect on as a matter of urgency.

Apart from the moral and legal grounds for respect for human rights in conservation efforts, it has been opined that practically, conservation will often be more effective if people's rights are respected and fulfilled: Local people who benefit from conservation and who are better able to meet their needs and achieve their development objectives are more likely to change any behaviour that may damage the environment through overexploitation; local and indigenous people often have knowledge, skills and organisational capacities that are useful and relevant in resource management; people are more likely to follow resource management agreements and rules if they have had input into these agreements. Participation in decision-making makes it more likely that the agreements will meet their needs and will reflect

[7] Ibid.
[8] 'Why Are Wetlands Important? - Wetlands (U.S. National Park Service)' <*https://www.nps.gov/subjects/wetlands/why.htm*> accessed 30 December 2021.
[9] United Nations, *Convention on Wetlands of International Importance especially as Waterfowl Habitat*, Ramsar, Iran, 2.2.1971 as amended by the Protocol of 3.12.1982 and the Amendments of 28.5.1987.

what is achievable.[10] It is imperative that all stakeholders join hands in conservation of biodiversity.

It is also important to point out that in addition to mitigation, biodiversity and ecosystem services play an important role in adapting to the impacts of climate change, and reducing the risk of climate-related and non-climate-related disasters.[11]

Unless challenges threatening wetlands and biodiversity resources within these wetlands are addressed, the dream of achieving sustainable development goals will remain a mirage.

3. Threats to Wetlands Conservation

Human development, urbanization, and poor management have all been blamed for the disappearance of wetlands.[12] Due to changes in land-use patterns, such as conversion of wetlands into farmlands, human settlements, urban centers, and infrastructure development, it is estimated that the area of wetlands has decreased by more than half since 1900.[13]

These are exacerbated by current challenges to biodiversity protection, such as habitat loss and degradation, climate change, chemical and biochemical pollution, logging and poaching, invasive species, illness, and the loss of plant pollinators, among others.[14] That wetlands in Kenya also suffer from

[10] BirdLife International, International B, 'An Introduction to Conservation and Human Rights for BirdLife Partners', 11.
[11] OECD (2019), *Biodiversity: Finance and the Economic and Business Case for Action*, report prepared for the G7
Environment Ministers' Meeting, 5-6 May 2019, 31.
[12] 'Wetland Conservation and Its Impact on Biodiversity' (Planet Forward) *<https://www.planetforward.org/idea/wetland-conservation-biodiversity>*
accessed 28 December 2021.
[13] Mwangi B, "Threats of Land Use Changes on Wetland and Water Areas of Murang'a County, Kenya." *Applied Ecology and Environmental Sciences*, vol. 9, no. 6 (2021): 585-590. doi: 10.12691/aees-9-6-2.
[14] Ralf C Buckley, 'Grand Challenges in Conservation Research' (2015) 3 Frontiers in Ecology and Evolution 128
<https://www.frontiersin.org/article/10.3389/fevo.2015.00128>
accessed 28 December 2021.

over-exploitation of their natural resources is one major threat. Others are encroachment, habitat degradation and biodiversity loss.[15]

It has been contended that because wetlands produce a wide range of plant, animal, and mineral products that are used and valued by people all over the world, whether in local, rural communities or far-off cities in foreign countries, wetlands have attracted significant portions of human populations who survive by exploiting their resources through various resource utilization activities, often driven by economic and financial considerations. Such reliance on natural resource exploitation for survival always puts the resources in jeopardy, especially if the value of the resources is unknown or undervalued by the stakeholders.[16]

4. Looking into the Future: Nurturing Wetlands and Biodiversity Conservation

Wetlands are ecologically diverse and highly productive ecosystems that improve water quality, regulate erosion, sustain stream flows, store carbon, and offer habitat for at least one-third of all threatened and endangered species.[17] Kenyan wetlands are believed to cover up to 4% of the entire landmass, approximately 14,000 km^2 of the land surface, with a peak of roughly 6% during the rainy season.[18]

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[15] 'Wetlands and Biodiversity – Nature Kenya' <*https://naturekenya.org/2020/01/29/wetlands-and-biodiversity/*> accessed 30 December 2021.

[16] Oduor FO, Raburu PO and Mwakubo S, "To conserve or convert wetlands: evidence from Nyando wetlands, Kenya." *Journal of Development and Agricultural Economics* 7, no. 2 (2015): 48-54, at 48-49.

[17] 'Why Are Wetlands Important? - Wetlands (U.S. National Park Service)' <*https://www.nps.gov/subjects/wetlands/why.htm*> accessed 30 December 2021.

[18] Mwangi B, "Threats of Land Use Changes on Wetland and Water Areas of Murang'a County, Kenya." *Applied Ecology and Environmental Sciences*, vol. 9, no. 6 (2021): 585-590, at 586. doi: 10.12691/aees-9-6-2; see also Francis O Oduor, Phillip O Raburu and Samuel Mwakubo, 'To Conserve or Convert Wetlands: Evidence from Nyando Wetlands, Kenya' (2015) 7 Journal of Development and Agricultural Economics 48, 48 <*https://academicjournals.org/journal/JDAE/article-abstract/82B41C449827*> accessed 30 December 2021.

The High Court correctly pointed out in *Mohamed Ali Baadi and others v Attorney General & 11 others [2018] eKLR* that access to information is a key pillar in our Constitution's environmental governance scheme because effective Public Participation in decision-making requires full, accurate, and up-to-date information.[19] With enhanced literacy levels, it is possible to carry out civic education regarding various challenges that arise from given projects and also for communities to fully appreciate the merits and demerits of certain projects and environmental resources, including wetlands, and also appreciate the compromises that they need to make, if any.[20] There is a need for a more active and meaningful involvement of communities living around wetlands to help them appreciate the importance of wetlands to both their livelihoods and biodiversity conservation. It has been suggested that in order to enhance effective public participation, the duty bearers should do the following: ensuring that as duty bearers (leaders) they are accessible to and represent citizens; ensuring existence of forums and opportunities for citizens to participate and engage in matters affecting their lives; providing civic education; developing effective communication channels with citizens; providing timely information to citizens on critical and emerging issues; and providing resources to facilitate public participation.[21]

In addition to the foregoing, the United Nations Environmental Assembly (UNEA) asserts that this development path should maintain, enhance and, where necessary, rebuild natural capital as a critical economic asset and source of public benefits, especially for poor people whose livelihoods and security depend strongly on nature.[22] There is no better way to apply this than in enhancing protection of wetlands.

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[19] *Mohamed Ali Baadi and others v Attorney General & 11 others [2018] eKLR*, Petition 22 of 2012.

[20] 'The Role of Civic Education' *<https://civiced.org/papers/articles_role.html>* accessed 24 July 2021.

[21] Uraia, 'What is Public Participation?' *https://uraia.or.ke/wp-content/uploads/2016/11/Citizen-Participation-BOOKLET.pdf* accessed 21 July 2021.

[22] 'What Is an "Inclusive Green Economy"? | UNEP - UN Environment Programme' *<https://www.unenvironment.org/explore-topics/green-economy/why-does-green-economy-matter/what-inclusive-green-economy>* accessed 24 December 2020.

It is proposed that, because management decisions have not adequately considered the economic importance wetland goods and services provide to local communities and the national economy, a valuation of wetlands goods and services would assist policymakers in making decisions regarding wetlands conservation and exploitation in the country.[23] Arguably, this would enhance the participation of these communities as they appreciate the actual benefits they can get from these wetlands.

SDG Goal 1 seeks to ensure that State Parties end poverty in all its forms everywhere by the year 2030.[24] "More than one billion people in the globe

[23] Oduor FO, Raburu PO and Mwakubo S, "To conserve or convert wetlands: evidence from Nyando wetlands, Kenya." *Journal of Development and Agricultural Economics* 7, no. 2 (2015): 48-54, at 49.

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

The related targets include:

> *1.1 By 2030, eradicate extreme poverty for all people everywhere, currently measured as people living on less than $1.25 a day.*
>
> *1.2 By 2030, reduce at least by half the proportion of men, women and children of all ages living in poverty in all its dimensions according to national definitions.*
>
> *1.3 Implement nationally appropriate social protection systems and measures for all, including floors, and by 2030 achieve substantial coverage of the poor and the vulnerable.*
>
> *1.4 By 2030, ensure that all men and women, in particular the poor and the vulnerable, have equal rights to economic resources, as well as access to basic services, ownership and control over land and other forms of property, inheritance, natural resources, appropriate new technology and financial services, including microfinance.*
>
> *1.5 By 2030, build the resilience of the poor and those in vulnerable situations and reduce their exposure and vulnerability to climate-related extreme events and other economic, social and environmental shocks and disasters.*

live in abject poverty on less than $1.25 a day," according to estimates, "while the richest 1% own nearly half of the world's wealth," implying "a huge gap and inequality in the distribution of the world economy."[25] Despite the fact that Africa as a continent is endowed with tremendous natural and human resources as well as great cultural, ecological, and economic diversity, high rates of poverty are more pronounced in developing countries, particularly on the African continent.[26] Some of the causes of poverty in Africa include, *inter alia*, population growth, war and crises, climate change,

> *1.A Ensure significant mobilization of resources from a variety of sources, including through enhanced development cooperation, in order to provide adequate and predictable means for developing countries, in particular least developed countries, to implement programmes and policies to end poverty in all its dimensions.*
>
> *1.B Create sound policy frameworks at the national, regional and international levels, based on pro-poor and gender-sensitive development strategies, to support accelerated investment in poverty eradication actions.*

[25] 'Poverty Is a Human Rights Violation | Apolitical' (17 June 2020) <*https://apolitical.co/en/solution_article/poverty-is-a-human-rights-violation*> accessed 24 December 2020.

[26] 'Poverty in Africa Is Now Falling—but Not Fast Enough' <*https://www.brookings.edu/blog/future-development/2019/03/28/poverty-in-africa-is-now-falling-but-not-fast-enough/*> accessed 25 December 2020; Chandy L, 'Why Is the Number of Poor People in Africa Increasing When Africa's Economies Are Growing?' (*Brookings*, 30 November 1AD) <*https://www.brookings.edu/blog/africa-in-focus/2015/05/04/why-is-the-number-of-poor-people-in-africa-increasing-when-africas-economies-are-growing/*> accessed 25 December 2020; 'On the Poorest Continent, the Plight of Children Is Dramatic' (*SOS-US-EN*) <*https://www.sos-usa.org/SpecialPages/Africa/Poverty-in-Africa*> accessed 25 December 2020; 'Poverty and Development in Africa' <*https://www.globalpolicy.org/social-and-economic-policy/poverty-and-development/poverty-and-development-in-africa.html*> accessed 25 December 2020; 'Poverty and Development in Africa' <*https://www.globalpolicy.org/social-and-economic-policy/poverty-and-development/poverty-and-development-in-africa.html*> accessed 25 December 2020; Muigua K, *Utilizing Africa's Natural Resources to Fight Poverty* (2014) <*http://kmco.co.ke/wp-content/uploads/2019/06/Utilizing-Africas-Natural-Resources-to-Fight-Poverty-26th-March2014.pdf*> accessed 25 December 2020.

illnesses, inadequate agricultural infrastructure, and unjust trade structures.[27] These need to be addressed as a step towards protecting wetlands as poverty arguably contributes to environmental degradation.[28]

To address biodiversity loss issues, all parties, including private actors, must work together to reduce actions that jeopardize the future of the planet. To that end, the *United Nations Guiding Principles on Business and Human Rights* were drafted and endorsed in recognition of: States' existing obligations to respect, protect, and fulfill human rights and fundamental freedoms; the role of business enterprises as specialized organs of society performing specialized functions, required to comply with all applicable laws and respect human rights; and the need for rights and obligations to be matched to appropriate and effective remedial measures.[29]

One way of ensuring that all human activities foster biodiversity conservation is introducing pricing of biodiversity and actively assessing biodiversity's contribution to economic growth. However, it has been pointed out that while establishing the value of biodiversity to economies is important, as it may partly help policymakers in all countries to appreciate that there is a cost to losing nature, at the same time, an economic assessment must take into account the perspectives of the humanities, of developing countries and of members of indigenous communities. [30] Notably, undervaluing the economic and societal values of biodiversity is believed to

[27] 'On the Poorest Continent, the Plight of Children Is Dramatic' (*SOS-US-EN*) <*https://www.sos-usa.org/SpecialPages/Africa/Poverty-in-Africa*> accessed 25 December 2020.

[28] See generally, Kanetasya Sabilla, 'Environmental Degradation and Poverty Nexus: Evidence from Coral Reef Destruction in Indonesia' (2017) 7 Journal of Indonesian Social Sciences and Humanities 81 <*http://jissh.journal.lipi.go.id/index.php/jissh/article/view/143*> accessed 30 December 2021; Zabala A and Sullivan CA, 'Multilevel Assessment of a Large-Scale Programme for Poverty Alleviation and Wetland Conservation: Lessons from South Africa' (2018) 61 Journal of Environmental Planning and Management 493.

[29] UN Guiding Principles on Business and Human Rights, Resolution 17/4, 16 June 2011.

[30] 'The Value of Biodiversity Is Not the Same as Its Price' (2019) 573 Nature 463; Costanza, R., d'Arge, R., De Groot, R., Farber, S., Grasso, M., Hannon, B., Limburg, K., Naeem, S., O'neill, R.V., Paruelo, J. and Raskin, R.G., 'The Value of the World's Ecosystem Services and Natural Capital' (1997) 387 Nature 253.

pose a threat to biodiversity and investment in conservation, and while the value of conventional natural resources such as forestry, fisheries, and wildlife is well appreciated the wider ecological services that biodiversity provides which include water catchments, a natural cleansing of the air, water and soils we pollute, carbon sequestration and, in developing economies such as Kenya, the biomass energy that fuels the lives of most Kenyans in the form of wood and charcoal, are seldom valued.[31]

The government should continue to establish effective systems of Strategic Environmental Assessment (SEA), Environmental Impact Assessment (EIA), Strategic Environmental and Social Assessment (SESA), Environmental Audit and Monitoring, and Environmental Security Assessment (ESA), and ensure that they are reviewed on a regular basis to ensure that they remain effective. Without extensive environmental evaluation processes, development initiatives targeting wetland areas should be avoided. There is a need to ensure that these EIA processes are not only formal but also reflective of what is happening on the ground, and that there is a follow-up mechanism in place to ensure that companies engage with communities throughout and continue to carry out their obligations in accordance with the law and assessment reports.[32]

Biodiversity Impact Assessment should be included in these impact assessment processes (BIA). BIA is a subset of EIA that entails finding,

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[31] Wakhungu, J.W., Waruingi, L., Agwanda, B., Awori, P., Isiche, J., Itela, S. and Njumbi, S., 'Towards a National Biodiversity Conservation Framework: Policy Implications of Proceedings of the International Conference on Biodiversity, Land-Use and Climate Change', 5.

[32] 'Chapter 3: EIA Process' <*http://www.fao.org/3/V8350E/v8350e06.htm*> accessed 24 July 2021; '1.7 Overview of the Stages of the EIA Process' <*https://www.soas.ac.uk/cedep-demos/000_P507_EA_K3736-Demo/unit1/page_14.htm*> accessed 24 July 2021; 'Our Role in Securing Public Participation in the Kenyan Legislative and Policy Reform Process' (*Natural Justice*, 23 July 2020) <*https://naturaljustice.org/our-role-in-securing-public-participation-in-the-kenyan-legislative-and-policy-reform-process/*> accessed 24 July 2021; 'Accountability, Transparency, Participation, and Inclusion: A New Development Consensus? - Carnegie Endowment for International Peace' <*https://carnegieendowment.org/2014/10/20/accountability-transparency-participation-and-inclusion-new-development-consensus-pub-56968*> accessed 24 July 2021.

measuring, quantifying, valuing, and internalizing the unintended consequences (on biodiversity) of development activities.[33] Arguably, EIA processes should entail BIA, and specifically, ecological impact assessment to the extent that ecological diversity is one aspect of biodiversity, in order to determine how and to what extent, development interventions and projects are affecting biodiversity — composition, structure and function.[34] While neither the Constitution of Kenya 2010 nor EMCA expressly mentions BIA, the same can be adopted in line with the provisions of Article 69 of the Constitution as well as sections 57A, 58, 62, and 112 on conservation of environmental resources, including biodiversity.

On a global level, the inclusion of BIA in EIA activities is also supported by Article 14 of the Convention on Biological Diversity, which states that each Contracting Party shall: (a) Introduce appropriate procedures requiring environmental impact assessment of its proposed projects that are likely to have significant adverse effects on biological diversity with a view to avoiding or minimizing such effects and, where appropriate, allow for public participation in such procedures; (b) Introduce appropriate arrangements to ensure that the environmental consequences of its programmes and policies that are likely to have significant adverse impacts on biological diversity are duly taken into account; (c) Promote, on the basis of reciprocity, notification, exchange of information and consultation on activities under their jurisdiction or control which are likely to significantly affect adversely the biological diversity of other States or areas beyond the limits of national jurisdiction, by encouraging the conclusion of bilateral, regional or multilateral arrangements, as appropriate; (d) In the case of imminent or grave danger or damage, originating under its jurisdiction or control, to biological diversity within the area under jurisdiction of other States or in areas beyond the limits of national jurisdiction, notify immediately the potentially affected States of such danger or damage, as well as initiate action to prevent or minimize such danger or damage; and (e) Promote national arrangements for emergency responses to activities or events, whether

[33] Wale E and Yalew A, 'On Biodiversity Impact Assessment: The Rationale, Conceptual Challenges and Implications for Future EIA' (2010) 28 Impact Assessment and Project Appraisal 3, 3.
[34] Ibid, 3.

caused naturally or otherwise, which present a grave and imminent danger to biological diversity and encourage international cooperation to supplement such national efforts and, where appropriate and agreed by the States or regional economic integration organizations concerned, to establish joint contingency plans.[35] The Conference of the Parties is to examine, on the basis of studies to be carried out, the issue of liability and redress, including restoration and compensation, for damage to biological diversity, except where such liability is a purely internal matter.[36]

It is, therefore, worth pointing out that Article 14 does not impose a direct obligation that is enforceable by other states to conduct EIAs before undertaking activities that pose risks to biological diversity.[37] This is also captured in *COP 8 Decision VIII/28, Impact Assessment: Voluntary Guidelines on Biodiversity-Inclusive Impact Assessment* which 'emphasizes that the voluntary guidelines on biodiversity-inclusive environmental impact assessment are intended to serve as guidance for Parties and other Governments, subject to their national legislation, and for regional authorities or international agencies, as appropriate, in the development and implementation of their impact assessment instruments and procedures'.[38]

It has been acknowledged that natural habitat loss and fragmentation, as a result of development projects, are major causes of biodiversity erosion, and while Environmental impact assessment (EIA) is the most commonly used site-specific planning tool that takes into account the effects of development projects on biodiversity by integrating potential impacts into the mitigation hierarchy of avoidance, reduction, and offset measures, the extent to which

[35] Article 14(1), Convention on biological Diversity; see also generally, Craik N, 'Biodiversity-Inclusive Impact Assessment', *Elgar Encyclopedia of Environmental Law* (Edward Elgar Publishing Limited 2017).
[36] Convention on biological Diversity, Article 14 (2).
[37] Craik N, 'Biodiversity-Inclusive Impact Assessment', *Elgar Encyclopedia of Environmental Law* (Edward Elgar Publishing Limited 2017), 2.
[38] Unit B, 'Impact assessment: Voluntary guidelines on biodiversity-inclusive impact assessment' <*https://www.cbd.int/decision/cop/?id=11042*> accessed 10 September 2021.

