Journal of Conflict Management & Sustainable Development

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Editors' Note

The year 2020 is here.

The journal of Conflict Management and Sustainable Development continues to provide a platform where scholars can engage in discourse on conflict management topics relating to sustainable development.

The journal is peer reviewed and refereed so as to ensure the highest academic standards.

This issue, Volume. 4 No. 1, carries articles dealing with themes such as: The Blue Economy, Corporate Social Responsibility, Environmental Protection, Regional Integration, Artificial Intelligence, Traditional Ecological Knowledge and Implementation of International Agreements. The journal also contains a review of the book '*Securing Our Destiny Through Effective Management of the Environment.*'

Development is not feasible in an environment of unresolved conflicts. There is a need of finding lasting solutions to conflicts. Peacemaking and peacebuilding are vital components of conflict management and development.

The sustainable development goals envisage a world without poverty, hunger and where everyone can access justice. It is an ideal world that can be achieved.

The journal contributes to the debate touching on how to make the world a better place to live in.

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

Dr. Kariuki Muigua, PhD, FCIArb (Chartered Arbitrator), Accredited Mediator.
Managing Editor,
February, 2020

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Content	Author	Page
Mainstreaming Traditional Ecological Knowledge in Kenya for Sustainable Development	Dr. Kariuki Muigua	1
Fragmentation of Investment Codes in Africa: The Pan African Investment Code (PIAC) as a Centripetal Continental Force	Wilfred Mutubwa	22
A Critique of Kenya's Implementation of the Rome Statute	Dr. Kenneth Wyne Mutuma Lilian Okumu Obu	37
Harnessing the Blue Economy: Challenges and Opportunities for Kenya	Dr. Kariuki Muigua	54
Artificial Intelligence and its Future in Arbitration	Ibrahim Godofa	67
The Nexus between Corporate Social Responsibility and Protection of Environment in Kenya.	Peter Mwangi Muriithi	85
Securing Our Destiny Through Effective Management of The Environment	Jack Shivugu	101

Mainstreaming Traditional Ecological Knowledge in Kenya for Sustainable Development

Kariuki Muigua*

Abstract

The sustainable development agenda calls for concerted efforts from all stakeholders in the conservation and protection of the environment. It also encourages an integrated approach in the application of scientific and traditional knowledge from communities in achieving the sustainable development goals. This paper argues that for Kenya to achieve these goals there is a need to incorporate and encourage active use and application of traditional ecological knowledge in environmental conservation in Kenya. This also calls for mainstreaming of this knowledge into policy, law and action plans in order to enhance its applicability.

1. Introduction

Africa has a rich and highly diverse array of natural resources. It also has traditional communities' knowledge and environmental governance practices that have been practised over centuries before the advent of colonialization.[1] This was a reflection of the cumulative body of knowledge and beliefs handed down through generations by cultural transmission and the relationship of the local people with their environment.[2] Traditional knowledge incorporates belief systems that play a fundamental role in a people's livelihood, maintaining their health, and protecting and replenishing the environment.[3]

From international law to domestic laws, there have been renewed efforts and calls for environmental conservation and conservation. There has also been a realisation of the critical role that traditional knowledge has played over the centuries especially among indigenous and local communities. This is especially pronounced within the sustainable development discourse. As

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[1] African Regional Intellectual Property Organization, available at *http://www.aripo.org/index.php/services/traditional-knowledge* [Accessed on 18/08/2019].

[2] Ibid.

[3] Ibid.

early as 1970s and 80s, there were attempts at mainstreaming traditional environmental knowledge in policy, law and action plans as a way of promoting sustainable development. This was captured in the Brutland Commission Report, *Our Common Future*[4] which notes that 'the processes of development generally lead to the gradual integration of local communities into a larger social and economic framework. But some communities - so-called indigenous or tribal peoples - remain isolated because of such factors as physical barriers to communication or marked differences in social and cultural practices.[5] It goes on to state that the isolation of many such people has meant the preservation of a traditional way of life in close harmony with the natural environment. Their very survival has depended on their ecological awareness and adaptation. But their isolation has also meant that few of them have shared in national economic and social development; this may be reflected in their poor health, nutrition, and education.[6]

In 2015, countries adopted the *2030 Agenda for Sustainable Development*[7] and its 17 Sustainable Development Goals.[8] The Sustainable Development Agenda envisages a development agenda that integrates the three dimensions of sustainable development (environmental, economic and social).[9] One of the goals of this Agenda is to 'end hunger, achieve food security and improved nutrition and promote sustainable agriculture.[10] Notably, one of the envisaged ways of achieving this goal is to ensure that by 2020, member states will maintain the genetic diversity of seeds, cultivated plants and farmed and domesticated animals and their related wild species, including through soundly managed and diversified seed and plant banks at the national, regional and international levels, and promote access to and fair and equitable sharing

[4] WCED, *Our common future: Report of the World Commission on Environment and Development*, G. H. Brundtland, (Ed.). Oxford: Oxford University Press, 1987.

[5] Ibid, para. 70.

[6] Ibid, para. 71.

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

[8] United Nations, "The Sustainable Development Agenda," available at https://www.un.org/sustainabledevelopment/development-agenda/ [Accessed on 18/08/2019].

[9] ibid.

[10] Goal 2, *Transforming our world: the 2030 Agenda for Sustainable Development.*

of benefits arising from the utilization of genetic resources and associated traditional knowledge, as internationally agreed.[11]

Environment and natural resources play an important role in the lives of various communities. For instance, food security is notably related to sustainable environmental governance and management. Environmental sustainability is associated with reduced risk of widespread food insecurity.[12] Food security depends, *inter alia*, on sustainable management of natural resources and the environment since in many indigenous communities, natural resources are the principal sources of their staple food.[13] Traditional knowledge within indigenous communities thus plays an important role in the achievement of food security for these communities and others since they rely on their traditional ecological knowledge in management of these resources.[14]

Environmental sustainability comes with sound environmental decision-making. This is supposed to be an all-inclusive process that involves not only the formal decision-makers but also communities. These communities are a rich source of traditional knowledge that includes environmental knowledge. This paper focuses on traditional environmental knowledge and how the same can be fully incorporated and mainstreamed into environmental governance for sustainable development. 'Environmental mainstreaming' has been defined as the informed inclusion of relevant environmental concerns into the decisions of institutions that drive national, local and sectoral development policy, rules, plans, investment and action.[15] This paper thus looks at how traditional environmental knowledge can be mainstreamed not just in the agricultural sector but all areas that have an environmental aspect within them.

[11] Goal 2.5, *Transforming our world: the 2030 Agenda for Sustainable Development.*

[12] Pérez-Escamilla, R., "Food security and the 2015–2030 sustainable development goals: From human to planetary health: Perspectives and opinions," *Current developments in nutrition*, Vol.1, no. 7 (2017): e000513, p.4.

[13] The *Rome World Food Summit*, Commitment No. 3.

[14] Ibid.

[15] Dalal-Clayton, D. B., & Bass, S., *The challenges of environmental mainstreaming: Experience of integrating environment into development institutions and decisions*, No. 1. IIeD, 2009.

2. Traditional Environmental Knowledge: Relevance to the Environment and Natural Resources Management

Traditional knowledge has been broadly defined as a cumulative, collective body of knowledge, experience, and values held by societies with a history of subsistence.[16] "Traditional knowledge" is also defined as any knowledge originating from a local or traditional community that is the result of intellectual activity and insight in a traditional context, including know-how, skills, innovations, practices and learning, where the knowledge is embodied in the traditional lifestyle of a community, or contained in the codified knowledge systems passed on from one generation to another.[17] The term is not to be limited to a specific technical field, and may include agricultural, environmental or medical knowledge, and knowledge associated with genetic resources.[18]

Traditional knowledge has also been defined as knowledge, know-how, skills and practices that are developed, sustained and passed on from generation to generation within a community, often forming part of its cultural or spiritual identity.[19] The term "indigenous knowledge" may generally refer to how members of a community perceive and understand their environment and resources, particularly the way they convert those resources through labour.[20]

Traditional knowledge or traditional ecological knowledge is believed to represent experience acquired over thousands of years of direct human contact with the environment.[21] A growing recognition of the capabilities of

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[16] Ellis, S.C., "Meaningful consideration? A review of traditional knowledge in environmental decision making," *Arctic* (2005): 66-77, at p. 66.

[17] African Regional Intellectual Property Organization (ARIPO), *Swakopmund Protocol on the Protection of Traditional Knowledge and Expressions of Folklore*, Adopted by the Diplomatic Conference of ARIPO at Swakopmund (Namibia) on August 9, 2010.

[18] Ibid.

[19] World Intellectual Property Organisation, 'Traditional Knowledge,' available at *http://www.wipo.int/tk/en/tk/* [Accessed on 18/08/2019].

[20] Castro, A.P. & Ettenger, K., 'Indigenous Knowledge And Conflict Management: Exploring Local Perspectives And Mechanisms For Dealing With Community Forestry Disputes,' *Paper Prepared for the United Nations Food and Agriculture Organization, Community Forestry Unit, for the Global Electronic Conference on "Addressing Natural Resource Conflicts Through Community Forestry,"* (FAO, January-April 1996). Available at *http://www.fao.org/docrep/005/ac696e/ac696e09.htm* [Accessed on 18/08/2019].

[21] Inglis, J., ed., *Traditional ecological knowledge: concepts and cases*, IDRC, 1993, at p. 1.

ancient agriculturalists, water engineers and architects led to increased appreciation of ethnoscience, ancient and contemporary, which paved way for the acceptability of the validity of traditional knowledge in a variety of fields.[22] One of the fields that embraced the use of traditional knowledge is the environment.

The concept of Traditional Ecological Knowledge has been applied to several categories of information, which are distinguishable on substantive and epistemological grounds.[23] These may include: Factual/rational knowledge about the environment. This includes statements of fact about such matters as weather, ice, coastal waters, currents, animal behaviour, traveling conditions and the like; Factual knowledge about past and current use of the environment (e.g., patterns of land use and occupancy, or harvest levels); Culturally based value statements about how things should be, and what is fitting and proper to do, including moral or ethical statements about how to behave with respect to animals and the environment, and about human health and well-being in a holistic sense; and culturally based cosmology—the foundation of the knowledge system—by which information derived from observation, experience, and instruction is organized to provide explanations and guidance.[24]

Traditional ecological knowledge is also seen as bound up with "indigenous stewardship method," which is defined as the "ecologically sustainable use of natural resources within their capacity to sustain natural processes."[25] Proponents of traditional knowledge maintain that it can offer contributions to environmental decision making from a broader scope of environmental values, practices, and knowledge.[26] have adapted to local ecological niches over long timeframes, and the detailed and broad knowledge they have of adaptation, is affected negatively by the loss of land, ecosystem capacity, and

[22] Ibid, p.2.

[23] Usher, P.J., "Traditional ecological knowledge in environmental assessment and management," *Arctic*, 53, no. 2 (2000): 183-193, at p.186.

[24] Ibid, at p. 186.

[25] Whyte, K.P., "On the role of traditional ecological knowledge as a collaborative concept: a philosophical study," *Ecological processes*, Vol.2, no. 1 (2013): 7, at p.3.

[26] Ellis, S.C., "Meaningful consideration? A review of traditional knowledge in environmental decision making," *Arctic* (2005): 66-77, at p. 67.

alienation of culturally significant places, migration and losses in livelihoods.[27] They are thus interested parties when it comes to efforts towards achieving sustainable development and should thus be included.

Some communities' traditional ecological knowledge practices are perceived to promote dry land ecosystems management.[28] For instance, in Tanzania, pastoralists reduce risk of livestock mortality by seasonal movement of livestock to the productive and high rainfall areas.[29] This may however be criticized for negative effect on some environmental aspects.[30] Regarding wildlife in the rangelands, Maasai pastoralists do not consume wild meat and therefore do not aspire to kill wildlife that grazing close to their livestock. They allow wild animals, especially the ungulates to graze with their animals without any disturbances.[31] This knowledge is passed from generation to generation among the Maasai as part of preservation of their culture and ensuring sustainability of their livelihoods.[32]

There are also studies that have demonstrated that the belief system of the Giriama people, through their indigenous knowledge and management systems, demonstrated through indigenous nomenclature, taboos, proverbs and lived experience, has had a great contribution to the conservation of

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[27] Crawhall, N., 'Indigenous knowledge in adaptation: conflict prevention and resilience-building,' *Conflict-sensitive Adaptation: Use Human Rights to Build Social and Environmental Resilience, Brief 10.* (Indigenous Peoples of Africa Co-ordinating Committee and IUCN Commission on Environmental, Economic and Social Policy, 2014), p. 2. Available at *http://cmsdata.iucn.org/downloads/tecs_csa_10_indigenous_knowledge_in_adaptation_crawhall.pdf* [Accessed on 18/08/2019].

[28] Olekao, S. K., & Sangeda, A. Z., "Traditional ecological knowledge in management of dryland ecosystems among the Maasai pastoralists in Kiteto District," *Tanzania J Environ Res* 2 (2018); Olekao, S.K., "The role of traditional ecological knowledge in management of dryland ecosystems among the Maasai pastoralists in Kiteto District, Tanzania," PhD diss., Sokoine University of Agriculture, 2017. Available at http://www.suaire.suanet.ac.tz:8080/xmlui/bitstream/handle/123456789/2073/SAMWEL%20KORINJA%20OLEKAO.pdf?sequence=1&isAllowed=y [Accessed on 22/08/2019].

[29] Ibid, p.8.

[30] Ibid, p.9.

[31] Ibid, p.9. Ungulates are a group of large mammals that are distinguished from other animals by the presence of hooves. They are an extremely well-known and economically important group that includes animals such as horses, camels, cows, sheep, goats, deer, pigs, giraffes, hippos, rhinos and many more. (Basic Biology, available at https://basicbiology.net/animal/mammals/ungulate).

[32] Tian, X., "Day-to-day accumulation of indigenous ecological knowledge: A case study of pastoral Maasai children in southern Kenya," (2016). Available at https://pdfs.semanticscholar.org/c3ac/77c4808b83701fe24d46009ec27bea38769f.pdf [Accessed on 22/08/2019].

mangroves, fisheries, corals and coral reefs.[33] These are just a few of the many examples that may be cited to demonstrate how Kenyan communities have for years utilised their traditional ecological knowledge in environmental and natural resources conservation.

There are two recognised practical methods for encouraging the use of traditional knowledge in environmental decision-making. The first one includes those methods that are based on official recognition of traditional knowledge, followed the development of rules of procedure for the use of knowledge by institutions of authority. In this "top-down" approach, the structures of governance are constructed accommodate traditional knowledge, but the knowledge itself is not fostered or sought out.[34] The second category increases the capacity of indigenous people to bring traditional knowledge to bear on policies and procedures governance and regulation. This "bottom-up" approach is characterized by initiatives designed to encourage learning and transmission of traditional knowledge at community level, as well as developing the means communicate this knowledge within the structures processes of environmental governance.[35]
This paper envisages the mainstreaming of both approaches into environmental governance through full and meaningful implementation of the existing laws recognising traditional knowledge as well as the constitutional and statutory provisions aimed at empowering communities through encouraging participation and sharing and access to information by communities.

[33] Shilabukha, K., "Indigenous Knowledge and Management Systems for Marine Resources among the Giriama of North Coastal Kenya," PhD diss., University of Nairobi, 2015. Available at http://erepository.uonbi.ac.ke/bitstream/handle/11295/92635/Khamati_Indigenous%20knowledge%20and%20management%20systems%20for%20marine%20resources%20among%20the%20Giriama%20of%20north%20coastal%20Kenya.pdf?sequence=3&isAllowed=y [Accessed on 22/08/2019].

[34] Ellis, S.C., "Meaningful consideration? A review of traditional knowledge in environmental decision making," *Arctic* (2005): 66-77, at p.67.

[35] Ibid, p.67.

3. International and National Legal Framework on Traditional Environmental Knowledge

3.1 International Framework on Traditional Environmental Knowledge

Notably, at the international level, there has been a growing recognition that traditional knowledge and customary sustainable use underpin indigenous peoples' and local communities' resilience to change including climate change, as well as contribute directly to biological and cultural diversity, and global sustainable development.

At the international level, Article 6 of the *Convention on Biological Diversity* provides that each Contracting Party should, in accordance with its particular conditions and capabilities: develop national strategies, plans or programmes for the conservation and sustainable use of biological diversity or adapt for this purpose *existing strategies, plans or programmes* which should reflect, inter alia, *the measures set out in the Convention relevant to the Contracting Party concerned*; and integrate, as far as possible and as appropriate, the conservation and sustainable use of biological diversity into relevant sectoral *or cross-sectoral plans, programmes and policies* (emphasis added).

The *Convention on Biological Diversity* recognizes the importance of indigenous and local communities to the conservation and sustainable use of biological diversity. The key provisions are to be found in Article 8(j) which requires that the traditional knowledge of indigenous and local communities be respected, preserved and maintained; that the use of such knowledge should be promoted for wider application with the approval and involvement of the holders of such knowledge; and that they should equitably share in the benefits which arise from the use of their knowledge.[36]

Article 10(c) of the *Convention on Biological Diversity* further provides that each Contracting Party shall, as far as possible and as appropriate protect and encourage customary use of biological resources in accordance with traditional cultural practices that are compatible with conservation or sustainable use requirements. This is the only international Convention that

[36] United Nations, *Convention on Biological Diversity* of 5 June 1992, 1760 U.N.T.S. 69, Article 8.

expressly recognises the role of traditional knowledge in environmental management and sustainable development agenda.

The *United Nations Declaration on the Rights of Indigenous Peoples*,[37] provides that indigenous peoples have the right to maintain, control, protect and develop their cultural heritage, traditional knowledge and traditional cultural expressions, as well as the manifestations of their sciences, technologies and cultures, including human and genetic resources, seeds, medicines, knowledge of the properties of fauna and flora, oral traditions, literatures, designs, sports and traditional games and visual and performing arts. They also have the right to maintain, control, protect and develop their intellectual property over such cultural heritage, traditional knowledge, and traditional cultural expressions.[38] In conjunction with indigenous peoples, States are obligated to take effective measures to recognize and protect the exercise of these rights.[39]

The Food and Agriculture Organization of the United Nations (FAO) opines that the promotion and protection of traditional and local food and agricultural knowledge will require international, intercultural and interdisciplinary approaches, communication and cooperation.[40] Coordination of indigenous and local communities' sustainable use, conservation and management of food and agriculture within and across ecosystems, landscapes and seascapes will also require synergies that link food security, livelihood sustainability, poverty alleviation and food and agricultural productivity to rural development processes based on *in* and *ex situ* conservation of food and agricultural genetic resources.[41] Traditional environmental knowledge from these communities thus becomes relevant in achieving the foregoing.

[37] 61/295. *United Nations Declaration on the Rights of Indigenous Peoples*.

[38] *United Nations Declaration on the Rights of Indigenous Peoples,* Art. 31(1).

[39] Ibid, Art. 31(2).

[40] Food and Agriculture Organization of the United Nations (FAO), *FAO and traditional knowledge: the linkages with sustainability, food security and climate change Impacts*, 2009, p.9.

[41] Ibid.

3.2 National Legal Framework on Traditional Environmental Knowledge

The Constitution of Kenya provides that culture is the foundation of the nation and the cumulative civilization of the Kenyan people and nation.[42] Specifically, it obligates the State to, *inter alia*, recognise the *role of science and indigenous technologies in the development of the nation*, and, recognise and protect the ownership of indigenous seeds and plant varieties, their genetic and diverse characteristics and their use by the communities of Kenya (emphasis added).[43] Further, with respect to the environment, the State is obligated to protect and enhance intellectual property in, and indigenous knowledge of, biodiversity and the genetic resources of the communities.[44] The State should not just protect the indigenous knowledge but should also actively promote the use of this knowledge for environmental protection and conservation for sustainable environment.

Notably, one of the national values and principles of governance as outlined under Article 10 of the Constitution is sustainable development. The principles of sustainable development as captured in EMCA[45] include: the principle of public participation in the development of policies, plans and processes for the management of the environment; *the cultural and social principle traditionally applied by any community in Kenya for the management of the environment or natural resources in so far as the same are relevant and are not repugnant to justice and morality or inconsistent with any written law* (emphasis added); the principle of international co-operation in the management of environmental resources shared by two or more states; the principles of intergenerational and intragenerational equity; the polluter-pays principle; and the pre-cautionary principle. This is a clear indication of the central role that traditional environment knowledge should play in realisation of the sustainable development agenda.

[42] Art. 11(1), Constitution of Kenya 2010.
[43] Ibid, Art. 11(2) (b) & (3) (b).
[44] Art. 69(1) (c), Constitution of Kenya.
[45] EMCA, S. 3(5).

The *Protection of Traditional Knowledge and Traditional Cultural Expressions Act, 2016,*[46] was enacted to provide a unified and comprehensive framework for the protection and promotion of traditional knowledge and traditional cultural expressions; and to give effect to Articles 11, 40(5) and 69 of the Constitution. One of the main purposes of the Act is to recognize the intrinsic value of traditional cultures and traditional cultural expressions, including their social, cultural, economic, intellectual, commercial and educational value.[47] The Act defines "traditional knowledge" as any knowledge originating from an individual, local or traditional community that is the result of intellectual activity and insight in a traditional context, including know-how, skills, innovations, practices and learning, embodied in the traditional lifestyle of a community, or contained in the codified knowledge systems passed on from one generation to another and includes agricultural, *environmental* or *medical knowledge, and knowledge associated with genetic resources or other components of biological diversity* (emphasis added), and know-how of traditional architecture, construction technologies, designs, marks and indications.[48]

While the enactment of this Act marked a milestone in recognition of traditional knowledge, there has been little in terms of evidence of its implementation especially in environmental management and governance matters.

4. Kenya's Environmental Laws: Challenges and Prospects

As already highlighted in the previous section, formal recognition of traditional knowledge has existed in Kenya's laws for some time.[49] However, this has not marked an increase or even efforts to promote any meaningful or active utilisation of the knowledge held by communities for management of environmental problems in the country. There has been what mostly seems like promoting use of formal and western knowledge at the expense

[46] *Protection of Traditional Knowledge and Traditional Cultural Expressions Act, 2016,* No. 33 of 2016, (Government Printer, Nairobi, 2016).

[47] Ibid, s. 2(d).

[48] *Protection of Traditional Knowledge and Traditional Cultural Expressions Act, 2016,* s. 4.

