

**Achieving Sustainable Development, Peace
and Environmental Security**

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Achieving Sustainable Development, Peace and Environmental Security

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Dedication

Dedicated to those who dream
Big dreams
To those who never ever give up
To those that look for their own luck
Conquering the fear of Failure
And the fear of Success
And to that hungry child who knows
That there is a better tomorrow

Spare a thought for those who seek to eliminate poverty
Hunger and disease
To those who strive to ensure
That human beings
Live in Dignity
And to those who believe
That
Achieving Sustainable Development
Peace
and
Environmental Security
Is an idea
Whose time has come

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I acknowledge my readers worldwide. I write for this generation and the ones who are yet to be born. I appreciate you all.

I recognize those who encourage me to dream and dream big; those who remind me that we become what we think of most. I appreciate those who know that if one's dream is big enough nobody can take it away; those who remind us that the developments we see around us were once dreams.

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Author's Note

Sustainable development Agenda was informed by the global community's desire to combat the ever increasing environmental degradation which not only endangers the ability of the earth to replenish for the sake of future generations but also causes untold suffering to the present generation as evidenced by abject poverty in some parts of the world especially where they directly rely on the natural resources for their livelihoods, as well as the health concerns occasioned by massive pollution. The degradation and pollution is as a result of economic development activities as well as the indiscriminate exploitation of natural resources particularly among the poor countries. While economic development is certainly important for the sake of improving the lives of people, environmental health cannot be ignored as this would be counterproductive. Thus, environmental security, which involves the process of ensuring that the environment can sustainably support the livelihoods of communities, is important. Arguably, environmental insecurity would result in violence which in turn jeopardizes world peace.

It is for this reason that the 2030 Agenda for Sustainable Development Goals (SDGs) which was launched in 2015 by the United Nations recognises peace, justice and environmental security as key pillars for the realisation of SDGs goals of ending poverty, protecting the environment and ensuring that all people enjoy peace and prosperity by the year 2030.

The three-pillar model adopted by the 2030 Agenda on SDGs requires action to secure social well-being of all groups of people without discrimination, protecting the environment which is the reservoir for the resources required for poverty eradication as well as utilizing these resources sustainably to meet the socio-economic needs of all countries. The recent Corona Virus (Covid-19) pandemic, however, demonstrated that countries need to adequately invest in the health of their people, empower them to be economically stable through addressing social ills such as corruption, abject poverty and over-reliance on foreign aid.

This book contains thirteen (13) chapters which address the various elements of sustainable development agenda such as poverty eradication, sustainable production and consumption patterns, inequalities between and

within countries, peace, social justice and building of strong and resilient governance institutions, among others.

While there are several domestic, regional and international laws and frameworks meant to facilitate achievement of SDGs, these will not be achieved without political goodwill as well as public participation of all persons. Such participation will, however, only be possible if the people are facilitated through education as well as economic empowerment. Notably, most chapters in the book have used Kenya as the main point of reference throughout the discussion but certainly, the lessons and recommendations made are applicable to many other developing countries in Africa and beyond.

Overall, the book focuses on the period falling post-2015 and also heavily relies on the debates surrounding the Covid-19 pandemic in a bid to offer suggestions on the most viable way forward in achieving the sustainable development goals. The book notably crystallizes the author's views on various issues as highlighted in previous but recent work around the said thematic topics.

This book is thus current and relevant to all stakeholders including government agencies, scholars, communities, general readers as well as students. Addressing threats to peace and environmental security is undoubtedly a relevant debate that should inform any efforts towards creating a prosperous, peaceful and just society for a sustainable future for all.

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Nairobi, Kenya, February 2021

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List of Abbreviations

ADR-Alternative Dispute Resolution

AfCFTA-African Continental Free Trade Agreement

BAU-Business As Usual

BIAT-Action Plan for Boosting Intra-African Trade

CBNRM-Community Based Natural Resource Management

Communal Areas Management Programme for Indigenous Resources

COP 21-21st UN Climate Change Conference of the Parties (COP26).

COP 26-26th UN Climate Change Conference of the Parties.

Covid-19-Corona Virus Disease

CSR-Corporate social responsibility

EAC-East African Community

ECOWAS-Economic Community of West African States

EGPA-Elizabeth Glaser Pediatric AIDS Foundation.

EMCA-Environmental Management and Co-ordination Act, 1999.

FAO- United Nations Food and Agriculture Organization.

GDP-Gross Domestic Product.

GEF-Global Environment Facility

GHG-Green House Gas

GNP-Gross National Product

GOK-Government of Kenya.

ICSID-International Centre for the settlement of Investment Disputes

ICTs-Information and Communication Technologies

INDC-Intended Nationally Determined Contribution.

IPCC-Intergovernmental Panel on Climate Change.

IPM-Integrated Pest Management (IPM)

LTWP-Lake Turkana Wind Power.

MOH-Ministry of Health

NACOSTI-National Commission for Science, Technology and Innovation.

NAPs-National Adaptation Plans.

NCCRS-Climate Change Response Strategy.

NCI-National Cohesion and Integration.

NDC-Nationally Determined Contribution.

NEMA-National Environment Management Authority

NET-National Environment Tribunal

NGOs-Non-Governmental Organizations.

NHIF -National Health Insurance Fund

NSSF-National Social Security Fund.

NuPEA -Nuclear Power and Energy Agency.

OECD-Organisation for Economic Co-operation and Development.

RECs-Regional Economic Communities

REDD-Reducing Emissions from Deforestation and Forest Degradation

SADC-Southern African Development Community

SCIEWS-Climate Information and Early Warning Systems.

SCP-Sustainable Consumption and Production

SDGs-Sustainable Development Goals

TDRMs-Traditional Dispute Resolution Mechanisms.

TWh- 1 terawatt hour

UHC -Universal Health Coverage

UNDP-United Nations Development Programme

UNEA-United Nations Environmental Assembly.

UNEP- United Nations Development Programme

UNESCO-United Nations Educational, Scientific and Cultural Organization

UNFCCC-United Nations Framework Convention on Climate Change

UN-United Nations

WFP-U.N. World Food Program

WHO-World Health Organization.

CHAPTER ONE

Introduction:

Sustainable Development, Peace and Environmental Security

1.1 Introduction

This chapter offers a brief introduction on the linkage between sustainable development, peace and environmental security. This is in line with the book's title which seeks to discuss the various subtopics that fall under each of the three concepts and how these subtopics interact with each other.

1.2 Sustainable Development

Viewed through ethical lens, some authors see sustainable development as a normative value system, on a par with human rights, democracy and freedom (and it is closely interlinked with all these systems), where, sustainable development is seen as essentially a strong ethical, or moral, pronouncement as to what should be done.¹ According to the proponents of this view, the concept of sustainable development rests on three moral imperatives: satisfying human needs, ensuring social equity and respecting environmental limits.² However, the most common view is the three-pillar model, which seeks to balance social, environmental and economic targets.³

The Sustainable Development Goals (SDGs) were adopted by all United Nations Member States in 2015 as a universal call to action to end poverty, protect the planet and ensure that all people enjoy peace and prosperity by 2030.⁴ Notable the 2030 Agenda adopts the three-pillar approach to sustainable development debate.

¹ Holden E, Linnerud K and Banister D, 'The Imperatives of Sustainable Development' (2017) 25 *Sustainable Development* 213.

² Ibid.

³ Ibid.

⁴ UN General Assembly, *Transforming our world: the 2030 Agenda for Sustainable Development*, 21 October 2015, A/RES/70/1.

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This book is largely informed by the emerging issues since the year 2015 when the United Nations 2030 Agenda for Sustainable Development Goals (SDGs) was adopted by states around the world. The book highlights the challenges that countries have faced in implementing the 2030 Agenda on SDGs and also offers some recommendations on how the same can be addressed. The Corona Virus Disease (Covid-19) Pandemic has also greatly interrupted the journey towards achieving sustainable development Agenda and this will thus feature in this book. The book discusses various themes that are drawn from the SDGs ranging from poverty eradication, public participation, social justice, gender equality and equity, human health and well-being, sustainable consumption, and inequality within and among countries, among others.

These themes are bound together by the thread of achieving sustainable peace and environmental security in the context of sustainable development agenda. In general, the environment refers to the biological, physical, and chemical components and systems necessary to sustain life.⁵ The environment thus forms the basis of all life on earth, including human life and wellbeing, making it an important component of sustainable development agenda.

1.3 Peace: Meaning and Scope

While it is difficult to define the term 'peace' using particular words or phrases, many societies often link it to harmony, tranquillity, cooperation, alliance, well-being, and agreement.⁶ It is, however, worth pointing out that 'peace is not just the absence of violence, it is much more.'⁷ Thus, every

⁵ 'Environmental Security - an Overview | ScienceDirect Topics' <<https://www.sciencedirect.com/topics/earth-and-planetary-sciences/environmental-security>> accessed 16 February 2021.

⁶ Spring Ú.O. (2008) Peace and Environment: Towards a Sustainable Peace as Seen From the South. In: Brauch H.G. et al. (eds) *Globalization and Environmental Challenges. Hexagon Series on Human and Environmental Security and Peace*, vol 3. Springer, Berlin, Heidelberg, 113-126 <https://link.springer.com/chapter/10.1007/978-3-540-75977-5_5>accessed 26 November 2020.

⁷ Galtung, J., "Violence, peace, and peace research," *Journal of peace research*, Vol. 6,

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culture may have a unique but related understanding of what peace entails. Besides, peace may be classified into positive peace or negative peace, where negative peace is defined as the absence of violence or the fear of violence while positive peace is the attitudes, institutions and structures, that when strengthened, lead to peaceful societies.⁸

In this respect, positive peace is often seen as a true, lasting, and sustainable peace built on justice for all peoples, a concept that may have informed the drafting of SDG 16⁹ which seeks to: *Promote Peaceful And Inclusive Societies For Sustainable Development, Provide Access To Justice For All And Build Effective, Accountable And Inclusive Institutions At All Levels*. The related SDG Goal 16 targets require countries to: significantly reduce all forms of violence and related death rates everywhere; end abuse, exploitation, trafficking and all forms of violence against and torture of children; promote the rule of law at the national and international levels and ensure equal access to justice for all; by 2030, significantly reduce illicit financial and arms flows, strengthen the recovery and return of stolen assets and combat all forms of organised crime; substantially reduce corruption and bribery in all their forms; develop effective, accountable and transparent institutions at all levels; ensure responsive, inclusive, participatory and representative decision-making at all levels; broaden and strengthen the participation of developing countries in the institutions of global governance; by 2030, provide legal identity for all, including birth registration; ensure public access to information and protect fundamental freedoms, in accordance with national legislation and international agreements; strengthen relevant national institutions, including through international cooperation, for building capacity at all levels, in particular in developing countries, to prevent violence and combat terrorism and crime; and promote and enforce

no. 3 (1969): 167-191.

⁸ Herath, O., "A critical analysis of Positive and Negative Peace," (2016), p.106. Available at

<http://repository.kln.ac.lk/bitstream/handle/123456789/12056/journal1%20%281%29.104-107.pdf?sequence=1&isAllowed=y> accessed 26 November 2020.

⁹ Goal 16: Peace, justice and strong institutions.

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non-discriminatory laws and policies for sustainable development.¹⁰ Arguably, these targets are aimed at creating a just and peaceful society, thus promoting positive peace.

The concept of positive peace is frequently associated with the elimination of the root causes of war, violence, and injustice and the conscious attempt to build a society that reflects attitudes, institutions and structures, that when strengthened, lead to peaceful societies. Positive peace assumes an interconnectedness of all life.¹¹ On the other hand, in a negative peace situation, while there may not be witnessed conflict out in the open, the tension is usually boiling just beneath the surface because the conflict was never reconciled and thus negative peace seeks to address immediate symptoms, the conditions of war, and the use and effects of force and weapons.¹² In Kenya, both situations may be existing in different parts of the country, depending on the political and socio-economic conditions of the group of people in question. This is because conflict is grounded in social, structural, cultural, political and economic factors since depreciation in one increases the chances of conflict in a particular society.¹³

1.4 Environmental Security

It has rightly been pointed out that 'increasingly, security is now defined as the security of individuals as human beings as such, and not only as citizens of a particular state; as a result, to preserve security, the entire human environment ought to be taken into consideration, including the need to

¹⁰ Doss E, 'Sustainable Development Goal 16' (*United Nations and the Rule of Law*) <<https://www.un.org/ruleoflaw/sdg-16/>> accessed 19 February 2021.

¹¹ Herath, O., "A critical analysis of Positive and Negative Peace," (2016), p.106.

¹² Ibid, pp.106-107.

¹³ Maiese, M., 'Social Structural Change,' in G. Burgess & H. Burgess (eds), *Beyond Intractability*, (Conflict Information Consortium, University of Colorado, Boulder, July 2003), available at

<http://www.beyondintractability.org/essay/social-structural-changes> accessed 26 November 2020; See also Maiese, M., 'Causes of Disputes and Conflicts,' in G. Burgess & H. Burgess (eds), *Beyond Intractability*, (Conflict Information Consortium, University of Colorado, Boulder, October, 2003), available at <http://www.beyondintractability.org/essay/underlying-causes> accessed 26 November 2020.

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resolve environmental problems and ensure a sustainable future'.¹⁴ The need to link security and the environment was informed by several factors which include, firstly, environmental degradation is in itself a severe threat to human security and all life on earth.¹⁵ Secondly, environmental degradation or change can be both a cause and consequence of violent conflict.¹⁶ In addition, environmental degradation, but also poor respect for environmentally attuned resource management, may lead to disputes within and between otherwise friendly countries.¹⁷ Indeed, this is the current issue between Kenya and Somalia where the two countries are before the International Court of Justice,¹⁸ where Kenya and Somalia are in dispute over a potentially lucrative, triangular stretch of 100,000 square kilometers of offshore territory believed to contain large oil and gas deposits, in accordance with the application filed by Somalia in 2014.¹⁹ Somalia wants the court to demarcate the maritime boundary, and to determine the exact geographical coordinates as an extension of its southeastern land borders. Kenya, on the other hand, wants the border to run in parallel along the line of latitude on its eastern border.²⁰

¹⁴ Græger, Nina. "Environmental Security?" *Journal of Peace Research* (1996): 109-116.

¹⁵ *Ibid*, 109.

¹⁶ *Ibid*, 110.

¹⁷ *Ibid*, 110.

¹⁸ Maritime Delimitation in the Indian Ocean (Somalia v. Kenya).

¹⁹ Dahir AL, 'Kenya and Somalia Are Facing off in Court over an Oil-Rich Triangle of the Indian Ocean' (*Quartz Africa*) <<https://qz.com/africa/785326/a-maritime-border-case-between-kenya-and-somalia-has-began-at-the-international-court-of-justice-in-the-hague/>> accessed 16 February 2021.

²⁰ *Ibid*; Maluki PM, 'Why the US, UK, France and Norway Are Taking Sides in Kenya's Maritime Row with Somalia' (*Quartz Africa*) <<https://qz.com/africa/1743984/us-uk-france-norway-pick-sides-in-kenya-somalia-maritime-row/>> accessed 16 February 2021; 'Kenya and Somalia's Long-Simmering Territorial Dispute Threatens to Boil Over' <<https://www.worldpoliticsreview.com/insights/28660/the-long-simmering-kenya-somalia-maritime-dispute-threatens-to-boil-over>> accessed 16 February 2021; 'Kenya and Somalia's Maritime Dispute: One Winner, Two Losers?' (*African Arguments*, 30 October 2019) <<https://africanarguments.org/2019/10/kenya-somalia-maritime-dispute-one-winner-two-losers/>> accessed 16 February 2021; 'ICJ Rejects Kenya's Request to Delay Somalia Maritime Case' (*Nation*) <<https://nation.africa/kenya/news/icj-rejects-kenya-s-request-to-delay-somalia-maritime-case-3290438>> accessed 16 February 2021; 'Somalia Rejects Kenya Request

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It has been argued that by signing the *Rio Declaration on Environment and Development*, the global community of states, it signifies their formal acknowledgement that there is a connection between peace, human welfare and environmental protection.²¹

While there is no universally accepted definition of 'environmental security', one author has defined 'environmental security' as the ability of individuals to avoid or adapt to environmental change so that things that are important to their well-being are not substantially negatively affected.²² To this author, there is a widely agreed set of needs and rights enshrined in the *Universal Declaration on Human Rights* and the associated the *Covenants on Civil and Political Rights* and *Economic Social and Cultural Rights*, and these should be taken as a minimum list of the things that should be secured from environmental change.²³

Environmental security has also been defined as the process of peacefully reducing human vulnerability to human-induced environmental degradation by addressing the root causes of environmental degradation and human insecurity.²⁴

Arguably, peace and environmental security are therefore intimately related, and neither can be achieved without the other. To avoid environmental insecurity the causes of environmental change need to be addressed, since it is these that expose groups to changes in the distribution, abundance, and quality of resources on which they depend.²⁵

to Delay Maritime Case' <<https://www.aa.com.tr/en/africa/somalia-rejects-kenya-request-to-delay-maritime-case/2141770>> accessed 16 February 2021.

²¹ Barnett J, 'Environmental Security and Peace' (2007) 3 *Journal of Human Security* 4.

²² *Ibid*, 5.

²³ *Ibid*, 6.

²⁴ F. Rita, "The Environmental Security Debate and Its Significance for Climate Change," *The International Spectator: Italian Journal of International Affairs*, Vol. 43, Issue 3, 2008, pp.51-65 at p. 56.

²⁵ Barnett J, 'Environmental Security and Peace' (2007) 3 *Journal of Human Security*, 12.

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According to the Global Environment Facility (GEF), 'Environmental security has been described as a bundle of issues which involves the role that the environment and natural resources can play in peace and security, including environmental causes and drivers of conflict, environmental impacts of conflict, environmental recovery, and post-conflict peacebuilding. The scope of security and insecurity is by no means limited to violent conflict or its absence but includes the roots of sustainable livelihoods, health, and well-being.'²⁶ Since ecosystem goods and services fundamentally underpin human well-being and human security and human beings depend on the earth's ecosystems and the services they provide, the degradation of these services often causes significant harm to human well-being which, explicitly includes human security.²⁷

1.5 Sustainable Development, Peace and Environmental Security: The Linkage

Arguably, there is a need for a better understanding of the links between environment and human security as this is considered vital for effective conflict prevention, post-conflict reconstruction and promotion of peaceful and inclusive societies.²⁸ It has rightly been pointed out that at the core of the 2030 Agenda lies a clear understanding that human rights, peace and security, and development are deeply interlinked and mutually reinforcing.²⁹ Through its entirety, the importance of enhancing access to justice, ensuring safety and security, and promoting human rights for sustainable development are reflected, while Sustainable Development Goal 16 marks the intersection between sustaining peace and the 2030 Agenda.³⁰ As already pointed out, environmental conflicts are those induced by ecological factors such as the scarcity and destruction of natural resources,

²⁶ PANEL A, 'Environmental Security: Dimensions and Priorities'.

²⁷ Ibid.

²⁸ Environment UN, 'GOAL 16: Peace, Justice and Strong Institutions' (*UNEP - UN Environment Programme*, 2 October 2017) <<http://www.unep.org/explore-topics/sustainable-development-goals/why-do-sustainable-development-goals-matter/goal-16>> accessed 19 February 2021.

²⁹ Doss E, 'Sustainable Development Goal 16' (*United Nations and the Rule of Law*) <<https://www.un.org/ruleoflaw/sdg-16/>> accessed 19 February 2021.

³⁰ Ibid.

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the transboundary movement of hazardous materials, the loss of livelihoods dependent on natural resources that may lead to demographic pressure and forced migration, and degradation resulting from climate change.³¹

According to the United Nations, the *2030 Agenda for Sustainable Development*, adopted by the United Nations General Assembly on 25 September 2015, recognizes not only that peace and security are prerequisites for achieving sustainable development, but that sustainable development provides the pathway to peaceful societies.³² Sustainable Development Goal (SDG) 16 obligates all countries to ‘promote peaceful and inclusive societies for sustainable development, provide access to justice for all and build effective, accountable and inclusive institutions at all levels’.³³ UNEP observes that strengthened institutions, rule of law and enforcement contribute to support the implementation of multi-lateral environmental agreements and progress towards internationally agreed global environmental goals.³⁴

Notably, the relationships between the environment and human security (understood as the survival and dignity of human beings through freedom from fear and freedom from want) are close and complex where a great deal of human security is tied to peoples’ access to natural resources and vulnerabilities to environmental change – and a great deal of environmental change is directly and indirectly affected by human activities

³¹ ‘Peaceful Environment, Environmental Peace?’ (*Peace Insight*) <<https://www.peaceinsight.org/en/articles/environment-peace/>> accessed 19 February 2021.

³² Nations U, ‘Fostering Peace and Sustainable Development’ (*United Nations*) <<https://www.un.org/en/chronicle/article/fostering-peace-and-sustainable-development>> accessed 16 February 2021.

³³ SDG 16, UN General Assembly, *Transforming our world: the 2030 Agenda for Sustainable Development*, 21 October 2015, A/RES/70/1.

³⁴ Environment UN, ‘GOAL 16: Peace, justice and strong institutions’ (*UNEP - UN Environment Programme*, 2 October 2017) <<http://www.unep.org/zh-hans/node/2012>> accessed 20 February 2021.

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and conflicts.³⁵ The link between sustainable development and environmental security is well captured in the assertion that: efforts to protect nature will fail unless they simultaneously advance the cause of human betterment; efforts to better the lives of people will fail if they fail to conserve, if not enhance, essential resources and life support systems.³⁶ In acknowledging that environmental degradation poses risks to human security, it has also been observed that 'climate-related security risks are risks emerging from accelerating climate change to people's wellbeing and livelihoods that may have implications for societal, economic and political stability at local, national, regional and international levels. In this respect, the concern is not only about vulnerability, human security or the immediate threat of violence or conflict, but more generally about the link between climate impacts, human security and deteriorating societal stability.³⁷ Some of the most common security related concerns voiced relate to livelihood security risks and supply chain security risks in relation to food, water and energy.³⁸ However, it is acknowledged that environmental factors themselves are rarely, if ever, the sole cause of violence since natural resource management and other environmental factors are linked to violent conflicts in a variety of ways often obscured by more visible issues, such as ethnic tension and power politics.³⁹

The global challenge of sustainable development encompasses the complex interdependencies of environmental change, socio-economic development, and peaceful existence. Sustainability and peace are intricately linked,

³⁵ Khagram, Sanjeev, William C. Clark, and Dana Firas Raad. 2003. "From the Environment and Human Security to Sustainable Security and Development." *Journal of Human Development* 4(2): 289-313.

³⁶ *Ibid*, 289.

³⁷ 'Climate-Related Security Risks in the 2020 Updated Nationally Determined Contributions - World' (*ReliefWeb*) <<https://reliefweb.int/report/world/climate-related-security-risks-2020-updated-nationally-determined-contributions>> accessed 19 February 2021.

³⁸ *Ibid*, p. 10.

³⁹ 'Conflict and Peacebuilding' (*International Institute for Sustainable Development*) <<https://www.iisd.org/topics/conflict-and-peacebuilding>> accessed 19 February 2021.

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especially in the context of rapid global changes in the functioning of the Earth system.⁴⁰ In this context, it has been argued that:

“Peace as a broad and inclusive concept that goes beyond just the absence of war and conflict and pursues social harmony and justice. Structural and indirect forms of violence prevent amicable living conditions even in societies that are not subjected by conventional wars and armed conflicts. Within the context of sustainability–peace nexus, peace implies a broader concept that includes elements of individual inner peace, peaceful mindset, spirituality, peace cultures within organizations and regions, and peace with nature and other species. This holistic view of peace comprises negative peace – or the absence of armed conflict and direct violence – and positive peace, which entails the restoration of harmonious relationships and creation of social systems that address the underlying causes of all forms of conflict and violence. This notion of peace is central to the Sustainable Development Goals (SDGs) (UN 2015). In fact, one implication of the deep interconnectivities of peace to all other SDGs is that if we do not address peace effectively, then we jeopardize all other goals.”⁴¹

The United Nations Development Programme rightly points out that ‘peace is not simply a benchmark to achieve. It requires ongoing, dynamic participation from the entire society in its governance and economy to ensure that conflicts don’t escalate into violence. That is why a country’s development must be inclusive and sustainable; it gives everyone a stake in a shared future.’⁴² Severe environmental degradation have been attributed to deepened regional divisions and have been known to trigger social conflicts for communities that depend on these resources for their

⁴⁰ Virji H and others, ‘The Sustainability–Peace Nexus in the Context of Global Change’ (2019) 14 Sustainability Science 1467.

⁴¹ Ibid.

⁴² ‘Sustainable Development and Sustaining Peace: Two Sides of the Same Coin’ (UNDP)

<<https://www.undp.org/content/undp/en/home/blog/2017/7/20/Sustainable-development-and-sustaining-peace-Two-sides-of-the-same-coin.html>> accessed 16 February 2021.

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livelihoods and fulfillment of basic needs, with the environment itself being dramatically affected by such conflicts.⁴³

The SDGs aim to be relevant to all countries – poor, rich and middle-income – to promote prosperity while protecting the environment and tackling climate change. They have a strong focus on improving equity to meet the needs of women, children and disadvantaged populations in particular so that “no one is left behind”.⁴⁴ Notably, marginalization can also be ecological. Ecological marginalization entails the long-term migration of disadvantaged populations to ecologically fragile areas such as steep sloping lands, tropical rain forests, areas threatened by desertification and so on.⁴⁵ The fragility of the natural environment, coupled with increased population densities, lack of context appropriate knowledge, low levels of capital, and weak institutional arrangements usually result in severe ecological damage.⁴⁶ Arguably, human vulnerability resulting from such social problems as poverty only makes such ecological damage worse as families try to survive. It is for this reason that sustainable development Agenda becomes important in achieving the twin benefits of peaceful societies and environmental security. According to the UNDP’s 2016 Annual Report on The Rule of Law and Human Rights, Sustainable Development Goal 16 (SDG 16) – for peaceful, just, and inclusive societies – ushers in a new kind of development: one where people could influence the decisions that affect their lives and create communities that thrive. SDG 16 articulates the key role that governance and the rule of law play in

⁴³ Abboud | NA, ‘Environment as a Peace-Building Tool | EcoMENA’ (27 November 2018) <<https://www.ecomena.org/environment-peace/>> accessed 19 February 2021.

⁴⁴ ‘Sustainable Development Goals’ <<https://www.who.int/westernpacific/health-topics/sustainable-development-goals>> accessed 16 February 2021.

⁴⁵ Khagram, Sanjeev, William C. Clark, and Dana Firas Raad. 2003. "From the Environment and Human Security to Sustainable Security and Development." *Journal of Human Development* 4(2): 289-313, at 295.

⁴⁶ *Ibid*, 295.

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promoting peaceful, just, and inclusive societies and in ensuring sustainable development.⁴⁷

This book establishes the linkage between sustainable development, peace and environmental security through discussing the various elements of the environmental security and sustainable development across the various chapters. There is a need to pursue peace by all means as conflict, insecurity, weak institutions and limited access to justice remain a great threat to sustainable development.⁴⁸ Thus, while the book is divided into various chapters, these chapters are ultimately linked together through running themes based on the 2030 Agenda for SDGs.

The 17 SDGs are integrated and interconnected and acknowledge that action in one area will affect outcomes in others, and that development must balance social, economic and environmental sustainability.⁴⁹ The SDGs represent a global vision for development which necessitate members to undertake necessary legislative, political, economic, technological, social and environmental interventions towards their attainment.⁵⁰

Most of the SDGs are geared towards social justice and seek to achieve the following: end extreme poverty (SDG No.1); end hunger and achieve food security (SDG No.2); ensure healthy lives and promote well-being for all (SDG No.3); ensure quality education (SDG No.4); achieve gender equality (SDG No.5); ensure availability of clean water and sanitation (SDG No.6); ensure access to affordable and clean energy (SDG No.7); decent work for

⁴⁷ Environment UN, 'GOAL 16: Peace, Justice and Strong Institutions' (*UNEP - UN Environment Programme*, 2 October 2017) <<http://www.unep.org/explore-topics/sustainable-development-goals/why-do-sustainable-development-goals-matter/goal-16>> accessed 19 February 2021.

⁴⁸ Martin, 'Peace, Justice and Strong Institutions' (*United Nations Sustainable Development*)<<https://www.un.org/sustainabledevelopment/peace-justice/>> accessed 19 February 2021.

⁴⁹ 'Sustainable Development Goals' (*UNDP*) <<https://www.undp.org/content/oslo-governance-centre/en/home/sustainable-development-goals.html>> accessed 6 February 2021.

⁵⁰ Ibid.

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all and economic growth (SDG No.8); reduce inequalities within and among countries (SDG No.10); ensure responsible consumption and production (SDG No.12), combat climate change (SDG No.13) and achieve peace, justice and strong institutions (SDG No.16).⁵¹ All these SDGs are discussed under the various chapters in the book.

1.6 Conclusion

This chapter has discussed the concepts of sustainable development, peace and environmental security and also highlighted the linkage among the three concepts. Sustainable development seeks to strike a balance between ensuring human welfare is taken care of while also seeking to ensure that the environmental resources are utilized in a manner that promotes protection and conservation for the sake of future generations. The 2030 Agenda for Sustainable Development Goals is an ambitious global plan that seeks to promote just and peaceful societies as part of ensuring social wellbeing, in addition to in addition to promoting sustainable economic development, environmental protection and conservation. The environment is considered as the reservoir of the resources required to support human life. As such, human survival and well-being requires well preserved environment. A degraded environment means that humans cannot meet their needs and this may result in conflict and fight over dwindling resources. Armed conflicts may also cause environmental degradation which in turn fuels the conflict all the more. As such, peace and environmental security may not be possible without well maintained and sustained environment which in turn means that achieving sustainable development will remain a pipe dream.

The next chapters of this book are thus dedicated to discussing the various elements of sustainable development, peace and environmental security which are all considered to be important in the global efforts towards achieving the sustainable development agenda.

⁵¹ UN General Assembly, *Transforming our world: the 2030 Agenda for Sustainable Development*, 21 October 2015, A/RES/70/1.

CHAPTER TWO

Reflections on the Environment and Sustainable Development: Giving Natural Resources a Legal Personality

2.1. Introduction

This chapter offers a critique of the current approach in natural resources management in both international and national laws which is mostly anthropocentric. The argument is that while the *Earth Charter* recognises nature and the need for environmental conservation, the same document also ties this with human rights and human needs, thus implying that the main reason for respect for the environment and Mother Nature is to be able to meet and fulfil the needs of the humankind. In addition, while some jurisdictions have taken the bold step of vesting nature with a legal personality and consequently rights based on its intrinsic nature, the practice has been to conserve the environment and natural resources guided by the sustainable development agenda which is largely anthropocentric, that is, putting the human being and the satisfaction of all their needs at the centre of these efforts. The chapter examines the idea of giving natural resources a legal personality and relates this to the Kenyan context. It advocates for an approach that strikes a balance between ecocentrism/biocentrism and anthropocentrism approaches in environmental and natural resources management and conservation in Kenya.

The Constitution of Kenya 2010 defines “natural resources” to mean the physical non-human factors and components, whether renewable or non-renewable, including –(a)sunlight;(b)surface and groundwater;(c)forests, biodiversity and genetic resources; and(d)rocks, minerals, fossil fuels and other sources of energy.¹ Under Kenya’s *Environmental Management and*

¹ Article 260, Constitution of Kenya 2010.

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*Coordination Act*², natural resources include resources of the air, land, water, animals, and plants including their aesthetic qualities.³

Thus, natural resources include all aspects of the environment which are not man-made and are of value to human beings such as forests, minerals, oceans, freshwater, soil and air.⁴ Natural resources are classified as either renewable or non-renewable; *renewable resources* are those that can be replenished at about the same rate as they are used, while non-renewable resources are those that are depleted faster than they can regenerate.⁵

In 2011, Bolivia passed the world's first laws granting all nature equal rights to humans which included, inter alia: the right to life and to exist; the right to continue vital cycles and processes free from human alteration; the right to pure water and clean air; the right to balance; the right not to be polluted; and the right to not have cellular structure modified or genetically altered.⁶ Notably, the proposal for the 'rights of nature' is credited to have initially developed in North America and Europe in the mid-twentieth century, and was built on a platform of ideas, including those of Leopold and proponents of animal rights such as Peter Singer, Tom Regan and Jeremy Bentham.⁷

The *Earth Charter*, which comes closest to acknowledging the intrinsic value of Mother Nature, is a declaration of fundamental ethical principles for building a just, sustainable and peaceful global society in the 21st century. It seeks to inspire in all people a new sense of global interdependence and shared responsibility for the well-being of the whole human family, the

² *Environmental Management and Coordination Act*, No. 8 of 1999, Laws of Kenya.

³ S. 2, Act No. 8 of 1999.

⁴ Devlin, R. & Grafton R, *Economic Rights and Environmental Wrongs: Property Rights for the Common Good*, (Edward Elgar Publishing, 1998).

⁵ Muigua, K., Kariuki, F., Wamukoya, D., *Natural Resources and Environmental Justice in Kenya*, Glenwood Publishers, Nairobi, 2015.

⁶ 'Bolivia Enshrines Natural World's Rights with Equal Status for Mother Earth' (*the Guardian*, 10 April 2011)

<<http://www.theguardian.com/environment/2011/apr/10/bolivia-enshrines-natural-worlds-rights>> accessed 10 November 2020.

⁷ Sólón, Pablo. "The rights of mother earth." *Democratic Marxism Series* (2018): 107, 114.

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greater community of life, and future generations.⁸ It does not therefore offer an approach purely informed by the need to protect the nature as it is but by the need to ensure its continued supply of resources for the sake of human beings.

Conspicuously, anthropocentrism is deeply embedded in modern society, where human beings are treated as the central and most important entity in the world; superior to non-human life because they are the only ones that have consciousness, values and moral status. In this context, nature is seen as something separate from humans; it exists for the survival and development of human societies; it is the 'environment' of humans and a set of resources that can be exploited for their benefit.⁹

This chapter challenges the current approaches, both international and national, to environmental and natural resources management which are largely based on an anthropocentric lens, that is, taking care of nature as a means to an end which is meeting the basic needs of the human beings and not necessarily for the sake of the nature itself and the other organisms that rely on it.

2.2. Legal Status of Natural Resources Management: International and National Approaches

While the international law is generally concerned with provision of guidelines and principles on management of environmental and natural resources by state parties as well as governance of the common areas such as seas and oceans, the international legal regime of natural resources has in several instruments affirmed the sovereignty of a state over the natural resources found within its territory.¹⁰ Notably, these legal instruments

⁸ 'Earth Charter' (*Charter for Compassion*)

<<https://secure.charterforcompassion.org/350-org/earth-charter>> accessed 11 November 2020.

⁹ Sólón, Pablo. "The rights of mother earth." *Democratic Marxism Series* (2018): 107, 107.

¹⁰ Schrijver, Nicolaas. "Self-determination of peoples and sovereignty over natural wealth and resources." (2013): 95-102; Gumplová, Petra. "Sovereignty over natural resources—A normative reinterpretation." *Global Constitutionalism* 9, no. 1 (2020): 7-

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affirm the countries' legal right to exploit the resources as they wish with occasional guiding principles such as the principles of sustainable development meant to remind these countries to conserve the resources for the sake of future generations in those territories.¹¹

It has now become common for the most recent constitutions around the world to provide for norms concerning the environmental protection as a consequence to the increased attention over the past years towards ecological hardship.¹² However, these constitutional reforms which embrace strengthened proper rights of nature and similarly of ethnic rights also grant the State the right to exploit and commercialize natural resources and extraction has increased.¹³ Indeed, it has rightly been pointed out that 'while the environmental dimension is incorporated into some constitutions, it appears purely in terms of the interest or usefulness that nature represents for people. The requirement of a 'healthy environment' does imply certain levels of quality, but not for living species or the integrity of the ecosystems, rather as an indispensable factor in ensuring human health.¹⁴

It has been observed that natural resources law focuses mostly on extraction and primary production of goods and services, that is, consumption while environmental law focuses on secondary processing, transportation, manufacturing, and disposal, that is, it is more about the unwanted side

37; United Nations General Assembly, *Resolution 1803 (XVII)*, 1962; 'Indigenous Peoples Permanent Sovereignty Over Natural Resources | Australian Human Rights Commission'

<<https://humanrights.gov.au/about/news/speeches/indigenous-peoples-permanent-sovereignty-over-natural-resources>> accessed 11 November 2020.

¹¹ UN General Assembly, *Transforming our world: the 2030 Agenda for Sustainable Development*, 21 October 2015, A/RES/70/1.

¹² Rebecca Romanò, 'Can Nature Be Entitled to Constitutional Rights? A Historical Overview and the Innovative Approach of Bolivia and Ecuador.'

¹³ Rickard Lalander, 'Rights of Nature and the Indigenous Peoples in Bolivia and Ecuador: A Straitjacket for Progressive Development Politics?' (2014) 3 *Iberoamerican Journal of Development Studies* 148.

¹⁴ 'The Political Ecology of Nature in the Bolivian and Ecuadorian Constitutions - Rosa Luxemburg Foundation' <<https://www.rosalux.org.ec/en/the-political-ecology-of-nature-in-the-bolivian-and-ecuadorian-constitutions/>> accessed 10 November 2020.

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effects of consumption.¹⁵ Natural resources law is dominated by a "resource-ist," utilitarian approach rather than by a naturalist intrinsic value approach.¹⁶

The Constitution of Kenya 2010 includes provisions related to land, environment and natural resource management, and envisages development of new laws, policies, guidelines and other enabling legal instruments relating to different yet related sectors at the national and county levels.¹⁷ The enactment and implementation of these laws is to be guided by the national values and principles of governance which include: patriotism, sharing and devolution of power, the rule of law, democracy and participation of the people; human dignity, equity, social justice, inclusiveness, equality, human rights, non-discrimination and protection of the marginalised; good governance, integrity, transparency and accountability; and sustainable development.¹⁸ Again, these values and principles are largely anthropocentric and have little or nothing to do with respecting nature for its own intrinsic value.

There are three main approaches to environmental ethics depending on how people think about and interact with their environment which are: anthropocentrism; ecocentrism and biocentrism. Anthropocentrism is a combination of egoistic and socialturistic values, held by those who emphasize the consequences of environmental deterioration for oneself and for human beings in general; a human-centered approach, meaning that human beings are the most important life forms; they consume natural resources to fulfil their own needs, hoping to develop the environment they most desire.¹⁹ Thus, under this approach, nature is valued for its

¹⁵ Fischman, Robert L. "What Is Natural Resources Law?" *78 University of Colorado Law Review* 717 (2007) (2007), 731.

¹⁶ *Ibid*, 733.

¹⁷ Constitution of Kenya 2010, Chapter Five.

¹⁸ Art.10 (2), Constitution of Kenya.

¹⁹ Surmeli, Hikmet, and Mehpare Saka. "Preservice teachers' anthropocentric, biocentric, and ecocentric environmental ethics approaches." *International Journal of Academic Research* 5, no. 5 (2013): 159-163.

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convenience, and therefore it should be protected for the purpose of maintaining an appropriate quality of life for human beings.²⁰

Ecocentrism is the broadest term for worldviews that recognize intrinsic value in all life forms and ecosystems themselves, including their abiotic components.²¹ Ecocentrism goes beyond biocentrism (ethics that sees inherent value to all living things) by including environmental systems as wholes, and their abiotic aspects. It also goes beyond zoocentrism (seeing value in animals) on account of explicitly including flora and the ecological contexts for organisms.²² Some scholars see ecocentrism as the umbrella that includes biocentrism and zoocentrism, because all three of these worldviews value the non-human, with ecocentrism having the widest vision.²³

Thus, while anthropocentric concerns for the environment are narrowly aimed at preserving the welfare of humans, bio centric and ecocentric concerns are oriented toward protecting non-human organisms and nature as a whole.²⁴

2.3. Management and Governance of Natural Resources in Kenya: Challenges in Approaches

The management and governance of natural resources in Kenya is largely governed by the various values attached to these resources, including: economic, social or cultural, where; economically, natural resources are not only a source of food and raw materials but are also a source of income for individuals and the State; socially, natural resources like water bodies play recreational role amongst others, they also contribute to the improvement

²⁰ Ibid.

²¹ Washington, Haydn, Bron Taylor, Helen Kopnina, Paul Cryer, and John J. Piccolo. "Why ecocentrism is the key pathway to sustainability." *The Ecological Citizen* 1, no. 1 (2017): 35-41, 35.

²² Ibid, 35.

²³ Ibid, 35.

²⁴ Joshua Rottman, 'Breaking down Biocentrism: Two Distinct Forms of Moral Concern for Nature' (2014) 5 *Frontiers in Psychology* <<https://www.frontiersin.org/articles/10.3389/fpsyg.2014.00905/full>> accessed 11 November 2020.

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of the quality of life of individuals; and culturally, different Kenyan communities attach importance to some natural resources that may be revered as shrines, dwelling places for ancestors and sacred sites where rites of passage and other cultural celebrations take place.²⁵

The Constitution of Kenya outlines the obligations of the State in relation to the environment and natural resources as follows: ensure sustainable exploitation, utilization, management and conservation of the environment and natural resources, and ensure the equitable sharing of the accruing benefits; work to achieve and maintain a tree cover of at least ten per cent of the land area of Kenya; protect and enhance intellectual property in, and indigenous knowledge of, biodiversity and the genetic resources of the communities; encourage public participation in the management, protection and conservation of the environment; protect genetic resources and biological diversity; establish systems of environmental impact assessment, environmental audit and monitoring of the environment; eliminate processes and activities that are likely to endanger the environment; and utilize the environment and natural resources for the benefit of the people of Kenya.²⁶ The Constitution also obligates every person to cooperate with State organs and other persons to protect and conserve the environment and ensure ecologically sustainable development and use of natural resources.²⁷

Notably, while these obligations are geared towards conservation measures, they lean towards an anthropocentric approach but have little to do with an ecocentric or bio centric approach. They seek to preserve and conserve environmental and natural resources for the sake of human needs. The law on environment and natural resources management and governance in Kenya thus takes the same approach taken by many other jurisdictions around the world where these resources are taken care of for as long as they

²⁵ See Muigua, K., Kariuki, F., Wamukoya, D., *Natural Resources and Environmental Justice in Kenya*, Glenwood Publishers, Nairobi, 2015.

²⁶ Constitution of Kenya, 2010, Article 69(1).

²⁷ *Ibid*, Article 69(2).

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can meet and satisfy the economic and social needs of the human race.²⁸ This is also affirmed in the Constitution's guarantee on the right of every person to a clean and healthy environment, which includes the right- to have the environment protected for the benefit of present and future generations, through legislative and other measures, particularly those contemplated in Article 69; and to have obligations relating to the environment fulfilled under Article 70.²⁹ While the law has evolved from the case of *Maathai v Kenya Times Media Trust Ltd*³⁰, where the Court ruled that a person must have *locus standi* before they can bring a petition before court for environmental damage, to a situation where one does not need to prove *locus standi*³¹, the Constitution still provides that if a person alleges that *a right to a clean and healthy environment recognised and protected under Article 42* has been, is being or is likely to be, denied, violated, infringed or threatened, the person may apply to a court for redress in addition to any other legal remedies that are available in respect to the same matter (emphasis added).³² The implication is that these provisions were coined along anthropocentric approach to conservation, that is, a clean and healthy environment should be maintained for the sake of enjoyment by human beings and not necessarily for its intrinsic value or for the benefit of the other non-human living and non-living things.

It is clear that inasmuch as there has been progress towards protection and conservation of environmental and natural resources in Kenya, the law still largely leans towards taking an anthropocentric approach, at least practically. While the Constitution acknowledges that the environment is the heritage of the people of Kenya, the same makes it clear that the same is to be respected and the determination is to sustain it for the benefit of future generations.³³

²⁸ Ochola, Washington Odongo, Pascal C. Sanginga, and Isaac Bekalo, eds. *Managing natural resources for development in Africa: A resource book*. IDRC, 2010.

²⁹ Constitution of Kenya, 2010, Article 42.

³⁰ *Maathai v Kenya Times Media Trust Ltd*, Civil Case No 5403 of 1989.

³¹ See sec. 3, *Environmental Management and Coordination Act*, No. 8 of 1999, Laws of Kenya; see also Article 70 (3), Constitution of Kenya 2010.

³² Constitution of Kenya 2010, Art. 70(1).

³³ *Ibid*, Preamble.

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This is the approach that also mainly informs the sustainable development agenda, where these resources are to be conserved and utilized for the sake of meeting the needs of the current generation and future generations.³⁴

2.4. Giving Natural Resources a Legal Personality: Prospects and Challenges

Environmental law commentators have argued that while so much have been done both internationally and within countries to put in place laws to avert environmental degradation, scientific evidence indicates that the global environmental crisis is accelerating and that environmental laws have not been able to reverse the trend.³⁵ The trend is well summarized in the following quote:

“Human activities are significantly influencing Earth’s environment in many ways in addition to greenhouse gas emissions and climate change. Anthropogenic changes to Earth’s land surface, oceans, coasts and atmosphere and to biological diversity, the water cycle and biogeochemical cycles are clearly identifiable beyond natural variability. They are equal to some of the great forces of nature in their extent and impact. Many are accelerating. Global change is real and is happening now.”³⁶

It is further noted that this global change cannot be understood in terms of a simple cause and effect model since the human-driven changes cause multiple effects that cascade through the Earth system in complex ways, and these effects interact with one another and with local and regional-scale changes in multidimensional patterns that are challenging to understand and even more difficult to predict.³⁷

³⁴ Muigua, K., *Nurturing Our Environment for Sustainable Development*, Glenwood Publishers, Nairobi, 2016

³⁵ Guillaume Chapron, Yaffa Epstein, José Vicente López-Bao, ‘A rights revolution for nature,’ *Science*, 1; See also Rodgers Jr, William H. "Improving Laws, Declining World: The Tort of Contamination." *Valparaiso University Law Review* 38, no. 4 (2011): 1249-1261.

³⁶ Sólón, Pablo. "The rights of mother earth." *Democratic Marxism Series* (2018): 107, 110.

³⁷ *Ibid*, 110.

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As a result of this deficiency, a movement to recognize nature as a rights holder argues that existing laws regulate, rather than stop, the destruction of the natural world, and instead of incrementally reforming such laws, a growing number of jurisdictions around the world have recognized rights for nature.³⁸

Rights for collectives, rights for animals, and rights of nature have been grounded in the interest theory of rights.³⁹ Since according to the interest theory of rights, a person or other entity has a right if and only if they are capable of having rights, and some aspect of their interest or well-being is “a sufficient reason for holding some other person(s) to be under a duty”, some interests of nature that have been argued to be sufficient to produce rights include existence, habitat, and fulfilling ecological roles.⁴⁰

However, while the interest theory itself does not resolve whether nature is capable of having rights, some commentators have suggested that entities that have value for their own sake, rather than for the value they provide others, can have rights, and accordingly, rights-of-nature advocates make a moral assertion that nature does have this intrinsic value.⁴¹

Other rights arguments stem from religion or spirituality, as was the case in New Zealand’s recognition of the Whanganui River and surrounding area as the legal person Te Awa Tupua which arose out of a treaty settlement with a Maori tribe and that tribe’s spiritual connection to the river.⁴² This also informed the decision of the Andean countries of Ecuador and Bolivia, where indigenous worldviews that prioritize harmony with nature over economic development have been enshrined in law.⁴³ The ideals

³⁸ Guillaume Chapron, Yaffa Epstein, José Vicente López-Bao, ‘A rights revolution for nature,’ *Science*, 1.

³⁹ Ibid.

⁴⁰ Ibid.

⁴¹ Guillaume Chapron, Yaffa Epstein, José Vicente López-Bao, ‘A rights revolution for nature,’ *Science*, 1.

⁴² Ibid.

⁴³ ‘Buen Vivir: The Rights of Nature in Bolivia and Ecuador’

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encapsulated in the concept of *Buen Vivir* (“good way of living”) and the recognition of the rights of Mother Nature draw from ancient Andean indigenous traditions that pre-date the Spanish colonial era.⁴⁴ The “good way of living” (or *Buen Vivir* in Spanish) is rooted in the cosmovision of the Quechua peoples of the Andes, of “sumac kawsay”, a kichwa term which denotes the fullness of life, rooted in community and harmony with other people and nature.⁴⁵

Notably, even among most African traditional societies, land belonged first to God, and then to the clan or sub-clan and its access and use is controlled by elders, and everyone was under obligation to care for the environment, water and pastures.⁴⁶ However, the creation of modern institutions for natural resources management has undermined the effectiveness of traditional institutions, yet in most areas it is still traditional institutions that are found on the ground.⁴⁷

The Bolivian Constitution of 2009 recognises *Buen Vivir* as a principle to guide state action.⁴⁸ Bolivia’s 2011 Law of Mother Nature was the first national-level legislation in the world to bestow rights to the natural world.⁴⁹ Unlike the anthropocentric approach to conservation in which nature is valued for the utility or the benefits it provides (conventionally as use or exchange value), biocentrism, which is a narrower aspect of

<<https://www.rapidtransition.org/stories/the-rights-of-nature-in-bolivia-and-ecuador/>> accessed 10 November 2020.

⁴⁴ Ibid.

⁴⁵ Ibid.

⁴⁶ International Union for Conservation of Nature, ‘Local rules and customary regulations on natural resource management in Lower Tana catchment, Kenya,’ *Building Drought Resilience Project*, April, 2013, 2.

⁴⁷ Ibid, 4.

⁴⁸ *Buen Vivir: The Rights of Nature in Bolivia and Ecuador* <<https://www.rapidtransition.org/stories/the-rights-of-nature-in-bolivia-and-ecuador/>> accessed 10 November 2020.

⁴⁹ Ibid.

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ecocentrism, defends the intrinsic values of nature as independent of the value of the non-human world for human uses and purposes.⁵⁰

There is a need for the stakeholders in the environmental and natural resource governance and management sector in Kenya to consider moving away from the anthropocentric approach only and embrace an ecocentric approach for the sake of all living and non-living organisms that rely on the nature for their wellbeing.⁵¹ It is in such an approach that human needs will also be met through natural resources exploitation, as a by-product and not necessarily as an end in itself.

The constitutional provisions on land and environment which recognize environment as an important part of humanity are not enough; there may be a need to consider granting nature some rights that should exist independently of its usefulness in meeting human needs.

Granting nature, a legal personality, however, does not automatically guarantee efficiency in environmental conservation and protection. Some authors have argued that despite Ecuador and Bolivia granting nature a legal personality, they are yet to achieve the expected ideal experience as far as environmental conservation and natural resources protection are concerned.

2.4.1. Place of Human Beings in the Biodiversity Conservation Debate

It is now an established fact that human civilization has had a huge negative impact on biodiversity, particularly since the industrial revolution through such activities as overfishing and hunting, the destruction of habitats through agriculture and urban sprawl, the use of pesticides and herbicides,

⁵⁰The Political Ecology of Nature in the Bolivian and Ecuadorian Constitutions – Rosa Luxemburg Foundation' <<https://www.rosalux.org.ec/en/the-political-ecology-of-nature-in-the-bolivian-and-ecuadorian-constitutions/>> accessed 10 November 2020.

⁵¹ Muigua, K., 'The Neglected Link: Safeguarding Pollinators for Sustainable Development in Kenya,' *Journal of Conflict Management and Sustainable Development*, Volume 1, No 2, (2017).

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and the release of other toxic compounds into the environment.⁵² While some organisms have been able to adapt to the changing environmental conditions, the impact of mankind on biodiversity has clearly been detrimental to many animals, plants and the natural environment in general.⁵³

The anthropocentric approach which places man at the centre of nature and his environmental surroundings has all the more contributed to this wanton destruction of nature as man seeks to meet his needs using environmental and natural resources despite the negative effects left on the environment.⁵⁴ This is attributable to the fact that anthropocentrism regards humans as separate from and superior to nature and holds that human life has intrinsic value while other entities (including animals, plants, mineral resources, and so on) are resources that may justifiably be exploited for the benefit of humankind.⁵⁵ Anthropocentrism is heavily reflected in the sustainable development debate as first captured in the *Report of the World Commission on Environment and Development: Our Common Future*⁵⁶ which stated, *inter alia*:

This Commission believes that people can build a future that is more prosperous, more just, and more secure. Our report, Our Common Future, is not a prediction of ever increasing environmental decay, poverty, and hardship in an ever more polluted world among ever decreasing resources.

⁵² Philip Hunter, 'The Human Impact on Biological Diversity. How Species Adapt to Urban Challenges Sheds Light on Evolution and Provides Clues about Conservation' (2007) 8 EMBO Reports 316; Anastasia A Kokovkina, 'Ecological Crisis and Global Responsibility Ethics', *Proceedings of the XXIII World Congress of Philosophy* (2018).

⁵³ Ibid.

⁵⁴ Richard A Gray, 'Ecology and Ethics: Is There a Duty to Nature?' (1994) 22 Reference Services Review 57; Berfin Kart, 'Ethical Responsibility of Man for Ecological Problems in Context of HPP (Hydroelectrical Power Plant)'.