EIA fully address the identification of impacts and conservation stakes associated with biodiversity loss has been criticized as inadequate.[39]

The *COP 8 Decision VIII/28, Impact Assessment: Voluntary Guidelines on Biodiversity-Inclusive Impact Assessment* provides, *inter alia*, that the Conference of the Parties to the Convention on Biological Diversity:- notes that the Akwé: Kon Voluntary Guidelines for the Conduct of Cultural, Environmental and Social Impact Assessments regarding Developments Proposed to Take Place on, or which are Likely to Impact on, Sacred Sites and on Lands and Waters Traditionally Occupied or used by Indigenous and Local Communities (decision VII/16 F, annex) should be used in conjunction with the voluntary guidelines on biodiversity-inclusive environmental impact assessment contained in the annex below and the draft guidance on biodiversity-inclusive strategic environmental assessment contained in annex II to the note by the Executive Secretary on voluntary guidelines on biodiversity-inclusive impact assessment.[40]

The *Voluntary Guidelines On Biodiversity-Inclusive Environmental Impact Assessment* identifies some biodiversity issues at different stages of environmental impact assessment.[41] The guidelines identify different stages in this process: *Screening*- used to determine which proposals should be subject to EIA, to exclude those unlikely to have harmful environmental impacts and to indicate the level of assessment required. Screening criteria have to include biodiversity measures, or else there is a risk that proposals with potentially significant impacts on biodiversity will be screened out; *Scoping*: used to define the focus of the impact assessment study and to identify key issues, which should be studied in more detail. It is used to derive terms of reference (sometimes referred to as guidelines) for the EIA study and to set out the proposed approach and methodology. Scoping also enables the competent authority (or EIA professionals in countries where

[39] Bigard C, Pioch S and Thompson JD, 'The Inclusion of Biodiversity in Environmental Impact Assessment: Policy-Related Progress Limited by Gaps and Semantic Confusion' (2017) 200 Journal of environmental management 35, 35.
[40] Unit B, 'Impact assessment: Voluntary guidelines on biodiversity-inclusive impact assessment' <*https://www.cbd.int/decision/cop/?id=11042*> accessed 10 September 2021.
[41] Ibid.

scoping is voluntary) to: (a) Guide study teams on significant issues and alternatives to be assessed, clarify how they should be examined (methods of prediction and analysis, depth of analysis), and according to which guidelines and criteria; (b) Provide an opportunity for stakeholders to have their interests taken into account in the EIA; and (c) Ensure that the resulting Environmental Impact Statement is useful to the decision maker and is understandable to the public[42]; *Assessment and evaluation of impacts, and development of alternatives*; *Reporting: the environmental impact statement (EIS)*; *Review of the environmental impact statement*; *Decision-making;* and, *Monitoring, compliance, enforcement and environmental auditing*.[43]

COP 8 Decision suggests that, taking into account the three objectives of the Convention, fundamental questions which need to be answered in an EIA study include: (a) *Would the intended activity affect the biophysical environment directly or indirectly in such a manner or cause such biological changes that it will increase risks of extinction of genotypes, cultivars, varieties, populations of species, or the chance of loss of habitats or ecosystems*? (b) *Would the intended activity surpass the maximum sustainable yield, the carrying capacity of a habitat/ecosystem or the maximum allowable disturbance level of a resource, population, or ecosystem, taking into account the full spectrum of values of that resource, population or ecosystem*? And, (c) *Would the intended activity result in changes to the access to, and/or rights over biological resources*?[44]

It may be important for stakeholders in environmental law in Kenya to review the requirements and process of EIA in biodiversity rich areas to include BIA as envisaged under Article 69(1) of the Constitution of Kenya. Notably, effective impact assessments and management plans largely rely on a solid foundation of: a) Information on biodiversity (e.g., taxonomic descriptions of species, conservation status assessments of species, conservation status assessments of ecosystems, distribution maps of species and habitats at a scale that is appropriate for project planning, understanding of sensitivity to stressors); b) Understanding of direct, indirect, and where

[42] Ibid.
[43] Ibid.
[44] Ibid.

feasible, cumulative impacts (i.e., placing the project in the context of land/resource use trends to ascertain how it contributes to landscape-scale impacts); c) Identification of priorities for biodiversity conservation (e.g., existing and planned protected areas, National Biodiversity Strategies and Action Plans); and d) Demonstrated methods to manage impacts.[45]

Arguably, if development projects are to take into consideration biodiversity conservation, then it is the high time that stakeholders consider inclusion of BIA in EIA and ESIA activities in the country. Fostering Environmental Democracy in these processes will also be important as the impact assessment is not purely technical and it is good practice to consult project stakeholders in all steps of the process, especially in the identification of potential impacts at the outset of the assessment.[46] This is especially important because local stakeholders may have a greater appreciation than external technical experts of the biodiversity values in the area and their sensitivity to impacts.[47]

It is important for business and financial organisations to actively help achieve national biodiversity goals, the Convention on Biological Diversity (CBD) Aichi Biodiversity Targets and the SDGs, in close co-operation and co-ordination with policy makers and civil society as they also depend on biodiversity for the production of goods and services The profitability and long-term survival of a number of business sectors (such as agriculture and fisheries which depend directly on biodiversity and well-functioning ecosystems), and loss of biodiversity and ecosystem services can, therefore, result in higher costs and risks for business and financial organisations, and directly affect their performance.[48]

[45] Hardner, J., Gullison, R.E., Anstee, S. and Meyer, M., 'Good Practices for Biodiversity Inclusive Impact Assessment and Management Planning' [2015] Prepared for the Multilateral Financing Institutions Biodiversity Working Group, 4.
[46] Ibid, 7.
[47] Ibid, 6.
[48] OECD (2019), *Biodiversity: Finance and the Economic and Business Case for Action*, report prepared for the G7
Environment Ministers' Meeting, 5-6 May 2019, 35.

While it has been argued that since Africa's poverty problems run deep, it is only the long process of building democratic institutions and the civil society needed to make them work will bring meaningful development to Africa, where empowerment of local people will ensure long-term poverty reduction.[49]

It has rightly been pointed out that, ironically, indigenous and traditional communities – the very groups which have contributed least to the imminent threats of catastrophic anthropogenic climate change and biodiversity collapse, and whose practices are actually based on a sustainable bio-cultural paradigm – constitute most of those who are at greatest risk.[50] This is partly attributable to existing social and economic marginalization: globally the indigenous population, estimated at around 370 million, comprises 5 per cent of the world's population but 15 per cent of its poorest people, where climate change, colonialism and economic globalization have also left a legacy of other issues, such as environmental damage, land loss and lack of access to basic services, that have not only resulted in ill health and lower life expectancy but also devastated their complex cultural systems.[51]

Tackling the challenges that contribute to loss and deterioration of wetlands can go a long way in ensuring that these biodiversity rich areas are protected for the sake of both humans and other species that inhabit the wetlands.

5. Conclusion

Wetlands provide a variety of key ecosystem services, such as fresh water, nutrient cycling, food and fiber production, carbon fixation and storage, flood control and water storage, water treatment and purification, and biodiversity habitats, as mentioned in this paper.[52] It has rightly been pointed

[49] 'Development Requires Local Empowerment' <*https://archive.globalpolicy.org/socecon/develop/democracy/2006/0927localempowerment.htm*> accessed 21 July 2021.

[50] Havemann P, 'Lessons from Indigenous Knowledge and Culture: Learning to Live in Harmony with Nature in an Age of Ecocide' [2016] State of the World's Minorities and Indigenous Peoples, 49.

[51] Ibid, 49.

[52] Richard T Kingsford, Alberto Basset and Leland Jackson, 'Wetlands:

out that the world's biodiversity is dwindling, and it is becoming clear that freshwater habitats are deteriorating at a quicker rate than terrestrial and marine ecosystems.[53]

There is a need for active and meaningful involvement of communities in biodiversity conservation efforts especially within wetland areas because while activities that damage the environment, such as mining, industrial development or commercial logging, can deprive people of their livelihoods and cultural rights, it is also true that strict environmental protection which excludes people and deprives them of resources on which they are dependent, without providing viable alternatives, can affect people's right to a livelihood.[54]

Urgent measures that involve all stakeholders meaningfully need to be taken towards nurturing wetlands as a step towards conservation of biodiversity resources. Nurturing our Wetlands for Biodiversity Conservation is clearly the way to go.

Conservation's Poor Cousins' (2016) 26 Aquatic Conservation: Marine and Freshwater Ecosystems 892, 892 <*https://onlinelibrary.wiley.com/doi/abs/10.1002/aqc.2709*> accessed 28 December 2021.

[53] Richard T Kingsford, 'Conservation of Floodplain Wetlands – out of Sight, out of Mind?' (2015) 25 Aquatic Conservation: Marine and Freshwater Ecosystems 727, 727 <*https://onlinelibrary.wiley.com/doi/abs/10.1002/aqc.2610*> accessed 28 December 2021.

[54] Ibid, 5.

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'1.7 Overview of the Stages of the EIA Process' *<https://www.soas.ac.uk/cedep-demos/000_P507_EA_K3736-Demo/unit1/page_14.htm>* accessed 24 July 2021.

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'Chapter 3: EIA Process' *<http://www.fao.org/3/V8350E/v8350e06.htm>* accessed 24 July 2021.

'Development Requires Local Empowerment' *<https://archive.globalpolicy.org/socecon/develop/democracy/2006/0927localempowerment.htm>* accessed 21 July 2021.

'On the Poorest Continent, the Plight of Children Is Dramatic' (*SOS-US-EN*) *<https://www.sos-usa.org/SpecialPages/Africa/Poverty-in-Africa>* accessed 25 December 2020.

'Our Role in Securing Public Participation in the Kenyan Legislative and Policy Reform Process' (*Natural Justice*, 23 July 2020) *<https://naturaljustice.org/our-role-in-securing-public-participation-in-the-kenyan-legislative-and-policy-reform-process/>* accessed 24 July 2021.

'Poverty and Development in Africa' *<https://www.globalpolicy.org/social-and-economic-policy/poverty-and-development/poverty-and-development-in-africa.html>* accessed 25 December 2020.

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Investor-State Dispute Resolution in a Fast-Paced World

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Abstract

Although States have the right to territorial sovereignty, the world is increasingly becoming 'borderless'. As States continue to trade with each other and investors carry on investing in foreign jurisdictions, the world has become a global village. It follows that with these increased interactions and investment opportunities, disputes become inevitable. Often these disputes are either between States or States and Investors. As a result, a need is created for a robust, effective, and efficient mechanisms not only for the resolution of these disputes but also their prevention. It would appear as if this was the premise for making Investor-State Dispute Settlement (ISDS) a common feature of International Investment Agreements (IIAs). The existing and previous body of treaties, multilateral and bilateral investment agreements, and arbitral decisions provide extensive literature that is important in the examination and conceptualization of ISDS. Currently, developing states lead in being parties to ISD procedures particularly as respondents. It is noteworthy that this system is not fool proof. The object of this essay is to conceptualize and problematize investor-state disputes resolution in a fast-paced world.

1.0 Introduction

Foreign Investments have continued to increase exponentially throughout the past years. This increase stems from the continued attraction of foreign investors by various States. Generally, States with the highest number foreign investors are characterised by better investment protection mechanisms. There are various standards of investment protection. These

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standards include; the national treatment and most-favoured nation principle.[1] The national treatment dictates that the relevant state must accord the same treatment it would extend to its nationals to foreign investors[2], while the most favoured nation principle entails extending the same treatment given to investors of a contracting State to investors of non-party states.[3] Further, there are complimentary standards to the protection of investors which include prompt and adequate compensation for losses, fair and equal treatment, and protection against expropriation.[4] An investment is every asset that an investor owns or controls, either directly or indirectly, with the characteristic of an investment including the commitment of capital or other resources with the goal of making a profit or gain or assumption of risks.[5] On the other hand, an investor is defined by the German BIT as any natural person, juridical person within federal law meaning, or a commercial, company or association with or without legal capacity founded pursuant to federal law.[6] For the purposes of this exposition, this essay shall adopt the foregoing definitions of investments and investors within the US and German Models respectively.

Since the mid-1900s there have been several Bilateral Investment Treaties (BITs) and IIAs that have been entered into between states and between states and investors. The object of these agreements is to address a litany of issues that arise between the host countries and investors when trading in goods or services. As such, these BITs confer substantive obligation between the parties including the resolution of disputes through arbitration. Conventionally, disputes were brought by the States against other states, however most treaties allow investors to bring direct international

[1] Herdegen Matthias, *Principles of International Economic Law* (Second Edition, Oxford University Press 2016).
[2] US Model Bilateral Investment Treaty USTR 2012Article 1(3).
[3] *Ibid n1,* p393.
[4] Marvin Rowe, 'Fundamental Principles of Foreign Investment Protection' [2012] Fundamental Principles of Foreign Investment Protection Marvin Rowe *https://www.academia.edu/5088589/Fundamental_Principles_of_Foreign_Investment_Protection,* accessed 27 May 2022.
[5] US Model Bilateral Investment Treaty USTR 2012, Article 1.
[6] German Model Bilateral Investment Treaty 2008, Article 1.

investment claims against the host state.[7] Historically, developing states have continued to be the respondent in claims submitted for arbitration.[8] This is because developing countries enter contracts with foreign companies to foster development and to raise revenue through taxes as a result of structural adjustment programmes seeing as most developing countries[9] are riddled with debt. [10]

Against this background, developing states have continued to evaluate Investor-State Dispute Resolution provisions with the attempt to align them with the prevailing state policies and to increase their exercise control over the arbitration process. In contrast to this, some states have opted to remove themselves from ISDS.[11]

This essay is divided into two parts, with the first part seeking to conceptualise the nature of Investor-State Dispute settlement including the use of international arbitration as a mechanism for resolving these disputes. Further, this part shall outline the advantages and disadvantages for using international arbitration to resolve these disputes. The second part of this exposition shall evaluate the evolution of investor state dispute resolution including the process for the settlement of disputes under the International Centre for Settlement of Investment Disputes (ICSID) framework. Lastly, this essay shall proffer remedies to the shortcomings characterising Investor-State Disputes.

[7] 'Investor-State Dispute Settlement', UNCTAD Series on Issues in International Investment Agreements II (United Nations 2014) *<https://unctad.org/system/files/official-document/diaeia2013d2_en.pdf>* accessed 26 May 2022.
[8] *Ibid n7,* p19.
[9] Herdegen Matthias, Principles of International Economic Law (Second Edition, Oxford University Press 2016).
[10] York W Bradshaw and Jie Huang, 'Intensifying Global Dependency: Foreign Debt, Structural Adjustment, and Third World Underdevelopment' (1991) 32 The Sociological Quarterly 321.
[11] *Ibid n7.*

2.0 Conceptualising the Nature of Investor-State Disputes Settlement

Investor-State disputes under International Investment Agreements (IIAs) are unique from conventional international disputes. Owing to this uniqueness it follows that these disputes must be resolved by employing befitting mechanisms. Firstly, these disputes have as the defendant, a sovereign state. This is different from other forms of investment disputes which have business entities as the parties. Besides, the foreign investor will challenge the acts or measures taken by the state of one if its agents in their sovereign capacity hence the nature of the measures or acts being challenged remains idiosyncratic. Therefore, a dispute runs the risk of turning into a political issue both within the jurisdiction of the host state and international community. This is particularly so when the matter involves huge public funds. Currently, in Kenya here has been a lot of controversies surrounding the Mombasa port and the Standard Gauge Railway project contract which was signed between the Kenyan Government and Chinese contractors because of the heavy capital investment by the government.[12]

Moreover, the nature of remedy for the resolution of these disputes is specific and limited. This is contrary to the remedies available when solving an ordinary legal dispute. For investor-state disputes the available remedy is the international arbitration. It follows that, international arbitration has established itself as the main option for investors for dispute settlement in contemporary investment law. International arbitration is seen as a neutral way on resolving disputes between states and investors. It depoliticises disputes, it assures adjudicative independence, expeditious, flexible, and affordable. Besides, international arbitration guarantees the parties substantial control over the matter since they can choose their arbitrator and even the law which should govern the dispute resolution.[13]

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[12] Philip Munyanga, 'State Rejects Once Again Plea to Make SGR Contract Public' Business Daily (12 January 2022) <*https://www.businessdailyafrica.com/bd/news/state-rejects-once-again-plea-make-sgr-contract-public-3680312*> accessed 28 May 2022.

[13] 'Investor–State Disputes: Prevention and Alternatives to Arbitration' (United Nations 2010) <*https://unctad.org/system/files/official-document/diaeia200911_en.pdf*> accessed 26 May 2022.

Lastly, the relationship that exists between the parties is characterised by long-term engagement with mutual dependence. For example, the state may enter into a Bilateral Investment Treaty with a private foreign investor to provide public services or where the BIT involves an investment with high sunk costs where returns are only feasible after years. Therefore, the state and the investor will be obliged to maintain a functioning relationship despite the existence of a dispute. This relationship can only be preserved if the disputes are resolved amicably whilst preserving the relationship that exists. International arbitration offers an amicable way or resolving Investor-State Disputes without severing the relationship that exists between the parties.[14]

2.1 Evaluating the Efficacy of International Arbitration in Resolving ISD

Although international arbitration has found its place in international investment law as the preferred mechanism for resolving investor-state disputes, it has advantages and disadvantages. One of the advantages of international arbitration is that it allows the investor to have a neutral, independent and qualified arbitrator or tribunal to facilitate the resolution of the dispute. This has boosted investor confidence because previously the investor would seek redress form domestic courts which were accused of being biased and under the political influence of the host state.[15] Also, independence could be enhanced by picking an arbitration seat that is outside the host country. An arbitration seat means the law that the parties will use to determine the procedural framework for the arbitration.[16]

Secondly, arbitration allow the parties to exercise control over the dispute. Firstly, the parties have the authority to choose the arbitration tribunal or appoint arbitrators of their choice. Moreover, the parties can choose the seat

[14] *Ibid n13,* p12.
[15] 'Investor-State Dispute Settlement',, UNCTAD Series on Issues in International Investment Agreements II (United Nations 2014) <*https://unctad.org/system/files/official-document/diaeia2013d2_en.pdf*> accessed 26 May 2022.
[16] Prof Dr Klaus Peter Berger Cologne LL M, University of and Klaus Peter Berger, 'Principle XIII.3.3 - Seat of Arbitration' <*https://www.trans-lex.org/969040/_/seat-of-arbitration/*> accessed 28 May 2022.

of the arbitration and the venue for the arbitration.[17] This is different with litigation where the control of the case lies with the courts of law. Besides, through arbitration the matter is often settled expeditiously because it avoids the case backlogs that come with court litigation and the parties can determine how fast they want the matter to be resolved. By expediting the resolution of these cases, the parties can cut costs that result from the lengthy court process.

Lastly, international arbitration is considered more effective that other alternative forms of dispute resolution. This is primarily because arbitral awards are enforceable against the other party despite the public international law doctrine of inviolability of states. The ICISID and UNCITRAL arbitration rules and the New York have provided a mechanism that has guaranteed the enforcement of arbitration awards against the parties.[18] Besides, the anchoring of international arbitration in treaties, and recognition and enforcement of arbitral awards have given legitimacy to international arbitration as a mode of resolving disputes.