[49] Muigua, K., *Nurturing Our Environment for Sustainable Development,* Glenwood Publishers, Nairobi, 2016; Muigua, K., *Harnessing Traditional Knowledge for Environmental Conflict Management in Kenya*, available at http://www.kmco.co.ke/attachments/article/175/TRADITIONAL%20KNOWLEDGE%20AND%20CONFLICT%20MANAGEMENT-25%20April%202016.pdf [Accessed on 19/08/2019].

of the traditional one. As a result, communities feel sidelined as they are neither involved in decision-making and management practices and are also expected to respond to the government's directives without any inclusion. This has especially been exemplified by the government efforts at conservation and management of forests and the associated resources. A case in point is the Mau forest issue where the Government of Kenya has been carrying out evictions on families that are accused of encroaching on the Mau forest, the largest of the country's five watersheds. The government in its latest efforts is planning to force an estimated 10,000 people to move elsewhere.[50] These people have been accused of illegal logging and clearing of forests for settlement and farming.[51] The Government has even indicated that any person holding any title documents to any part of the forest would be evicted without any form of compensation from the Government as they are deemed to have illegally encroached on government land.[52] These evictions have not been well received in some quarters, with some terming the exercise as politically motivated.[53] For instance, an argument has been advanced to the effect that the Mau Forest Complex has about 22 blocks with 21 blocks having been gazetted as national government forest land and already under the management of Kenya Forest Service. On the other hand, block no. 22 is neither gazetted as national government forest land nor is it under the management of the Kenya Forest Service. Instead, the block was set aside as resettlement land held in trust by the County Government of Narok.[54] According to this view, the people to be affected are on the said block 22 and thus, the evictions should not be going on as they are politically motivated. The communities are also divided, with a section of the Kalenjin

[50] Soi, C., "Kenya to evict thousands to protect Mau forest," *Al Jazeera News,* 14 March 2019. Available at https://www.aljazeera.com/news/2019/03/kenya-evict-thousands-protect-mau-forest190314165702863.html [Accessed on 22/08/2019].

[51] Ibid.

[52] Murage, G., "CS Tobiko to order second phase of Mau evictions," *The Star*, 16 July 2019. Available at https://www.the-star.co.ke/news/2019-07-16-cs-tobiko-to-order-second-phase-of-mau-evictions/ [Accessed on 22/08/2019].

[53] Vidija, P., "Rift Valley MPs turn wrath on Tobiko over Mau evictions," *The Star,* 29 July 2018. Available at https://www.the-star.co.ke/news/2018-07-29-rift-valley-mps-turn-wrath-on-tobiko-over-mau-evictions/ [Accessed on 22/08/2019]. Per Hon. Isaac Ruto, former Governor of Bomet County.

[54] Kenya Citizen TV, *Newsnight*, Published on Aug 20, 2019. Available at https://www.youtube.com/watch?v=yKChcQ-PqPg [Accessed on 22/08/2019].

community opposing the evictions while part of the Maasai community supports the exercise.

In the case of *Joseph Letuya & 21 others v Attorney General & 5 others [2014] eKLR*[55], the Court observed that: "quite apart from the special consideration that needs to be given to the Ogiek community as a minority and indigenous group when allocating forest land that this court has enunciated on in the foregoing, this court also recognizes the unique and central role of indigenous forest dwellers in the management of forests. This role is recognized by various international and national laws. The *Convention on Biological Diversity* which Kenya has ratified and which is now part of Kenyan law by virtue of Article 2(6) of the Constitution recognizes the importance of traditional knowledge, innovations and practices of indigenous and local communities for the conservation and sustainable use of biodiversity and that such traditional knowledge should be respected, preserved and promoted."[56]

The Maasai peaceful co-existence with wildlife is however not without challenges especially when environmental co-management is practised. It has been observed that although Maasai knowledge is evoked in conservation planning proposals, Maasai participation as knowledgeable actors in conservation activities on their lands remains extremely limited.[57] This is compared to situations throughout the world where environmental co-management is said to be taking place between scientists and local communities.[58] Some argue that the lack of success at `integrating' local knowledge with scientific resource management is the result of reluctance by scientific and state agencies to relinquish power and devolve decision-making and knowledge-creation processes to local people.[59] In addition to the

[55] ELC Civil Suit No. 821 of 2012 (OS).

[56] See also *Treaty Making and Ratification Act*, No. 45 of *2012.*

[57] Goldman, M., "Tracking wildebeest, locating knowledge: Maasai and conservation biology understandings of wildebeest behavior in Northern Tanzania," *Environment and Planning D: Society and space* 25, no. 2 (2007): 307-331, at p.308.

[58] Ibid.

[59] Ibid.

foregoing, while the Constitution recognises customary law as part of Kenyan law, the same is subjected to written law.[60]

The element of traditional knowledge includes moral and ethical statements about the environment and about the relationships between humans, animals, and the environment; the "right way" to do things.[61] Customary law thus contains important environmental norms and ethics on how to manage the environment. Despite this, customary law and traditional ecological norms have suffered the problem of general acceptance by the law enforcing authorities including those charged with coming up environmental policies, plans and programmes. While some instances seem to support and recognise the use of traditional knowledge, there has not been consistency. There is a need to mainstream traditional environmental knowledge for environmental management and governance in Kenya.

5. Mainstreaming Traditional Ecological Knowledge in Kenya's Environmental Governance Framework

Traditional knowledge may contribute to improved development strategies in several ways such as by helping identify cost-effective and sustainable mechanisms for poverty alleviation that are locally manageable and locally meaningful; by a better understanding of the complexities of sustainable development in its ecological and social diversity, and helping to identify innovative pathways to sustainable human developmental that enhance local communities and their environment.[62]

The *1994 Draft Declaration on Human Rights and Environment* describes the procedural rights, such as the right to participation, necessary for realization of the substantive rights.[63] Article 1 of the *Aarhus Convention* states that "in order to contribute to the protection of the right of every person of present

[60] Art. 2(4) of the Constitution provides that any law, including customary law, that is inconsistent with this Constitution is void to the extent of the inconsistency, and any act or omission in contravention of this Constitution is invalid.

[61] Mackenzie Valley Environmental Impact Review Board, *Guidelines for Incorporating Traditional Knowledge in Environmental Impact Assessment*, July 2005, p. 6. Available at *http://www.reviewboard.ca/upload/ref_library/1247177561_MVReviewBoard_Traditional_Knowledge_Guidelines.pdf* [Accessed on 19/08/2019].

[62] African Regional Intellectual Property Organization, *op cit.*

[63] Part 3 (Principles 15-24).

and future generations to live in an environment adequate to his or her health and wellbeing, each Party should guarantee the rights of access to information, public participation in decision-making and access to justice in environmental matters in accordance with the provisions of this Convention."[64] It is believed that environmental procedural rights such as the access to information, public participation and access to justice may be one of the ways and means to a realistic way for attaining the sustainable development.[65] Recognition and active utilisation of communities' traditional environmental knowledge can create a viable channel for communities to appreciate government's efforts in effective environmental governance through promoting sustainable use of the environment and its resources.

Traditional knowledge, coupled with other forms of knowledge can enhance predicting and preventing the potential environmental impacts of development, as well as informing wise land-use and resource management especially within the local community setups.[66] Proponents of traditional knowledge maintain that it can offer contributions to environmental decision making from a broader scope of environmental values, practices, and knowledge.[67]Traditional knowledge can be used at the local level by communities as the basis for making decisions pertaining to food security, human and animal health, education, natural resource management and other vital activities.[68]

Exploring the community's knowledge and knowledge of people dealing with agriculture, is crucial to determine their norms, values, and belief in regards

[64] Aarhus Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters, UN Doc. Sales No. E/F/R.98.II.E.27.

[65] Mohammad, N., 'Environmental Rights for Administering Clean and Healthy Environment towards Sustainable Development in Malaysia: A Case Study,' *International Journal of Business and Management*; Vol. 9, No. 8; 2014, pp. 191-198 at p.192.

[66] Ellis, S.C., Meaningful Consideration? A Review of Traditional Knowledge in Environmental Decision Making,' *Arctic*, Vol. 58, No. 1 (March 2005), p. 66–77 at p. 67.

[67] Ibid at p. 67.

[68] Gorjestani, N., 'Indigenous Knowledge for Development: Opportunities and Challenges,' in Twarog, S. & Kapoor, P. (eds), 'Protecting and Promoting Traditional Knowledge: Systems, National Experiences and International Dimensions,' (United Nations Conference on Trade and Development, 2004), UNCTAD/DITC/TED/10, pp. 265-272 at p. 265. Available at *http://unctad.org/en/docs/ditcted10_en.pdf* [Accessed on 19/8/2019].

to their activities, particularly in the area of water and land management.[69] The way people develop such knowledge by understanding their environment through observation and experiences determines the specific group of people's knowledge. Incorporating provisions recognising traditional environmental knowledge in national environmental laws is commendable but just marks the first step towards mainstreaming such knowledge into effective environmental governance. There is need for actively and meaningfully involving communities in utilising traditional environmental knowledge to practice sustainable production methods.

There is need to cultivate a culture of respect for environment by all. Environmental ethics and consciousness can go a long way in promoting participatory approaches to conservation and management of environment and its resources. Dissemination of information and knowledge in meaningful forms can also enhance participation in decision-making and enhance appreciation of the best ways of protecting and conserving the environment.[70] The objects of the devolution of government are, inter alia— to give powers of self-governance to the people and enhance the participation of the people in the exercise of the powers of the State and in making decisions affecting them; to recognise the right of communities to manage their own affairs and to further their development; and to protect and promote the interests and rights of minorities and marginalised communities.[71] Encouraging and mainstreaming the use of traditional environmental knowledge by communities can go a long way in facilitating participation.

Fostering use of traditional knowledge in conservation and production to active and meaningful participation in decision-making can enable the citizenry appreciate that achieving the sustainable development agenda is not just a State's responsibility but one that requires cooperation between the State actors and the individuals, as envisaged under Article 69(2) of the

[69] Retnowati, A., et al, 'Environmental Ethics in Local Knowledge Responding to Climate Change: An Understanding of Seasonal Traditional Calendar *Pranoto Mongso* and Its Phenology in Karst Area of Gunung Kidul, Yogyakarta, Indonesia,' *Procedia Environmental Sciences*, Vol. 20, 2014, pp. 785 – 794 at p. 787.

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

[71] Art. 174.

Constitution.[72] There is need to empower communities so as to actualise these constitutional provisions. Where they do not perceive a danger to their livelihoods, these communities are likely to embrace development projects and are also not likely to turn to unconventional ways of protecting their livelihoods.[73]

6. Conclusion

One way of protecting and enhancing the use of traditional environmental knowledge in environmental management, while ensuring meaningful inclusion and participation of local communities, is integrating it into the environmental governance framework as this will help achieve sustainable development as contemplated in the sustainable development agenda. Combining western scientific knowledge which forms the bulk of *formal laws, policies and programmes with traditional environmental knowledge for the purpose of improving natural resources and environmental management is important for inclusive and participatory approaches to environmental management* (emphasis added).

With the communities empowered through recognition and utilisation of traditional environmental knowledge in environmental management, then it is possible to hold to account those who flout environmental laws and agreed norms, be they entities or individuals. It is easier to engage a community that feels a sense of belonging than one that feels sidelined by the state actors. There is a need to create conducive environment for promoting mutual respect for both formal and informal sources of knowledge. The implication would be that environmental scientists and policy professionals, indigenous and non-indigenous, should focus more on creating long term processes that allow for the implications of different approaches to knowledge in relation to stewardship and management priorities to be responsibly thought through.[74] Diverse forms of knowledge including traditional environmental knowledge should be utilised in a bid to address environmental problems in Kenya. The

[72] Article 69(2) of the Constitution provides that every person has a duty to cooperate with State organs and other persons to protect and conserve the environment and ensure ecologically sustainable development and use of natural resources.

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

[74] Whyte, K.P., "On the role of traditional ecological knowledge as a collaborative concept: a philosophical study." *Ecological processes*, Vol.2, no. 1 (2013): 7, p. 2.

sustainable development agenda calls for an integrated approach to natural resources governance and management to ensure that all groups and stakeholders are brought on board. Traditional environmental knowledge should thus be mainstreamed into the national environmental laws, polices, plans and other efforts geared towards achieving the sustainable development agenda. This will improve cooperative environmental and natural resources stewardship and management between indigenous and non-indigenous institutions.[75] Mainstreaming Traditional Ecological Knowledge in Kenya is a critical step that needs to be taken to enable the country achieve the sustainable development goals.

[75] Ibid,p. 3.

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Fragmentation of Investment Codes in Africa: The Pan African Investment Code (PIAC) as A Centripetal Continental Force

By: ***Wilfred Mutubwa****

1. Introduction

In a world of complex layers of bilateral, regional and multilateral trade and investment arrangements, investment agreements are bound to, inevitably, overlap or contradict each other. This paper discusses the fragmentation of investment agreements, codes and protocols in Africa within the context of regional integration. The paper explores the role that the Pan African Investment Code can play in eliminating the negative effects of fragmentation of intra- African investment agreements.

The paper is presented in four substantive parts. The first part gives a general overview of fragmentation of Continental and sub-regional integration efforts in Africa, and its ramifications. The second part discusses the efforts in harmonisation of continental and sub-regional integration in Africa through the Draft Protocol on the AU Relations with Regional Economic Communities (RECs). The shortcomings of the draft Protocol are identified. The third part highlights the causes and effects of fragmentation of investment codes in Africa. The fourth part suggests the possible role that the PAIC can play in the harmonisation of investment codes relating to intra-African investments.

2. Fragmentation of Continental and Sub-Regional Integration Efforts in Africa

Bachinger and Hough observe that every African country is currently a member of averagely four different trade blocs, creating the famous spaghetti bowl of RIAs.[1] They further noted that the plan of the AU is to integrate the

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[1] K Bachinger and J Hough, "New Regionalism in Africa; Waves of Integration" (2009) 32(2) *Africa Insight* 43-59, at 43-44. The AU Agenda 2063 is an ambitious plan for a prosperous Africa building on the African RECs based on a 25, 10, 5 year and short term plan for integrating the continent. The agenda envisages political Unity of the Africa will be culmination of the Economic and Political integration process characterised by a continental government and

various RIAs into one large economy with the ultimate goal of unifying the continent and creating a United States of Africa by 2030.[2] For instance, most SADC members are also parties to an EPA with the European Union (EU) through the Southern African Customs Union (SACU). [3] South Africa is also a party to a free trade agreement with the EU.[4] The parties to SADC are also members of the COMESA, while some members of the EAC are also members of the SADC and COMESA.[5] The EAC, on its own, is also negotiating trade agreements with the EU.[6] SADC, EAC and COMESA members are also member states of the TFTA.

The conclusion drawn from this complex web of a multiplicity of multilateral and bilateral trade agreements, involving the very same parties, is that it has been a source of divided loyalty.[7] It has created expensive engagements for poor African economies to maintain and confusion for transnational business people as to the applicable regime.[8] It has also encouraged trade deflection

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institutions by 2030. With the coming into force of the AfCFTA Agreement and the TFTA Agreements, the average membership of African nations in RECs may now be six. See also the Africa Regional Integration Index Report 2016 <https://www.tralac.org/documents/news/2771-com2019-africa-regional-integration-index-report-arii-2019-presentation/file.html.> accessed on 8th May 2019.

[2] ibid.

[3] R Kirk and M Stern. "The New South African Customs Union. Agreement 2005" *The World Economy 28(2) 169.*

[4] The SADC –EU Economic Partnership Agreement legal texts available at http://trade.ec.europa.eu/doclib/docs/2015/october/tradoc_153915.pdf . Accessed on 5th May 2019.

[5] For example, Zambia, Tanzania and Zimbabwe are members of both SADC and COMESA. Tanzania is also a member of EAC.

[6] On the Economic Partnership Agreement between the EU and the EAC, see the status report at http://www.europarl.europa.eu/RegData/etudes/BRIE/2018/620218/EPRS_BRI(2018)620218_EN.pdf . Accessed on 5th May 2019. Ouma views the current deadlock in negotiating a new agreement as having been caused by matters "deeper than the merits of the Agreement concerned". She sees the ineffectiveness of the decision-making process, as well as the lack of proper constitution of a representative body in the negotiations, as having facilitated the advancement of national interests over the collective interests of the East African Community, hence the stalemate. See, P Ouma, "The EU – EAC Economic Partnership Agreement Standoff: The Variable Geometry Question" (2019) <http://www.afronomicslaw.org/2019/05/30/the-eu-eac-economic-partnership-agreement-standoff-the-variable-geometry-question/> accessed on 30th September 2019 [1].

[7] Uzodike UO, "The Role of Regional Economic Communities in Africa's Economic Integration, Prospects and Constraints" (2009) 39(2) *Africa Insight* 26, at 36. Jelle argues that the AfCFTA presents African states with an opportunity for a better structured economic Agreement with the EU. This is a prospect the EU is already warming up to. With a larger market, it is hoped that the negotiating scales will tilt, or at least sway, in favour of Africa. See A Jelle, "With AfCFTA in Mind: New Dawn for Afro-EU Relations?" (2019) <http://www.afronomicslaw.org/2019/05/27/with-afcfta-in-mind-new-dawn-for-afro-eu-relations/> accessed on 30th September 2019.

[8] ibid.

and negatively affected the attainment of multilateral trade in Africa, and as a ripple effect, on the global plane as well. [9] Mistry observes that dual or multiple membership of RECs creates complications and retards progress, as a country may become a conduit for leakage from one [regional] arrangement to another. [10]

A further layer of multilateral trade integration is in the form of the AfCFTA. The AfCFTA Agreement, the AEC, and the TFTA, all propose that member states should maintain memberships in COMESA, EAC and SADC while still pursuing integration at the continental level.[11] This may end up complicating and entangling the "spaghetti bowl" even further, so that one may not be able, at the end of the day, to tell the true existence, value or even difference between any of the RECs. They may all be lost in the complex web and drowned in the swamp of treaties and the myriad of protocols attendant thereto, both at the continental and sub-regional REC levels.

The maintaining of parallel REC structures while developing the AfCFTA and AEC may have been well meaning, mainly due to efforts at ensuring seamless transition at the end of the integration process. However, in the intervening period, the existence of several integration efforts pulling in different directions does not augur well for the timeous fusion and integration of the merging RECs into the AfCFTA and AEC.

Articles 4(2) (a), 6 (2) (a) of the AEC Treaty, the preamble TFTA Agreement, and Article 19(2) of the AfCFTA Agreement, expressly encourage the continued existence of and/or establishment of "future" RECs. Yet, the essence of the TFTA Agreement and AEC Treaty is to build a multilateral trading and economic system that cuts across the entire continent, as opposed to sub-regional trading blocs. It is, therefore, tempting to conclude that in their attempt sell the idea of the AEC and the TFTA, the drafters of both instruments sought to appease states' fixations, investment (in time, money and systems) and sentimental attachment to their respective RECs.

[9] ibid.

[10] PS Mistry, "Africa's Record of Regional Cooperation and Integration" (2000) 99(397) *African Affairs* 570.

[11] Articles 4(2) (a), 6 (2) (a) of the AEC Treaty; the preamble TFTA Agreement and article 19 (2) of the AfCFTA Agreement.

The TFTA and AEC may have found acceptance but at the same time sacrificed and undermined the very objectives for which they were set up.

To allow and actively encourage the setting up of new sub-regional trading blocs will, invariably, regress the realisation of both the AEC and TFTA. This is tantamount to taking three steps forward and two backwards so as to allow the new RECs to catch up with the integration process. In the end, the process will inevitably stall or run on the spot. The permissive language used in the AEC Treaty and the TFTA with respect to maintaining the existing sub-regional RECs while at the same time establishing new RECs is injudicious, misconceived and inconsistent with their overall continental integration objectives.

The cost of administering trade agreements and their dispute settlement organs is another significant hurdle. For example, all the TFTA members belong to at least 4 RECs, excluding bilateral and multilateral trade arrangements.[12] These arrangements require administration both internally (within the state), at the REC and the WTO levels. Additionally, the need to fund the operational costs of the trade arrangements, its secretariats and the bureaucracies' attendant thereto, is unsustainable particularly for frail foreign aid weaned and dependent sub-Saharan Africa states, which form the bulk of the AfCFTA.[13] Furthermore, these countries have to juggle their priority expenditure with the meeting of its many subscription obligations arising from the multiple trade arrangement memberships.[14] Consequently, many states are serial and chronic defaulters in meeting their treaty subscription obligations and as a result, the integration organs are poorly funded, slowing down the integration process. This is a reality which faces the AfCFTA Agreement and its organs including its dispute settlement mechanisms.

3. Harmonisation of Regional Integration Efforts in Africa: The Draft Protocol on the AU Relations with RECs

The Draft Protocol on the AU Relations with RECs is meant to offer a preposition that will either eliminate or at least ameliorate fragmentation and

[12]Bachinger and Hough, (n) 1, 43-44.

[13]UO Uzodike, (n) 7.

[14]ibid.

its effects as witnessed in economic integration.[15] The Draft Protocol seeks to advance the theme of harmonisation of the policies, operations, objectives and programmes undertaken by sub-regional RECs on the continent.[16] To this end, an entire structure, complete with a secretariat and technical committees, is set up to oversee the implementation of the Protocol.[17]

Though still at the draft stage, several concerns are apparent, even from a cursory reading of the text of the proposed Protocol. Firstly, the Protocol rightly notes that both the AEC Treaty and the AfCFTA Agreement are primarily meant to harmonise, coordinate and consolidate economic regionalism in Africa.[18] The AfCFTA Agreement also defines, in fairly clear terms, the relationship and hierarchical order of AU and REC norms.[19] The AEC Treaty is, in fact, succinct to this end by providing, in Article 6, the step-wise harmonisation process complete with milestones to be achieved within set timelines. Article 6 of the AEC Treaty contemplates the establishment of a FTA within ten years of the Treaty. Although the AfCFTA came into being more than fourteen years after the AEC Treaty contemplated, it marked an effort to put in place the FTA envisioned under Article 6 (2) (c) of the AEC Treaty. However, the problem is that this critical step towards the AEC is coming at least 8 years late.[20] Furthermore, the Draft Protocol that is supposed to harmonise the relationship between the AU and RECs is coming midstream to the implementation of Article 6 of the AEC Treaty, and 10 years to the date earmarked for realisation of the continental economic community.[21] It does not help matters that the protocol is still in draft. The

[15]Draft Protocol on the Relations between the African Union and the Regional Economic Communities <https://wits.worldbank.org/GPTAD/PDF/annexes/AEC_protocols.pdf.> accessed on 9th May 2019. According to O Kaaba and B Fagbayibo, this Draft protocol is unhelpful in advancing the rule of law on the continent since it is yet to be adopted and is largely ambiguous. See O Kaaba and B Fagbayibo, "Promoting the Rule of law through the Principle of Subdiarity in the African Union: A Critical Perspective" (2019) *Global Journal of Comparative Law* 27-51.

[16] See the Preamble, Articles 2 and 3 of the Draft Protocol.