⁵⁵ 'Anthropocentrism | Philosophy' (*Encyclopedia Britannica*) <<https://www.britannica.com/topic/anthropocentrism>> accessed 13 November 2020.

⁵⁶ World Commission on Environment and Development (ed), *Our Common Future* (Oxford University Press 1987).

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We see instead the possibility for a new era of economic growth, one that must be based on policies that sustain and expand the environmental resource base. And we believe such growth to be absolutely essential to relieve the great poverty that is deepening in much of the developing world.⁵⁷

Despite this conflict between humans and the nature, it is an open secret that human beings need the nature to meet most if not all of their basic needs.⁵⁸ It is for this reason that some commentators have challenged the possibility of adopting an exclusively ecocentric approach to environmental conservation and natural resources management due to the arguably complicated relationship between human beings and their environment.⁵⁹

To demonstrate the complicated relationship that different cultures and groups of people have with the environment, some authors have argued that since there are different approaches to this relationship or views, disagreement, competition and even conflict between rival individuals and groups is not a social aberration but, on the contrary, an essential

⁵⁷ World Commission on Environment and Development (ed), *Our Common Future*, para. 3.

⁵⁸ Richard Wilk, 'Consumption, Human Needs, and Global Environmental Change' (2002) 12 *Global environmental change* 5; David Kaimowitz and Douglas Sheil, 'Conserving what and for whom? Why Conservation Should Help Meet Basic Human Needs in the Tropics' (2007) 39 *Biotropica* 567; Bjørn P Kaltenborn, John DC Linnell and Erik Gómez-Baggethun, 'Can Cultural Ecosystem Services Contribute to Satisfying Basic Human Needs? A Case Study from the Lofoten Archipelago, Northern Norway' (2020) 120 *Applied Geography* 102229; Farhan Ali, Shaoan Huang and Roland Cheo, 'Climatic Impacts on Basic Human Needs in the United States of America: A Panel Data Analysis' (2020) 12 *Sustainability* 1508; Juan Angel Chica Urzola and Vanessa Benavides Miranda, 'Sustainable Development, Human Needs, Well-Being and Energy' (2018) 5 *International Journal of Innovation and Research in Education Sciences-IJIREs* 52; Jona Razzaque, 'Human Rights and the Environment: The National Experience in South Asia and Africa'; Elisa Lanzi and others, 'Developing Pathways to Sustainability: Fulfilling Human Needs and Aspirations While Maintaining Human Life Support Systems'.

⁵⁹ See Stephen Gough, William Scott and Andrew Stables, 'Beyond O'Riordan: Balancing Anthropocentrism and Ecocentrism' (2000) 9 *International Research in Geographical and Environmental Education* 36.

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characteristic of society's uncertain relationship with its environment.⁶⁰ This may be used to explain the often witnessed conflict between government agencies seeking to 'uproot' communities from what they consider to be their homes for conservation purposes, as evidenced by the Mau forest evictions in Kenya.⁶¹ The proponents of the argument seeking to strike a balance between anthropocentrism and ecocentrism approaches to environmental challenges suggest if the governing institutions would be willing to entertain all the views, the reward for tolerating a degree of apparent internal inconsistency is the discovery of synergies between opposed views.⁶² To them, under conditions of uncertainty, legitimacy should be extended to all possible perspectives on human-nature relationships as a way of ensuring that there is an acknowledgment of the role of institutions' and actors' "social involvements".⁶³ This is perhaps the part where conflict management would come in handy, using more of the collaborative approaches such as negotiation, mediation and conciliation, among others.⁶⁴

⁶⁰ Ibid.

⁶¹ 'Mau Forest Evictions Leave Ogiek Homeless' <<http://www.culturalsurvival.org/news/mau-forest-evictions-leave-ogiek-homeless>> accessed 16 November 2020; 'Ministry of Environment and Forestry » Blog Archive » Second Phase of Mau Evictions to Kick off Soon' <<http://www.environment.go.ke/?p=6844>> accessed 16 November 2020; 'Kenya Forest Service Evicts 300 Ogiek Families from Their Homes in the Mau Forest. Despite the African Court on Human and Peoples' Rights 2017 Ruling That the Ogiek Should Not Be Evicted | REDD-Monitor' <<https://redd-monitor.org/2020/07/16/kenya-forest-service-evicts-300-ogiek-families-from-their-homes-in-the-mau-forest-despite-the-african-court-on-human-and-peoples-rights-2017-ruling-that-the-ogiek-should-not-be-evicted/>> accessed 16 November 2020; <https://www.the-star.co.ke/authors/gilbertkoech>, 'Environment CS Stops Eastern Mau Forest Evictions' (*The Star*) <<https://www.the-star.co.ke/counties/rift-valley/2020-07-23-environment-cs-stops-eastern-mau-forest-evictions/>> accessed 16 November 2020.

⁶² Stephen Gough, William Scott and Andrew Stables, 'Beyond O'Riordan: Balancing Anthropocentrism and Ecocentrism' (2000) 9 *International Research in Geographical and Environmental Education* 36.

⁶³ Ibid.

⁶⁴ See Muigua, K., Kariuki, F., Wamukoya, D., *Natural Resources and Environmental Justice* in Kenya, 28

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Regarding the debate to accord nature a legal personality status, some of the earliest proponents have rightly observed that:

*"The fact is, that each time there is a movement to confer rights onto some new "entity," the proposal is bound to sound odd or frightening or laughable. This is partly because until the rightless thing receives its rights, we cannot see it as anything but a thing for the use of "us"-those who are holding rights at the time."*⁶⁵

The above was meant to elicit a debate toward considering human beings and the law in general giving legal rights to forests, oceans, rivers and other so-called "natural objects" in the environment-indeed, to the natural environment as a whole.⁶⁶ The suggestion was that we should have a system in which, when a friend of a natural object perceives it to be endangered, he or she can apply to a court for the creation of a guardianship.⁶⁷ In such a system, it was suggested, the law would have provisions which could provide for guardianship both in the instance of public natural objects and also, perhaps with slightly different standards, in the instance of natural objects on "private" land, effectively securing an effective voice for the environment.⁶⁸

Coming back to the Kenyan scenario, the Constitution of Kenya 2010 defines a 'person' to 'include a company, association or other body of persons whether incorporated or unincorporated'.⁶⁹ Notably, this recognition comes with rights and responsibilities. While the Constitution and the relevant statutes may not outline 'responsibilities' for the environment and all it entails (for what other responsibilities or duties should we place on the environment while we already view it as the source of our livelihoods?), we may consider granting the same a legal personality for purposes of

Glenwood Publishers, Nairobi, 2015, chapt. 16; Muigua, K., *Alternative Dispute Resolution and Access to Justice in Kenya*, Glenwood Publishers, Nairobi, 2015.

⁶⁵ Stone, Christopher D. "Should Trees Have Standing? Towards Legal Rights for Natural Objects." *Southern California Law Review* 45 (1972): 450-501, 455.

⁶⁶ *Ibid*, 456.

⁶⁷ *Ibid*, 466.

⁶⁸ *Ibid*, 465, 470.

⁶⁹ Article 260, Constitution of Kenya, 2010.

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protecting it for its intrinsic value, away from the basis of taking care of it for the goods and services that we get from it as human beings. This constitutional provision may therefore need to be expanded in light of granting nature a 'legal personality' as was done in Ecuador and Bolivia, for the sake of protecting the environment for its intrinsic value in the ecosystem and not necessarily for the sake of the benefits that accrue to the human beings. The recognition the 'legal standing' and 'independent voice' of a major river on NZ's North Island (Whanganui River represents a noteworthy milestone in a broader movement towards the legal recognition of the rights of nature.⁷⁰ There is the case of the Río Atrato in Colombia, recognised as a legal person by the domestic Constitutional Court in November 2016, in a decision not released publicly until May 2017.⁷¹ According to the Colombian Constitutional Court, the Atrato River needs better care and is "subject to the rights that implicate its protection, conservation, maintenance and in this specific case, restoration." The Court also called out the state on its neglectful behaviour and ordered that the river be cleaned up.⁷² Commenting on the place of human beings in nature, the Colombian Constitutional Court stated as follows:

5.9. Finally, the ecocentric approach starts from a basic premise according to which the land does not belong to man and, on the contrary, assumes that man is part of the earth, like any other species [86]. According to this

⁷⁰ Good, Meg. "The river as a legal person: evaluating nature rights-based approaches to environmental protection in Australia." *National Environmental Law Review* 1 (2013): 34.

⁷¹ Elizabeth Macpherson and Felipe Clavijo Ospina, 'The Pluralism of River Rights in Aotearoa, New Zealand and Colombia' (SocArXiv 2020) <<https://osf.io/preprints/socarxiv/rdh4x/>> accessed 16 November 2020; 'Colombia's Constitutional Court Grants Rights to the Atrato River and Orders the Government to Clean up Its Waters' (*Mongabay Environmental News*, 22 May 2017) <<https://news.mongabay.com/2017/05/colombias-constitutional-court-grants-rights-to-the-atrato-river-and-orders-the-government-to-clean-up-its-waters/>> accessed 16 November 2020.

⁷² 'Colombia's Constitutional Court Grants Rights to the Atrato River and Orders the Government to Clean up Its Waters' (*Mongabay Environmental News*, 22 May 2017) <<https://news.mongabay.com/2017/05/colombias-constitutional-court-grants-rights-to-the-atrato-river-and-orders-the-government-to-clean-up-its-waters/>> accessed 16 November 2020.

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interpretation, *the human species is just one more event in a long evolutionary chain that has lasted for billions of years and therefore is not in any way the owner of other species, biodiversity, or resources, or the fate of the planet.* Consequently, this theory conceives nature as a real subject of rights that must be recognized by the States and exercised under the protection of its legal representatives, such as, for example, [namely] by the communities that inhabit nature or that have a special relationship with it (emphasis added).⁷³

The court's sentiments in the above case affirms the position that an anthropocentric approach to relating with the environment makes the humans forget that they are not really lords over every other aspect of the environment and their actions should reflect this.

The Court also commented on what they identified as bio-cultural rights and the special relationship that exists between a community's culture and the environment and had the following to say:

5.11. The first thing that must be pointed out is that so-called *biocultural rights, in their simplest definition, refer to the rights that ethnic communities have to administer and exercise autonomous guardianship over their territories --according to their own laws and customs --and the natural resources that make up their habitat, where their culture, their traditions and their way of life are developed based on the special relationship they have with the environment and biodiversity.* These rights result from the recognition of the deep and intrinsic connection that exists between nature, its resources, and the culture of the ethnic and indigenous communities that inhabit them, which are interdependent with each other and cannot be understood in isolation. The central elements of this approach establish an intrinsic link between nature and culture, and the diversity of the human species as part of nature and manifestation of multiple life forms. From this perspective, the conservation of biodiversity necessarily leads to the preservation and protection of the ways of life and

⁷³ Judgment T-622/16 (The Atrato River Case), Constitutional Court of Colombia (2016), para. 5.9.

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cultures that interact with it. In a country as rich in environmental aspects as Colombia, which is considered fifth among the seventeen most mega-biodiverse countries in the world, and which has natural forests and paramos in about 53% of its territory --which provides water to 70% of the national population --and in which there are more than 54, 871 animal and plant species, 341 different types of ecosystems, and 32 terrestrial biomes [92], and including important ancestral cultures. The protection and preservation of cultural diversity is essential to the conservation and sustainable use of biological diversity and vice versa (emphasis added).⁷⁴

Regarding the above two instances (Colombia and New Zealand), it has also been noted that “recognizing that the river is a person is an attempt to accommodate diverse legal and cultural interests in the river, in order to establish a new collaborative relationship between the state and river communities. Whether either model results in improved river outcomes, or increased indigenous or community jurisdiction to govern, turns not on the fiction that the river is a person but on the surrounding institutional framework, which has been carefully designed to engender enforceability”.⁷⁵

It is therefore worth considering extending the same treatment to the natural resources and the environment in Kenya and also recognise the special relationship between nature and human beings especially among the indigenous communities and those who interact with certain aspects of the environment on a day to day basis. It is not enough for the Constitution of Kenya to place what seems like a secondary duty on every persons to merely ‘cooperate’ with State organs and other persons to protect and conserve the environment and ensure ecologically sustainable development and use of natural resources.⁷⁶ There is a need for active involvement of communities

⁷⁴ Ibid, para. 5.11.

⁷⁵ Elizabeth Macpherson and Felipe Clavijo Ospina, ‘The Pluralism of River Rights in Aotearoa, New Zealand and Colombia’ (SocArXiv 2020) <<https://osf.io/preprints/socarxiv/rdh4x/>> accessed 16 November 2020.

⁷⁶ Article 69(2), Constitution of Kenya 2010.

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in these efforts. In some instances, they could even elect amongst themselves who would act like the 'legal guardians' of certain resources or natural features on behalf of the community and country in general. Article 11 of the Constitution on culture should be positively implemented and extended to utilize unique communities' cultural and traditional ecological knowledge to achieve conservation and sustainability.⁷⁷ The argument for "personifying" the environment would allow the law to view the guardian of the natural object as the guardian of unborn generations, as well as of the otherwise unrepresented, but distantly injured, contemporary humans.⁷⁸

It is, however, acknowledged that legal person models are certainly context-specific, but further comparative studies of the Colombian and New Zealand models is needed to examine if and how legal personality improves river governance and state-community relationships, not just for future generations but for the entire human species.⁷⁹

2.5 Conclusion

As rightly pointed out, whether nature has moral rights is likely to remain debated, but nature clearly can have legal rights, and does so in jurisdictions

⁷⁷ 11. Culture

(1) This Constitution recognises culture as the foundation of the nation and as the cumulative civilization of the Kenyan people and nation.

(2) The State shall--

(a) promote all forms of national and cultural expression through literature, the arts, traditional celebrations, science, communication, information, mass media, publications, libraries and other cultural heritage;

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

(c) promote the intellectual property rights of the people of Kenya.

(3) Parliament shall enact legislation to--

(a) ensure that communities receive compensation or royalties for the use of their cultures and cultural heritage; and

(b) recognise and protect the ownership of indigenous seeds and plant varieties, their genetic and diverse characteristics and their use by the communities of Kenya.

⁷⁸ Stone, Christopher D., *Should Trees Have Standing? Toward Legal Rights for Natural Objects*, 475.

⁷⁹ *Ibid*, 30.

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that have recognized, granted, or enacted them.⁸⁰ Arguably, rights of nature may offer benefits lacking in other types of legal protection for the environment, and these nature rights can lead to a remedy when regulations fail to correct injustices.⁸¹ This is because, majority or all of conservation laws only seek to protect the nature from destruction but do not expressly grant nature the right to exist on their own, so that if these conservation laws were to be repealed, there would be no incentive to protect the nature from destruction or overexploitation.

Arguably, nature should be treated as the possessor of intrinsic values and these values are proper to the environment itself and do not depend on its usefulness or appropriation by human beings; they represent the intrinsic value of living beings and their physical underpinning.⁸² The implications of this ecocentric/biocentric approach would be at least on three levels: ethical, legitimizing a debate on the values the non-human environment encompasses; moral, from which obligations such as ensuring the preservation of biodiversity are derived; and political, expressed in aspects that range from Constitutional authority to the elaboration of a new legal framework.⁸³

An anthropocentric approach does not afford proper protection of natural resources as it leans towards ensuring that these resources are taken care of as a means towards satisfying the needs of humankind as opposed to protecting them from destruction based on their own intrinsic value. It is time for stakeholders to reconsider the approach taken in coming up with environmental and natural resources laws in Kenya. An ecocentric approach which would enable nature to be granted legal personality would possibly achieve better results in conserving the environmental resources. It is for

⁸⁰ Guillaume Chapron, Yaffa Epstein, José Vicente López-Bao, 'A rights revolution for nature,' *Science*, 1.

⁸¹ *Ibid*, 2.

⁸² 'The Political Ecology of Nature in the Bolivian and Ecuadorian Constitutions - Rosa Luxemburg Foundation'
<<https://www.rosalux.org.ec/en/the-political-ecology-of-nature-in-the-bolivian-and-ecuadorian-constitutions/>> accessed 10 November 2020.

⁸³ *Ibid*.

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this reason that there arises a need for taking an approach that strikes a balance between anthropocentrism and ecocentrism in efforts geared towards addressing the continuing environmental uncertainty in Kenya.⁸⁴ The conservation and protection of environmental and natural resources should be based on the recognition of the intrinsic values of the resources and the whole ecological system and not merely as part of securing human needs that rely on these resources for satisfaction. It is the high time that human beings recognised that they are merely a part of the larger natural system and not the fulcrum around which the system revolves as the current human beings mentality seems to suggest, at least through their actions.

⁸⁴ Stephen Gough, William Scott and Andrew Stables, 'Beyond O'Riordan: Balancing Anthropocentrism and Ecocentrism' (2000) 9 *International Research in Geographical and Environmental Education* 36.

CHAPTER THREE

Combating Climate Change in Kenya for Environmental Security and Sustainable Development

3.1 Introduction

Climate change remains one of the main global challenges that has affected both developed and developing countries in their efforts towards achievement of the sustainable development agenda although it is arguable that the developing countries have been affected in greater ways.¹ This is because, since the environment remains the main source of raw materials for national development and a source of livelihoods for many communities especially those living within the rural settings, and climate change affects the ability of the environment to supply these needs, climate change has a direct effect on the livelihoods of communities as well as countries' ability to achieve growth and development. The year 2020 indeed proved how harsh climate change can be and Corona Virus pandemic (Covid-19) did not make things any better. It has been observed that from wildfires in California and locust attacks in Ethiopia and Kenya to job losses caused by pandemic lockdowns across the world, climate change and Covid-19 disrupted food production and tipped millions more people into hunger in 2020.² In addition, Oxfam has estimated that more than 50 million people in East and Central Africa require emergency food aid – and those numbers are set to rise as the region braces for a harsh drought linked to the La Nina climate pattern, as well as more locust swarms.³ Indeed, commentators have

¹ 'Unprecedented Impacts of Climate Change Disproportionately Burdening Developing Countries, Delegate Stresses, as Second Committee Concludes General Debate | Meetings Coverage and Press Releases' <<https://www.un.org/press/en/2019/gaef3516.doc.htm>> accessed 23 January 2021; 'Untitled' <<https://unfccc.int/news/impacts-of-climate-change-on-sustainable-development-goals-highlighted-at-high-level-political-forum>> accessed 23 January 2021.

² 'COVID-19 Caused Food Insecurity to Soar, But Climate Change Will Be Much Worse - Homeland Security Today' <<https://www.hstoday.us/subject-matter-areas/emergency-preparedness/covid-19-caused-food-insecurity-to-soar-but-climate-change-will-be-much-worse/>> accessed 17 January 2021.

³ Ibid.

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expressed their fears that the situation could worsen from the current year 2021 as both the coronavirus crisis and wild weather exacerbate fragile conditions linked to conflicts and poverty in many parts of the globe, with the head of the U.N. World Food Program (WFP) warning that “even before Covid-19 hit, 135 million people were marching towards the brink of starvation; this could double to 270 million within a few short months”.⁴

Climate change thus remains a challenge to many because, as the United Nations Environment Programme observes, climate change is increasing the frequency and intensity of extreme weather events such as heat waves, droughts, floods and tropical cyclones, aggravating water management problems, reducing agricultural production and food security, increasing health risks, damaging critical infrastructure and interrupting the provision of basic services such water and sanitation, education, energy and transport.⁵

It is for this reason that there have been global calls on governments and all other stakeholders to put in place climate change mitigation measures and ensure that their economies become resilient. Climate change is one of the main environmental goals under the United Nation’s *2030 Agenda for Sustainable Development Goals*⁶ (SDGs) as captured under Sustainable Development Goal 13 meant to help countries achieve resilience and build adaptive capacity. SDG Goal 13 calls on countries to take urgent action to combat climate change and its impacts.⁷ SDG Goal 13 targets require countries to: strengthen resilience and adaptive capacity to climate-related

⁴ Ibid; ‘WFP Chief Warns of Hunger Pandemic as COVID-19 Spreads (Statement to UN Security Council) | World Food Programme’ <<https://www.wfp.org/news/wfp-chief-warns-hunger-pandemic-covid-19-spreads-statement-un-security-council>> accessed 17 January 2021.

⁵ Environment UN, ‘GOAL 13: Climate Action’ (UNEP - UN Environment Programme, 2 October 2017) <<http://www.unenvironment.org/explore-topics/sustainable-development-goals/why-do-sustainable-development-goals-matter/goal-13>> accessed 17 January 2021.

⁶ UN General Assembly, *Transforming our world: the 2030 Agenda for Sustainable Development*, 21 October 2015, A/RES/70/1.

⁷ Sustainable Development Goal 13.

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hazards and natural disasters in all countries;⁸ integrate climate change measures into national policies, strategies and planning;⁹ improve education, awareness-raising and human and institutional capacity on climate change mitigation, adaptation, impact reduction and early warning;¹⁰ implement the commitment undertaken by developed-country parties to the United Nations Framework Convention on Climate Change to a goal of mobilizing jointly \$100 billion annually by 2020 from all sources to address the needs of developing countries in the context of meaningful mitigation actions and transparency on implementation and fully operationalize the Green Climate Fund through its capitalization as soon as possible;¹¹ and promote mechanisms for raising capacity for effective climate change-related planning and management in least developed countries and small island developing States, including focusing on women, youth and local and marginalized communities¹². Notably, the 2030 Agenda acknowledges that the United Nations Framework Convention on Climate Change is the primary international intergovernmental forum for negotiating the global response to climate change.¹³

The above goals and targets are commendable and are meant to help countries come up with climate change mitigation and adaptation mechanisms to combat the challenge of climate change. However, due to their development activities and approaches, both developed and developing countries have not managed to combat climate change. Indeed, it has been observed that despite the growing amount of climate change concern, mitigation efforts, legislation, and international agreements that have reduced emissions in some places, the continued economic growth of the less developed world has increased global greenhouse gases emission, with the time between 2000 and 2010 experiencing the largest increases since

⁸ Target 13.1, SDG Goal 13.

⁹ Target 13.2, SDG Goal 13.

¹⁰ Target 13.3, SDG Goal 13.

¹¹ Target 13.a, SDG Goal 13.

¹² Target 13.b, SDG Goal 13.

¹³ See DGS Goal 13 (asterisk).

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1970.¹⁴ According to scientific reports, the Earth's mean surface temperature in 2020 was 1.25°C above the global average between 1850 and 1900, largely attributable to greenhouse gases from human activities.¹⁵ It has also been reported that human activities are estimated to have caused approximately 1.0°C of global warming above pre-industrial levels, with a likely range of 0.8°C to 1.2°C and global warming is likely to reach 1.5°C between 2030 and 2052 if it continues to increase at the current rate.¹⁶

It must also be acknowledged that due to their differing economies and unique challenges, developing countries have far more been affected by climate change compared to the developed countries.¹⁷ Kenya is no exception especially considering that its economy is considered to be agricultural based and much of its rural population is still highly dependent on agriculture and environment to meet their livelihood needs.¹⁸ This has

¹⁴ '15.5: Anthropogenic Causes of Climate Change' (*Geosciences LibreTexts*, 4 November 2019) <[https://geo.libretexts.org/Bookshelves/Geology/Book%3A_An_Introduction_to_Geology_\(Johnson_Affolter_Inkenbrandt_and_Mosher\)/15%3A_Global_Climate_Change/15.05%3A_Anthropogenic_Causes_of_Climate_Change](https://geo.libretexts.org/Bookshelves/Geology/Book%3A_An_Introduction_to_Geology_(Johnson_Affolter_Inkenbrandt_and_Mosher)/15%3A_Global_Climate_Change/15.05%3A_Anthropogenic_Causes_of_Climate_Change)> accessed 17 January 2021.

¹⁵ Wilby R, 'Climate Change: What Would 4°C of Global Warming Feel Like?' (*The Conversation*) <<http://theconversation.com/climate-change-what-would-4-c-of-global-warming-feel-like-152625>> accessed 17 January 2021.

¹⁶ Summary for Policymakers – Global Warming of 1.5 °C' <<https://www.ipcc.ch/sr15/chapter/spm/>> accessed 17 January 2021.

¹⁷ 'Unprecedented Impacts of Climate Change Disproportionately Burdening Developing Countries, Delegate Stresses, as Second Committee Concludes General Debate | Meetings Coverage and Press Releases' <<https://www.un.org/press/en/2019/gaef3516.doc.htm>> accessed 23 January 2021.

¹⁸ Alila, Patrick O., and Rosemary Atieno. "Agricultural policy in Kenya: Issues and processes." *Nairobi: Institute of Development Studies* (2006); Faling, Marijn. "Framing agriculture and climate in Kenyan policies: A longitudinal perspective." *Environmental Science & Policy* 106 (2020): 228-239; Faling, Marijn, and Robbert Biesbroek. "Cross-boundary policy entrepreneurship for climate-smart agriculture in Kenya." *Policy Sciences* 52, no. 4 (2019): 525-547; Haradhan Kumar Mohajan, 'Food and Nutrition Scenario of Kenya' (2014) 2 *American Journal of Food and Nutrition* 28.

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resulted in environmental degradation due to pollution and indiscriminate use of available environmental and natural resources.¹⁹ This chapter adds to the existing literature in this area on how the country can successfully combat climate change in its bid to achieve sustainable development. It is imperative that countries combat climate change urgently considering that it is estimated that without action, by 2050, 68% of humanity may live in urban areas and populations in the tropics will be most exposed to extreme humid heat.²⁰ The World has been struggling with Covid-19 pandemic since March 2020 and the negative effect on economies and livelihoods has been enormous. Despite this, some commentators have argued that climate change could be more devastating than Covid-19.²¹

3.2 Climate Change: Definition and Causes

Climate is defined as the temperature and precipitation patterns and range of variability averaged over the long-term for a particular region.²² On the other hand, climate change has been defined as ‘a long-term shift in the average weather conditions of a region, such as its typical temperature, rainfall, and windiness’.²³ The *United Nations Framework Convention on*

¹⁹ Abioye O Fayiga, Mabel O Ipinmoroti and Tait Chirenje, ‘Environmental Pollution in Africa’ (2018) 20 *Environment, Development and Sustainability* 41; (PDF) *Environmental Degradation: Causes, Impacts and Mitigation* (*ResearchGate*) <https://www.researchgate.net/publication/279201881_Environmental_Degradation_Causes_Impacts_and_Mitigation> accessed 23 January 2021.

²⁰ Wilby R, ‘Climate Change: What Would 4°C of Global Warming Feel Like?’ (*The Conversation*) <<http://theconversation.com/climate-change-what-would-4-c-of-global-warming-feel-like-152625>> accessed 17 January 2021.

²¹ Clifford C, ‘Bill Gates: Climate Change Could Be More Devastating than Covid-19 Pandemic – This Is What the US Must Do to Prepare’ (*CNBC*, 8 January 2021) <<https://www.cnbc.com/2021/01/08/bill-gates-climate-change-could-be-worse-than-covid-19.html>> accessed 17 January 2021.

²² ‘15.1: Global Climate Change’ (*Geosciences LibreTexts*, 26 December 2019) <[https://geo.libretexts.org/Bookshelves/Geology/Book%3A_An_Introduction_to_Geology_\(Johnson_Affolter_Inkenbrandt_and_Mosher\)/15%3A_Global_Climate_Change/15.01%3A_Global_Climate_Change](https://geo.libretexts.org/Bookshelves/Geology/Book%3A_An_Introduction_to_Geology_(Johnson_Affolter_Inkenbrandt_and_Mosher)/15%3A_Global_Climate_Change/15.01%3A_Global_Climate_Change)> accessed 17 January 2021.

²³ Canada E and CC, ‘Climate Change Concepts’ (*aem*, 26 September 2018) <<https://www.canada.ca/en/environment-climate-change/services/climate-change/canadian-centre-climate-services/basics/concepts.html>> accessed 17 January 2021.

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Climate Change ²⁴(UNFCCC) defines "climate change" to mean a change of climate which is attributed directly or indirectly to human activity that alters the composition of the global atmosphere and which is in addition to natural climate variability observed over comparable time periods.²⁵

It has been pointed out that while prehistoric changes in climate have been very slow since climate changes typically occur slowly over many millions of years, the climate changes observed today are rapid and largely human-caused.²⁶

According to the available scientific data, anthropogenic climate change, or, human-caused climate change is believed to be causing rapid changes to the climate, which will cause severe environmental damage.²⁷ This is mainly attributed to anthropogenic greenhouse gases emissions, mostly carbon dioxide (CO₂), from fossil fuel combustion and industrial processes and the following economic sectors: electricity and heat production; agriculture, forestry, and land use; industry; transportation including automobiles; other energy production; and buildings.²⁸

²⁴ UN General Assembly, *United Nations Framework Convention on Climate Change: resolution / adopted by the General Assembly*, 20 January 1994, A/RES/48/189.

²⁵ *Ibid*, Article 1(2).

²⁶ '15.5: Anthropogenic Causes of Climate Change' (*Geosciences LibreTexts*, 4 November 2019)

<[https://geo.libretexts.org/Bookshelves/Geology/Book%3A_An_Introduction_to_Geology_\(Johnson_Affolter_Inkenbrandt_and_Mosher\)/15%3A_Global_Climate_Change/15.05%3A_Anthropogenic_Causes_of_Climate_Change](https://geo.libretexts.org/Bookshelves/Geology/Book%3A_An_Introduction_to_Geology_(Johnson_Affolter_Inkenbrandt_and_Mosher)/15%3A_Global_Climate_Change/15.05%3A_Anthropogenic_Causes_of_Climate_Change)> accessed 17 January 2021.

²⁷*Ibid*.

²⁸ '15.5: Anthropogenic Causes of Climate Change' (*Geosciences LibreTexts*, 4 November 2019)

<[https://geo.libretexts.org/Bookshelves/Geology/Book%3A_An_Introduction_to_Geology_\(Johnson_Affolter_Inkenbrandt_and_Mosher\)/15%3A_Global_Climate_Change/15.05%3A_Anthropogenic_Causes_of_Climate_Change](https://geo.libretexts.org/Bookshelves/Geology/Book%3A_An_Introduction_to_Geology_(Johnson_Affolter_Inkenbrandt_and_Mosher)/15%3A_Global_Climate_Change/15.05%3A_Anthropogenic_Causes_of_Climate_Change)> accessed 17 January 2021;

'How We Know Today's Climate Change Is Not Natural' (*State of the Planet*, 4 April 2017) <<https://blogs.ei.columbia.edu/2017/04/04/how-we-know-climate-change-is-not-natural/>> accessed 17 January 2021;

'The Science of Carbon Dioxide and Climate' (*State of the Planet*, 10 March 2017) <<https://blogs.ei.columbia.edu/2017/03/10/the-science-of-carbon-dioxide-and-climate/>> accessed 17 January 2021.

3.3 The Legal Framework on Climate Change Mitigation and Adaptation

Climate change mitigation has been defined as a human-mediated reduction of the anthropogenic forcing of the climate system that includes strategies to reduce GHG sources and emissions and enhancing GHG sinks.²⁹ At the global scene, there exist a number of related environmental legal instruments, plans and programmes aimed at combating climate change.

3.4 International Legal Framework on Climate Change Mitigation and Adaptation

a) Montreal Protocol on Substances the Deplete the Ozone Layer

The *Montreal Protocol on Substances the Deplete the Ozone Layer* was signed in 1987 and entered into force in 1989 as a global agreement to protect the Earth's ozone layer by phasing out the chemicals that deplete it, a plan that includes both the production and consumption of ozone-depleting substances.³⁰ The Protocol is believed to have successfully met its objectives thus far as it continues to safeguard the ozone layer today.³¹

b) Vienna Convention for the Protection of the Ozone Layer

The *Vienna Convention for the Protection of the Ozone Layer* was the first convention of any kind to be signed by every country involved, taking effect in 1988 and reaching universal ratification in 2009.³² The Vienna Convention obligates the Parties to take appropriate measures in accordance with the provisions of this Convention and of those protocols in force to which they are party to protect human health and the environment against adverse

²⁹ Rinku Singh and GS Singh, 'Traditional Agriculture: A Climate-Smart Approach for Sustainable Food Production' (2017) 2 *Energy, Ecology and Environment* 296.

³⁰ 'The Montreal Protocol on Substances That Deplete the Ozone Layer | Ozone Secretariat'

<<https://ozone.unep.org/treaties/montreal-protocol/montreal-protocol-substances-deplete-ozone-layer>> accessed 21 January 2021.

³¹ Ibid.

³² 'The Vienna Convention for the Protection of the Ozone Layer | Ozone Secretariat' <<https://ozone.unep.org/treaties/vienna-convention>> accessed 21 January 2021.

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effects resulting or likely to result from human activities which modify or are likely to modify the ozone layer.³³

c) The Kyoto Protocol

The *Kyoto Protocol* was adopted on 11 December 1997 and entered into force on 16 February 2005, currently with 192 Parties.³⁴ The Kyoto protocol was the first agreement between nations to mandate country-by-country reductions in greenhouse-gas emissions. Kyoto emerged from the UNFCCC, which was signed by nearly all nations at the 1992 Earth Summit.³⁵ The Kyoto Protocol operationalizes the United Nations Framework Convention on Climate Change by committing industrialized countries and economies in transition to limit and reduce greenhouse gases (GHG) emissions in accordance with agreed individual targets,³⁶ whereas the Convention itself only asks those countries to adopt policies and measures on mitigation and to report periodically.³⁷ Notably, the Kyoto Protocol only binds developed countries, and places a heavier burden on them under the principle of “common but differentiated responsibility and respective capabilities”, because it recognizes that they are largely responsible for the current high levels of GHG emissions in the atmosphere.³⁸ While industrialized nations pledged to cut their yearly emissions of carbon, as measured in six greenhouse gases, by varying amounts, averaging 5.2%, by 2012 as compared to 1990, some almost achieved these targets while others like China and United States exceeded the targets by producing more carbon to the point of cancelling the progress made by all other states.³⁹ In addition, some countries such as India and

³³Vienna Convention for the Protection of the Ozone Layer, Article 2(1).

³⁴ ‘Untitled’ <https://unfccc.int/kyoto_protocol> accessed 21 January 2021.

³⁵ Extract from The Rough Guide to Climate Change, ‘What Is the Kyoto Protocol and Has It Made Any Difference?’ (*the Guardian*, 11 March 2011) <<http://www.theguardian.com/environment/2011/mar/11/kyoto-protocol>> accessed 21 January 2021.

³⁶ ‘Untitled’ <https://unfccc.int/kyoto_protocol> accessed 21 January 2021.

³⁷ Ibid.

³⁸ Ibid.

³⁹ Extract from The Rough Guide to Climate Change, ‘What Is the Kyoto Protocol and Has It Made Any Difference?’ (*the Guardian*, 11 March 2011)

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China were never in the list of the original 37 developed countries bound by the Protocol yet China and India together account for approximately 35% of total carbon emissions, as of 2020, while the developed nations of the UK, France, and Germany combined, only account for 4% of the world's carbon emissions.⁴⁰ The Kyoto Protocol was essentially replaced by the Paris Climate Accord in 2015.⁴¹

d) Doha Amendment to the Kyoto Protocol

Parties to the Kyoto Protocol adopted an amendment to the Kyoto Protocol by decision 1/CMP.8 in accordance with Articles 20 and 21 of the Kyoto Protocol, at the eighth session of the Conference of the Parties serving as the meeting of the Parties to the Kyoto Protocol (CMP) held in Doha, Qatar, on 8 December 2012.⁴² As of 28 October 2020, 147 Parties had deposited their instrument of acceptance, therefore, the threshold for entry into force of the Doha Amendment had been met.⁴³

The Doha Amendment refers to the changes made to the Kyoto Protocol in 2012, after the First Commitment Period of the Kyoto Protocol concluded. The Amendment adds new emission reduction targets for Second Commitment Period (2012-2020) for participating countries.⁴⁴

e) Paris Climate Accord, 2015

The Paris Agreement is a legally binding international treaty on climate change, adopted by 196 Parties at COP 21 in Paris, on 12 December 2015 and

<<http://www.theguardian.com/environment/2011/mar/11/kyoto-protocol>> accessed 21 January 2021.

⁴⁰ 'Kyoto Protocol - Overview, Components, Current State' (*Corporate Finance Institute*)

<<https://corporatefinanceinstitute.com/resources/knowledge/other/kyoto-protocol/>> accessed 21 January 2021.

⁴¹ Ibid.

⁴² 'Untitled' <<https://unfccc.int/process/the-kyoto-protocol/the-doha-amendment>> accessed 21 January 2021.

⁴³ Ibid.

⁴⁴ 'Doha Amendment to the Kyoto Protocol (2012)' (*Cop23*) <<https://cop23.com.fj/knowledge/doha-amendment-kyoto-protocol-2012/>> accessed 21 January 2021.

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entered into force on 4 November 2016.⁴⁵ Its goal is to limit global warming to well below 2, preferably to 1.5 degrees Celsius, compared to pre-industrial levels.⁴⁶ Unlike the Kyoto Protocol, the Paris Agreement is a landmark in the multilateral climate change process because, for the first time, a binding agreement brings all nations into a common cause to undertake ambitious efforts to combat climate change and adapt to its effects.⁴⁷

The 26th UN Climate Change Conference of the Parties (COP26) will be held in Glasgow from 1st to 12th November 2021.⁴⁸ The COP26 summit is expected to bring parties together to accelerate action towards the goals of the Paris Agreement and the UN Framework Convention on Climate Change.⁴⁹

f) United Nations Convention to Combat Desertification

The objective of the *United Nations Convention to Combat Desertification*⁵⁰ is to combat desertification and mitigate the effects of drought in countries experiencing serious drought and/or desertification, particularly in Africa, through effective action at all levels, supported by international cooperation and partnership arrangements, in the framework of an integrated approach which is consistent with Agenda 21, with a view to contributing to the achievement of sustainable development in affected areas.⁵¹ This is to be achieved through long-term integrated strategies that focus simultaneously, in affected areas, on improved productivity of land, and the rehabilitation, conservation and sustainable management of land and water resources, leading to improved living conditions, in particular at the community level.⁵²

⁴⁵ 'Untitled' <<https://unfccc.int/process-and-meetings/the-paris-agreement/the-paris-agreement>> accessed 21 January 2021.

⁴⁶ Ibid.

⁴⁷ Ibid.

⁴⁸ 'UN Climate Change Conference (COP26) at the SEC - Glasgow 2021' (*UN Climate Change Conference (COP26) at the SEC - Glasgow 2021*) <<https://ukcop26.org/>> accessed 17 January 2021.

⁴⁹ Ibid.

⁵⁰ United Nations Convention to Combat Desertification (1994).

⁵¹ Article 2(1).

⁵² Article 2(2).

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g) Agenda 21

Agenda 21 is a comprehensive plan of action to be taken globally, nationally and locally by organizations of the United Nations System, Governments, and Major Groups in every area in which human impacts on the environment.⁵³

h) United Nations Framework Convention on Climate Change (UNFCCC)

The *United Nations Framework Convention on Climate Change*⁵⁴ was passed to achieve, in accordance with the relevant provisions of the Convention, stabilization of greenhouse gas concentrations in the atmosphere, at a level that would prevent dangerous anthropogenic interference with the climate system. Such a level should be achieved within a time-frame sufficient to allow ecosystems to adapt naturally to climate change, to ensure that food production is not threatened and to enable economic development to proceed in a sustainable manner.⁵⁵

In their actions to achieve the objective of the Convention and to implement its provisions, the Parties are to be guided, *inter alia*, by the following principles: the Parties should protect the climate system for the benefit of present and future generations of humankind, on the basis of equity and in accordance with their common but differentiated responsibilities and respective capabilities. Accordingly, the developed country Parties should take the lead in combating climate change and the adverse effects thereof;⁵⁶ the specific needs and special circumstances of developing country Parties, especially those that are particularly vulnerable to the adverse effects of climate change, and of those Parties, especially developing country Parties, that would have to bear a disproportionate or abnormal burden under the

⁵³ 'Agenda 21 .. Sustainable Development Knowledge Platform' <<https://sustainabledevelopment.un.org/outcomedocuments/agenda21>> accessed 21 January 2021.

⁵⁴ UN General Assembly, *United Nations Framework Convention on Climate Change: resolution / adopted by the General Assembly*, 20 January 1994, A/RES/48/189.

⁵⁵ *Ibid*, Article 2.

⁵⁶ *United Nations Framework Convention on Climate Change*, Article 3(1).

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Convention, should be given full consideration;⁵⁷ the Parties should take precautionary measures to anticipate, prevent or minimize the causes of climate change and mitigate its adverse effects. Where there are threats of serious or irreversible damage, lack of full scientific certainty should not be used as a reason for postponing such measures, taking into account that policies and measures to deal with climate change should be cost-effective so as to ensure global benefits at the lowest possible cost. To achieve this, such policies and measures should take into account different socio-economic contexts, be comprehensive, cover all relevant sources, sinks and reservoirs of greenhouse gases and adaptation, and comprise all economic sectors. Efforts to address climate change may be carried out cooperatively by interested Parties;⁵⁸ the Parties have a right to, and should, promote sustainable development. Policies and measures to protect the climate system against human-induced change should be appropriate for the specific conditions of each Party and should be integrated with national development programmes, taking into account that economic development is essential for adopting measures to address climate change;⁵⁹ the Parties should cooperate to promote a supportive and open international economic system that would lead to sustainable economic growth and development in all Parties, particularly developing country Parties, thus enabling them better to address the problems of climate change. Measures taken to combat climate change, including unilateral ones, should not constitute a means of arbitrary or unjustifiable discrimination or a disguised restriction on international trade.⁶⁰

i) Intergovernmental Panel on Climate Change (IPCC)

The Intergovernmental Panel on Climate Change (IPCC) is the United Nations body established in 1988 for assessing the science related to climate change.⁶¹ The Intergovernmental Panel on Climate Change (IPCC) collects, reviews, and summarizes the best information on climate change and its

⁵⁷ *United Nations Framework Convention on Climate Change*, Article 3(2).

⁵⁸ *United Nations Framework Convention on Climate Change*, Article 3(3).

⁵⁹ *Ibid*, Article 3(4).

⁶⁰ *Ibid*, Article 3(5).

⁶¹ 'IPCC – Intergovernmental Panel on Climate Change' <<https://www.ipcc.ch/>> accessed 21 January 2021.

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impacts, and puts forward possible solutions.⁶² IPCC often discharges its work through scientific reports, summarizing current and relevant findings in the field and written for policymakers and scientists, but they are available to everyone.⁶³

3.5 Kenya's Legal Framework on Climate Change Mitigation

i. Environmental Management and Co-ordination Act, 1999

The *Environmental Management and Co-ordination Act, 1999*⁶⁴ (EMCA) mandates the Cabinet Secretary in charge of environmental matters in consultation with the National Environment Management Authority, to undertake or commission other persons to undertake national studies and give due recognition to developments in scientific knowledge relating to substances, activities and practices that deplete the ozone layer to the detriment of public health and the environment.⁶⁵ The Cabinet Secretary in consultation with the Authority, is then required to issue guidelines and institute programmes concerning the: elimination of substances that deplete the stratospheric ozone layer; controlling of activities and practices likely to lead to the degradation of the ozone layer and the stratosphere; reduction and minimisation of risks to human health created by the degradation of the ozone layer and the stratosphere; and formulate strategies, prepare and evaluate programmes for phasing out ozone depleting substances.⁶⁶

The Act also mandates the Cabinet Secretary, in consultation with relevant lead agencies, to issue guidelines and prescribe measures on climate change.⁶⁷ EMCA also provides for fiscal incentives that are designed to promote climate change mitigation. It empowers the Cabinet Secretary

⁶²The Intergovernmental Panel on Climate Change' (MIT Climate Portal) <<https://climate.mit.edu/explainers/intergovernmental-panel-climate-change>> accessed 21 January 2021.

⁶³ Ibid.

⁶⁴ Environmental Management and Co-ordination Act, No. 8 of 1999, Laws of Kenya.

⁶⁵ Ibid, sec. 56(1).

⁶⁶ Ibid, sec. 56(2).

⁶⁷ Ibid, sec. 56A.

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responsible for Finance, on the recommendation of the National Council of Public benefit organizations, to propose to Government tax and other fiscal incentives, disincentives or fees to induce or promote the proper management of the environment and natural resources or the prevention or abatement of environmental degradation.⁶⁸ The tax and fiscal incentives, disincentives or fees may include: customs and excise waiver in respect of imported capital goods which prevent or substantially reduce environmental degradation caused by an undertaking; tax rebates to industries or other establishments that invest in plants, equipment and machinery for pollution control, re-cycling of wastes, water harvesting and conservation, prevention of floods and for using other energy resources as substitutes for hydrocarbons; tax disincentives to deter bad environmental behaviour that leads to depletion of environmental resources or that cause pollution; or user fees to ensure that those who use environmental resources pay proper value for the utilization of such resources.⁶⁹

EMCA also provides for Strategic Environmental Assessments⁷⁰; Environmental Impact Assessment⁷¹; Environmental Audit⁷²; and Environmental Monitoring⁷³, all of which are meant to protect the environment from environmentally degrading human activities.

ii. Climate Change Action Plan 2018–2022

The Climate Change Action Plan 2018–2022⁷⁴ aims to further Kenya's development goals by providing mechanisms and measures that achieve low carbon climate resilient development. NCCAP 2018-2022 builds on the first action plan (2013-2017), sets out actions to implement the Climate

⁶⁸Environmental Management and Co-ordination Act, sec. 57(1).

⁶⁹ Ibid, sec. 57(2).

⁷⁰ Ibid, sec. 57A.

⁷¹ Ibid, sec. 58.

⁷² Ibid, sec. 68.

⁷³ Ibid, sec. 69.

⁷⁴ Government of the Republic of Kenya (2018). *National Climate Change Action Plan 2018-2022*. Ministry of Environment and Forestry, Nairobi.

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Change Act (2016), and provides a framework for Kenya to deliver on its Nationally Determined Contribution (NDC) to the Paris Agreement.⁷⁵

iii. Climate Change Act, 2016

The Climate Change Act 2016⁷⁶ was enacted to provide for a regulatory framework for enhanced response to climate change; to provide for mechanism and measures to achieve low carbon climate development, and for connected purposes.⁷⁷ The Act is to be applied for the development, management, implementation and regulation of mechanisms to enhance climate change resilience and low carbon development for the sustainable development of Kenya.⁷⁸

3.6 Climate Change Mitigation in Kenya: Challenges and Prospects

Africa is classified as one of the continents highly vulnerable to climate change due to several reasons: high poverty level, high dependence on rain-fed agriculture, poor management of natural resources, capacity/technology limitations, weak infrastructure, and less efficient governance/institutional setup.⁷⁹ Arguably, Kenya's challenges as far as combating climate change is concerned are not any different from the ones identified above.

Climate change impacts and the associated socio-economic losses on Kenya have been exacerbated by the country's high dependence on climate sensitive natural resources.⁸⁰ The main climate hazards include droughts and floods which cause economic losses estimated at 3% of the country's Gross Domestic Product (GDP) while Kenya's total greenhouse gas (GHG)

⁷⁵ National Climate Change Action Plan: 2018-2022, p.4.

⁷⁶ Climate Change Act, No. 11 of 2016, Laws of Kenya.

⁷⁷ Ibid, Preamble.

⁷⁸ Ibid, sec. 3(1).

⁷⁹ Kimaro, Didas N., Alfred N. Gichu, Hezron Mogaka, Brian E. Isabirye, and Kifle Woldearegay. "Climate Change Mitigation and Adaptation in ECA/SADC/COMESA region: Opportunities and Challenges." <https://www.researchgate.net/publication/346628199_Climate_Change_Mitigation_and_Adaptation_in_ECASADCCOMESA_region_Opportunities_and_Challenges> accessed 17 January 2021.

⁸⁰ GoK, I. N. D. C. "Kenya's Intended Nationally Determined Contribution." (2015).

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emissions are relatively low, out of which 75% are from the land use, land-use change and forestry and agriculture sectors.⁸¹ Kenya's Vision 2030 which seeks to convert the country into a newly industrialized middle income country by 2030 is expected to increase emissions from the energy sector.⁸²

Kenya's agricultural sector has been greatly affected by climate change and has also seen growth in use of farming chemicals. The growing population in Kenya coupled with dwindling rainfall and shrinking land parcels have all led to the adoption of modern commercial approaches to agricultural production to achieve food security which has coincidentally greatly contributed to environmental degradation and climate change.⁸³

As opposed to the highly commercialized agricultural practices, indigenous agriculture systems are believed to be diverse, adaptable, nature friendly and productive through such approaches as mixed cropping which not only decreases the risk of crop failure, pest and disease but also diversifies the food supply and the higher vegetation diversity in the form of crops and trees escalates the conversion of CO₂ to organic form, thus reducing global warming.⁸⁴

Kenya submitted its Intended Nationally Determined Contribution (INDC) in 2015 as part of its obligations as a signatory and party to the United Nations Framework Convention on Climate Change (UNFCCC).⁸⁵ Their

⁸¹ Ibid.

⁸² Ibid.

⁸³ Kioko, John, and Moses M. Okello. "Land use cover and environmental changes in a semi-arid rangeland, Southern Kenya." *Journal of Geography and Regional Planning* 3, no. 11 (2010): 322-326.

⁸⁴ Rinku Singh and GS Singh, 'Traditional Agriculture: A Climate-Smart Approach for Sustainable Food Production' (2017) 2 *Energy, Ecology and Environment* 296.

⁸⁵ SusWatch Kenya, 'Nationally Determined Contributions (NDCs) Implementation: The Kenyan Scenario,' *Policy Brief*, December 2019, 1

<https://www.inforse.org/africa/pdfs/PolicyBrief_Kenya_CS0_view_on_NDCs_Dec_2019.pdf> accessed 17 January 2021.

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implementation is to begin in this year 2021. Some of the challenges identified are related to technical capacity and financial resource gaps.⁸⁶

Kenya's updated Nationally Determined Contribution (NDC) to the United Nations Framework Convention on Climate Change (UNFCCC) submitted on 28th December 2020 sets out two important developments from its first NDC, which was submitted in December 2016. As compared to the first NDC target of 30% GHG emission reduction, the updated NDC commits to lower GHG emissions by 32% by 2030 relative to the business as usual (BAU) scenario.⁸⁷ In addition, while the first NDC was fully conditional to international support, the updated NDC intends to mobilize domestic resources to meet 13% of the estimated USD 62 Billion NDC implementation costs.⁸⁸

3.7 Combating Climate Change for Sustainable Development: Way Forward

3.7.1 International Cooperation on Climate Change Mitigation

The World Food Programme has in the recent past observed that the coronavirus crisis has shown how faster international action and better cooperation in areas like science and technology could help tackle the problem (food shortage and climate change).⁸⁹ There is a need for Kenya to work closely with other countries and stakeholders at the global level to combat climate change.

⁸⁶ Ibid.

⁸⁷ 'NDC Update Kenya: Enhanced Reduction Target' (*Changing Transport*, 13 January 2021) <<https://www.changing-transport.org/ndc-update-kenya-enhanced-reduction-target/>> accessed 21 January 2021.

⁸⁸ Ibid.

⁸⁹ 'COVID-19 Caused Food Insecurity to Soar, But Climate Change Will Be Much Worse - Homeland Security Today' <<https://www.hstoday.us/subject-matter-areas/emergency-preparedness/covid-19-caused-food-insecurity-to-soar-but-climate-change-will-be-much-worse/>> accessed 17 January 2021.

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The Paris Agreement provides a framework for financial, technical and capacity building support to those countries that need it.⁹⁰ The Paris Agreement reaffirms that developed countries should take the lead in providing financial assistance to countries that are less endowed and more vulnerable, while for the first time also encouraging voluntary contributions by other Parties, as climate finance is needed for mitigation and adaptation.⁹¹ The Paris Agreement also encourages technology development and transfer for both improving resilience to climate change and reducing GHG emissions, by establishing a technology framework to provide overarching guidance to the well-functioning Technology Mechanism.⁹² Also, in recognition of the fact that not all developing countries have sufficient capacities to deal with many of the challenges brought by climate change, the Paris Agreement places great emphasis on climate-related capacity-building for developing countries and requests all developed countries to enhance support for capacity-building actions in developing countries.⁹³

Kenya's Government should also continually work closely with the UNEP in design and execution of climate change mitigation plans. UNEP assists countries all over the world in their efforts to create National Adaptation Plans (NAPs), which process seeks to identify medium- and long-term adaptation needs, informed by the latest climate science.⁹⁴ NAPs are meant to: reduce vulnerability to the impacts of climate change by building

⁹⁰ 'Untitled' <<https://unfccc.int/process-and-meetings/the-paris-agreement/the-paris-agreement>> accessed 21 January 2021.

⁹¹ Ibid; see also UN General Assembly, *United Nations Framework Convention on Climate Change*, Article 11.

⁹² Ibid.