Despite these advantages, there are disadvantages that are associated with international arbitration. To begin with, the costs of for international arbitration have skyrocketed in the recent past. This is against the popular notion that arbitration is cost effective compared to litigation. These costs are not exclusively on the amount paid to the arbitrators but also the settlement amounts that the states must pay to honour the award. For instance, in *Plama Consortium v Bulgaria*,[19] the legal costs for the claimant amounted to $4.6 million while that of the respondent amounted to $13.2

[17] Sunday Fagebemi, 'The Doctrine Of Party Autonomy In International Commercial Arbitration: Myth Or Reality?' (2015) 6 <*file:///C:/Users/USER/Downloads/128033-Article%20Text-347306-1-10-20160113.pdf*> accessed 25 May 2022.
[18] 'INVESTOR-STATE DISPUTE SETTLEMENT',, UNCTAD Series on Issues in International Investment Agreements II (United Nations 2014) <*https://unctad.org/system/files/official-document/diaeia2013d2_en.pdf*> accessed 26 May 2022.
[19] ICSID Case No. ARB/03/24.

Million. It was worth noting that in the award, the claimant was directed to pay all the legal costs. [20]

There have been significant delays in the enforcement of arbitral awards. Generally, the parties delay the enforcement of arbitral awards under the guise of exhausting all the procedural mechanisms available for the setting aside of arbitral awards. It has been argued that exhausting these procedural possibilities for annulment may take up to four years.[21] For instance, the *Nyutu case*[22] was instituted in 2016 but was determined by the supreme court of Kenya in 2019. Therefore, the delay occasioned lasted for almost four years. It follows that the time used to litigate over commercial matters in courts is not different from the time taken in arbitration before the enforcement of the award.

Lastly, the goal of dispute resolution through arbitration has been to ensure compensation for damages arising from the violation of the treaty provisions and obligations. As this exposition has established before, the nature of BITs may sometimes require that the parties maintain a functioning relationship for the future. This is particularly so where the subject matter of the investment treaty is the provision of public services by a private foreign investor to the citizens of the host state. The danger with focusing on compensation is that it ignores the need for a room for the investor and host state to strike a deal including possible changes that will enhance disputes avoidance between the parties.[23]

3.0 The Evolution of Investor-State Dispute Resolution

Prior to the standardization of Investor-State Dispute resolution, investors had only two ways of enforcing obligations arising from Bilateral Investment Treaties. Firstly, the investor relied on the prevailing domestic judicial and administrative system. However, this was mired with challenges, a notable lack of judicial independence since the judiciary bowed to the political

[20] *Ibid n18.*
[21] *Ibid n18.*
[22] *Nyutu Agrovet Limited v Airtel Networks Kenya Limited; Chartered Institute of Arbitrators-Kenya Branch (Interested Party)* [2015] eKLR.
[23] *Ibid 18.*

influence of the host state and inviolability of the state under domestic laws.[24] Ergo, investors were unable to recover their losses against the host state. Secondly, in the event the domestic mechanisms were considered ineffective, the investor would rely on their home government to espouse the claim.[25] However, this is only as effective and efficient as the investor's home state is. For instance, if the home state is a 'powerful' State then the investor stood a better chance against the host state. On the contrary, for an investor coming from a less powerful country, which is the case for developing countries, obtaining espousal from the state proved difficult. It is essential to note that this system had challenges.[26] For example, by virtue of the home state taking up the claim, the investors control became diminished control over the claim, seeing as the claim would now belong to the state. Besides, for transnational corporations it may be difficult to establish the home state. These challenges stoked the fires calling for a neutral forum for the resolution of investor-state disputes. Consequently, the International Centre on Settlement of Investment Disputes (ICSID) was established pursuant to the ICSID convention.[27]

3.1 The International Centre for Settlement of Investment Disputes

The International Centre for Settlement of Investment Disputes (ICSID) is one of the five organizations under the World Bank Group. This institute was created by the 1965 Convention on the Settlement of Investment Disputes between States and Nationals of other States. Today, the centre is known for being a leader in Investor-State Arbitration. This object of this centre was to create and promote a predictable legal regime for the resolution of disputes

[24] *Ibid n7,* p23.
[25] J Reuben Clark, 'Diplomatic Protection of Citizens Abroad: Or the Law of International Claims. By Edwin M. Borchard. New York. The Banks Law Publishing Company. 1915. Pp. Xxxvii, 988.' (1916) 10 American Journal of International Law 182.
[26] *Ibid n7.*
[27] Convention on the Settlement of Investment Disputes between States and Nationals of Other States 1965

arising from foreign investments. Since its inception, the Convention has about 147 member states around the world.[28]

3.1.1 Appraising the ICSID Framework

ICSID was established to facilitate conflict avoidance, promote access to justice, and settle investment disputes. ICSID has the jurisdiction over the settlement of ISD where the contracting state and the host state or the host state and investor have consented in writing to arbitrate under the ICSID framework.[29] Consent is crucial as it gives ICSID exclusive jurisdiction of the arising matter. However, it is noteworthy that in some treaties, consent may be contingent on the exhaustion of local remedies.[30] Also, since states enjoy diplomatic immunity, this convention prohibits the invocation of diplomatic immunity when it comes to the enforcement of arbitral awards.[31] Moreover, this convention limits appeals that may rise from the arbitral awards under Article 53 which provides that;

> *"[t]he award shall be binding on the parties and shall not be subject to any appeal or to any other remedy except those provided for in this Convention. Each party shall abide by and comply with the terms of the award except to the extent that enforcement shall have been stayed pursuant to the relevant provisions of this Convention."*

The above provision bolsters the recognition of arbitral awards by states party to the ICSID convention. Through recognition the parties will be honour the obligations set out of the award; that is, it promotes compliance to the award. Therefore, the party states must enforce the arbitral awards as if they were the final determination by their courts of law.[32]

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[28] Sergio Puig, 'Recasting ICSID's Legitimacy Debate Towards a Goal-Based Empirical Agenda' (2013) 36 Fordham International Law Journal <*https://core.ac.uk/download/pdf/144232035.pdf*> accessed 27 May 2022.

[29] ICSID Convention 1995, Article 25 para 1.

[30] Convention on the Settlement of Investment Disputes between States and Nationals of Other States 1965, Article 26.

[31] Convention on the Settlement of Investment Disputes between States and Nationals of Other States 1965, Article 27(1). ICSID

[32] Convention on the Settlement of Investment Disputes between States and Nationals of Other States 1965, Article 51 Para 1.

The finality of arbitral award provides certainty to the process thus making it attractive for investors to enter into BITS because they are guaranteed resolution that is not only expedient but also final. It has been argued that allowing appeals to the highest level of the judicial system like the supreme risks arbitration being used as a springboard for litigation.[33] Also, appeals would increase the lag in the resolution of these disputes which is harmful to the reputation of the investors, their investments, and may lead to higher economic costs because of legal representation throughout the appeal process. However, the finality or arbitral awards has been criticised as a challenged to access to justice for the parties. African countries such as Kenya have been on the limelight for setting aside awards that have violated public policy.[34] It has been argued that public policy is an 'unruly horse' and that the function of deciding what is public policy is purely legislative and judicial function. Besides, defining the nature of public policy is problematic because of relativity; that is, Kenya's public policy are different to Tanzania's policy.

3.1.2 Efficacy of ICSID in Resolving ISD

Despite ICSID remaining to be the leading framework for the resolution of investment disputes, it has fallen on the axe of sharp criticisms by developing countries. The relationship between ICSID and developing countries remains strained. Consequently, developing countries such as India are not party to ICSID while countries such as Venezuela, Ecuador, and Bolivia have pulled out from the ICSID Convention. [35] India's refusal to join the ICSID Convention was informed by India's Council for Arbitration. This council believed that the convention favoured developed countries. Besides, there was no scope provided for reviewing the awards granted, seeing as Article 53 of this convention states that the arbitral award is final and not subject to

[33] Kariuki Muigua, 'Arbitration Law and the Right of Appeal in Kenya' (Social Science Research Network 2021) SSRN Scholarly Paper 3953985 <*https://papers.ssrn.com/abstract=3953985*> accessed 27 May 2022.
[34] *Nyutu Agrovet Limited v Airtel Networks Kenya Limited; Chartered Institute of Arbitrators-Kenya Branch (Interested Party)* [2019] eKLR.
[35] Abhisar Vidyarthi, 'Revisiting India's Position to Not Join the ICSID Convention' (Kluwer Arbitration Blog, 2 August 2020) <*http://arbitrationblog.kluwerarbitration.com/2020/08/02/revisiting-indias-position-to-not-join-the-icsid-convention/*> accessed 27 May 2022.

any appeals unless within the framework of the convention. India wanted to reserve the right to have awards set aside for violating public policy.

ICSID was founded with the best intentions. However, it has failed to meet its objectives. The ad hoc investor-state arbitration is seen as unfair because the members of this body lack independence.[36] Therefore, they serve the interest of Transnational Corporations and the economically powerful.[37] International law is shaped by political power. This power interacts with other forces to form the outcome of the system for resolution of disputes. Therefore, the ICSID system is arguably idealized. This system seeks to pierce the veil of diplomatic immunity by ensuring that states participate in the arbitration process and fulfil the obligation set under the awards. The so-called international legalization that this ICSID system tries to promote is blind to the force that is borne by the elite players in the international economic realm. Ergo, certain developing countries are reluctant in becoming members of this system because they believe it is skewed in favour of the politically and economically powerful.

ICSID plays an important role in ensuring a stable and increased flows in Foreign Direct Investment (FDI). An increase in FDI enhances the economic growth of developing countries because these investments are a source of revenue and employment. Many developing countries are burdened with a high unemployment gap. Therefore, ICSID:

> *"should be regarded as an effective instrument of international public policy which is meant in the final analysis to secure a stable and increasing flow of resources to developing countries under reasonable conditions. ... ICSID is not merely a dispute settlement mechanism, [it] aims at improving the international investment climate .... ICSID*

[36] Emilie M Hafner-Burton, David G Victor and Yonatan Lupu, 'Political Science Research on International Law: The State of the Field' (2012) 106 American Journal of International Law 47.
[37] *Ibid n24.*

> *should renew its efforts to secure a stable and increasing flow of resources to developing countries under reasonable conditions."*[38]

Perhaps this is the reason why developing states that are not party to this convention have a low-level attraction for foreign investors. This is owed to investor scepticism over using domestic laws to resolve investment disputes. Developing countries like India have developed domestic laws that govern foreign direct investment. Bilateral Investment Disputes in India are governed by the 2015 India Model BIT. However, India has been urged to join ICSID because it provides a more transparent, reliable, and predictable framework which automatically improves investor confidence in states that are members to this convention.[39]

4.0 Conclusion

Undoubtedly, the resolution of investor-state dispute resolution is critical. Consequently, the international community came up with the ICSID framework to form the foundation and regime for resolving these disputes. Although this framework has provided a predicable regime for the resolution of disputes thus boosting investor confidence among the members of this convention, it has its share of weakness and challenges that must be resolved. Besides, the use of arbitration has a mode of resolving these disputes has become double edged sword that has become costly, slow, and solely focused on compensation for violation of obligation as opposed to dispute avoidance. Also, with arbitration come confidentiality which has substantially lowered transparency. Admittedly, there is a need for reforms to make the international arbitration and the ICSID more effective to serve their purpose.

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[38] Sergio Puig, 'Recasting ICSID's Legitimacy Debate Towards a Goal-Based Empirical Agenda' (2013) 36 Fordham International Law Journal <*https://core.ac.uk/download/pdf/144232035.pdf*> accessed 27 May 2022.

[39] Abhisar Vidyarthi, 'Revisiting India's Position to Not Join the ICSID Convention' (Kluwer Arbitration Blog, 2 August 2020) <*http://arbitrationblog.kluwerarbitration.com/2020/08/02/revisiting-indias-position-to-not-join-the-icsid-convention/*> accessed 27 May 2022.

5.0 Reforms

Focus should be shifted towards dispute avoidance as opposed to dispute settlement. Dispute prevention policies are essential because they are geared towards highlight potential disputes and preventing them from happening. This will ensure that costs and time are not lost. Besides, it will preserve the relationship existing between the parties.

Improving transparency. The arbitration process is always confidential. This is because most of the arbitration agreements have non-disclosure clauses. This has been the case even where there is high public interest because the sums used are public funds. It is essential to note that transparency will improve the legitimacy of the arbitration process thus increasing investor confidence. Under the ICSID framework the proceeding are confidential unless the parties consent to the disclosure of the award.[40] It is therefore important that this rule be reviewed to make the disclosures automatic unless the party concerned sends or raises an objection the award should be made available to the public.

The introduction of an appeals facility is long overdue. From the above discussions, this essay has established that developing countries like India are not party to the ICSID convention because it does not provide for a mechanism for appealing the arbitral awards. However, the grounds of appeal should be limited to avoid the use of arbitration as a springboard to litigation which may result in delays in the enforcement of the arbitral awards under the guise of exhausting of appeal mechanism available to the parties. Because of relativity of public policies and subject matter of investment treaties, it is prudent to tailor the existing regime for the resolution of these disputes per the relevant International Investment Agreements. This will serve to best meet the desires and interests of the parties.

[40] 'Investor-State Dispute Settlement,' *UNCTAD Series on Issues in International Investment Agreements II* (United Nations 2014) <*https://unctad.org/system/files/official-document/diaeia2013d2_en.pdf*> accessed 26 May 2022.

Lastly, international investment agreements have often given rights to the investors against the host state. However, obligations are not extended to the investors. It has been argued that International Investment law does not exists in a vacuum and as a result IIA must appreciate human rights and environmental concerns which form part of the principles of international economic law.[41] Therefore, IIAs must in the future be sensitive to these emerging concerns and sustainable development goals.

[41] Herdegen Matthias, *Principles of International Economic Law* (Second Edition, Oxford University Press 2016).

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Status of Participation of Women in Mediation: A case Study of Development Project Conflict in Olkaria IV, Kenya

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&
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Abstract

Peace remains indispensable for a thriving development. Yet, development continues to be problematized by the discontented community of its potential negative effects resulting in conflicts whose impacts are largely felt by women. Women are the central custodians of their families and equally play an important role in neutralizing conflicts in communities. While mediation continues to be advocated as an effective strategy for managing natural resources conflicts, the participation of women in its processes and their significance remains rather questionable, including among the pastoral communities.

This paper reviews the status of participation of women in mediation that was successfully used between 2015 and 2016 to resolve conflicts between Kenya Electricity Generating Company (KenGen) and the community. The paper demonstrates a need for further democratization of the mediation processes to cater for more participation of women to enhance the mediation results and offer more sustainable resolutions. Further research is needed to determine the extent to which women are involved at every mediation phase, with a database on the challenges and solutions to their participation to improve mediation's effectiveness as an alternative dispute resolution mechanism in resolving natural resources conflicts beyond Kenya.

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Key words: Natural resources and development conflicts, mediation processes, participation of women, pastoral communities, sustainable peace.

Introduction

While the world strives to tackle persistent and emerging challenges including climate change through investments in germane development such as exploration of renewable energy, these developments continue to be problematized by the community due to socio-economic and environmental impacts, resulting in conflicts whose largest brunt is borne by women.[1] Women constitute at least half of every community.[2] Women are the central custodians of their families, and they equally play an important role in neutralizing conflicts in community including among the pastoral communities.

Women and children are deemed as the greatest victims of conflicts largely because of the inequalities that exist between men and women in social, economic and political spheres. The Global Gender Gap Report 2020 ranked Kenya at 109 out of 153 countries with significant inequalities between males and females' health outcomes, representation in decision-making, labour force participation, and education attainment,[3] rendering women

[1] Kong'ani and others, 'Variety and Management of Developmental Conflicts: The Case of the Olkaria IV Geothermal Energy Project in Kenya' (2021) 21 Conflict, Security & Development 781; Guangdong Wu, Xianbo Zhao and Jian Zuo, 'Effects of Inter-Organizational Conflicts on Construction Project Added Value in China' (2017) 28 International Journal of Conflict Management 695.

[2] Ester Boserup, Su Fei Tan and Camilla Toulmin, *Woman's Role in Economic Development* (0 edn, Routledge 2013) *<https://www.taylorfrancis.com/books/9781134036981>* accessed 18 February 2022; Agbajobi Damilola, 'The Role of Women in Conflict Resolution and Peacebuilding', *eds. R. Bowd and A. B. Chikwanha, Understanding Africa's Contemporary Conflicts, African Human Security Initiative* (2010) *<https://gsdrc.org/document-library/the-role-of-women-in-conflict-resolution-and-peacebuilding/#:~:text=There%20are%20obvious%20reasons%20why%20women%20are%20important%20to%20the%20peacebuilding%20process.&text=Women%20are%20also%20advocates%20for,they%20have%20contributed%20as%20observers.>;* Jyoti Jaggernath, 'Women, Climate Change and Environmentally-Induced Conflicts in Africa' (2014) 28 Agenda 90.

[3] Klaus Schwab and others, *Global Gender Gap Report 2020 Insight Report* (World Economic Forum 2019).

more vulnerable to greater losses and suffering during conflicts.[4] Similarly, to men, women have needs, priorities, and voices which ought to be considered and met to prevent them from being used to promote hatred and violence, often at their expense. Thus, including women at conflict resolution tables will grant them an opportunity to be heard and their needs and priorities met leading to more inclusive and sustainable resolutions.

Women have played important role in conflict resolution in communities since antiquity. The elderly women for instance were revered and acknowledged for giving insights on conflict resolution behind closed doors. They also employed their wisdom and creativity to solve disputes in their community.[5] Women's central role as advocates for peace, peacekeepers and builders continues to be recognized worldwide.[6] Accord Insight for instance, acknowledges the essential role that women played in lobbying elders to intervene and end conflicts resulting in peace conferences in Somaliland.[7] This Insight also highlights women's key role in mobilizing funds e.g., through social groupings to convene women for peace initiatives.[8]

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[4] Kariuki Muigua, 'Mainstreaming the Role of Women in Peacemaking and Environmental Management in Kenya' *<http://kmco.co.ke/wp-content/uploads/2020/07/Mainstreaming-the-Role-of-Women-in-Peacemaking-and-Environmental-Management-in-Kenya-Kariuki-Muigua-July-2020.pdf>*.

[5] Ernest E Uwazie, *Conflict Resolution and Peace Education in Africa* (Lexington 2003).

[6] Damilola (n 2); Vicky Karimi, 'Securing Our Lives: Women at the Forefront of the Peace and Security Discourse in Kenya' *<https://africanleadershipcentre.org/attachments/article/557/VIcky_Karimi%20_APN_Working_Paper.pdf>;* Susan Mbula Kilonzo, 'Silent Peacemakers: Grass-Roots Transitional Justice and Peacebuilding by Women in Kenyas North Rift Conflicts' (2021) 9s2 Journal of the British Academy 53; Muigua (n 4); UNSC, 'United Nations Security Council (2020). Report of the Secretary-General on Women Peace and Security (S/2021/827), Para. 15. Data Come from the Council on Foreign Relations, Women's Participation in Peace Processes.' (United Nations Security Council 2020) S/2021/827 *<https://www.unwomen.org/en/what-we-do/peace-and-security/facts-and-figures#notes>*.

[7] Accord Insight (ed), *Women Building Peace* (Conciliation Resources 2013).

[8] Ibid.