[17] Chapter Two of the Protocol sets out its institutional framework.

[18] Articles 3 and 4 of the AEC Treaty; and the Preamble Article 3 and 4 of the AfCFTA Agreement.

[19] Article 19 of the AfCFTA Agreement provides that the Agreement shall prevail in the event of any inconsistency between it and any regional agreement.

[20] According to Article 6 (2) (c) of the AEC Treaty, a FTA should have been established within 10 years of the coming into force of the Treaty (1994), i.e by 2004.

[21]According to Article 6 (2) (a) of the AEC Treaty, the harmonisation of RECs should occur within 5 years of the 1994 (when Treaty came into force) treaty, i.e by 2000. The Protocol remains a draft 10 years since it was mooted.

stark reality is that, at the current pace, it is unlikely that the AEC will be realised by 2030 as planned.

Secondly, while the Protocol is detailed on the socio-economic areas of cooperation and harmonisation, it is silent on the harmonisation, coordination and hierarchical relations between AU and REC dispute settlement mechanisms.[22] This is with particular reference to economic integration. On dispute resolution, the Protocol says nothing more than to confer jurisdiction upon "the Court of Justice of the Union" over disputes arising out of the interpretation or applicability of the provisions of the Constitutive Act of the AU, the AEC Treaty, the Protocol itself and the treaties establishing RECs.[23]

Thirdly, the Protocol will come into force upon endorsement by the AU Assembly of Heads of State and Government; and also when signed by the Chairperson and Chief Executives of at least three (3) RECs.[24] While it is appreciated that a minimum threshold for accession to the Protocol is necessary, a process meant to harmonise the economic communities of Africa into a continental vehicle must, out of necessity, carry along all the RECs. If not, there is always the lurking danger of sectional continental integration, which is inimical to the establishment of the desired continental market.

There have been significant developments since the Draft Protocol on AU Relations with RECs was prepared. For instance, the 26-member TFTA Agreement was concluded in 2015.[25] The TFTA is by far the largest sub-

[22] Article 2 of the Protocol defines the scope of its application to include implementation of measures in the economic, social, political and cultural fields including gender, peace and security. Article 2 (b) provides for the harmonisation and coordination of macro-economic policies in peace and security policies, agriculture, industry, transport and communication, energy and environment, trade and customs, monetary and financial matters, integration legislation, human resources, gender, tourism, science and technology, cultural and social affairs, democracy, governance, human rights and humanitarian matters.

[23] Article 32, the dispute resolution clause of the Protocol. Curiously the drafters of the Protocol seem to be oblivious of the merger of the AU courts and the creation of a single court hence their erroneous reference to the "Court of Justice of the Union", a non-existent entity.

[24] Article 33 of the Protocol.

[25] The TFTA; its objectives, structure and dispute resolution system; is discussed in Chapter 3.4.4 of this thesis. Nalule observes that the complete absence or even mere mention of the Draft Protocol in AfCFTA Agreement is

continental REC in Africa. The current draft of the Protocol only recognises 8 RECs in Africa.[26] A more current version of the Protocol should identify and appropriate a more central role to the TFTA, particularly as with regards to the economic integration of the continent. Significantly, the TFTA, a conglomerate of three established RECs in Africa, provides a viable and less protracted preposition to bringing together 26 African states at one go and through one REC.

Fourthly, the Protocol presents yet another example of top-to-bottom approach to economic integration in Africa. This approach is characterised by the creation of continental and sub-continental integration bodies. These were created by governments and technocrats without the input of the common people on the streets, whom these efforts are supposed to serve or benefit.[27] It has, therefore, been suggested that this approach has always spelt doom to the integration of markets in Africa because the common people do not own the process and hence feel far removed from it.[28] Fagbayibo aptly addresses this criticism, by suggesting that the debate and processes of regional integration should be moved from an elitist framing to the grassroots:

> *In addition, there is a need to "privatise" the process of regional integration by ensuring popular participation and an ample support base. For the success and sustainability of this process, it is imperative that the debate surrounding regional integration is moved from the elitist realm of technocrats, civil societies and the academia to a forum that seeks to inform the African populace about the benefits and the drawbacks of integration and to garner their opinions. The "common man or woman" in the streets of, inter alia,*

telling of the commitment of AU member states towards continental economic integration. The AfCFTA being an effort at harmonising RECs in Africa should have specifically mentioned and related itself with the Draft Protocol. See, Nalule, "The Treaty Establishing the African Economic Community and the Agreement establishing the African Continental Free Trade Area: Some Relational Aspects and Concerns" (2019) <http://www.afronomicslaw.org/2019/08/14/the-treaty-establishing-the-african-economic-community-and-the-agreement-establishing-the-african-continental-free-trade-area-some-relational-aspects-and-concerns/> accessed on 23rd September 2019 [8].

[26] The Protocol seems to only make provision for eight RECs in Africa, namely: ECOWAS, COMESA, ECCAS, SADC, IGAD, CEN-SAD, AMU and EAC. See also the commentary by the AU <https://au.int/en/organs/recs> accessed on 23rd September 2019 in which only 8 RECs are named as being the subjects of the Protocol.

[27] B Fagbayibo, "A Supranational African Union? Gazing into the Crystal Ball" (2008) *De Jure* 493-503, at 503.

[28] ibid.

> *Kigali, Arusha, Kumasi and Maputo should be given an opportunity to contribute to this debate. The fact the majority of the continent's population is illiterate and impoverished makes the issue of popular mobilisation more important.*[29]

Proliferation and Fragmentation of Investment Codes in Africa Closely related to international investment arbitration is the viability of the various investment codes conceived and promulgated on the continent. Investment codes are meant to be blueprints for spurring economic activities through strategies that encourage foreign direct investment within the member states who subscribe to these codes. International arbitration is the most preferred mode of settling international commercial and investor-state disputes, hence the co-relation.

The EAC, SADC, ECOWAS and COMESA all have Investment Codes, Acts or Protocols.[30] The objective of these codes and protocols is to harmonise member states' investment policies and laws in alignment with the common regional codes. For example, Article 19, Annex I of the SADC Protocol on Finance and Investment (SADC-FIP) enjoins member states to harmonise their investment policies, laws and practices with the objective of creating a SADC investment zone.[31] To this end, Article 2 of the SADC-FIP elaborately provides that one of the key objectives of the Protocol is:

> *Harmonisation of the financial and investment policies of the state parties in order to make them consistent with the objectives of SADC and ensure that*

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[29]ibid.

[30]The EAC has a model Investment Treaty concluded in 2016 <https://www.eac.int/documents/category/investment-promotion-private-sector-development> accessed on 6th April, 2019; ECOWAS has a Supplementary Act on Investments (supplementary Act A/SA 3/12/08; <https://investmentpolicy.unctad.org/international-investment-agreements/treaties/treaties-with-investment-provisions/3547/ecowas-supplementary-act-on-investments> accessed on 6th April, 2019. COMESA has a Common Investment Agreement, <https://www.iisd.org/toolkits/sustainability-toolkit-for-trade-negotiators/wp-content/uploads/2016/06/rei120.06tt1.pdf> accessed on 6th April, 2019. SADC has the SADC Finance and Investment Protocol (FIP), available at <https://www.sadc.int/files/4213/5332/6872/Protocol_on_Finance__Investment2006.pdf.> accessed on 6th April, 2019.

[31] The SADC-FIP discussed in detail in L Ngobeni and B Fagbayibo, "The Investor-State Dispute Resolution Forum under the SADC Protocol on Finance and Investment: Challenges and Opportunities for effective Harmonisation" (2015) 19 *Journal of Law and Development* 175-191.

> *any change to financial and investment policies in the state party do not necessitate undesirable adjustments in other state parties.*

Several issues arise with respect to the proliferation of investment codes in Africa. The first and most obvious one is that most member states of African RECs also have domestic investment laws and policies. Some of which are inconsistent with or in direct conflict with the regional codes or policies. For example, Mhlongo notes that the scope of definition, and exceptions, of "an investment" in the SADC-FIP and South Africa's Protection Investment Act 22 of 2015 are capable of multiple interpretations.[32] This is primarily with respect to the following cardinal principles of investment law: the right of establishment of investment,[33] fair and equitable treatment, [34]and legal protection of investment.[35]

The second problem is one associated with the multiple memberships by African countries of RECs with similar objectives. For instance, all the COMESA member states are either members of EAC or SADC.[36] All member states of SADC and EAC are also members of the TFTA, while Tanzania is a member of both SADC and EAC and is, therefore, subject to

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[32]L Mhlongo, "A Critical Analysis of the Protection of Investment Act 22 of 2015" (2019) Forthcoming in *South Africa Public Law Journal* 1-25, at 8-18.

[33]L Mhlongo observes that Section 7 of the South African Protection of Investment Act provides that all investments must be established in compliance with the laws of South Africa. However, section 7(2) of the Act does not, however, create a right for a foreign investor or prospective investor to establish an investment in South Africa. While the State retains the sovereign right to regulate investments in its territory, general international law on foreign investment places obligations on states not to place unreasonable restrictions to foreign investment. Article 2(3) of the SADC FIP, in line with this general principle, prohibits member states from amending or modifying, without good reasons, or arbitrarily, the terms, conditions and any benefit specified in the code. See L Mhlongo, ibid, 10-11.

[34] While both the South African Investment Act and Annexure 1 of the SADC FIP provide for the National Treatment Standard (NTS), they do not directly provide for the Most Favoured Nation (MFN). Article 6 of the Annexure 1 of the SADC FIP provides that investors "shall enjoy fair and equitable treatment in the territory of any member state", on the other hand, South Africa's Investments Act requires that administrative, legislative and judicial process do not operate in a matter that is arbitrary or that denies administrative and procedural justice to an investor, L Mhlongo, ibid, 11.

[35] L Mhlongo underscores that section 2 of the Constitution of South Africa affirms its supremacy. This means that, in South Africa, the validity of international law is not measured against the rules of international customary law, but by the Constitution. As a result, she further observes, it will be difficult for foreign investors to invoke international investment law which may be seen to offend the South African Constitution. See, L Mhlongo, ibid, 13.

[36]M Kane, "The Pan African Investment Code: A good First Step, but more is Needed" (2018) *Perspectives on Tropical Foreign Direct Investment Issues* (Columbia Centre on Sustainable Investment) 1–3, 1. <http://ccsi.columbia.edu/files/2016/10/No-217-Kane-FINAL.pdf> accessed on 23rd September 2019.

both the SADC-FIP and EAC Investment Code. All these regional organisations promote economic regionalism with very similar objectives, including the desire for a common investment policy throughout their respective regions. This leads to the problem of states being required to adopt several codes and protocols on the same subject and sometimes with conflicting objectives and provisions.

The Possible role of the PAIC in redressing Fragmentation of Investment Codes in Africa According to UNCTAD, 99 investor – state dispute claims have been filed against African States since 1987.[37] In most of these cases, African states have lost and been ordered to pay huge compensatory damages.[38] African countries have in turn raised several concerns about the traditional ISDS system, including the lack of legitimacy and transparency, exorbitant costs, and inconsistent and flawed awards.[39]

In response to what they view as a system skewed against them, African countries have either attempted to backtrack from ISDS Treaty obligations, or to establish their own ISDS systems. Tanzania, for example, has enacted legislation that requires the use of domestic courts as the forum for ISDS to the exclusion of international arbitration.[40] The South African Protection of

[37]Investment Policy Hub <https://investmentpolicy.unctad.org/international-investment-agreements/iia-mapping> accessed on 7th April 2019.

[38]ibid. See also World Bank <https://icsid.worldbank.org/en/Documents/resources/2018ICSIDAnnualReport.ENG.pdf> accessed on 7th April 2019.

[39]T Chidede, "Investor – State Dispute Settlement in Africa and the AfCFTA Investment Protocol" (2018) at p.1-2. <https://www.tralac.org/blog/article/13787-investor-state-dispute-settlement-in-africa-and-the-afcfta-investment-protocol.html >accessed on 7th April 2019. See, for example the key findings and recommendations of South Africa in G de Carvalho "At the Table or on the Menu? Africa's Agency and the Global Order" (2019) Institute for Security Studies available at https://issafrica.org/research/africa-report/at-the-table-or-on-the-menu-africas-agency-and-the-global-order accessed on 20th November 2019.

[40] In 2014, Tanzania was identified as a top destination for foreign direct investment in East Africa by UNCTAD. However, since the new government came into power in 2017, the Country has developed a rather combative stance towards foreign investment, particularly in the natural resources sector. Three controversial pieces of legislation have since been passed, namely: the Written Laws (Miscellaneous Amendments) Act 2017; the National Wealth and Resources (Permanent Sovereignty) Act 2017 and the National Wealth and Resources (Review and Renegotiation of Unconscionable Terms) Act 2017. Under Section 6(2) of the Review and Renegotiation of Unconscionable Terms Act provides that a contract that contains a clause that subjects the "state to the jurisdiction of foreign law and fora" is "deemed to be unconscionable." Under the new law, reference to "foreign fora' such as international ISDS arbitration relating to the Tanzanian government may, therefore, be unconscionable. Section 11

Investment Act, 2015 and the SADC FIP now require exhaustion of local remedies before engaging in international arbitration, be it under the UNCITRAL rules or ICSID.[41] While concerns over the ISDS system are not confined to Africa, most African countries are still parties to, and still conclude, BITs (with other African countries or external partners) which prescribe ICSID, UNCITRAL, ICC-ICA, LCA, PCA and LCIA as the ISDS fora.

There is, however, a discernible shift towards a regional and sub-regional focus in ISDS in Africa. For example, the SADC FIP and ECOWAS Supplementary Investment Act do not provide a specific ISDS forum but they make provisions for investors to use local remedies.[42] The EAC Model Investment Code prescribes mediation and investment Arbitration as the preferred state-state, and state-investor dispute settlement mechanism.[43] The COMESA Common Investment Agreement incorporates ISDS arbitration through the COMESA Court of Justice, Africa arbitration centres, as well as ICSID and UNCITRAL arbitral tribunals.[44] The greatest challenge is that African countries belong to more than one REC and are, therefore, obliged to subscribe to different sub-regional ISDS with different approaches, including whether or not to exhaust local remedies before resorting to the regional mechanism.

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of the Permanent Sovereignty Act prohibits international dispute resolution mechanisms or any court or tribunal from exercising jurisdiction over extraction, exploitation or acquisition and use of natural wealth and resources. Jurisdiction is reserved for the domestic Tanzanian judicial or other bodies, established under Tanzanian law. Section 22 of the Public – Private Partnership (Amendment) Act, No. 9 of 2018 prohibits international arbitration and instead prescribes "mediation or arbitration adjudicated by judicial bodies or other organs established in Tanzania and in accordance with its laws". For a detailed discussion on the effect of these statutory amendments on FDI in Tanzania, see, M Masamba, "Government Regulatory Space in the Shadow of BITs: Tanzania's Natural Resources Regulatory Review" (2017) <https://www.iisd.org/itn/2017/12/21/governmentregulatory-space-in-the-shadow-of-bits-the-case-of-tanzanias-natural-resource-regulatory-reform-magalie-masamba/> accessed on 7th April 2019.

[41] L Mhlongo, (n) 976, 17. Ngobeni and Fagbayibo, note 31 above, at p. 176. The South African Minister of Trade and Industry, a strong proponent of the Protection of Investment Act, argues that doing away with international arbitration will increase the protection of investors and the economy. He further states that because of the long line of precedents on similar disputes domestically, and its rich heritage, the South African Judiciary is better placed in ensuring protection of investors through consistent and, therefore, predictable decisions. See, https://www.economywatch.com/features/south-africa-cancelling-foreign-investment.02-01.html accessed on 7th April, 2019.

[42] T Chidede, (n) 39, 2.

[43] Article 23 of The EAC Model Investment Code (2016). The Arbitration is to be conducted under the ICSID Convention and Rules, UNCITRAL Rules, the ICSID additional Facility Rules; or EACJ.

[44] The Amended COMESA Common and Investment Agreement, 2017. Articles 26, 27 and 28.

This is where the PAIC becomes useful. While the PAIC is not a panacea to all the problems afflicting ISDS in Africa, it substantially responds to most of the current concerns surrounding the subject. First, the PAIC provides for arbitration through African arbitration institutions governed by UNCITRAL Arbitration Rules, with the consent of the parties.[45] This, at least, eliminates the different approaches African states have taken on ISDS when concluding BITs among themselves.

Secondly, a dispute settlement that is predictable, independent and allows investors to enforce their rights remains crucial for foreign investors.[46] Legal certainty and respect for the rule of law is a non-negotiable minimum for an investor seeking to invest in a country. The AfCFTA investment protocol should expand to include disputes by individuals and not only inter-state disputes. [47]This access to ISDS should include non-African investors, otherwise disputes between such investors and African states will still be hosted in European capitals.

Like the COMESA Investment Agreement and the EAC approach, the PAIC should cascade its ISDS system through the sub-regional judicial organs. A harmonisation of the various sub-regional codes will be crucial in achieving this end. To overcome the perception that most African domestic courts lack impartiality and independence from their governments, the PAIC should provide for a waiver of the rule for mandatory exhaustion of local remedies, where it can be shown that it is either impossible or unnecessarily obstructive to procure its compliance.

It is in light of the problems discussed in the preceding part of this chapter that the Pan African Investments Code (PAIC) becomes an important tool in the quest for harmonisation of investment codes and protocols throughout Africa. The PAIC was primarily formulated as a tool to promote harmony in

[45] Chapter 6. The 2016 Draft Treaty is available at https://au.int/sites/default/files/documents/32844-doc-draft_pan-african_investment_code_december_2016_en.pdf . Accessed on 7th April 2019.

[46] T Chidede, (n) 39, 3.

[47]Article 28 of the AfCFTA Agreement restricts access to the dispute resolution mechanisms to state parties. Article 1 of the Protocol on Rules and Procedures on the settlement of Disputes defines "Complaining Party", "Dispute", "Party to a dispute" and "third Party" as state Parties to the Protocol, thus leaving no room for natural and corporate individuals. Article 5 as read with Article 6, of the Protocol, also provide that the Dispute Settlement Body (AfCFTA DSB) is only accessible by state parties.

the investment strategy in Africa. Kane observes that the PAIC was developed by African experts and welcomed by policy makers:

> *as an opportunity to contribute to African industrial and structural transformation through a binding instrument that would effectively restore the balance between investors' rights and host states' obligations, take into account countries' sustainable development objectives, streamline the investor-state dispute settlement system (ISDS), and finally, overcome issues with the fragmentation of the international investment regime, due to the multiplicity of investment treaties and the diverse interpretive practice of arbitral tribunals.*[48]

Kane notes that in the course of negotiating the code, the original ambition of having a binding investment code to replace intra-African agreements was abandoned in favour of a "guiding text."[49] According to Kane, this choice of a soft law instrument will exacerbate the fragmentation of the investment law regime in Africa and, hence, impair one of the code's core objectives, that of the harmonisation of investment policy and regulation across the continent.[50] Furthermore, the benefits of not including the controversial fair and equitable-treatment provisions in the code, on the one hand, and excluding dispute settlement procedures from the scope of the Most Favoured National (MFN) Clause, on the other hand, is a vexing limitation particularly in the absence of a binding text.[51] As the PAIC code loses its treaty character, there is no guarantee that these two provisions will not be re-introduced in new bilateral investment treaties negotiated by African countries.[52]

Ngobeni perceives the failure to include a post-termination survival clause in the draft PAIC as a fundamental weakness thereof.[53] Such clauses are meant

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[48]M Kane, (n) 36, 1.

[49]M Kane, ibid. Article 3 of the Code contemplates a non-binding instrument. The text of the Code is available at <https://au.int/en/documents/20161231/pan-african-investment-code-paic> accessed on 6th April, 2019.

[50]ibid, 2.

[51]ibid.

[52]ibid.

[53]L Ngobeni T (2019) "The Relevance of the Draft Pan African Investment Code (PAIC) in Light of the Formation of the African Continental Free Trade Area" (2019) [2] <http://www.afronomicslaw.org/2019/01/11/the-relevance-of-the-draft-pan-african-investment-code-paic-in-light-of-the-formation-of-the-african-continental-free-trade-area/> accessed on 30th September 2019.

to protect investors for a reasonable period after the termination of an investment agreement.[54] He also views the creation of double standards, with a lower protection threshold for intra-African investors, as discriminative.[55] Since the PAIC provides for dispute resolution at the national level, Ngobeni rightly advocates for harmonisation of the multifarious approaches in domestic investor protection.[56] The non-binding effect of the PIAC also presents a patent weakness since African states generally ignore model or soft laws.[57]

Although the PAIC itself is not without normative and structural weakness, it offers a beginning point for discussion on the harmonisation and consolidation of continental investment policies and ISDS. The harmonisation of RECs under the AU and the shift towards continental economic regionalism offers real motivation for the adoption of the PAIC by all AU member states. The first step, and perhaps the clearest sign of Africa's move towards continental economic regionalism, was seen in the establishment of the TFTA in 2015.[58] The TFTA Agreement advocates for the harmonising of programmes and polices within and between the three merging RECs.[59]The Agreement, in Article 36, also contemplates the conclusion of an investment protocol. Article 14 of the TFTA Agreement also requires members to design and standardise their trade and customs, documentation and information in accordance with internationally accepted standards. The AfCFTA Agreement also provides for an investment protocol, which will be finalised by 2020.[60] According to Ngobeni, this protocol will render the PAIC worthless.[61] Sub-regional protocols and codes sought to replace or harmonise domestic investment laws. It is, therefore, imperative that continental integration

[54]ibid, L Ngobeni notes, for example, that the South Africa – Mozambique BIT has a 10-year post-termination survival.

[55]ibid, [6]. He further notes that this may encourage forum shopping by intra-African investors seeking establishment of their entities outside Africa so that they can benefit from favourable protection of their investments.

[56] For example, he argues that since PAIC does not guarantee access to international arbitration, while most BIT do. The indecisiveness on the choice of forum for dispute resolution is therefore viewed as a weak link. L Ngobeni, ibid, [2].

[57]ibid.

[58]See W Mutubwa (2017) "The COMESA –SADC – EAC Tripartite Free Trade Area Agreement and Regional Integration in Africa: achieving the African Economic Community Dream (2017) *Journal of cmsd* vol.1(2) [1-53].

[59] Article 4 and 5 of the TFTA Agreement.

[60] Article 4 and 7 of the AfCFTA Agreement.

[61]L Ngobeni, (n) 53 [7].

efforts under the AfCFTA, PAIC and AEC should proceed and harmonise investment protocols across Africa so as to further ease intra-Africa and foreign investment without the current fragmentation.[62]

4. Conclusions

In the spirit of harmonisation of African Investment laws, codes and protocols, and in line with the Preamble and Article 3 (c) of the AEC Treaty, it is proposed that all the sub-regional investment protocols be aligned with the PAIC so as to ensure harmony in African investment law. In terms of dispute resolution, arbitration under the ACJ&HR and/or sub regional courts should be specifically included in the PAIC, as the preferred or prescribed method for resolution of all intra-African investment disputes.