⁹³Ibid; 'Untitled'

<<https://unfccc.int/process-and-meetings/the-paris-agreement/the-paris-agreement/key-aspects-of-the-paris-agreement>> accessed 21 January 2021.

⁹⁴ UN Environment, 'National Adaptation Plans' (*UNEP - UN Environment Programme*, 14 September 2017) <<http://www.unenvironment.org/explore-topics/climate-change/what-we-do/climate-adaptation/national-adaptation-plans>> accessed 21 January 2021.

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adaptive capacity and resilience; and integrate adaptation into new and existing policies and programmes, especially development strategies.⁹⁵

3.7.2 Integrated Approach to Reduction of Greenhouse Gases Emission

It has been argued that the Paris Agreement's goal of staying under 2° Celsius and aiming for 1.5°C global warming, as compared to pre-industrial average global temperature, scientifically translates to limiting emissions of greenhouse gases within a finite global carbon budget.⁹⁶ As already pointed out, greenhouse gas emissions account for the largest causes of anthropogenic climate change. It has been reported that globally, the economic slowdown during the coronavirus pandemic was expected to slash emissions by 4-7% in 2020, bringing them close to where global emissions were in 2010.⁹⁷ However, concentrations of greenhouse gases are still rising rapidly in the atmosphere.⁹⁸ Cutting down greenhouse gas emissions can potentially reduce the impacts and costs associated with climate change.⁹⁹

With the outbreak of Covid-19 pandemic, major cities around the world have reported an increase in the numbers of people cycling and walking in

⁹⁵ Ibid.

⁹⁶ 'Nature-Based Solutions for Better Climate Resilience: The Need to Scale up Ambition and Action | NDC Partnership' <<https://ndcpartnership.org/nature-based-solutions-better-climate-resilience-need-scale-ambition-and-action>> accessed 21 January 2021.

⁹⁷ Raymond C and Matthews T, 'Global Warming Now Pushing Heat into Territory Humans Cannot Tolerate' (*The Conversation*) <<http://theconversation.com/global-warming-now-pushing-heat-into-territory-humans-cannot-tolerate-138343>> accessed 17 January 2021.

⁹⁸ Ibid.

⁹⁹ UN Environment, 'Adaptation Gap Report 2020' (*UNEP - UN Environment Programme*, 9 January 2021)

<<http://www.unenvironment.org/resources/adaptation-gap-report-2020>>

accessed 20 January 2021; 'How to Boost Resilience to Climate Change - Adaptation Gap Report 2020 - YouTube'

<<https://www.youtube.com/watch?v=-KhZ16QPv2c&feature=youtu.be>>

accessed 20 January 2021.

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public spaces.¹⁰⁰ Cities such as Bogota, Berlin, Vancouver, New York, Paris and Berlin are reported to have expanded bike lanes and public paths to accommodate the extra cycling traffic, with Australia's New South Wales government also encouraging councils to follow suit.¹⁰¹ The result has been a decline in global daily emissions, with the fall in road traffic being the main driver of the global emissions decline.¹⁰² It is estimated that daily global CO₂ emissions decreased by -17% by early April 2020 compared with the mean 2019 levels, just under half from changes in surface transport.¹⁰³

The National and County Governments in Kenya could learn from these global trends and encourage more people to embrace cycling to and from work especially around major towns and the cities in Kenya by creating room for bike lanes and public paths as well as improving security in public places and enhancing road safety. This has the can potential to improve the country's chances of achieving climate mitigation due to the reduced daily emissions from traffic.

It has been suggested that encouraging cycling and working from home to continue beyond the current pandemic is likely to help countries in meeting their climate goals.¹⁰⁴

There is also a need for the country to embrace vehicle technology that emits less greenhouse gases such as electric vehicles and trains. While this will certainly require massive amount of investments and time, the investment will be worth it in the long run as far as reduction of greenhouse gas emissions is concerned.

¹⁰⁰Quéré CL and others, 'Coronavirus Is a "sliding Doors" Moment. What We Do Now Could Change Earth's Trajectory' (*The Conversation*) <<http://theconversation.com/coronavirus-is-a-sliding-doors-moment-what-we-do-now-could-change-earths-trajectory-137838>> accessed 17 January 2021.

¹⁰¹ Ibid.

¹⁰² Ibid.

¹⁰³ Le Quéré C and others, 'Temporary Reduction in Daily Global CO₂ Emissions during the COVID-19 Forced Confinement' (2020) 10 *Nature Climate Change* 647.

¹⁰⁴Quéré CL and others, 'Coronavirus Is a "sliding Doors" Moment. What We Do Now Could Change Earth's Trajectory' (*The Conversation*).

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The country has however shown some intended positive steps towards this. Notably, the transport sector makes up the biggest share of petroleum consumption in Kenya; as such about 67% of Kenya's energy-related CO₂ emissions and 11.3% of Kenya's total GHG emissions in 2015 came from transport-related activities (GHG inventory report, 2019).¹⁰⁵ Kenya thus seeks to implement low carbon and efficient transportation systems in its December 2020 updated NDC. These are: Up scaling the construction of roads to systematically harvest water and reduce flooding; Enhancing institutional capacities on climate proofing vulnerable road infrastructure through vulnerability assessments; and Promoting use of appropriate designs and building materials to enhance resilience of at least 4500 km of roads to climate risks.¹⁰⁶ Key actions for the transport sector include: Developing an affordable, safe and efficient public transport system, including a Bus Rapid Transit System in Nairobi and non-motorized transport facilities; Reducing fuel consumption and fuel overhead costs, including electrification of the Standard Gauge Railway; Encouraging low-carbon technologies in the aviation and maritime sectors; Climate proofing transport infrastructure; Encouraging technologies such as development of electric modes of transport and research on renewable energy for powering different modes of transport; Creating awareness on issues such as fuel economy and electric mobility options; Putting enabling policies and regulations in place to facilitate implementation of the mitigation and adaptation actions.¹⁰⁷

There is also a need for the country to continually invest in renewable sources of energy such as solar, wind power, biogas, among others.¹⁰⁸

¹⁰⁵ 'NDC Update Kenya: Enhanced Reduction Target' (*Changing Transport*, 13 January 2021)

<<https://www.changing-transport.org/ndc-update-kenya-enhanced-reduction-target/>> accessed 21 January 2021.

¹⁰⁶ Ibid.

¹⁰⁷ Ibid.

¹⁰⁸ Muigua, K., Exploring Alternative Sources of Energy in Kenya, *Journal of Conflict Management and Sustainable Development*, Volume 5, No 2, (October, 2020); Muigua, K., Towards Energy Justice in Kenya, February 2020, available at <http://kmco.co.ke/wp-content/uploads/2020/01/Towards-Energy-Justice-in-Kenya.pdf>; Muigua, K., Access to Energy as a Constitutional Right in Kenya,

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The reduction of GHG emissions can also be done through, inter alia, involving the communities in nature-based solutions to reduce the emissions gap such as improved land use and management which may include low-emissions agriculture, agro-forestry, and ecosystem conservation and restoration all of which could achieve this task if properly implemented.¹⁰⁹ Nature-based solutions combine climate change mitigation, adaptation, disaster risk reduction, biodiversity conservation, and sustainable resource management.¹¹⁰

Reducing Emissions from Deforestation and Forest Degradation (REDD) is a mechanism that has been under negotiation by the United Nations Framework Convention on Climate Change (UNFCCC) since 2005, with the objective of mitigating climate change through reducing net emissions of greenhouse gases through enhanced forest management, mostly in the developing countries.¹¹¹ Forests play an important role in reducing GHG emissions. The Constitution of Kenya 2010 obligates the State to ensure that the country achieves a land surface tree cover of at least 10 per cent.¹¹² It has been observed that past attempts to increase forest cover and address the problem of deforestation and forest degradation in the country have not been very successful due to a number of reasons: increasing demand for land for agriculture, settlement and other developments, high energy demand and inadequate funding to support investments in the forestry

available at <http://www.kmco.co.ke/attachments/article/118/Access%20to%20Energy%20as%20a%20Constitutional%20Right%20in%20Kenya-%20NOVEMBER%202013.pdf>.

¹⁰⁹ 'Nature-Based Solutions for Better Climate Resilience: The Need to Scale up Ambition and Action | NDC Partnership' <<https://ndcpartnership.org/nature-based-solutions-better-climate-resilience-need-scale-ambition-and-action>> accessed 21 January 2021.

¹¹⁰ Ibid.

¹¹¹ Kimaro, Didas N., Alfred N. Gichu, Hezron Mogaka, Brian E. Isabirye, and Kifle Woldearegay. "Climate Change Mitigation and Adaptation in ECA/SADC/COMESA region: Opportunities and Challenges," 4.

¹¹² Article 69 (1), Constitution of Kenya 2010.

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sector.¹¹³ In order to overcome these challenges, Kenya's participation in REDD+ is premised on the conviction that the process holds great potential in supporting: realization of vision 2030 objectives of increasing forest cover to a minimum of 10%; access to international climate finance to support investments in the forestry sector; Government efforts in designing policies and measures to protect and improve its remaining forest resources in ways that improve local livelihoods and conserve biodiversity; realization of the National Climate Change Response Strategy (NCCRS) goals; and contribution to global climate change mitigation and adaptation efforts.¹¹⁴ These efforts coupled with lifestyle changes and investments in cleaner technologies can potentially reduce greenhouse gases emission in Kenya thus enabling the country to meet and even exceed its global country targets.

3.7.3 Inclusion of Communities in Climate Change Impact Reduction and Early Warning Systems

The United Nations describes early warning system as an adaptive measure for climate change, using integrated communication systems to help communities prepare for hazardous climate-related events.¹¹⁵ Such systems are meant to save lives and jobs, land and infrastructures and supports long-term sustainability, as well as assisting public officials and administrators in their planning, saving money in the long run and protecting economies.¹¹⁶

The United Nation, working in diverse partnerships, has been putting in place a number of innovative early warning systems initiatives in vulnerable areas around the world, such as the Strengthening Climate Information and Early Warning Systems (SCIEWS) project, which is a comprehensive programme operating across Africa, Asia and the Pacific, meant to ensure

¹¹³Kimaro, Didas N., Alfred N. Gichu, Hezron Mogaka, Brian E. Isabirye, and Kifle Woldearegay. "Climate Change Mitigation and Adaptation in ECA/SADC/COMESA region: Opportunities and Challenges," 16.

¹¹⁴ Ibid.

¹¹⁵United Nations, 'Early Warning Systems' (*United Nations*) <<https://www.un.org/en/climatechange/climate-solutions/early-warning-systems>> accessed 20 January 2021.

¹¹⁶ Ibid.

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preparedness and rapid response to natural disasters, using a model that integrates the components of risk knowledge, monitoring and predicting, dissemination of information and response to warnings.¹¹⁷

Such systems should actively and meaningfully involve local communities, because as it has been observed, indigenous people are good observers of changes in weather and climate and acclimatize through several adaptive and mitigation strategies.¹¹⁸

3.7.4 Environmental Education and Creating Awareness on Climate Change Mitigation and Resilience

It has been argued that it is critically important to be aware of the geologic context of climate change processes if we are to understand the anthropogenic (human-caused) climate change because, firstly, this awareness increases the understanding of how and why our activities are causing present-day climate change, and secondly, it allows us to distinguish between natural and anthropogenic processes in the climate record in the past.¹¹⁹

Resilience has been defined as the ability to deal with shocks and stress without crossing tipping points and applies to human and environmental systems, from individual households to financial systems, ecosystems, and the biosphere as a whole. Resilience also includes the capacity to adapt to the change, that is, to deal with change without crossing a threshold, and the ability to transform in situations of crises – essentially, the capacity to rebuild livelihoods or functioning ecosystems after crossing a tipping point.¹²⁰

¹¹⁷ Ibid.

¹¹⁸ Rinku Singh and GS Singh, 'Traditional Agriculture: A Climate-Smart Approach for Sustainable Food Production' (2017) 2 Energy, Ecology and Environment 296.

¹¹⁹ '15.1: Global Climate Change' (*Geosciences LibreTexts*, 26 December 2019) <[https://geo.libretexts.org/Bookshelves/Geology/Book%3A_An_Introduction_to_Geology_\(Johnson_Affolter_Inkenbrandt_and_Mosher\)/15%3A_Global_Climate_Change/15.01%3A_Global_Climate_Change](https://geo.libretexts.org/Bookshelves/Geology/Book%3A_An_Introduction_to_Geology_(Johnson_Affolter_Inkenbrandt_and_Mosher)/15%3A_Global_Climate_Change/15.01%3A_Global_Climate_Change)> accessed 17 January 2021.

¹²⁰ 'Nature-Based Solutions for Better Climate Resilience: The Need to Scale up Ambition and Action | NDC Partnership' <<https://ndcpartnership.org/nature->

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For mitigation planning, the primary goal is to reduce current and future direct and indirect GHG emissions, particularly from energy production, land use, waste, industry, the built environment infrastructure, and transportation.¹²¹ The primary goal of adaptation is to adjust the built, social, and eco-logical environment to minimize the negative impacts of both slow-onset and extreme events caused by climate change, such as sea-level rise, floods, droughts, storms, and heat waves.¹²²

Arguably, conservation, restoration, and the management of ecosystems play a crucial role in climate change mitigation (for instance, through land use forms that maintain carbon stocks, carbon sequestration and the reduction of greenhouse gas emissions), which practices can be important for climate change adaptation, buffering societies from the impacts of climate change and reducing disaster risk.¹²³

There is a need for government bodies in charge of various but relevant sectors to work closely with communities as a way of creating awareness on how their day to day activities are likely to affect the environment and the climatic conditions in general. Dissemination of environmental knowledge as well as creating opportunities for collaborative approaches to combating climate change can go a long way in not only mitigation and adaptation measures but also creating resilient economies and livelihoods. Arguably,

based-solutions-better-climate-resilience-need-scale-ambition-and-action>
accessed 21 January 2021.

¹²¹Grafakos, S., Pacteau, C., Delgado, M., Landauer, M., Lucon, O., and Driscoll, P. (2018). Integrating mitigation and adaptation: Opportunities and challenges. In Rosenzweig, C., W. Solecki, P. Romero-Lankao, S. Mehrotra, S. Dhakal, and S. Ali Ibrahim (eds.), *Climate Change and Cities: Second Assessment Report of the Urban Climate Change Research Network*. Cambridge University Press. New York. 101–138, 103

< https://uccrn.ei.columbia.edu/sites/default/files/content/pubs/ARC3.2-PDF-Chapter-4-Mitigation-and-Adaptation-wecompress.com_.pdf> accessed 17 January 2021.

¹²² Ibid.

¹²³ 'Nature-Based Solutions for Better Climate Resilience: The Need to Scale up Ambition and Action | NDC Partnership' <<https://ndcpartnership.org/nature-based-solutions-better-climate-resilience-need-scale-ambition-and-action>> accessed 21 January 2021.

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in many decision-making processes, perceptions matter more than facts because how we feel about a risk (subjective perceptions of risk) influences what we pay attention to in complicated situations and how we approach and solve problems. Failure to acknowledge this may create and widen the gap between what experts perceive as risk and what the public perceives as risk.¹²⁴

Climate change knowledge should also be incorporated into the primary, secondary and all tertiary level curricula in order to inculcate a sense of environmental ethics in all people from an early age and to ensure that the knowledge acquired will go a long way in combating climate change. These efforts should be guided by, inter alia, Article 6 of UNFCCC which states that: in carrying out their commitments under Article 4, paragraph 1 (i), the Parties shall: Promote and facilitate at the national and, as appropriate, sub regional and regional levels, and in accordance with national laws and regulations, and within their respective capacities:(i) the development and implementation of educational and public awareness programmes on climate change and its effects;(ii) public access to information on climate change and its effects;(iii) public participation in addressing climate change and its effects and developing adequate responses; and (iv) training of scientific, technical and managerial personnel; Cooperate in and promote, at the international level, and, where appropriate, using existing bodies:(i) the development and exchange of educational and public awareness material on climate change and its effects; and(ii) the development and implementation of education and training programmes, including the strengthening of national institutions and the exchange or secondment of personnel to train experts in this field, in particular for developing countries.¹²⁵

¹²⁴Grafakos, S., Pacteau, C., Delgado, M., Landauer, M., Lucon, O., and Driscoll, P. (2018). Integrating mitigation and adaptation: Opportunities and challenges. In Rosenzweig, C., W. Solecki, P. Romero-Lankao, S. Mehrotra, S. Dhakal, and S. Ali Ibrahim (eds.), *Climate Change and Cities: Second Assessment Report of the Urban Climate Change Research Network*. Cambridge University Press. New York. 101–138, 133.

¹²⁵ UN General Assembly, *United Nations Framework Convention on Climate Change*, Article 6.

3.7.5 Integrating Traditional Knowledge with Mainstream Scientific Knowledge for Climate Mitigation and Adaptation

The Organisation for Economic Co-operation and Development (OECD), countries can use technological change to address climate change without compromising economic growth through ensuring that their climate and innovation policies provide the right incentives for the development and diffusion of “climate-friendly” technologies.¹²⁶ OECD recommends that this can be achieved through, inter alia: providing predictable and long-term policy signals in order to give potential innovators and adopters of climate-friendly technologies the confidence to undertake the necessary investments; using flexible policy measures to give potential innovators incentives to identify the best way to meet climate objectives, and to avoid locking-in technologies that may become inefficient in future; putting a price on Green House Gas (GHG) emissions, for example through taxes or tradable permits, in order to provide incentives across all stages of the innovation cycle; providing an appropriate mix and sequencing of complementary policy measures in order to overcome barriers to development and diffusion of breakthrough technologies; balancing the benefits of technology-neutral policies with the need to direct technological change toward climate-saving trajectories, by diversifying the portfolio of technologies for which support is provided and identifying general purpose technologies with environmental benefits; since the sources of innovation are widely-dispersed, supporting research and development in a broad portfolio of complementary fields, and not just energy, “climate-friendly” or 'environmental' Research and development (R&D); ensuring that international policy efforts maximize the potential for sharing of knowledge and technologies of mutual benefit, for example through international research-sharing agreements; and supporting international technology-oriented agreements as an important complement to other international efforts (e.g. emissions-based agreements).¹²⁷

¹²⁶ OECD, 'Promoting Technological Innovation to Address Climate Change,' (November 2011), 1 <<http://www.oecd.org/env/cc/49076220.pdf>>accessed 17 January 2021.

¹²⁷ Ibid, 1.

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Kenya should review and align her science and technological innovation policies to the above recommendations from the OECD in order to ensure their maximum effectiveness in promoting innovation as a tool for combating climate change in the country. Indeed, the starting point should be the Constitution of Kenya. The Constitution of Kenya 2010 obligates the State to, *inter alia*: promote science and recognise the role of science and indigenous technologies in the development of the nation; and promote the intellectual property rights of the people of Kenya.¹²⁸

The *Environmental Management and Co-ordination Act, 1999*¹²⁹ calls for integration of traditional knowledge for the conservation of biological diversity with mainstream scientific knowledge in conservation of conservation of biological resources *in situ*.¹³⁰ Investments in incentivized mitigation programmes, especially in agriculture and forestry, can offer mitigation benefits, increased productivity, improved livelihoods, biodiversity conservation and increased resilience to climate change.¹³¹

The *Science, Technology and Innovation Act, 2013*¹³² was enacted to facilitate the promotion, co-ordination and regulation of the progress of science, technology and innovation of the country; to assign priority to the development of science, technology and innovation; to entrench science, technology and innovation into the national production system and for connected purposes.¹³³ The Act acknowledges that reference to “innovation” under the Act includes ‘indigenous or traditional knowledge by community of beneficial properties of land, natural resources, including plant and animal resources and the environment’, where “traditional knowledge” means the wisdom developed over generations of holistic

¹²⁸ Article 11(2), Constitution of Kenya, 2010.

¹²⁹ Environmental Management and Co-ordination Act, No. 8 of 1999, Laws of Kenya.

¹³⁰ *Ibid*, sec. 51(f).

¹³¹ Kimaro, Didas N., Alfred N. Gichu, Hezron Mogaka, Brian E. Isabirye, and Kifle Woldearegay. "Climate Change Mitigation and Adaptation in ECA/SADC/COMESA region: Opportunities and Challenges," 4.

¹³² Science, Technology and Innovation Act, No. 28 of 2013, Laws of Kenya.

¹³³ *Ibid*, Preamble.

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traditional scientific utilization of the lands, natural resources, and environment.¹³⁴

The Act establishes the National Commission for Science, Technology and Innovation (NACOSTI)¹³⁵ whose objective is to regulate and assure quality in the science, technology and innovation sector and advise the Government in matters related thereto.¹³⁶ The Government, through NACOSTI should

¹³⁴ Ibid, sec. 2; see also *Protection of Traditional Knowledge and Cultural Expressions Act*, No. 33 of 2016, Laws of Kenya.

¹³⁵ Ibid, sec. 3.

¹³⁶ Ibid. sec. 4. The functions of the Commission as set out under section 6 thereof are to: develop, in consultation with stakeholders, the priorities in scientific, technological and innovation activities in Kenya in relation to the economic and social policies of the Government, and the country's international commitments; lead inter-agency efforts to implement sound policies and budgets, working in collaboration with the county governments, and organisations involved in science and technology and innovation within Kenya and outside Kenya; advise the national and county governments on the science, technology and innovation policy, including general planning and assessment of the necessary financial resources; liaise with the National Innovation Agency and the National Research Fund to ensure funding and implementation of prioritized research programmes; ensure co-ordination and co-operation between the various agencies involved in science, technology and innovation; accredit research institutes and approve all Scientific research in Kenya; assure relevance and quality of science, technology and innovation programmes in research institutes; advise on science education and innovation at both basic and advanced levels; in consultation with the National Research Fund Trustees, sponsor national scientific and academic conferences it considers appropriate; advise the Government on policies and any issue relating to scientific research systems; promote increased awareness, knowledge and information of research system; co-ordinate, monitor and evaluate, as appropriate, activities relating to scientific research and technology development; promote and encourage private sector involvement in scientific research and innovation and development; annually, review the progress in scientific research systems and submit a report of its findings and recommendations to the Cabinet Secretary; promote the adoption and application of scientific and technological knowledge and information necessary in attaining national development goals; develop and enforce codes, guidelines and regulations in accordance with the policy determined under this Act for the governance, management and maintenance of standards and quality in research systems; and undertake, or cause to be undertaken, regular inspections, monitoring and evaluation of research institutions to ensure compliance with set standards and guidelines.

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work closely with all learning institutions as well as stakeholders in the informal sector to not only tap into the innovations but to also identify the challenges that are affecting the growth and development of this sector.

Science and technological innovation should be encouraged through adequate funding as well as fiscal incentives and ensuring that there is a ready market for the same. If the Government can work with the locals, they will not only promote the development of science but will also create an opportunity to utilize the local innovations and ideas especially in environmental areas to combat climate change. NACOSTI should also closely work with the Kenya Institute for Public Policy Research and Analysis whose main functions include: identifying and undertaking independent and objective programmes of research and analysis, including macroeconomic, inter-disciplinary and sectoral studies on topics affecting public policy in areas such as human resource development, social welfare, environment and natural resources, agriculture and rural development, trade and industry, public finance, money and finance, macroeconomic and microeconomic modelling.¹³⁷ While coming up with approaches for reducing the country's climate risk and exposure to the main types of climate hazard, their design, implementation and management may and should indeed draw on local and traditional, as well as expert knowledge.

Arguably, nature-based solutions – locally appropriate actions that address societal challenges, such as climate change, and provide human well-being and biodiversity benefits by protecting, sustainably managing and restoring natural or modified ecosystems – must become a priority when the government is coming up with solutions to the climate change challenges, with youth, women, indigenous peoples and local communities being key stakeholders.¹³⁸ It has rightly been pointed out that traditional knowledge is holistic in nature due to its multitude applications in diverse fields such as

¹³⁷ Kenya Institute for Public Policy Research and Analysis Act, No. 15 of 2006, Laws of Kenya, sec. 6(b).

¹³⁸ UN Environment, 'Adaptation Gap Report 2020' (UNEP - UN Environment Programme, 9 January 2021)

<<http://www.unenvironment.org/resources/adaptation-gap-report-2020>>
accessed 20 January 2021.

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agriculture, climate, soils, hydrology, plants, animals, forests and human health.¹³⁹

The above listed recommendations by the OECD should provide cue when it comes to creating a conducive policy and legal environment for science and innovation.

3.7.6 Diversification of Economic Activities for Poverty Eradication and Climate Change Mitigation and Adaptation

The World Bank observed in December 2020 that, considering that “the pandemic and global recession may cause over 1.4% of the world’s population to fall into extreme poverty, in order to reverse this serious setback to development progress and poverty reduction, countries will need to prepare for a different economy post-Covid, by allowing capital, labour, skills, and innovation to move into new businesses and sectors.”¹⁴⁰

A chief scientist at the U.N. Food and Agriculture Organization (FAO) was recorded in 2020 affirming that farmers and poor urban residents have so far borne the brunt of the Covid-19 pandemic, meaning inequality between and within countries could deepen further in 2021.¹⁴¹ This was mainly attributed to the fact that cut off from markets and with a plunge in customer demand, farmers struggled to sell their produce while informal workers in urban areas, living hand to mouth, found themselves jobless as lockdowns were imposed.¹⁴² While the United Nations Sustainable Development Goals set to end hunger by 2030, the World Bank has observed that the Covid-19 pandemic is estimated to have pushed an additional 88 million to 115

¹³⁹ Rinku Singh and GS Singh, ‘Traditional Agriculture: A Climate-Smart Approach for Sustainable Food Production’ (2017) 2 *Energy, Ecology and Environment* 296.

¹⁴⁰ ‘COVID-19 to Add as Many as 150 Million Extreme Poor by 2021’ (*World Bank*) <<https://www.worldbank.org/en/news/press-release/2020/10/07/covid-19-to-add-as-many-as-150-million-extreme-poor-by-2021>> accessed 17 January 2021.

¹⁴¹ ‘COVID-19 Caused Food Insecurity to Soar, But Climate Change Will Be Much Worse - Homeland Security Today’ <<https://www.hstoday.us/subject-matter-areas/emergency-preparedness/covid-19-caused-food-insecurity-to-soar-but-climate-change-will-be-much-worse/>> accessed 17 January 2021.

¹⁴² *Ibid.*

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million people into extreme poverty in the year 2020, with the total rising to as many as 150 million by 2021, depending on the severity of the economic contraction.¹⁴³

There is a need for countries, including Kenya, to create a conducive environment that will allow their citizens to invest and explore new and emerging sectors such as information technology, science and technology, among others. This should target both urban and rural dwellers. This is because the World Bank has estimated that with the effects of Covid-19 expected to continue, increasing numbers of urban dwellers are expected to fall into extreme poverty, which has traditionally affected people in rural areas.¹⁴⁴

3.7.7 Embracing Climate Resilient Agricultural Production Methods for Climate Change Mitigation and Poverty Reduction

It has rightly been pointed out that sustainable food production poses one of the major challenges of the twenty-first century in the era of global environmental problems such as climate change, increasing population and natural resource degradation including soil degradation and biodiversity loss, with climate change being among the greatest threats to agricultural systems.¹⁴⁵

The adverse effect of agriculture on the environment and climate change (contributors of global warming through a share of about 10–12% increase in total anthropogenic GHG emission) has largely been attributed to the Green Revolution which though multiplied agricultural production several folds jeopardized the ecological integrity of agro ecosystems by intensive use of fossil fuels, natural resources, agrochemicals and machinery and subsequently threatened the age-old traditional agricultural practices.¹⁴⁶

¹⁴³ 'COVID-19 to Add as Many as 150 Million Extreme Poor by 2021' (*World Bank*) <<https://www.worldbank.org/en/news/press-release/2020/10/07/covid-19-to-add-as-many-as-150-million-extreme-poor-by-2021>> accessed 17 January 2021.

¹⁴⁴ Ibid.

¹⁴⁵ Rinku Singh and GS Singh, 'Traditional Agriculture: A Climate-Smart Approach for Sustainable Food Production' (2017) 2 *Energy, Ecology and Environment* 296.

¹⁴⁶ Ibid.

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Arguably, achieving the goals of eradicating hunger and poverty by 2030 while addressing the climate change impacts need a climate-smart approach in agriculture, an approach based on the objectives of sustainably enhancing food production, climate adaptation and resilience and reduction in GHGs emission.¹⁴⁷

Arguably, the negative impacts of climate change on production, incomes and well-being can be avoided or ameliorated through adaptation, which includes changes in agricultural practices as well as broader measures such as improved weather and early warning systems and risk management approaches.¹⁴⁸ Climate smart agriculture is described as an approach that provides a conceptual basis for assessing the effectiveness of agricultural practice change to support food security under climate change, with particular attention to sustainable land management.¹⁴⁹

It has also been suggested that traditional practices like agro forestry, intercropping, crop rotation, cover cropping, traditional organic composting and integrated crop-animal farming all have potentials for enhancing crop productivity and mitigating climate change considering that indigenous farmers and local people perceive climate change in their own ways and prepare for it through various adaptation practices.¹⁵⁰

The Government and other stakeholders should work closely with farmers to identify and explore the available opportunities for farmers to engage in sustainable farming practices, informed by both science and indigenous knowledge.

¹⁴⁷ Ibid.

¹⁴⁸ McCarthy, N., Brubaker, J. 2014, *Climate-Smart Agriculture and resource tenure in Sub-Saharan Africa: a conceptual framework*, Rome, FAO, 6.

¹⁴⁹ Ibid, 6.

¹⁵⁰ Rinku Singh and GS Singh, 'Traditional Agriculture: A Climate-Smart Approach for Sustainable Food Production' (2017) 2 *Energy, Ecology and Environment* 296.

3.8 Climate Change Mitigation: Exploring Alternative Sources of Energy in Kenya

3.8.1 Introduction

With the ever growing population, advanced technological developments and climate change, the world continues to face challenges as far as energy needs are concerned.¹⁵¹ In order to meet its energy requirements, the Government of Kenya set out to install nuclear energy reactors as an alternative source of renewable energy in addition to hydropower, wind and geothermal power, among others, in the country.¹⁵² The country's energy needs are expected to rise due to population increase as well as the country's development blueprint, Vision 2030 and the Big Four Agenda.¹⁵³ Kenya expects peak demand to top 22,000 megawatts by 2031, partly due to industrial expansion, a component in Kenyatta's Big Four Agenda.¹⁵⁴

Currently, it is estimated that hydropower accounts for 35 percent of Kenya's electricity generation, with the rest coming from geothermal, wind and diesel powered plants.¹⁵⁵ Notably, Kenya is not the only African country that is on the journey towards establishing their first nuclear plant, as way of diversifying the countries' energy mix to improve their electricity

¹⁵¹ David Bodansky, 'Nuclear Energy : Principles, Practices, and Prospects' (CERN Document Server, 2008) <<https://cds.cern.ch/record/1109377>> accessed 19 August 2020.

¹⁵² Republic of Kenya, *National Energy Policy*, October, 2018 <https://kplc.co.ke/img/full/BL4PdOqKtxFT_National%20Energy%20Policy%20October%20%202018.pdf> accessed 30 September 2020.

¹⁵³ Kiprop, Eliud, Kenichi Matsui, and Nicholas Maundu. "Can Kenya supply energy with 100% renewable sources?." In *5th International Conference on Environment and Renewable Energy*, pp. 18-19. 2017 <https://www.researchgate.net/publication/328925970_Can_Kenya_Supply_Energy_With_100_Renewable_Sources> accessed 30 September 2020.

¹⁵⁴ 'Kenya on Course for \$5 Billion Nuclear Plant to Power Industry' *Bloomberg.com* (4 August 2020) <<https://www.bloomberg.com/news/articles/2020-08-04/kenya-on-course-for-5-billion-nuclear-plant-to-power-industry>> accessed 19 August 2020.

¹⁵⁵ Republic of Kenya, *National Energy Policy*, October, 2018.

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generation capacity.¹⁵⁶ However, while Kenya is at an advanced stage with the nuclear power plant establishment, there have been serious concerns relating to the technical issues associated with storage, transportation and the disposal of radioactive material and waste.¹⁵⁷ This is in view of the nuclear disasters that have occurred in the past and recently across the globe.¹⁵⁸ There is a need for the Government of Kenya and other stakeholders to be wary of the same even as the country ventures into nuclear energy production.

3.8.2 Energy Sources in Kenya: The Challenges

The Ministry of Energy observes that energy is one of the key enablers of Kenya's Vision 2030 and the Big 4 Agenda development programs and thus, Kenya treats energy security as a matter of national priority.¹⁵⁹ This is based on the fact that the Third Medium Plan 2017-2022 identifies energy as the country's driver into "a newly-industrializing, middle-income economy, providing a high quality of life to all its citizens in a clean and secure environment," and as a result, Kenya considers access to competitively-

¹⁵⁶ 'A Case for Nuclear Energy in Kenya' (*The Star*) <<https://www.the-star.co.ke/opinion/columnists/2019-04-05-a-case-for-nuclear-energy-in-kenya/>> accessed 19 August 2020.

¹⁵⁷ 'A Case for Nuclear Energy in Kenya' (*The Star*) <<https://www.the-star.co.ke/opinion/columnists/2019-04-05-a-case-for-nuclear-energy-in-kenya/>> accessed 19 August 2020.

¹⁵⁸ 'A Brief History of Nuclear Accidents Worldwide | Union of Concerned Scientists' <<https://www.ucsusa.org/resources/brief-history-nuclear-accidents-worldwide>> accessed 6 October 2020; Daniel Bukszpan, '11 Nuclear Meltdowns and Disasters' (*CNBC*, 16 March 2011) <<https://www.cnbc.com/2011/03/16/11-Nuclear-Meltdowns-and-Disasters.html>> accessed 6 October 2020; 'Nuclear Reactor Accidents - History and Legacies' (*Atomic Heritage Foundation*) <<https://www.atomicheritage.org/history/nuclear-reactor-accidents-history-and-legacies>> accessed 6 October 2020; 'Chernobyl Was the World's Worst Nuclear Power Plant Accident. Here's How It Compares to Fukushima and Three Mile Island.' (*Business Insider Africa*, 12:20 200AD) <<https://africa.businessinsider.com/tech/chernobyl-was-the-worlds-worst-nuclear-power-plant-accident-heres-how-it-compares-to/1x12t91>> accessed 6 October 2020.

¹⁵⁹ kawi, 'Background' (*Ministry of Energy*) <https://energy.go.ke/?page_id=439> accessed 28 September 2020.

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priced, reliable, quality, safe and sustainable energy as an essential ingredient for the country's social –economic development.¹⁶⁰

It has rightly been pointed out that in the past decade the country has grappled with the challenge of unreliable, expensive and unsustainable energy use supporting a stagnating industrial and manufacturing base. This is due to aging energy infrastructure that can no longer meet the modern day requirements as envisaged in the country's economic blueprint, the Kenya Vision 2030.¹⁶¹

As Kenya seeks to realize the national blueprint for development and the sustainable development agenda as far as energy generation is concerned, there has been efforts to diversify energy sources in the country. It has been observed that Kenya is moving towards procuring more of its additional power from wind and solar and with the substantial growth in hydro, wind and solar energy in the recent years, this has led to a decline in generation from oil, gas and coal sources and electricity imports.¹⁶²

Indeed, Kenya is considered the world's 8th largest geothermal power producer, has the continent's largest wind farm, a vibrant off grid energy market, and an aggressive last mile campaign to connect every citizen.¹⁶³

As at 2015, it was estimated that the energy sector relies on three main sources of energy, biomass, petroleum and electricity, at 68%, 21% and 9%

¹⁶⁰ Ibid.

¹⁶¹ Owiro, D., G. Poquillon, K. S. Njonjo, and C. Oduor. "Situational analysis of energy industry, policy and strategy for Kenya." *Institute of Economic Affairs* (2015) <https://media.africaportal.org/documents/Situational-Analysis-of-Energy-Industry-Policy-and--Strategy-for-Kenya_1.pdf> accessed 28 September 2020, p.5.

¹⁶² Research and Markets, 'Insights on the Energy Requirements of Kenya to 2050 - Moving Towards Procuring More Power from Wind and Solar' (*GlobeNewswire News Room*, 11 September 2020) <<http://www.globenewswire.com/news-release/2020/09/11/2092394/0/en/Insights-on-the-Energy-Requirements-of-Kenya-to-2050-Moving-Towards-Procuring-more-Power-from-Wind-and-Solar.html>> accessed 24 September 2020.

¹⁶³ 'Our Latest Thoughts on Kenya's Power Sector Challenges' (*Energy For Growth*) <<https://www.energyforgrowth.org/blog/our-latest-thoughts-on-kenyas-power-sector-challenges/>> accessed 21 September 2020.

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of total energy consumption in Kenya, with biomass constituting the largest source of energy consumed in Kenya in the form of wood fuel and charcoal, extensively used in the rural areas by mostly poor households for cooking and heating purposes, as well as small business, principally kiosks and restaurants within urban centres.¹⁶⁴

Some reports show that Kenya has had one of the fastest increases in electrification rates within sub-Saharan Africa since 2013: by 2018, 75% of the population had access, with the Government aiming to reach full access by 2022.¹⁶⁵ Notably, Government's Kenya Vision 2030 aspires to transform Kenya from low income status into a middle-income country and a key element to this vision is a lower cost of power reaching more broadly across the population.¹⁶⁶ As the African Continent seeks to invest in infrastructural development, including the power sector, Kenya is touted as one of the countries that have made notable progress. For instance, it is noted that the Programme for Infrastructure Development in Africa is forecasting an additional 140,000 MW of power over for the East African Power Pool where Kenya's share of this is 13,852 MW of planned peak demand by 2038 or an increase of just over 11,000 MW over this 20-year period.¹⁶⁷

Despite this positive report, Kenya's energy sector is faced by a myriad of challenges. As far as the use of clean energy is concerned, it is estimated that

¹⁶⁴ Owiro, D., G. Poquillon, K. S. Njonjo, and C. Oduor. "Situational analysis of energy industry, policy and strategy for Kenya." *Institute of Economic Affairs* (2015), p.7.

¹⁶⁵ 'Kenya Energy Outlook - Analysis' (IEA) <<https://www.iea.org/articles/kenya-energy-outlook>> accessed 21 September 2020.

¹⁶⁶ Research and Markets Ltd, 'Kenyan Energy Requirements Forecasted to 2050 - Research and Markets' <<https://www.researchandmarkets.com/reports/5136031/kenyan-energy-requirements-forecasted-to-2050>> accessed 24 September 2020.

¹⁶⁷ Research and Markets, 'Insights on the Energy Requirements of Kenya to 2050 - Moving Towards Procuring More Power from Wind and Solar' (*GlobeNewswire News Room*, 11 September 2020) <<http://www.globenewswire.com/news-release/2020/09/11/2092394/0/en/Insights-on-the-Energy-Requirements-of-Kenya-to-2050-Moving-Towards-Procuring-more-Power-from-Wind-and-Solar.html>> accessed 24 September 2020.

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two-thirds of Kenya's energy currently comes from bioenergy.¹⁶⁸ It has been observed that as Kenya seeks to move from non-renewable energy sources to renewable energy sources, moving an economy which relies heavily on wood fuel and biomass as its largest energy source, to achieve sustainable energy use through the gradual increase in the use of renewable energy sources that are often expensive due to the technology deployed, in the face of oil and coal discoveries that could be more readily accessible in spite of its known effects on the environment is a great challenge.¹⁶⁹

While independent power producers have made considerable efforts to produce enough power to run the country, there have been challenges with uptake of the same by the Kenya Power and Lighting Company Plc. (KPLC). For instance, in the recent times and partly due to the Corona Virus (Covid-19) pandemic, there have been reports that measures to contain the pandemic have led to reduced demand for power especially among the commercial consumers who account for over 65% of the power use in the country.¹⁷⁰ Reports also indicate that KPLC has prioritized the uptake of geothermal at 39.5 per cent, hydro at 33.9 per cent, wind at 14 per cent, diesel at 9.7 per cent with other sources like solar, imports from Uganda and co-generation accounting for about three per cent.¹⁷¹ This has thus left some of the producers with excess power.¹⁷² This shows that Kenya's main consumers of electricity are commercial businesses and when these run into

¹⁶⁸ 'Kenya Energy Outlook - Analysis' (IEA) <<https://www.iea.org/articles/kenya-energy-outlook>> accessed 21 September 2020.

¹⁶⁹ Owiro, D., G. Poquillon, K. S. Njonjo, and C. Oduor. "Situational analysis of energy industry, policy and strategy for Kenya." *Institute of Economic Affairs* (2015), p. 7.

¹⁷⁰ 'Consumers Pay the Price as Covid Electricity Cuts Hit Turkana Project - The East African' Monday September 14 2020 <<https://www.theeastafrican.co.ke/tea/business/consumers-pay-the-price-as-covid-electricity-cuts-hit-turkana-project-1939124>> accessed 1 October 2020.

¹⁷¹ 'Consumers Pay the Price as Covid Electricity Cuts Hit Turkana Project - The East African' Monday September 14 2020 <<https://www.theeastafrican.co.ke/tea/business/consumers-pay-the-price-as-covid-electricity-cuts-hit-turkana-project-1939124>> accessed 1 October 2020.

¹⁷² Ibid.

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problems, the independent power producers are left stranded. This happens while there are still reports that there are homes still not connected to the grid despite the Government's best efforts to do so. Thus, even as the Government looks for ways to produce cleaner power, there is also a need to address the disconnect between production and take up of the power. It is estimated that Kenya's Lake Turkana wind farm and its 365 turbines make for a generating capacity of more than 300MW, creating one of the most productive projects anywhere in the world.¹⁷³ Wind power has become a key contributor to the national grid to the extent that where there is interruption in its production, consumers have ended paying more for electricity in the country.¹⁷⁴

Notably, the Lake Turkana Wind Power (LTWP) has been allocated a maximum production quota of 210MW, against an installed capacity of 310MW.¹⁷⁵ While this has been attributed to the Covid-19 pandemic that afflicted almost the whole world in 2020, it raises a concern as to whether the power producers' major customers are only the commercial users. This is because, it has already been pointed out that there are households that still mainly rely on kerosene and biomass as their main source of energy for their inability to afford electricity. Thus, even as we vouch for increased transition to renewable energy by way of increased production, this scenario points out the fact that there is more than availability of the renewable energy: the same must not only be made available but must also be made affordable to the local 'mwananchi' (citizen).

¹⁷³ 'What's Driving Wind Power in Kenya and What Challenges Lie in Wait?' <<https://www.nenergybusiness.com/features/wind-power-kenya-challenges/>> accessed 24 September 2020.

¹⁷⁴ 'Consumers Pay the Price as Covid Electricity Cuts Hit Turkana Project - The East African' <<https://www.theeastafrican.co.ke/tea/business/consumers-pay-the-price-as-covid-electricity-cuts-hit-turkana-project-1939124>> accessed 1 October 2020.

¹⁷⁵ 'Consumers Pay the Price as Covid Electricity Cuts Hit Turkana Project - The East African' <<https://www.theeastafrican.co.ke/tea/business/consumers-pay-the-price-as-covid-electricity-cuts-hit-turkana-project-1939124>> accessed 1 October 2020.

3.8.3 Nuclear Power as a Substitute for Fossil Fuels

It has been noted that many countries are reconsidering the role of nuclear energy in their energy mix, as a means to alleviate the concerns over climate change, security of energy supply and the price and price volatility of fossil fuels.¹⁷⁶ Thus, the need for alternative sources of energy has been fueled by the combination of climate change fears and a continued growth in energy demand as a way of moving away from the global fossil fuel addiction.¹⁷⁷ Currently, it is estimated that nuclear fission as one such alternative accounts for 14% of global electricity generation and has the potential to generate significantly more.¹⁷⁸ The proponents of use of nuclear energy argue that it has the potential to reduce pollution, cut greenhouse gas emissions, and help countries attain more energy independence.¹⁷⁹

The global legal framework on production and use of nuclear energy governs key issues relating to the use and safety of nuclear energy and all countries venturing into this territory are expected to abide by the same. Specifically, the existing international nuclear liability regime is based on the Convention on Third Party Liability in the Field of Nuclear Energy of 29 July 1960, as amended by the Additional Protocol of 28 January 1964 and by the Protocol of 16 November 1982 (1960 Paris Convention) and the Vienna Convention on Civil Liability for Nuclear Damage (1963 Vienna Convention), which set forth the basic principles of nuclear liability law.¹⁸⁰ These principles include: the operator of a nuclear

¹⁷⁶ Gordelier, Stan, and Ron Cameron. "Comparing nuclear accident risks with those from other energy sources." *Nucl Dev* (2010): 33-40, p.9; Strupczewski, A. "Accident risks in nuclear-power plants." *Applied Energy* 75 (2003): 79-86.

¹⁷⁷ 'Nuclear Power: The Good, the Bad and the Ugly'
<<https://sites.google.com/site/asaksdfuyhlaku/>> accessed 8 September 2020.

¹⁷⁸ Ibid.

¹⁷⁹ 'International Politics - Nuclear Energy'
<<https://sites.google.com/a/ncsu.edu/nuclear-energy/politics/foreign>>
accessed 8 September 2020.

¹⁸⁰ Gioia, Andrea, "The 1997 Vienna Convention on Civil Liability for Nuclear Damage and the 1997 Convention on Supplementary Compensation. Explanatory Texts." (2007): 5-99

<https://www-pub.iaea.org/MTCD/Publications/PDF/P1768_web.pdf>
accessed 8 September 2020.

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installation is exclusively liable for nuclear damage; strict (no fault) liability is imposed on the operator; exclusive jurisdiction is granted to the courts of one State, to the exclusion of the courts in other States; and liability may be limited in amount and in time.¹⁸¹ The International Atomic Energy Agency is the main institution that oversees the implementation of these legal instruments among other functions.¹⁸² Countries such as France have been using nuclear energy as their biggest contributor to domestic electricity needs.¹⁸³ However, it should be noted that even such countries as France and Germany that have far much advanced technology and regulatory frameworks in place for nuclear energy are also cutting down on their use of nuclear energy for its potential negative effects if not well handled.¹⁸⁴

3.8.4 Nuclear Energy in Kenya: Legal and Institutional Framework

The preferred site for the nuclear plant in the country is Tana River County, near the Kenyan coast which was preferred after studies across three regions. The plant will be developed with a concessionaire under a build, operate and transfer model.¹⁸⁵ It is noteworthy that Kenya is still at a nascent

¹⁸¹ Ibid, pp. 1-2.

¹⁸² 'International Atomic Energy Agency | Nuclear Energy for Peaceful Uses | NTI' <<https://www.nti.org/learn/treaties-and-regimes/international-atomic-energy-agency/>> accessed 6 October 2020; See also Convention on Third Party Liability in the Field of Nuclear Energy and the Vienna Convention on Civil Liability for Nuclear Damage and the 1997 Vienna Convention on Civil Liability for Nuclear Damage and the 1997 Convention on Supplementary Compensation for Nuclear Damage.

¹⁸³ 'Nuclear Power in France | French Nuclear Energy - World Nuclear Association' <<https://www.world-nuclear.org/information-library/country-profiles/countries-a-f/france.aspx>> accessed 6 October 2020; Velasquez, Carlos E., Fidéllis BGL e Estanislau, Antonella L. Costa, and Cláudia Pereira. "Assessment of the French nuclear energy system—A case study." *Energy Strategy Reviews* 30 (2020): 100513.

¹⁸⁴ Nuclear Reactors: Permanent Shutdowns by Country Worldwide 2020 | Statista' <<https://www.statista.com/statistics/513639/number-of-permanent-nuclear-reactor-shutdowns-worldwide/>> accessed 6 October 2020.

¹⁸⁵ 'Kenya on Course for \$5 Billion Nuclear Plant to Power Industry' *Bloomberg.com* (4 August 2020) <<https://www.bloomberg.com/news/articles/2020-08-04/kenya-on-course-for-5-billion-nuclear-plant-to-power-industry>> accessed 19 August 2020.

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stage in its plans to set up nuclear reactors, especially as far as regulatory frameworks are concerned.

a) Nuclear Power and Energy Agency (NuPEA)

The Nuclear Power and Energy Agency, formerly Kenya Nuclear Electricity Board (KNEB), is a State Corporation established under the Energy Act 2019.¹⁸⁶ The Agency is charged with, inter alia: being the nuclear energy programme implementing organization and promoting the development of nuclear electricity generation in Kenya; and carrying out research, development and dissemination activities in the energy and nuclear power sector.¹⁸⁷ The Agency is therefore expected to work closely with the other stakeholders in the energy sector to oversee the setting up and successful running of nuclear energy production projects in the country.

b) Nuclear Regulatory Act 2019

The Nuclear Regulatory Bill 2018 was first published by Parliament on November 19, 2018.¹⁸⁸ The Bill has since been enacted as law under *Nuclear Regulatory Act, 2019*¹⁸⁹ which was enacted to provide for a comprehensive framework for the regulation of safe, secure and peaceful utilization of atomic energy and nuclear technology; the production and use of radiation sources and the management of radioactive waste; the repeal of the Radiation Protection Act and for connected purposes.¹⁹⁰ While the Act is quite comprehensive, there will be need for constant review as the stakeholders identify what works and what challenges arise in the course of its implementation.

3.8.5 Nuclear Energy in Kenya: Getting it Right

Some commentators on the issue have highlighted some of the issues that have made the general public uncomfortable with the idea of Kenya turning to nuclear energy including: lack of properly trained manpower, the overall

¹⁸⁶ Sec. 54, Energy Act, No. 1 of 2019, Laws of Kenya.

¹⁸⁷ Sec. 56, Energy Act, No. 1 of 2019, Laws of Kenya.

¹⁸⁸ Nuclear Regulatory Bill 2018, Kenya Gazette Supplement No.143 (National Assembly Bills No.27).

¹⁸⁹ Nuclear Regulatory Act, No. 29 of 2019, Laws of Kenya.

¹⁹⁰ Ibid, Preamble.

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cost of the project, suitability of the sites where nuclear plants are to be built and nuclear disaster management.¹⁹¹ However, even as the Government proceeds with the project, there is a need to consider and continually address the issues discussed hereunder to minimize the risk of coming face to face with the potential ugly consequences of mishandling the nuclear reactors.

i. Capacity Building

Considering that there are hardly any nuclear engineers currently working for the Nuclear Power and Energy Agency, and despite it doing a lot to ensure the existing engineers are trained and mentored abroad, the Government of Kenya through the agency has been rolling out annual training programmes targeting Kenyans in various fields to build adequate capacity for the country's nuclear power programme.¹⁹² The training mostly comprises of short and long term programmes in partnership with local and international institutions.¹⁹³ In the long run, the Government needs to invest in local institutions to enhance their capacity for training.

ii. Public Awareness

Considering that nuclear energy is a completely new concept among the Kenyan people, there is a need for authorities to sensitize the public on the same. It is commendable that there have been efforts by the relevant authorities to not only organize public forums but also organize primary and secondary schools' writing competitions on nuclear energy.¹⁹⁴ This should continue in order to address any concerns that the public may have

¹⁹¹'A Case for Nuclear Energy in Kenya' (*The Star*) <<https://www.the-star.co.ke/opinion/columnists/2019-04-05-a-case-for-nuclear-energy-in-kenya/>> accessed 19 August 2020.

¹⁹²'A Case for Nuclear Energy in Kenya' (*The Star*) <<https://www.the-star.co.ke/opinion/columnists/2019-04-05-a-case-for-nuclear-energy-in-kenya/>> accessed 19 August 2020.

¹⁹³'A Case for Nuclear Energy in Kenya' (*The Star*) <<https://www.the-star.co.ke/opinion/columnists/2019-04-05-a-case-for-nuclear-energy-in-kenya/>> accessed 19 August 2020.

¹⁹⁴'NuPEA 2020 Essay Contest' <<https://nuclear.co.ke/index.php/en/nupea-2020-essay-contest>> accessed 20 August 2020; 'Library' <<https://nuclear.co.ke/index.php/en/library>> accessed 20 August 2020.

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and also for ensuring that there is clear communication among all stakeholders. A well informed public can process and appreciate any information that is disseminated and it also makes it easier for the Government to tap into any potential talents out their seeking to pursue knowledge and expertise in the area of nuclear energy production.

3.8.6 Lessons from Elsewhere: Making the Best of Nuclear Power

It is estimated that currently, over thirty countries produce and use nuclear energy, with some, like France, producing large portions of their electricity from nuclear power, and others like Brazil and the Netherlands producing small percentages of electricity by nuclear power.¹⁹⁵ Notably, some countries like China are investing heavily into construction of new plants and others like Germany have long term plans to phase out their plants.¹⁹⁶ However, a few of the major players as highlighted below demonstrate that even as Kenya seeks to start nuclear power project, the Government should consider moving more towards other sources of renewable energy. Kenya is already hailed as one of the notable producers of renewable energy such as wind power and geothermal power. There is a need to explore these at a higher scale because while they are not cheap to produce, nuclear energy may even prove more expensive and complicated to run due to the potential risks.

a) France

As at September 2020, it was estimated that France derives about 75% of its electricity from nuclear energy, due to a long-standing policy based on energy security, making France one of the world's largest net exporter of electricity due to its very low cost of generation, and gains over €3 billion per year from this.¹⁹⁷ In addition, the country has been very active in developing nuclear technology such as reactors and especially fuel products

¹⁹⁵ 'International Politics - Nuclear Energy'

<<https://sites.google.com/a/ncsu.edu/nuclear-energy/politics/foreign>> accessed 8 September 2020.