Women in pastoralist communities are respected for persuading their men to negotiate with the antagonist parties on contentious issues. Such influence has been demonstrated through women's act of tying a belt around their waists suggesting a need for the conflicting parties to cease-fire, and promote a conducive environment for child bearing and nurturing.[9] Also, women often discourage their men from pursuing their enemies by expressing fear to lose their men, and encourage them through meals preparations after a successful raid.[10]

Women's participation in peace talks enables them to share their daily experiences on matters related to inter alia, security, human rights, health care and employment which are essential components in promoting the relevancy and durability of peace and security plans.[11] Concerted efforts have been made in the implementation of the United Nations Security Council Resolution (UNSCR) 1325 call for the increased involvement of women at all levels of decision-making on conflict resolution and peacebuilding. This has resulted in the development of Action Plans at the country levels, Kenya included, amplifying women's vital role in responding to peace, conflict and security related issues.

Further, the Constitution of Kenya 2010 espouses the rights of women. Article 27 of the provides for the women and men's right to equal treatment including entitlement to enjoy equal opportunities in the political, social and economic spheres.[12] Moreso, Kenya has obligations to innumerable

[9] Janpeter Schilling, Francis EO Opiyo and Jürgen Scheffran, 'Raiding Pastoral Livelihoods: Motives and Effects of Violent Conflict in North-Western Kenya' (2012) 2 Pastoralism: Research, Policy and Practice 25; Caleb Maikuma Wafula, 'Does Community Saving Foster Conflict Transformation?: The Debate and Evidence from Kenya's ASAL Counties of West Pokot and Turkana.' *<http://hdl.handle.net/10625/59483>*.

[10] Schilling, Opiyo and Scheffran (n 9).

[11] Muigua (n 4); Mullen Michael and others, *Women on the Frontlines of Peace and Security* (National Defense University Press 2015) *<https://ndupress.ndu.edu/Portals/68/Documents/Books/women-on-the-frontlines.pdf>*.

[12] Constitution of Kenya, 'The Constitution of Kenya, 2010' [2010] National Council for Law Reporting with the Authority of the Attorney General 194.

international, regional and sub-regional instruments and commitments including the Universal Declaration of Human Rights and the Convention on the Elimination of all forms of Discrimination Against Women, all of which guarantee gender equality.

However, while the inclusion of women in peacebuilding processes and initiatives has accelerated in policy discussions over the past decade, the number of women in decision-making processes and conflict resolution remains rather minimal.[13] Although it's worth noting that there is an improvement in women's representation in other public decision-making roles such as political positions, women's underrepresentation at the peace tables remains low.[14] It is on this premise that this paper reviews the status of participation of women in mediation that was used successfully to resolve conflicts that emerged between Kenya Electricity Generating Company (KenGen) and the project affected persons (PAPs), during the establishment of Olkaria IV geothermal energy project to answer the following question:

> To what extent were women involved in the Olkaria IV mediation processes held between 2015 and 2016 to resolve the conflicts between the KenGen and the PAPs?

The Feminist Conflict Resolution Theory

This review is based on the feminist conflict resolution theory[15] which focuses on women's non-violent struggles for peace worldwide, and the theoretical frameworks considered to make sense of the relationship between women and peace, men and conflict, and sexism and militarism.[16] The theory

[13] Damilola (n 2); Karimi (n 6); Kilonzo (n 6); Louise Khabure, 'Committed to Peace or Creating Further Conflict? The Case of Kenya's Local Peacebuilding Committees' (December 2014) *<https://www.peaceinsight.org/en/articles/committed-peace-creating-conflict-case-kenyas-local-peacebuilding-committees/?location=kenya&theme=>;* Deockary JF Massawe, 'Roles of Women and Young People in Initiating Culture of Peace-Building in Kenya' (2021) 3 Journal of Sociology, Psychology & Religious Studies 117; Muigua (n 4).

[14] Karimi (n 6).

[15] M Bailey J, 'Mediation as a "Female" Process' (1989).

[16] Ibid.

seeks to establish elements of women input, observation and their understanding of reality which, could be critical ingredients at conflict resolution tables. This could be premised on the fact that women are the custodian of their families and also suffer the most from the consequences of conflicts including among the pastoral communities like in Olkaria IV area. Thus, the feminist conflict theory advocates for the incorporation of their experiences and ways of knowing as fundamental enablers to functional conflict management strategies and peacebuilding initiatives including mediation. Further, feminist scholars and activists suggest that there is need to approach a conflict from the weaker party's (like women) perspective to enable transform conflicts which involve unequal power relations. This includes in development activities among the pastoral communities where women are given equal status as children, [17] thus more likely to be marginalized during the mediation processes compared to their male counter parts[18]. Yet, their contribution in conflict resolution is deemed to generate more sustainable resolutions.

Study area

The research was conducted at the Resettlement Action Plan land (RAPland) in the development area of Olkaria IV which encompasses 155 households with 1209 PAPs. [19] RAPland is located in the Olkaria geothermal block in Naivasha-Sub-County, Nakuru County. The block was gazetted as a Geothermal Resource Area in 1971 [20] and is situated on KenGen's land covering about 80 square kilometers in the Hell's Gate

[17] Dorothy L Hodgson, 'Women as Children: Culture, Political Economy, and Gender Inequality among Kisongo Maasai' (1999) 3 Nomadic Peoples 115; WK Omoka., 'Briefing Paper No. 11: Climate Change, Lake Turkana and Inter-Communal Conflicts in the Ilemi Triangle Region.' *<https://shalomconflictcenter.org/briefing-paper-no-11/>*.

[18] Bailey (n 15).

[19] Gibb Africa, 'Updated Resettlement Action Plan for the Olkaria IV Power Station : Olkaria IV (Domes) Geothermal Project in Naivasha District' (Kenya Electricity Generating Company Ltd 2012) RP883v11 rev *<https://documents1.worldbank.org/curated/en/508361468046149605/pdf/RP8830v110P1030IA0IV0RAP0JULY002012.pdf>*; Kong'ani, Wahome and Thenya (n 1); Kong'ani, Wahome and Thenya (n 2).

[20] Sena Kanyinke, *Renewable Energy Projects and the Rights of Marginalised* (International Working Group for Indigenous Affairs report, 21 2015).

National Park (HGNP). The HGNP lies at 0°54′57″S, 36°18′48″E, to the south of Lake Naivasha, approximately 120 km north-west of Nairobi. Development of Olkaria IV energy plant compelled the relocation of four villages namely Cultural Centre, OlooNongot, OlooSinyat, and OlooMayana Ndogo from the Olkaria IV site to RAPland[21] located outside the park. The relocation aimed at protecting the community from the potential adverse impacts of the project, including disruption of their livelihood streams and noise pollution. However, PAPs raised complaints to project funders regarding KenGen's failure to translate some pledges like additional houses for those who had been left out resulting in conflicts between them. The PAPs complaint to the project financiers led to the recommendation of mediation of the conflicts.

Methodology

This study employed mixed approaches to collect qualitative data (the inception of mediation, its processes and the respondents' involvement) and quantitative data (respondents' demographics). Qualitative research enables a clear comprehension of the interviewee's opinions on subject under study and also enable researchers' access to information such as gender inclusion, [22] which could be a thorny issue in a patriarchal system. Quantitative research puts emphasis on quantification in data gathering.[23] Secondary data sources included desk review of literature on journal articles and published books on natural resources, development, conflict and conflict resolution, project implementation and mediation reports which provided the foundation for the argument. A reconnaissance was conducted in May 2019, where four research assistants (three males and one female) were recruited from RAPland and trained on various features of the

[21] Gibb Africa (n 19).

[22] Quan Nha Hong and others, 'Mixed Methods Appraisal Tool (MMAT), Version 2018' *<http://mixedmethodsappraisaltoolpublic.pbworks.com/w/file/fetch/127916259/MMAT_2018_criteria%C3%A2%E2%82%AC%20manual_2018%C3%A2%E2%82%AC%2008%C3%A2%E2%82%AC%2001_ENG.pdf>;* David Silverman, 'Qualitative Research', *A guide to the principles of qualitative research* (3rd edn, Sage Publications 2011).

[23] Julia Brannen (ed), *Mixing Methods: Qualitative and Quantitative Research* (Paperback ed, repr, Ashgate 2000).

questionnaire and interview procedures and etiquette. The semi-structured questionnaire was pilot tested and adjusted to improve its validity, proceeded by the collection of primary data in the four villages in RAPland including Cultural Centre, OlooNongot, OlooSinyat, and OlooMayana Ndogo.

Primary data was collected through a complete enumeration. Sampling of the entire population in a small populations promotes attainment of the required precision. [24] Thus, this study targeted the entire population relocated to RAPland comprising of 155 households. This aimed at recording insights from individual households on gender participation in Olkaria IV mediation. But, the study surveyed 117 households, 24 homes were not occupied by the time of the study since their occupants had temporarily moved out of RAPland in search of greener pastures. The occupants of 14 more households were also inaccessible, reportedly because of work-related engagements outside RAPland.

Data was collected through three focus group discussions (FGDs) of elders, women and youth each comprising of eight participants purposively selected from the four villages. The sampling was based on the participants' experiences and participation in the Olkaria IV mediation process. The female elders were separated from males to facilitate free participation and discussions, especially among women. The researcher also conducted in-depth interviews with eight key informants purposively sampled that generated further qualitative data. The informants included two participants (complainants), two from the Resettlement Action Plan Implementation Committee (RAPIC), two village elders, one mediator and an informer from KenGen. The interviews and discussions were conducted with the aid of a guide and checklist designed in advance. The researcher also engaged the research assistants through casual talks to complement the information gathered.

[24] Ajay S Singh and Masuku B Micah, 'Sampling Techniques & Determination of Sample Size in Applied Statistics Research: An Overview' (2014) 2 nternational Journal of economics, commerce and management 1.

The completed questionnaires were checked for adequacy and clarifications, and coded. The quantitative data were organized into Microsoft Excel, imported into the R program,[25] and rigorously analyzed using a combination of descriptive statistics (frequencies and percentages). Qualitative data gathered through semi-structured questionnaire, FGDs, and informant interviews notes were typed, and the interview recordings transcribed. The transcripts were imported into qualitative research software, NVivo[26] for coding and content analysis through deductive and inductive approaches.

Results and Discussions

Awareness of mediation

The respondents were asked if they had heard of mediation's use in conflicts before the 2015 mediation, and if yes, to share their sources of knowledge about mediation? More than half (59%) of the respondents claimed that they had not heard of mediation before the one in which they got involved. The rest (41%) who had heard identified community conflict resolution (36%), government (21%), media (19%), school (17%), and friends/neighbors (7%) as their sources of information. Among those who were not aware, majority (60%) were women. A female FGDs participant noted, '*I can't really tell what mediation is since I'm a charcoal burner, I'm neglected because I am a Samburu and I don't have a husband*.' Thus, the lack of knowledge of mediation among such women is not only attributable to work related engagements that prohibits them from access to important information and benefits that could improve their lives. This also reveals the thinkable

[25] Gentleman, Robert, *Computer Science and Data Analysis Series. R Programming for Bioinformatics.* (CRC Press, Tylor & Francis Group 2008) *<https://books.google.co.ke/books?hl=en&lr=&id=34Y6WjJy8zEC&oi=fnd&pg=PP1&dq=Gentleman,+Robert.+(2008).+Computer+Science+and+Data+Analysis+Series.+R+programming+for+bioinformatics.+CRC+Press.&ots=UjRe-r8fkO&sig=5bJrppECm9YPBtGBffTfx9ZHUUA&redir_esc=y#v=onepage&q=Gentleman%2C%20Robert.%20(2008).%20Computer%20Science%20and%20Data%20Analysis%20Series.%20R%20programming%20for%20bioinformatics.%20CRC%20Press.&f=false>*.

[26] Bazeley, Patricia and Kristi Jackson Eds., *Qualitative Data Analysis with NVivo.* (2nd edn, SAGE publications limited 2013).

cultural discrimination in the community on the basis of women, who besides being a widow, and hails from a different community and therefore, forbidden to participate in important decision-making processes, like at peace tables in this case, issues that are likely to render such women more susceptible during conflicts.

Mediation has been used to resolve conflicts in traditional set-ups since antiquity although the community does not call it as so. It is therefore safe to say that perhaps the lack of awareness could have been because of the low application and lack of community exposure to formal mediation processes. This could also be linked to the technicality of the term, "mediation," which could not be well comprehended by the majority (73%) of women who lacked any level of education. This findings aligns with Global Gender Gap Report 2020 which points out the inequalities between males and females in the country inter alia, education attainment, [27] which could be more pronounced among the pastoral communities and other marginalized groups, with women being disadvantaged. Yet, empowering women enables them to adequately participate and contribute not only in conflict resolution processes but also development.[28]

However, whereas the empowerment of women is essential, this might not readily translate into meaningful inclusion and participation of women due to cultural issues that confine them to domestic duties. These traditional practices also bar women from speaking in the same public space with elders and men. This includes mediation of conflicts beyond natural resources use and development within the communities.[29] Other studies among the Pokot community[30] suggests that women's low levels of literacy in the remote areas are exacerbated by the cultural and structural barriers results in their inability to access and benefit from technical information on conflict management among others, the likely case in Olkaria IV. Thus, the question would be,

[27] Schwab and others (n 3).
[28] Muigua (n 4).
[29] Angela Jill Lederach and others (eds), *Building Peace from within: An Examination of Community-Based Peacebuilding and Transitions in Africa* (AISA 2014); Muigua (n 4).
[30] Omoka. (n 17).

how do we penetrate such barriers to enhance women's participation in conflict resolution especially among the pastoral communities including in Olkaria?

The Pre-mediation phase

Ground setting

While the foundational meetings to mediation were held between European Investment Bank Complaints Mechanism (EIB-CM) designated mediator, KenGen and the PAPs in May 2015 to inform the scope of mediation and gather PAPs' views and expectations of mediation, only 15% of women inputted their views. Whereas, Article 27(8) of the Bill of Rights in the Constitution of Kenya 2010 provides for the State to take legislative and other measures to implement the principle requiring that not more than two thirds of the members of elective or appointive bodies shall be of the same gender," the 15% of women inclusion in Olkaria IV mediation inception meetings failed to meet this requirement. However, it would be safe to state that perhaps the promulgation of the Constitution of Kenya was still at its infancy stage in 2015, with little impact on gender inclusion.

Women are the main care takers of their families, and just like men, they have needs and priorities whose input in decision making processes including in conflict resolution would offer more sustainable outcomes, and deter them from being used to promote hatred and violence. Either, women's participation in peace talks enables them to share their daily experiences on security matters for instance as also advocated by the feminist conflict resolution theory.[31] Women's insights on based on their experiences are essential components in promoting the relevancy and durability of peace and security plans,[32] thus their inclusion at peace tables is paramount.

On the flipside, the study established that one female mediator aligned to the EIB-CM was involved in the mediation. The female mediator chaired the opening sessions of the mediation, where the mediator welcomed the

[31] Bailey (n 15).
[32] Michael and others (n 11); Muigua (n 4).

participants, took them through the itinerary of all mediation sessions, and officially opened the negotiations. The Olkaria IV mediation case advances the growing argument on the inclusion of female mediators in peace talks, positions that were previously dominated by male.[33] According to the report of the Secretary-General on women and peace, [34] only 13 per cent of negotiators were women, 6 per cent mediators and another 6 per cent of signatories in major peace processes worldwide between 1992 and 2019. This report also suggests that about seven out of every ten peace processes did not include any women mediators or signatories. However, women represented 23 per cent of conflict parties' delegations in UN supported peace processes in 2020, which would have been much lower without the UN's concerted efforts towards this end,[35] the likely case in Olkaria IV.

However, it is worth noting that although women representation at this "senior level," in the Olkaria IV mediation would have boosted the confidence of female participants in the mediation, facilitating the much-needed input, the process was largely conducted by the two male mediators. The female mediator only came in when there emerged thorny issues like the Cultural Center's occupation and the title deed concerns which could have possibly affected the final mediation agreement's results, perhaps to exert the financiers' positions. Generally, the acceptability of the female mediator in Olkaria IV mediation by the Maasai community is a stride towards penetrating the deeply rooted patriarch system among the pastoralist communities.

Selection of the representatives

PAPs and KenGen were the main parties to mediation. KenGen was represented by three participants. PAPs were represented by 17 participants where Resettlement Action Implementation Committee (RAPIC) nominated six members (two women, one youth, and three men) to represent resettled PAPs and the non-resettled PAPs nominated six participants (two women,

[33] Lederach and others (n 29).
[34] UNSC (n 6).
[35] UNSC, 'United Nations Security Council (2021). Report of the Secretary-General on Women Peace and Security (S/2021/827), Para. 19.' (United Nations Security Council 2021) S/2021/827 <*https://undocs.org/S/2021/827*>.

one youth, and three men) resulting in about a one-third representation of women. This result contradicts other mediation practices worldwide suffering from persisted conflicts and where most mediation teams do not include or encourage the voices and representation of women.[36]

The one-third representation of women in the Olkaria IV mediation team contributes towards narrowing the women inclusion gap which is also aligned to the Constitution of Kenya 2010. Article 27 of the Constitution espouses the rights of women as being equal in law to men, and are entitled to among others, the right to equal treatment, including the right to equal opportunities in political, economic, cultural and social spheres.[37] However, some women suggested that their voices were suppressed, and views oppressed, thus, begging the questions on what is meaningful participation especially among the pastoral communities and other marginalized groups which are also mainly patriarchal. Perhaps, there is a need to redefine participation with concerted efforts to overcome the potential cultural barriers prohibiting women from meaningful involvement in important decision-making processes including in peace talks, should sustainable conflict resolution, peace and development be achieved beyond pastoral communities.

The election of representatives by the community was facilitated by the three mediators. While nearly two-thirds (65%) of the representatives were satisfied with the process of nomination the representatives to the mediation team, about one-third (35%) of the respondents were dissatisfied with the majority (70%), being women. They cited among other issues, nepotism and failure to use secret ballots. The latter could have contributed to the lack of fair participation by women, maybe due to the fear of reprisal.

Further, a participant in the FGDs with female indicated that, *'During the election, we were not involved fully, I remember I was working and the election was held.*' Another evidence of work-related engagements by women limiting their participation in conflict resolution processes. This

[36] Muigua (n 4).
[37] Constitution of Kenya (n 12).

result collaborates with the experiences among the Pokot community,[38] where the unequal gender norms are deemed to deny and further foreclose women's capacity for decision-making among the pastoralist communities. Women were traditionally excluded because of unequal division of labour that prohibits them from participation since they increasingly have less time given their labour-intensive household obligations and because of cultural restrictions[39] to their mobility, the likely case in Olkaria IV mediation, resulting in the dissatisfaction among (70%) of women.

In regards to community leadership and representation in the mediation process, the study established that four Council of Elders (CAC) members, all males, one each from the four villages (Olomayana Ndogo, Cultural Centre, Oloongonot and Oloosinyatti) were invited to participate as friends of the three mediators. The all-male dominated leadership among the PAPs' reflects a possible continued marginalization of women in similar settings in the country. This is a clear demonstration of the little change in the status of women in the study community, where women are accorded equal status with children,[40] with norms among the Pokot pastoral communities continuing to prohibit women from speaking in the same spaces where men are gathered.[41]

The absence of women in the community's leadership and the suppression of their voices resonates the findings recorded in the "Feeling the heat: responses to geothermal development in Kenya's Rift Valley[42]," which suggested that women's leadership in the Maasai community was not yet fully recognized by the Maasai men, and that majority of the meetings at the village level were dominated by men who would shout down a woman leader

[38] Omoka. (n 17).
[39] Ibid.
[40] Hodgson (n 17); Blessing Nonye Onyima, 'Women in Pastoral Societies in Africa' in Olajumoke Yacob-Haliso and Toyin Falola (eds), *The Palgrave Handbook of African Women's Studies* (Springer International Publishing 2019) *<http://link.springer.com/10.1007/978-3-319-77030-7_36-1>* accessed 21 July 2022.
[41] Omoka. (n 17).
[42] Hughes Lotte and Rogei Daniel, 'Feeling the Heat: Responses to Geothermal Development in Kenya's Rift Valley' [2020] Journal of Eastern African Studies 1.

that spoke for her village women, demonstrating further challenges of patriarchal systems.