[62] ibid [5 and 9].

A Critique of Kenya's Implementation of the Rome Statute

By: ***Kenneth Wyne Mutuma**** *&* ***Lilian Okumu Obuo*****

1. Introduction

The period following World War I saw unsuccessful attempts aimed at establishing international criminal institutions.[1] On 17th July 1998, the Rome Statute of the International Criminal Court (Statute) was adopted by 120 votes to 7 (USA, Libya, Israel, Iraq, China, Syria, and Sudan, with 20 abstentions), [2]establishing the International Criminal Court (ICC).[3] The Statute entered into force on 1 July 2002 and was premised on the fact that war crimes, crimes against humanity, the crime of aggression and genocide are a concern to the international community as a whole, and must not go unpunished.[4] The Statute places the duty of prosecuting these crimes on States and the ICC gains jurisdiction only when the domestic legal systems are unwilling or unable to carry out this mandate.[5]In this regard, State parties are obligated to cooperate fully with the ICC when it gains jurisdiction.[6]

The Rome Statute does not provide the procedures for its implementation and enforcement, but simply directs State parties to comply with their obligations under the treaty.[7] Kenya, as a State party to the Statute is, therefore, obligated to harmonise its laws and institutions so that it discharges its obligations under the Statute in good faith. It has attempted to do this through the provisions of the International Crimes Act,[8] which *inter alia* facilitates implementation of the Statute on matters such as prosecution, arrest and cooperation with the ICC in the investigations and evidence in

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[1] Cassese A, *International Criminal Law*, 2ed, Cambridge University Press, Cambridge, 2011, 317.
[2] UN Doc. A/CONF.183/SR.9 Report of the Conference, para 28,33 and 40.
[3] UN Doc A/CONF. 183/9 ; 37ILM 1002(1998) ; 2187 UNTS 90.
[4] Paragraph 4 of the Preamble to The Rome Statute of the International Criminal Court, (1998).
[5] Article 17, Rome Statute.
[6] Article 88, Rome Statute.
[7] Article 88, Rome Statute.
[8] International Crimes Act, (Act No. 16 of 2008).

relation to international crimes. This article discusses whether Kenya's domestication in this regard, successfully discharges its primary obligations under the treaty. The first part provides an overview of the ICC and the obligations upon states flowing out of the Statute. This is followed by an outline of the International Crimes Act and how it seeks to discharge these obligations. Finally, the article explores various challenges that arise in implementing the Rome Statute.

2. Overview of the ICC

The ICC consists of four organs: the Presidency; the Judicial Divisions comprising of Appeals Division, Trial Division and Pre-Trial Division; the Office of the Prosecutor; and the Registry.[9] It exercises jurisdiction over four crimes: genocide, war crimes, crimes against humanity and crimes of aggression.[10] It is essentially a court of last resort where judicial proceedings arise if States are either unwilling or genuinely unable to exercise their jurisdiction.[11] The Court's jurisdiction may be invoked by three methods: referral from a State party,[12] referral from United Nations Security Council acting under Chapter VII[13] and, finally, the Prosecutor initiating an investigation *proprio motu.*[14]

States Parties under the Statute are obligated to prosecute international crimes and to cooperate with organs established under the Statute including the arrest and surrender of persons to the Court. In the first instance, states have a duty to exercise criminal jurisdiction over those responsible for international crimes.[15] The national courts take precedence and the ICC only exercises complementary jurisdiction when the State is unable or unwilling to exercise this jurisdiction.[16] This reaffirms the primary right of States to exercise criminal jurisdiction.[17] It is in this spirit that States are to avail

[9] Article 34, The Rome Statute.
[10] Articles 6, 7, 8,70, The Rome Statute.
[11] Article 17 – 18, The Rome Statute.
[12] Article 14, The Rome Statute.
[13] Article 13(b),The Rome Statute.
[14] Article 13, *15, The Rome Statute.*
[15] para 6 of the Preamble of the Rome Statute.
[16] Article 17(1) (b),The Rome Statute.
[17] para 6 of the Preamble and Article 1, The Rome Statute.

procedures to ensure the establishment of both legal and institutional frameworks to facilitate international criminal justice.

The Rome Statute establishes a system under which the Court receives assistance and cooperation from States.[18] For example, Article 86 calls upon State parties to cooperate fully with the Court in its investigation, prosecution and arrest of suspects[19] since the *Court does not have an enforcement mechanism to implement coercive measures in this regard.*[20] *Generally,* State Parties are obliged to accept and discharge requests for cooperation and failure to cooperate can lead to referral of the State to the Assembly of State Parties or to the Security Council which can take appropriate sanctions.[21] Although the Assembly of State Parties cannot take specific measures for non-cooperation, its resolutions have an effect on the state, and thus influence state attitude towards co-operation with the Court.

3. Kenya's Implementation of the Rome Statute

As a party to the Statute, Kenya is under an obligation to harmonise its laws and institutions with the Statute. The domestication of these obligations has been done under the International Crimes Act (the Act). The Act defines international crimes by reference to Articles 6, 7 and 8 of Rome Statute. International crimes may be tried by the High Court.[22] Consequently, the Act enables Kenya to exercise territorial jurisdiction over accused persons, whether such persons have Kenyan nationalities or not.[23] In addition, it puts in place a legal framework that avails procedures to investigate, arrest, prosecute, penalise and surrender persons to the ICC. At the same time the Act establishes various forms of assistance and cooperation with the ICC in this respect.[24] The next section is a brief discussion of Kenya's attempts to discharge its obligations pertaining to assistance (both pre-trial and during proceedings) as well as cooperation in relation to arrests and detention.

[18] para 6 of the Preamble and Article 1, The Rome Statute.
[19] Article 89, 98(2), The Rome Statute.
[20] Lynn G, 'African Guide to International Criminal Justice', *Institute for Security Studies, Pretoria,* 2008, 117.
[21] Article 87(7), The Rome Statute.
[22] Section 8(2), International Crimes Act, no. 16 of 2008.
[23] Section 8 (1)(a), International Crimes Act.
[24] Section 20(1), section 21, section 22(1)(b), International Crimes Act.

Kenya is obligated to assist the Court in pre-trial matters such as: investigations on its territory, identification/questioning of persons and securing evidence/search warrants.[25] This provision emphasises the primary responsibility of States to investigate and prosecute international crimes.[26] Where the ICC requests for assistance for questioning[27] or locating a person or a thing, the Attorney General authorises this[28] by forwarding the request to the appropriate agency to undertake the same.[29] In terms of assistance in gathering of evidence and effecting search warrants,[30] where the AG gives the necessary authority, witness statements must be supported by oaths/affirmation before the High Court. [31] Search requests directed by the AG to the relevant criminal justice actor will be dependent on subsequent applications for a search warrant by the High Court.[32] In such cases, the applicable law – the Evidence Act - applies with any necessary modifications.[33] A criticism here is that the Evidence Act is, to a large extent outdated as it lacks procedures on how to deal with disclosure or confidentiality of material that may prejudice further investigations or the protection of witnesses and victims.[34]

The Act provides for various forms of assistance once proceedings have commenced such as offering the Court assistance when it sits within the territory of a State Party, facilitating the service of documents, and enforcing penalties imposed by the Court. For example, even though the seat of the Court is at The Hague, the Court may sit elsewhere, whenever it considers it desirable.[35] While discharging these functions at any seat, orders made by the Court shall not be subject to review[36] as the Court remains independent of the domestic judiciary.

[25] Part 9, The Rome Statute.
[26] Article 1,The Rome Statute.
[27]Articles 19(8), 56, 64 or 93(1)(a), The Rome Statute.
[28] Section 76(1), International Crimes Act.
[29] Section 84, section 85(1) (a), International Crimes Act.
[30] Article 93(b), The Rome Statute.
[31] Section, 78(1) International Crimes Act.
[32] Section 96(1), International Crimes Act.
[33] Section 80, Evidence Act, (1963).
[34] Rule 69 of Rules of Procedure and Evidence.
[35] Article 3, The Rome Statute.
[36] Section 165, International Crimes Act.

In terms of service of documents, section 86 of the Act provides for assistance in arranging the service of documents in Kenya.[37] In such instances, the Attorney General forwards the request to the relevant agency,[38] which transmits back a certificate confirming service or non-service with reasons thereof.[39] Assistance with regard to enforcement of penalties[40] includes using the criminal justice system to facilitate orders for victim reparation,[41] fines[42] and forfeiture orders.[43] In this case any money or property recovered is to be transferred to the ICC.[44] This has come under criticism from those who believe that monies recovered should be put in a local Victim Protection Trust Fund to facilitate the compensation and reparation in the localities that they reside.[45]

By far one of the most important modes of assistance provided for under the Act is that in relation to arrest, surrender and transfer of prisoners.[46] Upon receipt of such a request, the Cabinet Secretary responsible for national security submits the same to the High Court to determine whether to issue a warrant of arrest.[47] If issued, the person is presented to the High Court[48] and if eligible for surrender, will be detained pending surrender to the ICC.[49] To allow the person an opportunity to appeal, the surrender may only occur after fifteen days of detention.[50] If the person is not surrendered to the ICC within two months, he/she may apply to the High Court for discharge.[51]

[37]Article 93(1) (d), The Rome Statute;Section 85(3), section 86(2) and section 88(3)(a) & (b), The International Crimes Act.

[38] Section 86(1), International Crimes Act.

[39] Section 86(2), International Crimes Act.

[40] Sections 119 -130, International Crimes Act.

[41] Section 119, International Crimes Act.

[42] Section 120, International Crimes Act.

[43] Section 121-129, International Crimes Act.

[44] Section 130, International Crimes Act.

[45] Section 27, Victim Protection Act, (No. 17 of 2014).

[46] Sections 28 to 75, International Crimes Act; Article 89, The Rome Statute.

[47] Sections 29(1), 30, 31,33, International Crimes Act.

[48]Section 35(1), International Crimes Act.

[49] Section 42(2), Section 35(2) and (3), The Rome Statute; The Constitution of Kenya, 2010 Article 49(1)(h).

[50] Section 9(c), The Rome Statute.

[51] Section 42(3), Section 52(1) (a), International Crimes Act; *Walter Osapiri Barasa vs. The Cabinet Secretary, Ministry of Interior and National Co-Ordination and 4 others,* Constitutional Petition Number 488 of 2013.

In terms of transfer to the ICC,[52] the AG will make arrangements for the prisoner to travel to the ICC accompanied by the police or other authorised person.[53] Similarly, Kenya is expected to assist the ICC in the transit of persons from other countries to the Court to serve sentences.[54] The ICC makes the necessary request to Kenya[55] accompanied by various documents, including the description of the person being transferred, brief facts of the case,[56] and unless the transit through Kenya would impede the transfer to the ICC, the authorities are obligated to grant the request.[57] Finally, if Kenya is willing to host prisoners serving sentences imposed by ICC, the Cabinet Secretary responsible for national security will advise ICC accordingly[58] and the prisoner shall be transported to Kenya to serve his sentence in accordance with the Prisons Act of Kenya.[59]

4. Institutional Frameworks for the Implementation

Kenya is equally under obligation to set up institutional frameworks for the prosecution of international crimes in the domestic courts. This institutional framework includes both the judicial and executive components of government. It is also important to consider how civil society in general is a critical part of this framework, and as such enhances the realisation of the country's obligations under the Rome Statute.

The Judiciary plays a critical role in the enforcement of Kenya's obligations under the Rome Statute. Jurisdiction over international crimes is conferred upon the High Court[60] and as earlier discussed this court has powers to issue arrest warrants,[61] determine the eligibility of a person's surrender and order search and seizure. In addition to the courts, the Judicial Service Commission (JSC),[62] whose mandate is to promote the efficient and effective

[52] Article 93(1) (f), The Rome Statute; Section 90, 91, The International Crimes Act.
[53] Section 95, International Crimes Act.
[54] Sections 131,132, 133,145 and 151, International Crimes Act; Article 89 or 93(7) The Rome Statute.
[55] Article 187, The Rome Statute.
[56] Article 187, The Rome Statute.
[57] Section 132(1), 132(4), International Crimes Act.
[58] Section 134(1) – (4), International Crimes Act.
[59] Prisons Act, Cap. 90, Laws of Kenya.
[60] Section 8 (2), International Crimes Act.
[61] Section 39, International Crimes Act.
[62] Article 171(1), The Constitution of Kenya.

administration of justice, appointed a Committee[63] which recommended to the Chief Justice the need for the establishment of an International Crimes Division (ICD) of the High Court, to prosecute international and transnational crimes.[64]

Prior to the establishment of the ICD, such international crimes were prosecuted as ordinary crimes under the Penal Code and not under International Crimes Act, which came into force on 1 January 2009. This is in line with the principle of *nullem crimen sine lege* and *nulla poena sine lege* as articulated under Article 50(2) (n) of the Constitution of Kenya. Once established, the ICD will contribute towards effective and efficient discharge of Kenya's obligations under the Statute.

The Executive components at the heart of implementing the Rome Statute include: the Ministry of Interior and Coordination of National Government, the Attorney General, the Office of the Director of Public Prosecution and the Witness Protection Agency. As earlier noted, the Cabinet Secretary for Interior and Coordination of National Government executes the request for arrest and surrender of persons to ICC[65] and is mandated to make regulations to prescribe the procedure for implementation of the Act – although he has yet to make the said regulations.[66]

In addition to his role under Part Nine of the Rome Statute, the Attorney General[67] may appear as *Amicus Curiae* before the Court[68] and has done so in order to demonstrate the extent that Kenya has discharged its obligations under the Statute.[69] Jointly, the Office of the Director of Public Prosecutions (ODPP),[70] which undertakes criminal proceedings and the Inspector General

[63] Betty W,'Can the international crimes division prosecute Kenya's PEV cases?' Daily Nation 8 February 2014-<https://www.nation.co.ke/oped/blogs/dot9/International-Crimes-Division-bring-accountability/1959700-2197978-8fuaa9z/index.html> 22 June 2019.

[64] Judicial Service Commission, *Report of the Committee on the establishment of an International Crimes Division in the High Court of Kenya*, 30 October, 2012, 32, 146.

[65] Section 168, the International Crimes Act; Article 93 (10), the Rome Statute.

[66] Section 172, The International Crimes Act; *Walter Osapiri Barasa V the Cabinet Secretary, Ministry of Interior And National Co-Ordination and 4 others*, Constitutional Petition Number 488 of 2013.

[67] Article 156(4) (c) The Constitution of Kenya.

[68] Rule 103 (1) of the ICC Rules of Procedure and Evidence.

[69]The *Prosecutor V. Uhuru Muigai Kenyatta,* ICC-01/09-01/11-1987 12-10-2015 1/10 EC T OA10, e

[70]Article 157, The Constitution of Kenya; Section 5(3) of the ODPP Act , 2013.

of the National Police Service (which conducts the actual investigation of crimes)[71] discharge Kenya's obligations to investigate and prosecute international crimes. To this end, the ODPP has established task forces[72] and specialised units such as the War Crimes, Crimes against Humanity and Genocide Division to develop policies and strategies relating to international crimes.[73] Lastly, the Witness Protection Agency[74] provides the framework and procedures for protecting persons at risk of intimidation due to their co-operation with law enforcement agencies.[75]

It is worth mentioning the important role played by civil society organisations (CSOs) in the implementation of the country's obligations under the Rome Statute. Examples from the activities of two CSOs highlight this role. The Kenya Section of the International Commission of Jurists filed an application dated 18 November 2010 and obtained orders for provisional warrant of arrest against Omar Ahmad Hassan Al Bashir, the President of Sudan, in the event that he was present in the Republic of Kenya.[76] Another CSO, the Africa Centre for Open Governance, pursuant to Rule 103 of the Rules of Procedure and Evidence,[77] applied for leave to submit observations as *Amicus Curiae* in the case of *Prosecutor v Uhuru Muigai Kenyatta* in the context of non-cooperation by Kenya. Specifically, AfriCoG detailed the various instances of non-cooperation, including the failure to freeze the assets of Kenyatta to allow the Appeals Chamber to grasp the context in which these actions have taken place.[78] Each of these examples highlight the complementary role that CSOs can play in enhancing compliance, oversight and effective implementation of the country's obligations under the Rome Statute.

5. Implementation Challenges

It is clear that Kenya has an elaborate legal and institutional framework in place to implement its obligations under the Rome Statute. Despite this,

[71] Article 157(4), The Constitution of Kenya.

[72] Gazette notice no. 5417, *Multi-agency task force on the 2007/2008. post-election violence cases*, 20 April, 2012.

[73] The Office of the Director of Public Prosecutions (ODPP), *Strategic Plan*, 2011-2015,Nairobi, 44.

[74] Section 3A of the Witness Protection Act 2006, Chapter 79, Laws of Kenya.

[75] Article 93(1)(j), International Crimes Act.

[76] Miscellaneous Criminal Application Number 685 of 2010, of Kenya Section of the International Commission of Jurists V Attorney General & Another , 2011eKlr..

[77] Rules of Procedure and Evidence, ICC-ASP/1/3, 10, and Corr. 1 (2002), U.N. Doc. PCNICC/2000/1/Add.1, (2000).

[78] The Prosecutor V. Uhuru Muigai Kenyatta, ICC-01/09-02/11-1017 29-04-2015 1/13 EK T OA5, 10, -https://www.icc-cpi.int, -on 15 September 2016.

challenges subsist, which impede the discharge of these obligations. These challenges can broadly be categorized into two: those relating to the legal framework and those that are of a practical nature. The former is tied to the gaps in the law (such as the absence of regulations to support the relevant statutory framework) or conflicts within the law (such as tensions arising from conflicts between different sets of legal obligations owed by the country).[79] The latter relates to practical aspects such as the resources, capacity constraints and political will.

The current legal framework lacks rules and procedures necessary for the implementation of the International Crimes Act 2008. As noted, the Cabinet Secretary for the Ministry of Interior, is yet to make regulations on the procedure dealing with requests made by the ICC and the rules of evidence to be followed.[80] The absence of such rules has resulted in unstructured execution of requests by ICC. For instance, in *The Prosecutor v Paul Gicheru and Philip Kipkoech Bett*[81] Justice Luka Kimaru stayed the warrant of arrest pending the hearing of an application to quash the said warrants, until the Cabinet Secretary of Interior and Coordination of Government made regulations as provided by section 172 and 173 of the International Crimes Act.[82] Similarly, in the absence of rules and regulations with respect to the execution of a request by the ICC for arrest and surrender the principal judge in the case of *Walter Osapiri Barasa*,[83] was forced to direct the Cabinet Secretary to file a formal application for such execution as there were no guidelines to move the court. Although in these cases one could resort to the procedures under the Evident Act and Criminal Procedure Code, these procedures are inefficient and ineffective as they do not accommodate many of the realities of international crimes.[84]

The challenges inherent in conflicting legal obligations are evident when one examines the tensions created by the provisions relating to the immunity of heads of state under customary international law and national law and that

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[80] Section173 of International Crimes Act.

[81] *The Prosecutor v. Paul Gicheru and Philip Kipkoech Bett*, ICC-01/09-01/15.

[82] *Paul Gicheru & Another, Misc. Criminal Application No. 193 Of 2015.*

[83] *Walter Osapiri Barasa Vs. The Cabinet Secretary, Ministry of Interior And National Co-Ordination and 4 others*, Constitutional Petition Number 488 of 2013.

[84] Office of the Director of the Director of Public Prosecutions, *Second Progress Report*, 2013/2014, 52.

under the Rome Statute. These tensions have been exploited to undermine the implementation of the State's obligations. For instance, Article 27 of the Statute provides that immunities attaching to the official capacity of a person are not barred from the jurisdiction of the Court.[85]

This is in contrast to international customary law. For instance, the reliance on immunity for heads of states continues to be the subject of emerging international jurisprudence. On the one hand, there have been significant achievements in international criminal prosecutions towards the erosion of the concept of head-of-state immunity. This is demonstrated by the International Criminal Tribunal for Rwanda's conviction of former Rwandan Prime Minister, Jean Kambanda [86] and more recently the conviction of former Liberian President, Charles Taylor, where a challenge on the grounds of immunity was dismissed.[87] Further, the Constitution of Kenya, shields a sitting President from criminal proceedings.[88]

Additionally, there is tension between Article 27 and 98 of the Rome Statute. Under Article 98(1) the Court may not proceed with a request for surrender or assistance, which would require a State to act inconsistently with its obligations under international law (with respect to immunity of a person or property belonging to a Third State) unless the Court can first obtain a waiver of immunity from the relevant State. Thus, Article 98(1) renders the provisions of Article 27 ineffective and mirrors other situations where the provisions of immunity as addressed under the Rome Statute present visible tensions with obligations owed under regional treaty arrangements.[89] While Article 27 of the Rome Statute provides that official capacity is irrelevant, these other international obligations suggest that individuals who enjoy international immunity may only appear voluntarily before the ICC.

Beyond the legal challenges, certain practical constraints hinder the realisation of Kenya's obligations under the Rome Statute. This includes, amongst others, the lack of political will, capacity constraints and the

[85] Article 27 (2), The Rome Statute.

[86] *Prosecutor v. Jean Kambanda,* Case No. ICTR 97-23-S, Judgment and Sentence (4 September 1998).

[87] *Prosecutor V. Charles Ghankay Taylor, Case* No. Scsl-03-0, (2012).

[88] Article 143(1), The Constitution of Kenya, 2010.

[89] Makau M, 'The International Criminal Court in Africa: challenges and opportunities', The Norwegian Peace Building Centre, Noref Working Paper, September, 2010.

inadequate allocation of resources for the implementation of the Act. Each of these factors deserves attention as they ultimately impact the translation of the law into reality.

The lack of political will negatively impacts the effective discharge of Kenya's obligations under the Statute. Top government officials have been implicated in crimes that fall under the jurisdiction of the Court, compromising their ability to deliver justice.[90] Other government officials are reluctant to investigate/prosecute their political allies[91] since attempts to do so often elicit accusations of using the machinery of justice to intimidate and settle old scores.[92] This environment has impacted the investigations by the former Prosecutor, Luis Moreno-Ocampo and his successor Fatou Bensouda, into the crimes committed during the post-election violence 2007/2008.[93] Both prosecutors have had serious difficulties in securing full cooperation from the Executive.[94] The reluctance to cooperate is further evident in the conduct of the legislature, which voted for the country to withdraw from the ICC.[95] In the debates leading to this decision, the Leader of the Majority stated the Kenyan cases were political. The effect of this anti-ICC climate fostered by public officials has not only had a chilling effect on the willingness of witnesses to cooperate with the Prosecutor[96] but underlies a government, which projects an outward appearance of cooperation, while sabotaging the same at every stage of requests made by the Court.[97]

[90]Okechukwu O, 'The challenges of international criminal prosecutions in Africa', 31 *Fordham International Law Journal,* 2007, 360.