¹⁹⁶ Ibid.

¹⁹⁷ 'Nuclear Power in France | French Nuclear Energy - World Nuclear Association' <<https://www.world-nuclear.org/information-library/country-profiles/countries-a-f/france.aspx>> accessed 4 October 2020.

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and services have been a significant export.¹⁹⁸ According to the available data, the total country's electricity generation in 2017 was 562 TWh broken down as follows: nuclear 398TWh (71%); hydro 55.1 TWh (10%); natural gas 40.4 TWh (7%); wind 24.7 TWh (4%); coal 15.1 TWh (3%); biofuels & waste 10.2 TWh; (2%); solar 10.2 TWh (2%); oil 7.4 TWh (1%).¹⁹⁹ Despite this success in generation of nuclear power, reports from as recent as January 2020 indicate that the Government of France policy is to reduce reliance on nuclear energy from 75% to 50% of the country's electricity by 2035 by bringing in more renewable power.²⁰⁰ In addition, some of the challenges that have led to the closure of some of the reactors include but are not limited to safety-related issues reported at some plants over the past several years, including non-lethal radioactive contamination of workers, electrical fault, cracks in a reactor cover, a chemistry error, water pollution, and a fuel leak.²⁰¹ France has also been reacting to pressure from its neighbours including Germany which has been arguing that "nuclear power is not a climate savior. It is risky, expensive and leaves behind radioactive waste for thousands of generations."²⁰²

¹⁹⁸ Ibid.

¹⁹⁹ Ibid.

²⁰⁰ 'France to Cut Nuclear Energy Reliance by 2035: Minister | Reuters' <<https://www.reuters.com/article/us-france-nuclearpower/france-to-cut-nuclear-energy-reliance-by-2035-minister-idUSKCN1NN0OK>> accessed 4 October 2020; Darrell Proctor, 'Last Reactor at Oldest French Nuclear Plant Going Offline' (*POWER Magazine*, 28 June 2020) <<https://www.powermag.com/last-reactor-at-oldest-french-nuclear-plant-going-offline/>> accessed 4 October 2020; Jake Stones, 'French Strategy Boasts Largest 2030 Electrolyser Hydrogen Capacity' (*ICIS Explore*) <<https://www.icis.com/explore/resources/news/2020/09/11/10551839/french-strategy-boasts-largest-2030-electrolyser-hydrogen-capacity>> accessed 4 October 2020.

²⁰¹ Darrell Proctor, 'Last Reactor at Oldest French Nuclear Plant Going Offline' (*POWER Magazine*, 28 June 2020) <<https://www.powermag.com/last-reactor-at-oldest-french-nuclear-plant-going-offline/>> accessed 4 October 2020.

²⁰² Deutsche Welle (www.dw.com), 'France Shuts down First Reactor of Fessenheim Nuclear Plant near German Border | DW | 22.02.2020' (*DW.COM*) <<https://www.dw.com/en/france-shuts-down-first-reactor-of-fessenheim-nuclear-plant-near-german-border/a-52466064>> accessed 4 October 2020.

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Kenya should therefore anticipate and address similar concerns in time and periodic review of the country's performance is critical.

b) Germany

Germany itself currently has six nuclear power plants operating all of which are all scheduled to be shut down by the end of 2022.²⁰³ The 2011 Fukushima nuclear disaster in Japan led to widespread anti-atomic-power protests across Germany after which it is reported that German Chancellor Angela Merkel announced that all plants would be closed over the next decade, making Germany the second country after Italy to shut down all of its atomic energy stations.²⁰⁴ This is a pointer that nuclear energy may not always be the answer and there is a need to tap into more renewable sources of energy in the country.

c) Sweden

The construction of Sweden's first commercial nuclear power plant started on 1 August 1966 and grid connection was carried out on 19 August 1971, namely Oskarshamn-1, which was retired in 2017 after an estimated generation of total of 110 TWh over its lifetime.²⁰⁵ The shutdown of O1 left

²⁰³ Deutsche Welle (www.dw.com), 'France Shuts down First Reactor of Fessenheim Nuclear Plant near German Border | DW | 22.02.2020' (DW.COM) <<https://www.dw.com/en/france-shuts-down-first-reactor-of-fessenheim-nuclear-plant-near-german-border/a-52466064>> accessed 4 October 2020; 'Germany Shuts down Atomic Plant as Nuclear Phase-out Enters Final Stretch | News | DW | 31.12.2019' <<https://www.dw.com/en/germany-shuts-down-atomic-plant-as-nuclear-phase-out-enters-final-stretch/a-51845616>> accessed 4 October 2020.

²⁰⁴ Deutsche Welle (www.dw.com), 'Germany Shuts down Atomic Plant as Nuclear Phase-out Enters Final Stretch | DW | 31.12.2019' (DW.COM) <<https://www.dw.com/en/germany-shuts-down-atomic-plant-as-nuclear-phase-out-enters-final-stretch/a-51845616>> accessed 4 October 2020; 'Germany Demolishes Cooling Tower of Former Nuclear Power Plant | News | DW | 09.08.2019' <<https://www.dw.com/en/germany-demolishes-cooling-tower-of-former-nuclear-power-plant/a-49967279>> accessed 4 October 2020.

²⁰⁵ Ihédate and ihedate, 'Sweden Retires First Commercial Nuclear Reactor (Oskarshamn-1)' (*World Nuclear Industry Status Report*, 20 June 2017) <<https://www.worldnuclearreport.org/Sweden-Retires-First-Commercial-Nuclear-Reactor-Oskarshamn-1.html>> accessed 5 October 2020.

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eight reactors operating in Sweden, one at Oskarshamn (O3), four at Ringhals and three at Forsmark where Ringhals-2 was scheduled to shut down in 2019, with Ringhals-1 to follow in 2020.²⁰⁶ The closure decision was taken for commercial reasons, and although the price of electricity has recovered since 2015, the assessment was that it would not be possible to continue operation of either of the two reactors, for both economic and practical reasons.²⁰⁷

3.8.7 Realizing the Right to Clean and Sustainable Energy for all

It has been argued that since energy cannot be created or destroyed, one of the best ways of ensuring that all Kenyans have access to clean energy is promoting energy efficiency.²⁰⁸

Goal 7 of the Sustainable Development Goals (SDGs) seeks to ensure that there is access to affordable, reliable, sustainable and modern energy for all.²⁰⁹ Particularly, countries are expected to ensure that by 2030, there is universal access to affordable, reliable and modern energy services; substantial increase in the share of renewable energy in the global energy

²⁰⁶ Ibid; 'Ringhals 2 Nuclear Plant Shuts Down' (*Vattenfall*)

<<https://group.vattenfall.com/press-and-media/news--press-releases/newsroom/2019/ringhals-2-nuclear-plant-shuts-down>> accessed 5 October 2020; 'Ringhals 2 Enters Retirement: Corporate - World Nuclear News' <<https://world-nuclear-news.org/Articles/Ringhals-2-enters-retirement>> accessed 5 October 2020; 'Sweden Closes Nuclear Reactor after over 40 Yrs of Operation' (*AP NEWS*, 30 December 2019) <<https://apnews.com/article/a08facfe81523e85083e21ffe1ded681>> accessed 5 October 2020.

²⁰⁷ 'Ringhals 2 Nuclear Plant Shuts Down' (*Vattenfall*)

<<https://group.vattenfall.com/press-and-media/news--press-releases/newsroom/2019/ringhals-2-nuclear-plant-shuts-down>> accessed 5 October 2020.

²⁰⁸ Munene, Martin Brown, Janes Ouma Odongo, and Anne Nyambane. "Energy Efficiency in Kenya." (2019). Available at <https://ke.boell.org/sites/default/files/energy_efficiency_in_kenya_study_.pdf> Accessed on 1 September 2020.

²⁰⁹UN General Assembly, *Transforming our world: the 2030 Agenda for Sustainable Development*, 21 October 2015, A/RES/70/1, SDG Goal 7.

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mix and doubling the global rate of improvement in energy efficiency.²¹⁰ Thus, away from nuclear energy, the Government of Kenya needs to put in place other measures to enhance the efficiency of the available sources of renewable energy as well nonrenewable sources while minimizing any negative effects that these may have on the environment or the public's health.

i. Expanding infrastructure and upgrading technology for supplying modern and sustainable energy services

SDG Goal 7.b seeks to ensure that by 2030, countries expand infrastructure and upgrade technology for supplying modern and sustainable energy services for all especially in developing countries, in particular least developed countries, Small Island developing States and landlocked developing countries, in accordance with their respective programmes of support.

In line with the 'Last Mile Project', there is a need for the Government of Kenya to continually invest in infrastructure as well as upgrading energy technology to ensure that all Kenyans have access to modern and sustainable energy. As things stand, there is a huge number of Kenyans who still rely of non-renewable energy such as kerosene, wood and charcoal (biomass), thus making it difficult to achieve the minimum 10% tree cover as provided for under Article 69 of the Constitution of Kenya 2010.²¹¹

Under Kenya's Vision 2030 and specifically the National Renewable Energy Master Plan, the Government of Kenya hopes to 'promote development of renewable energy as an alternative source of energy which will include generation of energy from solar, wind, biogas, development of bio-energy including bio-ethanol and diesel value chains and promotion of the use of

²¹⁰ Ibid.

²¹¹ 'How Kenya Can Transform the Charcoal Sector and Create New Opportunities for Low-Carbon Rural Development on JSTOR'

<https://www.jstor.org/stable/resrep02811?seq=1#metadata_info_tab_contents> accessed 21 September 2020.

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improved cooking stoves and charcoal kilns, and re-afforestation of water towers.²¹²

While these aspirations come with social, economic and political challenges, if achieved, they can go a long way in achieving the right to affordable and sustainable energy for all.

ii. Mainstreaming Gender Issues in Energy and Addressing Poverty

Gender mainstreaming has been defined as: “...the process of assessing the implications for women and men of any planned action, including legislation, policies or programmes, in all areas and at all levels. It is a strategy for making women’s as well as men’s concerns and experiences an integral dimension of the design, implementation, monitoring and evaluation of policies and programmes in all political, economic and societal spheres so that women and men benefit equally and inequality is not perpetuated. The ultimate goal is to achieve gender equality and equity.”²¹³ Some authors have argued that if the right to energy for all Kenyans is to be realized, then gender issues ought to be tackled. This is because of the important role that women play when it comes to meeting the energy needs of families especially in the rural setting.²¹⁴ The *National Gender and Equality Commission Act, 2011*²¹⁵ defines “gender” to mean the social definition of women and men among different communities and cultures, classes, ages and during different periods in history.²¹⁶ On the other hand, the Act defines “gender mainstreaming” to mean ensuring that the concerns of women

²¹² ‘Development of New and Renewable Sources of Energy | Kenya Vision 2030’ <<https://vision2030.go.ke/project/development-of-new-and-renewable-sources-of-energy/>> accessed 30 September 2020.

²¹³ United Nations. *Gender Mainstreaming an Overview*. Office of the Special Adviser on Gender Issues, 2002 <<https://www.un.org/womenwatch/osagi/pdf/e65237.pdf>> Accessed 9 October 2020.

²¹⁴ ‘Women in Energy Means More Clean Energy for All across Africa’ <<https://www.esi-africa.com/industry-sectors/future-energy/women-in-energy-means-more-clean-energy-for-all-across-africa/>> accessed 28 September 2020.

²¹⁵ National Gender and Equality Commission Act, No.15 of 2011, Laws of Kenya.

²¹⁶ National Gender and Equality Commission Act, sec. 2.

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and men form an integral dimension of the design of all policies, laws and administrative procedures including budgeting and budget implementation, and the monitoring and evaluation of programmes implementing such policies, laws and administrative procedures in all political, economic and societal spheres; so as to ensure that women and men benefit equally, and that inequality is not perpetuated.²¹⁷ Indeed, it has been observed that while mainstreaming is clearly essential for securing human rights and social justice for women as well as men, it also increasingly recognized that incorporating gender perspectives in different areas of development ensures the effective achievement of other social and economic goals.²¹⁸ Past studies have revealed that most Kenyans are still lagging behind as far as understanding of their human rights is concerned. Many still think that different rights apply to men and women. For instance, in 2018, a survey carried out by IPSOS revealed that about 53 per cent of Kenyans were unable identify any human rights violations in their home areas.²¹⁹

Facilitating access to clean energy for both men and women not only contributes to strengthening families and their health but also creates business opportunities for them.²²⁰ There is also a need to address poverty levels in the country. An economically empowered household is likely to have more choices when it comes to energy use for their domestic needs. Enhancing energy production in the country without addressing the socioeconomic factors that make energy unavailable to most households in the first place may not achieve much as far as adoption of cleaner sources of energy is concerned.

²¹⁷ National Gender and Equality Commission Act, sec. 2.

²¹⁸ United Nations. *Gender Mainstreaming an Overview*. Office of the Special Adviser on Gender Issues, 2002.

²¹⁹ Hillary Orinde, 'Survey Reveals How Kenyans Are Ignorant of Their Human Rights' (*The Standard*)

<<https://www.standardmedia.co.ke/kenya/article/2001276119/kenyans-in-the-dark-about-their-rights>> accessed 14 October 2020.

²²⁰ Ibid.

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iii. Promoting Energy Efficiency in Kenya

A number of studies have been carried out on factors that affect energy efficiency practices and how the stakeholders in the Kenyan energy sector can enhance energy efficiency in the country. Some of the energy demand and consumption aspects that influence the adoption of energy efficiency practices in the country that have been identified include: the different types of energy being used domestically in the household level; the respondents' knowledge of energy efficiency; household energy consumption monitoring/tracking trends; respondents' perception of energy efficiency; knowledge on the potential energy efficiency practices; benefits associated with energy efficiency; and their knowledge regarding climate change dynamics and how these compare with domestic energy use.²²¹

Promoting energy efficiency practices has been hailed not only as a way to ensure that there is enough energy for all but also as a climate mitigation measure.²²² As a result, Kenya's Climate Change Action Plan 2018–2022 has prioritized enhancement of energy efficiency as one of the priority actions to mitigate climate change in the country.²²³ It is important to point out that

²²¹ Munene, Martin Brown, Janes Ouma Odongo, And Anne Nyambane, 'Energy Efficiency in Kenya: Public Awareness, Strategies, Challenges & Opportunities | Heinrich Böll Stiftung | Nairobi Office Kenya, Uganda, Tanzania, Somalia/Somaliland' (*Heinrich-Böll-Stiftung*) <<https://ke.boell.org/en/2019/09/16/energy-efficiency-kenya-public-awareness-strategies-challenges-opportunities>> accessed 3 October 2020; Zaharia, Alina, Maria Claudia Diaconeasa, Laura Brad, Georgiana-Raluca Lădaru, and Corina Ioanăș. "Factors Influencing Energy Consumption in the Context of Sustainable Development." *Sustainability* 11, no. 15 (2019): 4147; Temiz Dinç, Dilek, and Ece C. Akdoğan. "Renewable energy production, energy consumption and sustainable economic growth in Turkey: A VECM Approach." *Sustainability* 11, no. 5 (2019): 1273; Jian, Jianhui, Xiaojie Fan, Pinglin He, Hao Xiong, and Huayu Shen. "The effects of energy consumption, economic growth and financial development on CO2 emissions in China: A VECM Approach." *Sustainability* 11, no. 18 (2019): 4850.

²²² 'Promoting Energy Efficiency as a Climate Change Mitigation Action in Kenya | UNDP in Kenya' (*UNDP*) <<https://www.ke.undp.org/content/kenya/en/home/stories/2019/lecrd-promoting-energy-efficiency.html>> accessed 4 October 2020.

²²³ *Ibid.*

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producing power without promoting efficient consumption of the same will mean that it may be counterproductive as it may never be enough for everyone. There is need for continued promotion of diverse methods of enhancing efficiency across use of all sources of energy and in all sectors such as through ensuring that energy efficient appliances are not only available but also affordable, there is a wider use of efficient technology to take advantage of the available sources of energy such as biomass to come up with the most efficient and less polluting forms of the same and even use of biogas in villages for lighting and cooking. As already pointed out, biomass provides about 69% of the country's overall energy requirements while petroleum accounts for about 22% and electricity about 9% and as at June, 2017, 65.6% of the electricity component was generated using renewable energy sources with fossil fuels providing the balance of 34.4%.²²⁴ There is a need to expand the use of these sources to generate more electricity.

Private persons may also be considered for funding to come up with larger scale biogas production projects to light villages.²²⁵ This will not only create employment for more people but will also promote cleaner energy technologies and climate change mitigation.

iv. Capacity Building for Adoption of Nuclear Power

It is commendable that the Government of Kenya already put in place the Nuclear Power and Energy Agency as envisaged under the Energy Act, 2019 and also enacted the Nuclear Regulatory Act 2019. However, it is true that the Agency requires to work closely with other stakeholders across the board. While the Government has shown some efforts towards training of personnel to create expertise in nuclear power, there is a need for sustained and long term efforts for capacity building through training of engineers in

²²⁴ Republic of Kenya, *National Energy Policy*, October, 2018, para. 3.

²²⁵ Huber, Sebastian. "Small-scale biogas production from organic waste and application in mid-income countries—a case study of a Lebanese community." (2019) <<http://www.diva-portal.org/smash/get/diva2:1334609/FULLTEXT01.pdf>> accessed 4 October 2020.

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industry and consultants as well as developing localized university and polytechnic level training in the country.

3.9 Conclusion

It has been observed that responding to climate change, reducing rural poverty and achieving global food and nutrition security are three urgent and interlinked problems facing the global community today.²²⁶ The biggest threat to the 2030 Agenda is climate change, where the Sustainable Development Goals, from poverty eradication and ending hunger to conserving biodiversity and peace, will be unattainable if climate change is not urgently addressed.²²⁷ Before the outbreak of Corona Virus pandemic, SDG Goal 13 aimed to mobilize US\$100 billion annually by 2020 to address the needs of developing countries to both adapt to climate change and invest in low-carbon development.²²⁸ However, as things stand currently, countries also have to contend with the Covid-19 pandemic, further complicating the situation.

This chapter has put across the argument is that for the country to combat climate change, there is a need for an integrated approach that meaningfully involves all the stakeholders. While it has been acknowledged that efforts to mitigate climate change require political action²²⁹, Governments alone

²²⁶ McCarthy, N., Brubaker, J. 2014, *Climate-Smart Agriculture and resource tenure in Sub-Saharan Africa: a conceptual framework*, Rome, FAO, 6 <https://www.researchgate.net/publication/279912013_Climate_Smart_Agriculture_and_Resource_Tenure_in_sub-Saharan_Africa_A_Conceptual_Framework>accessed 17 January 2021.

²²⁷ 'Aligning SDG and Climate Action' (*Sustainable Goals*, 18 June 2019) <<https://www.sustainablegoals.org.uk/aligning-sdg-and-climate-action/>> accessed 21 January 2021.

²²⁸ 'Goal 13: Climate Action' (*UNDP*) <<https://www.undp.org/content/undp/en/home/sustainable-development-goals/goal-13-climate-action.html>> accessed 21 January 2021.

²²⁹ '15.5: Anthropogenic Causes of Climate Change' (*Geosciences LibreTexts*, 4 November 2019) <[https://geo.libretexts.org/Bookshelves/Geology/Book%3A_An_Introduction_to_Geology_\(Johnson_Affolter_Inkenbrandt_and_Mosher\)/15%3A_Global_Climate_Change/15.05%3A_Anthropogenic_Causes_of_Climate_Change](https://geo.libretexts.org/Bookshelves/Geology/Book%3A_An_Introduction_to_Geology_(Johnson_Affolter_Inkenbrandt_and_Mosher)/15%3A_Global_Climate_Change/15.05%3A_Anthropogenic_Causes_of_Climate_Change)> accessed 17 January 2021.

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cannot possibly achieve this task. Climate change mitigation is an important step towards achieving sustainability in the country, without which the realisation of both the country's Vision 2030 and the United Nation's 2030 Agenda for Sustainable Development will remain a mirage. There is a need to adopt mitigation and adaptation approaches to address climate change. While mitigation and adaptation policies have different goals and opportunities for implementation, many drivers of mitigation and adaptation are common, and solutions can be interrelated.²³⁰

According to the IPCC Fifth Assessment Report:²³¹

"[T]he more human activities disrupt the climate, the greater the risks of severe, pervasive and irreversible impacts for people and ecosystems... [W]e have the means to limit climate change and its risks, with many solutions that allow for continued economic and human development. However, stabilizing temperature increase to below 2°C relative to pre-industrial levels will require an urgent and fundamental departure from business as usual."

Notably, energy sources also greatly affects a country's ability to combat climate change. That is why this chapter has dedicated a whole section to the possibility of exploring alternative sources of energy as a step towards combating climate change.

²³⁰Grafakos, S., Pacteau, C., Delgado, M., Landauer, M., Lucon, O., and Driscoll, P. (2018). Integrating mitigation and adaptation: Opportunities and challenges. In Rosenzweig, C., W. Solecki, P. Romero-Lankao, S. Mehrotra, S. Dhakal, and S. Ali Ibrahim (eds.), *Climate Change and Cities: Second Assessment Report of the Urban Climate Change Research Network*. Cambridge University Press. New York. 101-138, 102 <https://uccrn.ei.columbia.edu/sites/default/files/content/pubs/ARC3.2-PDF-Chapter-4-Mitigation-and-Adaptation-wecompress.com_.pdf> accessed 17 January 2021.

²³¹The Intergovernmental Panel on Climate Change' (*MIT Climate Portal*) <<https://climate.mit.edu/explainers/intergovernmental-panel-climate-change>> accessed 21 January 2021.

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Some of the existing studies have concluded that although the government of Kenya has done so much to turn around energy use practices in the country, and the take up of these is increasing, most citizens still use crude energy sources basically wood, charcoal and crude fuels.²³² There also seems to be a disconnect between the reported government efforts and achievements vis-à-vis actual public energy use and practices pointing to both a communication gap and inability of the citizens to quickly take up these projects.²³³ Thus, while this chapter supports the government's efforts to diversify the available sources of renewable energy in Kenya, there is also a need for continued public awareness campaigns to sensitize the public on the need for practicing energy efficiency regardless of the energy source in question. It is not just about affordability and availability of energy but also how efficiently the same is utilized.

Such energy sources as nuclear power, while viable in the country require continued consultations, creating public awareness and immense investment in radioactive waste handling and disposal for the sake of public health and environmental protection. Indeed, some commentators have argued that African countries looking to invest in nuclear energy as a source of clean electricity should consider Europe's struggles with disposing of radioactive waste.²³⁴ It is therefore important that the Government expands its choices while trying to meet the current and future energy needs of the country by investing more in the already available renewable sources of energy, enhance efficiency and also ensure affordability by a wider group.

²³² Munene, Martin Brown, Janes Ouma Odongo, And Anne Nyambane, 'Energy Efficiency in Kenya: Public Awareness, Strategies, Challenges & Opportunities | Heinrich Böll Stiftung | Nairobi Office Kenya, Uganda, Tanzania, Somalia/Somaliland' (*Heinrich-Böll-Stiftung*) <<https://ke.boell.org/en/2019/09/16/energy-efficiency-kenya-public-awareness-strategies-challenges-opportunities>> accessed 3 October 2020.

²³³ Ibid.

²³⁴ Deutsche Welle (www.dw.com), 'What Happens to Nuclear Waste from Power Plants? | DW | 13.11.2019' (*DW.COM*) <<https://www.dw.com/en/what-happens-to-nuclear-waste-from-power-plants/a-51216359>> accessed 4 October 2020.

Chapter Three - Combating Climate Change in Kenya for Environmental Security and Sustainable Development

Exploring alternative sources of energy is a worthwhile exercise in line with Kenya's quest for Sustainable Development. Combating climate for Sustainable Development in Kenya is indeed a goal that is achievable.

CHAPTER FOUR

Reconceptualising the Sustainable Development Agenda for Poverty Eradication

4.1 Introduction

The sustainable development goals as captured under the United 2030 Agenda for Sustainable Development (SDGs) seek to ensure that natural resources are managed in a way that balances the needs of human beings and the need for conservation of these resources for the sake of present and future generations. The SDGs acknowledge the complex relationship between economic, social and environmental elements of development. They also set goals and targets that states must meet by the year 2030 using these resources. SDG Goal 1 thereof seeks to ensure that countries end poverty in their all its forms in their territories as part of a prerequisite for the realisation of sustainable development. It is an open secret that world is still struggling with abject poverty and huge inequalities. Kenya is no exception since a huge number of its population are still considered to be living below poverty line. Thus, even when the country boasts of impressive economic growth, this class of people have little, if anything, to celebrate since the gains do not trickle down to positive touch their lives. As such, they often feel marginalised and sidelined as far as national development agenda is concerned.

This chapter discusses how the SDG Goal 1 can be achieved in Kenya especially in the aftermath of Covid 19 which has affected the global economy, with the developing countries suffering the greatest. The chapter offers some recommendations that may be considered for the sake of ensuring poverty in all its form is eradicated, consequently allow all sections of the society to feel that they belong, and that that the government's development agenda is inclusive. The recommendations range from financial support for empowerment, to climate change and gender equality and equity, among others. Poverty eradication is an important step towards ensuring that every person's inherent dignity and the right to have that

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dignity respected and protected is realised as guaranteed under the Constitution of Kenya.

In addition to the foregoing, Sustainable Development Goal (SDG) 3 of the United Nations 2030 Agenda on Sustainable Development obligates State Parties to work towards ensuring healthy lives and wellbeing of people of all ages in their territories by the year 2030. The Covid-19 has drawn the attention of all countries to the status of their health system, mostly by exposing the weaknesses. This ranges from the inadequate health facilities, shortage of health workers and even the limited financial investment in emergency treatment requirements. The results have been devastating on most countries' economies. Kenya has not been left behind as it has had to mainly rely on grants and loans from foreign sources to meet its public health obligations and needs. This chapter also highlights these challenges in line with Sustainable Development Goal 3 (SDG 3) which requires all states to put in place measures geared towards ensuring healthy lives and the general wellbeing of their citizens. The chapter also offers some recommendations in line with the same.

4.2 Eradicating Poverty for Inclusive Development in Kenya

The sustainable development agenda is mainly informed by an anthropocentric approach to development. The concept of sustainable development seeks to combine growing concerns about a range of environmental issues, socio-economic issues to do with poverty and inequality and concerns about a healthy future for humanity.¹ As already highlighted in another chapter, this is an approach that puts the needs of the human beings at the centre of development activities with a view to ensuring that their needs are fully satisfied while protecting and conserving the environment for the sake of future (human) generations.²

¹ Hopwood B, Mellor M and O'Brien G, 'Sustainable Development: Mapping Different Approaches' (2005) 13 *Sustainable development* 38, 39.

² See generally, Muigua K, *Nurturing Our Environment for Sustainable Development*. Glenwood Publishers Limited, 2016; see also Howarth RB, 'Sustainability, Well-Being, and Economic Growth' (2012) 5 *Minding Nature* 32.

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The anthropocentric approach to environmental management and development, both of which form the basis of sustainable development agenda, include poverty eradication, food security, environmental democracy, environmental justice, environmental security, public participation, gender equity, access to information and conflicts management, amongst others.³ Sustainable development seeks to promote and ensure the fulfilment of the basic needs of the world's poor without compromising the capacity of the environment to provide similar benefits for future generations.⁴ In this respect, the sustainable development debates revolve around how natural and environmental resources can be utilized to alleviate human suffering and poverty.⁵ The United Nations Environmental Assembly (UNEA) asserts that this development path should maintain, enhance and, where necessary, rebuild natural capital as a critical economic asset and source of public benefits, especially for poor people whose livelihoods and security depend strongly on nature.⁶

This is important considering that 'more than one billion people in the world live in abject poverty on less than \$1.25 per day while the richest 1% people have almost half of the world's wealth, leading to the conclusion that there is a huge gap and inequality in the distribution of the world economy'.⁷ Thus, while many countries across the world, including Kenya, have been working towards eradication of poverty, huge inequalities have persisted

³ See Muigua, K., *Nurturing Our Environment for Sustainable Development*, Glenwood Publishers, Nairobi – 2016).

⁴ Mbote, P.K. & Cullet, P., 'Environmental Justice and Sustainable Development: Integrating Local Communities in Environmental Management,' *ELRC Working Paper 1996 – 1*, (International Environmental Law Research Centre, 1996), p. 7 <<http://www.ielrc.org/content/w9601.pdf>> accessed 24 December 2020.

⁵ 'The Relationship between Poverty and the Environment' (*Voices of Youth*) <<https://www.voicesofyouth.org/blog/relationship-between-poverty-and-environment>> accessed 24 December 2020.

⁶ 'What Is an "Inclusive Green Economy"? | UNEP - UN Environment Programme' <<https://www.unenvironment.org/explore-topics/green-economy/why-does-green-economy-matter/what-inclusive-green-economy>> accessed 24 December 2020.

⁷ 'Poverty Is a Human Rights Violation | Apolitical' (17 June 2020) <https://apolitical.co/en/solution_article/poverty-is-a-human-rights-violation> accessed 24 December 2020.

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and progress has been uneven.⁸ The high rates of poverty have especially been more pronounced in developing countries mainly in the African continent.⁹ This is despite the fact that Africa as a continent is endowed with immense natural and human resources as well as great cultural, ecological and economic diversity.¹⁰ Some of the causes of poverty in Africa include, *inter alia*, population growth, war and crises, climate change, illnesses, inadequate agricultural infrastructure, and unjust trade structures.¹¹ This is however not to say that poverty is only to be found in developing countries because, as it has been pointed out by one scholar, 'extreme poverty prevails in all countries of the world, regardless of their economic, social, and cultural situation and seriously affects the most vulnerable and

⁸Poverty Eradication: Sustainable Development Knowledge Platform' <<https://sustainabledevelopment.un.org/topics/povertyeradication>> accessed 25 December 2020.

⁹Poverty in Africa Is Now Falling—but Not Fast Enough' <<https://www.brookings.edu/blog/future-development/2019/03/28/poverty-in-africa-is-now-falling-but-not-fast-enough/>> accessed 25 December 2020; Chandy L, 'Why Is the Number of Poor People in Africa Increasing When Africa's Economies Are Growing?' (*Brookings*, 30 November 1AD) <<https://www.brookings.edu/blog/africa-in-focus/2015/05/04/why-is-the-number-of-poor-people-in-africa-increasing-when-africas-economies-are-growing/>> accessed 25 December 2020; 'On the Poorest Continent, the Plight of Children Is Dramatic' (*SOS-US-EN*) <<https://www.sos-usa.org/SpecialPages/Africa/Poverty-in-Africa>> accessed 25 December 2020; 'Poverty and Development in Africa' <<https://www.globalpolicy.org/social-and-economic-policy/poverty-and-development/poverty-and-development-in-africa.html>> accessed 25 December 2020.

¹⁰ 'Poverty and Development in Africa' <<https://www.globalpolicy.org/social-and-economic-policy/poverty-and-development/poverty-and-development-in-africa.html>> accessed 25 December 2020; Muigua K, *Utilizing Africa's Natural Resources to Fight Poverty* (2014) <<http://kmco.co.ke/wp-content/uploads/2019/06/Utilizing-Africas-Natural-Resources-to-Fight-Poverty-26th-March2014.pdf>> accessed 25 December 2020.

¹¹ 'On the Poorest Continent, the Plight of Children Is Dramatic' (*SOS-US-EN*) <<https://www.sos-usa.org/SpecialPages/Africa/Poverty-in-Africa>> accessed 25 December 2020.

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disadvantaged individual's families and groups who are hindered in the exercise of their Human Rights and fundamental freedom'.¹²

The United Nations 2030 agenda for Sustainable Development which contains 17 Sustainable Development Goals (SDGs) has some goals and targets that are specifically meant to address poverty and inequalities in the world. SDG Goal 1 seeks to ensure that State Parties end poverty in all its forms everywhere by the year 2030.¹³ This is supposed to involve targeting

¹² Dr Dharmendra Kumar Singh, 'Poverty and Human Dignity: A Human Rights Approach' (2017) 22 IOSR Journal of Humanities and Social Science 48; see also 'Goal 1: No Poverty | UNDP' <<https://www.undp.org/content/undp/en/home/sustainable-development-goals/goal-1-no-poverty.html>> accessed 25 December 2020.

¹³ SDG Goal 1, United Nations, *Transforming our world: the 2030 Agenda for Sustainable Development*, Resolution adopted by the General Assembly on 25 September 2015, A/RES/70/1.

The related targets include:

1.1 *By 2030, eradicate extreme poverty for all people everywhere, currently measured as people living on less than \$1.25 a day.*

1.2 *By 2030, reduce at least by half the proportion of men, women and children of all ages living in poverty in all its dimensions according to national definitions.*

1.3 *Implement nationally appropriate social protection systems and measures for all, including floors, and by 2030 achieve substantial coverage of the poor and the vulnerable.*

1.4 *By 2030, ensure that all men and women, in particular the poor and the vulnerable, have equal rights to economic resources, as well as access to basic services, ownership and control over land and other forms of property, inheritance, natural resources, appropriate new technology and financial services, including microfinance.*

1.5 *By 2030, build the resilience of the poor and those in vulnerable situations and reduce their exposure and vulnerability to climate-related extreme events and other economic, social and environmental shocks and disasters.*

1.A *Ensure significant mobilization of resources from a variety of sources, including through enhanced development cooperation, in order to provide adequate and predictable means for developing countries, in particular least developed*

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the most vulnerable, increasing basic resources and services, and supporting communities affected by conflict and climate-related disasters.¹⁴

4.2.1 The Definition of Poverty: Meaning and Scope

While there is no single meaning of the term 'poverty' due to the varying elements associated with the same, there exists a number of definitions that ably captures the scope of the term as intended to be used in this chapter. One author has observed that:

*"Poverty is commonly understood as the state of one who lacks a certain amount of material possessions or money. It is a human condition where people do not have adequate access to their fundamental needs such as income, food, clothing, shelter, health care, security, education etc."*¹⁵

Poverty can also be conceptualized in a broad manner which may include, inter alia, the recognition that it is not limited to lack of income only, but comprises of deprivations in areas of health, education, participation and security.¹⁶ Furthermore, human poverty may also be perceived as a denial of human rights as it arguably infringes on, among others, human freedom

countries, to implement programmes and policies to end poverty in all its dimensions.

1. B Create sound policy frameworks at the national, regional and international levels, based on pro-poor and gender-sensitive development strategies, to support accelerated investment in poverty eradication actions.

¹⁴ 'Goal 1: No Poverty | UNDP'

<https://www.undp.org/content/undp/en/home/sustainable-development-goals/goal-1-no-poverty.html> accessed 25 December 2020.

¹⁵ 'Poverty Is a Human Rights Violation | Apolitical' (17 June 2020) https://apolitical.co/en/solution_article/poverty-is-a-human-rights-violation accessed 24 December 2020.

¹⁶ Gordon, D., Chapter 1, 'Definitions of Concepts for the Perceptions of Poverty and Social Exclusion' www.bris.ac.uk/poverty/downloads/.../pse/99-Pilot/99-Pilot_1.doc accessed 24 December 2020.

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and destroys human dignity. It is viewed as an intrusion into human dignity.¹⁷

Basic human rights are an integral part of human rights and their violation has been seen as sabotage of human dignity.¹⁸ Indeed, in the Kenyan case of *M W K & another v Attorney General & 3 others* [2017] eKLR¹⁹, the High Court referred to South African jurisprudence and stated as follows:

49. Article 28 provides no definition of dignity. However, its role and importance as a foundational constitutional value has been emphasized in a number of cases. In the South African case of *S v Makwanyane*, [18] O'Regan J pointed out that "without dignity, human life is substantially diminished" and pronounced the prime value of dignity in the following terms: -

"The importance of dignity as a founding value of the ... Constitution cannot be overemphasized. Recognizing a right to dignity is an acknowledgment of the intrinsic worth of human beings: human beings are entitled to be treated as worthy of respect and concern. The right is therefore the foundation of many of the other rights that are specifically entrenched in Chapter 3."²⁰ (Emphasis added)

Sustainable development, as defined in the *Brundtland Commission Report*, includes human development.²¹ One of the ways of achieving human development which empowers people, both men and women, is addressing

¹⁷ Rukooko, A.B., 'Poverty and human rights in Africa: historical dynamics and the case for economic social and cultural rights', *The International Journal of Human Rights*, Vol. 14, Iss. 1, 2010.

¹⁸ *Vienna Declaration and Programme of Action*, Article 25, Adopted by the World Conference on Human Rights in Vienna on 25 June 1993.

¹⁹ *M W K & another v Attorney General & 3 others* [2017] eKLR, Constitutional Petition 347 of 2015.

²⁰ *Ibid*, Para. 49.

²¹ Costantini, V. & Monni, S., "Measuring Human and Sustainable Development: an integrated approach for European Countries," *Working paper No. 41*, 2004. p. 8 <<http://host.uniroma3.it/dipartimenti/economia/pdf/WP41.pdf> > accessed 24 December 2020.

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poverty in order to empower people to contribute positively towards national development with dignity, without solely relying on the Government to do so.²²

The view that poverty is a shortage of income should also be discarded and instead embrace that perceives poverty as ‘unfreedoms’ of various sorts: the lack of freedom to achieve even minimally satisfactory living conditions.²³ This is because while low income can contribute to poverty, lack of schooling facilities, absence of health facilities, unavailability of medicines, the suppression of women, hazardous environmental features and lack of jobs do also play a major role.²⁴ Thus, as long as these factors exist, then poverty cannot be said to have been eliminated. Poverty is viewed as a socio-economic phenomenon.²⁵ It is therefore arguable that while the Constitution of Kenya guarantees right to dignity for everyone, this right goes beyond freedom from being treated or punished in a cruel, inhuman or degrading manner; it must be guaranteed through ensuring that the ‘unfreedoms’ mentioned above are addressed. Certainly, there is no dignity in living in abject poverty. Indeed, it has been posited that abject poverty conditions are not only a violation of the right to human dignity but in some circumstances, it is actually a threat to right to life.²⁶ The State must protect its people from descending into such circumstances where their human dignity becomes compromised through deprivation of basic needs or even reaches a point of threat to right to life. Some scholars have rightly argued that ‘poverty is not only deprivation of basic needs or material resources but a violation of human dignity. The most injurious and debilitating

²² Muigua, K., *Nurturing Our Environment for Sustainable Development*, Glenwood Publishers, Nairobi – 2016).

²³ Green, D., *From Poverty to Power: How active citizens and effective states can change the world*, (2nd ed., 2012), p. IX (Foreword by Amartya Sen), Rugby, UK: Practical Action Publishing and Oxford: Oxfam International
<http://www.oxfamamerica.org/static/media/files/From_Poverty_to_Power_2nd_Edition.pdf> accessed 24 December 2020.

²⁴ Muigua, K., *Nurturing Our Environment for Sustainable Development*, Glenwood Publishers, Nairobi – 2016).

²⁵ Dr Dharmendra Kumar Singh, ‘Poverty and Human Dignity: A Human Rights Approach’ (2017) 22 IOSR Journal of Humanities and Social Science 48, 48.

²⁶ *Ibid*, 48.

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characteristic of poverty is loss of dignity'.²⁷ Arguably, social economic rights as guaranteed under Article 43 of the Constitution of Kenya²⁸ are critical for enjoyment of the right to life.

4.2.2 International and National Legal Frameworks on Poverty Eradication

There exists a number of international and regional legal instruments that are geared towards eradication of poverty.

i. International Human Rights Legal Instruments

The central aim of the *Agenda 21*²⁹ as adopted in 1992 was combating poverty, hunger, ill health and illiteracy, and the continuing deterioration of the ecosystems on which the human race depend for their well-being. It also sought to deal with the integration of environment and development concerns and greater attention to them which would lead to the fulfillment of basic needs, improved living standards for all, better protected and managed ecosystems and a safer, more prosperous future.³⁰ Thus, the aim was to achieve a global consensus and political commitment at the highest level on development and environment cooperation.³¹

Article 2 of the *International Covenant on Economic, Social and Cultural Rights (ICESCR)*³² states:

“Each State Party to the present Covenant undertakes to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources,

²⁷ Ibid, 48.

²⁸ Kenya Law: The Constitution of Kenya'

<<http://www.kenyalaw.org/kl/index.php?id=398>> accessed 25 December 2020.

²⁹ (A/CONF.151/26, vol. II), United Nations Conference on Environment & Development Rio de Janeiro, Brazil, 3 to 14 June 1992, Agenda 21.

³⁰ Ibid, Preamble.

³¹ United Nations Conference on Environment & Development Rio de Janeiro, Brazil, 3 to 14 June 1992, Agenda 21, Preamble (para. 1.3).

³² UN General Assembly, *International Covenant on Economic, Social and Cultural Rights*, 16 December 1966, United Nations, Treaty Series, vol. 993, p. 3.

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with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures."

*Agenda 21*³³ also rightly pointed out that managing resources sustainably requires an environmental policy which not only focuses on the conservation and protection of resources but also takes due account of those who depend on the resources for their livelihoods as a way of addressing poverty and achieving long-term success in resource and environmental conservation.³⁴

In order to ensure that biological diversity management takes care of the needs of the people especially those living around them, the *Convention on Biological Diversity*³⁵ was negotiated with the objective of promoting the conservation of biodiversity, the sustainable use of its components, and the fair and equitable sharing of benefits arising out of the utilization of genetic resources.³⁶

The 2002 World Summit on sustainable Development in Johannesburg adopted a plan of implementation reiterating the Rio principles and establishing poverty eradication, sustainable consumption and production patterns and protection of the natural resource base for economic and social development as the three prime objectives (Johannesburg Plan).³⁷

The *United Nations Conference on Sustainable Development* ("Rio+20")³⁸ which took place in Rio de Janeiro, Brazil in June 2012, also involved governments

³³ (A/CONF.151/26, vol. II), United Nations Conference on Environment & Development Rio de Janeiro, Brazil, 3 to 14 June 1992, Agenda 21.

³⁴ *Ibid*, Clause 3.2.

³⁵ 1992 Convention on Biological Diversity, [1993] ATS 32 / 1760 UNTS 79 / 31 ILM 818 (1992).

³⁶ Article 1.

³⁷ World Summit on Sustainable Development, *Johannesburg Declaration on Sustainable Development*, A/CONF.199/20, Annex: Plan of Implementation of the World Summit on Sustainable Development.

³⁸ United Nations, *Report of the United Nations Conference on Sustainable Development*, Rio de Janeiro, Brazil 20–22 June 2012, A/CONF.216/16.

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committing to sustainable development and to ensure the promotion of an economically, socially and environmentally sustainable future for the planet and for present and future generations. The participants would ensure that they work towards eradicating poverty which they recognised as the greatest global challenge facing the world today and an indispensable requirement for sustainable development, thus creating the need for freeing humanity from poverty and hunger as a matter of urgency.³⁹

At the Rio+20 Conference, world leaders, participants from governments, the private sector, NGOs and other groups, deliberated on how they can reduce poverty, advance social equity and ensure environmental protection.⁴⁰

The *2030 Agenda for Sustainable Development*, includes a set of 17 Sustainable Development Goals (SDGs) to end poverty, fight inequality and injustice, and tackle climate change by the year 2030.⁴¹ The 2030 Agenda for Sustainable Development⁴² is a plan of action for people, planet and prosperity. It also seeks to strengthen universal peace in larger freedom and was formulated in recognition that eradicating poverty in all its forms and dimensions, including extreme poverty, is the greatest global challenge and an indispensable requirement for sustainable development.⁴³

The *Sustainable Development Goals, Agenda 2030* (SDGs) define sustainable development broadly to cover issues such as poverty, inequality, gender

³⁹ Ibid, Article 1.2; Article 1.8.

⁴⁰United Nations Conference on Sustainable Development
<<http://www.uncsd2012.org/about.html>>accessed 24 December 2020.

⁴¹ United Nations Development Programme, 'Sustainable Development Goals (SDGs),' <<http://www.undp.org/content/undp/en/home/mdgoverview/post-2015-development-agenda.html> > accessed 24 December 2020.

⁴²*Transforming our world: the 2030 Agenda for Sustainable Development*, Resolution adopted by the General Assembly on 25 September 2015, [without reference to a Main Committee (A/70/L.1)], Seventieth session, Agenda items 15 and 116, 21 October 2015.

⁴³ Ibid, Preamble.

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equality, health, education, governance, climate change and environmental protection.⁴⁴

The *African Convention on the Conservation of Nature and Natural Resources*⁴⁵ seeks: to enhance environmental protection; to foster the conservation and sustainable use of natural resources; and to harmonize and coordinate policies in these fields-with a view to achieving ecologically rational, economically sound and socially acceptable development policies and programmes.⁴⁶

Under the SDGs and other legal instruments and policies, poverty eradication efforts have since adopted a human rights approach due to its complex relationship with the basic human rights. The Office of the High Commissioner for Human Rights (UN Human Rights) rightly observes that:

*A human rights definition and understanding leads to more adequate responses to the many facets of poverty, responses that do not trample on rights in the pursuit of growth and development. It gives due attention to the critical vulnerability and subjective daily assaults on human dignity that accompany poverty. Importantly, it looks not just at resources but also at the capabilities, choices, security and power needed for the enjoyment of an adequate standard of living and other fundamental civil, cultural, economic, political and social rights.*⁴⁷

The main objective of all the major international legal instruments, policies and actions on human rights is the alleviation of human suffering and to

⁴⁴ See United Nations, *Transforming our world: the 2030 Agenda for Sustainable Development*, A/RES/70/1, Resolution adopted by the General Assembly on 25 September 2015.

⁴⁵ African Union, *African Convention on the Conservation of Nature and Natural Resources*, OAU, 1001 UNTS 3.

⁴⁶ *Ibid*, Article I.

⁴⁷ OHCHR | Human Rights Dimension of Poverty' <<https://www.ohchr.org/en/issues/poverty/dimensionofpoverty/pages/index.aspx>> accessed 23 December 2020.

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promote the total wellbeing of all, the absence of which wellbeing is usually perceived to be poverty.⁴⁸

ii. National Policy and Legal Frameworks on Poverty Eradication in Kenya

The Constitution of Kenya 2010 stipulates that 'the national values and principles of governance include, inter alia, human dignity, equity, social justice, inclusiveness, equality, human rights, non-discrimination and protection of the marginalised'.⁴⁹ The Preamble also recognises the aspirations of all Kenyans for a government based on the essential values of human rights, equality, freedom, democracy, social justice and the rule of law.⁵⁰ In addition, the Constitution states that 'the Bill of Rights is an integral part of Kenya's democratic state and is the framework for social, economic and cultural policies'.⁵¹ It also states that 'the purpose of recognising and protecting human rights and fundamental freedoms is to preserve the dignity of individuals and communities and to promote social justice and the realisation of the potential of all human beings'.⁵² Article 28 of the Constitution also guarantees that 'every person has inherent dignity and the right to have that dignity respected and protected'.⁵³

One of the ways that human dignity is violated or lost is through poverty. Indeed, it has been argued that the loss of dignity is worse than poverty itself.⁵⁴ The Court of Appeal at Mombasa in *COI & another v Chief Magistrate Ukunda Law Courts & 4 others* [2018] eKLR⁵⁵ quoted with approval the

⁴⁸ Muigua, K., *Nurturing Our Environment for Sustainable Development*, Glenwood Publishers, Nairobi – 2016).

⁴⁹ Article 10 (2) (b), Constitution of Kenya, 2010.

⁵⁰ Preamble, Constitution of Kenya 2010.

⁵¹ Article 19 (1), Constitution of Kenya, 2010.

⁵² Article 19 (2), Constitution of Kenya, 2010.

⁵³ Article 28, Constitution of Kenya, 2010.

⁵⁴ 'The Saddest Thing in the World Is Not Poverty; It's Loss of Dignity | Jonathan Glennie' (*the Guardian*, 28 January 2015) <<http://www.theguardian.com/global-development/2015/jan/28/dignity-sustainable-development-goals>> accessed 23 December 2020.

⁵⁵ *COI & another v Chief Magistrate Ukunda Law Courts & 4 others* [2018] eKLR, Civil Appeal 56 of 2016.

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Constitutional Court of South Africa in *Dawood and Another vs. Minister of Home Affairs and Others* (CCT35/99) [2000] ZACC 8 :-

“Human dignity informs constitutional adjudication and interpretation at a range of levels. It is a value that informs the interpretation of many, possibly all, other rights. Human dignity is also a constitutional value that is of central significance in the limitations analysis.” [Emphasis added].⁵⁶

The Court of Appeal went on as follows:

26. *It is thus apparent, regardless of one’s status or position or mental or physical condition, one is, by virtue of being human, worthy of having his or her dignity or worth respected. In addition, the South African Constitutional Court in Mayelane vs. Ngwenyama and Another (CCT 57/12) [2013] ZACC 14 stated that: -*

“...the right to dignity includes the right-bearer’s entitlement to make choices and to take decisions that affect his or her life – the more significant the decision, the greater the entitlement. Autonomy and control over one’s personal circumstances is a fundamental aspect of human dignity.”⁵⁷

The place of human dignity in the Bill of rights has also been acknowledged in both the *International Covenant on Civil and Political Rights* (ICCPR)⁵⁸ and the *International Covenant on Economic, Social and Cultural Rights* (ICESCR)⁵⁹ provide in their preambles which are similar as follows:

“Considering that, in accordance with the principles proclaimed in the Charter of the United Nations, recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world, recognizing that these

⁵⁶ Ibid, para. 25.

⁵⁷ Ibid, para. 26.

⁵⁸ UN General Assembly, *International Covenant on Civil and Political Rights*, 16 December 1966, United Nations, Treaty Series, vol. 999, p. 171.

⁵⁹ UN General Assembly, *International Covenant on Economic, Social and Cultural Rights*, 16 December 1966, United Nations, Treaty Series, vol. 993, p. 3.

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rights derive from the inherent dignity of the human person..." [Emphasis added].⁶⁰

The Constitution of Kenya also guarantees that 'every person has the right – to the highest attainable standard of health, which includes the right to health care services, including reproductive health care; to accessible and adequate housing, and to reasonable standards of sanitation; to be free from hunger, and to have adequate food of acceptable quality; to clean and safe water in adequate quantities; to social security; and to education.⁶¹ It also guarantees that no person shall not be denied emergency medical treatment.⁶² It also obligates the State to provide appropriate social security to persons who are unable to support themselves and their dependants.⁶³

The Constitution obligates all State organs and all public officers to address the needs of vulnerable groups within society, including women, older members of society, persons with disabilities, children, youth, members of minority or marginalised communities, and members of particular ethnic, religious or cultural communities.⁶⁴

Going by the elements of poverty that were discussed hereinabove, it is arguable that the denial of any of these social economic rights in Kenya places one on a direct path to poverty. For instance, in the case of *Githunguri Residents Association v Cabinet Secretary - Ministry of Education, Attorney*

⁶⁰ See also the *African Charter on Human and People's Rights* whose Article 5 provides that:

"Every individual shall have the right to the respect of the dignity inherent in a human being and to the recognition of his legal status. All forms of exploitation and degradation of man particularly slavery, slave trade, torture, cruel, inhuman of degrading punishment and treatment shall be prohibited."

⁶¹ Article 43(1), Constitution of Kenya 2010.

⁶² Ibid, Article 43(2).

⁶³ Ibid, Article 43(3).

⁶⁴ Ibid, Article 21(3).

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*General & 5 others [2015] eKLR*⁶⁵, the Court affirmed the relationship between education and alleviation of poverty by citing a South African case as follows:

Why is education such an important right? In Constitutional Law of South Africa/Commentary /Part 11, <http://products.jutaland.co.za>, Ste Woolman and Michael Bishop quoted the opening lines of the Committee on Social, Economic and Cultural Rights' General Comment on the Right to Education to make the point that education is empowerment. The Committee stated thus;

*"Education is both a human right in itself and an indispensable means of realizing other human rights. As an empowerment right, education is the primary vehicle by which economically and socially marginalized adults and children can lift themselves out of poverty and obtain the means to participate fully in their communities. Education has a vital role in empowering women, safeguarding children from exploitative and hazardous labour and sexual exploitation, promoting human rights and democracy, protecting the environment, and controlling population growth. Increasingly, education is recognized as one of the best financial investments States can make. But the importance of education is not just practical; a well-educated, enlightened and active mind, able to wander freely and widely, is one of the joys and rewards of human existence."*⁶⁶

*I agree with the above sentiments.....*⁶⁷

The Kenyan Court went on as follows:

It is therefore the conviction and strong view of this Court that the right to basic education is not to be progressively realised as seems to be the expectation of school management bodies. That right is to be enjoyed now and to argue otherwise would be to cheapen the Constitution and even in a society

⁶⁵ *Githunguri Residents Association v Cabinet Secretary - Ministry of Education, Attorney General & 5 others [2015] eKLR, Petition 464 of 2013.*

⁶⁶ *Ibid*, Para. 30.