The Mediation phase

During the mediation phase which started in August 2015, the mediation team hosted at least three meetings before the negotiation of the issues. The mediation Chairperson and the team drafted the procedure for the mediation agreement. However, the study revealed that the mediation participants were left to read and sign the mediation agreement without mediator intervention or support. The pact was written in English, and it is not clear whether the community representatives understood the mediation rules since only 24% of them (4/17) – all male, were literate, further complicating the adequate participation of the women in this process.

Although the efforts could have been made by the mediation team to engage a Maasai lady to translate English to Maa and vice-versa to break the language barrier and enhance the participation of women, the respondents noted there were many issues that could have been inappropriately translated from English to Maa because Maa is loaded with varied nuances. This could have been further complicated by the possibility of the uneasiness among the PAPs' Elders who oversee the implementation of the Maasai cultural practices among which those that which forbid women from speaking in the same public space with men.

While slightly more than half of the respondents (53%) were satisfied by the mediation process, those who were dissatisfied (47%) were mainly women (72%), citing the inadequate publicity of the process, little consultation at the initial stage, inadequate capacity building on the mediation process, poor coordination and limited public participation. Besides, the FGDs with women revealed that some of them were dissatisfied, since they were denied voice because of their sex, suppressed, and their views disregarded. Similarly, Hughes & Rogei,[43] recorded that the village representatives were predominantly middle-aged to elderly men (all Maasai males) over about 40 identify as elders and women complained that their grievances were ignored.

[43] Ibid.

The respondents in Olkaria mediation case also acknowledged that they had elected leaders who made decisions on their behalf, with which they had to abide irrespective of their feelings on the matters, another possible hindrance to adequate participation of women in the mediation processes.

Endorsement of the mediation agreement

The results established that the community was convened in June 2016 at the RAPland's Social Hall for a *Baraza (meeting)* where the mediators read out the 27 items in the agreement to both parties (PAPs and KenGen). Since the agreement was already signed, the community in general did not see the need to give input to it, talk less of women. They felt that they were denied an opportunity to react to the mediation resolutions. However, most of these community members including women endorsed the accord perhaps for fear of victimization. The endorsement of the agreement in an open forum could have further inhibited their freedom of voting especially among women who have a little say in decision-making processes among the pastoral communities.[44] Possibly, their honest decision would have been exercised if the secret ballots had been used. There could be a need to redefine public participation which is one of the central values of democracy enshrined in the Constitution of Kenya, 2010. Article 10 of the Constitution[45] provides for a right to all citizens to have a say in decisions affecting their lives, including among the marginalized communities like in Olkaria IV.

It is worth noting that the mediation resulted in the reaching of consensus on contentious issues between KenGen and the PAPs with subsequent reduction in conflicts, mended and improved relationships between parties and improved PAPs' livelihoods. However, while the majority of the respondents (83%) suggested they would recommend mediation of any other community development project conflicts, only (35%) of the women held this view, a further demonstration of their dissatisfaction that could have been linked to their minimal participation. A likely threat to the sustainability of the resolutions. Sustainable Development Goals (SDGs) recognizes the need to promote peaceful and inclusive societies (inclusive of women and

[44] Omoka. (n 17).
[45] Constitution of Kenya (n 12).

descending/minority voices) that provides for access to justice for all and build effective, accountable and inclusive institutions at all levels. Thus, much work is needed towards adequate inclusion of women in conflict resolution beyond Olkaria IV mediation case.

Conclusion and recommendations

The Olkaria mediation processes yielded an agreement on contentious issues, reduced conflicts, mended relationships and oiled the project operations. However, the adequate inclusion of women in such processes as advocated for also by the feminist conflict resolution theory as enablers to functional conflict resolution processes and the legal frameworks around Women Security and Peace still has a long way to go. Limited knowledge and exposure to formal mediation processes, cultural and structural barriers remain a hindrance to women's adequate participation at peace tables. While there is need to redefine meaningful participation in peace talks among the pastoral communities, and build women's capacity to enhance their participation and inclusion, much effort should also be geared towards addressing the traditional practices that prohibit women from this meaningful participation through co-designing of conflict resolution processes. Further research is needed to determine the extent to which women are involved at every mediation phase, with a database on the challenges and solutions to their participation to improve mediation's effectiveness as an alternative dispute resolution mechanism in resolving natural resources conflicts beyond Kenya.

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The Business of Climate Change: An Analysis of Carbon Trading in Kenya

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1. Introduction

The Climate Change phenomenon continues to put the world on edge with several intervention measures being put into place as attempts to arrest its negative effects remain on course. One of the most significant intervention measures which the global community has put into place is the concept of carbon trading. Carbon trading remains a popular although sometimes a controversial phenomenon, more so, between the developed versus the developing countries' dichotomy.

This article analyses the business of carbon trading in the context of Kenya's legal framework. In order to undertake this task, the article would be organised into various interrelated sections. This first section offers introductory remarks. The second explores over the climate change phenomenon. This would then examine the legal framework that underpins climate change into the Kenyan legal system. The third section would then provide an exposition of the concept of carbon trading and its various forms. The final section would then offer concluding remarks to the discussion.

2. Climate Change

Climate Change is the response of the planet's climate system to the altered concentration of the greenhouse gases (hereinafter GHGs) within the global atmosphere.[1] It entails changes of climate which are attributed either directly

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or indirectly to human activities that alter the composition of the global atmosphere and which are in addition to natural climate variability observed over comparable time periods.[2]

The Climate Change causes several effects on the environment. These include depletion of the ozone layer which provides a shield against harmful exposure to ultraviolet radiations from the sun and control over the temperature structure of the stratosphere.[3] It also causes acid rain and ecological harm which arise when acidic gases such as carbon dioxide, sulphur dioxide and nitrogen dioxide react with water vapour to form weak acidic solutions such as carbonic acid, sulphuric acid and nitric acid solutions in rainfall.[4] In addition, climate change also causes direct harm to human health which, especially, arises from changes in the concentration of gases in the atmosphere have been proven to cause respiratory problems, brain damage and cancer. As a result, there is more reduction of life expectancy as the climate worsens.

There are three principal causes of climate change. These include air and atmospheric pollution, anthropogenic sources, and the urban and transboundary air pollution.[5] Atmospheric pollution is the group of gases produced from combustion processes including carbon monoxide (CO),

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[1] Hunter, D., Salzman, J., and Zaelke, D., (eds.), *International Environmental Law and Policy*, Thomson West: Foundation Press, 2007, p. 631.
[2] Article 1 (2) of The United Nations Framework Convention on Climate Change defines Climate Change.
[3] Sivasakthivel T. and Reddy, K.K.S.K., "Ozone Layer Depletion and Its Effects: A Review", *International Journal of Environmental Science and Development*, Vol. 2, No.1, February 2011, p. 30.
[4] Njeru, M., *Comprehensive Secondary Chemistry*, Oxford University Press, Nairobi, 2002, p. 60.
[5] Fakana, S.T., "Causes of Climate Change: Review Article", *Global Journal of Science Frontier Research: (H) Environment & Earth Science*, Volume 20 Issue 2 Version 1.0 Year 2020, p. 8.

carbon (IV) oxide (CO_2), and oxides of nitrogen (NO_X).[6] Another source of atmospheric pollution is Sulphur dioxide (SO_2) which is released in the atmosphere from the combustion of fossil fuels that contain Sulphur.[7] A third source of atmospheric pollution arises from particles of Lead metal and other heavy metals that arise from combustion processes in motor vehicles, metal processing industries and waste incineration, particularly waste batteries.[8]

Aside from the above substances, another source of atmospheric pollution includes the very small particulate matter such as PM_{10} and $PM_{2.5}$ which arise from diesel engines. Further, the role of complex pollutants which are produced from the incomplete combustion of fuels can also not be gainsaid. These substances, which are highly toxic at small levels, include dioxins, furans, polyaromatic hydrocarbons (PAHs), polychlorinated biphenyls (PCBs).[9] Other sources include volatile organic compounds (VOCs) which are released from vehicle exhaust gases, either as unburnt fuels or combustion products, chlorofluorocarbons (CFCs), used in aerosol sprays, solvents, refrigerants, air-conditioning units etc. CFCs and hydrochlorofluorocarbons (HCFCs) which are inert in the lower atmosphere do undergo a significant reaction within the upper atmosphere and do destroy stratospheric ozone. The last group of atmospheric pollutants is methane which is emitted during the production and transportation of coal, natural gas and oil.[10]

[6] Njeru *supra*, p. 52.
[7] Twoli, N., and Mungai, D., *School Certificate Chemistry*, East African Educational Publishers, Nairobi, 2004, p. 142
[8] Njeru, *supra*, p. 190.
[9] Bhargava, A., Dlugogorski, B.Z., and Kennedy, E.M, "Emission of Polyaromatic Hydrocarbons, Polychlorinated Biphenyls and Polychlorinated Dibenzo-p-dioxins and Furans from Fires of Wood Chips," *Fire Safety Journal*, Volume 37, Issue 7, October 2002, p. 659.
[10] Rojas-Downing, M.M, Nejadhashemi, A.P., Harrigan, T., and Woznicki, S.A., "Climate Change and Livestock: Impacts, Adaptation, and Mitigation," *Climate Risk Management*, 2017, Volume 16, p. 145.

On its part, anthropogenic activities have increased the concentrations of the gases in the atmosphere.[11] Examples of human activities spearheading change in concentrations of gases include increased use of fossil fuels deforestation, increasing livestock farming leads to increase in methane, farming using artificial fertilizers, use of equipment that produce fluorinated gases such as refrigerators, air conditioning systems and heat pumps, fire extinguishers, solvents and aerosol propellants, foam agents etc. Transboundary air pollution emerged after the effects of large-scale industrialisation and intensive development such as nuclear testing, air pollution from ships and aeroplanes became evident.[12] The Trail Smelter Case was the first major international dispute over transboundary air pollution.[13]

3. Legal Framework Governing Climate Change

3.1 International Legal Framework

3.1.1 The Vienna Convention for the Protection of the Ozone Layer 1985[14]

The Vienna Convention for the Protection of the Ozone Layer is a framework convention which lays down principles which have been agreed upon by many States Parties*with regard to the protection of the ozone layer. This treaty, which came into effect in 1988, was the very first convention to be signed by all countries involved and it reached universal ratification in

[11] Fakana, *supra.* See also, Trenberth, K.E., "Climate Change Caused by Human Activities is Happening and it Already Has Major Consequences", *Journal of Energy & Natural Resources Law*, 2018, Vol. 36(4), pp. 463-481.

[12] Bergin M.S., West J.J., Keating T.J, and Russell A.G., "Regional Atmospheric Pollution and Transboundary Air Quality Management", *Annual Review of Environmental Resources*, 2005, Vol. 30, pp. 1–37.

[13] Trail Smelter case, 16 April 1938, 11 March 1941, 3 RIAA 1907 (1941) *https://legal.un.org/riaa/cases/vol_III/1905-1982.pdf* (accessed 19/01/22). See also Wirth J.D., "The Trail Smelter Dispute: Canadians and Americans Confront Transboundary Pollution, 1927-41," *Environmental History*, April 1996, Volume 1, No. 2, p. 34.

[14] United Nations, Treaty Series, Registration No. No. 26164, Vol. 1513, p. 293.

2009.[15] The treaty does not however require countries to take control actions for the protection of the ozone layer. Kenya acceded to the treaty on 9th November 1988.[16] In terms of its operations, the States Parties meet once every three years in order to make decisions on important issues.

The convention establishes a framework for the adaptation of measures to protect human health and the environment against adverse effects resulting or likely to result from human activity which modify or are likely to modify the ozone layer.[17] It does not set targets or timetables for action but requires four categories of appropriate measures to be taken by parties in accordance with the means at their disposal and their capabilities and on the basis of relevant scientific and technical considerations.[18] The obligations are; first, co-operation on systematic observations; secondly, research and information exchange; thirdly, adaptation of appropriate legislative or administrative measures; finally, co-operation on policies to control, limit, reduce or prevent activities that are likely to have adverse effects resulting to modifications to the ozone layer and cooperation in formulation of measures, procedures and standards to implement the Convention.[19]

3.1.2 The Montreal Protocol on Substances that Deplete the Ozone Layer, 1987[20]

The Protocol sets forth specific legal obligations, including limitations and reductions on the determined levels of consumption and production of certain controlled ozone-depleting substances.[21] Kenya ratified this Protocol on 9th November 1988. It has since its inception been amended severally

[15] Albrecht, F., and Parker, C.F., "Healing the Ozone Layer: The Montreal Protocol and the Lessons and Limits of a Global Governance Success Story", in Hart, P., and Compton, M., (eds), Great Policy Successes, Oxford, 2019, p. 306.
[16] Kenya Law, "Vienna Convention For The Protection Of Ozone Layer, 1985", National Council for Law Reporting (Kenya Law), 2022, available at *<http://kenyalaw.org/treaties/treaties/81/Vienna-Convention-for-the-Protection-of-Ozone-Layer>* (accessed on 28th August 2022).
[17] Article 2(1).
[18] Article 2(1), (2) and (4)
[19] Article 2(2)(a)- (d)
[20] UN Treaty Registration No. 26369, Vol. I-26369
[21] Article 3,

including in 1990, 1992, 1995, 1997, 1999, 2007. The 1990 Amendments, among others, amended the Preamble to make reference to the need to take into account the developmental needs of developing countries, the provision of additional financial resources and access to relevant technologies and transfer of alternative technologies. The 1992 Amendments introduced changes to the timetable for phasing out substances under Article 2 (a) - (e), while also adding three new substances, together with new reporting requirements.

3.1.3 United Nations Framework Convention on Climate Change, 1992[22]

The Convention was adopted on 9th May 1992. The development of its text and ultimate adoption were the joint efforts of The World Meteorological Organization and the UNEP when they established the Intergovernmental Panel on Climate Change in 1988. The IPCC's first report in 1990 provided an assessment of the problem of global climate change. The Convention, i.e. UNFCCC, was then developed and adopted during the United Nations Conference on Environment and Development, i.e. Earth Summit held at Rio de Janeiro. Kenya ratified the Convention on 28th November 1994 as a Non-Annex I Party.

The Convention establishes commitments for stabilisation of greenhouse gas concentrations in the atmosphere at safe levels and for limiting emissions of GHGs by developed countries in line with soft targets and timetables. It also provides financial mechanism and a commitment by certain developed States Parties to provide financial resources to meet certain incremental costs and adaptation measures, the establishment of two subsidiary bodies to the Conference of the Parties (COP), among others. It integrates environmental consideration into economic development and defines rights and obligations the international community in the quest for sustainable development and protection of the global climate.

[22] UN Treaty Registration No. 30822

3.1.4 Kyoto Protocol to the United Nations Framework Convention on Climate Change, 1997[23]

This Protocol was adopted on 11th December 1997 and entered into force on 11th December 2005 with Kenya ratifying it on 25th February 2005. The Protocol sets mechanisms through which signatory industrialised countries follow in order to reduce greenhouse gas (GHG) emissions.[24] Taking into consideration the fact that developed countries are substantially responsible for much of the high levels of GHG emissions within the atmosphere, the Protocol places a heavier burden on such nations under the principle of "common but differentiated responsibilities".[25]

One of the most notable achievements of the Protocol is that it provides commitments for Annex 1 Parties to quantified emission reduction targets together with a timetable for their achievement. This is achieved through Article 3(1) of the text which provides that Annex 1 parties shall individually or jointly, ensure that their aggregate anthropogenic carbon (IV) oxide equivalent emissions of the GHGs listed in Annex A do not exceed their assigned amounts. The six GHGs targeted include carbon dioxide, methane, nitrous oxide, hydrofluorocarbons, perfluorocarbons and sulphur hexafluoride.

The Protocol identifies policies and measures that parties may implement to achieve their quantified limitation and emission reduction targets.[26] These, for example, include enhancement of energy efficiency, protection and enhancement of sinks, promotion of sustainable forms of agriculture, increased research on and use of new and renewable forms of energy, measures to limit or reduce emissions in the transport sector and the limitation or reduction of methane emissions.[27] It requires Parties to cooperate towards enhancing both the individual and combined effectiveness of their policies and measures by taking steps to share relevant experience

[23] UN Treaty Registration No. 30822
[24] Mwania, K.N., "Carbon Trading in Kenya: A Critical Review", *International Journal of Science, Environment and Technology*, Vol. 9, No 3, 2020, p. 314.
[25] *Ibid*.
[26] Article 2 of the Protocol.
[27] Article 2(1) (a) of the Protocol.

and information, including developing ways of improving the compatibility, transparency and effectiveness of policies and measures.[28]

Quite importantly, the Protocol introduces flexibility mechanisms that allow Annex 1 Parties to meet their commitments. Such mechanisms include emissions trading, joint implementation and the Clean Development Mechanism (CDM). These mechanisms are to be supplemental to domestic actions taken to achieve emission reductions. The idea of emissions trading permits countries to buy emission reduction credits representing greenhouse gas reductions in other countries. Article 6 provides for joint implementation by permitting Annex 1 Parties to transfer or acquire from any other Annex 1 Party States emission reduction credits. This can either be undertaken through projects which are aimed at reducing anthropogenic emission sources or by enhancing anthropogenic removals by sinks of GHGs.

The CDM enables Annex 1 Parties to gain emission reduction credits which assist them in achieving compliance with their specified respective quantified emissions limitation and reduction commitments. This is to be done through investment in emission reduction projects in other countries so as to achieve sustainable development.[29] Article 10 reaffirms the commitments of developing countries under Article 4 (1) of the Convention. Such commitments include cost effective national or regional programmes which improve the quality of local emission factors, activity data which reflect the social and economic conditions of each Party for the preparation and periodic updates of national inventories of emissions of GHGs, as well as measures to facilitate adequate adaptation to climate change.