[91]Okechukwu O, 'The challenges of international criminal prosecutions in Africa', 359.

[92]Okechukwu O, 'The challenges of international criminal prosecutions in Africa', 359.

[93] Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an investigation into the situation in the Republic of Kenya, ICC-01/09, 31 March 2010 -https://www.icc-cpi.int/kenya- on accessed on 15 September 2016.)

[94] *The Prosecutor V. Uhuru Muigai Kenyatta*, ICC-01/09-02/11-733-Red 13-05-2013 18/18 RHT, Public redacted version of the 8 May 2013 Prosecution response to the "Government of Kenya's Submissions on the Status of Cooperation with the International Criminal Court, or, in the alternative, Application for Leave to file Observations pursuant to Rule 103(1) of the Rules of Procedure and Evidence" (ICC-01/09-02/11-713) - https://www.icc-cpi.int/kenya- on 15 September 2016.

[95]Aljazeera and Agencies, 'Kenya parliament votes to withdraw from ICC', Aljazeera, 6 September 2013 - http://www.aljazeera.com/news/Africa/2013/09/201395151027359326.html- on 10 August, 2015

[96] Aljazeera and Agencies, 'Kenya parliament votes to withdraw from ICC', para 1.

[97] Aljazeera and Agencies, 'Kenya parliament votes to withdraw from ICC', para 4.

As discussed earlier, various government agencies provide significant strengths in the implementation of Kenya's obligations under the Rome Statue such as the Attorney General, the Director of Public Prosecutions, the Witness Protection Agency, the Police and the Judiciary. [98] Most notable in this regard is the intention to establish a specialised division of the High Court to handle international crimes promises the expeditious disposal of cases.[99] Notwithstanding this effort, capacity constraints continue to hamper the fulfillment of the country's obligations under the Rome Statute. For example, the specialised division of the High Court is yet to be established and pertinent cases continue to be determined in the Criminal Division of the High Court with resultant delays.[100] Furthermore, there is a dearth of national jurisprudence in international crimes leading to an overreliance on the international jurisprudence where different rules of procedure and evidence are applied.[101] To compound this, local judicial officers and prosecutors are not fully aware of obligations under the Rome Statute and the Act.[102] More could also be done to guarantee the protection of witnesses e.g. making provision for the concealment of their identity from accusers and raising greater awareness of the Witness Protection Act 2006.[103]

Finally, there are no structured ways of engagements and sharing information on investigations and prosecutions of international crimes. Various criminal justice agencies and institutions have different functions and responsibilities, in the implementation and discharge of Kenya's obligations under International Crimes Act. These agencies include Police**,** Office of the Director of Public Prosecutions**,** Attorney General, the Judiciary and Witness Protection Agency. Effective discharge of Kenya's obligations under the statute depends on the consolidated and enhanced partnership and coordination between criminal justice actors. This may cause delay of the

[98] Article 160(1), Article 156 and 245(2)(b), The Constitution of Kenya.

[99] Judicial Service Commission, *Report of the Committee of progress report the Judicial Service Commission on the establishment of an International Crimes Division in the High Court of Kenya Nairobi*, 30 October 2012. - http://www.judiciary.go.ke/portal/page/speeches- on 22 September 2016.

[100] *Republic (through Cabinet Secretary, Ministry of Interior and Coordination of National Government) v Paul Gicheru & another* [2017] eKLR.

[101] Article 64, Rome Statute of International Criminal Court.

[102] Office of the Director of Public Prosecutions, *Second Progress Report*, 2013/2014 , 50; Judiciary, *State of Judiciary and the Administration of Justice Report,* 2014-2015, 96. – www.judiciary.go.ke/.../STATE%20OF%20THE%20JUDICIARY%20REPORT%203.pd-*on 24 September 2016.*

[103] Judiciary, *State of Judiciary and Administration of Justice Annual Report*, 2014-2015, 114.

execution of requests for cooperation by the ICC and impede timely discharge of the obligations to a large.

In light of the approval by Parliament to withdraw from the Statute and repeal International Crimes Act 2008, it is unlikely that Parliament will allocate adequate funds to agencies to discharge the obligations under the Statute. Inadequate funds have proven to be the most critical weakness so far in the discharge of Kenya's obligations. Key agencies within the criminal justice system such as the National Police Service and the Government Chemist suffer acute capacity due to financial constraints, which inevitably affect the efficient delivery of services by the entire system.[104] Despite the enormous mandate bestowed upon agencies such as Judiciary, ODPP, Office of the Attorney General, and Witness Protection Agency, limited funding has resulted in institutions that are understaffed and lack adequate infrastructure, including facilities and equipment, necessary for the optimum discharge of the country's obligation.[105]

6. Conclusion

In light of the above challenges, there are a number of recommendations that may enable Kenya efficiently and effectively discharge its obligations under the Rome Statute. Firstly, the government should develop and promulgate rules and regulations of Evidence and Procedure to support the Act.[106] In this regard, Rwanda may offer a useful approach. Rwanda enacted the Transfer Law to govern the transfer of cases from ICTR and other states to Rwanda.[107] This law incorporates Rules of Procedures and Evidence from ICTR,[108] as well as guarantees of the accused persons (and persons in detention)[109] and the protection of witnesses.[110] In the same breadth, the Attorney General could extrapolate **rules** and regulations under sections 172 and 173 of the

[104] Judiciary, *State of Judiciary and the Administration of Justice Report*, 97.

[105] Judiciary, *Progress Report on the Transformation of the Judiciary, The First Hundred And Twenty Days,* 19th October, 2011, 6. - http://www.judiciary.go.ke/portal/page/speeches- on 22 September 2016.

[106] Section 172 ,173, The International Crimes Act.

[107] Rwanda's Organic Law No. 11/2007; Organic Law No. 03/2009/OL; Organic Law No. 47/2013 (2013 Transfer Law), (together, the "Transfer Law").

[108] Transfer Law, Articles 7- 11.

[109] Transfer Law, Article 23.

[110] Transfer Law, Articles 13-14.

International Crimes Act to facilitate effective implementation of the Kenya's obligations under the Rome Statute.

Secondly, the Government should develop strong institutions to facilitate efficient and effective discharge by adopting measures that target the entire criminal justice systems including the judiciary, the ODPP, the AG and the police. The measures amongst others could include the establishment of a Specialized Division of the High Court to hear and determine international crimes. In addition, the government should build capacity of criminal justice agencies so as to improve the quality of investigations and prosecution, such as providing specialized training for the police, prosecutors, judges and magistrates on international criminal law, international humanitarian law and international human rights law.[111] It may also be beneficial to conduct exchange and mentorship programme at the international plane to share experiences of international best practices in the investigations and prosecutions of international crimes.

The lack of political will at the top echelons of government may be countered through an aggressive campaign targeting society at its grassroots with the intention of using public opinion to pressure the political leadership. Civil society could conduct sensitization workshops and outreach programmes targeting key stakeholders in the public sector in order to demystify Kenya's obligations under the Rome Statute and International Crimes Act 2008. Such sessions could enable the public to engage with the contextual background that has necessitated the emergence of international criminal law such as atrocities committed in the past. As these programmes spread and gain the support of the local population, government and politicians are likely to bend to public opinion and provide the necessary support to the ICC. This is likely to translate to improved budgetary allocation to the criminal justice agencies in order to improve their execution of their obligations under the Statute by inter alia providing for their training, building of the necessary infrastructure for witness protection, and facilities such as forensic laboratories, case management system and infrastructure to implement witness protection measures.

[111] The Judiciary, *State of Judiciary and Administration of Justice Report*, 2015-2015, 97 - www.judiciary.go.ke/.../STATE%20OF%20THE%20JUDICIARY%20REPORT%203.pd *on 24 September 2016.*

Finally, the effective discharge of Kenya's obligations depends on coordination and cooperation between criminal justice actors. Such cooperation could be rooted in developing memorandum of understanding among actors or approving standard operating procedures upon which inter-agency cooperation could be founded.

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Republic (through Cabinet Secretary, Ministry of Interior and Coordination of National Government) v Paul Gicheru & another [2017] eKLR.

Miscellaneous Criminal Application Number 685 of 2010, of Kenya Section of the International Commission of Jurists V Attorney General & Another, 2011eKlr.

Paul Gicheru & Another, Misc. Criminal Application No. 193 of 2015.

Prosecutor v. Jean Kambanda, Case No. ICTR 97-23-S, Judgment and Sentence (4 September 1998).

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Harnessing the Blue Economy: Challenges and Opportunities for Kenya

By: ***Kariuki Muigua****

Abstract

The blue economy holds great potential for Kenya's economy as well as the livelihoods of various communities working and living within these areas. Documented evidence has shown that Kenya's resources in this sector are enormous and have been contributing to different sectors of the economy as well as proving employment for a huge group of people in the country. Despite this, the sector is still greatly under exploited due to a number of challenges that affect the country's potential in this area. This paper discusses these challenges and suggests ways through which Kenya's Blue Economy can be unlocked to boost national development agenda. This is in light of the outcome of the Nairobi Blue Economy Conference held in Nairobi in November 2018.

1. Introduction

Partly based on the recently concluded first ever Global Sustainable Blue Economy Conference held in Nairobi, Kenya in November 2018,
[1], in which Kenya can tap into its diverse blue resources, with the aim of drawing valuable lessons for Kenya and making recommendations on what the country can do to maximize on these outcomes and achieve sustainable livelihoods for its people and national economic development in general. This is in recognition of the fact that 'there is a direct correlation between blue economy and livelihoods and food security'.[2]

Kenya's oceanic territory has vast resources that can assist Kenya grow economically, eradicate poverty and achieve sustainable development.

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[1] Conference on the Global Sustainable Blue Economy, held at the Kenyatta International Convention Centre, Nairobi from 26th to 28th November 2018. Available at http://www.blueeconomyconference.go.ke/ [Accessed on 17/12/2018].

[2] Guleid, M., "True value of the blue economy to Kenya," Standard *Digital,* 29th Nov 2018. Available at https://www.standardmedia.co.ke/article/2001304390/true-value-of-the-blue-economy-to-kenya [Accessed on 17/12/2018].

However, there exist challenges in harnessing these resources. The paper critically analyses these challenges, how they can be surmounted and recommends measures within the policy, legal and institutional framework to assist Kenya effectively harness these resources. These are meant to enable the country expand her economy and improve her people's livelihoods through tapping into the enormous resources contained within its blue resources.

2. Blue Economy: The Definition and Scope

Blue economy has been defined as:

> *… a sustainable ocean-based economic model that is largely dependent on coastal and marine ecosystems and resources, but one that employs environmentally-sound and innovative infrastructure, technologies and practices, including institutional and financing arrangements, for meeting the goals of: (a) sustainable and inclusive development; (b) protecting the coasts and oceans, and reducing environmental risks and ecological scarcities; (c) addressing water, energy and food security; (d) protecting the health, livelihoods and welfare of the people in the coastal zone; and (e) fostering an ecosystem-based climate change mitigation and adaptation measures.*[3]

The World Bank also defines 'blue economy' in the following terms: "sustainable use of ocean resources for economic growth, improved livelihoods, and jobs while preserving the health of ocean ecosystem."[4] Thus, according to the World Bank, the "blue economy" concept seeks to promote economic growth, social inclusion, and the preservation or improvement of livelihoods while at the same time ensuring environmental sustainability of the oceans and coastal areas.[5]

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[3] UNDP, "Leveraging the Blue Economy for Inclusive and Sustainable Growth," *Policy Brief, Issue No: 6/2018,* April, 2018, p.2. Available at http://www.ke.undp.org/content/dam/kenya/docs/UNDP%20Reports/Policy%20Brief%20%202018%20-%206-%20%20Blue%20Economy%20for%20Inclusive%20and%20Sustainable%20Growth.pdf [Accessed on 17/12/2018].

[4] The World Bank, Infographic: What is the Blue Economy? June 6, 2017, available at http://www.worldbank.org/en/news/infographic/2017/06/06/blue-economy [Accessed on 17/12/2018].

[5] World Bank and United Nations Department of Economic and Social Affairs, *The Potential of the Blue Economy: Increasing Long-term Benefits of the Sustainable Use of Marine Resources for Small Island Developing States and Coastal Least Developed Countries*, World Bank, Washington DC, 2017, p.2. Available at

Blue Economy thus encompasses diverse but related issues surrounding the exploitation of ocean resources, as captured in the theme of the Global Sustainable Blue Economy Conference 2018, which was '*the Blue Economy and the 2030 Agenda for Sustainable Development*' broken down into nine distinct but mutually reinforcing sub-themes: smart shipping, ports, transportation and global connectivity, employment, job creation and poverty eradication, cities, tourism, resilient coasts and infrastructure, sustainable energy and mineral resources and innovative industries, management and sustaining marine life, conservation and sustainable economic activities, ending hunger, securing food supplies, promoting good health and sustainable fisheries, climate action, agriculture, waste management and pollution-free oceans, maritime security safety and regulatory enforcement and people, culture, communities, the inclusive blue economy.[6]

With its great potential the blue economy holds a lot of promise for Kenya's economy. Scholars have argued that the linkage between the *blue econo*my, economic growth, and ocean and coastal resource conservation should be clarified by highlighting the following: The *blue economy* encompasses all economic activities with a direct dependence on the ocean or coastal and marine resources; it also includes marine education and research as well as activities of the public sector agencies with direct coastal and ocean responsibilities (e.g., national defense, coast guard, marine environmental protection, etc.); the ocean generates economic values that are not usually quantified, such as habitat for fish and marine life, carbon sequestration, shoreline protection, waste recycling and storing, and ocean processes that influence climate and biodiversity; and new activities are also evolving over the recent years, such as desalination, marine biotechnologies, ocean energy, and seabed mining.[7]Despite the existence of these resources and their potential benefits to Kenya's economy, harnessing them has been beset with major challenges, as discussed in the next section of this paper.

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https://openknowledge.worldbank.org/bitstream/handle/10986/26843/115545.pdf?sequence=1&isAllowed=y [Accessed on 17/12/2018].

[6] *Report On The Global Sustainable Blue Economy Conference 26th – 28th November 2018, Nairobi, Kenya*, Prepared By SBEC Technical Documentation Review Committee At A Retreat Held At Lake Naivasha Simba Lodge, Kenya, December 5th – 9th 2018.

[7] UNDP, "Leveraging the Blue Economy for Inclusive and Sustainable Growth," *Policy Brief, Issue No: 6/2018,* April, 2018, op. cit., p.2.

3. Towards A Sustainable Blue Economy for Economic and Social Development: Challenges and Prospects for Kenya

3.1 Achieving Sustainable Blue Economy in Kenya: Challenges

The United Nations Development Programme has observed that as far as exploitation of the blue resources is concerned, the Eastern Africa region faces challenges of illegal and unregulated fishing, piracy and armed robbery, maritime terrorism, illicit trade in crude oil, arms, drug and human trafficking and smuggling of contraband goods; degradation of marine ecosystems through discharge of oil, the dumping of toxic waste, illegal sand harvesting and the destruction of coral reefs and coastal forests.[8] Kenya also suffers from fragmented management of the coastal zone, lack of capacity and technical know-how, lack of capital, minimal participation by citizens, incoherent benefit sharing regime and biodiversity loss, amongst others.[9]

Furthermore, Kenya is confronted with piracy in the Indian Ocean, illegal fishing and border disputes, the dispute with Somalia over the maritime boundary[10], over a potentially lucrative triangular stretch of 100,000 square kilometers offshore territory that is about 370 kilometers from the coastline, believed to be home to huge oil and gas deposits.[11] Through these challenges, Kenya loses resources to foreign exploitation due to lack of capacity and knowhow as well as degraded and dwindling resources within its internal waters, attributable to environmental degradation, as already highlighted. Notably, the country's marine fisheries are primarily exploited by foreign fishing vessels which rarely land or declare their catches in the country, thus depriving the country of much needed revenue and processing jobs.[12]

During the Blue Economy Conference, there was emphasis on the need to improve the health of the oceans, seas, lakes, and rivers and the ecosystems

[8] Ibid, p.5.

[9] See United Nations, Kenya: Common Country Assessment, United Nations Development Assistance Framework for Kenya: 2018-2022, January 2018. Available at http://ke.one.un.org/content/dam/kenya/docs/unct/Kenya-%20Common%20Country%20Assessment%20%202018.pdf [Accessed on 20/12/2018].

[10] Maritime Delimitation in the Indian Ocean (Somalia v. Kenya).

[11] UNDP, "Leveraging the Blue Economy for Inclusive and Sustainable Growth," *Policy Brief, Issue No: 6/2018,* April, 2018, op. cit., p.5.

[12] USAID, "The Importance of Wild Fisheries For Local Food Security: Kenya," p.1. Available at https://www.agrilinks.org/sites/default/files/resource/files/kenya_file.pdf [Accessed on 20/12/2018].

which are under increased threats and in decline in many countries and regions across the globe.[13] Some of the threats highlighted include climate change, pollution and waste management, illegal activities at seas including Illegal Unregulated and Unreported fishing, piracy and terrorism, destruction of marine ecosystems and management of resource in areas beyond national jurisdiction.[14]

The challenges facing exploitation of Kenya's coastal and marine resources have also been highlighted in the *Integrated Coastal Zone Management (ICZM) Policy 2014*[15] as follows: uncoordinated sectoral policies; and population increase and society placing many legitimate, but often competing, demands on the resource base and the environment, with the sectoral management approaches have failed to achieve the objectives of coastal planning and sustainable development.[16] This has been attributed to: limited understanding of coastal and marine resources, natural processes and opportunities; institutional weaknesses, single sector planning, bureaucracy, competing interests among institutions and misplaced priorities; inadequate legislation and enforcement; inadequately trained personnel, use of inappropriate technologies and equipment, and limited experience in integrated coastal planning, development and management.[17] The result of all these has been deficient pollution management, over-extraction of resources and unsustainable livelihoods, unsustainable use patterns, resulting in wide spread degradation and loss of critical habitats and loss of development opportunities.[18]

Statistics have shown that fisheries, which Kenya has only focused on both for domestic and export markets, accounting for only about 0.5 per cent of the Gross Domestic Product (GDP) and generate employment for over two million Kenyans through fishing, boat building, equipment repair, fish

[13] *Report on the Global Sustainable Blue Economy Conference 26th – 28th November 2018, Nairobi, Kenya*, p.4.
[14] Ibid, p.4.
[15] Sessional Paper No. 13 of 2014, Republic of Kenya.
[16] *Integrated Coastal Zone Management (ICZM) Policy 2014*, p.1.
[17] Ibid, pp.1-2.
[18] Ibid, p.2; See also Odhyambo, G., "Tapping blue economy benefits takes commitment," in Kenya School of Government, "Unpacking the Big Four," *Weekly Bulletin,* Vol. 7 Issue 20, 2nd - 8th June, 2018, p.3. Available at https://www.ksg.ac.ke/images/bulletin/KSG_Bulletin_2nd-8th_June_2018.pdf [Accessed on 20/12/2018].

processing, and other ancillary activities.[19] Despite this, the Kenya Maritime Authority (KMA) estimates the annual economic value of goods and services in the marine and coastal ecosystem of the *blue economy* in the Western Indian Ocean is over US$22 billion with Kenya's share slightly over US$4.4 billion (20%) with the tourism sector taking the lion's share of over US$4.1 billion.[20] Therefore, the full economic potential of marine resources has not been exploited, yet Kenya has a maritime territory of 230,000 square kilometers and a distance of 200 nautical miles offshore.[21] Kenya has not yet invested in this potentially lucrative area thus occasioning loss of income and opportunities for the Kenyan people. It is also a potential solution to the food insecurity problem in Kenya through maximizing on the seafood harvesting.[22] The global Sustainable Blue Economy Conference (SBEC 2018) came up with several forward looking resolutions as captured in the outcome Report.[23] The Conference captured concrete commitments and practical actions that can be taken today to help the world transition to the blue economy.[24] However, for Kenya to benefit to fully benefit from these resources there must be conscious efforts aimed at tackling the highlighted challenges related to environmental sustainability, maritime security and inclusive development. While the next section highlights some of the outcomes of the Blue Economy, it also makes further recommendations on the way forward on how these challenges can be overcome.

3.2 Tapping into the Blue Economy Resources: The Way Forward

There have been positive steps, albeit slow ones, in tapping into these vast resources. For instance, in the recent years, there have seen a shift in approach, where there has been an integrated approach as reflected in the renaming of the Department of Fisheries as the Department of Fisheries and

[19] UNDP, "Leveraging the Blue Economy for Inclusive and Sustainable Growth," *Policy Brief, Issue No: 6/2018,* April, 2018, op. cit., p.5.

[20] Ibid, p.5.

[21] Ibid, p.5.

[22] USAID, "The Importance of Wild Fisheries For Local Food Security: Kenya," op. cit.

[23] *Report On The Global Sustainable Blue Economy Conference 26th – 28th November 2018, Nairobi, Kenya*, Prepared By SBEC Technical Documentation Review Committee At A Retreat Held At Lake Naivasha Simba Lodge, Kenya, December 5th – 9th 2018.

[24] Ibid.

Blue Economy in June 2016 and the establishment of a Blue Economy Implementation Committee in January 2017.[25]

The Conference was as a result of a collaboration between Kenya and its co-hosts Canada and Japan whose main objective was to help the participants learn how to build a blue economy that: Harnesses the potential of our oceans, seas, lakes and rivers to improve the lives of all, particularly people in developing states, women, youth and Indigenous peoples; and leverages the latest innovations, scientific advances and best practices to build prosperity while conserving our waters for future generations.[26] This was a great opportunity for marketing Kenya not only as a respectable global player in the sector but also a chance to highlight its ecotourism potential. This should not stop and the stakeholders in the marine wildlife as well as the hospitality sector should use the same to their advantage to maximize on the tourism generated income in Kenya.

Considering that the Conference brought together 16,320 participants from 184 countries, including 7 Heads of State and Government, 84 Ministers, several Heads of International Organizations, Mayors and Governors, the business and private sector, community leaders, the civil society, and women and youth organizations,[27] it creates the perfect platform to launch an integrated approach with the concerted efforts of all the stakeholders. The community leaders present in the Conference should continually be engaged in bringing coastal communities on board through empowerment measures such as funding mechanisms for building of capacity and technical knowhow as far as fishing and exploitation of other marine resources is concerned. This should of course be done within the principles of sustainable development to

[25] Benkenstein, A., "Prospects for the Kenyan Blue Economy," South African Institute of International Affairs, Policy Insights 62, July, 2018, p.1. Available at https://saiia.org.za/wp-content/uploads/2018/07/saia_spi_62_benkestein_20180718.pdf [Accessed on 17/12/2018].