⁶⁷ *Ibid*, Para. 31.

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where we live with great wealth disparities and million wallowing in abject poverty, only education can give everyone the chance and opportunity to realise their dream and aspirations. That opportunity was not granted in the circumstances obtaining in this Petition (emphasis added).

While the Constitution affirms that the State shall take legislative, policy and other measures, including the setting of standards, to achieve the progressive realisation of the rights guaranteed under Article 43⁶⁸, and courts have also ruled in the past that some of the social economic rights are to be progressively realised,⁶⁹ it is also true that ‘in applying any right under Article 43, if the State claims that it does not have the resources to implement the right, a court, tribunal or other authority shall be guided by the following principles – it is the responsibility of the State to show that the resources are not available; in allocating resources, the State shall give priority to ensuring the widest possible enjoyment of the right or fundamental freedom having regard to prevailing circumstances, including the vulnerability of particular groups or individuals; and the court, tribunal or other authority may not interfere with a decision by a State organ concerning the allocation of available resources, solely on the basis that it would have reached a different conclusion.⁷⁰ While striving towards progressive realisation of social economic rights in Kenya, the Government should thus work towards ensuring that the most basic needs of people are met or such people are empowered enough to access the same, as a step towards fighting poverty.

*Sessional paper No. 10 of 2012 On Kenya Vision 2030*⁷¹ is a long-term development blueprint for Kenya which aims to transform the country into “a newly-industrialising, middle-income country providing a high quality

⁶⁸ Article 21(2), Constitution of Kenya 2010.

⁶⁹ *In the Matter of the Principle of Gender Representation in the National Assembly and the Senate* [2012] eKLR, Advisory Opinions Application 2 of 2012.

⁷⁰ Article 20(5), Constitution of Kenya 2010.

⁷¹ Republic of Kenya, *Sessional paper No. 10 of 2012 On Kenya Vision 2030*, (Government Printer, 2012).

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of life to all its citizens in a clean and secure environment".⁷² Kenya Vision 2030 was launched in 2008 as Kenya's development blueprint covering the period 2008 to 2030.⁷³

The social pillar of the Vision 2030 seeks to invest in the people of Kenya.⁷⁴ The social pillar forms the basis of transformation in eight key social sectors, namely: education and training; health; water and sanitation; the environment; housing and urbanisation; as well as in gender, youth, sports and culture.⁷⁵ The Blueprint has very forward looking strategies meant to address poverty in the country. However, as at 2020, only ten years shy of the deadline to achieve Vision 2030, the same is threatened by lack of funds, lack of political good -will and corruption.⁷⁶ There is a need for the Government to renew its commitment towards ensuring that the same is achieved.

The Presidency's *Big Four Agenda* which is a 5-year development plan under 4 key pillars, namely: food security, affordable housing, manufacturing, and affordable healthcare for all.⁷⁷ The Agenda thus mainly focuses on social economic rights. It is expected to advance the goals of Vision 2030.⁷⁸

⁷² 'Sessional Paper No. 10 of 2012 on Kenya Vision 2030 - Welcome to Foresight for Development'

<<http://www.foresightfordevelopment.org/sobipro/54/1263-sessional-paper-no-10-of-2012-on-kenya-vision-2030>> accessed 25 December 2020.

⁷³ 'Towards 2030 | Kenya Vision 2030' <<https://vision2030.go.ke/towards-2030/>> accessed 25 December 2020.

⁷⁴ 'Sessional Paper No. 10 of 2012 On Kenya Vision 2030 - Welcome to Foresight for Development', chapter Four.

⁷⁵ Ibid, 93.

⁷⁶ 'Viewpoint: Will Corruption Kill off Kenya's Vision 2030 Plans?' *BBC News* (18 October 2012) <<https://www.bbc.com/news/world-africa-19980173>> accessed 25 December 2020; KIBATI M, 'Corruption, Impunity Blocking Vision 2030' (*The Standard*)

<<https://www.standardmedia.co.ke/commentary/article/2001284573/corruption-impunity-blocking-vision-2030>> accessed 25 December 2020.

⁷⁷ 'The Big 4 - Empowering the Nation' <<https://big4.delivery.go.ke/>> accessed 25 December 2020.

⁷⁸ 'Towards 2030 | Kenya Vision 2030' <<https://vision2030.go.ke/towards-2030/>> accessed 25 December 2020.

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Specifically, the Third Medium Term Plan will be driven by the Big Four Agenda, implemented on the foundations that have been put in place during the First and Second Medium Terms Plans.⁷⁹

The above national constitutional, policy and statutory instruments are not exhaustive as they are implemented through various government policies, programmes, plans and actions. Also noteworthy is the fact that Article 2 (5) (6) of the Constitution provides that the general rules of international law shall form part of the law of Kenya⁸⁰ and to this end, they thus inform the government actions and measures geared towards eradication of poverty, in line with the United Nations 2030 Agenda on Sustainable Development.

4.2.3 Poverty Eradication in Kenya: Challenges and Prospects

A sustainably managed environment is seen as a prerequisite for socio-economic development and poverty reduction. This is because the natural environment supplies ecosystem goods and services that provide income, support job creation, poverty alleviation, contribute to safety nets and reduce inequity.⁸¹

As at 2019, that is, pre-Covid 19 period, it was reported that Kenya experienced robust economic growth from 2005-06 to 2015-16, growing at an average annual rate of 5.3%, higher than the average in Sub-Saharan Africa.⁸² The result was accelerated gains in the fight to reduce poverty, with about 4.5 million Kenyans escaping poverty, a decline from 46.8% to 36.1% of the population.⁸³ This growth was however inequitable since not every segment of the population benefited from the same.⁸⁴ While rural areas have

⁷⁹ Ibid.

⁸⁰ See also *Treaty Making and Ratification Act*, No. 45 of 2012, Laws of Kenya.

⁸¹ Environment UN, 'GOAL 1: No Poverty' (*UNEP - UN Environment Programme*, 3 October 2017) <<http://www.unenvironment.org/explore-topics/sustainable-development-goals/why-do-sustainable-development-goals-matter/goal-1-no>> accessed 24 December 2020.

⁸² 'More than Just Growth: Accelerating Poverty Reduction in Kenya' <<https://blogs.worldbank.org/african/more-than-just-growth-accelerating-poverty-reduction-in-kenya>> accessed 25 December 2020.

⁸³ Ibid.

⁸⁴ Ibid.

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been experiencing some growth due to economic diversification, it was reported that urban poverty rate remained statistically unchanged, where the absolute number of urban poor increased from 2.3 million to 3.8 million due to high population growth, increasing living costs, especially because of high housing costs as well as high food prices, paired with scarce job opportunities thus reducing the disposable income for urban households.⁸⁵ While the World Bank observes that the poverty rate in Kenya had been on a downward trend over the past 15 years before 2020, the rate of poverty in Kenya cannot still be ignored, especially with the numbers rising due to the Covid-19.⁸⁶ According to the World Bank, an additional two million people in Kenya have been pushed into deprivation as the coronavirus pandemic increased poverty levels by four percentage points, with the country experiencing a situation where Kenya's poor population was predominantly rural and less well educated pre-Covid-19.⁸⁷ However, Covid-19 created a new group of 'newly' poor Kenyans with different demographic characteristics," such as urban with household heads who are younger and more educated.⁸⁸ As at November, 2020, it was also estimated that Kenya's unemployment rate almost doubled to 10.4% in the second quarter.⁸⁹

Thus, as things stand, the situation is getting worse and all the gains of yesteryears are quickly being undone. This therefore calls for the Government to work even harder than before to not only stabilize the

⁸⁵ Ibid.

⁸⁶ 'Pandemic Created New Class of Kenyan Poor, World Bank Says' *Bloomberg.com* (25 November 2020)

<<https://www.bloomberg.com/news/articles/2020-11-25/pandemic-hit-created-new-class-of-kenyan-poor-world-bank-says>> accessed 25 December 2020.

⁸⁷ Ibid.

⁸⁸ Ibid; 'Pandemic Pushes 2 Million Kenyans into Poverty' (*The East African*) <<https://www.theeastafrican.co.ke/tea/business/pandemic-pushes-2-million-kenyans-into-poverty-3216566>> accessed 25 December 2020.

⁸⁹ Ibid; 'Kenya: Rising Unemployment Leads People to Line for Dirty Jobs' <<https://www.aa.com.tr/en/africa/kenya-rising-unemployment-leads-people-to-line-for-dirty-jobs/1965212>> accessed 25 December 2020.

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economy, which has been shrinking⁹⁰, but also to ensure that the same gets back on track and the efforts towards eradication of poverty are given maximum attention.

4.2.4 Eradicating Poverty for Inclusive Development in Kenya

The SDGs ought to inform the efforts of member states in achieving sustainable development, poverty eradication, and environmental conservation and protection. They offer an integrated approach, which is environmentally conscious, to combating the various problems that affect the human society as well as the environmental resources.⁹¹

It has rightly been argued that a development strategy anchored in inclusive growth can have two mutually reinforcing strategic focuses, namely: high, sustainable growth which can create and expand economic opportunities; and broader access to these opportunities which can ensure that members of society can participate in and benefit from growth.⁹² This is meant to ensure that growth reaches the impoverished who remain excluded by circumstance, poor governance, and other market-resistant obstacles.⁹³

⁹⁰ 'Kenyan Economy Shrinks for the First Time since September 2008 - Citizentv.Co.Ke' <<https://citizentv.co.ke/business/kenyan-economy-shrinks-for-the-first-time-since-september-2008-347867/>> accessed 25 December 2020; 'Kenyan Economy Shrinks for First Time in 17 Years Due to Virus' <<https://www.bloombergquint.com/business/kenyan-economy-shrinks-for-first-time-in-17-years-due-to-virus>> accessed 25 December 2020; 'Kenya's Economy Shrinks by 5.7% in 2020 Q2 as Pandemic Hits Key Sectors - Kenyan Wallstreet' <<https://kenyanwallstreet.com/kenyas-economy-shrinks-by-5-7-in-2020-q2/>> accessed 25 December 2020.

⁹¹ Muigua, K., *Nurturing Our Environment for Sustainable Development*, Glenwood Publishers, Nairobi - 2016).

⁹² Elmer, 'Inclusive Growth and Poverty Reduction' (*Asian Development Bank*, 6 January 2015) <<https://www.adb.org/themes/social-development/poverty-reduction/inclusive-growth>> accessed 25 December 2020.

⁹³ Ibid; see also 'Africa: Poor Excluded From Benefits of High Economic Growth' <<https://www.globalpolicy.org/social-and-economic-policy/poverty-and-development/poverty-and-development-in-africa/50363-africa-poor-excluded-from-benefits-of-high-economic-growth.html?itemid=id#969>> accessed 25 December 2020; 'Growth Without Equity Roils South Africa' <<https://www.globalpolicy.org/social-and-economic-policy/poverty-and->

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a) Gender Sensitive Approaches to Poverty Eradication

Poverty affects males and females in varying ways and as such, any efforts geared towards its eradication should bring on board all the affected parties in order to come up with effective mechanisms that will not only reflect and address the needs of all sections of the society, but will also facilitate participation of all.⁹⁴ This is also important as it helps generate social acceptance of the government's policies while are geared towards addressing the real issues affecting its people.⁹⁵ In most parts of the world, women comprise the largest group among those excluded from the benefits of economic expansion and thus ought to be closely involved in development agenda to address their unique needs and ensured that they are also empowered in all spheres of life.⁹⁶ One of the main reasons why it is critical to empower women is the fact that women are considered as economic actors: they produce and process food for the family; they are the primary caretakers of children, the elderly and the sick; and their income and labour are directed toward children's education, health and well-being.⁹⁷ If both men and women are empowered, then households will get closer to eradicating poverty and focus on self-actualization and national development.⁹⁸

development/poverty-and-development-in-africa/52239-growth-without-equity-roils-south-africa-.html?itemid=id#44653> accessed 25 December 2020.

⁹⁴ 'Chapter 1: Women and Poverty – Global Women's Issues: Women in the World Today, Extended Version'

<<https://opentextbc.ca/womenintheworld/chapter/chapter-1-women-and-poverty/>> accessed 25 December 2020.

⁹⁵ Muigua, K., *Nurturing Our Environment for Sustainable Development*, Glenwood Publishers, Nairobi – 2016).

⁹⁶ Elmer, 'Inclusive Growth and Poverty Reduction' (*Asian Development Bank*, 6 January 2015) <<https://www.adb.org/themes/social-development/poverty-reduction/inclusive-growth>> accessed 25 December 2020.

⁹⁷ 'Chapter 1: Women and Poverty – Global Women's Issues: Women in the World Today, Extended Version'

<<https://opentextbc.ca/womenintheworld/chapter/chapter-1-women-and-poverty/>> accessed 25 December 2020.

⁹⁸ Lefton R, 'Gender Equality and Women's Empowerment Are Key to Addressing Global Poverty' (*Center for American Progress*, 11 March 2013) <<https://www.americanprogress.org/issues/poverty/news/2013/03/11/56097/>

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b) Eradicating Poverty for Environmental Sustainability

Poverty deprives people of the choice about whether or not to be environmentally sound in their activities.⁹⁹ The 1987 *Brundtland Commission Report* stated: 'those who are poor and hungry will often destroy their immediate environment in order to survive: They will cut down forests; their livestock will overgraze grasslands; they will overuse marginal land; and in growing numbers they will crowd into congested cities. The cumulative effect of these changes is so far-reaching as to make poverty itself a major global scourge.'¹⁰⁰ This may result in climate change, which again, has the reverse effect of contributing to poverty due to dwindling natural resources. Thus, poverty eradication should go hand in hand with climate mitigation measures. Notably, the *2030 Agenda for Sustainable Development* acknowledges this interrelationship as it seeks to end poverty, fight inequality and injustice, and tackle climate change by the year 2030.¹⁰¹

c) Value Addition Model versus Commodity Export Model for Africa

It has been pointed out that one of the greatest unresolved challenges facing Africa's agribusiness sector is the lack of value addition.¹⁰² As a way of addressing poverty in Kenya and Africa in general, there is a need for

gender-equality-and-womens-empowerment-are-key-to-addressing-global-poverty/> accessed 25 December 2020.

⁹⁹ Beder, S, 'Costing the Earth: Equity, Sustainable Development and Environmental Economics,' *New Zealand Journal of Environmental Law*, Vol. 4, 2000, pp.227-243 at p.230; See also generally, Emas, R., 'The Concept of Sustainable Development: Definition and Defining Principles,' Brief for GSDR 2015, p3<https://sustainabledevelopment.un.org/content/documents/5839GSDR%202015_SD_concept_definiton_rev.pdf> accessed 25 December 2020.

¹⁰⁰ Beder, S, 'Costing the Earth: Equity, Sustainable Development and Environmental Economics,' *New Zealand Journal of Environmental Law*, Vol. 4, 2000, pp.227-243, p.230).

¹⁰¹ United Nations Development Programme, 'Sustainable Development Goals (SDGs),'<<http://www.undp.org/content/undp/en/home/mdgoverview/post-2015-development-agenda.html>> accessed 25 December 2020.

¹⁰² 'Why is so Little Value Added in Africa's Soft Commodity Value Chain?' (*Global Trade Review (GTR)*) <<https://www.gtreview.com/supplements/gtr-africa-2019/little-value-added-africas-soft-commodity-value-chain>> accessed 25 December 2020.

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governments to adopt and develop the value addition model as opposed to a commodity export model, as a way of promoting the use of the resources as anchors for regional growth clusters and consequently ensuring that they attract value-addition industries for job creation.¹⁰³

Notably, most processing of cash crops in Africa is basic where the majority of cash crops go through the bare minimum required for export or sale to the next part of the value chain and the results are that while African farmers and processors put in all the work to make a fungible commodity that is easy to trade, all of the value add goes to those further down the chain.¹⁰⁴

There is a need to change this practice as way of ensuring that African farmers and processors get value for the African resources and also get an opportunity for job creation which will ultimately help in alleviation of poverty. The lack of an efficient marketing infrastructure in Africa which prevents farmers and processors from getting full value from their crop, even in its raw form ought to be addressed in order to reverse this trend.¹⁰⁵ Such initiatives as the African Union's African Commodity Strategy, a part of Agenda 2063, should be fully exploited in order to find strategic measures to address price volatility and to use Africa's wealth of natural resources

¹⁰³ Ngwenya, S., "Africa has to Shed off the Resource Curse Stigma" *The Star Newspaper*, Friday January 3, 2014.

¹⁰⁴ 'Why is so Little Value Added in Africa's Soft Commodity Value Chain?' (*Global Trade Review (GTR)*)

<<https://www.gtreview.com/supplements/gtr-africa-2019/little-value-added-africas-soft-commodity-value-chain>> accessed 25 December 2020; 'Development Aid to Africa Negligible in Comparison to Illicit

Outflows' <<https://www.globalpolicy.org/component/content/article/211-development/52662-development-aid-to-africa-negligible-in-comparison-to-illicit-outflows-.html>> accessed 25 December 2020.

¹⁰⁵ 'Why is so Little Value Added in Africa's Soft Commodity Value Chain?' (*Global Trade Review (GTR)*) <<https://www.gtreview.com/supplements/gtr-africa-2019/little-value-added-africas-soft-commodity-value-chain>> accessed 25

December 2020; Muigua K, *Utilizing Africa's Natural Resources to Fight Poverty* (2014) <kmco.co.ke/wp-content/uploads/2019/06/Utilizing-Africas-Natural-Resources-to-Fight-Poverty-26th-March2014.pdf> accessed 25 December 2020.

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and absolute advantage in the commodities market to ensure that Africa's commodities are used for its industrialisation.¹⁰⁶

Notably, increased participation in international trade can catalyse economic growth and foster sustainable development. As such, promoting value addition and enhancing domestic productive capacity is therefore of continuing importance in developing countries as they seek to participate beneficially in global trade.¹⁰⁷

There is also a need for diversification of economic activities in the country as this may cushion the communities and national economy generally from unforeseen disruptions or a decline in the agricultural sector production which is prone to climate change yet it is considered to be the backbone of Kenya's economy.¹⁰⁸ The need for diversification has been witnessed in rural areas where it was reported in 2019 that poverty declined considerably in rural areas, from about 50% in 2005-06 to 38.8% in 2015-16, largely attributed to the increasing importance of non-agricultural income (particularly commerce) to supplement agricultural income for rural households, which has been aided by the expansion of mobile money and the telecommunication revolution.¹⁰⁹ There is therefore a need for the

¹⁰⁶ 'African Commodity Strategy | AUDA-NEPAD' <<https://www.nepad.org/agenda-2063/flagship-project/african-commodity-strategy>> accessed 25 December 2020.

¹⁰⁷ United Nations, 'Promoting value addition and the enhancement of domestic productive capacity through local economic empowerment,' *Note by the UNCTAD secretariat*, Expert Meeting on Promoting Value Addition and Enhancement of Domestic Productive Capacity through Local Economic Empowerment Geneva, 16 October 2019 Item 3 of the provisional agenda <https://unctad.org/system/files/official-document/ciem10d2_en.pdf> accessed 25 December 2020.

¹⁰⁸ 'Kenya at a Glance | FAO in Kenya | Food and Agriculture Organization of the United Nations' <<http://www.fao.org/kenya/fao-in-kenya/kenya-at-a-glance/en/>> accessed 25 December 2020; Jowi E, 'Is Agriculture Still the Backbone of Kenya's Economy?' [2016] Natural Resource Modelling.

¹⁰⁹ 'More than Just Growth: Accelerating Poverty Reduction in Kenya' <<https://blogs.worldbank.org/african/more-than-just-growth-accelerating-poverty-reduction-in-kenya>> accessed 25 December 2020.

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Government to work closely with stakeholders in different sectors to create opportunities for the Kenyan people, as a channel for diversification.

d) Population Control

Notably, while African economies are generating more income, that income has to be shared among an ever-increasing number of people, thus causing a slower rate in poverty reduction than population growth.¹¹⁰ The result has been that as more people leave the poverty class, others are joining that reducing the rate of poverty eradication in the continent.¹¹¹ For instance in Kenya, in 2009, it was estimated that Kenya had a population of 37.7 million people and the figure grew to about 47.6 million people in 2019.¹¹² As already pointed out, high population growth comes with extra expenditure and stretched out incomes thus undoing all the gains made in eradication of poverty. There is a need for the Government to work closely with other stakeholders such as religious organizations, civil societies and Non-Governmental Organizations (NGOs) to educate the communities on the need for birth control. This will not only ease strain on the particular households but also on the national economy.

e) Need for Increased Access to Finance for Communities Empowerment

It has been pointed out that eradicating deprivations, building capabilities and opening up opportunities require investment and as a result, governments should not only increase public spending towards empowerment programmes and measures but should also work closely with the private sector in order to help increase access and offer new

¹¹⁰ Chandy L, 'Why Is the Number of Poor People in Africa Increasing When Africa's Economies Are Growing?' (*Brookings*, 30 November 1AD) <<https://www.brookings.edu/blog/africa-in-focus/2015/05/04/why-is-the-number-of-poor-people-in-africa-increasing-when-africas-economies-are-growing/>> accessed 25 December 2020.

¹¹¹ Ibid.

¹¹² '2019 Kenya Population and Housing Census Volume II: Distribution of Population by Administrative Units' (*Kenya National Bureau of Statistics*) <<https://www.knbs.or.ke/?wpdmpro=2019-kenya-population-and-housing-census-volume-ii-distribution-of-population-by-administrative-units>> accessed 25 December 2020.

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approaches to provisioning.¹¹³ While there has been a number of Kenyan Government funded initiatives aimed at financing youth and women groups for empowerment,¹¹⁴ and commendably so, there is a need for the Government to also consider the men folk especially in the villages and informal urban settlements especially where the man is the head of the household. This will not only ensure that there is equity and equality but will also empower these households financially especially where the man has children and no wife or the wife is not in a position to work for gain for one reason or the other. Empowered households are able to tackle poverty without waiting for government handouts and donations and this also safeguards their dignity as human beings. This is also likely to spur economic diversification through investments in non-agricultural sectors such as information technology and science and technology in general, in line with the Constitution of Kenya 2010¹¹⁵. The Government should thus continually work with financial institutions to ensure that financing is

¹¹³ Independent Group of Scientists appointed by the Secretary-General, Global Sustainable Development Report 2019: The Future is Now – Science for Achieving Sustainable Development, (United Nations, New York, 2019), 45 <https://sustainabledevelopment.un.org/content/documents/24797GSDR_report_2019.pdf> accessed 25 December 2020.

¹¹⁴ Youth Enterprise Development Fund' <http://www.youthfund.go.ke/> accessed 25 December 2020; 'Home' <<https://www.wef.co.ke/>> accessed 25 December 2020; 'Women Empowerment in Kenya Organization. (WEIKE) - Kenya -50 Million African Women Speak' <https://www.womenconnect.org/web/kenya/empowerment/-/asset_publisher/aV6bGKqYx8gS/content/women-empowerment-in-kenya-organization-weike-> accessed 25 December 2020.

¹¹⁵ The Constitution provides as follows:

11. Culture

(1) This Constitution recognises culture as the foundation of the nation and as the cumulative civilization of the Kenyan people and nation.

(2) The State shall –

(a) promote all forms of national and cultural expression through literature, the arts, traditional celebrations, science, communication, information, mass media, publications, libraries and other cultural heritage;

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

(c) promote the intellectual property rights of the people of Kenya.

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available to all those who need it. This should target both formal and informal sectors in both urban and rural areas for accelerated eradication of poverty in Kenya.

However, the Government should also ensure that as these groups of people make their investment, there is a conducive tax regime to promote growth and development as well as ready markets both within the country and outside Kenya for the marketing of the end products, whichever the sector.

f) Promotion of Regional and International Trade

Trade is one of the most critical driving forces of economic development for all countries, usually aimed at development and the eradication of poverty.¹¹⁶ The World Bank asserts that countries that are open to international trade tend to grow faster, innovate, improve productivity and provide higher income and more opportunities to their people. In addition, open trade also benefits lower-income households by offering consumers more affordable goods and services.¹¹⁷ The Government of Kenya should continually take advantage of the regional and international trade agreements and deals that will ensure that they get markets for goods and services produced or offered in the country and also ensure that the market remains affordable for the average Kenyan especially for goods and services that may not be available locally. This has the twin effect of not only ensuring that Kenyans earn money but also ensuring that they get the best deals when making purchases. The increased disposable income and the

¹¹⁶ 'The Link between Trade and Development: What Role for the EU Trade Policy?' AIF Conference, Christiansborg, 12 September 2000; See also Preamble, World Trade Organization. "Marrakesh Agreement Establishing the World Trade Organization. Annex 1A: Multilateral Agreements on Trade in Goods-Agreement on Trade-Related Investment Measures", The Results of the Uruguay Round of Multilateral Trade Negotiations: The Legal Texts (World Trade Organization, Geneva, 1995), pp. 163-167; 'Stronger Open Trade Policies Enable Economic Growth for All' (*World Bank*)

<<https://www.worldbank.org/en/results/2018/04/03/stronger-open-trade-policies-enables-economic-growth-for-all>> accessed 25 December 2020.

¹¹⁷ Stronger Open Trade Policies Enable Economic Growth for All' (*World Bank*)

<<https://www.worldbank.org/en/results/2018/04/03/stronger-open-trade-policies-enables-economic-growth-for-all>> accessed 25 December 2020.

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potential savings by consumers from an expanded market has the potential to address poverty and ultimately contribute to national development.¹¹⁸

4.3 Ensuring Healthy Lives and Wellbeing for All Kenyans

The Corona Virus Disease Pandemic (Covid-19) has exposed and brought to the attention of the whole world just how important health and wellbeing of the population is. Indeed, the fact that Covid-19 has affected all sectors of the global economy is evidence enough that human health and wellbeing form the backbone of the global economy. It has become clear that no matter how much governments invest in other areas of the economy, if the health sector is ailing, then all the other efforts come to naught. Indeed, it has been argued that ‘health care is not only a problem of healthcare but also a problem of a profound social nature, making it an integral part of all the social and economic development conditions’.¹¹⁹

While Kenya has been investing and making efforts towards guaranteeing the realisation of the right to health care and wellbeing for all, there are still a lot of challenges facing the health sector. This section discusses some of the main challenges and offers recommendations on what the country can do in its efforts towards realisation of Sustainable Development Goal (SDG) 3 on ensuring healthy lives and wellbeing of all its citizens.¹²⁰ SDG 3 spells

¹¹⁸ ‘Global Trade Liberalization and the Developing Countries -- An IMF Issues Brief’ <<https://www.imf.org/external/np/exr/ib/2001/110801.htm>> accessed 25 December 2020.

¹¹⁹ Tomaziu-Todosia M, ‘The Importance of Public Health Policies in the Social-Economic Development of Romania’ (2019) 10 *Postmodern Openings* 162.

¹²⁰ SDG 3 seeks to “ensure healthy lives and promote wellbeing for all at all ages”. The Health targets for SDG 3 include: By 2030, reduce the global maternal mortality ratio to less than 70 per 100 000 live births; By 2030, end preventable deaths of newborns and children under 5 years of age, with all countries aiming to reduce neonatal mortality to at least as low as 12 per 1000 live births and under-5 mortality to at least as low as 25 per 1000 live births; By 2030, end the epidemics of AIDS, tuberculosis, malaria and neglected tropical diseases and combat hepatitis, water-borne diseases and other communicable diseases; By 2030, reduce by one third premature mortality from non-communicable diseases through prevention and treatment and promote mental health and well-being; Strengthen the prevention and treatment of substance abuse, including narcotic drug abuse and harmful use of alcohol; By 2020, halve the number of global deaths and injuries from road traffic

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out the specific targets and end goals that countries should aspire to achieve. Notably, SDG 3 outlines targets that touch on various aspects of right to health for all groups of people, including men, women and children and their group-specific health needs.

4.3.1 Right to Health: Definition and Scope

The 1946 Constitution of the World Health Organization (WHO) defines health as “a state of complete physical, mental and social well-being and not merely the absence of disease or infirmity”. The preamble further states that “the enjoyment of the highest attainable standard of health is one of the fundamental rights of every human being without distinction of race, religion, political belief, economic or social condition.”¹²¹

accidents; By 2030, ensure universal access to sexual and reproductive health-care services, including for family planning, information and education, and the integration of reproductive health into national strategies and programmes; Achieve universal health coverage, including financial risk protection, access to quality essential health-care services and access to safe, effective, quality and affordable essential medicines and vaccines for all; By 2030, substantially reduce the number of deaths and illnesses from hazardous chemicals and air, water and soil pollution and contamination; 3.a Strengthen the implementation of the WHO Framework Convention on Tobacco Control in all countries, as appropriate; 3.b Support the research and development of vaccines and medicines for the communicable and non-communicable diseases that primarily affect developing countries, provide access to affordable essential medicines and vaccines, in accordance with the Doha Declaration on the TRIPS Agreement and Public Health, which affirms the right of developing countries to use to the full the provisions in the Agreement on Trade-Related Aspects of Intellectual Property Rights regarding flexibilities to protect public health, and, in particular, provide access to medicines for all; 3.c Substantially increase health financing and the recruitment, development, training and retention of the health workforce in developing countries, especially in least developed countries and small island developing States; and 3.d Strengthen the capacity of all countries, in particular developing countries, for early warning, risk reduction and management of national and global health risks.

(‘WHO | Sustainable Development Goal 3: Health’ (WHO) <<http://www.who.int/topics/sustainable-development-goals/targets/en/>> accessed 16 December 2020).

¹²¹ Preamble, *Constitution of the World Health Organization*, Basic Documents, Forty-fifth edition, Supplement, October 2006, pp.1-18.

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The CESCR General Comment No. 14 on *The Right to the Highest Attainable Standard of Health*¹²², defines the right to health as a; “... a fundamental human right indispensable for the exercise of other human rights. Every human being is entitled to the enjoyment of the highest attainable standard of health conducive to living a life in dignity.”¹²³

Arguably, the right to health is conditioned by the health system and the socio-economic factors, which are reflected in the health of the population.¹²⁴ Notably, socioeconomic status underlies three major determinants of health: health care, environmental exposure, and health behaviour.¹²⁵

The World Health Organization's Commission has defined the Social Determinants of Health, that is, the factors apart from medical care that can be influenced by social policies and shape health in powerful ways, as “the conditions in which people are born, grow, live, work and age” and “the fundamental drivers of these conditions”.¹²⁶ Related to this is the fact that ‘health-related behaviours are strongly shaped by social factors, including income, education, and employment’.¹²⁷

The scope, content and nature of State obligations under Article 12 of the ICESCR have been expounded by the Committee on Economic, Social and Cultural Rights (CESCR) under the *General Comment No. 14: The Right to the Highest Attainable Standard of Health (Art. 12 of the Covenant)*.

¹²² UN Committee on Economic, Social and Cultural Rights (CESCR), *General Comment No. 14: The Right to the Highest Attainable Standard of Health (Art. 12 of the Covenant)*, 11 August 2000, E/C.12/2000/4.

¹²³ *Ibid.*, para. 1.

¹²⁴ Tomaziu-Todosia M, ‘The Importance of Public Health Policies in the Social-Economic Development of Romania’ (2019) 10 *Postmodern Openings* 162.

¹²⁵ Nancy E Adler and Katherine Newman, ‘Socioeconomic Disparities in Health: Pathways and Policies’ (2002) 21 *Health Affairs* 60.

¹²⁶ Paula Braveman and Laura Gottlieb, ‘The Social Determinants of Health: It’s Time to Consider the Causes of the Causes’ (2014) 129 *Public Health Reports* 19.

¹²⁷ *Ibid.*

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The *General Comment No. 14: The Right to the Highest Attainable Standard of Health (Art. 12 of the Covenant)*¹²⁸ acknowledges that ‘the right to health is closely related to and dependent upon the realization of other human rights, as contained in the International Bill of Rights, including the rights to food, housing, work, education, human dignity, life, non-discrimination, equality, the prohibition against torture, privacy, access to information, and the freedoms of association, assembly and movement, all of which and other rights and freedoms address integral components of the right to health.’¹²⁹

It has been observed that while it is difficult to pinpoint exactly what the right to health entails, there are specific elements that constitute the core content of the right to health and these include: a) access to maternal and child health care, including family planning; b) immunisation against the major infectious diseases; c) appropriate treatment of common diseases and injuries; d) essential drugs; e) adequate supply of safe water and basic sanitation; and f) freedom from serious environmental health threats. In addition to the scope of core content, a number of guidelines constitute the framework of the right to health: a) availability of health services; b) financial, geographic and cultural accessibility of health services; c) quality of health services; and d) equality in access to available health services.¹³⁰

In addition to the foregoing, the right to health is also considered to be part of the broader right to an adequate standard of living.¹³¹ Under Article 25(1) of the 1948 Universal Declaration of Human Rights, ‘everyone has the right to a standard of living adequate for the health and well-being of himself and his family’ and this includes the following elements: a) food; b) clothing; c)

¹²⁸ UN Committee on Economic, Social and Cultural Rights (CESCR), *General Comment No. 14: The Right to the Highest Attainable Standard of Health (Art. 12 of the Covenant)*, 11 August 2000, E/C.12/2000/4.

¹²⁹ *Ibid.*, para. 3.

¹³⁰ ‘The Right to Health’ (Icelandic Human Rights Centre)

<<https://www.humanrights.is/en/human-rights-education-project/human-rights-concepts-ideas-and-fora/substantive-human-rights/the-right-to-health>> accessed 16 December 2020.

¹³¹ *Ibid.*

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housing; d) medical care; and e) necessary social services.¹³² These elements are also all captured under Article 43 of the Constitution of Kenya 2010 on socio-economic rights. It is therefore evident that the right to health is not a standalone right but instead it is intertwined with many other rights.

4.3.2 Right to Health: International and National Legal Frameworks

a) Right to Health and International Law

The *Universal Declaration of Human Rights*¹³³ guarantees that ‘everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control’.¹³⁴ In addition, ‘motherhood and childhood are entitled to special care and assistance. All children, whether born in or out of wedlock, shall enjoy the same social protection’.¹³⁵ The *International Covenant on Economic, Social and Cultural Rights*¹³⁶ is one of the main international human rights instrument laying basis for a comprehensive recognition of the right to health. It guarantees that ‘the States Parties to the present Covenant recognize the right of everyone to the enjoyment of the highest attainable standard of physical and mental health’.¹³⁷ In addition, ‘the steps to be taken by the States Parties to the present Covenant to achieve the full realization of this right shall include those necessary for: the provision for the reduction of the stillbirth-rate and of infant mortality and for the healthy development of the child; the improvement of all aspects of environmental and industrial hygiene; the

¹³² Ibid.

¹³³ UN General Assembly, *Universal Declaration of Human Rights*, 10 December 1948, 217 A (III).

¹³⁴ Ibid, Article 25(1).

¹³⁵ Ibid, Article 25(2).

¹³⁶ UN General Assembly, *International Covenant on Economic, Social and Cultural Rights, International Covenant on Civil and Political Rights and Optional Protocol to the International Covenant on Civil and Political Rights*, 16 December 1966, A/RES/2200.

¹³⁷ *International Covenant on Economic, Social and Cultural Rights, International Covenant on Civil and Political Rights and Optional Protocol to the International Covenant on Civil and Political Rights*, Article 12(1).

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prevention, treatment and control of epidemic, endemic, occupational and other diseases; and the creation of conditions which would assure to all medical service and medical attention in the event of sickness.¹³⁸

The *Convention on the Elimination of All Forms of Discrimination against Women*¹³⁹ captures the State Parties' concern that in situations of poverty women have the least access to food, *health*, education, training and opportunities for employment and other needs.¹⁴⁰ The Convention requires State Parties to take all appropriate measures to eliminate discrimination against women in order to ensure to them equal rights with men in the field of education and in particular to ensure, on a basis of equality of men and women, *inter alia*: access to specific educational information to help to ensure the health and well-being of families, including information and advice on family planning.¹⁴¹ In addition, States Parties are to take all appropriate measures to eliminate discrimination against women in the field of employment in order to ensure, on a basis of equality of men and women, the same rights, in particular, *inter alia*: the right to protection of health and to safety in working conditions, including the safeguarding of the function of reproduction.¹⁴²

Besides the foregoing, the Convention states that States Parties shall take all appropriate measures to eliminate discrimination against women in the field of health care in order to ensure, on a basis of equality of men and women, access to health care services, including those related to family planning.¹⁴³ Notwithstanding the provisions of paragraph I of this article, States Parties are also obligated to ensure to women appropriate services in connection with pregnancy, confinement and the post-natal period,

¹³⁸ Ibid Article 12(2).

¹³⁹ UN General Assembly, *Convention on the Elimination of All Forms of Discrimination against Women*, 18 December 1979, A/RES/34/180.

¹⁴⁰ Ibid, Preamble.

¹⁴¹ Ibid, Article 10 (h).

¹⁴² Ibid, Article 11(f).

¹⁴³ Ibid, Article 12(1).

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granting free services where necessary, as well as adequate nutrition during pregnancy and lactation.¹⁴⁴

The State Parties to this Convention are supposed to ensure that these rights extend to all women including those in the rural areas by ensuring that they have, inter alia, access to adequate health care facilities, including information, counselling and services in family planning.¹⁴⁵

The *Convention on the Rights of the Child*¹⁴⁶ requires that States Parties shall ensure that the institutions, services and facilities responsible for the care or protection of children shall conform to the standards established by competent authorities, particularly in the areas of safety, health, in the number and suitability of their staff, as well as competent supervision.¹⁴⁷ Under the Convention, States Parties recognize the right of the child to the enjoyment of the highest attainable standard of health and to facilities for the treatment of illness and rehabilitation of health. States Parties shall thus strive to ensure that no child is deprived of his or her right of access to such health care services.¹⁴⁸ In line with this, States Parties shall pursue full implementation of this right and, in particular, shall take appropriate measures: to diminish infant and child mortality; to ensure the provision of necessary medical assistance and health care to all children with emphasis on the development of primary health care; to combat disease and malnutrition, including within the framework of primary health care, through, inter alia, the application of readily available technology and through the provision of adequate nutritious foods and clean drinking-water, taking into consideration the dangers and risks of environmental pollution; to ensure appropriate pre-natal and post-natal health care for mothers; to ensure that all segments of society, in particular parents and children, are informed, have access to education and are supported in the

¹⁴⁴ Ibid, Article 12(2).

¹⁴⁵ Ibid, Article 14.

¹⁴⁶ UN Commission on Human Rights, *Convention on the Rights of the Child*, 7 March 1990, E/CN.4/RES/1990/74.

¹⁴⁷ Ibid, Article 3(3).

¹⁴⁸ Ibid, Article 24(1).

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use of basic knowledge of child health and nutrition, the advantages of breastfeeding, hygiene and environmental sanitation and the prevention of accidents; and to develop preventive health care, guidance for parents and family planning education and services.¹⁴⁹

The *African Charter on Human and Peoples' Rights*¹⁵⁰ guarantees that 'every individual shall have the right to enjoy the best attainable state of physical and mental health'.¹⁵¹ In addition, States Parties to the Charter are obligated to take the necessary measures to protect the health of their people and to ensure that they receive medical attention when they are sick.¹⁵²

Notably the foregoing international and regional legal instruments spell out the state obligations relating to the realization of the right to health which obligations relate to: the obligations to *respect*, *protect* and *fulfil*. Under the *General Comment No. 14 on the right to health*:

*The obligation to fulfil contains obligations to facilitate, provide and promote. The obligation to respect requires States to refrain from interfering directly or indirectly with the enjoyment of the right to health. The obligation to protect requires States to take measures that prevent third parties from interfering with article 12 guarantees. Finally, the obligation to fulfil requires States to adopt appropriate legislative, administrative, budgetary, judicial, promotional and other measures towards the full realization of the right to health.*¹⁵³

These obligations are in turn captured under the domestic laws of state parties and are supposed to define the content of legal and institutional frameworks.

¹⁴⁹ Ibid, Article 24(2).

¹⁵⁰ Organization of African Unity (OAU), *African Charter on Human and Peoples' Rights* ("Banjul Charter"), 27 June 1981, CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982).

¹⁵¹ Ibid, Article 16(1).

¹⁵² Ibid, Article 16(2).

¹⁵³ UN Committee on Economic, Social and Cultural Rights (CESCR), *General Comment No. 14: The Right to the Highest Attainable Standard of Health* (Art. 12 of the Covenant), para. 33.

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Notably, the right to health is not to be understood as a right to be healthy but it contains both freedoms and entitlements.¹⁵⁴ The freedoms include the right to control one's health and body, including sexual and reproductive freedom, and the right to be free from interference, such as the right to be free from torture, non-consensual medical treatment and experimentation. On the other hand, the entitlements include the right to a system of health protection which provides equality of opportunity for people to enjoy the highest attainable level of health.¹⁵⁵

b) Right to Health under the Domestic Law in Kenya: Legal and Institutional Framework

Notably, Article 2 (5) and (6) of the Constitution of Kenya make any treaty or convention ratified by Kenya, part of the laws applicable to Kenya.¹⁵⁶ Thus, in addition to the legal instruments discussed under this section, the international ones discussed in the foregoing section are also applicable in Kenya in so far as the same have been ratified accordingly.

The Constitution of Kenya 2010 has numerous provisions that capture not only the various elements of the right to health/health care services but also guarantees this right for all groups of persons.¹⁵⁷

¹⁵⁴ UN Committee on Economic, Social and Cultural Rights (CESCR), *General Comment No. 14: The Right to the Highest Attainable Standard of Health (Art. 12 of the Covenant)*, para. 8.

¹⁵⁵ UN Committee on Economic, Social and Cultural Rights (CESCR), *General Comment No. 14: The Right to the Highest Attainable Standard of Health (Art. 12 of the Covenant)*, para. 8.

¹⁵⁶ See also Treaty making and Ratification Act, No. 45 of 2012, Laws of Kenya.

¹⁵⁷Section 26 of the Bill of Rights provides for the fundamental right to life.

Article 27(1) and (2) of the Constitution of Kenya states that every person is equal before the law and has a right to equal protection, equal benefit and equal enjoyment of all rights and fundamental freedoms. (4) The State shall not discriminate directly or indirectly against any person on any ground, including race, sex, pregnancy, marital status, health status, ethnic or social origin, colour, age, disability, religion, conscience, belief, culture, dress, language or birth.

Article 43 (1) (a) of the Constitution provides that every person has the right to the highest attainable standard of health, which includes the right to health care services, including reproductive health care.

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The Constitution guarantees that ‘every person has the right – to the highest attainable standard of health, which includes the right to health care services, including reproductive health care.¹⁵⁸ Article 43(2) thereof also provides that a person shall not be denied emergency medical treatment.¹⁵⁹

Article 43 (2) also provides that a person shall not be denied emergency medical treatment.

Article 46. Consumer rights

(1) Consumers have the right –

(a) to goods and services of reasonable quality;

(c) to the protection of their health, safety, and economic interests;

Article 53. Children

(1) Every child has the right –

(c) to basic nutrition, shelter and health care;

(d) to be protected from abuse, neglect, harmful cultural practices, all forms of violence, inhuman treatment and punishment, and hazardous or exploitative labour;

56. Minorities and marginalised groups

The State shall put in place affirmative action programmes designed to ensure that minorities and marginalised groups – e) have reasonable access to water, health services and infrastructure.

57. Older members of society

The State shall take measures to ensure the rights of older persons –

(d) to receive reasonable care and assistance from their family and the State.

204. Equalisation Fund

(2) The national government shall use the Equalisation Fund only to provide basic services including water, roads, health facilities and electricity to marginalised areas to the extent necessary to bring the quality of those services in those areas to the level generally enjoyed by the rest of the nation, so far as possible.

¹⁵⁸ Constitution of Kenya 2010, Article 43(1).

¹⁵⁹ Ibid, Article 43(2). Art 42: See also Article 26. Right to life

(1) *Every person has the right to life.*

(2) *The life of a person begins at conception.*

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The state of health is closely the state of the environment and as such, Article 42 of the Constitution guarantees that ‘every person has the right to a clean and healthy environment, which includes the right-to have the environment protected for the benefit of present and future generations through legislative and other measures, particularly those contemplated in Article 69; and to have obligations relating to the environment fulfilled under Article 70.¹⁶⁰ This connection has been affirmed in various courts, locally and

(3) A person shall not be deprived of life intentionally, except to the extent authorised by this Constitution or other written law.

(4) Abortion is not permitted unless, in the opinion of a trained health professional, there is need for emergency treatment, or the life or health of the mother is in danger, or if permitted by any other written law.

¹⁶⁰ In *Kiluwa Limited & another v Commissioner of Lands & 3 others* [2015] eKLR, Constitutional Petition 8 of 2012, the Court stated as follows:

137. The right to a clean and healthy environment, guaranteed under 42 of the Constitution includes the right to have the environment protected for the benefit of the present and future generations not only through legislative and other measures, and particularly those measures contemplated in Article 69 to ensure inter alia sustainable exploitation, utilization, management and conservation of the environment and natural resources and ensure the equitable sharing of the accruing benefits.

.....

142. On the question of the right to clean and healthy environment, though Article 43 of the Constitution guarantees that right, it would not be remiss for this court to refer to the much earlier law, the Environment Management and Control Act No. 8 of 1999) (EMCA) which came into force on 14th January, 2000 (as amended by Acts of that name Nos. 6 of 2006, No. 17 of 2006, and No. 5 of 2007), had in section 3(1) thereof, declared that every person in Kenya is entitled to a clean and healthy environment, and has the duty to safeguard and enhance the environment. That right is granted constitutional sanctity in Article 42 of the constitution, that every person has the right to a clean and healthy environment and this includes –

- (a) the right to have the environment protected for the benefit of present and future generations through legislative and other measures, particularly, those contemplated in Article 69, and*
- (b) to have the obligations relating to the environment fulfilled under Article 70.*

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143. Under section 3(2) of EMCA, the entitlement to a clean and healthy environment under section 3(1) includes the access by any person in Kenya to the various public elements or segments of the environment for recreational, educational, health, spiritual and cultural purposes. Section 3(4) gives capacity or standing to any person to bring an action notwithstanding that such a person cannot show that the Defendant's act or omission has caused or is likely to cause him any personal injury provided that such action –

- (a) is not frivolous or vexatious, or
- (b) is not an abuse of the court process.

144. An action seeking any orders on protection of the environment, may include orders to -

- (1) prevent, discontinue any act or omission deleterious to the environment;
- (2) to compel any public officer to take measures to prevent or discontinue any act or omission deleterious to the environment.

145. In granting any of the above orders, the court will be guided by the following principles –

- (1) the principle of public participation in the development of policies, plans and processes for the management of the environment;
- (2) the cultural and social principles traditionally applied by any community in Kenya for the management of the environment or natural resources in so far as the same are relevant and are not repugnant to justice and morality or inconsistent with any written law;
- (3) the principles of international co-operation on the management of environmental resources shared by two or more states;
- (4) the polluter pays principle; and
- (5) the precautionary principle.

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internationally.¹⁶¹ In the case of *Peter K. Waweru vs R*¹⁶², the High Court of Kenya affirmed that indeed, the right to life and right to clean and healthy environment are connected, in the following words:

“it is quite evident from perusing the most important international instruments on the environment that the word life and the environment are inseparable and the word “life” means much more than keeping body and soul together.”

The UN Conference on the Human Environment 1972, that is, the Seminal Stockholm Declaration noted that the environment was “essential to ... the enjoyment of basic human rights – even the right to life itself.” Principle 1 asserts that:

*“Man has the fundamental right to freedom, equality and adequate conditions of life; in an environment of a quality that permits a life of dignity and well-being.”*¹⁶³

In *Mohamed Ali Baadi and others v Attorney General & 11 others* [2018] eKLR¹⁶⁴, the High Court of Kenya stated as follows:

109. In addition to the above, one of the issues implicated in this Petition is what is now generally recognized minimum requirements for existence of

¹⁶¹ Peter K. Waweru v Republic [2006] eKLR, Mis.Civl Appli.No. 118 OF 2004; In Ms. Shehla Zia v. WAPDA, PLD 1994 SC 693 Justice SALEEM AKHTAR (Supreme Court of Pakistan) held as follows:

“The Constitution guarantees dignity of man and also right to “life” under Article 9 and if both are read together, question will arise whether a person can be said to have dignity of man if his right to life is below bare necessity line without proper food, clothing shelter education, healthcare, clean atmosphere and unpolluted environment.”

¹⁶² Peter K. Waweru v Republic [2006] eKLR, Mis.Civl Appli.No. 118 OF 2004.

¹⁶³ As quoted in Peter K. Waweru v Republic [2006] eKLR, Mis.Civl Appli.No. 118 OF 2004.

¹⁶⁴ Mohamed Ali Baadi and others v Attorney General & 11 others [2018] eKLR, Petition 22 of 2012.

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environmental democracy, namely, "the tripartite of the so-called access rights in environmental matters, namely, (a) access to information, (b) participation in decision-making, and (c) access to justice." [53] These three access rights have the common denominator that they empower individuals to have a meaningful voice in decisions that affect them and their development. The Constitution of Kenya and Environmental Law recognizes these three access rights.

110. As pointed out later in this judgment, the above rights are also intertwined in that achievement and application of each impact on realization of the others. For instance, access to information ensures that all persons who choose to participate in environmental decision-making are equipped with the necessary, or at least, basic facts about quality of their environment and their legitimate expectation on the same.

111. Thus, violation of rights to a clean and healthy environment can easily lead to the violation of other rights in the Bill of Rights such as the right to life. Yet, the determination of violations or threats of violation of any rights in the Bill of Rights undoubtedly falls within the province of this Court.

.....

277. Article 70 of the Constitution confers standing upon a person who alleges violation of rights to a clean and healthy environment. This means that "the environmental right is sufficiently comprehensive and all-encompassing to provide 'everyone' with the possibility of seeking judicial recourse in the event that any of several potential aspects related to the right or guarantee derived there from is infringed." From the foregoing, it is clear that protection of the environment has now become an urgent responsibility to which our legal system responds to inadequately. It is undisputed that environmental protection in Kenya has constitutional protection.

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The right to clean and healthy environment is thus recognised under the laws of Kenya as an integral part of the right to health and general wellbeing for all people.¹⁶⁵

The Health Act, 2017¹⁶⁶ was enacted to establish a unified health system, to coordinate the inter-relationship between the national government and county government health systems, to provide for regulation of health care service and health care service providers, health products and health technologies and for connected purposes.¹⁶⁷ The objects of the Act are to – establish a national health system which encompasses public and private institutions and providers of health services at the national and county levels and facilitate in a progressive and equitable manner, the highest attainable standard of health services; protect, respect, promote and fulfill the health rights of all persons in Kenya to the progressive realization of their right to the highest attainable standard of health, including reproductive health care and the right to emergency medical treatment; protect, respect, promote and fulfill the rights of children to basic nutrition and health care services contemplated in Articles 43(1) (c) and 53(1) (c) of the Constitution; protect, respect, promote and fulfill the rights of vulnerable groups as defined in Article 21 of the Constitution in all matters regarding health; and recognize the role of health regulatory bodies established under any written law and to distinguish their regulatory role from the policy making function of the national government.¹⁶⁸

The Health Act, 2017 guarantees that it is a fundamental duty of the State to observe, respect, protect, promote and fulfill the right to the highest attainable standard of health including reproductive health care and emergency medical treatment by inter alia – developing policies, laws and other measures necessary to protect, promote, improve and maintain the health and well-being of every person; ensuring the prioritization and

¹⁶⁵ See Muigua, K., "Reconceptualising the Right to Clean and Healthy Environment in Kenya." (2015).

¹⁶⁶ Health Act, No. 21 of 2017, Laws of Kenya.

¹⁶⁷ Ibid, Preamble.

¹⁶⁸ Health Act, 2017, sec. 3.

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adequate investment in research for health to promote technology and innovation in health care delivery; ensuring the realization of the health related rights and interests of vulnerable groups within society, including women, older members of society, persons with disabilities, children, youth, members of minority or marginalized communities and members of particular ethnic, religious or cultural communities; ensuring the provision of a health service package at all levels of the health care system, which shall include services addressing promotion, prevention, curative, palliative and rehabilitation, as well as physical and financial access to health care; and ensuring adequate investment in research for health to promote technology and innovation in health care delivery.¹⁶⁹

The Health Act also guarantees that every person has the right to the highest attainable standard of health which shall include progressive access for provision of promotive, preventive, curative, palliative and rehabilitative services.¹⁷⁰ In addition, every person shall have the right to be treated with dignity, respect and have their privacy respected in accordance with the Constitution and this Act.¹⁷¹

The other relevant national legal instruments include: Public Health Act Cap 242¹⁷²; Public Health Officers (Training Registration and Licensing) Act of 2013¹⁷³; Kenya Health Sector Referral Implementation Guidelines 2014¹⁷⁴;

¹⁶⁹ Health Act, 2017, sec. 4.