3.1.5 The Paris Agreement, 2015[30]

This Agreement was adopted on 12th December 2015 during Conference of Parties (COP) 21 in Paris and entered into force on 4th November 2016.[31] It aims to, among others, limit global warming to well below 2°C above pre-

[28] Article 2(1) (b) of the Protocol.
[29] Article 12
[30] UN Treaty Registration No. No. 54113.
[31] The Paris Agreement 2015

industrial levels and pursuing efforts to limit the temperature increase to 1.5° C above pre-industrial levels, increasing the ability to adapt to the adverse impacts of Climate Change and foster climate resilience and low GHGs emissions development, in a manner that does not threaten food production and making finance flows consistent with a pathway towards low GHG emissions and climate resilient development.[32] It works on a 5-year cycle of climate action done by the countries then submitting their plans referred to as nationally determined contributions (NDCs) that showcase how they will reduce their greenhouse gas emissions to achieve the goals and also how they will build resilience to adapt to the impacts on Climate Change.[33]

There is also the requirement to submit long-term low GHG emissions development strategies (LT-LEDS) in a comprehensive and facilitative manner[34]. Besides, the Agreement provides a framework for financial[35], technical[36] and capacity building support[37] to those countries that need it by developed countries while also encouraging voluntary contributions[38] by other parties. The Agreement also establishes an enhanced transparency framework (ETF) which provides that as from 2024, States will be obligated to report on actions taken and progress in Climate Change mitigation, adaptation measures, international procedures for review of reports and support received or provided so as to build mutual trust and confidence.[39]

3.2 National Legal and Policy Framework

Kenya, although lacking a specific law on carbon trading, has various other laws that fill the gap. These include the Constitution of Kenya 2010, Energy Act No 12 of 2006, Energy Management Regulations 2012, Environmental Management and Coordination Act No 8 of 1999 and the Climate Change

[32] Article 2 of Paris Agreement
[33] Article 4(2) and (3)
[34] Article 14
[35] Article 9(1)
[36] Article 10
[37] Article 11
[38] Articles 6 and 9(2)
[39] Article 13

Act 2016. It is now proposed that these be examined in greater detail hereafter.

3.2.1 The Constitution of Kenya, 2010

This is the Grundnorm which provides a basis for the implementation of carbon trading within Kenya. It provides that every treaty and convention that Kenya is a signatory or party to is part of the law of Kenya.[40] This is therefore the basis upon which International Law, such as the ones examined herein-above, forms part of the Kenyan law. The Constitution entitles every person to a clean and healthy environment.[41] It also further provides for the protection of the environment for the benefit of future generations.[42] The Constitution has expressly provided for the protection of the environment and that includes protection from the adverse effects of Climate Change which can be achieved through carbon trading projects. The State is obligated to sustainably develop and conserve its natural resources. The obligation to conserve the natural resources presents an opportunity to earn carbon credits and trade them creating an incentive to do better and further conserve the environment.

3.2.2 Energy Act 2019[43]

Under sections 8-14, this Act provides that the Cabinet Secretary of Energy and petroleum be vested with powers to harness opportunities for the utilization of clean energy mechanisms and technologies. These provisions accord Kenya the opportunity to earn carbon credits and trade them. Section 44 (q) requires Rural Electrification and Renewable Energy Corporation to harness opportunities offered under clean development mechanism and other mechanisms including, but not limited to, carbon credit trading to promote the development and exploitation of renewable energy sources. Renewable energy projects form part of the projects under carbon trading in the clean development mechanisms. They reduce the use of fuels which causes pollution by replacing it with clean sources of energy such as wind and solar.

[40] Article 2(6)
[41] Article 42
[42] Article 69(1)
[43] Act No. 1 of 2019.

3.2.3 Environmental Management and Coordination Act 1999[44]

Under section 9, this Act establishes the National Environmental Authority (NEMA) which is tasked with the coordination of various environmental activities that are meant to guarantee the sustainable use of resources.[45] Aside from NEMA, section 125 of the Act also establishes the National Environmental Tribunal as a quasi-judicial body with jurisdiction to preside over disputes of environmental nature arising under the Act. The Act does not mention carbon credits but the provisions of the Act are applicable in the process of carbon trading and the projects undertaking since NEMA oversees all the projects that would have an environmental impact in the country.

3.2.4 Climate Change Act 2016[46]

This Act provides the regulatory framework for Kenya's response to Climate Change and for mechanisms and measures to achieve low carbon development. The Act is required to be applied in all sectors of the Kenyan economy for both the national and county governments. The Act, among others, provides incentives and obligations for private sector contributions towards the achievement of low carbon resilient development, promotion of low carbon technologies, improvement of efficiencies and reduction of emissions intensity by facilitating approaches and uptake of technologies that support low carbon, and climate resilient development, mobilising and transparent management of public and other financial resources for the National Climate Change Response.[47]

Further, it puts in place the structures and framework for the implementation of the Nationally Determined Contributions (NDCs). The Act establishes the National Climate Change Council, which is responsible for the overall coordination and advisory functions on matters relating to Climate Change, approving and overseeing implementation of the National Climate Change

[44] Chapter 387 Laws of Kenya
[45] Bondi, V., "Carbon Trading In Kenya in Hitchhiker's Guide To Law", 18th June, 2015. Available at <*https://vyonnabondi.wordpress.com/2015/06/18/carbon-trading-in-kenya-3/*> (accessed 15/2/22).
[46] Act No. 11 of 2016.
[47] Section 3(2)(f), (g) and (h)

Action Plan, among many other functions.[48] It also establishes the Climate Change Fund which is a climate financing mechanism.[49] The Act calls for National Climate Change Action Plans (NCCAPs) every five years formulated by the Cabinet Secretary which shall address all sectors of the economy and provide mechanisms for mainstreaming of the Plan into such sectors.[50] In the first such five-year plan, a Monitoring, Verification and Reporting (MRV+) system was proposed for Kenya to effectively measure, report and verify its climate actions.[51]

3.2.5 National Policy on Climate Finance, 2016[52]

This allows for the enhancement of Kenya's participation in the international carbon markets, generation of carbon units and access to carbon finance. It sets out how the governments will deliver on the climate finance aspects of the Act and Kenya's Nationally Determined Contribution (NDC) obligations. In this regard, the Policy notes that government has tools to generate carbon finance, including encouraging the generation and sale of carbon credits, putting a price on carbon, and establishing an emissions trading system [53] . It prioritises various interventions, including: government's development of new legislative instruments and carbon market initiatives; the identification and implementation of fiscal, taxation and other policy options (such as green bonds) in priority areas with high GHG emission abatement potential or high climate resilience benefits; and, the use of policies, laws and regulations to develop market-based and non-market-based mechanisms.[54]

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[48] Section 5(1) and (2)
[49] Section 25(1) and (2)
[50] Section 13(1) and (4)
[51] Government of Kenya, "Kenya National Climate Change Action Plan 2013-2017", Government of Kenya Vision 2030, page 130, available at *https://cdkn.org/sites/default/files/files/Kenya-National-Climate-Change-Action-Plan.pdf* (accessed 15/2/22).
[52] Government of The National Policy on Climate Finance pdf *http://www.environment.go.ke/wp-content/uploads/2018/05/The-National-Climate-Finance-Policy-Kenya-2017-1.pdf* (accessed 16/2/22)
[53] *Ibid* p. viii
[54] *Ibid* pp. 27 and 28

The Policy provides a framework to attract flows of climate finance and promote climate investment through financial and economic instruments, and cooperative approaches/market-based mechanisms, in which benefits and risks are distributed equitably, including specific interventions which have relevance for the carbon market. It acknowledges that trade could be negatively impacted by carbon taxes and obligations for emissions reduction effectively being countered by the promotion of low-carbon and green commodities and goods.[55] This acknowledgement leads to the submission that the Policy implicitly envisages Kenya's implementation of Carbon Pricing, in the form of a carbon tax, although there is no further reference, specifically, to carbon taxation in the Policy.

3.3 National Strategies, Plans and Annual Report documents

3.3.1 National Climate Change Response Strategy, 2010[56]

One of the components of this Strategy is the development of a National Wildlife Adaptation Strategy. This is to be achieved through a series of interventions including evaluation of the potential socio-economic impacts of remedial measures on Kenya's tourism sector. In this regard, for instance, carbon tax has been specifically mentioned as an example of a remedial measure.[57]

3.3.2 Ministry of Finance, the Economy and Investment Annual Report 2012[58]

There is a 2012 Ministry of Finance report on the National Policy on Carbon Investments and Emissions Trading. It outlines a strategy for the country where carbon trading was concerned. The policy document provided that carbon credit eligible projects in all sectors be implemented as per CDM as

[55] *Ibid*, p. 23
[56] National Treasury, "National Policy on Climate Finance", , Government of Republic of Kenya, 2016, available at http://www.environment.go.ke/wp-content/documents/complete%20nccrs%20executive%20brief.pdf (accessed on 16th February 2022).
[57] *Ibid*, p. 56
[58] Ministry of Finance, "Annual Report 2012 of Ministry of Finance", Government of the Republic of Kenya.

a means of facilitating their approval by the executive board of the UNFCCC and that carbon credits which were generated by these projects would be used for the recapitalisation of the projects and that they could only be traded with the direct approval of the Treasury.

3.3.3 National Climate Change Action Plan, 2013-2017[59]

The Action Plan 2013 inter alia provides for eight sub-components, representing long-term and integrated strategies for achieving key Climate Change goals, including Subcomponent 8: Finance which developed various financial mechanisms, including the Fund, an investment strategy and a carbon trading platform to position Kenya to access finances from various sources.

Among the Action Plan 2013's set of enabling actions to support the transition to a low carbon resilient development pathway, and financing of the Action Plan 2013, there is the recommendation to establish a carbon trading platform to market Kenya's carbon market activity [60]. The recommendation is for a primary platform, the purpose of which is described as being to "facilitate the origination of carbon credits from individual projects and their initial purchase from project developers". The European Union's Emission Trading Scheme is cited as an example of such an initiative.[61]

Three key options for the design of the platform were identified: a more efficient Designated National Authorities (DNA); an export promotion agency model where public resources are used to increase the supply of Kenyan credits and promote their sale in overseas markets; and, a brokerage model where a new body is created which looks to bring together buyers and sellers of credits and works on a commission basis. Either or both of the first

[59] Ministry of Environment and Forestry, "National Climate Change Plan 2013-2017", Government of the Republic of Kenya, available at https://cdkn.org/sites/default/files/files/Kenya-National-Climate-Change-Action-Plan.pdf (accessed 16th February 2022).
[60] *Ibid*, p. 41
[61] *Ibid*., p. 87

two options were indicated as likely to be the most appropriate for Kenya.[62] The Action Plan 2013's set of enabling actions also recommended the enactment of an overarching a standalone Climate Change law. An obvious, but unstated, element of a standalone Climate Change law would be the establishment of the legal regime and required administrative and institutional infrastructure to operationalize the proposed carbon trading platform.

3.3.4 National Climate Change Action Plan, 2018[63]

The Action Plan 2018 updates the Action Plan 2013 but, significantly, contains no mention of a carbon trading platform. The Action Plan 2018 continues and develops the Policy's theme of enhancing Kenya's participation in the international carbon markets, generation of carbon units and access to carbon finance, also addressing fiscal measures to support the National Climate Change Response and emphasising obtaining climate and carbon finance from a wide and diverse range of international sources, particularly the existing suite of funds.

It mentions the plan of attracting investment to support implementation of the National Climate Change Policy. It is interesting to note that, while the Policy mentions taxation as a policy option to support mitigation actions, without specifying the nature of such taxation, i.e., specifying that such taxation is anticipated to be applied, either as a means to price local greenhouse gas emissions which would constitute a disincentive for emitters or, incentivize climate-friendly initiatives in the form of tax-breaks for implementing emissions-reducing actions. The Action Plan's references to taxation are limited to the provision of tax incentives to support private sector investment, including attracting Foreign Direct Investment in the national economy.

[62] *Ibid*, p. 88
[63] Ministry of Environment and Forestry, "National Climate Change Action Plan 2018-2022", Volume 3: Mitigation Technical Analysis Report", 2018, available at http://www.environment.go.ke/wp-content/uploads/2020/03/NCCAP_2018-2022_ExecutiveSummary-Compressed-1.pdf (accessed 16th February 2022).

4. The Business of Carbon Trading

Carbon trading is defined as a flexibility mechanism that involves purchasing or acquiring credits representing greenhouse gas reductions in other countries.[64] The goal of carbon trading is to make it easier for companies and governments to meet emission reduction targets. It is usually undertaken in two main forms. These are, first, the 'cap and trade' form, and secondly, the 'offsetting' form.

4.1 Cap and Trade Form

This form of carbon trading is also known as the carbon market form. It occurs when a government or intergovernmental body sets an overall legal limit on emissions (the cap) over a specific period of time, and grants a fixed number of permits to those releasing the emissions.[65] The polluting entity must hold enough permits to cover the emissions it releases. In the event one polluter does not use all its permits, then it can trade the "surplus" permits with another entity that has already exhausted all its permits and needs more to continue emitting, without exceeding the legal limit[66]. This is the approach underlying the European Union's Emissions Trading Scheme (EU ETS), the world's largest carbon market, which was worth US$ 63 billion in 2008 and continues to expand rapidly.[67] The idea is that the availability of carbon permits will gradually be reduced, thereby ensuring scarcity, so that the

[64] Sands P., Peel J., Fabra A., MacKenzie R., *Principles of International Environmental Law*, 2018, 3rd Edition, Cambridge University Press, p 287

[65] Kaufman N., "Carbon Tax vs. Cap-and-Trade: What's a Better Policy to Cut Emissions?", *World Resources Institute*, 1st March, 2016.

[66] Kill J., Ozinga S., Pavett S., Wainwright R., Trading Carbon: How it Works and Why it is Controversial", *FERN*, 2022, available at *https://www.unredd.net/documents/redd-papers-and-publications-90/other-sources-redd-papers-and-publications/understanding-redd-climate-change-840/climate-change-850/2961-trading-carbon-how-it-works-and-why-it-is-controversial-2961.html* (accessed on 1st February 2022).

[67] World Bank, State and Trends of the Carbon Market 2009, World Bank, Washington DC, 2009, p.7 *https://openknowledge.worldbank.org/bitstream/handle/10986/13403/48998.pdf?sequence=1&isAllowed=y* (accessed 3/2/22)

market retains its value while at the same time forcing a reduction in the overall level of pollution.[68]

4.2 Offsetting Form

For this kind of carbon trading, instead of cutting emissions at source, companies, governments and individuals finance emissions-saving projects outside of the capped area.[69] The UN-administered Clean Development Mechanism (CDM) is the largest offsetting scheme with almost 1800 registered projects.[70] Although they are proposed as emissions reduction, they do not reduce emissions but merely move reductions to places where it is cheapest to make them.[71] The carbon savings are calculated according to how much less greenhouse gas is presumed to be entering the atmosphere than would have been the case without that project. Researcher Dan Welch sums up the difficulty by stating, "offsets are an imaginary commodity created by deducting what you hope happens from what you guess would have happened".[72] It occurs in two different contexts, first, the compliance market and, secondly, the voluntary offset market.

The CDM regulates projects located in countries that do not have emissions targets while the Joint Implementation allows for offset projects in countries with emissions targets. Before a carbon offset project can sell offset credits, it has to pass through a series of stages intended to establish the number of offset credits that can eventually be sold. This guide uses the CDM process as a reference to explain the different steps. The voluntary market uses a less

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[68] Gibertson, T., and Reyes O., "Carbon Trading: How It Works And Why It Fails, Dag Hammarskjold Foundation", *Uppsala*, 2009, available at *https://www.agrecol.de/files/Carbon%20trading%20-%20%20how%20it%20works%20and%20why%20it%20fails.pdf* p12 (accessed on 3rd February 2022).

[69] UNEP Risoe CDM/JI Pipeline Analysis and Database, 1 September 2009, http://cdmpipeline.org/overview.htm (accessed 3/2/22).

[70] *Ibid.*

[71] *Ibid.*

[72] Welch D., "A Buyer's Guide to Off Sets", *Ethical Consumer*, Issue No. 106, May/June 2007, available at *http://www.togetherworks.org.uk/index.php?q=node/156* (accessed on 3rd February 2022).

structured procedure with fewer independent assessments of the claims and calculations, and has no single agreed set of standards. It also lacks a central database comparable to the CDM's database that the UNFCCC Secretariat maintains to try and prevent the double selling of offset credits.[73]

4.3 The Business of Carbon Trading in Kenya

Kenya is amongst the countries regarded as being the most vulnerable to Climate Change due to a dependency on climate sensitive sectors such as its rain-fed agriculture.[74] The country's agricultural sector directly contributes to 24% of the GDP, tourism contributing 27% of the foreign exchange earnings and 12% to the GDP and hydro-electric energy generation contributing 50% of the total energy production.[75] These factors have increased the vulnerability of Kenya to Climate Change hence the use of climate resilient technologies and methodology as a buffering mechanism to adapt to the effects of the change in climate such as carbon trading.[76]

4.3.1 Carbon Trading Projects in Kenya

Carbon trading projects in Kenya fall under two categories. These are, first, the Clean Development Mechanism and, secondly, the Voluntary Carbon Market.

4.3.1.1 Clean Development Mechanism Projects

Through CDM projects, the investing entity earns Certified Emission Reduction Credits while achieving sustainable development in the developing nation. The projects are registered with a CDM Registry, a

[73]International Rivers, "Making Your Voice Heard: A Citizens Guide to the CDM', available at *https://archive.internationalrivers.org/resources/making-your-voice-heard-a-citizen-s-guide-to-the-cdm-3951*, (accessed on 3rd February 2022).

[74] Ogenga J., Mugalavai E., and Nyand N., "Impact of Rainfall Variability on Food Production under Rain-fed Agriculture in Homa Bay County, Kenya," *International Journal of Scientific and Research Publications*, August 2018, Volume 8, Issue 8

[75] UNEP, "Carbon Pricing Approaches In Eastern And Southern Africa Annexure A: Country Chapters A Report Submitted Under The Collaborative Instruments For Ambitious Climate Action (CI-ACA)", *UNEP*, April 2019, available at https://wedocs.unep.org/handle/20.500.11822/28250?show=full/ (accessed 15th February 2022).

[76] *Ibid*.

standardized electronic database that ensures accurate accounting of the issuance, holding and acquisition of CERs.[77] By the year 2016, nineteen CDM Projects were already registered in Kenya.[78] The first project was registered in 2008[79], Mumias Sugar Company Limited, with the support of Japan Carbon Finance Limited developed a 35-Megawatt (MW) sugarcane bagasse-based co-generation power plant[80]. So far, over $2.1 billion has been invested in these projects which are estimated to produce cumulative emissions savings in excess of 135 million tons of Carbon (IV) oxide offsets[81]. Kenya is often described as a market-friendly economy, but its deficits in security, governance and infrastructure constrain economic development, the diversity potential of CDM projects require scratching the surface on a sector-by-sector basis to understand barriers and success factors[82].

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[77] Kyoto Protocol to the United Nations Framework Convention on Climate Change, 11th December, 1997, 22, available at *https://unfccc.int/resource/docs/convkp/kpeng.pdf* (accessed on 22nd February 2022)

[78] National Environment Management Authority, "Component 3: Increasing resilience to the effects of rise in sea level and shoreline changes through Integrated Shoreline and Mangrove Ecosystem Management at Vanga and Gazi in the Coastal region of Kenya", National Environment Management Authority, 2022, available at *http://www.nema.go.ke/index.php?option=com_content&view=article&id=241:status-of-cdm-projects-in-kenya&catid=100:dna&Itemid=598* (accessed on 22nd February 2022).

[79] Government of Kenya Ministry of Environment & Mineral Resources, "Analysis of The Carbon Market Landscape In Kenya", Government of Kenya, 2012, available at *http://www.kccap.info/index.php?option=com_phocadownload&view=category&id=38&Itemid=45* (select the URL under "Annexe D – Carbon Markets in Kenya" (accessed 22nd February 2022).

[80] KEPSA, "Kenya's National Climate Change Action Plan and the Private Sector", *KEPSA*, 2014, available at *https://cdkn.org/wp-content/uploads/2015/04/Climate-Change-Action-Plan.pdf*. (Accessed on 22nd February 2022)

[81] UNFCCC, Project 1404: "35 MW Bagasse Based Cogeneration Project" by Mumias Sugar Company Limited (MSCL), *United Nations Framework Convention On Climate Change*, available at *http://cdm.unfccc.int/Projects/DB/TUEV-SUED1193228673.11/view* (accessed on 22nd February 2022).