[26] Conference on the Global Sustainable Blue Economy, held at the Kenyatta International Convention Centre, Nairobi from 26th to 28th November 2018. Available at http://www.blueeconomyconference.go.ke/ [Accessed on 17/12/2018].

[27] *Report On The Global Sustainable Blue Economy Conference 26th – 28th November 2018, Nairobi, Kenya*, Prepared By SBEC Technical Documentation Review Committee At A Retreat Held At Lake Naivasha Simba Lodge, Kenya, December 5th – 9th 2018. Available at http://www.blueeconomyconference.go.ke/wp-content/uploads/2018/12/SBEC-FINAL-REPORT-8-DECEMBER-2018-rev-2-1-2-PDF2-3-compressed.pdf [Accessed on 17/12/2018].

achieve the twin goals of environmental conservation and sustainable livelihoods.

SBEC 2018 resulted in among others the *Nairobi Statement of Intent on Advancing a Sustainable Blue Economy*[28] which contains a number of key political messages, including, the need to; promote action-oriented global strategies that places people and the blue economy resources at the centre of sustainable development; promote collaboration for sustainable partnerships and projects in the various sectors of the blue economy; mobilize finance from the public and private sources, promote access to technologies and innovations, share best practices, capacity building; promote gender equality, the role and participation of women and youth in the blue economy; strengthen science and research to generate and disseminate evidence-based knowledge and information as well as to inform policy and decision making; strengthen governance mechanisms; and promote synergies within and between different levels of governments.[29] Incorporating these resolutions in the national policy, legal and institutional frameworks will go a long way in enhancing Kenya's capacity to harness the blue resources for the realisation of its sustainable development needs.

One of the challenges facing exploitation of the blue resources in Kenya is the lack of capital. Notably, during the Conference, participants also committed to put aside money to protect oceans, seas, lakes and rivers and the ecosystems they support.[30] Participants made numerous voluntary non-monetary and monetary commitments amounting to approximately USD172.2 billion in the various sectors of the blue economy, covering new partnerships and networks for joint investments in projects, financing, technology development and transfer and capacity building, among others.[31] Kenya can capitalize on this to enter into mutually beneficial cooperation that will help it build capacity for exploitation of these resources.

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[28] *The Nairobi Statement of Intent on Advancing the Global Sustainable Blue Economy*, available at http://www.fao.org/fi/static-media/MeetingDocuments/SustainableBlueEconomy/3.pdf [Accessed on 18/12/2018].

[29] *Report on the Global Sustainable Blue Economy Conference 26th – 28th November 2018, Nairobi, Kenya*, Prepared By SBEC Technical Documentation Review Committee At A Retreat Held At Lake Naivasha Simba Lodge, Kenya, December 5th – 9th 2018, p.3.

[30] Ibid, p.3.

[31] Ibid, p.3.

There were also strategic discussions predicated on the two pillars of production; accelerated economic growth, job creation and poverty alleviation, and sustainability; climate change and controlling pollution.[32] Through mutually beneficial alliances as well as meaningful inclusion of all the stakeholders, including communities, Kenya can tap into its blue resources as one of the ways of achieving the Agenda 2030 on Sustainable Development as well as the Vision 2030 development blueprint. The outcomes are expected to galvanize and deepen collaboration between and among governments and stakeholders on blue economy, and to help align the blue economy with the needs of the society.[33]

The blue economy resources hold great promise and opportunity to build greater prosperity for all through such opportunities as: deep-sea mining, fisheries development, smart shipping, aquaculture, training more women in maritime related sectors, blue financing, establishment of regional centers for ship owners, research and technology development, mainstreaming climate change and environmental sustainability in the blue economy, developing blue economy observatory mechanism, raising awareness on the importance and value of maritime resources.[34]

In addition to the foregoing, there is a need for conscious efforts aimed at curbing pollution of the water bodies. This must start from the highlands where the agricultural residue chemicals and soil erosion originate from. Farmers should continually be sensitized on the need for cautious and minimal use of farming chemicals that are likely to adversely affect the water bodies and the living resources therein.
There is also a need to ensure full implementation of the ICZM policy, which is a forward looking policy that holds potential in enhancing the country's capacity in not only conserving and protecting the coastal and marine

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

[33] *Report on the Global Sustainable Blue Economy Conference 26th – 28th November 2018, Nairobi, Kenya*, p.3.
[34] *Report on the Global Sustainable Blue Economy Conference 26th – 28th November 2018, Nairobi, Kenya*, p.4.

resources but also tapping into these resources for national development and improving the livelihoods of the coastal communities.

As already noted, climate change also threatens the profitability of the blue economy and thus specific measures as envisaged in Kenya's *Climate Change Act* 2016[35] should proactively be implemented to avert and reverse the adverse effects of climate change on these resources. As pointed out elsewhere in this paper, most African countries, including Kenya, lack advanced industries for processing and value addition of raw materials. This can be attributed to high capital requirements to set up such industries and the technology gap.[36] The lack of capacity and technology knowhow as well as capital negatively affects the country's ability to tap into these resources. There should be conscious efforts from the Government of Kenya to not only source for strategic partnerships to acquire the capital and the technical knowhow required for the exploitation of these resources but also make budgetary allocation to develop the sector due to its high potential in enhancing the lives of communities as well as its contribution to the national GDP. Funding mechanisms would not only build capacity for the experts but also facilitate the community's efforts to venture into this area of economy.

In order to tap into the blue economy as a solution to the food insecurity problem in the country, there is a need for the various communities to be sensitised on the need to venture into seafood business both as a source of food as well as a source of income. Supplying them with the knowledge as well as the required resources for startup should now be a priority for the government as it will also mean that the country's status as a consumer and producer or exporter of seafood will be enhanced internationally.

As already pointed out, the successful exploitation of the blue resources in Kenya requires the concerted efforts of all. A clear stakeholder mapping of all the potential beneficiaries as well as the interested parties, such as communities that directly rely on these resources for their livelihoods is needed so that they can work closely with the government bodies in charge

[35] Climate Change Act, No. 11 of 2016, Laws of Kenya. The Act was enacted to provide for a regulatory framework for enhanced response to climate change; to provide for mechanisms and measures to achieve low carbon climate development, and for connected purposes. The Act also establishes the National Climate Change Council to coordinate the country's climate change efforts.

[36] Ngwenya, S., *"Africa has to Shed off the Resource Curse Stigma*" The Star Newspaper, Friday January 3, 2014.

of these resources as well as environmental conservation to ensure that they all work towards improving the lives of the people, economic development as well as environmental conservation. The Government (Executive, Judiciary and Parliament) can work closely with the county governments, Non-Governmental Organisations, scientists and other professionals as well as the specific committees or offices charged with coming up with the policy blueprint for the development of the country's blue economy to ensure that there is not only in place practical measures laid down by way of legal and policy frameworks but that the same are also fully implemented and enforced to protect the resources from degradation and pollution as well as Illegal Unregulated and Unreported fishing from foreigners. If the foregoing proposed measures are considered as well as the full implementation of the Blue Economy Conference resolutions, Kenya would be well on its way to realisation of the sustainable development goals and the country's Vision 2030.

4. Conclusion

The sustainable development agenda calls for economic development that is both inclusive and environmentally sound, and undertaken in a manner that does not deplete the natural resources that societies depend on in the long-term, and this includes the oceans, making it a key component of the *blue economy*.[37]

Kenya can reap from the Blue Economy. It can harness the blue economy resources to achieve sustainable development and specifically address questions of eradication of poverty, provision of food security and generally raise the people's standards of living.

[37] UNDP, "Leveraging the Blue Economy for Inclusive and Sustainable Growth," *Policy Brief, Issue No: 6/2018,* April, 2018, op. cit., p.6.

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The World Bank, Infographic: What is the Blue Economy? June 6, 2017, available at http://www.worldbank.org/en/news/infographic/2017/06/06/blue-economy [Accessed on 17/12/2018].

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USAID, "The Importance of Wild Fisheries for Local Food Security: Kenya." Available at https://www.agrilinks.org/sites/default/files/resource/files/kenya_file.pdf [Accessed on 20/12/2018].

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Artificial Intelligence and Its Future in Arbitration

By: ***Ibrahim Godofa****

Abstract

This paper examines Artificial Intelligence and its future in arbitration. Although the use of artificial intelligence is not widespread in arbitration and come with several teething problems, the benefits that it offers the practice of arbitration are numerous. This is because, when it is embraced with an open mind, albeit with caution as well, artificial intelligence has the potential to revolutionize the practice of arbitration in the present as well as into the future. Specific attention is drawn to the numerous potentials that artificial intelligence offers towards achieving access to justice.

This paper is broken down into seven sections. The first section introduces the paper by giving an overview of the use of technology in arbitration, defining key terms, setting out the objectives of the paper, as well as its limitations. The second part traces the background of the use of technology in arbitration. The third part discusses artificial intelligence and access to justice. The fourth part examines challenges that have been faced in the use of artificial intelligence in arbitration. The fifth part highlights opportunities for improvements. The sixth part presents a case for future use of artificial intelligence in arbitration. The final part concludes the findings in the paper.

The aim of this paper is to examine the current experiences of the use of artificial intelligence in the practice of arbitration, to highlight opportunities for improvements, and to ultimately present a case for the future of artificial intelligence in arbitration.

1. Introduction

1.1 Overview of Technology in Arbitration

While arbitration is often famed for its relatively high speed to litigation, more disputes that are increasingly complex in nature are being presented before it thereby rendering this speed trait illusionary by the day.[1] To maintain all the efficient characteristics of the arbitral process that has endeared it to the

[1] Thomas D. Halket, 'The Use of Technology in Arbitration: Ensuring the Future is Available to Both Parties' (2007) 81 (269) *St. John's Law Review* Available at: http://www.halketweitz.com/use_of_technology_in_arbitration.pdf (Last Accessed on November 16, 2019)

hearts of many parties that continue to seek resolution of their disputes through it, especially in this modern times, the use of technology and technical aids is becoming ever more necessary.[2]

The use of technology in arbitration has been rising alongside the use of technology in the legal profession as a whole,[3] an aspect that has been truly rapid and far-reaching in its impact over the years.[4] However, the flexible nature of the framework governing arbitration has presented an even better incentive for the use of technology to thrive in arbitration than it would in other mechanisms of dispute resolution.[5] Over the years therefore, the use of technology in arbitral procedures has become unstoppable.[6]

1.2 Definition of Key Terms

Some of the key terms and concepts that have been employed in this paper can be defined as follows:

a) Arbitration – According to general consensus of judicial pronouncements and statutory provisions, it is defined as a process for hearing and deciding disputes of economic implications which arise between parties who depending on an agreement between them, submit their claims to one or more persons they choose to serve as an arbitrator.[7]

[2] Ibid

[3] Thomas Schultz, 'Information Technology and Arbitration: A Practitioner's Guide' (2006) *Kluwer Law International* Available at: https://books.google.co.ke/books?hl=en&lr=&id=Zto0c7nXKwoC&oi=fnd&pg=PA6&dq=using+technology+in+arbitration&ots=rSwzanj9G-&sig=SfylgkOS7B8_oTbxNCTcg5pZmI&redir_esc=y#v=onepage&q=using%20technology%20in%20arbitration&f=true (Last Accessed on November 16, 2019)

[4] Richard Susskind, 'The future of law: facing the challenges of information technology' (1998) *Oxford University Press*

[5] Ibid *Schultz*, (n3)

[6] Ibid

[7] Wesley A. Sturges, 'Arbitration – What is it' (1960) 35 *New York University Law Review*, Page 1031Available at: https://digitalcommons.law.yale.edu/cgi/viewcontent.cgi?article=4305&context=fss_papers (Last Accessed on November 16, 2019)

b) Technology – Is defined as a branch of knowledge, or the results of application of science, the study of techniques, practice, or an activity.[8] Its definition has widely been accepted to be rather vague in its nature.[9]

c) Technical Aids – This is a term that is used to refer to information and communication technology equipment and services which are used to accomplish a certain task.[10]

d) Artificial Intelligence (AI) – It is defined as a computer systems or programs that are designed to perform tasks that are ordinarily performed through the human intellect in an arbitrary world.[11] Simply put, it is the exhibition of intellectual traits that are conventionally associated with humans by a machine in its tasks.

e) Information Technology (IT) – Is defined as both computer software and hardware solutions which provide support of management, strategists, as well as operations in an organisation in order to increase its productivity.[12]

1.3 Objectives of the Paper

This paper is aimed at achieving the following objectives: To examine the place of technology as a whole and artificial intelligence in particular in arbitration. To interrogate the benefits of artificial intelligence in providing access to justice through arbitration. To investigate the criticisms levelled against the use of artificial intelligence in arbitration. To analyse the various opportunities available for improvement in the use of artificial intelligence in arbitration. And finally, to present a case for the future of artificial int

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[8] Brian Arthur, 'The nature of technology: What it is and how it evolves' (2009) *Simon and Schuster* Available at: https://books.google.co.ke/books?hl=en&lr=&id=3qHsXYXN0EC&oi=fnd&pg=PA1&dq=what+is+technology&ots=5YTdlJ7Tu7&sig=FP1-1pJCdDuKAU-gy6z-loHtiew&redir_esc=y#v=onepage&q=what%20is%20technology&f=false (Last Accessed on November 16, 2019)

[9] Ibid

[10] Ibid *Halket*, (n1)Available at: http://www.halketweitz.com/use_of_technology_in_arbitration.pdf (Last Accessed on November 16, 2019) It should be noted that this term will be used in this paper to refer to the various technological assistances that is used in the arbitral process

[11] Dimiter Dobrev, 'A Definition of Artificial Intelligence' (2004) *Institute of Mathematics and Informatics, Bulgaria Academy of Sciences.* Available at: https://arxiv.org/pdf/1210.1568.pdf (Last Accessed on November 16, 2019)

[12] Choo Wou Onn, and Shahryar Sorooshian, 'Mini literature analysis on information technology definition' (2013) 3(2) *Information and Knowledge Management*, Page 139-140 Available at: https://pdfs.semanticscholar.org/0333/904fd80b3cc67decd855dffa21e9f7c8732b.pdf (Last Accessed on November 17, 2019)

elligence in arbitral practices.

1.4 Limitations of the paper

This paper is restricted to the examination of artificial intelligence especially with regards to its use in arbitration as well as its future in arbitration practices. The paper does not render itself to the examination of any others aspects of artificial intelligence or arbitration outside this scope.

2.0 Background of the Use of Technology in Arbitration

The onset of the use of technology in general and artificial intelligence in particular in the practice of arbitration can be traced back to the global movement in embracing internet use especially with regards to use in the legal field.[13] Additionally, the use of technology has been argued to have flourished more in arbitration as compared to litigation due to the fact that arbitration is not burdened by the procurement and implementation nightmares that bedevil large institutions like the court when it comes to acquiring and capitalizing on technology.[14] These observations therefore explain the onset of the use of technology in arbitration as well as factors that have made it a success.

Despite all these attractive features associated with the use of technology in arbitration, it is important to note that the use of information technology in the facilitation of arbitral processes is still at an infancy stage.[15] However, there is pressure building in the international commercial arbitration space from clients who believe that the same technology that has changed the way in which global commerce operates should also be able to aid the resolution of their disputes with the same speed and efficiency.[16] Nevertheless, there is

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[13] Jasna Arsic, 'International Commercial Arbitration on the Internet: Has the Future Come Too Early?' (1997) 14(3) *Journal of International Arbitration* Available at: https://heinonline.org/HOL/LandingPage?handle=hein.kluwer/jia0014&div=33&id=&page= (Last Accessed on November 16, 2019)

[14] Tyrone L. Holt, 'Whither Arbitration – What Can be Done to Improve Arbitration and Keep out Litigation's Ill Effects' (2008) 7 *DePaul Bus. & Comm. LJ.* Page 455Available at: https://via.library.depaul.edu/cgi/viewcontent.cgi?article=1120&context=bclj (Last Accessed on November 16, 2019)

[15] Gabrielle Kaufmann-Kohler, and Thomas Schultz, 'The Use of Information Technology in Arbitration' (2005) Available at: http://lk-k.com/wp-content/uploads/The-Use-of-Information-Technology-in-Arbitration.pdf (Last Accessed on November 17, 2019)

[16] Ibid

an important caution against the use of technology to contravene procedural safeguards and compromise the quality of justice.[17]

All these factors considered, it is indeed correct to observe that as of today, the use of information technology has gathered a considerable momentum and that major arbitral institutions are increasingly embracing it in practice.[18] Therefore, while the use of technology in arbitration is a prospectively attractive phenomenon that is still developing all around the world, players in the field are seeing opportunities in this and are already embracing information technology in their arbitral practices.

3.0 Artificial Intelligence and Access To Justice

3.1 Attractive Attributes of AI in Access to Justice

In a simple contextual way, artificial intelligence can be said to be instances in which machines exhibit traits of intelligence that is otherwise associated with humans in the course of their work.[19] The essence of AI has been summarised down to its ability to be able to make required generalizations in a timely manner relying on limited data.[20] Machines that exhibit artificial intelligence characteristics are often capable of performing a lot of tasks that people simply can't do thereby exhibiting traits of intelligence.[21]

3.2 AI in the Legal Profession

In the legal profession in general, AI has come in with aspects of natural language processing, machine learning, as well as a host of data-driven analysis

[17] Ibid

[18] See steps taken by the International Chamber of Commerce (ICC) in embracing the use of Information Technology in its arbitral processes.Available at: https://iccwbo.org/publication/information-technology-international-arbitration-report-icc-commission-arbitration-adr/ (Last Accessed on November 17, 2019)

The ICC Commission on Arbitration and ADR also has a report titled 'Information Technology in International Arbitration' Available at: https://iccwbo.org/content/uploads/sites/3/2017/03/icc-information-technology-in-international-arbitration-icc-arbitration-adr-commission.pdf (Last Accessed on November 17, 2019)

[19] There is really no agreement on an all-encompassing definition of AI as presented by different scholars in their works. However, the simplest way to understand it is by considering the works of a machine that exhibit some intelligence in the way it has been carried out or in the way the end result has been arrived at. This in a nutshell, can be considered to be artificial intelligence.

[20] Jerry Kaplan, 'Artificial Intelligence: What Everyone Needs to Know' (2016) *Oxford University Press* Available at:
https://books.google.co.ke/books?hl=en&lr=&id=7y_KDAAAQBAJ&oi=fnd&pg=PP1&ots=gIKluDZpZr&sig=SQak7A_bDVOHhBdn-GFsG64I2Dg&redir_esc=y#v=onepage&q&f=false (Last Accessed on November 17, 2019)

[21] Ibid

to challenge the traditional conceptions of human legal experts.[22] AI is therefore already being hailed for the tremendous disruption[23] that it has caused and is likely to continue causing in the legal professional.[24] Specific areas of impact that AI has influenced in the legal field thus far include; issues of discovery, aspects of legal search, generation of documents, generation of briefs, and the prediction of outcomes of cases.[25]

3.3 AI in Arbitration

In arbitration, AI has been described to be most necessary in international arbitration due to the typically complex nature of the cases that are presented before international arbitration.[26] AI is touted to have the capacity to carry out the analysis of the bulky data before an international arbitral proceedings and most importantly arrive at a rational decision which is free from cognitive biases.[27] However, an important question has been raised with regards to the actual utility of the machine learning nature of AI that enables it to predict outcomes in similar cases in international arbitration especially considering the fact that international arbitration proceedings are non-repetitive in nature.[28]

Other aspects of arbitration that have been connected to increased utilisation of artificial intelligence include; detection of corruption and negative influences on the part of the arbitrator(s), promotion of diversity in appointment of arbitral panels, and arbitration of smart contracts.[29] AI can be

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[22] Benjamin Alarie, Anthony Niblett, and Albert H. Yoon, 'How artificial intelligence will affect the practice of law' (2018) 68 *University of Toronto Law Journal*, Page 106-124
Available at: https://tspace.library.utoronto.ca/bitstream/1807/88092/1/Alarie%20Artificial%20Intelligence.pdf (Last Accessed on November 17, 2019)

[23] Disruption, especially with regards to technology means innovations which alter existing operations in a field in a manner that is regarded to be significant.
Also see: https://www.investopedia.com/terms/d/disruptive-technology.asp (Last Accessed on November 17, 2019)

[24] Ibid *Alarie, Niblett, and Yoon*, (n22)

[25] John O. McGinnis, and Russell G. Pearce, 'The great disruption: How machine intelligence will transform the role of lawyers in the delivery of legal services' (2019) 82(6) *Fordham Law Review*
Available at: https://ir.lawnet.fordham.edu/cgi/viewcontent.cgi?article=5007&context=flr (Last Accessed on November 17, 2019)

[26] Maxi Scherer, 'International Arbitration 3.0 – How Artificial Intelligence Will Change Dispute Resolution' (2018) *Austrian Yearbook of International Arbitration* Available at: https://papers.ssrn.com/sol3/Data_Integrity_Notice.cfm?abid=3377234 (Last Accessed on November 17, 2019)

[27] Ibid

[28] Ibid

[29] Lito Dokopoulou, 'Arbitration X Technology: A Call for Awakening?' (2019) *Kluwer Arbitration Blog*

utilised through the use of specific algorithms to detect red flags of corruption in arbitral processes, to make the process of appointment of arbitrators more open using automated short lists of arbitrators, as well as in enhancing the arbitral process in smart contracts through the use of robots.[30]

Further utilities of AI in arbitration is with regards to the review of very long and intricately detailed contracts to make appropriate recommendations of the seat of arbitration and compatible arbitral institutions.[31] To this end, AI is seen as having the ability to reduce the inordinate amounts of tasks before humans in arbitral proceedings especially bearing in mind midnight clauses.[32] AI has also been argued to be able to efficiently scrutinize arbitral awards to enhance its chances of recognition as well as enforcement by checking to see whether the arbitral tribunal has complied with the requisite procedural formats and whether the tribunal has attended to every questions raised by the parties among other methods in a manner that is faster and more efficient than human capacities.[33]

So, the use of AI in arbitration in general and international arbitration in particular can be summarized as follows: AI has the ability to provide enhanced representation to parties by augment the human cognitive abilities and automating tasks that would otherwise consume huge amounts of time through human labour.[34] AI could also smoothen the adjudication process in arbitration by enhancing the non-biased appointment of arbitrators and

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Available at: http://arbitrationblog.kluwerarbitration.com/2019/01/14/arbitration-x-technology-a-call-for-awakening/?doing_wp_cron=1573976511.5388379096984863281250 (Last Accessed on November 17, 2019)

[30] Ibid

[31] Ibrahim Shehata, 'The Marriage of Artificial Intelligence & Blockchain in International Arbitration: A Peak into the Near Future!!!' (2018) *Kluwer Arbitration Blog* Available at: http://arbitrationblog.kluwerarbitration.com/2018/11/12/the-marriage-of-artificial-intelligence-blockchain-in-international-arbitration-a-peak-into-the-near-future/ (Last Accessed on November 17, 2019)

[32] The term 'Midnight Clause' is used to refer to arbitration provision/clause in contracts that is often inserted at the end of the contract document when memorialising the final terms of the deal, making it appear like an afterthought long into the process. Hence the reference to midnight. Also see: Nancy Holtz, 'Beware the midnight clause: Hold the champagne?' (2016) Available at: https://www.jamsadr.com/files/uploads/documents/articles/holtz-insidecounsel.com-beware-the-midnight-clause.pdf (Last Accessed on November 17, 2019)

[33] Ibid *Shehata*, (n31)

[34] Lucas Bento, 'International Arbitration and Artificial Intelligence: Time to Tango?' (2018) *Kluwer Arbitration Blog* Available at: http://arbitrationblog.kluwerarbitration.com/2018/02/23/international-arbitration-artificial-intelligence-time-tango/ (Last Accessed on November 17, 2019)

reviewing awards to ensure they are water-tight.[35] AI could also help third parties e.g. third party funders to have the necessary insights about arbitral cases at their fingertips in order to make more informed decisions about cases to fund for example.[36] It is impressive to also note that in the long run, all these AI interventions are likely to reduce the cost of arbitration for the parties.[37]

3.4 Benefits of AI Towards Enhancing Access to Justice

The use of artificial intelligence towards access to justice has presented numerous benefits some of which can be highlighted as follows: Firstly, AI has recorded better performance than humans at rule-based tasks such as electronic discovery of documents with even a higher accuracy.[38] This is a clear advantage as far as reduction of workload is concerned towards creating access to justice.