¹⁷⁰ Health Act, 2017, sec. 5(1).

¹⁷¹ Health Act, 2017, sec. 5(2).

¹⁷² An Act of Parliament to make provision for securing and maintaining health.

¹⁷³ An Act of Parliament to make provision for the training, registration and licensing of public health officers and public health technicians, to regulate their practice, to provide for the establishment, powers and functions of the Public Health Officers and Public Health Technicians Council and for connected purposes.

¹⁷⁴ The goal of the referral guidelines is to guide the effective management of referral services to ensure continuity of care and effective management of the health needs of the population of Kenya (para. 1.4.1); The referral guidelines have the following objectives: Increase the use of services at lower levels of the health care system; Reduce self-referral to the higher levels of care; Develop service providers' capacity to offer services and appropriately refer at each level of the health care system; Improve the health system's ability to transfer clients, client parameters, specimens and expertise between the different levels of the health care system; Improve

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Kenya Health Sector Referral Strategy 2014-2018; Kenya Health Policy 2012-2030¹⁷⁵; and Kenya National Patients' Right Charter 2013¹⁷⁶.

While Kenya's healthcare system is made up of several systems: public, private and faith-based or NGO, it is estimated that about 48% are public and operate under the Ministry of Health, 41% are in the private sector, 8% are faith-based health services, and 3% are run by NGOs.¹⁷⁷

In a bid to implement Sustainable Development Goal 3 on Good Health and Well-being, the institutional stakeholders working together in Kenya include but are not limited to: Ministry of Health (MOH); Ministry of labour; Government of Kenya (GOK); Council of Governors (COG); Ministry of Education; Elizabeth Glaser Pediatric AIDS Foundation (EGPAF); and National Social Security Fund (NSSF).¹⁷⁸

4.3.3 The State of Health Sector in Kenya: Challenges and Successes

In 2018, the Government of Kenya launched the national Universal Health Coverage pilot programme in a controlled population in four counties

supportive supervision, thereby ensuring up-to-date management practices in use across the country; Improve referral performance monitoring and coordination; Improve preparedness and response to emergencies and disasters; Improve counter referral and referral feedback information system and strengthen out-reach systems for provision of referral health services to marginalized and vulnerable populations; Provide quality emergency health services at the point of need, regardless of ability to pay.

¹⁷⁵ The Kenya Health Policy 2012–2030 has defined the approach to strengthen comprehensive service delivery in the country. It emphasises the elaboration of service delivery solutions across the six levels of care from the community health services (level 1), primary care services (levels 2 and 3), county health services (levels 4 and 5), and the national referral services (level 6).

¹⁷⁶ The patient's rights charter explains the rights of patients and how patients can register complaints or compliments about any health professional or facility.

¹⁷⁷ Mohiddin A and Temmerman M, 'COVID-19 Exposes Weaknesses in Kenya's Healthcare System. And What Can Be Done' (*The Conversation*) <<http://theconversation.com/covid-19-exposes-weaknesses-in-kenyas-healthcare-system-and-what-can-be-done-143356>> accessed 15 December 2020.

¹⁷⁸ 'Sustainable Development Goal 3: Good Health and Well-Being | United Nations in Kenya' <<https://kenya.un.org/en/sdgs/3>> accessed 14 December 2020.

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namely: Kisumu County, because it leads in the high number of infectious diseases like HIV/AIDS and tuberculosis; Machakos County hospital visits are mostly because of accidents and injuries; Nyeri County which is leading in cases of non-communicable diseases, particularly diabetes; and Isiolo County which was ideally meant to assess how the package will work among the nomadic population.¹⁷⁹

The Government of Kenya has made some progress and key reforms towards achieving Universal Health Care, and these include: free maternity services in all public health facilities since 2013; free primary health care in all public primary healthcare facilities – about 3,300 facilities; major programme to equip major public hospitals across the country with modern diagnostic equipment (94 facilities) where contracts have already been signed up with suppliers; a National Referral Strategy has been developed and piloted; health insurance subsidies through NHIF targeting disadvantaged groups continues to be implemented; provision of infrastructure and equipment to health facilities across county governments (new wards, ambulances, additional health workers); among other initiatives.¹⁸⁰

It is however worth pointing that despite this, the Kenyan population is struggling with financing medical care and it is estimated that about 20% of Kenyans have some form of health insurance coverage, including national health insurance, but this varies by region, with 41% of residents in Nairobi having cover, while under 3% have cover in marginalised rural areas such as Wajir and West Pokot.¹⁸¹

¹⁷⁹ 'County Governments at the Centre of Achieving Universal Health Care | Kenya Vision 2030' <<https://vision2030.go.ke/county-governments-at-the-centre-of-achieving-universal-health-care/>> accessed 15 December 2020.

¹⁸⁰ 'Beyond The Conference – Kenya's Progress towards Affordable and Accessible Health Care | Kenya Vision 2030' <<https://vision2030.go.ke/beyond-the-conference-kenyas-progress-towards-affordable-and-accessible-health-care/>> accessed 16 December 2020.

¹⁸¹ Mohiddin A and Temmerman M, 'COVID-19 Exposes Weaknesses in Kenya's Healthcare System. And What Can Be Done' (*The Conversation*) <<http://theconversation.com/covid-19-exposes-weaknesses-in-kenyas->

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While the Government of Kenya, both at national and devolved levels of governance, has been making efforts to achieve the right to health for the people of Kenya, there are a lot of challenges that have been identified as still affecting the sector. According to a Report published by the National Commission on Human Rights in 2017 focusing on a Case Study of Kisumu County on realization of the right to health, there has been progress in the realization of the right to health, but significant gaps still exist, which include: concerns about poor services or the total lack of some aspects of health services in the country. In addition, the ability of the county governments to ensure the realization of the right to health has also been questioned by some stakeholders, including medical practitioners and members of the public.¹⁸² The complaints range from underequipped public facilities; inability of the infrastructure in place to contain the growing population of residents; inadequate human resource in comparison to persons seeking medical treatment, thereby limiting the ability of residents to access quality and affordable health care services, among others.¹⁸³

Kenyans wake up every other day to threats of strikes by medical staff ranging from doctors to nurses in public health facilities. The strikes are attributable to limited career opportunities, insufficient workforce, and low remuneration thus increasing the risk of the health care staff migrating from their countries but also within countries such as from public hospitals to

healthcare-system-and-what-can-be-done-143356> accessed 15 December 2020; Dutta, A., T. Maina, M. Ginivan, and S. Koseki. 2018. Kenya Health Financing System Assessment, 2018: Time to Pick the Best Path. Washington, DC: Palladium, Health Policy Plus

<http://www.healthpolicyplus.com/ns/pubs/1132311587_KenyaHealthFinancingSystemAssessment.pdf> accessed 15 December 2020.

¹⁸² Kenya National Commission on Human Rights, *The Right to Health: A Case Study of Kisumu County*, 2017

<<https://www.knchr.org/Portals/0/EcosocReports/Report%20on%20the%20Right%20to%20Health%20in%20Kisumu%20County.pdf?ver=2018-02-19-123045-547>> accessed 14 December 2020.

¹⁸³ Kenya National Commission on Human Rights, *The Right to Health: A Case Study of Kisumu County*, 2017.

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private ones.¹⁸⁴ This is despite the fact health care staff are crucial for health service delivery and the provision of quality care to patients.¹⁸⁵

4.3.4 Ensuring Healthy Lives and Well-being for All Kenyans

The *CESCR General Comment No. 14: The Right to the Highest Attainable Standard of Health* affirms that the realization of the right to health may be pursued through numerous, complementary approaches, such as the formulation of health policies, or the implementation of health programmes developed by the World Health Organization (WHO), or the adoption of specific legal instruments.¹⁸⁶ This section outlines some recommendations that can help Kenya get closer to ensuring that all its citizens enjoy healthy lives and general wellbeing.

a) Addressing the Socioeconomic Factors that Affect Right to Health in Kenya: Way Forward

As already pointed out, the health status of any population is not independent of the socioeconomic status of the group of people in question. Studies, although some contentious, have established a relation between health and other factors such as poverty, income and education, among others.¹⁸⁷ It is however acknowledged that these factors do not work in isolation even in their influence on health-genetics also may play a role in an individual's vulnerability or resilience to socioeconomic adversity:

¹⁸⁴ Goetz K and others, 'Working Atmosphere and Job Satisfaction of Health Care Staff in Kenya: An Exploratory Study' (*BioMed Research International*, 4 October 2015) <<https://www.hindawi.com/journals/bmri/2015/256205/>> accessed 15 December 2020; Waithaka D and others, 'Prolonged Health Worker Strikes in Kenya- Perspectives and Experiences of Frontline Health Managers and Local Communities in Kilifi County' (2020) 19 *International Journal for Equity in Health* 23.

¹⁸⁵ Goetz K and others, 'Working Atmosphere and Job Satisfaction of Health Care Staff in Kenya: An Exploratory Study' (*BioMed Research International*, 4 October 2015) <<https://www.hindawi.com/journals/bmri/2015/256205/>> accessed 15 December 2020.

¹⁸⁶ UN Committee on Economic, Social and Cultural Rights (CESCR), *General Comment No. 14: The Right to the Highest Attainable Standard of Health (Art. 12 of the Covenant)*, para. 1.

¹⁸⁷ See Paula Braveman and Laura Gottlieb, 'The Social Determinants of Health: It's Time to Consider the Causes of the Causes' (2014) 129 *Public Health Reports* 19.

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different individuals' biological responses to the same socio-environmental trigger can vary markedly according to specific genetic polymorphisms.¹⁸⁸ Studies carried out on socio-economic inequality and inequity in use of health care services in Kenya have established that:

'There is significant inequality and inequity in the use of all types of care services favouring richer population groups, with particularly pronounced levels for preventive and inpatient care services. These are driven primarily by differences in living standards and educational achievement, while the region of residence is a key driver for inequality in preventive care use only. Pro-rich inequalities are particularly pronounced for care provided in privately owned facilities, while public providers serve a much larger share of individuals from lower socio-economic groups'.¹⁸⁹

There are also other studies which support the fact that individuals from poorer households show lower propensity to seek care in health facilities (as opposed to relying on traditional healers or self-treating with medicines bought directly from pharmacies) when facing health problems and illness and the quality of service providers is lower in poorer areas.¹⁹⁰

There is a need for the Government to continually address abject poverty that afflicts huge parts of the Kenyan population. This is because it has been argued that children growing up in socioeconomically disadvantaged neighborhoods face greater direct physical challenges to health status and health-promoting behaviours; they also often experience emotional and psychological stressors, such as family conflict and instability arising from

¹⁸⁸ Paula Braveman and Laura Gottlieb, 'The Social Determinants of Health: It's Time to Consider the Causes of the Causes' (2014) 129 *Public Health Reports* 19.

¹⁸⁹ Ilinca S and others, 'Socio-Economic Inequality and Inequity in Use of Health Care Services in Kenya: Evidence from the Fourth Kenya Household Health Expenditure and Utilization Survey' (2019) 18 *International Journal for Equity in Health* 196.

¹⁹⁰ Ilinca S and others, 'Socio-Economic Inequality and Inequity in Use of Health Care Services in Kenya: Evidence from the Fourth Kenya Household Health Expenditure and Utilization Survey' (2019) 18 *International Journal for Equity in Health* 196.

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chronically inadequate resources.¹⁹¹ It is worth pointing out that the realization of these socio-economic factors is also closely related to the realization of the right to dignity as guaranteed under Article 28 of the Constitution which provides that; “Every person has an inherent dignity and the right to have that dignity respected and protected.

Article 19 of the Constitution of Kenya is categorical that ‘the Bill of Rights is an integral part of Kenya’s democratic state and is the framework for social, economic and cultural policies’.¹⁹² In addition, it provides that ‘the purpose of recognising and protecting human rights and fundamental freedoms is to preserve the dignity of individuals and communities and to promote social justice and the realisation of the potential of all human beings’.¹⁹³

i. Multisectoral Approach and Collaboration among Different Stakeholders

While continued investment on improving the health sector in the country is a commendable move, ‘in order to achieve equity in health and access to care, such efforts must be paralleled by multi-sectoral approaches to address all key drivers of inequity: persistent poverty, disparities in living standards and educational achievement, as well as regional differences in availability and accessibility of care’.¹⁹⁴

Under the current Constitution of Kenya, primary health care provision is a shared responsibility between the national and county governments.¹⁹⁵ It has been argued that while the pilot implementation of Universal Health Coverage (UHC) in four counties in Kenya has demonstrated better impact

¹⁹¹ See Paula Braveman and Laura Gottlieb, ‘The Social Determinants of Health: It’s Time to Consider the Causes of the Causes’ (2014) 129 *Public Health Reports* 19.

¹⁹² Constitution of Kenya 2010, Article 19 (1).

¹⁹³ Constitution of Kenya 2010, Article 19 (2).

¹⁹⁴ Ilinca S and others, ‘Socio-Economic Inequality and Inequity in Use of Health Care Services in Kenya: Evidence from the Fourth Kenya Household Health Expenditure and Utilization Survey’ (2019) 18 *International Journal for Equity in Health* 196.

¹⁹⁵ Constitution of Kenya 2010, Fourth Schedule.

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on the health outcome and greater accessibility while building Resilient and Sustainable Health system that can respond to unforeseen shocks, the success of UHC in Kenya will require more than executive or national-level goodwill; with health as a devolved function, each of the 47 counties must put in systems and resources to ensure its success.¹⁹⁶

The county governors ought to prioritize delivery of a better healthcare system to citizens through a deliberate cohesive approach to UHC between the central government and the counties in order to achieve desired outputs within a short time.¹⁹⁷

The collaboration should however go beyond provision of healthcare services to tackling the challenges that hinder enjoyment of the right to health care by all, such as persistent poverty, disparities in living standards and educational achievement, as well as regional differences in availability and accessibility of care'. There must be better coordination between the government, private and faith or NGO institutions especially in relation to specialist care and other empowerment programmes.¹⁹⁸

ii. Strict Regulation of Private Health Care Providers

Due to socio-economic inequalities, the private sector primarily serves wealthier individuals, whereas those from poorer households more commonly rely on public care providers or use lower standard, often unlicensed, private care facilities.¹⁹⁹

¹⁹⁶ 'COVID-19: Lessons from the Losses' (*Inter Press Service*, 7 September 2020) <<http://www.ipsnews.net/2020/09/covid-19-lessons-losses/>> accessed 15 December 2020.

¹⁹⁷ Ibid.

¹⁹⁸ Mohiddin A and Temmerman M, 'COVID-19 Exposes Weaknesses in Kenya's Healthcare System. And What Can Be Done' (*The Conversation*) <<http://theconversation.com/covid-19-exposes-weaknesses-in-kenyas-healthcare-system-and-what-can-be-done-143356>> accessed 15 December 2020.

¹⁹⁹ Ilinca S and others, 'Socio-Economic Inequality and Inequity in Use of Health Care Services in Kenya: Evidence from the Fourth Kenya Household Health Expenditure and Utilization Survey' (2019) 18 *International Journal for Equity in Health* 196.

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Reports from as recent as the year 2019 indicated that as at March 2019, at least 7,900 health facilities in Nairobi County were not registered or licensed and were therefore operating illegally.²⁰⁰ These numbers would grow astronomically if a study were to document the whole country. It also follows that a huge number of the poor sections of the general population has either suffered loss or obtained substandard medical attention.

There is a need for the relevant Regulatory boards such as the Kenya Medical Practitioners and Dentists Board, the Nursing Council, the Clinical Officers Council, Laboratory Board, Radiation Board and the Pharmacy and Poisons Board to crack the whip and weed out all these illegal facilities in a bid to protect the health and wellbeing of the Kenyan populace.

iii. Affordable and Sustainable Health Insurance Cover in Kenya

Covid-19 disease pandemic has exposed the challenges of health care financing in the country, especially with the National Health Insurance Fund (NHIF) declining to fund treatment for its members who contract the disease, with the exception of civil servants, police and prisons service.²⁰¹

²⁰⁰ Omulo C, 'Kenya: 7,900 Clinics Operating Illegally in Nairobi, Committee Reports' (*allAfrica.com*, 11 April 2019) <<https://allafrica.com/stories/201904110184.html>> accessed 15 December 2020; <https://www.the-star.co.ke/authors/maureen-kinyanjui>, '7,964 Health Facilities in Nairobi Are Illegal' (*The Star*) <<https://www.the-star.co.ke/counties/nairobi/2019-04-11-7964-health-facilities-in-nairobi-are-illegal/>> accessed 15 December 2020; Thiong'o J, '90pc of Nairobi Clinics Do Not Have Licenses - Standard Health' (*Health*) <<https://www.standardmedia.co.ke/health/article/2001320591/90pc-of-nairobi-clinics-do-not-have-licenses>> accessed 15 December 2020.

²⁰¹ pm EM on 18 N 2020-12:52, 'NHIF to Only Cover Covid-19 Costs for Govt Workers' (*Kenyans.co.ke*) <<https://www.kenyans.co.ke/news/59265-nhif-only-cover-covid-19-costs-govt-workers>> accessed 15 December 2020; Thiong'o J, 'Over 100,000 Nairobi County Staff Risk Losing NHIF Cover' (*The Standard*) <<https://www.standardmedia.co.ke/business/article/2001369484/over-100-000-nairobi-county-staff-risk-losing-nhif-cover>> accessed 15 December 2020.

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Notably, even the private insurers declined to cover the cost of treating Covid-19 cases thus complicating the problem further.²⁰²

NHIF is the primary provider of health insurance in Kenya and the primary vehicle through which Kenya intends to expand insurance coverage.²⁰³ It is one of the most common employment based health financing scheme in the country. While the NHIF has been expanding in coverage areas and the target population,²⁰⁴ the failure or inability to cover Covid-19 cases has demonstrated all the more the urgent need for the Universal Health Coverage (UHC) for all.²⁰⁵ Recent studies have concluded that ‘Through its focus on increasing affordability of care for all Kenyans, the newly launched universal health coverage scheme represents a crucial step towards reducing disparities in health care utilization’.²⁰⁶

The country’s development blueprint, Vision 2030 and the Presidency’s Big Four Agenda all have 100% Universal Health Coverage (UHC) as one of the main pillars, a commendable step.²⁰⁷ The 100% Universal Health Coverage (UHC) aims to: actualize 100% cost subsidy on essential health services and reduce medical out-of-pocket expenses by 54% as a percentage of household expenditure.²⁰⁸ The Government has been distributing World Class medical

²⁰² am EM on 15 N 2020-9:07, ‘Father’s Agony as Family Billed 750K After 4 Days’ (*Kenyans.co.ke*)<<https://www.kenyans.co.ke/news/59153-crisis-nhif-private-insurers-refuse-settle-covid-19-bills>> accessed 15 December 2020.

²⁰³ Dutta, A., T. Maina, M. Ginivan, and S. Koseki. 2018. Kenya Health Financing System Assessment, 2018: Time to Pick the Best Path. Washington, DC: Palladium, Health Policy Plus, 60; see also National Hospital Insurance Act of 1966.

²⁰⁴ ‘President’s Delivery Unit - Flagship Projects - NHIF Expansion’ <<https://www.delivery.go.ke/flagship/nhif>> accessed 15 December 2020.

²⁰⁵ ‘COVID-19: Lessons from the Losses’ (*Inter Press Service*, 7 September 2020) <<http://www.ipsnews.net/2020/09/covid-19-lessons-losses/>> accessed 15 December 2020.

²⁰⁶ Ilinca S and others, ‘Socio-Economic Inequality and Inequity in Use of Health Care Services in Kenya: Evidence from the Fourth Kenya Household Health Expenditure and Utilization Survey’ (2019) 18 *International Journal for Equity in Health* 196.

²⁰⁷ ‘The Big 4 - Empowering the Nation’ <<https://big4.delivery.go.ke/>> accessed 15 December 2020.

²⁰⁸ *Ibid.*

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equipment to all counties, introduced a free maternity health program and expanded National Hospital Insurance Fund.²⁰⁹

There is a need for financial investment and political goodwill towards ensuring that the UHC is realised for all Kenyans to benefit, both rich and poor. UHC might be more stable than the employment based health financing as a source of health revenue, because employment based health financing is unstable, fragmented, and inequitable, particularly during economic crises as evidenced during the covid-19 pandemic where many people lost access to employment linked healthcare because of a job loss in the family.²¹⁰

While employment based health financing remains an important source of revenue, especially for low and middle income countries that need to mobilize additional domestic resources, it has been suggested that universal healthcare entitlements, mandatory inclusion in national schemes, general tax contributions for resource pooling, and a move away from voluntary or contributory schemes that are linked to benefits entitlements are recommended.²¹¹

Notably, the realization of UHC in Kenya will only be achieved if the Government of Kenya will increase its budget allocation towards health and lead solid health system strengthening initiatives – as for example the NHIF reform – to increase efficiency, effectiveness and accountability within the health sector.²¹²

²⁰⁹ President's Delivery Unit - Flagship Projects'

<<https://www.delivery.go.ke/flagship>> accessed 15 December 2020.

²¹⁰ Vijayasingham L and others, 'Employment Based Health Financing Does Not Support Gender Equity in Universal Health Coverage' (2020) 371 *BMJ* m3384.

²¹¹ *Ibid.*

²¹² 'NHIF Reform Critical to Affordable Health For All in Kenya' (*Inter Press Service*, 27 March 2019) <<http://www.ipsnews.net/2019/03/nhif-reform-criticalaffordable-health-kenya/>> accessed 16 December 2020; cf. Okungu V, Chuma J and McIntyre D, 'The Cost of Free Health Care for All Kenyans: Assessing the Financial Sustainability of Contributory and Non-Contributory Financing Mechanisms' (2017) 16 *International Journal for Equity in Health* 39.

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Medical care should however also be made generally affordable. In *Pharmaceutical Society of South Africa v. Tshabalala-Msimang*, South African High Court held that ‘access to health care services required services to be both physically accessible and affordable, and acknowledged that prohibitive pricing of medicines may amount to a denial of access.’²¹³

iv. Improved Working Conditions for Health workers in Kenya

Job satisfaction and working atmosphere are considered to be important for optimal health care delivery.²¹⁴ In the face of frequent strikes by health workers in Kenya, there is a need for the national government and the county governments to work closely with all the stakeholders and health workers’ unions’ leaders to address the challenges of limited career opportunities, insufficient workforce, and low remuneration in order to curb the risk of the health care staff migrating to other countries as well as also within countries such as from public hospitals to private ones. This should be done as part of ensuring that Kenyans are guaranteed access to health care services and wellbeing.²¹⁵

Even as the national and county governments continually invest in health infrastructure and facilities under the UHC programmes, there is a need for the investment in infrastructure to be done simultaneously with that in human capital, competent and well-trained personnel to handle the equipment and patients in these facilities.²¹⁶

²¹³ *Pharmaceutical Society of South Africa v. Tshabalala-Msimang* 2005 (3) SA 23 8 (SCA) paras 42, 53 , 77.

²¹⁴ Goetz K and others, ‘Working Atmosphere and Job Satisfaction of Health Care Staff in Kenya: An Exploratory Study’ (*BioMed Research International*, 4 October 2015) <<https://www.hindawi.com/journals/bmri/2015/256205/>> accessed 15 December 2020.

²¹⁵ Waithaka D and others, ‘Prolonged Health Worker Strikes in Kenya- Perspectives and Experiences of Frontline Health Managers and Local Communities in Kilifi County’ (2020) 19 *International Journal for Equity in Health* 23.

²¹⁶ ‘COVID-19: Lessons from the Losses’ (*Inter Press Service*, 7 September 2020) <<http://www.ipsnews.net/2020/09/covid-19-lessons-losses/>> accessed 15 December 2020.

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Even as the Government of the Republic of Kenya continue to hire foreign doctors and in particular doctors from Cuba to work in Kenyan public medical facilities, there is need for capacity building within the local medical health workers.²¹⁷

v. Use of Technology in Health Care Provision: Telemedicine

Telemedicine has been taking root in Kenya, especially with the outbreak of the Covid-19 pandemic. The World Health Organisation observes that Information and Communication Technologies (ICTs) have great potential to address some of the challenges faced by both developed and developing countries in providing accessible, cost-effective, high-quality health care services through the use of telemedicine. Telemedicine uses ICTs to overcome geographical barriers, and increase access to health care services. This is particularly beneficial for rural and underserved communities in developing countries – groups that traditionally suffer from lack of access to health care.²¹⁸

The World Health Organization uses the following broad description of the term ‘telemedicine’:

*“The delivery of health care services, where distance is a critical factor, by all health care professionals using information and communication technologies for the exchange of valid information for diagnosis, treatment and prevention of disease and injuries, research and evaluation, and for the continuing education of health care providers, all in the interests of advancing the health of individuals and their communities”.*²¹⁹

²¹⁷ Cf. Samuel Nduati & 3 others v Cabinet Secretary Ministry of Health & 9 others [2018] eKLR, Petition 42 & 46 of 2018 (Consolidated).

²¹⁸ Seewon Ryu, ‘Telemedicine: Opportunities and Developments in Member States: Report on the Second Global Survey on EHealth 2009 (Global Observatory for EHealth Series, Volume 2)’ (2012) 18 Healthcare Informatics Research 153, 8.

²¹⁹ Ibid, 9.

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Notably, telemedicine is an open and constantly evolving science, as it incorporates new advancements in technology and responds and adapts to the changing health needs and contexts of societies.²²⁰

Telemedicine episodes may be classified on the basis of: (1) the interaction between the client and the expert (i.e. real-time or prerecorded), and (2) the type of information being transmitted (for example, text, audio, video).²²¹

In Kenya, a large portion of the population is unable to have face-to-face consults with medical providers and as a result, much of the care is triaged through community health workers and nurses and only those patients deemed to be in critical need of hospital services are transferred to see a medical provider.²²² This situation is made worse by the fact that there is a shortage of approximately 50% of the needed health care workforce to meet the needs of the population in Africa.²²³ Telemedicine and other telehealth services are thus meant to address the very limited access to face-to-face medical consults and high medical cost which can consequently see a reduction in poverty, improved health and well-being, improved education, and economic growth.²²⁴

²²⁰ Ibid.

²²¹ Craig J and Patterson V, 'Introduction to the Practice of Telemedicine' (2005) 11 *Journal of telemedicine and telecare* 3.

²²² 'Telehealth, MHealth, Mobile Medical Care, Telehealth Technology', (*Village HopeCore International*, 6 September 2018)

<<https://www.villagehopecore.org/telehealth-in-rural-kenya/>> accessed 16 December 2020.

²²³ Ibid.

²²⁴ Ibid; See also Holmes K and others, 'Pilot Results of a Telemedicine Social Franchise in Rural Kenya: Evidence of Sustainable Livelihood Creation' (2014) 78 *Procedia Engineering* 200; 'Profit-Making Idea: The Time for Telemedicine Has Arrived in Kenya' (*How We Made It In Africa*, 31 July 2020)

<<https://www.howwemadeitinafrica.com/profit-making-idea-the-time-for-telemedicine-has-arrived-in-kenya/69458/>> accessed 16 December 2020;

'Telemedicine Takes Root in Kenya amid COVID-19 Infection Fears - Xinhua | English.News.Cn'

<http://www.xinhuanet.com/english/africa/2020-05/12/c_139050942.htm> accessed 16 December 2020.

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In places such as Lamu County, where residents face extremely limited access to healthcare, the residents have now access to care-at-a-distance through the telemedicine project initiated by Huawei, Safaricom and local partners, which allows local healthcare workers and patients to remotely consult with specialists in towns and cities.²²⁵ There is a scarcity of licensed doctors and specialists in Lamu, and telemedicine is expected to transform medical care for low-income families in the region by reducing travel time and expenses; and 50% more patients will attend referrals each year, leading to significantly better patient outcomes.²²⁶

The Philips Foundation, a registered charity and platform for the worldwide societal activities of Royal Philips, has also since introduced mobile ultrasound technology, meant to improve maternal and child health, where ways will be explored to use mobile ultrasound technology at primary care level, performed by midwives and supported by remote experts through telehealth, to enhance availability of affordable services in the underserved communities and remote areas of Kenya.²²⁷

While telemedicine is no longer new in Kenya²²⁸, there is a need for the regulators to continually review the regulatory framework that will not only

²²⁵ 'Making Remote Healthcare a Reality in Kenya' (*huawei*)

<<https://www.huawei.com/en/industry-insights/outlook/mobile-broadband/wireless-for-sustainability/cases/making-remote-healthcare-a-reality-in-kenya>> accessed 16 December 2020.

²²⁶ Ibid.

²²⁷ 'Philips Foundation Announces Projects in Kenya' (*Philips*)

<<https://www.philips.co.ke/about/news/archive/standart/news/press/2019/20190307-philips-foundation-announces-projects-in-kenya.html>> accessed 16 December 2020.

²²⁸ 'Tele-Health Providers in Kenya - Kenya Healthcare Federation' <https://khf.co.ke/covid19_khf-news/tele-health-providers-in-kenya/> accessed 16 December 2020; 'Kenya Launches Telemedicine Initiative for the Poor' (*Sub-Saharan Africa*) <<https://www.scidev.net/sub-saharan-africa/news/kenya-launches-telemedicine-initiative-poor/>> accessed 16 December 2020; CORRESPONDENT, 'Smart Applications Partners with Rural Private Hospitals Associations' (*Capital Business*, 22 October 2020) <<https://www.capitalfm.co.ke/business/2020/10/smart-applications-partners-with-rural-private-hospitals-associations/>> accessed 16 December 2020; Sue

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promote its growth and development, but also to ensure that those who use it are either held or benefit from the same standards of professional care as those under the traditional forms of medical care and data protection.²²⁹ Notably, the Health Act, 2017 defines "e-Health" to mean the combined use of electronic communication and information technology in the health Sector including telemedicine.²³⁰ Telemedicine and telehealth services can indeed supplement the investment in physical infrastructure in provision of health care services.²³¹

vi. Investment in Advanced medical technologies: The Viability of Medical Tourism

A working health system is not only capable of ensuring that the citizens enjoy healthy lives and wellbeing, but is also capable of earning some extra income for the government through what is now commonly known as 'medical tourism', defined as the travel of people to a place other than where they normally reside for the purpose of obtaining medical treatment in that

Anderson, 'Telemedicine In Kenya: Big Idea Creating Access To Healthcare' (MATTER, 25 September 2020) <<https://www.matter.ngo/telemedicine-kenya/>> accessed 16 December 2020; Bonner L, 'Kenya Opens First Telemedicine Center for COVID-19 Detection - Axis Imaging News' <<https://axisimagingnews.com/news/kenya-opens-first-telemedicine-center-for-covid-19-detection>> accessed 16 December 2020.

²²⁹ Rangasamy M and others, 'Role of Telemedicine in Health Care System: A Review' "Role of telemedicine in health care system: a review," *Int J Recent Adv Pharma Res* 2 (2011): 1-10; 'The Emerging Practice of Telemedicine and the Law: Kenya's Stance' (*Centre for Intellectual Property and Information Technology law*, 20 August 2020)

<<https://cipit.strathmore.edu/the-emerging-practice-of-telemedicine-and-the-law-kenyas-stance/>> accessed 16 December 2020.

²³⁰ Sec. 2, Health Act, 2017.

²³¹ 'Telemedicine Takes Root in Kenya amid COVID-19 Infection Fears - Xinhua | English.News.Cn'

<http://www.xinhuanet.com/english/africa/2020-05/12/c_139050942.htm> accessed 16 December 2020; 'Africa Can Improve Future Health Systems Resilience by Complementing Gaps in Physical Infrastructure with Digital Health Solutions | African Arguments' <<http://africanarguments.org/2020/11/africa-can-improve-future-health-systems-resilience-by-complementing-gaps-in-physical-infrastructure-with-digital-health-solutions/>> accessed 16 December 2020.

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country.²³² India has emerged as one of the countries that have heavily invested in medical tourism. Medical tourism is a multi-billion dollar industry that has been heavily promoted by governments and the medical and tourism industries for the potential mutual benefits.²³³ India takes pride in being uniquely placed by virtue of its skilled manpower, common language, diverse medical conditions that doctors deal with, the volume of patients, and a large nonresident Indian population overseas.²³⁴ They have also invested in provision of dedicated services to alleviate the anxiety of foreign patients which include translation, currency conversion, travel, visa, post treatment care system, and accommodation of patient relatives during and after treatment.²³⁵ In 2019, India was ranked as the third most preferred destination for medical tourism, with the industry set to reach \$9 billion in valuation in 2020, although the projection might have since been affected by the Covid-19 pandemic.²³⁶

²³² 'India's Medical Tourism Gets Africans' Attention' (*Africa Renewal*, 25 November 2016) <<https://www.un.org/africarenewal/magazine/december-2016-march-2017/india%E2%80%99s-medical-tourism-gets-africans%E2%80%99-attention>> accessed 15 December 2020; 'Medical Tourism and The Value Of Technology In Medicine - Electronic Health Reporter' <<https://electronichealthreporter.com/medical-tourism-and-the-value-of-technology-in-medicine/>> accessed 16 December 2020; Manickam R and others, 'Emerging Trends and Future Prospects of Medical Tourism in India' (2015) 7 *Journal of Pharmaceutical Sciences and Research* 248.

²³³ 'Medical Tourism in India: Winners and Losers | Indian Journal of Medical Ethics' <<https://ijme.in/articles/medical-tourism-in-india-winners-and-losers/?galley=html>> accessed 15 December 2020.

²³⁴ Gupta V and Das P, 'Medical Tourism in India' (2012) 32 *Clinics in Laboratory Medicine* 321; 'Why Medical Tourism Is Booming In India | The Dope Why Medical Tourism Is Booming In India' (*The Dope*, 25 February 2020) <<https://thedope.news/why-medical-tourism-is-booming-in-india/>> accessed 16 December 2020.

²³⁵ Ibid.

²³⁶ Biswas D, 'In Dire Straits: India's Medical Tourism Companies Find No Business amid COVID-19' (*YourStory.com*, 24 June 2020)

<<https://yourstory.com/2020/06/coronavirus-medical-tourism-industry-lockdown-business>> accessed 15 December 2020; CNN MS, 'India Wants to Make Medical Tourism a \$9 Billion Industry by 2020' (*CNN*)

<<https://www.cnn.com/2019/02/13/health/india-medical-tourism-industry-intl/index.html>> accessed 16 December 2020.

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Notably, South Africa has also been making medical advances, and in addition to shorter travel times than India, South Africa advertises the added allure of safaris and spas.²³⁷ As Kenya pursues the dream of UHC as a key delivery under Vision 2030 and the Big Four Agenda, the government and all the relevant stakeholders in the health care sector should consider following in the footsteps of India and South Africa. In India, while the private sector has always been prominent as a source of medical care, since 1991 neoliberal government policies supporting the private sector have created conditions for its rapid growth.²³⁸ This may, therefore, take a while to achieve, but continuous investment in infrastructure and the medical personnel will see to it that we finally get there. While the country may not yet benefit from patients from outside the continent, it may first target patients from the region and the African continent in general. Medical tourism, however, should not be pursued at the expense of the poor in the country: the Government should ensure that the general populace in the country can access health care services before it seeks to extend the same to the foreigners. Kenya should consider going the Cuban way where, Cuba, which has been a pioneer in medical tourism for almost four decades, has hospitals for Cuban residents and others for foreigners and diplomats. Both kinds are run by the government and Cubans receive free healthcare for life while tourists have to pay for it.²³⁹ In addition, the Cuban government has developed medical tourism to generate income which is then reinvested into the country's medical sector to benefit its country's citizens.²⁴⁰

²³⁷ 'India's Medical Tourism Gets Africans' Attention' (*Africa Renewal*, 25 November 2016) <<https://www.un.org/africarenewal/magazine/december-2016-march-2017/india%E2%80%99s-medical-tourism-gets-africans%E2%80%99-attention>> accessed 15 December 2020.

²³⁸ 'Medical Tourism in India: Winners and Losers | Indian Journal of Medical Ethics' <<https://ijme.in/articles/medical-tourism-in-india-winners-and-losers/?galley=html>> accessed 15 December 2020.

²³⁹ Ibid.

²⁴⁰ Ibid; Network eHealth, 'Medical Tourism in Puducherry, an Under-Exploited Potential - EHealth Magazine'

<<https://ehealth.eletsonline.com/2018/07/medical-tourism-in-puducherry-an-under-exploited-potential/>> accessed 15 December 2020; Hernández Nariño A, 'Cuban Medical Tourism : Strategies to Make It More Competitive' (2008).

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4.4 Conclusion

Sustainable development mainly involves the integration of environmental, social, and economic concerns into all aspects of decision making.²⁴¹ Arguably, ending poverty can be achieved if sustainable economic growth, social protection, and environmental health and stewardship are considered together.²⁴² Even as Kenya seeks to become a newly industrialising middle income country, there is a need to adopt empowerment measures that will ensure that this development is inclusive of all groups in the society. It is possible for Kenya to achieve Vision 2030 in a way that not only promotes and upholds the principles of sustainable development but also one that embraces all communities for inclusive development that benefits all. Economically and socially empowered people are able to appreciate the import of political and civil rights and therefore, they will be more likely to participate meaningfully in the governance of the country. Eradication of poverty therefore potentially holds the key to the economic, social, economic and political prosperity of the country. Eradication of Poverty for Inclusive Development in Kenya is goal and a dream that is achievable

Through concerted effort by all.

The right to health is also not an isolated right as demonstrated in this chapter. It not only forms the basis for the realisation and enjoyment of other rights but it also requires the implementation and protection of other human rights for its full enjoyment. While Kenya has made commendable steps towards ensuring that its citizens enjoy healthy lives and general wellbeing, there is still a lot that requires to be done. This calls for multisectoral approach and cooperation between stakeholders to ensure that the same is realised. Any nation that seeks to develop must first invest in the health of

²⁴¹ Emas, R., 'The Concept of Sustainable Development: Definition and Defining Principles,' *Brief for GSDR 2015*, p.3<https://sustainabledevelopment.un.org/content/documents/5839GSDR%202015_SD_concept_definiton_rev.pdf> accessed 24 December 2020.

²⁴² Environment UN, 'Eradicating Poverty through an Inclusive Green Economy : UNEP Post 2015 Note 6' (*UNEP - UN Environment Programme*, 16 September 2017) <<http://www.unenvironment.org/resources/report/eradicating-poverty-through-inclusive-green-economy-unep-post-2015-note-6>> accessed 25 December 2020.

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its people. A healthy population is a wealthy population.²⁴³ Ensuring Healthy Lives and Wellbeing for all Kenyans is a vital Sustainable Development goal that should be attained at the earliest.

²⁴³'The Health and Wealth of Nations' (*ResearchGate*) <https://www.researchgate.net/publication/238827665_The_Health_and_Wealth_of_Nations> accessed 16 December 2020; '(PDF) Population Health and Economic Growth in Sub-Saharan Africa: A Panel Cointegration Analysis' (*ResearchGate*) <https://www.researchgate.net/publication/343281582_Population_health_and_economic_growth_in_sub-Saharan_Africa_A_Panel_Cointegration_Analysis> accessed 16 December 2020; Baum F, 'Wealth and Health: The Need for More Strategic Public Health Research' (2005) 59 *Journal of Epidemiology & Community Health* 542.

CHAPTER FIVE

A Human Rights Approach to Environmental and Natural Resource Conflicts Management in Kenya for Sustainable Development

5.1 Introduction

International concerns with human rights have expanded considerably in the past several decades.¹ Universal human rights are often expressed and guaranteed by law, in the forms of treaties, customary international law, general principles and other sources of international law, with the international human rights law laying down obligations of Governments to act in certain ways or to refrain from certain acts, in order to promote and protect human rights and fundamental freedoms of individuals or groups.² In the same breadth, over the years, the environment has secured a special place in the international law discourse. This has been evidenced by various legal instruments that are meant to provide directions and guidelines to the key players and the states in coming up with domestic environmental protection and conservation laws.³ The debate is however informed by two major approaches namely, anthropocentric and ecocentric approaches.

While the ecocentric approach is mainly concerned with the moral concern for nature in its own right as deserving protection and conservation, the anthropocentric approach, places humans as the central concern in environmental conservation and protection while the environment is considered secondary.⁴ Thus, ecocentrism is nature-centered, while

¹ D Shelton, *Human Rights, Health & Environmental Protection: Linkages in Law & Practice*; 2002

< https://www.who.int/hhr/Series_1%20%20Sheltonpaper_rev1.pdf> Accessed 10 August 2020, p. 3.

² 'OHCHR | What Are Human Rights'

<<https://www.ohchr.org/en/issues/pages/whatarehumanrights.aspx>> accessed 10 August 2020.

³ Ibid.

⁴ Helen Kopnina and others, 'Anthropocentrism: More than Just a Misunderstood Problem' (2018) 31 *Journal of Agricultural and Environmental Ethics* 109.

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anthropocentrism is human-centered. International legal instruments on environmental conservation and protection are divided between the two approaches, with some adopting the ecocentrism while others are based on anthropocentrism.⁵

A dual rights-based approach, where the intrinsic value of humans and nature co-exist in an interconnected manner can pool the benefits of both approaches. Both approaches are important and all that is needed is to strike a balance.⁶ Notably, while the sustainable development agenda debates accommodate both approaches, they lean more towards the anthropocentrism. The *2030 Agenda on Sustainable Development Goals*⁷ (SDGs) define sustainable development broadly to cover issues such as poverty, inequality, gender equality, health, education, governance, climate change

⁵ Vito De Lucia, 'The Ecosystem Approach between Anthropocentrism and Ecocentrism' (2015); Louis Kotzé and Duncan French, 'The Anthropocentric Ontology of International Environmental Law and the Sustainable Development Goals: Towards an Ecocentric Rule of Law in the Anthropocene' (2018) 7 *Global Journal of Comparative Law* 5; Vito De Lucia, 'Competing Narratives and Complex Genealogies: The Ecosystem Approach in International Environmental Law' (2015) 27 *Journal of Environmental Law* 91; Marie-Catherine Petersmann, 'Narcissus' Reflection in the Lake: Untold Narratives in Environmental Law Beyond the Anthropocentric Frame' (2018) 30 *Journal of Environmental Law* 235; Mohamed El-Kamel Bakari, 'Mapping the "Anthropocentric-Ecocentric" Dualism in the History of American Presidency: The Good, the Bad, and the Ambivalent' [2017] *Consilience* 1; Abadir Ibrahim, 'A Human Rights Approach to Environmental Protection: The Case of Ethiopia' (2009) 1 *Contemporary Legal Institutions*; Louis J Kotzé, 'Human Rights and the Environment in the Anthropocene': [2014] *The Anthropocene Review* <<https://journals.sagepub.com/doi/10.1177/2053019614547741>> accessed 11 August 2020.

⁶ See generally, K. Muigua, *Nurturing Our Environment for Sustainable Development*, Glenwood Publishers, Nairobi, 2016.

⁷ D Shelton, *Human Rights. Health & Environmental Protection: Linkages in Law & Practice*; 2002

< https://www.who.int/hhr/Series_1%20%20Sheltonpaper_rev1.pdf> Accessed 10 August 2020, p. 3.

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and environmental protection.⁸ The SDGs rest on three core elements of sustainability which include:⁹ Economic: An economically sustainable system that must be able to produce goods and services on a continuing basis, to maintain manageable levels of government and external debt, and to avoid extreme sectoral imbalances which damage agricultural or industrial production; Environmental: An environmentally sustainable system which must maintain a stable resource base, avoiding over-exploitation of renewable resource systems or environmental sink functions, and depleting non-renewable resources only to the extent that investment is made in adequate substitutes. This includes maintenance of biodiversity, atmospheric stability, and other ecosystem functions not ordinarily classed as economic resources; and Social: A socially sustainable system which must achieve distributional equity, adequate provision of social services including health and education, gender equity, and political accountability and participation.¹⁰

Environmental resources access, use and control are central to meeting human needs.¹¹ That is why environmental conflicts emerge, both nationally and internationally, when one group of persons feel that their rights in this

⁸ See United Nations, *Transforming our world: the 2030 Agenda for Sustainable Development*, A/RES/70/1, Resolution adopted by the General Assembly on 25 September 2015.

⁹ Jonathan M Harris, 'Basic Principles of Sustainable Development' [2000] Dimensions of Sustainable Development 21, Global Development and Environment Institute, Tufts University, Working Paper 00-04, June 2000
< http://www.buyteknet.info/files/share/data/ambides_lect/Harris_PrinSD.pdf>
Accessed 10 August 2020, pp.5-6.

¹⁰ Ibid, p.6.

¹¹ 'Our Planet, Our Health' <<http://ciesin.org/docs/001-232/chpt1.html>> accessed 11 August 2020; Jean-Louis Martin, Virginie Maris and Daniel S Simberloff, 'The Need to Respect Nature and Its Limits Challenges Society and Conservation Science' (2016) 113 Proceedings of the National Academy of Sciences 6105; Steven C Rockefeller, 'Principles of Environmental Conservation and Sustainable Development: Summary and Survey' [1996] unpublished paper prepared for the Earth Charter Project; 'Global Conservation: Balancing Nature and Human Needs' <<https://www.macfound.org/press/publications/global-conservation-balancing-nature-and-human-needs/>> accessed 11 August 2020.

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respect are threatened. This is because historically, as the United Nations has observed, environmental resources have often been an indicator of the wealth of those being in a position to utilize them.¹²

Various mechanisms are therefore employed in managing these conflicts and while some sufficiently address the human rights issues that emerge, others may not necessarily achieve as much. This chapter critically evaluates the various approaches to environmental conflicts management with a view to recommend the most suitable ones in ensuring that human rights, which mainly inform the anthropocentric approach, are secured. The chapter vouches for a rights-based approach to environmental issues and the related conflicts as a way of securing human rights while managing environmental conflicts.

5.2 Linking Human Rights and the Environment

Human rights may be defined as universal, inalienable rights inherent to all human beings, which they are entitled to without discrimination.¹³ The *Universal Declaration of Human Rights of 1948*¹⁴ (UDHR) set the stage for the recognition, protection and promotion of human rights the world over. UDHR places an obligation on all states to employ progressive measures to ensure recognition of human rights provided therein. Notably, the Declaration recognises the need for mobilization of resources by States so as to ensure realization of these rights. Art. 22 thereof provides that everyone, as a member of society, has the right to social security and is entitled to realization, through national effort and international co-operation and in accordance with the organization and resources of each State, of the

¹² Daniel Schwartz and Ashbindu Singh, *Environmental Conditions, Resources, and Conflicts: An Introductory Overview and Data Collection* (United Nations Environment Programme 1999) < <https://na.unep.net/siouxfalls/publications/Conflicts.pdf> > Accessed 10 August 2020.

¹³ 'OHCHR | What Are Human Rights' <<https://www.ohchr.org/en/issues/pages/whatarehumanrights.aspx>> accessed 10 August 2020.

¹⁴ UN General Assembly, *Universal Declaration of Human Rights*, 10 December 1948, 217 A (III).

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economic, social and cultural rights indispensable for his dignity and the free development of his personality.

The UDHR created a basis for the formulation of *International Covenant on Civil and Political Rights*, (ICCPR) 1966¹⁵ and *International Covenant on Economic, Social and Cultural Rights* (ICESCR) 1966.¹⁶ ICCPR provides under Article 47 thereof that nothing in that Covenant should be interpreted as impairing the inherent right of all peoples to enjoy and utilize fully and freely their natural wealth and resources. Further, ICESCR, under Article 1.2, provides that all peoples may, for their own ends, freely dispose of their natural wealth and resources without prejudice to any obligations arising out of international economic co-operation, based upon the principle of mutual benefit, and international law. In no case may a people be deprived of its own means of subsistence.

Principle 1 of the *Stockholm Declaration*¹⁷ is however credited as the first international legal instrument which expressly formed a foundation for linking human rights, health, and environmental protection, declaring that: Man has the fundamental right to freedom, equality and adequate conditions of life, in an environment of a quality that permits a life of dignity and well-being.¹⁸ However, while the language of Article 1 of both the *Stockholm Declaration* and the *Rio Declaration*¹⁹ seem to connote a human rights approach to the environmental conservation, during the conferences, various proposals for a direct and thus unambiguous reference to an

¹⁵ UN General Assembly, *International Covenant on Civil and Political Rights*, 16 December 1966, United Nations, Treaty Series, vol. 999, p. 171.

¹⁶ *International Covenant on Economic, Social and Cultural Rights*; adopted 16 Dec. 1966, 993 U.N.T.S. 3, G.A. Res. 2200 (XXI), U.N. GAOR, 21st Sess., Supp. No. 16, U.N. Doc. A/6316 (1966) (entered into force 3 Jan. 1976).

¹⁷ UN General Assembly, *United Nations Conference on the Human Environment*, 15 December 1972, A/RES/2994.

¹⁸ D Shelton, *Human Rights. Health & Environmental Protection: Linkages in Law & Practice*; 2002

<https://www.who.int/hhr/Series_1%20%20Sheltonpaper_rev1.pdf>

Accessed 10 August 2020, p. 3.

¹⁹ Rio Declaration on Environment and Development, A/CONF.151/26, vol. I, 1992.

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environmental human right were rejected²⁰. It is arguable that the conferences created an oxymoronic circumstance, in denying what would only be in the nature of 'the right to adequate conditions of life in *an environment of a quality that permits a life of dignity and well-being*'.²¹

Draft Principles on Human Rights and the Environment of 1994,²² (1994 Draft Principles) is an international instrument that comprehensively addresses the linkage between human rights and the environment. The *1994 Draft Principles* provide for the interdependence between human rights, peace, environment and development. Principle 1 thereof declares that human rights, an ecologically sound environment, sustainable development and peace are interdependent and indivisible.

In the first human rights-based approach to environmental protection, environmental protection is seen as a pre-condition to the enjoyment of internationally-guaranteed human rights, especially the rights to life and health, making it an essential instrument in the effort to secure the effective universal enjoyment of human rights.²³ Indeed, some domestic statutes and constitutions, such as the Constitution of Kenya 2010, have expressly recognised the right to a clean and healthy environment as a justiciable

²⁰ Handl, G., 'Declaration of the United Nations Conference on the Human Environment (Stockholm Declaration), 1972 and the Rio Declaration on Environment and Development, 1992' (United Nations Audiovisual Library of International Law, 2012).

²¹ 1972 Stockholm Declaration Principle 1. It reads in full: "Man has the fundamental right to freedom, equality and adequate conditions of life in an environment of a quality that permits a life of dignity and well-being, and he bears a solemn responsibility to protect and improve the environment for present and future generations".

²² Draft Principles On Human Rights And The Environment, E/CN.4/Sub.2/1994/9, Annex I (1994).

²³ D Shelton, *Human Rights. Health & Environmental Protection: Linkages in Law & Practice*; 2002

<https://www.who.int/hhr/Series_1%20%20Sheltonpaper_rev1.pdf> Accessed 10 August 2020, p. 3.

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right.²⁴ The place of a clean and healthy environment in realisation of other human rights was well captured in the following words:

*Human rights cannot be secured in a degraded or polluted environment. The fundamental right to life is threatened by soil degradation and deforestation and by exposures to toxic chemicals, hazardous wastes and contaminated drinking water. Environmental conditions clearly help to determine the extent to which people enjoy their basic rights to life, health, adequate food and housing, and traditional livelihood and culture. It is time to recognize that those who pollute or destroy the natural environment are not just committing a crime against nature, but are violating human rights as well.*²⁵

The second rights-based approach to environmental protection views environmental protection not as an essential element of human rights, but instead it views certain human rights as essential elements to achieving environmental protection, which has as a principal aim the protection of human health, as illustrated by the Rio Declaration on Environment and Development.²⁶

The third approach views the links as indivisible and inseparable and thus posits the right to a safe and healthy environment as an independent substantive human right.²⁷ Recognition of the relationship between abuse of human rights of various vulnerable communities and related damage to their environment is found in the concept of environmental justice. Environmental justice theory recognizes how discrimination and

²⁴ Constitution of Kenya 2010, Art. 42.

²⁵ D Shelton, *Human Rights. Health & Environmental Protection: Linkages in Law & Practice*; 2002

< https://www.who.int/hhr/Series_1%20%20Sheltonpaper_rev1.pdf> Accessed 10 August 2020, p. 4.

²⁶ Ibid, p. 4; Alan Boyle, 'Human Rights and the Environment: Where Next?' (2012) 23 *European Journal of International Law* 613.

²⁷ Ibid, p.4; Bridget Lewis, 'Environmental Rights or a Right to the Environment: Exploring the Nexus between Human Rights and Environmental Protection' (2012) 8 *Macquarie J. Int'l & Comp. Env'tl. L.* 36.