[82] Hoch S., "Can Carbon Credits Help Kenya to Become "Green"?: The Relevance of the Clean Development Mechanism for Kenya", *Heinrich Boll Stiftung*, 2012, p. 13, available at

Power shortage was Kenya's greatest infrastructural challenge. It is therefore notable that grid-connected electricity generation constitutes the majority of the active CDM projects in Kenya. Others include biomass co-generation, geothermal, wind and hydro-power projects.[83] Energy institutions have been divided into two segments. These are the regulatory segment, which is undertaken by the Energy & Petroleum Regulatory Authority (EPRA). The second segment is that of operations. This is split into power generation, through Kenya Electricity Generating Company PLC (KenGen) and transmission and distribution through Kenya Power and Lighting Corporation (KPLC), and Kenya Electricity Transmission Company. The Geothermal Development Corporation was established to explore Kenya's geothermal potential in the Rift Valley.[84] The feed-in-tariff (FIT) was established in 2008 by the Ministry of Energy to include solar in 2010.[85]

4.3.1.2 Grid Connected Electricity

There are various grid connected electricity projects in Kenya including geothermal energy at Olkaria. Secondly, there is wind power such as the Lake Turkana Wind Power which is the largest wind farm in Africa.[86] It was implemented by a private consortium while carbon management is done by Carbon Africa with the support of African Carbon Asset Development Facility (ACAD), a public-private partnership between UNEP, Standard Bank and the German Federal Environment Ministry.[87] Other examples are

https://ke.boell.org/sites/default/files/can_carbon_credits_help_kenya_become_green.indd_.pdf (accessed on 22nd February 2022)

[83] Nyambura B., and Nhamo G., "CDM Projects and Their Impact on Sustainable Development: A Case Study from Kenya," *Environmental Economics*, Volume 5 (1), 27th March 2014.

[84] *Ibid.*

[85] Ministry of Energy, "Feed-in-tariffs Policy", Government of Kenya, *http://admin.theiguides.org/Media/Documents/FiT%20Policy%202012.pdf* (accessed 22nd February 2022).

[86] African Development Bank, *Lake Turkana Wind Power Project: The largest wind farm project in Africa*, African Development Bank, 17th September 2015, available at https://www.afdb.org/en/projects-and-operations/selected-projects/lake-turkana-wind-power-project-the-largest-wind-farm-project-in-africa-143, accessed on 24th August 2022).

[87] Hoch, *supra*.

the Corner Baridi wind farm which is located at Kinangop Wind Park Ltd, amongst others.

Hydropower, through the Tana Power Stations and Kiambere Hydro-power were the earliest to be registered show an output of 237k CERs and 477 CERs in 2020 respectively.[88] The Bagasse Co-generation projects produce electricity from the biomass residues of sugar production.[89] Mumias Sugar has been the pioneer as previously stated. There is the 6MW Muhoroni Sugar[90] and the 40MW West Sugar Ltd recently having their validation terminated.[91] BIDCO Company Limited has also recently submitted a biomass co-generation project, as well as a fuel-switch project at its crude edible oil refinery.[92]

4.3.1.3 Energy efficient measures

Some of these include KPLC's Green Light for Africa Project which distributed 900,000 Compact Fluorescent Lamps to Kenyan households,[93] solar power technologies such as the Barefoot Power's Lighting

[88] *Ibid* pg. 17
[89] Nyambura and Nhamo, *supra*.
[90] UNFCCC, "6 MW Bagasse Based Cogeneration Project by Muhoroni Sugar Company Limited", *UNFCCC*, available at *https://cdm.unfccc.int/Projects/Validation/DB/QNMHK5H4FTGJ4K1AQLHYTQPNCUIJ70/view.html* (accessed on 22nd February 2022).
[91] UNFCCC, "40MW Bagasse Based Cogeneration at West Kenya Sugar Limited", *UNFCCC*, available at *https://cdm.unfccc.int/Projects/Validation/DB/BMNRNLA6HT98AYZ0RAM1XMXNYRTY7G/view.html* (accessed on 22nd February 2022)
[92] UNFCCC, "Installation of Cogeneration plant by utilizing the Biomass based Boiler with a capacity of 20 TPH at BIDCO Oil Refineries Limited, Kenya", *UNFCCC*, 2022, available at *https://cdm.unfccc.int/Projects/Validation/DB/B35PMUXLFZL2CXBWW2CQA7HYSTBZ5O/view.html* (accessed on 29th August 2022).
[93] UNFCCC, "Green Light for Africa- KPLC Kenya", *UNFCCC*, https://cdm.unfccc.int/ProgrammeOfActivities/cpa_db/8AKC10ZORVUIESQ9GMT42FNLPXY6BJ/view (accessed on 22nd February 2022).

Programme,[94] Nuru Lighting Programme,[95] Tough Stuff International, and the TATS Solar Lantern.[96]

4.3.1.4 Voluntary Carbon Market Projects

Under the Voluntary Carbon Market, an entity can be motivated by a desire to reduce emissions. They volunteer to take part in projects by purchasing carbon credits generated through carbon projects[97]. Majority of these projects in Kenya are in the forestry sector. There are nine forestry sector voluntary projects in Kenya. These include Kasigau Corridor REDD Project Phases I (Rukinga Sanctuary) and II (Community Ranches),[98] International Small Group & Tree Planting Programme (TIST),[99] Aberdare Range/Mt Kenya Small Scale Reforestation Initiative,[100] the Forest Again Kakamega Forest and Mikoko Pamoja Mangrove.

Apart from forestry, voluntary carbon market projects have led to domestic energy efficiency in Kenya through cook stoves and water filters reducing the unsustainable consumption of non-renewable biomass. An example is the CO_2-Balance Efficient Cook Stove Programme. Top Third Ventures 'Top

[94] UNFCCC, "Barefoot Power Lighting Programme", *UNFCCC*, available at https://cdm.unfccc.int/ProgrammeOfActivities/poa_db/OXBV8QY1G0E5KFR96NDJTLHUMIPSAC/viewCPAs (accessed on 22nd February 2022).

[95] UNFCCC, "Nuru Lighting Programme", *UNFCCC*, available at https://cdm.unfccc.int/ProgrammeOfActivities/poa_db/OGTH5Q4J6CAWXUBLNM2RE7I1S3PY08/view (accessed on 22nd February 2022).

[96] UNFCCC, "TATS Solar Lantern Programme", *UNFCCC*, available at https://cdm.unfccc.int/ProgrammeOfActivities/poa_db/LIQZ0G17YPM5KWR9BFNOEX34HJ86AV/view (accessed on 22nd February 2022).

[97] Gold Standard, "Carbon Market FAQs", *Gold Standard*, 2022, available at http://www.goldstandard.org/frequently-asked-questions/carbon-market (accessed on 22nd February 2022)

[98] Forests, WILDLIFE WORKS, available at *http://www.wildlifeworks.com/saveforests/forests_kasigau.php* (accessed on 22nd February 2022).

[99] TIST, "The International Small Group & Tree Planting Program", *TIST*, 2020, available at http://www.tist.org/welcome/ (accessed on 22nd February 2022).

[100] UNFCCC, "Project 3207: Aberdare Range / Mt. Kenya Small Scale Reforestation Initiative Kirimara-Kithithina Small Scale A/R Project", *UNFCCC*, 2020, available at *https://cdm.unfccc.int/Projects/DB/JACO1260322919.16/view* (accessed 22/2/22).

Third Ventures Stove Programme,[101] Climate Pal's 'Kenya Improved wood stoves' project,[102] and Envirofit International's 'Improved Cooking Stoves Programme of Activities in Africa'[103].

Agricultural and soil carbon projects such as the Kenya Agricultural Carbon Project implemented by a Swedish NGO, Vi Agroforestry, with support from the World Bank and participation in carbon credits off-take from the World Bank's Bio-Carbon Fund.[104] In mid-2011, Kenya Airways, in conjunction with International Air Transport Association (IATA) Organization, launched a Carbon Offset Program for its passengers via pre-CDM voluntary emission reductions from geothermal projects in Kenya.[105]

5. Conclusion

Kenya has the legal capacity to a domestic realisation of its ambition of introducing Carbon Pricing by 2025. A number of existing legal mechanisms have been identified that can be used as vehicles for the implementation of Carbon Pricing and development of Carbon trading in general. The introduction of climate action policies in the form of Carbon Pricing mechanisms will likely induce deeper modifications in the way energy is produced and consumed in the country.

Therefore, there is need for a better understanding of how such profound transformations will affect society, and more research efforts should be dedicated to this subject.

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[101] UNFCCC, "Top Third Ventures Stove Programme", *UNFCCC*, available at https://cdm.unfccc.int/ProgrammeOfActivities/poa_db/BSVR8KUNAXW0LI1PGC6H42Y3JD9EQ7/view (accessed on 22nd February 2022)

[102] EcoAct, "Climate Pal: EcoAct Offsetting Partner", available at https://eco-act.com/climate-pal/ (accessed on 22nd February 2022).

[103] Envirofit, "Smarter Cooking Technology for Better Living", *Envirofit*, available at https://envirofit.org/ (accessed on 22nd February 2022).

[104] The World Bank, "Kenya Agricultural Carbon Project", The World Bank, available at *https://projects.worldbank.org/en/projects-operations/project-detail/P107798* (accessed on 22nd February 2022).

[105] ClimateCare (2020) Kenya Airways; *https://climatecare.org/kenya-airways-encourage-their-customers-to-offset-flight-emissions/* (accessed 22/2/22)

With regards to the CDM relevance, it is expected to deliver sustainable development contributions as it encourages Kenya's shift towards renewable energy and embracing projects that will assist the environment and climate such as reforestation. However, it is noted that there is still a huge reliance on international expertise and finances. It is projected that biomass and oil products will remain two of Kenya's main sources of energy until at least 2030[106].

In order to help deal with some of the foregoing challenges, this paper makes four main recommendations. First, there is need for sensitisation on the use of carbon trading and finance among renewable energy developers in Kenya. Secondly, there is need for the create policies to promote carbon trading project deployment. Thirdly, it is also proposed that the country creates capacity within the local banking sectors and the capital markets to obtain carbon finance. Finally, it is also proposed that the role of the Designated National Authority (DNA) be reinforced while also establishing the human capacity and expertise needed to support developers to meet the requirements of the carbon markets.

[106] Longa F.D., and Van der Zwaan, B., "Do Kenya's Climate Change Mitigation Ambitions Necessitate Large-Scale Renewable Energy Deployment and Dedicated Low-Carbon Energy Policy?", *Renewable Energy: An International Journal*, 2017, 1559-1568.

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Deployment and Dedicated Low-Carbon Energy Policy?", *Renewable Energy: An International Journal*, 2017, 1559-1568.

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Critical Analysis of World Trade Organisation's Most-Favored Nation (MFN) Treatment: Prospects, Challenges and Emerging Trends in the 21st Century

By: ***Michael O. Okello*** *

1.0 Introduction

The paper focuses on the Most Favored Nation (MFN) Treatment within the context of regional integration and sustainable development in the 21st century. Its effect has evolved, since the Marrakesh Declaration when there was minimal active participation of developing states, to its adoption that has seen its benefits to a wider number of contracting under World Trade Agreements. However, there are emerging trends and case specific, regional scenarios that now renders it a not fit-for all purpose per se. Further, the premise of MFN and the participation of developing economies now depict major challenges, which may not have been either anticipated or considered in the very onset.

This paper critically analyses certain disparities and skewed aspects, some of which have pushed both developed and developing economies to react accordingly, to cushion themselves from the misgivings of MFN yet with ripple effects. This builds a case for reflection on salient gaps that the World Trade Agreements, the decision making and adjudicative organs need to timely address. Nevertheless, the paper highlights the rationale behind MFN treatment, while at the same time it pre-empts controversial debates in the near future, on the bilateral Investment treaty provisions (in retrospect). This will not only restate the vision of multilateral trade, but also to achieve equitable and special interventions with respect to trade in goods, services and trade related intellectual property rights in the affected states.

The paper recommends the necessity for protection sovereignty of states, upholding of the wider fundamental freedoms and inalienable rights from

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violations by developed economies, consensus on rules of interpretation of BITs clauses, qualification of 'equal treatment' in the sui generis cases. This will inter alia ensure non-discrimination *in fact* and foster local economies to grow and alleviate the emerging notion of marginalization of World Trade operation and its conflict with sub regional economic integration.

2.0 What is the Most Favored Nation (MFN) Treatment?

The Most Favored Nation (MFN) treatment is defined as the situation in which a state promises, usually by treaty, to trade with a particular partner on the most favorable tariff terms available to other parties to bilateral treaty with respect to like goods or services[1]. There might for example, be a policy in place of taxing the MFN nations imports at preferential rate[2]. Where a bilateral treaty (BIT) is signed, a MFN clause is provided, setting our terms that prohibit the host state from treating an investor from the other signatory state less favorably than any other foreign investor or a domestic investor, especially eliminating discrimination between them[3]. As a consequence MFN has an effect of enabling an (foreign) investor take advantage of more favorable provision found in a BIT between the host state and other favour states[4].

The operation of the MFN seeks to address through MFN clauses mischiefs of discrimination between states as well as against other countries, in the relevant markets involving dealings in goods, services and Intellectual property creations[5].

[1] Henry Campbell Black, 'Black's Law Dictionary'.
[2] Ibid.
[3] Turgut Aycan Özcan, 'Assessment of Most Favored Nation Clauses in Terms of Ejusdem Generis Principle and Its Impact over Some Bilateral Investment Treaties Executed by the Republic of Turkey in 1990s' (*Lexist*, 12 September 2018).
[4] United Nations, 'Marrakesh Agreement Establishing the World Trade Organization [Hereinafter Marrakesh Agreement]'.
[5] Patrick Anam, 'Most Favoured Nation Principle (MFN): Challenges and Opportunities' (23 July 2019).

It has been widely cited that MFN clauses are significant instrument of economic liberalization[6]. It removes entry barriers and distortions by guaranteeing foreign investors favorable treatments enjoyed by other domestic or foreign most favored customers or investors, owing from their economic or strategic influential negotiations with the countries where their investments take place [7].

3.0 WTO Agreements on MFN Treatment

The MFN status came forth between states since 11th century, and developed as a modern concept around 18th century, as a bilateral arrangement, where one country would grant another the status of "most favored nation." For instance, under the popular Jay Treaty of 1794, the United States accorded to Britain "most favored nation" trading status[8].

In the aftermath of the Second World War resulted to establishment of the General Agreement on Tariffs and Trade (GATT)[9]. The GATT came into force into force in 1948 and has various rules covering different areas of international trade and these rules are supposed to be adhered to by the contracting states. The Marrakesh Agreement, World Trade Organization (WTO) Agreement, General Agreement on Tariffs and Trade (GATT),

[6] Turgut Aycan Özcan (n 3).
[7] Kimberly Amadeo, 'Most Favored Nation Status: Pros and Cons' (*The Balance*, 20 April 2022).
[8] Jean Edward Smith and John Marshall, 'Definer of a Nation' (1998) 177 n The Treaty of Amity, Commerce, and Navigation, Between His Britannic Majesty and the United States of America, commonly known as the Jay Treaty. It was a treaty between the United States and Great Britain that averted war, resolved issues remaining since the Treaty of Paris of 1783 (which ended the American Revolutionary War), and facilitated ten years of peaceful trade between the United States and Britain in the midst of the French Revolutionary Wars, which began in 1792.
[9] GATT 1994: General Agreement on Tariffs and Trade 1994, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 1867 U.N.T.S. 187, 33 I.L.M. 1153 (1994).

General Agreement on Trade in Services (GATS)[10] and Agreement on Trade Related Intellectual Property Rights (TRIPs Agreement)[11] are three main instruments that govern MFN operation with respect to goods, services and intellectual property items.

3.1 Marrakesh Agreement and World Trade Organization (WTO)

The origin of MFN Treatment and the National treatment are traced from the Marrakesh Declaration[12]. Trade agreements and tariffs were negotiated under provisions of the General Agreement on Tariffs and Trade (GATT), which later established the World Trade Organization (WTO) in 1995 pursuant to the Marrakesh Agreement[13].

The preamble of the WTO Agreement highlights 'elimination of discriminatory treatment in international trade relations" as one of main ways through which objectives of WTO may be attained. The organization aims inter alia to regulate international trade and boost relations between countries, through principles of most favored nation, national treatment[14].

The MFN widely covers and prescribes nondiscrimination in international trade[15], which among other principles hold the World Trade Organization together and fosters international relations[16]. Under MFN, there is a negative obligations under WTO Agreements on foreign states under and host countries not to discriminate against their trading partners. A special

[10] GATS: General Agreement on Trade in Services, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1B, 1869 U.N.T.S. 183, 33 I.L.M. 1167 (1994).
[11] Agreement on Trade Related Intellectual Property Rights, including Trade in Counterfeit Goods, 1994.
[12] United Nations (n 4).
[13] Turgut Aycan Özcan (n 3).
[14] 'Most-Favored-Nation Clause' <*https://corporatefinanceinstitute.com/resources/knowledge/economics/most-favored-nation-clause/*> accessed 27 May 2022.
[15] United Nations, 'Most-Favored Nation Treatment : UNCTAD Series on Issues in International Investment Agreements II' (United Nations 2010).
[16] Patrick Anam (n 5).

favour enjoyed by the most favored nation goes to the rest of WTO Agreement members (unilaterally) subject to exemptions[17].

3.2 General Agreement on Tariffs and Trade (GATT)

Most Favored Nation Treatment (MFN) is one of these rules and is covered under GATT 1994 Article 1[18]. GATT provides for unconditional, immediate equal treatment with respect to any advantage, favour, privilege or immunity granted by any contracting party to like products traded amongst the contracting parties. MFN is in covered under article 1 of GATT governing trade of goods, where paragraph 1 provides that[19]:-

> [w]ith respect to customs duties and charges of any kind imposed on or in connection with importation or exportation or imposed on the international transfer of payments for imports or exports, and with respect to the method of levying such duties and charges, and with respect to all rules and formalities in connection with importation and exportation, and with respect to all matters referred to in paragraphs 2 and 4 of Article III, any advantage, favour, privilege or immunity granted by any contracting party to any product originating in or destined for any other country shall be accorded immediately and unconditionally to the like product originating in or destined for the territories of all other contracting parties.

3.3 General Agreement on Trade in Services (GATs)

The GATS governing instrument on trade in services (as defined under article 1), protects the MFN in order of priority as one of the key obligations and disciplines principles, under Part II'. Further, article II of GATs provides that:

1. With respect to any measure covered by this Agreement, each Member shall accord immediately and unconditionally to services and service suppliers of any other Member treatment no

[17] 'Most-Favored-Nation Clause' (n 14).
[18] Patrick Anam (n 5).
[19] United Nations (n 15).

less favorable than that it accords to like services and service suppliers of any other country.

2. A Member may maintain a measure inconsistent with paragraph 1 provided that such a measure is listed in, and meets the conditions of, the Annex on Article II Exemptions.
3. The provisions of this Agreement shall not be so construed as to prevent any Member from conferring or according advantages to adjacent countries in order to facilitate exchanges limited to contiguous frontier zones of services that are both locally produced and consumed.