Another crucial benefit of AI in as far as access to justice is concerned is with regards to the issue of cost of the adjudication process on the parties seeking determination of their matter.[39] AI is likely to reduce the cost of access to justice by reducing the labour and time factor that often increase the costs[40] and this is likely to open up and make the pursuit of justice affordable to more people who ordinarily need the justice system more than the justice providers who control it.[41]

Apart from electronic discovery, review of arbitral awards, appointment of arbitrators, reducing the cost of access to justice and all the benefits of AI

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[35] Ibid

[36] Ibid

[37] The researcher makes this inference based on the assumption that the reduction in labour and time that is occasioned by the use of AI in arbitration is likely to translate in less money spent on labour and time throughout the arbitral process.

[38] Mark McKamey, 'Legal Technology: Artificial Intelligence and the future of law practice' (2017) 22 *Appeal Law Journal* Available at: https://static1.squarespace.com/static/59bb4f5dc027d80ba3e5be79/t/5ac41e6c8a922d149605ee8c/1522802285716/SSRN-id3014408.pdf (Last Accessed on November 17, 2019)

[39] Darin Thompson, 'Creating New Pathways to Justice Using Simple Artificial Intelligence and Online Dispute Resolution' (2015) *Osgoode Legal Studies Research Paper Series*Available at: http://digitalcommons.osgoode.yorku.ca/cgi/viewcontent.cgi?article=1151&context=olsrps (Last Accessed on November 17, 2019)

[40] See Cit. no. 37

[41] Ibid *Thompson*, (n39)

discussed above, AI can also be used in the management of legal processes towards an efficient access to justice in the long run.[42] This is built primarily around data-driven efficiencies that curb all forms of wastages be it in time, labour or other aspects of efficiency towards access to justice.[43] These in a nutshell, are some of the benefits of using AI towards achieving a more efficient access to justice.

4.0 Challenges Experienced in The use of Artificial Intelligence in Arbitration

One point of concern that has been raised with regards to the use of AI in arbitration is the danger of susceptibility to cyberattacks and hacking.[44] This threat backed by the confidential nature of arbitration poses great financial and reputational risks to arbitrators as well as the parties to the arbitral process.[45]

Secondly, whereas some awards e.g. some unredacted ones in investor-state arbitration are often published, there is still a widespread lack of access to full reasoning of awards, and names of arbitrators, counsels, and experts thereby constituting insufficient data for AI analysis.[46] This is a challenge because AI relies on this analysis to predict results in international arbitration.[47]

Thirdly, while there have been pretty decent arguments with regards to AI reducing human biases in the arbitral process e.g. in the choice of arbitral panel,[48] it is important to make the observation that AI also comes with some

[42] Ronald W. Staudt, and Andrew P. Medeiros, 'Access to Justice and Technology Clinics: A 4% Solution' (2012) 88 *Chi-Kent Law Review* Available at: https://scholarship.kentlaw.iit.edu/cgi/viewcontent.cgi?article=3326&context=fac_schol (Last Accessed on November 17, 2019)

[43] Ibid

[44] Rich Barker, and Calum Mackenzie, 'Technology: Coming for A Job Near You?' (2019) Available at: https://www.accuracy.com/perspectives/tech-in-arbitration (Last Accessed on November 17, 2019)

[45] Ibid

[46] Kathleen Paisley, and Edna Sussman, 'Artificial Intelligence Challenges and Opportunities for International Arbitration' (2018) 11(1) *NYSBA New York Dispute Resolution Lawyer* Available at: https://sussmanadr.com/wp-content/uploads/2018/12/artificial-intelligence-in-arbitration-NYSBA-spring-2018-Sussman.pdf (Last Accessed on November 17, 2019)

[47] Ibid

[48] Ibid *Dokopoulou*, (n29)

biases that have been observed in its operations in other fields.[49] A good example of this is the patter by algorithms on LinkedIn that have constantly advertised less paying jobs to women on the platform.[50] This present a worrying concern with regards to the use of AI in arbitration especially considering that the eradication of existing biases in arbitration has been one of the points that have been used to drum support for the adoption of AI.

Another challenge with regards to the use of AI in the arbitral process lies in whether AI is able to meet the fundamental requirement of due process.[51] Whereas AI can be effectively programmed to manage the hearing, submissions, and all the procedural requirements of an arbitral process quite effectively, questions still remain as to whether it can offer the flexibility that comes with a human arbitrator to be able to appropriately modify procedures.[52] This therefore, forms another limitation to the utility of AI in arbitral proceedings.

5.0 Opportunities For Improvements

The Promise Of Ai in arbitration is that it has the ability to provide increased access to information regarding chances of success of claims, the best strategies that can be employed in arbitral processes for higher chances of success, a non-biased selection of arbitral panels, and other relevant issues that allow participants of an arbitral process to effectively participate in the process at a lower cost.[53] Notwithstanding all the challenges associated with the use of AI in arbitration that have been presented in the previous section, there is indeed a place for AI in the practice of arbitration. To this end therefore, opportunities for improvements of challenges facing AI in arbitration can be presented as follows.

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[49] Hope Reese, 'Bias in Machine Learning, and how to stop it' (2016) *Tech Republic*
Available at: http://www.techrepublic.com/article/bias-in-machine-learning-and-how-to-stop-it/ (Last Accessed on November 17, 2019)

[50] Ibid

[51] Christine Sim, 'Will Artificial Intelligence Take Over Arbitrators?' (2018) *Asian Journal of International Arbitration (Forthcoming)*Available at:
https://www.academia.edu/36646259/Will_Artificial_Intelligence_Take_Over_Arbitrators_2018_forthcoming_Asian_Journal_of_International_Arbitration (Last Accessed on November 17, 2019)

[52] Ibid

[53] Ibid *Paisley, and Sussman*, (n46)

With the increasing and high-profile cases and threats of cyberattacks in arbitration,[54] actors in the arbitral space should undertake their obligations to ensure that they pay heed to cybersecurity and establish and follow procedures that ensure proper storage and transmission of sensitive information throughout the arbitral process to mitigate threats in this digital world.[55] Arbitrators as well as legal counsel in the arbitral process should endeavour to remember at all times that protection of client confidences forms part of competent representation.[56]

With regards to biases contained in the algorithms deployed by artificial intelligence, one way to improve this is by putting in more awareness with regards to the data that is being fed into machine learning to curb the generation of algorithms which are biased.[57] In addition to this, there needs to be diversity in the field of machine learning to be able to recognise bias in AI and remedy the same in order to have non-biased results.[58]

With regards to the challenges that AI face in failing to more accurately meet outcomes of similar matters due to lack of sufficient info regarding previous awards, it is important to realise that this will take time to realise due to the largely confidential nature of arbitration and also due to the fact that many developments in AI are also still at an infancy stage.[59] However, AI can still be

[54] This is in reference to the hacking of the website of the Permanent Court of Arbitration during a hearing session of a sensitive matter between China and Philippines. Also see: Claire Morel de Westgaver, 'Cybersecurity in International Arbitration – A Necessity and An Opportunity for Arbitral Institutions' (2017) *Kluwer Arbitration Blog* Available at: http://arbitrationblog.kluwerarbitration.com/2017/10/06/cyber-security/?print=pdf (Last Accessed on November 17, 2019)

[55] Jim Pastore, 'Practical Approaches to Cybersecurity in Arbitration' (2017) 40(3) *Fordham International Law Journal*
Available at: https://ir.lawnet.fordham.edu/cgi/viewcontent.cgi?article=2658&context=ilj (Last Accessed on November 17, 2019)

[56] Ibid

[57] Susan Leavy, 'Gender bias in artificial intelligence: the need for diversity and gender theory in machine learning' (2018)
Available at: https://www.researchgate.net/publication/326048883_Gender_bias_in_artificial_intelligence_the_need_for_diversity_and_gender_theory_in_machine_learning/link/5bce138aa6fdcc204a001d87/download (Last Accessed on November 17, 2019)

[58] Ibid

[59] AI, like any other technology is ever-evolving and has not yet acquired wide and established usage. As such it is widely considered to still be at a developmental stage.

fully utilised for tasks that require analytical processing in arbitration, an area in which it has demonstrated excellence.[60]

6.0 A Case For Future Use

Having discussed the background of AI in arbitration, the role of AI in facilitating access to justice, the challenges that come with the use of AI in arbitration, as well as opportunities for improvements on these challenges, it is critical to now turn to the big question; what is the role of AI in the future of arbitration, if any?

> *Kathleen Paisley, and Edna Sussman argue in their article that:*[61]
> *"Whether we like it or not, artificial intelligence is going to play a major role in international arbitration in the near future. The amounts at issue are too high and the benefits from artificial intelligence too great to avoid."*[62]

This pretty much sums up the place of AI and the future of its use in arbitration. But most importantly, it also draws attention to considerations that actors in the arbitration field must bear in mind even as they consider the utility of AI going forward; for whom is AI useful in an arbitral process? What are the cost implications of using AI in arbitration? What impact is the use of AI likely to have on arbitration both positively as well as negatively?

But going forward, there have already been discussions within the arbitration community regarding the many ways in which AI can be incorporated into the practice of arbitration for now and into the future.[63] Some of the exciting propositions include the following: One is the use of augmented reality in arbitral proceedings especially with regards to demonstration of technical matters to provide the arbitral tribunal with a good perspective during submissions and hearings.[64] The second one is the use of instant translation

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[60] Ibid *Sim*, (n51)

[61] Ibid *Paisley, and Sussman*, (n46)

[62] Ibid

[63] See the discussions of the ICCA 2018 conference in Sydney, specifically the discussions of panel 12(a) titled 'The Moving Face of Technology; Technology as Disruption – Sub Panel on Artificial Intelligence'Available at: https://www.arbitration-icca.org/conferences-and-congresses/ICCA_SYDNEY_2018-video coverage/ICCA_SYDNEY_2018-Panel_12A.html (Last Accessed on November 17, 2019)

[64] Geneva Sekula, 'ICCA Sydney: The Moving Face of Technology' (2018) *Kluwer Arbitration Blog*

services on an application which will come in really handy in international arbitration specifically with regards to cross-border language issues.[65] Another exciting frontier is the use of real time analytics and AI for fast and efficient data processing and analysis especially in arbitral proceedings where the volumes of documents are overwhelming.[66]

It is therefore, sufficiently clear that artificial intelligence certainly has a place in the future of arbitration. It is also evident that aspects of AI are already in operation in arbitral practices especially in international arbitration. All these coupled with more exciting possibilities of interactions between AI and arbitration, some of which have been highlighted above, paint a picture of a very promising future for the utility of AI in arbitration. While some benefits are already visible even in current use of AI in arbitration, what lies ahead will always be more exciting. The challenges for the future however, lie in the adoption and the use of AI widely by actors in the arbitration field. As Geneva Sekula aptly quotes in her article:[67]

"The future is already here; it's just not evenly distributed"[68]

7.0 Conclusion

In her conference report, Lito Dokopoulou quotes a very powerful statement made by one of the speakers at the conference:[69]

"Arbitration by humans is not over yet"[70]

This statement so simply and aptly captures the fears, worries, and concerns that go through the minds of actors in the arbitral field whenever they hear about the current use or the future plans to use artificial intelligence in arbitration. However, it must be remembered that AI does not possess, or has not yet mastered rather, some inherently human attributes such as empathy, emotional intelligence, fairness, and trust which are still essential

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Available at: http://arbitrationblog.kluwerarbitration.com/2018/04/18/icca-sydney-moving-face-technology/ (Last Accessed on November 17, 2019)

[65] Ibid

[66] Ibid

[67] Ibid *Sekula*, (n64)

[68] Ibid

[69] See cit. no. 29

[70] Ibid

components in resolution of disputes between humans.[71] To this end there is no cause for alarm about AI replacing humans in arbitration and as such AI should therefore be approached with an open mind.

This paper has widely interrogated and examined the use of AI in arbitration and it is quite evident that whereas the use of AI in arbitral processes pose some challenges and exhibit some teething problems, the potential advantages that come with it are also enormous. A lot of benefits can therefore be realised for arbitration when actors in the field embrace the use of AI in their practices while of course being mindful of any potentially negative effects associated with it.

[71] Ibid *Sekula*, (n64)

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The Nexus between Corporate Social Responsibility and Protection of Environment in Kenya.

By: ***Peter Mwangi Muriithi****

Abstract

The motivation behind this paper is to analyze the role of corporate social responsibility in protecting the environment in Kenya. The paper questions the role that the principle of corporate social responsibility plays in the protection of the environment in Kenya. Inquisitively, the paper asks; what is the nexus between the principle of Corporate Social Responsibility and Environmental Protection in Kenya?

In doing so, the author shall: offer a brief history of the principle of corporate social responsibility; succinctly define the principle corporate social responsibility and environment; enunciates the role of corporate social responsibility in environmental protection in Kenya; juxtapose the principle of corporate social responsibility and environmental protection in Kenya, and lastly, the paper shall give a conclusion.

1.0 Introduction

To commence this discussion, this paper notes the words of two eminent personalities. In 1965, *Lai Bahadur Shastri*, then the prime minister of India, stated:

> "*A business has a responsibility to itself, to its customers, workers, shareholders and the community…Every enterprise, no matter how large or small, must, if it is to enjoy confidence and respect, seek actively to discharge its responsibilities in all directions…and not to one or two groups, such as shareholders or workers, at the expense of community and consumer. A business must be just and humane, as well as efficient and dynamic.*"[1]

Buttressing this position, former UK Prime Minister *Tony Blair* opined:

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[1] Kate Brown, Center for Social Markets, Corporate Social Responsibility: Perceptions of Indian Business 1 (Malini Mehra ed., Centre for Social Markets 2001) (quoting A. Mohan, Corporate Citizenship: Perspectives from India, 2 J. Corp. Citizenship 107

> *"…we are now, more than ever, aware of the potentially negative impact of business on the environment, whatever the nature or size of the business. There can only be positive results from developing sustainability from benefiting your own bottom line to benefiting tomorrow's industry to benefiting the environment in which we all live."*[2]

Within the world of business, the main responsibility for corporations has historically been to make money and increase shareholder value. In other words, corporate financial responsibility has been the sole bottom line driving force. However, a movement defining broader corporate responsibilities for the environment, for local communities, for working conditions and for ethical practices has gathered momentum and taken hold.[3] It is now generally accepted that beyond their normal profit-maximization goals, businesses have a responsibility to society at large. This new driving force is known as *corporate social responsibility (hereinafter CSR)*.[4]

Despite the growing awareness and popularity of the term *corporate social responsibility (CSR)*, there is no consensus as to what it actually means. In fact, CSR is often used interchangeably with various other terms, such as corporate philanthropy, corporate citizenship, sustainability, business ethics, and corporate governance. Although all these other terms do not mean the same thing, there is one underlying thread that connects them.[5]

This is the understanding that companies have a responsibility not just towards shareholders, but also towards other stakeholders, such as; customers, employees, communities, environmentalists, indigenous people, cultural organizations e.t.c.[6] All of these stakeholders are equally important to a corporation, and it should, therefore, strive with sincerity to fulfil the varied expectations each. A corporation has a role to play in treating its employees well, preserving the environment, developing sound corporate

[2] Tony Blair, UK Prime Minister, May 2000.

[3] Sir Geoffrey Chandler, "Defining Corporate Social Responsibility," Ethical Performance Best Practice, Fall 2001.

[4] Mahesh Chandra, 'ISO Standards from Quality to Environment to Corporate Social Responsibility and Their Implications for Global Companies' (2011) 10 J Int'l Bus & L page110

[5] Juno Consulting, Making Sense of Corporate Responsibility 1 (2005), Available at;
<http:// wwwJunoconsultingxom.aii/articles/Making_Sense_of_Corporate_Social_Responsibility_Part II Pdf> accessed on 20/10/ 2019

[6] Ibid No.5

governance, supporting philanthropy, human rights, respecting cultural differences and helping to promote fair trade among others. All are meant to have a positive impact on the communities, societies and environments in which companies.[7]

However, there have been various attempts to explain the term corporate social responsibility. *World Business Council for Sustainable Development* described corporate social responsibility "*as the commitment of business to contribute to sustainable economic development, working with employees, their families, the local community and society at large to improve their quality of life*"[8] This description implies that corporate social responsibility requires companies not only to strive for economic gains but also to address the moral issues they face.[9]

Corporate social responsibility (CSR) is oftentimes also described as the corporate "triple bottom line" the totality of the corporation's financial, social and environmental performance in conducting its business. It stresses that all three elements are equally important and that managers need to find a balance among the three in developing their strategies. [10]

As the commercial sector increases its investments in its three usual venues (the workplace, the market place and the community) it becomes vital to question the role of corporate social responsibility in environmental protection. Broadly, the term Corporate Social Responsibility is said to be concerned with the relationship between a corporation and the local society in which it resides or operates or concerned with the relationship between a corporation and its stakeholders.[11]

The *EU Commission on Corporate Social Responsibility* stated that **"…***Corporate social responsibility (CSR) is a concept whereby companies integrate social and*

[7] Sharma, Seema G. "Corporate Social Responsibility in India: An Overview." The International Lawyer, vol. 43, no. 4, 2009, page 1517. Available at <JSTOR, www.jstor.org/stable/40708084> accessed on 20/10/ 2019

[8] World Business Council for Sustainable Development, 2000: 10

[9] Mahesh Chandra, 'ISO Standards from Quality to Environment to Corporate Social Responsibility and Their Implications for Global Companies' (2011) 10 J Int'l Bus & L page110

[10] Sir Geoffrey Chandler, "Defining Corporate Social Responsibility," Ethical Performance Best Practice, Fall 2001.

[11] David Crowther & Güler Aras, 'Corporate Social Responsibility', 2008, page 10.

*environmental concerns in their business operations and in their interaction with their stakeholders on a voluntary basis***."**[12] Hence Corporate social responsibility is the commitment of businesses to contribute to sustainable economic development by working with employees, their families, the local community and society at large to improve their lives in ways that are good for business and for development.[13]

Further, *Howard R. Bowen* goes on to argue that *"…corporate social responsibility is no panacea for all business social problems, but that it contains an important truth that must guide business in the future."*[14] *Howard R. Bowen* defined corporate social responsibility as *"…the obligations of businessmen to pursue those policies, to make those decisions, or to follow those lines of action which are desirable in terms of the objectives and values of our society."* [15]

William C. Frederick analyzing what constitutes corporate social responsibility stated: *"…corporate social responsibility implies a public posture toward society's economic and human resources and a willingness to see that those resources are utilized for broad social ends and not simply for the narrowly circumscribed interests of private persons and* firms**."**[16]

Clarence C. Walton addressed many facets of *corporate social responsibility* and presented a number of different varieties or models of corporate social responsibility. *Clarence C. Walton* elaborating what constitutes corporate social responsibility stated *"… the new concept of corporate social responsibility recognizes the intimacy of the relationships between the corporation and society and realizes that such relationships must be kept in mind by top managers as the corporation and the related groups pursue their respective goals.*[17]

Further, he emphasizes that the essential ingredients of the corporation's social responsibilities include *a degree of voluntarism, as opposed to coercion*, an

[12] EU Commission [(2002) 347 paragraph 5.

[13] World Business Council for Sustainable Development, 'Corporate Social Responsibility: Making good business sense' 2000 page 2

[14] Howard R. Bowen, 'Social Responsibilities of the Businessman' (1953)

[15] Howard R. Bowen, 'Social Responsibilities of the Businessman' (1953)

[16] William C. Frederick, 'The Growing Concerns Over Business Responsibility, 1960.

[17] Clarence C. Walton, 'Corporate Social Responsibilities' (1967) page 18.

indirect linkage of certain other voluntary organizations to the corporation and the acceptance that costs are involved for which it may not be possible to gauge any direct measurable economic returns[18] and this definition is costly related to *Harold Johnson's* definition of corporate social responsibility as '*convention wisdom'* and described this conventional wisdom in that *"… a socially responsible firm is one whose managerial staff balances a multiplicity of interests. Instead of striving only for larger profits for its stockholders, a responsible enterprise also takes into account employees, suppliers, dealers, local communities, and the nation."*[19]

Finally, a groundbreaking contribution to the concept of corporate social responsibility (CSR) came from the Committee for Economic Development (CED)[20] and started by observing that *'business functions by public consent and its basic purpose is to serve constructively the needs of society to the satisfaction of society'*[21] and further noted that the social contract between business and society was changing in substantial and important ways and stated that:

> *"… Business is being asked to assume broader responsibilities to society than ever before and to serve a wider range of human values. Business enterprises, in effect, are being asked to contribute more to the quality of American life than just supplying quantities of goods and services. In as much as the business exists to serve society, its future will depend on the quality of management's response to the changing expectations of the public…"*[22]

On the other hand, there is the seminal issue of *protection of the environment.* This paper critically links the protection of the environment to the principle of corporate social responsibility (CSR) as a means of realizing sustainable development, in order to protect natural resources for future generations.[23] There is a growing concern of the impact of corporate activities on non-

[18] Ibid No.17

[19] Harold Johnson, 'Business in Contemporary Society: Framework and Issues' (1971), page 50.