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marginalization involves expropriating resources from vulnerable groups and exposing these communities to the ecological harms that result from use of those resources. Environmental justice is based on the human right to a healthy and safe environment, a fair share to natural resources, the right not to suffer disproportionately from environmental policies, regulations or laws, and reasonable access to environmental information, alongside fair opportunities to participate in environmental decision-making.²⁸

Thus, environmental protection should and has in the recent years been treated as a human rights issue because a human rights perspective directly addresses environmental impacts on the life, health, private life, and property of individual humans, thereby serving to secure higher standards of environmental quality, based on the obligation of states to take measures to control pollution affecting health and private life.²⁹

There is, thus, a direct co-relation between the environment and the right to life³⁰, human dignity³¹, right to reasonable standards of sanitation³², the right to food³³, and, the right to clean and safe water in adequate quantities.³⁴ The linkage of human rights and the environment is the entire basis upon which the sustainable development debate rests.³⁵ Sustainable development

²⁸ Scottish Executive Social Research, *Sustainable Development: A Review of International Literature*, (Scottish Executive Social Research, 2006) < <http://www.gov.scot/resource/doc/123822/0029776.pdf> > Accessed 10 August 2020, p.8.

²⁹ Boyle, A., 'Human Rights and the Environment: Where Next?' *The European Journal of International Law*, Vol.23, No. 3, 2012.

³⁰ See Constitution of Kenya 2010, Art. 26.

³¹ *Ibid*, Art. 28.

³² *Ibid*, Art. 43(b).

³³ *Ibid*, Art. 43(c).

³⁴ *Ibid*, Art. 43(d).

³⁵ Alan Boyle, 'Human Rights and the Environment: Where Next?' (2012) 23 *European Journal of International Law* 613; Dias, Ayesha. "Human rights, environment and development: With special emphasis on corporate accountability." *Human Development Report* (2000); Geiser, Hans. *Sustainable development from a human rights perspective and the challenges it represents for the Caribbean SIDS (a discussion paper)*. ECLAC, 2010; 'Human Rights Council (HRC) ... Sustainable Development Knowledge Platform'

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has been defined as a combination of elements, such as environmental protection, economic development, and most importantly social issues.³⁶ Human rights are inextricable from sustainable development, since human beings are at the centre of concerns for sustainable development.³⁷

The human rights-based approaches to environmental issues provide a powerful framework of analysis and basis for action to understand and guide development, as they draw attention to the common root causes of social and ecological injustice.³⁸ Human rights standards and principles then guide development to more sustainable outcomes by recognizing the links between ecological and social marginalization, stressing that all rights are embedded in complex ecological systems, and emphasizing provision for need over wealth accumulation.³⁹ Internationally, there are two major approaches to human rights and the environment, which are the greening of already existing human rights and the introduction of a third generation of human rights.⁴⁰ While this chapter does not delve into this debate and the

<<https://sustainabledevelopment.un.org/index.php?page=view&type=30022&nr=225&menu=3170>> accessed 11 August 2020; 'Human Rights and Development' (Icelandic Human Rights Centre) <<http://www.humanrights.is/en/human-rights-education-project/human-rights-concepts-ideas-and-fora/human-rights-in-relation-to-other-topics/human-rights-and-development>> accessed 11 August 2020; 'Human Rights and the Environment' (Icelandic Human Rights Centre) <<http://www.humanrights.is/en/human-rights-education-project/human-rights-concepts-ideas-and-fora/human-rights-in-relation-to-other-topics/human-rights-and-the-environment>> accessed 11 August 2020.

³⁶ Salustiano del Campo Momoh Tomoko Hamada, Giancarlo Barbiroli, Saskia Sassen, Eleonora Barbieri-Masini, Paul Nchoji Nkwi, Owen Sichone, Abubakar (eds), *Social And Economic Development – Volume VIII* (EOLSS Publications 2010).

³⁷ 1992 *Rio Declaration*, Principle 1, which reads in full: "Human beings are at the centre of concerns for sustainable development. They are entitled to a healthy and productive life in harmony with nature."

³⁸ Aled Dilwyn Fisher, 'A Human Rights-Based Approach to the Environment and Climate Change' [2014] Practitioner Guide for The Global Initiative for Economic, Social and Cultural Rights, March 2014.

³⁹ *Ibid.*

⁴⁰ Alan Boyle, 'Human Rights and the Environment: Where Next?' (2012) 23 *European Journal of International Law* 613; Boyle, Alan. "Human rights or environmental rights? A reassessment." *Fordham Environmental Law Review* (2007):

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debate is still ongoing on the proper place of human environmental rights⁴¹, what is not deniable is the fact that there is an important link between human rights and the protection and conservation of the environment.

5.3 Environmental and Natural Resources Conflicts: Overview of Conflict Management Mechanisms

It is worth pointing out that there exist various mechanisms which may be used in dealing with certain types of conflicts. For instance, Article 33 of the *Charter of the United Nations* provides that the parties to any dispute should, first of all seek a solution by *negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements, or other peaceful means of their own choice* (emphasis added).⁴²

Conflict may be defined as a struggle over values or claims to status and resources, in which the aim of the conflicting parties is not only the desired values but also neutralize, injure or eliminate their rivals.⁴³ There are many factors that determine the emergence, persistence, and even management of conflicts ranging from internal to relational and contextual factors.⁴⁴

Social conflicts, like all other kinds of conflicts, are inevitable in human interactions and if left unmanaged, they tend to degenerate into disputes that ruin the relations between persons or communities and yield undesired

471-511; West, Thomas Ernest Riversdale Barker. "Human and nonhuman rights approaches to environmental protection." PhD diss., University of Nottingham, 2017; Horn, Laura S. "Reframing human rights in sustainable development." *Journal of the Australasian Law Teachers Association* (2013): 1-15.

⁴¹ Alan Boyle, 'Human Rights and the Environment: Where Next?' (2012) 23 *European Journal of International Law* 613.

⁴² United Nations, *Charter of the United Nations*, 24 October 1945, 1 UNTS XVI.

⁴³ Mengesha, Abebe Demewoz, Samson Seid Yesuf, and Tessema Gebre, "Indigenous Conflict Resolution Mechanisms among the Kembata Society." *American Journal of Educational Research*, 2015, Vol. 3, No. 2, pp. 225-242 at pp. 225-226.

⁴⁴ L Kriesberg, *Factors Shaping the Course of Intractable Conflict. Beyond Intractability* (Electronic source [200705 04] 2003).

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costs.⁴⁵ Conflict is also regarded as undesirable in many societies since, in its violent form, it claims the lives of many people, destroy property, and diverts human as well as financial resources away from development.⁴⁶

Natural resource conflicts may be defined as social conflicts (violent or non-violent) that primarily revolve around how individuals, households, communities and states control or gain access to resources within specific economic and political frameworks.⁴⁷ They are the contests that exist as a result of the various competing interests over access to and use of natural resources such as land, water, minerals and forests. Natural resource conflicts mainly have to do with the interaction between the use of and access to natural resources and factors of human development factors such as population growth and socio-economic advancement.⁴⁸ Natural resource conflicts are sensitive considering that they arise from the need for people to satisfy their basic needs.⁴⁹

⁴⁵ Adan, Mohamud, and Ruto Pkalya. "Conflict Management in Kenya-Towards Policy and Strategy Formulation." (2006); Muigua, Kariuki. "Managing Environmental Conflicts through Participatory Mechanisms for Sustainable Development in Kenya." (2018).

⁴⁶ Mengesha, Abebe Demewoz, Samson Seid Yesuf, and Tessema Gebre, "Indigenous Conflict Resolution Mechanisms among the Kembata Society." *American Journal of Educational Research*, 2015, Vol. 3, No. 2, pp. 225-242 at p.227.

⁴⁷ Mikkel Funder, Signe Marie Cold-Ravnkilde and Ida Peters Ginsborg, *Addressing Climate Change and Conflict in Development Cooperation: Experiences from Natural Resource Management* (DIIS Report 2012) < https://www.researchgate.net/profile/Mikkel_Funder/publication/259324612_Addressing_Climate_Change_and_Conflict_in_Development_Cooperation_Experiences_from_Natural_Resource_Management/links/0046352b01b1a81862000000/Addressing-Climate-Change-and-Conflict-in-Development-Cooperation-Experiences-from-Natural-Resource-Management.pdf > Accessed 10 August 2020, p. 17.

⁴⁸ Toepfer, K., "Forward", in Schwartz, D. & Singh, A., *Environmental conditions, resources and conflicts: An introductory overview and data collection* (UNEP, New York, 1999). p.4

⁴⁹ Alfonso Peter Castro and Antonia Engel, *Negotiation and Mediation Techniques for Natural Resource Management. Case Studies and Lessons Learned* (Food & Agriculture Org 2007) (e-book).

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Conflict management may be defined as the practice of identifying and handling conflicts in a sensible, fair and efficient manner that prevents them from escalating out of control and becoming violent.⁵⁰ Conflict management is seen as a multidisciplinary field of research and action that addresses how people can make better decisions collaboratively.⁵¹ Thus, the roots of conflict are addressed by building upon shared interests and finding points of agreement.⁵²

The conflicts under review in this chapter are those associated with environmental and natural resources. The environment-conflict nexus is a subset of “environmental security” – a field of inquiry that seeks to determine whether or not traditional notions of security (which emphasize countering military threats with military power) should be adapted to include threats posed by population growth and diminishing quantity and quality of environmental goods and services.⁵³

Majority of cases of resource conflicts, often revolve around the following: conflict over resource ownership; conflict over resource access; conflict over decision making associated with resource management; and conflict over distribution of resource revenues as well as other benefits and burdens.⁵⁴

The structure of relations between parties to the conflict and the way parties interpret the same may affect the course of the conflict and its

⁵⁰ Ibid.

⁵¹ Anderson, J., et al, ‘Addressing Natural Resource Conflicts through Community Forestry: Setting the Stage,’ <<http://www.fao.org/docrep/005/ac697e/ac697e13.htm#TopOfPage>> Accessed 10 August 2020.

⁵² Ibid.

⁵³ Daniel Schwartz and Ashbindu Singh, *Environmental Conditions, Resources, and Conflicts: An Introductory Overview and Data Collection* (United Nations Environment Programme 1999) < <https://na.unep.net/siouxfalls/publications/Conflicts.pdf>> Accessed 10 August 2020, p.6.

⁵⁴ The United Nations Department of Political Affairs and United Nations Environment Programme, *Natural Resources and Conflict: A Guide for Mediation Practitioners*, (2015, UN DPA and UNEP), p. 11.

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management.⁵⁵ The relation factors include differences in sizes (group conflicts), economic endowment (resources), coerciveness between the parties, and cultural patterns of conduct.⁵⁶ They also include the nature and degree of integration between adversaries in economic, social, and cultural domains.⁵⁷ Thus, if any of the mechanisms used to address these conflicts is to be considered successful, it must deal with one or more of these factors.⁵⁸ Conflicts ought to be managed effectively and a number of mechanisms are used in achieving this, each with its own distinct merits and demerits. This section offers an overview of the various mechanisms used in management of environmental conflicts. Notably, conflict management mechanisms mostly used take either the form of conflict settlement or conflict resolution.⁵⁹ Conflict settlement deals with all the strategies that are oriented towards producing an outcome in the form of an agreement among the conflict parties that might enable them to end an armed conflict, without

⁵⁵ 'The Structure of International Conflict Management: An Analysis of the Effects of Interactability and Mediation - Jacob Bercovitch, Patrick M. Regan; *The International Journal for Peace Studies*'

<https://www.gmu.edu/programs/icar/ijps/vol4_1/bercovitch.htm> accessed 11 August 2020; Swanström, Niklas LP, and Mikael S. Weissmann. "Conflict, conflict prevention, conflict management and beyond: A conceptual exploration. Concept paper." *Central Asia-Caucasus Institute and Silk Road Studies Program, Johns Hopkins University-SAIS and Uppsala University* (2005).

⁵⁶ Muigua, Kariuki. "Managing natural resource conflicts in Kenya through negotiation and mediation." (2016); Alao, Abiodun. *Natural resources and conflict in Africa: the tragedy of endowment*. Vol. 29. University Rochester Press, 2007; Bavinck, Maarten, Lorenzo Pellegrini, and Erik Mostert, eds. *Conflicts over natural resources in the Global South: conceptual approaches*. CRC Press, 2014.

⁵⁷ Muigua, K., *Nurturing Our Environment for Sustainable Development*, Glenwood Publishers, Nairobi, 2016.

⁵⁸Bercovitch, Jacob. "Conflict and conflict management in organizations: A framework for analysis." *Hong Kong Journal of Public Administration* 5, no. 2 (1983): 104-123; Jin Lim and AsscProfDr Rashad Yazdanifard, 'The Difference of Conflict Management Styles and Conflict Resolution in Workplace' (2012) 1 *Business & Entrepreneurship Journal* 141.

⁵⁹Bloomfield, David. "Towards complementarity in conflict management: Resolution and settlement in Northern Ireland." *Journal of Peace Research* 32, no. 2 (1995): 151-164.

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necessarily addressing the underlying conflict causes.⁶⁰ Settlement is an agreement over the issues(s) of the conflict which often involves a compromise.⁶¹ Parties have to come to accommodations which they are forced to live with due to the anarchical nature of society and the role of power in the relationship. Basically, power is the defining factor for both the process and the outcome.⁶² As such, settlement mechanisms may not necessarily address the human rights issues relevant to the emergence and management of the conflict.

On the other hand, conflict resolution deals with process-oriented activities that aim to address and resolve the deep-rooted and underlying causes of a conflict.⁶³ Conflict resolution mechanisms include negotiation, mediation and problem solving facilitation.⁶⁴ This is in recognition of the fact that the view of what is just and what is unjust are not universally shared, and as such, divergent views of justice often cause social conflicts.⁶⁵ This is attributed to the fact that frequently, the parties involved in conflicts are

⁶⁰ Alfonso Peter Castro and Antonia Engel, *Negotiation and Mediation Techniques for Natural Resource Management. Case Studies and Lessons Learned* (Food & Agriculture Org 2007) (e-book).

⁶¹ Bloomfield, D., "Towards Complementarity in Conflict Management: Resolution and Settlement in Northern Ireland", *Journal of Peace Research*, Vol. 32, No. 2(May, 1995), p.152; Mwagiru Makumi, 'Conflict in Africa: Theory Processes and Institutions of Management' [2006] Nairobi: Centre for Conflict Research 115.

⁶² Baylis, C., and Carroll, R., "Power Issues in Mediation", *ADR Bulletin*, Vol. 1, No.8 [2005], Art.1, p.135.

⁶³ 'Negotiation and Mediation Techniques for Natural Resource Management' <<http://www.fao.org/3/a0032e/a0032e03.htm>> accessed 11 August 2020.

⁶⁴ Udezo, Benson OS. "Concepts and methods of conflict resolution and Peace-Building: Imperatives for religious leaders in Nigeria." *Journal of Religion and Human Relations* 1, no. 2 (2009); Fisher, Ron. "Sources of conflict and methods of conflict resolution." *International Peace and Conflict Resolution, School of International Service, The American University* (2000).

⁶⁵ corissajoy, 'Principles of Justice and Fairness' (*Beyond Intractability*, 29 June 2016) <https://www.beyondintractability.org/essay/principles_of_justice> accessed 11 August 2020; Scott D Campbell, 'Sustainable Development and Social Justice: Conflicting Urgencies and the Search for Common Ground in Urban and Regional Planning' (2013) 1 Michigan Journal of Sustainability <<http://hdl.handle.net/2027/spo.12333712.0001.007>>.

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convinced that their own view is the solely valid one.⁶⁶ It is, thus, suggested that since there is no access to an objective truth about justice, conflicts may be reconciled by the judgment of an authority accepted by all parties or by a negotiated agreement between the parties: agreements are just when the parties are equally free in their decision and equally informed about all relevant facts and possible outcomes.⁶⁷ A resolution approach to management of environmental conflicts is therefore more desirable since it gives the groups involved a chance to participate in environmental decision-making as well as expressing their ideas, thus creating an opportunity to address their needs and rights.⁶⁸

The institutional framework in Kenya on environmental management and conflict management includes: the Environment and Land Court⁶⁹, the National Environmental Management Authority,⁷⁰ National Environmental Complaints Committee⁷¹, National Environment Tribunal and other various informal community based resource governance bodies.⁷² The existing legal mechanism for managing natural resource conflicts as enshrined in the environmental law statutes include the courts of law both under civil and

⁶⁶ 'Learning to See Things from Another's Perspective, Opinion News & Top Stories - The Straits Times' <<https://www.straitstimes.com/opinion/learning-to-see-things-from-anothers-perspective>> accessed 11 August 2020.

⁶⁷ Muigua, K., *Nurturing Our Environment for Sustainable Development*, Glenwood Publishers, Nairobi, 2016.

⁶⁸ 'Environmental Conflicts' (ACCORD) <<https://www.accord.org.za/ajcr-issues/environmental-conflicts/>> accessed 11 August 2020; 'Negotiation and Mediation Techniques for Natural Resource Management' <<http://www.fao.org/3/a0032e/a0032e04.htm>> accessed 11 August 2020.

⁶⁹ Established under the Constitution of Kenya 2010 and *Environment and Land Court Act*, 2011.

⁷⁰ Established under S.7 of the EMCA (Cap 8 of 1999).

⁷¹ Environment Management and Co-ordination Act, Act. No. 8 of 1999; Environmental Management and Co-ordination (Amendment) Act, 2015 (No. 5 of 2015).

⁷² Some communities like the Meru, Maasai, Giriama, etc, have councils of elders who sit and resolve small scale disputes that erupt within their respective communities.

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criminal law,⁷³ statutory tribunals set up under various laws (such as the Land Adjudication Boards)⁷⁴ and customary law systems of conflict management.⁷⁵

5.4. Human Rights Protection in Environmental and Natural Resources Conflicts: Prospects and Challenges

Some authors rightly pointed out over 25 years ago that ‘political and strategic impact of surging populations, spreading disease, deforestation and soil erosion, water depletion, air pollution, and possibly, rising sea levels – developments that will prompt mass migration and, in turn, incite group conflicts – will be the core foreign-policy challenge in the twenty-first century’.⁷⁶ Predictably, all these issues and more have continued to inform the international debates on development and environmental conservation and protection. Nothing captures this better than the *United Nations 2030 Agenda on Sustainable Development*⁷⁷ which includes a set of 17 Sustainable Development Goals (SDGs) to end poverty, fight inequality and injustice, and tackle climate change by the year 2030.⁷⁸ The *2030 Agenda for Sustainable Development*⁷⁹ is a plan of action for people,

⁷³ Environment Management and Co-ordination Act, Act. No. 8 of 1999, Part XIII Ss. 137-146

⁷⁴ Established under Land Adjudication Act, Cap. 284, Laws of Kenya.

⁷⁵ Mbote, P.K., ‘Towards greater Access to Justice in Environmental Disputes in Kenya: Opportunities for Intervention,’ IELRC Working 2005-1. <<http://www.ielrc.org/content/w0501.pdf>> Accessed 10 August 2020.

⁷⁶ Daniel Schwartz and Ashbindu Singh, *Environmental Conditions, Resources, and Conflicts: An Introductory Overview and Data Collection* (United Nations Environment Programme 1999) < <https://na.unep.net/siouxfalls/publications/Conflicts.pdf>> Accessed 10 August 2020.

⁷⁷ *Transforming our world: the 2030 Agenda for Sustainable Development*, Resolution adopted by the General Assembly on 25 September 2015, [without reference to a Main Committee (A/70/L.1)], Seventieth session, Agenda items 15 and 116, 21 October 2015.

⁷⁸ United Nations Development Programme, ‘Sustainable Development Goals (SDGs),’ <<http://www.undp.org/content/undp/en/home/mdgoverview/post-2015-development-agenda.html>> Accessed 10 August 2020.

⁷⁹ *Transforming our world: the 2030 Agenda for Sustainable Development*, Resolution adopted by the General Assembly on 25 September 2015, [without reference to a

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planet and prosperity. It also seeks to strengthen universal peace in larger freedom and was formulated in recognition that eradicating poverty in all its forms and dimensions, including extreme poverty, which is seen as the greatest global challenge and an indispensable requirement for sustainable development.⁸⁰

The participants resolved, between 2015 and 2030, to end poverty and hunger everywhere; to combat inequalities within and among countries; to build peaceful, just and inclusive societies; to protect human rights and promote gender equality and the empowerment of women and girls; and to ensure the lasting protection of the planet and its natural resources. They resolved also to create conditions for sustainable, inclusive and sustained economic growth, shared prosperity and decent work for all, taking into account different levels of national development and capacities.⁸¹ Notably, in order to build peaceful, just and inclusive societies, management of environmental and natural resource-based conflicts is paramount. However, for the world states to also ensure that they protect human rights and promote gender equality and the empowerment of women and girls, the conflict management mechanisms employed must be used in a way that does not result in a conflict between the two goals.

This section highlights some of the challenges that are likely to arise in select environmental and natural resource-based conflict management mechanisms used internationally and nationally as far as securing human rights is concerned.

5.4.1 Human Rights and Environmental Litigation

National legal systems governing natural resource management are mostly based on legislation and policy statements that are administered through regulatory and judicial institutions, where adjudication and arbitration are

Main Committee (A/70/L.1)], Seventieth session, Agenda items 15 and 116, 21 October 2015.

⁸⁰ Ibid, Preamble.

⁸¹ Ibid, Agenda No. 3.

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the main strategies for addressing conflicts, with decision-making vested in judges and officials who possess the authority to impose a settlement on disputants.⁸² Further, decisions are more likely to be based on national legal norms applied in a standardized or rigid manner, with all-or-nothing outcomes. Thus, contesting parties often have very limited control over the process and outcomes of conflict management.⁸³ The judicial systems mostly employ the conflict settlement approach, with all its associated advantages and disadvantages.⁸⁴ Litigation does not afford the affected parties a reasonable and fair opportunity to participate in finding a lasting solution because, apart from the coercive nature of the process, litigation is also subject to other procedural technicalities which may affect its effectiveness.⁸⁵ While it is true that the Constitution of Kenya vests the courts with the authority to uphold and enforce the Bill of Rights,⁸⁶ some environmental conflicts require active participation in decision-making with full disclosure of the relevant information. However, the nature of the representative leadership in the country may not always allow this to happen. Political leaders may purport to speak and make decisions on behalf of a certain group, with minimal or no participation and access to information by the group in question and the same may unfortunately be treated as a reflection of the group's position on the issues in question.⁸⁷ As such, some of their rights and/or needs may not be adequately protected or realised. It is also

⁸² Alfonso Peter Castro and Antonia Engel, *Negotiation and Mediation Techniques for Natural Resource Management. Case Studies and Lessons Learned* (Food & Agriculture Org 2007) (e-book).

⁸³ Ibid.

⁸⁴ See Muigua, K., *Settling Disputes through Arbitration in Kenya*, 3rd Ed., Glenwood Publishers, Nairobi - 2017; Abdulla Mohamed Hamza, Miomir Todorovic and Knez Mihaljeva Street, 'Peaceful Settlement Of Disputes' 7 G.J.C.M.P., Vol.6 (1):11-17.

⁸⁵ Ojwang, J.B., "The Role of the Judiciary in Promoting Environmental Compliance and Sustainable Development," 1 *Kenya Law Review Journal* 19 (2007), pp. 19-29, p. 29.

⁸⁶ Constitution of Kenya, Article 23; See also Article 70.

⁸⁷ Jacobsen, Dag Ingvar. "Are the relations between politicians and administrators at the local level determined by the degree of central government regulations?" In *ECPR, Joint Sessions Workshops*, no. 21. 2001; Kanyinga, Karuti. "Kenya: Democracy and political participation." (2014).

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possible that power relations and lack of access to courts may come in the way of accessing justice for a marginalised or a disadvantaged group of persons.⁸⁸ It is thus arguable that the court may not always deliver what the particular group needs or deserves. Thus while such approaches as litigation or arbitration may be the most appropriate in some reliefs such as: a declaration of rights; an injunction; a conservatory order; a declaration of invalidity of any law that denies, violates, infringes, or threatens a right or fundamental freedom in the Bill of Rights and is not justified under Article 24; an order for compensation; and/or an order of judicial review,⁸⁹ they may fail to address the deep rooted causes of a conflict.⁹⁰ Procedural rights are limited by technicalities thus denying the group of persons in question an opportunity to actively and meaningfully participate in decision-making processes.⁹¹

⁸⁸ Magdalena Sepulveda Carmona and Kate Donald, 'Access to Justice for Persons Living in Poverty: A Human Rights Approach' (Social Science Research Network 2014) SSRN Scholarly Paper ID 2437808 <<https://papers.ssrn.com/abstract=2437808>> accessed 11 August 2020; 'Law and Justice Foundation - Access to Justice and Legal Needs. Stage 1: Public Consultations' <<http://www.lawfoundation.net.au/report/consultations>> accessed 11 August 2020.

⁸⁹ See Constitution of Kenya 2010, Article 23 (3).

⁹⁰ Mwangi Makumi, 'Conflict in Africa: Theory Processes and Institutions of Management' [2006] Nairobi: Centre for Conflict Research 115.

⁹¹ Benjamin Richardson and Jona Razzaque, 'Public Participation in Environmental Decision Making'; OITA US EPA, 'Public Participation Guide: Introduction to Public Participation' (US EPA, 24 February 2014)

<<https://www.epa.gov/international-cooperation/public-participation-guide-introduction-public-participation>> accessed 11 August 2020; Canberra corporateName=Commonwealth Parliament; address=Parliament House, 'Citizens' Engagement in Policymaking and the Design of Public Services' <https://www.aph.gov.au/about_parliament/parliamentary_departments/parliamentary_library/pubs/rp/rp1112/12rp01> accessed 11 August 2020; NU CEPAL, 'International Human Rights Standards Applicable to Access to Information, Public Participation and Access to Justice. Executive Summary (Preliminary Version)'.

5.4.2 Alternative Dispute Resolution Mechanisms and Human Rights in Environmental Matters

The phrase Alternative Dispute Resolution (ADR) refers to all those decision-making processes other than litigation including but not limited to negotiation, enquiry, mediation, conciliation, expert determination, arbitration and others.⁹² However, while arbitration is considered as part of ADR mechanisms, due to its coercive nature and great similarity to litigation, for purposes of this discussion, arbitration is grouped together with litigation. As such, the use of the term ADR in this chapter should be construed to refer to mediation, conciliation, negotiation and traditional/community based dispute management mechanisms.

ADR methods have been associated with the advantages of being cost effective, expeditious, informal and participatory.⁹³ As a result, parties retain a degree of control and relationships can be preserved. Conflict management mechanisms such as mediation encourages “win-win” situations, parties find their own solutions, they pursue interests rather than strict legal rights, are informal, flexible and attempts to bring all parties on board.⁹⁴ ADR mechanisms allow public participation in enhancing access to justice as they bring in an element of efficiency, effectiveness, flexibility, cost-effectiveness, autonomy, speed and voluntariness in conflict management.⁹⁵

Traditional Dispute Resolution Mechanisms (TDRMs) include informal mediation, negotiation, problem-solving workshop, council of elders,

⁹² Muigua, K., *Nurturing Our Environment for Sustainable Development*, Glenwood Publishers, Nairobi, 2016.

⁹³ Ibid; Muigua, K., *Alternative Dispute Resolution and Access to Justice in Kenya*, Glenwood Publishers, Nairobi, 2015; Muigua, K., *Resolving Conflicts through Mediation in Kenya*, Glenwood Publishers, Nairobi, 2013.

⁹⁴ Fenn, P., “Introduction to Civil and Commercial Mediation”, in Chartered Institute of Arbitrators, *Workbook on Mediation*, (CIArb, London, 2002), p.10.

⁹⁵ Muigua, K., *Nurturing Our Environment for Sustainable Development*, Glenwood Publishers, Nairobi, 2016.

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consensus approaches among others.⁹⁶ It has been observed that where traditional community leadership is strong and legitimate it has positive impacts in promoting local people's priorities in natural resource management.⁹⁷ The traditional and customary systems for managing conflict are associated with: encouraging participation by community members, and respect local values and customs; are more accessible because of their low cost, their flexibility in scheduling and procedures, and their use of the local language; they encourage decision-making based on collaboration, with consensus emerging from wide-ranging discussions, often fostering local reconciliation; they contribute to processes of community empowerment; informal and even formal leaders may serve as conciliators, mediators, negotiators or arbitrators; and finally, long-held public legitimacy provides a sense of local ownership of both the process and its outcomes.⁹⁸

ADR and TDRM processes are therefore more likely to afford communities or disgruntled groups procedural rights, and in effect, help in achievement of environmental justice and environmental democracy.⁹⁹ They would

⁹⁶ Muigua, Kariuki. "Institutionalising Traditional Dispute Resolution Mechanisms and other Community Justice Systems." *Alternative Dispute Resolution* (2017): 1-80; Dahal, Dev Raj, and Chandra Dev Bhatta. "The relevance of local conflict resolution mechanisms for systemic conflict transformation in Nepal." *Berghof Foundation for Peace Support* (2008).

⁹⁷ Shackleton, S., et al, 'Devolution And Community-Based Natural Resource Management: Creating Space for Local People to participate and Benefit?' *Overseas Development Institute Natural Resource Perspectives*, No. 76, March 2002, p.4.

⁹⁸ Alfonso Peter Castro and Antonia Engel, *Negotiation and Mediation Techniques for Natural Resource Management. Case Studies and Lessons Learned* (Food & Agriculture Org 2007) (e-book).

⁹⁹ Ilaria Beretta, 'Some Highlights on the Concept of Environmental Justice and Its Use' [2012] e-cadernos CES <<http://journals.openedition.org/eces/1135>> accessed 11 August 2020; Alma L Lowry, 'Achieving Justice through Public Participation: Measuring the Effectiveness of New York's Enhanced Public Participation Plan for Environmental Justice Communities'; 'Environmental Democracy? Does Anyone Really Care?' (*E-International Relations*, 26 October 2012) <<https://www.e-ir.info/2012/10/26/environmental-democracy-does-anyone-really-care/>> accessed 11 August 2020.

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provide a viable platform for access to justice which is essential as it affords the means by which the public challenge application of and implementation of environmental laws and policies.¹⁰⁰

While ADR and TDR mechanisms may suffer from the unenforceability of their outcomes and potential gender bias,¹⁰¹ they may provide a good platform for the realisation of procedural rights and the ability to recognise and address deep rooted causes of conflicts while coercive mechanisms such as litigation may come in handy in realisation of substantive rights.¹⁰²

5.5 Securing Human Rights in Environmental and Natural Resources Conflict Management

While there are other regulatory approaches to achieving environmental protection and addressing or avoiding environmental conflicts that are not rights-based such as economic incentives and disincentives, criminal law, and private liability regimes¹⁰³, a human rights based approach is arguably the most effective one that ensures that conflicts and all or most of their root causes are effectively addressed thus limiting any chances of reemergence

¹⁰⁰ Alfonso Peter Castro and Antonia Engel, *Negotiation and Mediation Techniques for Natural Resource Management. Case Studies and Lessons Learned* (Food & Agriculture Org 2007) (e-book).

¹⁰¹ Muigua, Kariuki. "Institutionalising Traditional Dispute Resolution Mechanisms and other Community Justice Systems." *Alternative Dispute Resolution* (2017): 1-80; Deborah R Hensler, 'Does Alternative Dispute Resolution Facilitate Prejudice and Bias? We Still Don't Know' <<https://core.ac.uk/reader/147643940>> accessed 11 August 2020; Todd B Carver and Albert A Vondra, 'Alternative Dispute Resolution: Why It Doesn't Work and Why It Does' [1994] *Harvard Business Review* <<https://hbr.org/1994/05/alternative-dispute-resolution-why-it-doesnt-work-and-why-it-does>> accessed 11 August 2020; Lorna McGregor, 'Alternative Dispute Resolution and Human Rights: Developing a Rights-Based Approach through the ECHR' (2015) 26 *European Journal of International Law* 607.

¹⁰² Tom Tyler and Rebecca Hollander-Blumoff, 'Procedural Justice and the Rule of Law: Fostering Legitimacy in Alternative Dispute Resolution' [2011] *Faculty Scholarship Series* <https://digitalcommons.law.yale.edu/fss_papers/4992>.

¹⁰³ D Shelton, *Human Rights, Health & Environmental Protection: Linkages in Law & Practice*; 2002

<https://www.who.int/hhr/Series_1%20%20Sheltonpaper_rev1.pdf> Accessed 10 August 2020, p. 4.

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of these conflicts.¹⁰⁴ While the emphasis on responsibilities rather than rights may still have its place in environmental protection and management of environmental conflicts, recognising the rights of conflicting groups and upholding them could be more effective.¹⁰⁵ The two approaches should therefore be used but with a rights-based one getting significant recognition. For instance, the Constitution of Kenya 2010 provides for environmental rights which include the right to clean and healthy environment for every person¹⁰⁶ but also spells out the duty of every person to cooperate with State organs and other persons to protect and conserve the environment and ensure ecologically sustainable development and use of natural resources.¹⁰⁷

Where conflict cannot be contained in a functional way, it can erupt in violence, war, and destruction, loss of life, displacements, long-term injuries, psychological effects as a result of trauma suffered especially in case of violent conflicts, and deep fear, distrust, depression, and sense of hopelessness.¹⁰⁸ All these raise significant but diverse human rights issues. However, while failure to address conflicts is likely to give rise to the listed adverse effects on human life, use of the inappropriate mechanism(s) to deal with the conflicts may address the problem for one group of persons while plunging the other one into deeper problems.¹⁰⁹ Scholars have argued that deep-rooted conflicts are caused by the absence of the fundamental needs of

¹⁰⁴ 'What Is HRBAP? | Human Rights-Based Approach to Programming' (UNICEF) <https://www.unicef.org/policyanalysis/rights/index_62012.html> accessed 11 August 2020; 'A Human Rights Approach to Conflict Resolution' (*Ethics & International Affairs*, 9 September 2019)

<<https://www.ethicsandinternationalaffairs.org/2019/a-human-rights-approach-to-conflict-resolution/>> accessed 11 August 2020.

¹⁰⁵ 'A Human Rights Approach to Conflict Resolution' (*Ethics & International Affairs*, 9 September 2019) <<https://www.ethicsandinternationalaffairs.org/2019/a-human-rights-approach-to-conflict-resolution/>> accessed 11 August 2020.

¹⁰⁶ Constitution of Kenya 2010, Article 42.

¹⁰⁷ Constitution of Kenya 2010, Article 69 (2).

¹⁰⁸ See K Annan, G Machel and B Mkapa, 'Back from the Brink: The 2008 Mediation Process and Reforms in Kenya' [2014] Nairobi: African Union Commission.

¹⁰⁹ Blondel, Alice. "Climate change fuelling resource-based conflicts in the Asia-Pacific." *Asia-Pacific Human Development Report Background Papers Series 12* (2012).

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security, identity, respect, safety, and control which many find non-negotiable.¹¹⁰

It has also been argued that deep-rooted conflicts are caused by the absence of the fundamental needs of security, identity, respect, safety, and control which many find non-negotiable.¹¹¹ The clash of interests can take many forms. It could be over resources such as land, food, territory, water, energy sources, and natural resources.¹¹² Conflict could also be associated with power and control of the resources.¹¹³ Conflicts could also be over identity,¹¹⁴ namely cultural, social and political identities to which people feel tied. Conflicts over status may arise, relating to whether people feel treated with respect and dignity and whether their traditions and social position are respected.¹¹⁵ Conflicts could be caused by differences of values, particularly those embodied in systems of government, religion, or ideology.¹¹⁶ Further, conflicts have been associated with the changing norms, values, and world views about property rights within formerly subsistence-based (or pastoralist) communities.¹¹⁷ These types of conflicts may be deep seated and the formal approaches to conflict management such

¹¹⁰ Burton, J., *Conflict: Human Needs Theory* (New York: St. Martin's Press), 1990; Kelman, H., *International Behavior: A Social Psychological Analysis* (New York: Holt, Rinehart and Winston), 1965.

¹¹¹ Ibid.

¹¹² Buckles, D. & Rusnak, D., 'Conflict and collaboration in natural resource management,' (International Development Research Centre, 2005), p. 2.

¹¹³ Ibid, p. 2.

¹¹⁴ See Rothman, J., *Resolving Identity-Based Conflict: In Nations, Organizations, and Communities*. (San Francisco: Jossey-Bass Publishers, 1997).

¹¹⁵ EAIM, 'Peace and Stability Are Prelude to Economic Development and Prosperity,'

<http://www.togoruba.org/togoruba1964/mainTogorubamap/mainMap/headingMap/English/2006/Art.sFeb-2006/1802EAIM06-06EA.html> Accessed 10 August 2020.

¹¹⁶ Adamu, A & Ben, A., 'Migration and Violent Conflict in Divided Societies: Non-Boko Haram violence against Christians in the Middle Belt region of Nigeria,' *Nigeria Conflict Security Analysis Network (NCSAN) Working Paper No. 1*, (World Watch Research, Abuja, Nigeria, March 2015).

¹¹⁷ Armitage, D., 'Adaptive Capacity and Community-Based Natural Resource Management,' *Environmental Management*, Vol. 35, No. 6, pp. 703–715, p. 710.

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as courts may not necessarily address all the issues arising.¹¹⁸ They require participatory approaches that take into account the concerns and rights of the target groups. Empowering these communities through such means as ensuring that they have access to all the information required in decision making and negotiating with them on what trade-offs may be necessary can potentially achieve environmental protection while at the same time ensuring that the human rights of these groups are protected.¹¹⁹ This is because, conflicts do not occur in vacuum and to a large extent, they are dependent on the context.¹²⁰ As such, the needs of target groups differ and must be treated as such.

The 1992 Conference of Rio de Janeiro on Environment and Development formulates a link between human rights and environmental protection largely in procedural terms, declaring in Principle 10 that access to information, public participation and access to effective judicial and administrative proceedings, including redress and remedy, should be guaranteed because environmental issues are best handled with the participation of all concerned citizens, at the relevant level.¹²¹

¹¹⁸ Philip Onguny and Taylor Gillies, 'Land Conflict in Kenya: A Comprehensive Overview of Literature' [2019] *Les Cahiers d'Afrique de l'Est / The East African Review* <<http://journals.openedition.org/eastafrica/879>> accessed 11 August 2020; Muigua, Kariuki. "Conflict Management Mechanisms for Effective Environmental Governance in Kenya." (2018); Young, Laura A., and Korir Sing'Oei. *Land, livelihoods and identities: Inter-community conflicts in East Africa*. Minority Rights Group International, 2011; N Rass, 'Policies and Strategies to Address the Vulnerability of Pastoralists in Sub-Saharan Africa'; PY Le Meur and others, 'Conflict over Access to Land & Water Resources within Sub-Saharan Dry Lands: Underlying Factors, Conflict Dynamics and Settlement Processes' [2006] Final report, GRET, Paris.

¹¹⁹ Machingura, Fortunate, and Seven Lally. "The Sustainable Development Goals and their trade-offs." *London: ODI* (2017); Balbo, Marcello, and Giulia Guadagnoli. "United Nations Trust Fund for Human Security Projects implemented by UN-Habitat in Afghanistan, Cambodia and Sri Lanka."

¹²⁰ T Belay, 'Conflicts, Conflict Resolution Practices and Impacts of the War in South Sudan' (2015) 2 *International Journal of School and Cognitive Psychology* S 013.

¹²¹ D Shelton, *Human Rights. Health & Environmental Protection: Linkages in Law & Practice*;

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The Sustainable Development Goals (SDGs) acknowledge that sustainable development cannot be realized without peace and security; and peace and security will be at risk without sustainable development.¹²² The SDGs recognize the need to build peaceful, just and inclusive societies that provide equal access to justice and that are based on respect for human rights, on effective rule of law and good governance at all levels and on transparent, effective and accountable institutions.¹²³

A human rights-based approach to environmental protection is therefore capable of not only addressing the conflict but also ensures that all other relevant rights in such scenarios are observed and upheld.¹²⁴ The choice of mechanism to be used is thus equally important.

Considering that conflicts between biodiversity conservation and other human activities are intensifying as a result of growing pressure on natural resources and associated demands by some for greater conservation,¹²⁵ approaches to reducing conflicts are increasingly focusing on engaging stakeholders in processes that are perceived as fair, that is, independent and where stakeholders have influence, and which in turn can generate trust between stakeholders.¹²⁶ Increased trust through fair participatory processes makes conflict resolution more likely.¹²⁷ Participatory approaches are defined as institutional settings where stakeholders of different types are

https://www.who.int/hhr/Series_1%20%20Sheltonpaper_rev1.pdf> Accessed 10 August 2020, p. 4.

¹²² United Nations, *Transforming our world: the 2030 Agenda for Sustainable Development*, A/RES/70/1, para. 35.

¹²³ *Ibid.*

¹²⁴ Campese, Jessica. *Rights-based approaches: Exploring issues and opportunities for conservation*. CIFOR, 2009

<http://www.cifor.org/publications/pdf_files/Books/BSunderland0901.pdf> Accessed 11 August 2020.

¹²⁵ Young, J.C., et al, 'The role of trust in the resolution of conservation conflicts,' *Biological Conservation*, Vol. 195, March 2016, pp. 196–202.

¹²⁶ *Ibid.*

¹²⁷ *Ibid.*

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brought together to participate more or less directly, and more or less formally, in some stage of the decision-making process.¹²⁸

There is a need for taking local communities into confidence and having confidence in them; engaging with their ideas, experiences, values, and capabilities and working with them, not on their behalf, to achieve resource-conservation objectives and community benefits.¹²⁹ In such approaches, environmental protection is achieved while at the same time, the communities' rights are protected.¹³⁰

It is recommended that conflict resolution mechanisms such as negotiation and mediation should be utilized more in management of environmental and natural resource-based conflicts as they can afford the parties an opportunity to negotiate and reach a compromise agreement, where all sides get satisfactory outcome.¹³¹ This is particularly important in ensuring that there will be no future flare-up of conflict due to unaddressed underlying issues.¹³² It is arguable that resolution mechanisms have better chances of achieving parties' satisfaction and protecting their rights when compared to settlement mechanisms.¹³³ Settlement mechanisms may first be used to quell any violence after which resolution mechanisms should be employed to address the deep rooted issues which mostly touch on human rights on such issues as dignity, culture and participation among others,

¹²⁸ Hove, SVD, 'Between consensus and compromise: acknowledging the negotiation dimension in participatory approaches,' *Land Use Policy*, Vol. 23, Issue 1, January 2006, pp. 10–17.

¹²⁹ Young, J.C., et al, 'The role of trust in the resolution of conservation conflicts,' *Biological Conservation*, Vol. 195, March 2016, pp. 196–202.

¹³⁰ Ibid.

¹³¹ Warner, M., 'Conflict Management in Community-Based Natural Resource Projects: Experiences from Fiji and Papua New Guinea,' *Working Paper No. 135*, (Overseas Development Institute, April, 2000), p. 16.

¹³² Mwangi Makumi, 'Conflict in Africa: Theory Processes and Institutions of Management' [2006] Nairobi: Centre for Conflict Research 115.

¹³³ Muigua, K., *Resolving Conflicts through Mediation in Kenya*, Glenwood Publishers, Nairobi, 2013.

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since conflict management processes are not mutually exclusive and one can lead to the other.¹³⁴

Notably, the 2010 Constitution of Kenya created an opportunity for exploring the use of ADR mechanisms and TDRMs in managing natural resource conflicts.¹³⁵ ADR and Traditional dispute resolution mechanisms, especially negotiation and mediation, should be utilized in addressing the complex issues in environmental conflicts that may not be resolved through the formal methods such as courts.¹³⁶ This is because some mechanisms such as mediation and negotiation can potentially bring about inclusiveness and public participation of all members of the community in decision-making. They are relevant in enjoyment of procedural rights in environmental matters.

5.6 Conclusion

Human rights fall under substantive and procedural rights. Environmental law is one of the branches of law where procedural rights play a vital role in addressing environmental concerns. This chapter has argued that while the formal approaches to environmental protection are important in securing substantive environmental rights, they may not be as effective in achieving procedural rights. It is for this reason that stakeholders should consider and promote active utilization of other informal approaches such as ADR and TDR in ensuring that all the rights of communities are protected. There is a need to strike a balance between conservation measures and access to resources by communities, through employing approaches that help in understanding the needs of the particular people and responding

¹³⁴ Chidhakwa, Z., 'Managing conflict around contested natural resources: a case study of Rusitu Valley area, Chimanimani, Zimbabwe,' *Natural Resource Conflict Management Case Studies: An Analysis of Power, Participation and Protected Areas*, (Southern Alliance for Indigenous Resources).

¹³⁵ Constitution of Kenya 2010, Art. 60; 67; 159(2) (c).

¹³⁶ Muigua, Kariuki, and Kariuki Francis. "Alternative Dispute resolution, access to Justice and Development in Kenya." *Strathmore LJ* 1 (2015): 1; Sandford, R. A. "Environmental dispute resolution: mediation, an effective alternative to litigation?" PhD diss., University of Tasmania, 1990.

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appropriately and consequently building trust within communities, and between communities and the national government.¹³⁷ In addition, for conflict management to be successful there is a need to employ participatory approaches so that the major issues can be identified, analysed and properly addressed.¹³⁸

A bottom-top approach to natural resource management, including conflict management, creates an opportunity to involve the local people who may have insiders' grasp of the issues at hand.¹³⁹

While conflicts cannot be avoided, there is a need to effectively manage them so as to ensure harmony amongst people and to prevent violence and the potential loss of lives and property. Management of natural resource conflicts also ensures security in terms of a guarantee of continued access to and use of the environmental resources necessary for to survival from generation to generation. Human rights are an integral part of any democracy and should therefore not be sacrificed; the place of human rights in Environmental and Natural resources Conflict management in Kenya is thus central and should remain so.

¹³⁷ Office for ECOSOC Support and Coordination United Nations. *Achieving sustainable development and promoting development cooperation: dialogues at the Economic and Social Council*. UN, 2008; Muigua, Kariuki. "Managing natural resource conflicts in Kenya through negotiation and mediation." (2016).

¹³⁸ Chidhakwa, Z., 'Managing conflict around contested natural resources: a case study of Rusitu Valley area, Chimanimani, Zimbabwe,' *Natural Resource Conflict Management Case Studies: An Analysis of Power, Participation and Protected Areas*, (Southern Alliance for Indigenous Resources).

¹³⁹ Muigua, Kariuki. "Conflict Management Mechanisms for Effective Environmental Governance in Kenya." (2018); 'Negotiation and Mediation Techniques for Natural Resource Management' <<http://www.fao.org/3/a0032e/a0032e04.htm>> accessed 11 August 2020; Hartter, Joel, and Sadie J. Ryan. "Top-down or bottom-up?: Decentralization, natural resource management, and usufruct rights in the forests and wetlands of western Uganda." *Land Use Policy* 27, no. 3 (2010): 815-826; Mark Reed and Julian sidoli del ceno, 'Mediation and Conservation Conflicts: From Top-down to Bottom-Up' (2015).

CHAPTER SIX

Environmental Democracy, Peace and Sustainable Development

6.1 Promoting Peaceful and Inclusive Societies for Sustainable Development in Kenya

6.1.1 Introduction

This first section mainly focuses on the ways through which Kenya can promote peacebuilding measures that will ensure the realization of the dream of a peaceful and inclusive society. Peacebuilding approaches and methods are geared towards ensuring people are safe from harm, have access to law and justice, are included in the political decisions that affect them, have access to better economic opportunities, and enjoy better livelihoods.¹

Peace is considered an important element of sustainable development and has even been given attention under the 2030 Agenda on Sustainable Development Goals. Kenya seeks to become a middle-income country by 2030 and this, arguably, cannot be achieved if the factors that threaten the peaceful coexistence of all communities are not adequately addressed. This chapter, largely informed by the Sustainable Development Goal 16, focuses on Kenya and offers some recommendations on how the country can successfully move towards the realization of peaceful and inclusive societies. Sustainable Development Goal (SDG) 16 requires all countries to 'promote peaceful and inclusive societies for sustainable development, provide access to justice for all and build effective, accountable and inclusive institutions at all levels'.²

¹ The Institute for Economics and Peace (IEP), 'Pillars of Peace - Understanding the Key Attitudes and Institutions That Underpin Peaceful Societies - International Security Sector Advisory Team (ISSAT)', p. 2

<<https://issat.dcaf.ch/ser/Learn/Resource-Library/Policy-and-Research-Papers/Pillars-of-Peace-Understanding-the-key-attitudes-and-institutions-that-underpin-peaceful-societies>> accessed 26 November 2020.

² SDG 16, UN General Assembly, *Transforming our world: the 2030 Agenda for Sustainable Development*, 21 October 2015, A/RES/70/1.

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The UN explains: “Goal 16 of the Sustainable Development Goals is dedicated to the promotion of peaceful and inclusive societies for sustainable development, the provision of access to justice for all, and building effective, accountable institutions at all levels. This aims to promote peaceful societies at national levels, as well as the role of cooperation at the international level”.³ This is also captured in the *Addis Ababa Action Agenda*⁴ which commits to promote peaceful and inclusive societies and to build effective, accountable and inclusive institutions at all levels to enable the effective, efficient and transparent mobilization and use of resources.⁵

It has rightly been pointed out that we cannot hope for sustainable development without peace, stability, human rights and effective governance, based on the rule of law.⁶

6.1.2 Peace efforts in Kenya: Challenges and Prospects

The Government of Kenya has undertaken various measures to foster national unity and patriotism. For instance, it adopted Sessional Paper No. 9 of 2013 on National Cohesion and Integration (NCI), Sessional Paper No. 3 of 2014 on National Policy and Action Plan on Human Rights and the Sessional Paper No. 5 of 2014 on Peacebuilding and Conflict Management.⁷

³ ‘Goal 16: Peace, Justice and Strong Institutions - SDG Tracker’ (*Our World in Data*) <<https://sdg-tracker.org/peace-justice>> accessed 26 November 2020.

⁴ United Nations, *Addis Ababa Action Agenda of the Third International Conference on Financing for Development (Addis Ababa Action Agenda)*, adopted at the Third International Conference on Financing for Development (Addis Ababa, Ethiopia, 13–16 July 2015) and endorsed by the General Assembly in its resolution 69/313 of 27 July 2015.

⁵ United Nations Inter-Agency Task Force on Financing for Development, ‘Promoting peaceful and inclusive societies’ <<https://developmentfinance.un.org/promoting-peaceful-and-inclusive-societies>> accessed 26 November 2020.

⁶ ‘Goal 16: Peace, Justice and Strong Institutions | UNDP’ <<https://www.undp.org/content/undp/en/home/sustainable-development-goals/goal-16-peace-justice-and-strong-institutions.html>> accessed 26 November 2020.

⁷ *Realisation of the National Values and Principles of Governance and Fulfilment of Kenya’s International Obligations for the Period 2013-2017: Jubilee Government Score Card* (Kenya National Commission on Human Rights 2017), 10

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These efforts have been informed by the fact that Kenya has grappled with historical land injustices that not only violate a raft of economic, social and cultural rights but also posed a threat to national unity due to marginalization and dispossession of community land.⁸

Despite these efforts, Kenya is far from boasting of a peaceful and inclusive society as it still experiences widespread poverty, huge gaps between the rich and the poor and conflicts among and between communities. Indeed, this state of affairs may have informed the National 'Building Bridges Initiative'⁹ which has been pushed by the Jubilee Government and its allies and hailed as capable of promoting peace, security and unity in Kenya. The resultant report is still undergoing political deliberations.

The bottom line is that Kenya is still experiencing social, economic and political injustices which in turn lead to conflicts and marginalization of various communities and groups of people. This is despite the constitutional and statutory provisions which seek to promote equality, peace and inclusive development in the country.

6.1.3 Promoting Sustainable Peace and Inclusive Societies for Sustainable Development in Kenya

Kenya has been making efforts geared towards peacebuilding as opposed to peacemaking only.¹⁰ Peacebuilding efforts aim at addressing the reasons

<<https://www.knchr.org/Portals/0/GeneralReports/Jubilee%20Government%20Scorecard.pdf?ver=2018-06-06-193327-647>> accessed 26 November 2020.

⁸ *Realisation of the National Values and Principles of Governance and Fulfilment of Kenya's International Obligations for the Period 2013-2017: Jubilee Government Score Card* (Kenya National Commission on Human Rights 2017), 11.

⁹ Republic of Kenya, 'Report of the Steering Committee on the Implementation of the Building Bridges to a United Kenya Taskforce Report,' *Building Bridges to a United Kenya: from a nation of blood ties to a nation of ideals*, October, 2020<https://e4abc214-6079-4128-bc62-d6e0d196f772.filesusr.com/ugd/00daf8_bedbb584077f4a9586a25c60e4ebd68a.pdf> accessed 26 November 2020.