The GATs recognizes exceptions to the MFN principle under paragraph 2 of the article II above. It further construed that MFN applies to like services and like supplies which are accorded immediate, unconditional and equal treatment.

3.4 The Agreement on Trade Related Intellectual Property Rights (TRIPs)

The Agreement on Trade-Related Intellectual Property Rights (TRIPS) [20] is an agreement of international law between all WTO contracting states. It sets enforcement, dispute resolution mechanisms and minimum standards that regulate specific forms of intellectual property for the states. The principles of MFN on intellectual property items is governed by TRIPs under article IV, which provides that

> [w]ith regard to the protection of intellectual property, any advantage, favour, privilege or immunity granted by a Member to the nationals of any other country shall be accorded immediately and unconditionally to the nationals of all other Members. Exempted from this obligation are any advantage, favour, privilege or immunity accorded by a Member:

[20] Agreement on Trade Related Intellectual Property Rights, including Trade in Counterfeit Goods, 1994.

(a) deriving from international agreements on judicial assistance or law enforcement of a general nature and not particularly confined to the protection of intellectual property;
(b) granted in accordance with the provisions of the Berne Convention (1971) or the Rome Convention authorizing that the treatment accorded be a function not of national treatment but of the treatment accorded in another country;
(c) in respect of the rights of performers, producers of phonograms and broadcasting organizations not provided under this Agreement;
(d) deriving from international agreements related to the protection of intellectual property which entered into force prior to the entry into force of the WTO Agreement, provided that such agreements are notified to the Council for TRIPS and do not constitute an arbitrary or unjustifiable discrimination against nationals of other Members

The provision secures MFN principles but expressly cites exemptions with respect to IPR items covered in conventions and international agreements that came into force, pre-WTO Agreement, and which are not discriminatory, arbitrary or unjustifiable against the national members[21]

4.0 Prospects of Most Favored Nation Treatment

The Most Favored Nation Treatment and status is distinguished from the NT, as the latter only applies one a product, service or item of IP that has already the market *ex port*. Accordingly, any imposed duties and import taxes are not in violation of National Treatment Status even where the domestic

[21] Rudolf Adlung and Antonia Carzaniga, 'MFN Exemptions Under the General Agreement on Trade in Services: Grandfathers Striving for Immortality?' [2009] Journal of International Economic Law.

markets are exempted from such exactions[22]. Further, while the national treatment (NT) principle prohibits discrimination *against* other states, the MFN status prohibits discrimination *between* other contracting states with respect to *like products*[23]. In addition, under MFN status, any advantage, favour, privilege or immunity granted by any contracting party to any product, service or IP work or item originating in or destined for any other country shall be accorded immediately and unconditionally[24] .

In other words, the discrimination in national treatment relates to advantage given to domestic products against products from other countries, while in MFN treatment, the discrimination relates to advantage given to products originating in or destined for any other country against that of other countries. Therefore, as a general rule, a state lowers a trade barrier or opens up a market pursuant to a BIT, it has to do so for 'like products' unconditionally and with immediate effect with respect to goods, services and IP items, for all other WTO agreement contracting trading partners)[25].

5.0 Critical Analysis of Prospects and Challenges of the MFN Status

The MFN has come under scrutiny with respect to anti-trust laws regime; it is a type of vertical arrangement that would locally constitute a restrictive trade practice between suppliers and buyers. The Chicago school has seen potential noncompetition risks, especially where they are adopted under BIT or unilaterally by way of policy[26].

Further, questions have been raised on the efficiency rationale of MFN principle and whether it has shortcomings. This is in light of the emerging or subsisting peculiarities and circumstances of states. Does the principle favor all party states to WTO Agreement?

[22] Patrick Anam (n 5).
[23] Ibid.
[24] United Nations (n 15).
[25] Turgut Aycan Özcan (n 3).
[26] Baker, Jonathan B. and Chevalier, Judith A, 'The Competitive Consequences of Most-Favored-Nation Provisions' (2013) 27 Antitrust Magazine <https://ssrn.com/abstract=2251165>.

5.1 Imperatives of MFN Treatment and Clauses

It has been justified as efficiency rationale; that mitigates holding up problems and counteracts incentives to delays in contracting, and reduce negotiation and transaction costs. Further, MFN Status operates as a substitute of specific of terms of engagement that would be required between trading partners for specific transactions of services, goods or IP items. This cures issues of delays, transaction and negotiation costs, as it guarantees contracting parties opportunity to enjoy the best price, based on most favored customer arrangements[27].

Those countries, acceding to the WTO Agreement enjoy and exercise monopolies of economic development, free trade, fairness, predictability and nondiscrimination based on principles of MFN and NT. The above have an overall effect of expansion of international markets, reduce export costs, enhance competiveness. Advantage of equal treatment that is guaranteed to all WTO members and based on common grounds reached by the incumbent (MFC) hence guarantees permanent normal trade relations.

MFN principles cuts down red tape, differential tariffs and eliminates the need for customs authorities to calculated specific duties for each transaction among and between states, as they are "universal'. There is certainty and predictability and level play field, subject to exemptions.

Finally, MFN eliminates undesired trade protectionism and resultant complacency in domestic industries and fosters innovation. It hence boosts the market expansion and growing of smaller economies. Benefits of economies of large scale in turn lead to increase in export trade and economic growth and international relations[28].

[27] Ibid.
[28] Ibid.

5.2 Challenges facing the MFN Treatment

It is envisaged that MFN lowers costs on one side, while increases it on the other: as discussed in this paper, there is cost implication in monitoring, enforcement and litigating over matters linked to interpretation, exemptions and test of like products as well as claims of violation with respect to MFN clauses[29]. The contracting states benefit from the efforts borne by most favored nations that contracted the BITs for like goods, services and IPRS, hence incur no costs in negotiating the same, without a general mechanisms or compensation or actual reciprocity other than unilateral agreement based on international relations and comity of states that is based on the WTO obligations[30].

Further, other nations have no incentives to push further beyond the exiting terms enjoyed with MFNS. While the contracting states including developing countries economically benefit from MFNS terms, they may have almost no opportunity to monitor and enforce compliance to MFN or its clauses hence makes no competitive sense[31].

Economic viewpoints cites that classes of competitive collusive nature of MFNS; as it results to facilitatory coordination may raise sellers costs and enable players raise questions against rival undertakings on undertakings that make adjustments to fit in a competitive market. It has also potential exclusionary attribute where, rival and entrant investors may exit or face entry barriers, where foreign exports enjoy subsidies and sell at lower prices that host countries .

MFN clauses may enforce prohibitive effect on prices with respect to BIT that other states enjoy or operate under. Accordingly, where the prices and taxes are higher, it may lead undertakings in a relevant market to compete less as MFN clauses assist the incumbents to foreclose entry or expansion.

[29] Ibid.
[30] Patrick Anam (n 5).
[31] Baker, Jonathan B. and Chevalier, Judith A (n 26).

There will therefore be claims over abuse of dominance or non-competitiveness of trade between states[32].

Since all members are accustomed to same status and treatment for like goods, services, IP items, others may fall victim of unfair or restrictive practices. The new entrants and rival have no option but to adopt the terms already negotiated by incumbent. This may not reflect or be subject to deferential and unique circumstance of developing countries. Where such aspects are not addressed, through exemptions and drastic measures, the BITS may enforce and reinforce terms that result to disproportionate effect of high tariffs, entry barrier, lack of opportunity to negotiate or enforce MFN clauses or monitor compliance[33].

6.0 Salient Aspects of MFN and Emerging Trends

The discourses on MFN remain controversial one today, and has been a subject of claims and litigation in the global scape including in Africa[34]. The disputes have inter alia involved the test for 'like products', the interpretation of the MFN clauses or their violations. What happens when aspects of international law and jus cogens are violated by a state that enjoys MFN Status? Or in the absence of an express agreement but unilateral declarations to be acceded by contracting states? Do they have a say to renegotiate the terms[35]? Critical analysis African regional integration depicts challenges and opportunities[36], viz:-

6. 1 Question of the Test of 'like' products

The nature of MFN clauses is that they are unconditional, and general and extends privileges enjoyed by MFNs to other contracting state parties to WTO Agreement. In so doing, the status allows equal treatment in respect of import/export of "like products" such as uniform taxation regimes in imports, exports and international transfer of payments, without

[32] Ibid.
[33] Ibid.
[34] Turgut Aycan Özcan (n 3).
[35] Baker, Jonathan B. and Chevalier, Judith A (n 26).
[36] Patrick Anam (n 5).

discrimination and or giving one party on advantage over the other with respect to 'like products' i.e. products with similar characteristics in *Japan -Taxes An Alcoholic Beverages*, vodka was considered to be like good to *Schochu*, on basis of unsophisticated market test and considered, taste, appearance and use. It was held that Japanese *Schochu* and U.S made whisky cognac and white spirits were like products[37]. The exporters of spirits to japan complained that japan offered low tax to *Schochu* than whisky cognac and white spirits. The panel found japan in violation of article 3 (supra) of GATT by its inconsistent tax system, hereby considering both exported products from US and Japan *Schochu* as 'like products'[38]

6.2 General Systems of Preference and exemptions

There are exemptions under GATT, GATs and TRIPs, where counties that under a treaty on a free trade area or customs may be allowed to apply differential (higher) tariffs at differential to that imposed on nonmembers, and contrary to MFN principles. Further, the developed countries may be unilateral agreements extend zero duty, quota free exports to develop preference.

There is more leeway exploited in the exemptions to most favored nation (MFN) obligation with respect to services under article II of GATS than in trade of goods under GATT. States had one-off opportunity upon entry to force of GATs in 1995 or WTO accession, to retain the departures from MFN treatment within 10 years. The MFN exemptions were subject to relatively soft disciplines only. Further, the departures from MFN treatment, were not subject to time constraints, including for Economic Integration Agreements and recognition measures related to standards, certificates and the like.

The question is how the patterns of current exemptions, to different groups affect the services negotiations. Scholars admit that non-availability of new exemptions, including for measures that had escaped members' attention

[37] Ibid.
[38] Ibid.

(especially developing countries) accession time to the agreements, could have raised propensity to and popularity of potential substitutes (including Regional Trade Agreement and Economic Integration Agreements). This may have also promoted an excessively broad interpretation of existing exemptions and discouraged governments from rescinding those that had served their initial purpose better. A more flexible approach might thus be warranted[39].

6.3 Plight of local industries

Where host countries grants to all WTO members states same treatment, it may be unable to protect local industries from cheaper goods imported from foreign countries. At the same time, undertakings that may not adjust to the exclusionary effect of margin squeeze and due to abuse of dominant position may choose to exist market for failure to compete.

Where a host state encourages subsidies policies in the domestic market, this may result to cheap exports and resultant distortion to foreign markets and unfair practice. Accordingly, exemptions are only allowable under strict conditions such that where MFN is not qualified, the host county fails to put in place subsidies to counter imbalance, and there may be a result into economic breakdown[40]. In *US- Grass Guzzler case*; which concerns environmentally, friendly laws, panel determined that statutes that do not aim at protectionism are GATT compatible[41]. Exceptions help in playing safely nets, where through integration contracting parties such as developing/ poorest nations gross[42].

6.4 Jus cogens (peremptory norms) and MFN Status

The MFN status does not after all guarantee permanent normal trade relations, neither does it only restrict to tariffs but goes beyond to relations, non-restrictive or protectionist environment and human rights obligations. It is emerging today that the principle is not permanent or absolute, as it may

[39] Rudolf Adlung and Antonia Carzaniga (n 21).
[40] Patrick Anam (n 5).
[41] Ibid.
[42] 'Most-Favored-Nation Clause' (n 14).

be qualified on justified grounds. Even in light of military actions against Ukraine in 2022, Russia remained member of the World Trade Organization. Biden administration suspended normal trade relations (MFN) with Russia apart April 2022[43]. Later, the Trump administration begun imposing tariff on Chinese imports since 2018 on claims of unfair practices (intellectual theft). Unless members have statutes that allow abrogation of MFN, countries generally remain to enjoy MFN status. The Ukraine-Russia war has raised geopolitical debates where as a customary law rule, sovereignty, reciprocity, law of war and principle of international rules have led to many states isolating relations with Russia. US. Declared that Russia no longer have MFN status with respect to WTO BIT agreements. The war has resulted to ripple effect in oil crisis and foreign trade imbalances[44].

6.6 Principles of Construction of MFN clauses in BITs

There has been litigating over substantive MFN based BIT clauses which do not exist in the original BIT. This for examples are based on claims with respect to discrimination, fairness and security, full protection and equal treatment. According to Article 9 of the Draft Articles on Most Favored Nation Clause prepared by International Law Commission, e*jusdem genris* may be employed in construction of clauses. It expressly prescribes that when *Ejusdem Generis principle* is applied to MFN clauses existing in the BITs, the wording of each MFN may be imported from other BITs. The United Nations Conference on Trade and Development (UNCTAD)[45] on MFN concurs with the fact that "the ejusdem generis rule, is relevant to determine issues belonging to the same subject matter or category of subjects to which the MFN clause relates[46].

6.7 MFN Marginalization

There is increasing fear that the proliferation of regional trade agreements (RTAs) is continuing to cause marginalization of MFN status of countries that are non-members. The RTAs offer mutual benefits and preferential

[43] Kimberly Amadeo (n 7).
[44] Ibid.
[45] United Nations (n 15).
[46] Turgut Aycan Özcan (n 3).

treatments on customs, and economic zones that result to beneficial treatments among parties. The increase is expected to continue. The African Continent is not only realizing such RTAs but also working on a model AfRFTA that seeks to open even more benefits to members. The resultant effect is that other countries are excluded from these preferential treatment that are based on the RTAs as non-parties on basis of privity of the agreements, and enforcement between parties based on the laws of treaties. This in the end beats the purposes, where the excluded countries are share membership with the RTA members in the wider WTO Agreements regimes. This 'violates' the WTO non-discrimination principle enshrined in article 2 of GATs and article 1 for GATT and article 4 of the TRIPs respectively within the MFN clauses in other BITs. Yet the very states would want to enjoy equal treatment under MFN terms. This depicts hypocrisy and indifference[47].

7.0 Summary and Recommendations

The MFN and by extension, the National Treatment principle are important. However, it is emerging that MFN does not purely guarantee permanent normal trade relations in trade, services and IP rights under WTO regime. While WTO aims have achieved a balance and yielded benefits discussed in the paper including 'equal treatment', it is not obvious as a general rule. The MFN status is now a qualified one, owing to the exemptions and exceptional cases discussed above where litigation outcomes show unwillingness of adverse parties to comply.

Further, international law principle on grounds of violations of peremptory norms has made countries with that status defrocked of it. Further, the emergence of RTAs result to results to unequal field and undue advantage by countries that want to exploit both the gains coming from RTA terms as well as MFN clauses in BITs of most favored customers. While such exemptions and alternatives to permanent normal trade relations seem to offer remedies and lee-ways, they show that there are certain inadequacies

[47] Rudolf Adlung and Antonia Carzaniga (n 21).

found or not addressed under the WTO regimes. This constructively act as a source of its marginalization.

The WTO regime needs to be evaluated, not with respect to compliance with it by contracting state only, but in the context of its effectiveness of lack thereof. Given the creating of the regimes came before the liberalization and democratization of the third world in the 90s, it is been over three decades where regional integration and more awareness on international law and relations have depicted salient reforms both from national and regional level that may need to adjust to address what issues were not cured in the WTO agreement frameworks. Nonetheless, MFN principle has yielded benefits to less favored nations in international trade in merchandise, services and IPR protection as well as technology transfer.

The WTO and its partners should relook at the inadequacies and gaps in its framework without compromising violations of international rules and peremptory norms by its WTO treaty members against recognition of sovereignty as seen in Russia –Ukraine war case.

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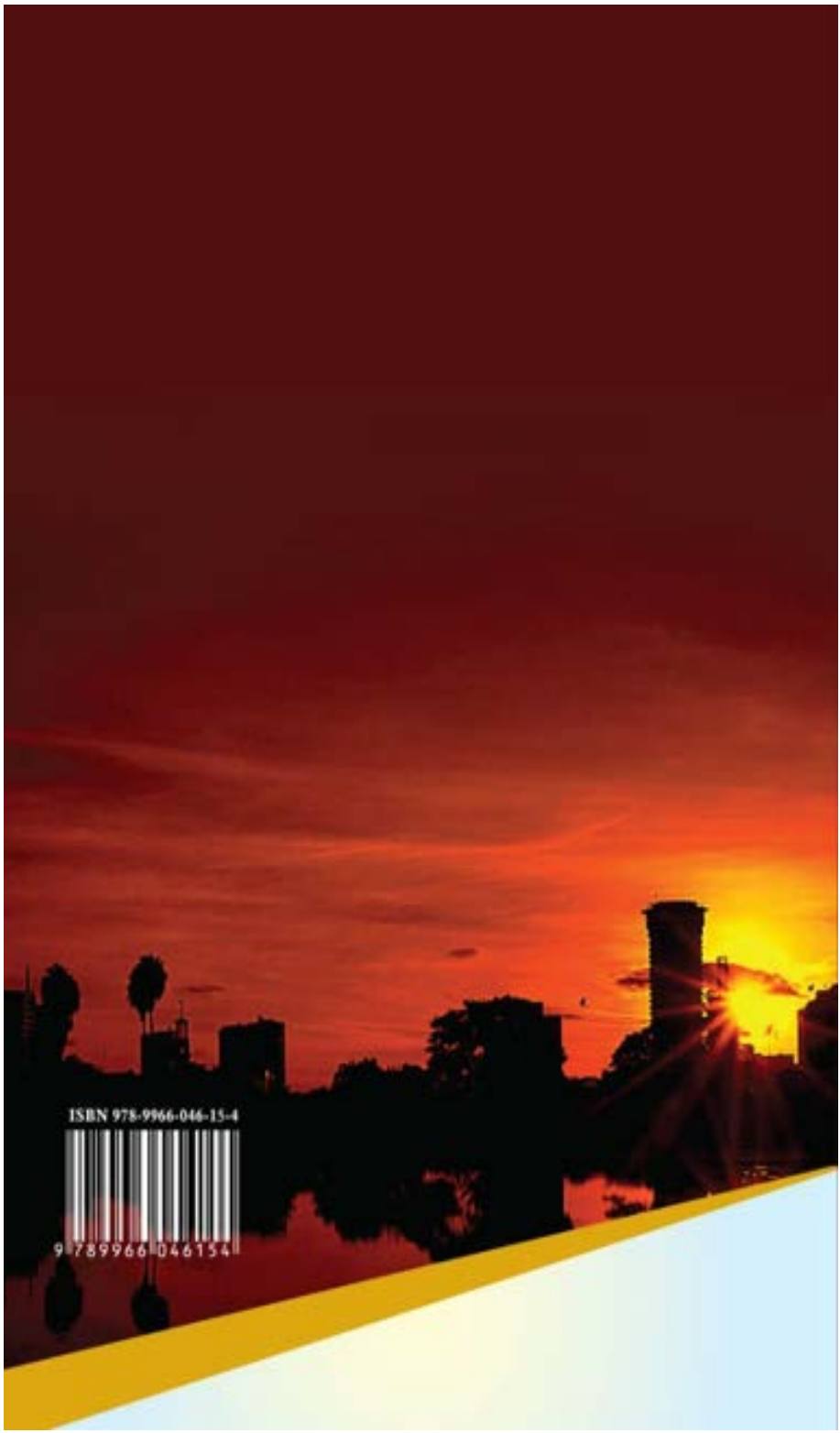
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