[20] CED, Social Responsibilities of Business Corporations.1971

[21] Ibid No. 20 page 11

[22] CED, Social Responsibilities of Business Corporations page 16

[23] Helen Anderson; Wayne Gumley, Corporate Social Responsibility: Legislative Options for Protecting Employees and the Environment, 29 Adel. L. Rev. 29 (2008) page 62

shareholder constituencies such as employees, creditors, victims of their torts, as well as the environment.[24]

The natural environment is not strictly a 'stakeholder' but rather a set of essential ecological services that are preconditions for a healthy society and the continued success of our economic activities. Thus the real stakeholder in the community, which depends upon the natural environment to supply essential ecological services which sustain its economic and social activities, as well as a multitude of unique aesthetic and recreational opportunities which add to our quality of life.[25]

The simplest and most memorable definition of "*environment*" is that given by Albert Einstein, who once said, "*The environment is everything that isn't me*." The only problem with adopting this definition is that there will be very little activity which does not have an "environmental" impact.[26] This illustrates that defining environment is in its own way challenging due to the scope of what can be regarded as part of the environment.

A succinct definition of *environment* is that it is a combination of elements whose complex interrelationships make up the settings, the surroundings and the conditions of life of the individual and of society as they are and as they are felt. (EC Council Regulation 1872/84, Action by the Community Relating to the Environment, 1984.)[27]

A legal definition of the term *environment* in Kenya is provided by Section 2 of the Environmental Management and Co-Ordination Act No. 8 of 1999 which states that: "*Environment*" *includes the physical factors of the surroundings of human beings including land, water, atmosphere, climate, sound, odour, taste, the biological factors of animals and plants and the social factor of aesthetics and includes both the natural and the built environment"* [28]

[24] Helen Anderson; Wayne Gumley, Corporate Social Responsibility: Legislative Options for Protecting Employees and the Environment, 29 Adel. L. Rev. 29 (2008) page 43

[25] Helen Anderson; Wayne Gumley, Corporate Social Responsibility: Legislative Options for Protecting Employees and the Environment, 29 Adel. L. Rev. 29 (2008) page 52

[26] Justine Thornton & Silas Beckwith, Environmental Law(Sweet and Maxwell 1997) page 2

[27] Mark Stallworthy, Environmental Law 1st Edition ,page 2

[28] Section 2 of EMCA Act Laws of Kenya

To ensure environmental protection environmental laws are enacted and their role remains unequivocally seminal in environmental protection. *Environmental Law* can be described as the body of law that is concerned with protecting the natural resources of Land, air, water (the three "environmental media") and the flora and fauna which inhabit them. [29] The *Black's Law Dictionary 9th Edition defines environmental law* as the field of law dealing with the maintenance and protection of the environment, including preventive measures such as the requirements of environmental-impact statements, as well as measures to assign liability and provide clean-up for incidents that harm the environment.[30]

It's worth noting that there are four main principles enshrined in Environmental Law. These are; Preventative principle, Polluter pays, Precautionary Principle and sustainable development. Principles such as these, along with other environmental policies and aims are sometimes referred to as 'soft law'. In comparison, 'hard law' refers to actual laws which can be enforced.[31]

2.0 Tracing the Historical Origins of the principle of Corporate Social Responsibility

The history of CSR dates back many years and in one instance can even be traced back 5000 years in Ancient Mesopotamia around 1700 BC, King Hammurabi introduced a code in which builders, innkeepers or farmers were put to death if their negligence caused the deaths of others or major inconvenience to local citizens.[32]

In Ancient Rome senators grumbled about the failure of businesses to contribute sufficient taxes to fund their military campaigns, while in the year 1622 disgruntled shareholders in the Dutch East India Company started issuing pamphlets complaining about management secrecy and "self-enrichment". With industrialization, the impacts of business on society and

[29] Justine Thornton & Silas Beckwith, Environmental Law(Sweet and Maxwell 1997)page 2

[30] Bryan A. Garner, Black's Law Dictionary 9th Edition.

[31] Brenda Short, Environmental Law 1st Edition ,page 12

[32] 'Corporate Social Responsibility: History, Benefits and Types' (UKEssays.com, October 2019) <https://www.ukessays.com/essays/management/a-brief-history-of-corporate-social-responsibility-management-essay.php?vref=1> accessed on 20/10/ 2019

the environment assumed an entirely new dimension.[33] The "corporate paternalists" of the late nineteenth and early twentieth centuries used some of their wealth to support philanthropic ventures. By the 1920s' discussions about the social responsibilities of business had evolved into what we can recognize as the beginnings of the "modern" CSR movement. [34]

The phrase '*Corporate Social Responsibility*' was coined in 1953 with the publication of Bowen's Social Responsibility of Businessmen" (Corporate watch report, 2006). The evolution of CSR is as old as trade and business for any of corporation. Industrialization and impact of businesses on society led to a completely new vision.[35]

By '80s and '90s CSR was taken into the discussion, the first company to implement CSR was Shell in 1998. (Corporate watch report, 2006). [36] With well informed and educated general people it has become a threat to the corporate and CSR is the solution to it. In 1990 CSR was standard in the industry with companies like Price Waterhouse Copper and KPMG. CSR evolved beyond code of conduct and reporting, eventually, it started taking initiative in NGO's, multi-stakeholder, ethical trading. (Corporate watch report, 2006). [37]

3.0 The Role of Corporate responsibility in promoting environmental protection

A company's social responsibilities can be categorized into four groups: economic responsibility, legal responsibility, ethical responsibility, and discretionary responsibility. The social responsibility of business encompasses the economic, legal, ethical, and discretionary expectations that society has

[33] Ibid No.32

[34] 'Corporate Social Responsibility: History, Benefits and Types' (UKEssays.com, October 2019) <https://www.ukessays.com/essays/management/a-brief-history-of-corporate-social-responsibility-management-essay.php?vref=1> accessed on 20/10/ 2019

[35] Ibid No.34

[36] 'Corporate Social Responsibility: History, Benefits and Types' (UKEssays.com, October 2019) <https://www.ukessays.com/essays/management/a-brief-history-of-corporate-social-responsibility-management-essay.php?vref=1> accessed on 20/10/ 2019

[37] 'Corporate Social Responsibility: History, Benefits and Types' (UKEssays.com, October 2019) <https://www.ukessays.com/essays/management/a-brief-history-of-corporate-social-responsibility-management-essay.php?vref=1> accessed on 20/10/ 2019

of companies and other organizations at a given point of time. The economic purpose of a company and its responsibilities towards shareholders and debtors, first and foremost, is a natural starting point in reviewing the responsibilities. [38]

A company must always obey the law as it tries to achieve its economic objectives. However, this is not always enough. There is a growing acknowledgement by corporations themselves and the broader community of the impact of corporate activities on non-shareholder constituencies, such as employees, creditors, victims of their torts, as well as the environment. This is reflected in the increased focus on corporate governance and in the increasing use of the terms 'corporate social responsibility' and 'corporate citizenship. [39]

The principle of corporate social responsibility was created to address this acknowledgement by corporate entities. The principle of *corporate social responsibility* refers to the operations or actions of companies that are above or independent of the limits or minimum requirements set by legislation.[40] Society expects companies to act in socially responsible ways. The society sets expectations for businesses to reflect its ethical norms, which includes the protection of the environment.[41]

Corporate social responsibility (CSR), has been defined in many different ways, but there are some common features in the given definitions. First, the obligation must be voluntarily adopted; behaviour influenced by the coercive forces of law is not voluntary as such. Second, the obligation is broad extending beyond traditional duty to shareholders to stakeholders, such as customers, employees, and suppliers. Thirdly, *corporate social responsibility* requires openness and transparency; a responsible company reports its

[38] Carroll, Archie B.: A Three-Dimensional Conceptual Model of Corporate Social Performance. Academy of Management Review 4/1979, pp. 497-505.

[39] Helen Anderson; Wayne Gumley, Corporate Social Responsibility: Legislative Options for Protecting Employees and the Environment, 29 Adel. L. Rev. 29 (2008) page 52

[40] Carroll, Archie B.: A Three-Dimensional Conceptual Model of Corporate Social Performance. Academy of Management Review 4/1979, page 497-505.

[41] Carroll, Archie B.: A Three-Dimensional Conceptual Model of Corporate Social Performance. Academy of Management Review 4/1979, page 497-505.

businesses and activities in public, and thus provides the general public with an opportunity to assess its activities. Fourthly, *corporate social responsibility* is the responsibility within the day-to-day business operations and activities, not something, which is occasional, or separate from the business.[42]

Juxtaposing these features with environmental protection, it goes without saying, that environmental protection by corporate entities under the concept of *corporate social responsibility is: environmental protection that is voluntary, environmental protection that extends beyond the existing traditional duties of a corporate entity, environmental protection that is open and transparent and lastly environmental protection that* is carried out by a corporate entity within its day-to-day business operations and activities and not environmental protection which is occasional or separate of the business.

It is noteworthy that environmental protection under the concept of *corporate social responsibility* is separate from the constitutional, statutory, policy and regulations duty of corporate entities to protect the environment. Succinctly stated, the environmental protection under the concept of *corporate social responsibility* consideration is outside the scope of environmental laws. Environmental protection under the concept of *corporate social responsibility* is majorly distinct from the duty to protect the environment by corporate entities under environmental laws, as it is voluntary in nature and non-enforceable**.** This assertion is in accordance with the voluntary approach to corporate social responsibility as adopted in Kenya.[43] This can further be deduced, from the interpretation of the existing legal framework providing for corporate social responsibility in Kenya.

Arjun Adhikari, in his article, defined voluntary corporate social responsibility approach as that approach which includes self-imposed obligations and negotiated instruments to the company for CSR.[44] In Kenya, the voluntary nature of the concept of *corporate social responsibility has meant the concept is minimally legislated upon.* Under The Code of Corporate Governance Practices for Issuers of Securities to the Public 2015(hereinafter 'The Code')

[42] R Knuuiten page 39

[43] Arjun Adhikari Corporate Social Responsibility: Voluntary or Mandatory? 8 NJA L.J. 185 (2014), Page 187

[44] Ibid No. 43

corporate social responsibility is provided for in a recommendative manner. From the onset, the Code of Corporate Governance decodes its recommendative nature. To this end the code chapter 1 under paragraph 1.1.1 it verbatim provides that "...*The Code sets out the principles and specific recommendations on structures and processes, which companies should adopt in making good corporate governance an integral part of their business dealings and culture"* Premised on this understanding, the code proceeds to provide for the principle of *corporate social responsibility***.** Chapter 2 under paragraph 2.11.1 the Code provides that the Board of a company is required to subject the company to an annual governance audit.

The governance audit among other areas ought to cover the company's governance practices in *corporate social responsibility***.**[45] After undergoing the governance audit, the Board is required to provide an explicit statement on the level of compliance.

Chapter 5 of the Code best captures the concept of *corporate social responsibility***.** To this end, the Code under paragraph 5.0 verbatim provides: "*To make ethical and responsible decisions, companies shall not only comply with their legal obligations but shall consider the reasonable expectations of their stakeholders. It is important for companies to demonstrate their commitment to appropriate corporate practices and strive to be socially responsible. Good corporate citizenship is the establishment of an ethical relationship between the company and the society in which it operates. As good corporate citizens of the societies in which they do business, companies have, apart from rights, legal and moral obligations in respect to their social and natural environments. The company as a good corporate citizen should protect, enhance and invest in the well-being of society and the natural ecology."* [46]

The Code further, explaining the social responsibility it provides under paragraph 5.3.1 that *as a* good corporate citizen the company should have comprehensive policies and practices in place throughout the business that enables it to make decisions and conduct its operations ethically, meet legal

[45] The Code of Corporate Governance Practices for Issuers of Securities to the Public 2015 under paragraph paragraph 2.11.1 (h)

[46] The Code of Corporate Governance Practices for Issuers of Securities to the Public 2015 Chapter 5

requirements and show consideration for society, communities and the environment. Under paragraph, 5.3.2 of the Code the board of a company is required to consider not only its financial performance but also the impact of the company's operations on society and the environment. Paragraph 5.3.2 of the Code provides although the company is an economic institution, it remains a corporate citizen and therefore has to balance between economic, social and *environmental value*. [47]

It is crystal clear, from the salient provisions of the code that *environmental protection remains a major facet of the concept of corporate social responsibility.* Buttressing the provisions of the Code of Corporate Governance Practices for Issuers of Securities to the Public 2015 *is Mwongozo, which* is *the Code of Governance for State Corporations.*

Chapter 1 of Mwongozo provides, that the Board for state corporations ought to carry out a governance audit annually. The governance audit among other areas ought to cover the corporation's governance practices in *corporate social responsibility.* [48]

Chapter 4 of Mwongozo in a bid to promote the culture of corporate social responsibility in state corporations, provides that the Board should ensure that a sustainable and appropriate budget is allocated for corporate social responsibility and investment. Lastly, under annexure 1(E) of Mwongozo, the board is tasked with reviewing periodically the organizations' strategic objectives and policies relating to sustainability and social responsibility investment.[49]

Lastly, Section 655 (4) (b) (i), (ii) and (iii) of the Companies Act 2015[50] provides that in the case of a quoted company, the directors shall specify in the business review (to the extent necessary for understanding of the development, performance or position of the company) information about: the environmental matters (including the impact of the business of the

[47] Ibid No.46

[48] Mwongozo (The Code of Governance for State Corporations.)

[49] Ibid No.48

[50] Act No. 17 of 2015

company on the environment); the employees of the company; and social and community issues including information on any policies of the company in relation to those matters and the effectiveness of those policies. The Companies Act in this way adopts corporate social responsibility.

From the above analysis, it is clear that corporate social responsibility as envisaged under the analyzed provisions of the law is voluntary in nature in Kenya. Voluntary corporate social responsibility approach includes self-imposed obligations and negotiated instruments to the company for corporate social responsibility. Usually this result from the fact that the company itself chooses to issue a set of rules. Codes of conduct are one of the most prominent voluntary approaches to corporate social responsibility. The voluntary nature of corporate social responsibility is often interpreted by business to mean that, since corporate social responsibility activities are not binding, they are always optional and therefore can be determined solely by the business. This approach emphasizes that the value of corporate social responsibility lies in its voluntary nature. Those with a less polarized position suggest that corporate social responsibility does not have to be regulated heavily but the state should provide an enabling environment.[51]

In the view of businesses, attempts to regulate corporate social responsibility would be counterproductive because this would stifle creativity and innovation among enterprises which drive the successful development of corporate social responsibility and could lead to conflicting priorities for enterprises operating in different geographical areas. [52]

Several tools are gradually evolving as a legal means of enforcing voluntary corporate social responsibility issues. Among these are the emerging rights of action under different national laws with the extra territorial application. The increasing interest in human rights issues has directed to voluntary corporate social responsibility as a possible basis for action against companies.[53] Even voluntary approaches to corporate social responsibility have a legal context. The intent to be bound is usually a decisive factor when

[51] Arjun Adhikari Corporate Social Responsibility: Voluntary or Mandatory? 8 NJA L.J. 185 (2014), page 187

[52] Ibid No.51

[53]Arjun Adhikari Corporate Social Responsibility: Voluntary or Mandatory? 8 NJA L.J. 185 (2014), page 187

Courts or other bodies administering justice are asked to determine legal issues relative to different forms of expression of will. The voluntary approaches such as company codes of conduct can shape the standards of care that are legally expected of businesses. In the workplace, an agreement reached through collective bargaining between employers and trade unions can become legally binding through incorporation in employment contracts. Through the use of voluntary codes and other forms of private standard-setting, companies decide what they consider to be their responsibilities to society.[54]

Corporate social responsibility, though voluntary in nature, it can play a seminal role in the protection of the environment in Kenya. It is arguable that the very nature corporate social responsibility being voluntary in Kenya can make it a viable means of protection. The voluntary nature of corporate social responsibility codes, principles and norms are *innovative and important instruments for the protection of the environment, especially in countries where public authorities fail to enforce minimum standards*. However, they are complementary to national, international legislation and collective bargaining.[55]

5.0 Conclusion

Protection of the environment in Kenya is vital and of optimum importance. This paper posits that corporate social responsibility can be an innovative way of protecting the environment. It is this paper considered view that corporate social responsibility can play a vital role in the realization of sustainable development. [56] There is a need for innovative ways of protecting the environment in Kenya. Corporate social responsibility offers an innovative way of protecting the environment.

[54] Arjun Adhikari Corporate Social Responsibility: Voluntary or Mandatory? 8 NJA L.J. 185 (2014), page 187

[55] Ibid No. 54, page 187-188

[56] *The Brundtland Commission e*stablished by the United Nations in 1983 released a report entitled *Our Common Future*, also known as the *Brundtland Report.* This report defined Sustainable Development as Development that meets the needs of the present without compromising the ability of future generations to meet their own needs

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Book Review : Securing Our Destinty Through Effective Management of the Environment

By: ***Jack Shivugu****

Author: Kariuki Muigua
Glenwoood Publishers, Nairobi: Kenya (2020),
ISBN: 978-9966-046-16-1

The environment is the precondition for human existence since it virtually contains all the ingredients for human survival such as air, food and water. The quality of the environment can thus be equated to the quality of human life. The 21st Century has however witnessed several environmental challenges notably climate change caused by acts and omissions of states, corporations, citizens among other actors. In the wake of the climate change debate, states are called upon to undertake measures aimed at environmental conservation through sustainable development in order to enhance the quality of human life. Written in an articulate and concise language *Securing Our Destiny Through Effective Management of the Environment* presents a much needed answer to the environment concerns in Kenya. The book presents a call for the management of the environment in an effective manner that enhances sustainable development. It analyses how effective management of Natural Resources and the Environment in Kenya can be achieved.

The book is divided into twelve chapters which advocate for effective management of environmental and natural resources in Kenya. The main running themes in the book include Sustainable Development; Public Participation and inclusivity; Environmental Democracy; Environmental Justice; Indigenous Ecological Knowledge; Social Justice; Environmental Rights; Role of Law in Environmental Management and Governance; Peacebuilding and Entrenching Environmental Rule of Law in Kenya, among others. The book links these themes with environmental conservation and management and argues a case for effective management of the environment through an integrated approach.

In the introductory chapter, the author analyses the Role of Law in Environmental Management and Governance. The chapter delves into the linkage between law and governance in general in order to determine whether it can be an effective tool in environmental management. The chapter then analyses the prospects and challenges in the legal and institutional framework on environmental management in Kenya. The chapter calls for revisiting the role of law in environmental governance in order to achieve sustainable development.

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Chapter two discusses the constitutional provisions covering the policy, legal and institutional framework on natural resource and environmental management in Kenya. It examines where the opportunities exist under the constitutional framework but the required implementation tools are either non-existent or underdeveloped. The chapter highlights salient provisions of the Constitution on state obligations in environmental and natural resources governance and obligations of citizens in environment and natural resources management and discusses the extent to which the provisions have been implemented. The author offers suggestions on some of the most plausible ways of effectively implementing these provisions.

Chapter three offers an insight on the Role of Corporations in Environmental Conservation and Sustainable Development in Kenya. The chapter argues that corporations have an important role to play in environmental management since most activities affecting the environment such as pollution are caused due to acts and omissions of corporation. The chapter advocates for enhanced corporate environmental compliance among other measures in order to promote environmental conservation and sustainable development in Kenya.

Chapter four examines the concept of environmental democracy and its place in environmental management in Kenya. It defines environmental democracy to include the rights of access to information, public participation and access

to justice in environmental matters. The chapter discusses this concept and offers useful tips aimed at realizing environmental democracy in Kenya.

Chapter five entails a discussion on Sustainable Management of the Extractives Industry in Kenya. It critically discusses the regulatory framework governing the extractives industry in Kenya and its prospects in enhancing the sector's returns and contribution to the national development agenda. It also suggests the way forward to enhance benefits from the extractives industry in Kenya.

Chapter six provides a discussion on the Blue Economy in Kenya. It argues that the blue economy holds a great potential for Kenya's economy as well as the livelihoods of various communities working and living within the coastal areas. The chapter highlights some of the challenges facing the blue economy in Kenya such as illegal and unregulated fishing, piracy and armed robbery, maritime terrorism, illicit trade in crude oil, arms, drug and human trafficking and smuggling of contraband goods; degradation of marine ecosystems through discharge of oil, the dumping of toxic waste, illegal sand harvesting and the destruction of coral reefs and coastal forests. It suggests solutions to curb these challenges in order to promote sustainable development.

Chapter seven delves into enhancing benefit sharing from natural resources exploitation. It critically examines the legal framework on benefit sharing and natural resource exploitation in Kenya. It highlights some of the challenges arising from the legal framework and suggests a way forward to enhance benefit sharing from natural resources exploitation in Kenya.

Chapter eight presents a case for an integrated approach to environmental management and conservation for sustainable development in Kenya. The chapter argues that none of the environmental management mechanisms in Kenya can fully achieve sustainable development goals if adopted on their own. The chapter explores the viability of these mechanisms which include command and control approaches, market based approaches, community based natural resource management and ecosystem based approaches. The chapter then argues a case for integrated environmental management and conservation in Kenya.

Chapter nine discusses the environmental liability regime in Kenya and suggests recommendations on how the same can be made more effective as a way of strengthening environmental management in the country.

Chapter ten deals with traditional ecological knowledge and suggests ways through which it can be fully incorporated and mainstreamed into environmental governance in Kenya. The chapter highlights the relevance and importance of traditional environmental knowledge in the environment and natural resources management discourse.

Chapter eleven offers a discourse on effective environmental management and governance for peace building in Kenya. The chapter discusses the link between environmental management and governance and peace building and suggests ways through which this can be achieved in Kenya.

Chapter twelve wraps up the discussion in the preceding chapters of the book and calls for a collaborative approach in environmental and natural resources governance and management, within the framework of the national values and principles of governance enshrined in the Constitution.

The book offers useful insight on environmental management in Kenya. It presents a call to move away from the sectoral approaches in addressing environmental and natural resources management in order to achieve holistic sustainability. The book analyses sound judicial decisions from Kenyan courts and international courts/tribunals to offer the reader practical scenarios of the issues under discussion. The ideas in the book have been presented in a simple manner and language making the book easy to comprehend.

The book is expertly written by a renowned author rich in environmental knowledge and experience. The book is undoubtedly rich in content and will immensely contribute to bridging the gap in environmental law literature in Kenya. *Securing Our Destiny through Effective Management of the Environment* is definitely a must read for students, teaching fraternity, members of the bar and the bench, legislators, policy makers and the public in general. Get yourself a copy!

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