¹⁰ 'Sustainable Peacebuilding Strategies: Peacebuilding Operations in Nakuru County, Kenya: Contribution to the Catholic Justice and Peace Commission (CJPC)' <<https://repository.globethics.net/handle/20.500.12424/3863583>> accessed 26

that lead to fights and/or conflicts and seek to support societies to manage their differences and conflicts without resorting to violence.¹¹ It, therefore, involves a broad range of measures, either focusing on before, during and/or after conflict. These are meant to prevent the outbreak, escalation, continuation and recurrence of conflict.¹² These efforts can also be geared towards either ‘positive’ or ‘negative’ peace.¹³ This section offers some diverse recommendations that, if explored, may assist the country in moving closer to achieving sustainable peace and building an inclusive society as part of efforts geared towards realizing the sustainable development agenda in Kenya.

a. Securing Sustainable Community Livelihoods for Peace: Sustainable Development Planning and Capacity Development

It has been suggested that food security and a healthy agricultural sector can play a critical role in preventing conflict and distress migration, and in building peace. This is because, in many countries, disasters or political instability have resulted in protracted crises and food shortages.¹⁴ Also, rural populations continue to be the most affected in conflicts; attacks on farming communities undermine livelihoods and may result in forced migration. As such, any peacebuilding efforts should include ensuring food security as part of addressing the root causes of conflict since peace and food

November 2020; ‘Peacebuilding Networks and Alliances in Kenya: A Retrospective Look at Collective Peacebuilding Effectiveness - Kenya’ (*ReliefWeb*)

<<https://reliefweb.int/report/kenya/peacebuilding-networks-and-alliances-kenya-retrospective-look-collective-peacebuilding>> accessed 26 November 2020; Rono EC, ‘The Role of Women in Post Violence Peace Building in Kenya: A Case Study of Nakuru County in 2007-2008 Post Election Violence’ (PhD Thesis, University of Nairobi 2013); Mutahi P and Ruteere M, ‘Violence, Security and the Policing of Kenya’s 2017 Elections’ (2019) 13 *Journal of Eastern African Studies* 253.

¹¹ Muigua, K., *Nurturing Our Environment for Sustainable Development*, Glenwood Publishers, Nairobi –2016).

¹² International Alert, “What is Peace Building?” Available at <https://www.internationalalert.org/what-we-do/what-is-peacebuilding> accessed 26 November 2020.

¹³ Ibid.

¹⁴SDG 16. Peace, Justice and Strong Institution | Sustainable Development Goals | Food and Agriculture Organization of the United Nations’ <<http://www.fao.org/sustainable-development-goals/goals/goal-16/en/>> accessed 26 November 2020.

security are often mutually reinforcing.¹⁵ Economically and socially empowered people are likely to participate more in governance matters and less likely to be influenced politically as they may not follow their political leaders blindly.¹⁶ This is because politicians often exploit the people's social vulnerability, marginalization and poverty to cause conflicts and divisions for their selfish interests.¹⁷

b. Addressing Gender Equality and Equity for Sustainable Peace and Inclusive Society

Notably, inequalities in wealth and income lead to a cascade of consequential social inequalities in a range of areas such as housing, work, energy, connectivity, health care, education, and related social benefits.¹⁸ It has been acknowledged that where conflict strikes, men are more likely to die on battlefields, but a disproportionate share of women will be targeted for sexual violence, among other violations, and homicide rates among

¹⁵ Ibid.

¹⁶ 'Promoting Empowerment of People in Achieving Poverty Eradication, Social Integration and Full Employment and Decent Work for All': <<https://digitallibrary.un.org/record/777727?ln=en>> accessed 26 November 2020; 'Political Empowerment' (GSDRC) <<https://gsdrc.org/topic-guides/voice-empowerment-and-accountability/supplements/political-empowerment/>> accessed 26 November 2020; 'Social and Economic Empowerment' (GSDRC) <<https://gsdrc.org/topic-guides/voice-empowerment-and-accountability/supplements/social-and-economic-empowerment/>> accessed 26 November 2020.

¹⁷ 'Exclusion as a Cause and Consequence of Violent Conflict' (GSDRC) <<https://gsdrc.org/topic-guides/social-exclusion/dynamics/exclusion-as-a-cause-and-consequence-of-violent-conflict/>> accessed 26 November 2020; Nantulya, Paul. "Exclusion, Identity and Armed Conflict: A historical survey of the politics of confrontation in Uganda with Specific Reference to the Independence Era." In *Politics of Identity and Exclusion in Africa: From Violent Confrontation to Peaceful Cooperation, conference proceedings, Senate Hall, University of Pretoria*, pp. 81-92. 2001; Nduku E, *Corruption in Africa: A Threat to Justice and Sustainable Peace* (Globethics net 2015).

¹⁸ 'Expert Group Meeting on "Tackling Global Challenges to Equality and Inclusion through the Gender-Responsive Implementation of the 2030 Agenda for Sustainable Development: Spotlight on SDGs 10, 13 and 16": Report and Recommendations | UN Women - Headquarters', 7 <<https://www.unwomen.org/en/digital-library/publications/2019/06/egm-tackling-global-challenges-to-equality-and-inclusion>> accessed 26 November 2020.

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women typically rise.¹⁹ It has also been documented that more broadly, whether in global, regional or national governance, women tend to be underrepresented in the governance of institutions. This is discriminatory, but it also entrenches gender disparities, during times of war and peace, as women's voices go unheard in decision-making.²⁰

Some of the recommendations from the United Nations work on gender equality and equity focus on strengthening good governance, inclusive rule of law, and access to justice; removing structural barriers to women's participation in decision-making and promoting inclusive and sustainable economic growth and social development that achieves gender equality and empowers all women and girls; investing in national statistical capacities to promote evidence-based policy-making, planning, and budgeting, and ensure better monitoring of progress and accountability for results; and increasing financing for the gender-responsive implementation of the 2030 Agenda through domestic resource mobilization policies and global action to address the systemic imbalances in domestic and international tax, trade, and investment arrangements.²¹

It has been asserted that realizing SDG 16 on peaceful, just, and inclusive societies requires a power shift that re-centres work on equality, development and peace around the voices, human security and rights of women and those most marginalized. This requires not just technical fixes, but the structural transformation that moves from institutionalizing a form of governance that enables

¹⁹ 'Sustainable Development Goal 16: Peace, Justice and Strong Institutions' (*UN Women | Europe and Central Asia*) <<https://eca.unwomen.org/en/news/in-focus/women-and-the-sdgs/sdg-16-peace-justice-strong-institutions>> accessed 26 November 2020.

²⁰ Ibid.

²¹ 'Expert Group Meeting on "Tackling Global Challenges to Equality and Inclusion through the Gender-Responsive Implementation of the 2030 Agenda for Sustainable Development: Spotlight on SDGs 10, 13 and 16": Report and Recommendations | UN Women - Headquarters', 7 <<https://www.unwomen.org/en/digital-library/publications/2019/06/egm-tackling-global-challenges-to-equality-and-inclusion>> accessed 26 November 2020.

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*domination and violence to institutionalize a form of governance that enables equality and peace for people and planet (emphasis added).*²²

In some countries such as Colombia, women have been at the forefront of peacebuilding efforts.²³ There is thus a need to promote gender equality and equity as a way of promoting peaceful and inclusive societies for sustainable development. The human rights of both men and women and indeed all groups in society should be respected, protected and implemented for the realization of just, inclusive and peaceful societies. The *UN Conference on Environment and Development, Agenda 21*²⁴ under section 23 calls for full public participation by all social groups, including women, youth, indigenous people and local communities in policy-making and decision-making.²⁵

c. Streamlining Environmental and Natural Resources Governance and Climate Change Mitigation

The 2030 SDGs Agenda acknowledges that while the causes of conflict vary widely, the effects of climate change only aggravate them.²⁶ Climate-related events such as drought threaten food and water supplies, increase competition for these and other natural resources and create civil unrest, potentially adding fuel to the already-disastrous consequences of conflict.²⁷

²² By Abigail Ruane, *Women's International League for Peace and Freedom (WILPF) (as quoted in 'SDG 16 – Governing for Gender Equality and Peace? Or Perpetual Violence and Conflict?'*

<<https://www.2030spotlight.org/en/book/1883/chapter/sdg-16-governing-gender-equality-and-peace-or-perpetual-violence-and-conflict>> accessed 26 November 2020).

²³ Newsroom, 'Women the "Driving Force" for Peacebuilding in Colombia' (*Modern Diplomacy*, 31 October 2020) <<https://moderndiplomacy.eu/2020/10/31/women-the-driving-force-for-peacebuilding-in-colombia/>> accessed 26 November 2020.

²⁴ United Nations Conference on Environment & Development Rio de Janeiro, Brazil, 3 to 14 June 1992.

²⁵ See also Article 10, Constitution of Kenya 2010 on national values and principles of governance.

²⁶ SDG Goal 13.

²⁷ Muigua, K., *Securing Our Destiny Through Effective Management of the Environment, Journal of Conflict Management and Sustainable Development, Volume 4, No 3, (May, 2020).*

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Thus, investing in good governance, improving the living conditions of people, reducing inequality and strengthening the capacities of communities can help build resilience to the threat of conflict and maintain peace in the event of a violent shock or long-term stressor.²⁸

Article 69 (1) of the Constitution of Kenya outlines the obligations of State in respect of the environment as follows: The State should: ensure sustainable exploitation, utilization, management and conservation of the environment and natural resources, and ensure the equitable sharing of the accruing benefits; work to achieve and maintain a tree cover of at least ten per cent of the land area of Kenya; protect and enhance the intellectual property in, and indigenous knowledge of, biodiversity and the genetic resources of the communities; encourage public participation in the management, protection and conservation of the environment; protect genetic resources and biological diversity; establish systems of environmental impact assessment, environmental audit and monitoring of the environment; eliminate processes and activities that are likely to endanger the environment, and utilize the environment and natural resources for the benefit of the people of Kenya. Besides, every person must cooperate with State organs and other persons to protect and conserve the environment and ensure ecologically sustainable development and use of natural resources.²⁹

The Government should work closely with all the relevant stakeholders to meet these obligations as a way of ensuring that communities benefit from such resources for empowerment as this will go a long way in promoting peaceful and inclusive societies for sustainable development. This is due to the likely effect of reduced poverty levels.

²⁸ United Nations, *The Sustainable Development Goals Report, 2018*, p.15. Available at <https://unstats.un.org/sdgs/files/report/2018/TheSustainableDevelopmentGoalsReport2018-EN.pdf> [Accessed on 22/01/2020]; Muigua, K., *Securing Our Destiny Through Effective Management of the Environment, Journal of Conflict Management and Sustainable Development, Volume 4, No 3, (May, 2020)*.

²⁹ Article 69(2), Constitution of Kenya, 2010.

d. Building Accountable and Inclusive Institutions for Peaceful and Inclusive Society

Putting in place accountable and inclusive institutions governed by the rule of law may promote and ensure participatory decision-making and responsive public policies that leave no one behind, ensuring citizens have unfettered justice and rule of law, without which there can be no sustainable development.³⁰

The law can be useful in contributing to the change in institutional norms as well as shaping the changes in attitudes and behaviour.³¹ The rule of law provides a viable framework for the peaceful management of conflicts due to its defining features: establishing the operating rules of society and therefore providing reliability, justice and stability in the society; norms defining appropriate societal behaviour; institutions able to resolve conflicts, enforce laws, and regulate the political and judicial system; laws and mechanisms protecting citizens' rights.³²

The role of law and the above features are exemplified in the Constitution which provides that 'the national values and principles of governance in this Article bind all State organs, State officers, public officers and all persons whenever any of them applies or interprets this Constitution; enacts, applies or interprets any law; or makes or implements public policy decisions.³³ The national values and principles of governance include- patriotism, national unity, sharing and devolution of power, the rule of law, democracy and participation of the people; human dignity, equity, social justice, inclusiveness, equality, human rights, non-discrimination and protection of the marginalised; good governance, integrity, transparency and

³⁰ 'SDG 16 as an Accelerator for the 2030 Agenda' (UNDP) <<https://www.undp.org/content/undp/en/home/blog/2019/sdg-16-as-an-accelerator-for-the-2030-agenda.html>> accessed 26 November 2020.

³¹ Muigua, K., *Securing Our Destiny Through Effective Management of the Environment, Journal of Conflict Management and Sustainable Development, Volume 4, No 3, (May, 2020)*.

³² Peace Building Initiative, "Introduction: Justice, Rule of Law & PeacebuildingProcesses,2009" <<http://www.peacebuildinginitiative.org/indexe33f.html?pageId=1844>> accessed 26 November 2020.

³³ Article 10(1), Constitution of Kenya 2010.

accountability; and sustainable development.³⁴ All these values and principles are not only meant to promote good governance but also build a peaceful and inclusive society for the people of Kenya. There is a need for active promotion and implementation of these national values and principles of governance as part of the peacebuilding efforts in Kenya. Ensuring that all governance institutions abide by these values and principles will also strengthen these institutions and ensure that they discharge their constitutional and statutory mandates effectively for the eventual realization of the sustainable development agenda in Kenya.

6.2 Mainstreaming the Role of Women in Peacemaking and Environmental Management in Kenya

6.2.1 Introduction

This second section examines and discusses ways in which women can meaningfully participate in peacemaking efforts and environmental management as far as addressing environmental related conflicts in Kenya is concerned. The section is based on the hypothesis that societal gendered division of labour makes women interact more with the environment as the caretakers of families and this places them at a better position to be included in managing environmental resources. Any adverse effects of conflict also affect their lives as they are left in charge of their homes and children. The section argues that there is a need to promote a more participatory role of women in not only preventing emergence of conflict but also in quelling the same where it arises and also to enhance their role in environmental management.

Peace is considered to be an important part of any society as self-determination is not possible without peace. Where conflict arises, it is often grounded in social, structural, cultural, political and economic factors, and depreciation in one increases chances of conflict in a particular society.³⁵

³⁴ Article 10(2), Constitution of Kenya 2010.

³⁵ Maiese, M., 'Social Structural Change,' in G. Burgess & H. Burgess (eds), *Beyond Intractability*, (Conflict Information Consortium, University of Colorado, Boulder, July 2003), available at <http://www.beyondintractability.org/essay/social-structural-changes> Accessed on 28 June 2020; See also Maiese, M., 'Causes of

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This section focuses on environmental and natural resource related conflicts and how these types of conflict affect efforts towards achieving peace in any given society. In discussing this, the author also offers suggestions on the role that women can play in peacemaking efforts and environmental management. Natural resources are an important source of livelihoods of many households in especially in rural areas.³⁶ In addition, it has been observed that conflicts over natural resources can be useful in making needs and rights clear and helping to solve injustices or inequities in resource distribution. However, some conflicts have the potential for becoming obstacles to livelihoods and sustainable resource management if they are not addressed.³⁷ It has also been rightly pointed out that women play a critical role in managing natural resources on family and community levels and are most affected by environmental degradation.³⁸ In addition, world's women are seen as the key to sustainable development, peace and security.³⁹ It is for these reasons that this section argues that women must and should be included in not only any peacemaking efforts where environmental related conflicts arise, but also in environmental management as a way of preventing any future conflicts from arising.

There are as many approaches to peace efforts as there are players. The three main approaches to peace include: peacekeeping, peacebuilding and peacemaking.⁴⁰ The three approaches are applied to different scenarios and

Disputes and Conflicts,' in G. Burgess & H. Burgess (eds), *Beyond Intractability*, (Conflict Information Consortium, University of Colorado, Boulder, October, 2003), available at <http://www.beyondintractability.org/essay/underlying-causes> Accessed on 28 June 2020.

³⁶ 'Negotiation and Mediation Techniques for Natural Resource Management' <<http://www.fao.org/3/a0032e/a0032e04.htm>> accessed 4 July 2020.

³⁷ Ibid.

³⁸ Bureau of International Information Programs and United States Department of State, 'Chapter 11: Women and the Environment', *Global Women's Issues: Women in the World Today, extended version* (Bureau of International Information Programs, United States Department of State 2012) <<https://opentextbc.ca/womenintheworld/chapter/chapter-11-women-and-the-environment/>> accessed 8 July 2020.

³⁹ Ibid.

⁴⁰ Johan, Galtung, *Three approaches to peace: Peacekeeping, peacemaking and peacebuilding*. 1976

stages in a conflict situation. This chapter is mainly concerned with peacemaking approach to peace efforts. As already pointed out, there are different players in a conflict situation. This section is concerned with women as key players in conflict situations. Women's roles are closely tied up to satisfying the basic needs of the extended family, among which are the global economic, and social needs and hence the need to include them in environmental management.⁴¹

The scope and context of the section is limited to discussing the connection between the role of women and peacemaking approaches in environmental-related conflict situations. Arguably, both men and women are affected differently by environmental-related conflicts. It has rightly been pointed out that the role of women in the exploitation of natural resources during the war is rarely acknowledged.⁴² As such, this discourse calls for a more inclusive role of women in environmental management.

6.2.2. Peacemaking and Environmental Management: The Linkage

Conflicts are issues about values which are non-negotiable. These needs and values are shared by the parties. Needs or values are inherent in all human beings and go to the root of the conflict while interests and issues are superficial and do not go to the root of the conflict.⁴³ They are infinite. Conflicts, therefore, arise out of the non-fulfillment of these non-negotiable needs or values of the conflicting parties in the society. Accordingly, if all

<https://www.galtung-institut.de/wp-content/uploads/2016/06/galtung_1976_three_approaches_to_peace.pdf>
Accessed on 28 June 2020.

⁴¹ Emmanuel Ngwa Nebasina, 'The Role of Women in Environmental Management: An Overview of the Rural Cameroonian Situation' (1995) 35 *GeoJournal* 516.

⁴² 'Understanding Gender, Conflict and the Environment' (*CEOBS*, 5 June 2017) <<https://ceobs.org/understanding-gender-conflict-and-the-environment/>> accessed 4 July 2020.

⁴³ Bloomfield, D., "Towards Complementarity in Conflict Management: Resolution and Settlement in Northern Ireland", *Journal of Peace Research*, Vol.32, No. 2 (May, 1995), pp.152-153.

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needs are met, the result is non-zero-sum which produces integrative and creative solutions and not a zero-sum solution.⁴⁴

A conflict involves at least two parties disagreeing over the distribution of material or symbolic resources or perceives their underlying cultural values and beliefs to be different or incompatible. It has also been argued that conflicts could also originate from the social and political make-up and structure of society.⁴⁵ This supports the perspective that conflict has to be dealt with at the psychological level to get past 'blocks' to positive communication and at an ontological level to uncover the 'real' causes of the conflict.⁴⁶ Thus, peacemaking efforts work towards stopping active conflicts (whether armed or not).⁴⁷ The term peace is related to the well-being of any person and is also linked to harmony, tranquility, cooperation, alliance, well-being, and agreement.⁴⁸ Peace is considered to be more than just the absence of violence.⁴⁹ As such, peace may be classified into positive peace or negative peace. Negative peace is the absence of violence or the fear of violence while positive peace is the attitudes, institutions and structures, that when strengthened, lead to peaceful societies.⁵⁰

⁴⁴ Fetherston, A.B., "From Conflict Resolution to Transformative Peacebuilding: Reflections from Croatia", *Centre for Conflict Resolution-Department of Peace Studies: Working Paper 4* (April, 2000), pp. 2-4.

⁴⁵ See Serge, L, et al, "Conflict Management Processes for Land-related conflict", *A Consultancy Report by the Pacific Islands Forum Secretariat*, available at www.forumsec.org, [Accessed on 4/7/2020].

⁴⁶ Fetherston, A.B., "From Conflict Resolution to Transformative Peacebuilding: Reflections from Croatia", op.cit.

⁴⁷ International Alert, "What is Peace Building?" Available at <https://www.international-alert.org/what-we-do/what-is-peacebuilding> [27/6/2020].

⁴⁸ Spring, Ú.O., "Peace and Environment: Towards a Sustainable Peace as Seen from the South." In *Globalization and Environmental Challenges*, Springer, Berlin, Heidelberg, 2008, pp. 113-126.

⁴⁹ Galtung, J., "Violence, peace, and peace research," *Journal of peace research*, Vol. 6, no. 3 (1969): 167-191.

⁵⁰ Herath, O., "A critical analysis of Positive and Negative Peace," (2016), p.106. Available at <http://repository.kln.ac.lk/bitstream/handle/123456789/12056/journal1%20%281%29.104-107.pdf?sequence=1&isAllowed=y> [Accessed on 26/6/2020].

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Positive peace is considered as a true, lasting, and sustainable peace built on justice for all peoples. The concept of positive peace involves the elimination of the root causes of war, violence, and injustice and the conscious attempt to build a society that reflects these commitments. Positive peace assumes an interconnectedness of all life.⁵¹

In a negative peace situation, it may not see conflict out in the open, but the tension is boiling just beneath the surface because the conflict was never reconciled. The concept of negative peace addresses immediate symptoms, the conditions of war, and the use and effects of force and weapons.⁵² Peacemaking generally includes measures to address conflicts in progress and usually involves diplomatic action to bring hostile parties to a negotiated agreement.⁵³ In most African setups, the traditional conflict resolution mechanisms have been employed, for example, in resolving environmental conflicts where the council of elders, provincial administration, peace committees, land adjudication committees and local environmental committees play a pivotal role in managing conflicts.⁵⁴

Peace and the environment are closely related as affirmed in the sustainable development discourse.⁵⁵ The United Nations *2030 Agenda for Sustainable Development*⁵⁶ (SDGs) provides a global blueprint for dignity, peace and prosperity for people and the planet, now and in the future. SDG Goal 16 focuses on promoting peaceful and inclusive societies for sustainable development, provide access to justice for all and build effective, accountable and inclusive institutions at all levels.⁵⁷

⁵¹ Herath, O., "A critical analysis of Positive and Negative Peace," (2016), p.106.

⁵² Ibid., pp.106-107.

⁵³ 'Terminology' (*United Nations Peacekeeping*)

<<https://peacekeeping.un.org/en/terminology>> accessed 4 July 2020.

⁵⁴ Muigua, K., *Resolving Conflicts through Mediation in Kenya, 2nd Ed.*, Glenwood Publishers, Nairobi – 2017.

⁵⁵ UN General Assembly, *Transforming our world: the 2030 Agenda for Sustainable Development*, 21 October 2015, A/RES/70/1, Target 35.

⁵⁶ UN General Assembly, *Transforming our world: the 2030 Agenda for Sustainable Development*, 21 October 2015, A/RES/70/1.

⁵⁷ Goal 16, *Transforming our world: the 2030 Agenda for Sustainable Development*, 21 October 2015, A/RES/70/1.

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Some scholars have argued that environmental peacemaking fundamentally utilizes cooperative efforts to manage environmental resources as a way to transform insecurities and create more peaceful relations between parties in dispute.⁵⁸ In addition, environmental management may help overcome political tensions by promoting interaction, confidence building, and technical cooperation.⁵⁹

An environmental conflict has been described as a particular social conflict characterized by: the qualitative or quantitative reduction of available environmental resources (water, biodiversity, arable land, raw materials and other finite common goods) due to the imposition of profitable projects by multinational companies and/or inappropriate policies by Governments, International financial organizations; and the escalation of protests by local residents and/or larger opposition movements in civil society, in an effort to protect the environment, common goods and people's rights.⁶⁰

In Northern Kenya, the resource based conflicts have been worsened by diminishing pasture and water resources, the proliferation of small arms and light weapons, disputes over land and ethnic boundaries, the absence of adequate state security, and the commercialization of cattle rustling.⁶¹ Environmental conflicts have been perceived as a symptomatic manifestation of global model of economic development based on the exploitation of natural resources, disregard for people's rights and lack of social justice.⁶² Furthermore, it has been suggested that there are about four

⁵⁸ Ken Conca and Geoffrey D Dabelko, 'Environmental Peacemaking /' (*Olin College Library Catalog*) <<http://olin.tind.io/record/126690>> accessed 28 June 2020.

⁵⁹ Ken Conca and Geoffrey D Dabelko, 'Environmental Peacemaking /' (*Olin College Library Catalog*) <<http://olin.tind.io/record/126690>> accessed 28 June 2020.

⁶⁰ CDCA, 'Why environmental conflicts?' Available at <<http://cdca.it/en/perche-i-conflitti-ambientali>> accessed 5 July 2020.

⁶¹ 'Peace by All Means: Women Crusaders in Northern Kenya Make the Search for Peace Personal | International Organization for Migration - Nairobi' <<http://iom.int/en/press-releases/peace-by-all-means-women-crusaders-northern-kenya-make-search-peace-personal>> accessed 5 July 2020.

⁶² CDCA, 'Why environmental conflicts?' Available at <http://cdca.it/en/perche-i-conflitti-ambientali> accessed 5 July 2020.

key factors that contribute in the creation of environmental conflict: poverty, vulnerable livelihoods, migration and weak state institutions – all problems that are present at the local level.⁶³

It is also argued that environmental factors often interact with the visible drivers of ethnic tensions, political marginalization and poor governance to create a causal framework that allows degradation to affect livelihoods, interests and capital – which, in turn, lead to conflict.⁶⁴

It is thus clear that if communities are guaranteed environmental security, where they are able to meet all their resource needs, peace becomes easier to achieve. Where there are threats to sources of livelihoods especially in communities that mainly rely on environmental resources it means increased chances of conflict.

6.2.3 Role of Women in Peacemaking: Challenges and Prospects

It has been observed that natural resource based conflicts can, arguably, involve three broad themes: actors (or stakeholders, groups of people, government structures and private entities), resource (land, forests, rights, access, use and ownership) and stakes (economic, political, environmental and socio-cultural).⁶⁵ As a result, it is contended that conflicts can be addressed with the actor-oriented approach, resource-oriented approach,

⁶³ Barnett, J., & Adger, W. N., 'Climate change, human security and violent conflict,' *Political Geography*, Vol.26, 2007, pp. 639-655, at p.643 (As quoted in Akins, E., "Environmental Conflict: A Misnomer?" *Environment, Climate Change and International Relations*: 99, available at

<http://www.e-ir.info/2016/05/12/environmental-conflict-a-misnomer/>].

⁶⁴ Akins, E., "Environmental Conflict: A Misnomer?" *Environment, Climate Change and International Relations*: 99, available at [http://www.e-](http://www.e-ir.info/2016/05/12/environmental-conflict-a-misnomer/)

[ir.info/2016/05/12/environmental-conflict-a-misnomer/](http://www.e-ir.info/2016/05/12/environmental-conflict-a-misnomer/) [Accessed on 5/5/2020]; See also Sosa-Nunez, G. & Atkins, E., *Environment, Climate Change and International Relations*, (E-International Relations, 2016). Available at <http://www.e-ir.info/wp-content/uploads/2016/05/Environment-Climate-Change-and-International-Relations-E-IR.pdf> [Accessed on 5/7/2020].

⁶⁵ Anderson, J., et al, 'Addressing Natural Resource Conflicts through Community Forestry: Setting the Stage,' *Annex C - Summary of Discussion Papers*, (FAO), available at

<http://www.fao.org/docrep/005/ac697e/ac697e13.htm#TopOfPage> [Accessed on 5/7/2020].

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stake-oriented approach or a combination of the three.⁶⁶ Despite this, there are key principles such as, inter alia, participatory approaches⁶⁷, equitable representation, capacity building, context of the conflict and increased access and dissemination of information, that must always be considered.⁶⁸ Natural resource based conflicts are sensitive considering that they arise from the need for people to satisfy their basic needs.⁶⁹

It is for this reason that this chapter advocates for inclusion of women in peacemaking efforts and environmental management as important actors and stakeholders in tackling environmental and natural resource related conflicts. While the inclusion of women in making processes has gained momentum in policy discussions over the last 15 years, the number of women in decision-making positions remains relatively small.⁷⁰ Peacemaking efforts have relatively remained a man's affair, the same group of people who largely participate in conflicts.⁷¹

Some authors have rightly pointed out that 'peace processes increasingly go beyond outlining cease-fires and dividing territory to incorporate elements

⁶⁶ Ibid.

⁶⁷ Participatory approaches are defined as institutional settings where stakeholders of different types are brought together to participate more or less directly, and more or less formally, in some stage of the decision-making process. (Hove, SVD, 'Between consensus and compromise: acknowledging the negotiation dimension in participatory approaches,' *Land Use Policy*, Vol. 23, Issue 1, January 2006, pp. 10-17.

⁶⁸ Anderson, J., et al, 'Addressing Natural Resource Conflicts through Community Forestry: Setting the Stage,' op cit.

⁶⁹ FAO, 'Negotiation and mediation techniques for natural resource management,' available at <http://www.fao.org/3/a-a0032e/a0032e05.htm> [Accessed on 5/7/2020].

⁷⁰ 'Why Women Should Have a Greater Role in Peacebuilding' (*World Economic Forum*)

<<https://www.weforum.org/agenda/2015/05/why-women-should-have-a-greater-role-in-peacebuilding/>> accessed 5 July 2020.

⁷¹ 'African Approaches to Building Peace and Social Solidarity' (*ACCORD*) <<https://www.accord.org.za/ajcr-issues/african-approaches-to-building-peace-and-social-solidarity/>> accessed 5 July 2020.

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that lay the foundations for peace and shape the structures of society'.⁷² It is for this reason that some authors have argued for the inclusion of all groups in society in peacemaking efforts. Some commentators have argued that the participation of women in peace talks is important as they are more likely to raise day-to-day issues such as human rights, citizen security, employment, and health care, which make peace and security plans more relevant and more durable.⁷³

Women are seen as 'more peaceful' compared to men and argument used to call for their greater participation in peace efforts. Indeed, some authors have gone as far as arguing that 'men are more likely to engage in aggression and war; in contrast "a world run by women" would be "less aggressive, adventurous, competitive, and violent", and "less prone to conflict and more conciliatory and cooperative than the one we inhabit now".⁷⁴ Others argue that conflict "accentuates existing differences of power and access to resources, weakening the position of those who are already without power, whether they are men, women or children".⁷⁵

While the former suggestion that women may be more peaceful is highly contentious, the latter argument solidifies the argument that women also have much to lose where there is conflict and hence creates the need to include them in peace processes.

Some authors have authoritatively explored women's participation in five important areas of international peace and security namely: (1) conflict

⁷² Marie O'Reilly and Thania Paffenholz, 'Reimagining Peacemaking: Women's Roles in Peace Processes' (International Peace Institute (IPI): The Graduate Institute of International ... 2015)

<[https://cve-](https://cve-kenya.org/media/library/Reilly_et_al_2015_Reimagining_Peacemaking_Women_s_Roles_in_Peace_Processes.pdf)

[kenya.org/media/library/Reilly_et_al_2015_Reimagining_Peacemaking_Women_s_Roles_in_Peace_Processes.pdf](https://cve-kenya.org/media/library/Reilly_et_al_2015_Reimagining_Peacemaking_Women_s_Roles_in_Peace_Processes.pdf)> Accessed 28 June 2020.

⁷³ 'Women on the Frontlines of Peace and Security'

<<https://ndupress.ndu.edu/Publications/Books/Women-on-the-Frontlines-of-Peace-and-Security/>> accessed 5 July 2020.

⁷⁴ See Hilary Charlesworth, 'Are Women Peaceful? Reflections on the Role of Women in Peace-Building' (2008) 16 *Feminist Legal Studies* 347.

⁷⁵ *Ibid*, 358.

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prevention, (2) peace negotiations, (3) post-conflict disarmament, demobilization, and reintegration, (4) governance, and (5) transitional justice.⁷⁶ Arguably, active inclusion of women in environmental management as part of the peacemaking efforts would go a long way in achieving lasting peace in any society.

Some scholars have observed that a key challenge to greater inclusion of women's issues and concerns in peace agreements and in peacemaking [and state building] efforts is that women are not seen as central to 'making or breaking' a peace agreement and other forms of identity, such as ethnicity, are considered to be a more fundamental fault line for conflict.⁷⁷ According to some commentators, the trauma of the conflict experience may provide an opportunity for women to come together with a common agenda. In some contexts, these changes have led women to become activists, advocating for peace and long-term transformation in their societies.⁷⁸

In some parts of Northern Kenya especially among the pastoralist communities, women have been as agents of both conflicts and peace. For instance, it has been observed that among the communities of Nawuiyapong in West Pokot County and Lorengippi in Turkana County, Northern Kenya, women have now taken an initiative to attend meetings between the community elders, so as to exert pressure on the elders towards making peaceful resolutions. Furthermore, in contrast to the practice among pastoralist communities where women have in the past motivated young men to participate in raids, the women crusaders are now acting as change agents and discouraging their young men from such activities.⁷⁹ In these

⁷⁶ Donna Ramsey-Marshall, 'Review of Women Building Peace: What They Do, Why It Matters' (2008) 25 *International Journal on World Peace* 112.

⁷⁷ 'Gender-Sensitive Peacebuilding and Statebuilding' (*GSDRC*) <<https://gsdrc.org/topic-guides/gender-and-conflict/approaches-tools-and-interventions/gender-sensitive-peacebuilding-and-statebuilding/>> accessed 4 July 2020.

⁷⁸ Julie Arostegui, 'Gender, Conflict, and Peace-Building: How Conflict Can Catalyse Positive Change for Women' (2013) 21 *Gender & Development* 533.

⁷⁹ 'Peace by All Means: Women Crusaders in Northern Kenya Make the Search for Peace Personal | International Organization for Migration - Nairobi'

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two communities, there are a group of women popularly referred to as the women crusaders, and they have been instrumental in pushing men (elders and youth-warriors) into committing themselves to resolutions reached during peace dialogues.⁸⁰

The inclusion of women in peace efforts is not alien to Africa as women elders in traditional African societies often played a key role in resolving conflicts.⁸¹ For instance, it is said that among the traditional Igbo society in Eastern Nigeria, women are the sustainers and healers of human relationships.⁸² Chinua Achebe buttresses this point further in his renowned novel, *Things Fall Part*, where he asserts as follows:

*“...when a father beats his child, it seeks sympathy in its mother’s hut. A man belongs to his father when things are good and life is sweet. But when there is sorrow and bitterness, he finds refuge in his motherland. Your mother is there to protect you”.*⁸³

This is true in virtually all the other African communities. The role of the Luo women, for instance, is also well documented in various stages of peace processes in their community. They could directly or indirectly intervene through elders and women networks within the warring factions to bring peace.⁸⁴

Despite this, a critical look at the cultures of most of the other African communities reveals that the role of women as compared to men in conflict

</article/peace-all-means-women-crusaders-northern-kenya-make-search-peace-personal> accessed 5 July 2020.

⁸⁰ Ibid.

⁸¹ See generally, Boege, V., Potential and limits of traditional approaches in peacebuilding. *Berghof Handbook II: Advancing Conflict Transformation*, 2011, pp.431-457.

⁸² Brock-Utne, B., "Indigenous conflict resolution in Africa," In *A draft presented to week-end seminar on Indigenous Solutions to Conflicts held at the University of Oslo, Institute of Educational Research*, 2001, p. 13.

⁸³ Achebe, C., *Things Fall Apart*, (William Heinemann Ltd, London, 1958) (As quoted in Brock-Utne, B., "Indigenous conflict resolution in Africa," op cit., p.13).

⁸⁴ Brock-Utne, B., *Indigenous Conflict Resolution in Africa*, op cit.

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management activities was and is still negligible.⁸⁵ For instance, among the Pokot and the Marakwet, women traditionally act as reference resource people but cannot challenge or influence decisions adopted by the male-dominated council of elders, the *Kokwo*. Among the Samburu, women are supposed to merely convey their suggestions through their male relatives. Such information may or may not be conveyed at all to the council of elders.⁸⁶

Consequently, traditions, cultural norms and practices that may be considered repugnant and contrary to written laws and that hinder the participation of women in conflict management, should be discarded. Women empowerment is essential to enable them participate in the various conflict resolution fora as they are the majority of the victims of conflicts. Their role as carriers of life and agents of peace has not changed in modern society. As such their participation in conflict resolution activities should not be curtailed by the adoption of formal dispute resolution mechanisms or adherence to traditions hindering their role on the same. Women have the capacity to negotiate and bring about peace, either directly or through creation of peace networks, among warring communities.⁸⁷ Their participation in conflict resolution should thus be enhanced.

⁸⁵ See Alaga, E., *Challenges for women in peacebuilding in West Africa*, (Africa Institute of South Africa (AISA), 2010); Cf. Ibewuiké, V. O., *African Women and Religious Change: A study of the Western Igbo of Nigeria with a special focus on Asaba town*, (Uppsala, 2006). Available at

<https://uu.diva-portal.org/smash/get/diva2:167448/FULLTEXT01.pdf> [Accessed on 5/7/2020].

⁸⁶ See generally, Rabar, B. & Karimi, M. (Eds), *Indigenous Democracy: Traditional Conflict Resolution Mechanisms: The Case of Pokot, Turkana, Samburu and Marakwet communities*, (ITDG, Nairobi, 2004), p.96.

⁸⁷ See generally, De la Rey, C., & McKay, S., Peacebuilding as a gendered process. *Journal of Social Issues*, Vol.62, No.1, 2006, pp.141-153; See also Paffenholz, T., et al, "Making Women Count - Not Just Counting Women: Assessing Women's Inclusion and Influence on Peace Negotiations," (Geneva: Inclusive Peace and Transition Initiative (The Graduate Institute of International and Development Studies) and UN Women, April 2016). Available at

<http://www.inclusivepeace.org/sites/default/files/IPTI-UN-Women-Report-Making-Women-Count-60-Pages.pdf> [Accessed on 5/7/2020].

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As already pointed out, peace building generally goes beyond conflict management measures, as it involves developing institutional capacities that alter the situations that lead to violent conflicts.⁸⁸ In traditional African societies, people engaged in activities that promoted peace through the various activities they engaged in. Resort to courts searching for justice when peace is what is needed may thus destroy relationships rather than build and foster them in the Kenyan case. In such cases, reconciliation, negotiation, mediation and other traditional mechanisms would be the better option.⁸⁹ There is a need to ensure that these processes include women as active players.

Thus, women are still subjugated when it comes to peacemaking efforts due to poverty, discriminatory cultural norms and traditions and lack of education. This is despite the ongoing national and international efforts geared towards empowering women.

6.2.4 Role of Women in Environmental Management

The role of most women at the household level is not unique to Kenya as in many other African countries, they are charged with fresh water collection and use, the tedious search and use of energy resources, land use and its security, the marketing of farm produce, domestic chores and other household undertakings which they carry out so as to sustain each individual in the household.⁹⁰ Despite this, these women have no rights over the land on which they perform, hence no access to credit facilities for desired farm inputs and other farm improvement facilities, receive

⁸⁸ See Maiese, M., 'Peacebuilding,' September 2003. Available at <http://www.beyondintractability.org/essay/peacebuilding> [Accessed on 5/7/2020].

⁸⁹ See generally, Huyse, L., "Tradition-based Justice and Reconciliation after Violent Conflict: Learning from African Experiences." (2008). Available at 174.129.218.71/resources/analysis/upload/paper_060208_bis.pdf [Accessed on 5/7/2020]; See also Bar-Tal, D., "From Intractable Conflict through Conflict Resolution to Reconciliation: Psychological Analysis." *Political Psychology*, Vol.21, No. 2 (2000); see also Bloomfield, D., et al, (eds.), *Reconciliation after violent conflict: A handbook*, (International Idea, 2003).

⁹⁰ Emmanuel Ngwa Nebasina, 'The Role of Women in Environmental Management: An Overview of the Rural Cameroonian Situation' (1995) 35 *GeoJournal* 515.

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inadequate education and training, due some times to culture and religious factors, and they are thus forced by such circumstances to negotiate for or rent and cultivate small isolated patches of land which in most cases are separated by considerable distances.⁹¹ The indirect effect of this scenario on the environment is that these women become frustrated and have no incentive for long term investments to upkeep positively the rural environmental management.⁹²

In her acceptance speech, Nobel Laureate, the late Prof. Wangari Maathai, summarised the importance of environmental resources to livelihood sustenance and the central role that citizenry can play in solving environmental problems, especially women, by stating that: ".....So, together, we have planted over 30 million trees that provide fuel, food, shelter, and income to support their children's education and household needs. The activity also creates employment and improves soils and watersheds. Through their involvement, women gain some degree of power over their lives, especially their social and economic position and relevance in the family....Initially, the work was difficult because historically our people have been persuaded to believe that because they are poor, they lack not only capital, but also knowledge and skills to address their challenges. Instead they are conditioned to believe that solutions to their problems must come from 'outside'. Further, women did not realize that meeting their needs depended on their environment being healthy and well managed. They were also unaware that a degraded environment leads to a scramble for scarce resources and may culminate in poverty and even conflict....In order to assist communities to understand these linkages, we developed a citizen education program, during which people identify their problems, the causes and possible solutions. They then make connections between their own personal actions and the problems they witness in the environment and in society.... (Emphasis added)."93

This speech aptly captures the place of women in environmental management and the need to include them in achieving effective

⁹¹ Ibid, p. 515.

⁹² Ibid, p.515.

⁹³ The Norwegian Nobel Institute, 'Wangari Maathai: The Nobel Lecture (Oslo, December 10, 2004),' available at http://nobelpeaceprize.org/en_GB/laureates/laureates-2004/maathai-lecture/ [Accessed on 26/06/2020].

environmental management for elimination of environmental based conflicts to achieve lasting peace.

6.2.5 Mainstreaming the Role of Women in Peacemaking and Effective Environmental Management in Kenya

Kenya has on several occasions witnessed violence erupting in the Rift valley as a result of pastoralists and farmers competing over the same land use or for vastly different uses.⁹⁴ Increasingly, stakeholders and leaders world over have agreed that 'women's participation in peace negotiations contributes to the quality and durability of peace after civil war'.⁹⁵ This assertion holds true especially in relation to environmental and natural resource related conflicts. This is because of the important role that women play as far as nurturing and providing for their families is concerned.

The women, peace, and security agenda first gained a foothold in 1995 at the Fourth World Conference on Women in Beijing.⁹⁶ In the year 2000, the United Nations Security Council adopted *Resolution 1325 on Women, peace and Security*⁹⁷ where they *inter alia* urged Member States to ensure increased representation of women at all decision-making levels in national, regional and international institutions and mechanisms for the prevention, management, and resolution of conflict.⁹⁸ The Council also called on all actors involved, when negotiating and implementing peace agreements, to adopt a gender perspective, including, *inter alia*: (a) the special needs of women and girls during repatriation and resettlement and for rehabilitation, reintegration and post-conflict reconstruction; (b) Measures that support local women's peace initiatives and indigenous processes for conflict resolution, and that involve women in all of the implementation mechanisms of the peace agreements; (c) Measures that ensure the protection of and respect for human rights of women and girls, particularly

⁹⁴ Ibid, p. 10.

⁹⁵ Jana Krause, Werner Krause and Pii Bränfors, 'Women's Participation in Peace Negotiations and the Durability of Peace' (2018) 44 *International Interactions* 985.

⁹⁶ Princeton Lyman, 'Women's Role in Bringing Peace to Sudan and South Sudan' [2013] unpublished article submitted to State Department.

⁹⁷ Adopted by the Security Council at its 4213th meeting, on 31 October 2000, S/RES/1325 (2000).

⁹⁸ Ibid, para. 1.

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as they relate to the constitution, the electoral system, the police and the judiciary.⁹⁹

It has however been observed that despite the adoption of UN Security Council Resolution 1325, which called for strengthening women and girls' protection from conflict-related sexual violence and women's equal participation in all stages of the prevention and resolution of conflict, women's participation in peace negotiations with voice and influence remains exceptional rather than the norm.¹⁰⁰

Women's traditional societal role as caretakers and mothers of family leaves them at a precarious position when natural resource related conflicts arise.¹⁰¹ Peacemaking is done collaboratively, at local, national, regional and international levels. Individuals, communities, civil society organizations, governments, regional bodies and the private sector all play a role in making peace. Peacemaking is also a long-term process, as it involves changes in attitudes and behaviour, and institutional norms.¹⁰² It has been observed that shared natural resources can provide the basis for dialogue between warring parties, as can common environmental threats that extend across human boundaries and borders.¹⁰³ Failure to promote such sharing of available natural resources for harmonious existence is a recipe for resource

⁹⁹ Ibid, para. 8.

¹⁰⁰Jana Krause, Werner Krause and Pii Bränfors, 'Women's Participation in Peace Negotiations and the Durability of Peace' (2018) 44 *International Interactions* 985.

¹⁰¹ 'Roles of Women, Families, And Communities in Preventing Illnesses And Providing Health Services In Developing Countries | The Epidemiological Transition: Policy and Planning Implications for Developing Countries | The National Academies Press' <<https://www.nap.edu/read/2225/chapter/14>> accessed 5 July 2020.

¹⁰² International Alert, "What is Peace Building?" Available at <https://www.international-alert.org/what-we-do/what-is-peacebuilding> [27/6/2020].

¹⁰³'How Does War Damage the Environment?' (CEOBS, 4 June 2020) <<https://ceobs.org/how-does-war-damage-the-environment/>> accessed 2 July 2020.

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fueled environmental conflicts.¹⁰⁴ Indeed, it has been documented that the current of wealth from the world's abundant natural resources is too often diverted away from populations in need, instead feeding conflicts and corruption, and leading to human rights abuses and environmental damage.¹⁰⁵

Some authors have observed that the pervasiveness of women's responsibility for environmental management hinges on a gendered division of labour, in which women are often disproportionately responsible for providing 'subsistence' products such as food, water and fuel.¹⁰⁶ For instance, women's roles mean that the well-being of whole households and communities frequently depends on their ability to access resources, including during conflict. In addition, even where daily life is disrupted by armed conflict, women's responsibilities tend to remain the same in spite of additional environmental pressures which may include degradation directly and indirectly connected to armed conflict.¹⁰⁷ The roles of women are said to alter and expand during conflict as they participate in the struggles and take on more economic responsibilities and duties as heads of households.¹⁰⁸

The place of women in peacemaking as far as environmental resources are concerned has been rightly summarized as follows:

¹⁰⁴ 'Natural Resource Wealth Fails to Translate into "Equivalent" Benefits for People, Fuelling Conflict, Instability, Deputy Secretary-General Tells Security Council | Meetings Coverage and Press Releases' <<https://www.un.org/press/en/2013/sc11037.doc.htm>> accessed 2 July 2020.

¹⁰⁵ 'Natural Resource Wealth Fails to Translate into "Equivalent" Benefits for People, Fuelling Conflict, Instability, Deputy Secretary-General Tells Security Council | Meetings Coverage and Press Releases' <<https://www.un.org/press/en/2013/sc11037.doc.htm>> accessed 2 July 2020.

¹⁰⁶ 'Understanding Gender, Conflict and the Environment' (CE OBS, 5 June 2017) <<https://ceobs.org/understanding-gender-conflict-and-the-environment/>> accessed 2 July 2020.

¹⁰⁷ Ibid.

¹⁰⁸ Julie Arostegui, 'Gender, Conflict, and Peace-Building: How Conflict Can Catalyse Positive Change for Women' (2013) 21 *Gender & Development* 533.

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“...Harnessing these positive environmental dividends requires policymakers to think about gender and the way social roles shape everyday interactions with the environment in conflict affected areas. Where women are identified as the primary managers of local resources, effective management and reform will remain incomplete and ineffective if a gendered lens is not considered....”¹⁰⁹

Some authors have argued that the linkages between women signatories and women civil society groups explain the observed positive impact of women’s direct participation in peace negotiations. In addition, collaboration and knowledge building among diverse women groups contributes to better content of peace agreements and higher implementation rates of agreement provisions.¹¹⁰

The participatory processes such as negotiation, mediation and conciliation should also include women as they may better understand the underlying issues in the conflict due to their close interactions with the natural resources. It has been noted that women have generally been under-represented in peace negotiations, both in numbers and status (where they often constitute ‘informal’ participants).¹¹¹ There is a need for the stakeholders involved in peacemaking to acknowledge the important role that women can and should play in not only management of environmental and natural resources but also ensuring that they actively participate in peacemaking efforts.

Women should also be included in dispute management committees, both formal and informal, as a way of not only ensuring that they actively participate but also as a way of encouraging attitude change among

¹⁰⁹ ‘Understanding Gender, Conflict and the Environment’ (CE OBS, 5 June 2017) <<https://ceobs.org/understanding-gender-conflict-and-the-environment/>> accessed 4 July 2020.

¹¹⁰ Jana Krause, Werner Krause and Piia Bränfors, ‘Women’s Participation in Peace Negotiations and the Durability of Peace’ (2018) 44 *International Interactions* 985.

¹¹¹ ‘Gender-Sensitive Peacebuilding and Statebuilding’ (GSDRC) <<https://gsdrc.org/topic-guides/gender-and-conflict/approaches-tools-and-interventions/gender-sensitive-peacebuilding-and-statebuilding/>> accessed 4 July 2020.

communities that women can and should indeed participate in brokering peace within their communities. The participation of women in peace processes improves their outcome, leading to more stable communities that are less likely to revert into conflict.¹¹²

a) Empowerment of Women through Elimination of Poverty

One of the ways of addressing poverty is focusing on human development which empowers people, both men and women, to contribute positively towards eradication of poverty without solely relying on the Government to do so. It has been observed that the view that poverty is a shortage of income ought to be changed to one that perceives poverty as ‘unfreedoms’ of various sorts: the lack of freedom to achieve even minimally satisfactory living conditions. Low income can contribute to that, but other factors such as the lack of schooling facilities, absence of health facilities, unavailability of medicines, the suppression of women, hazardous environmental features and lack of jobs do also play a major role. He opines that poverty can be reduced through addressing all these issues.¹¹³

It has been observed that poverty and the urgent desire to satisfy the basic needs of growing human populations are some of the root causes of the extensive exploitation and inherent depletion of natural resources especially within rural environment.¹¹⁴ Thus, poverty exerts undue pressure on environmental resources leading to environmental degradation. When women, who are the main caregivers in the Kenyan society especially within the rural communities, cannot comfortably meet the needs of their families,

¹¹² ‘United Nations Gender Equality Chief, Briefing Security Council, Points Out “Systemic Failure” to Integrate Women in Peacekeeping, Mediation | Meetings Coverage and Press Releases’

<<https://www.un.org/press/en/2018/sc13554.doc.htm>> accessed 5 July 2020.

¹¹³ Green, D., *From Poverty to Power: How active citizens and effective states can change the world*, (2nd ed., 2012), pg. IX (Foreword by Amartya Sen), Rugby, UK: Practical Action Publishing and Oxford: Oxfam International, Available at http://www.oxfamamerica.org/static/media/files/From_Poverty_to_Power_2nd_Edition.pdf [Accessed on 4/7/2020].

¹¹⁴ Emmanuel Ngwa Nebasina, ‘The Role of Women in Environmental Management: An Overview of the Rural Cameroonian Situation’ (1995) 35 *GeoJournal* 520.

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they turn to the environment to exert pressure on the small parcels of agricultural land as well as engaging in economic activities such as charcoal burning and timber harvesting to meet their needs. The unsustainable means of agricultural production adversely affects the environment.¹¹⁵ Economic empowerment of women would enable them diversify their sources of livelihood thus easing the pressure on the environment. The United Nations observe that Women's economic empowerment includes women's ability to participate equally in existing markets; their access to and control over productive resources, access to decent work, control over their own time, lives and bodies; and increased voice, agency and meaningful participation in economic decision-making at all levels from the household to international institutions.¹¹⁶ As far as realisation of sustainable development goals is concerned, the United Nations observes that 'empowering women in the economy and closing gender gaps in the world of work are key to achieving the 2030 Agenda for Sustainable Development and achieving the Sustainable Development Goals, particularly Goal 5, to achieve gender equality, and Goal 8, to promote full and productive employment and decent work for all; also Goal 1 on ending poverty, Goal 2 on food security, Goal 3 on ensuring health and Goal 10 on reducing inequalities'.¹¹⁷

As already pointed out, most natural resource related conflicts emanate from competition for access and control of natural resources. Economically empowered women can objectively engage in negotiations geared towards achieving peace or avoiding conflicts without them being disadvantaged.¹¹⁸ They can also contribute to the empowerment of households through ensuring that children go to school. For instance, it has been observed that

¹¹⁵ Elizabeth Rodriguez, Ryan Sultan and Amy Hilliker, 'Negative Effects of Agriculture on Our Environment' (2004) 3 *Ef. Agric. Trap*.

¹¹⁶ 'Facts and Figures: Economic Empowerment' (*UN Women*)

<<https://www.unwomen.org/what-we-do/economic-empowerment/facts-and-figures>> accessed 5 July 2020.

¹¹⁷ *Ibid.*

¹¹⁸ 'United Nations Gender Equality Chief, Briefing Security Council, Points Out "Systemic Failure" to Integrate Women in Peacekeeping, Mediation | Meetings Coverage and Press Releases'

<<https://www.un.org/press/en/2018/sc13554.doc.htm>> accessed 5 July 2020.

youths from Northern Kenyan communities partake in cattle raids against neighboring communities, which vice has been attributed to various factors such as lack of education, unemployment and the cultural obligation for young men to partake in the cattle raids. Acquiring cattle during such raids has for long been considered a sure way of enhancing the young men's status in society.¹¹⁹ Women would not only be able to take their children to school but would also discourage these youths from engaging in cattle raids.¹²⁰

b) Formal and Non-Formal Education for Meaningful Participation of Women

It has been observed that promoting women's capacities to participate in peace processes is crucial for their advancement and ability to contribute to peace, development and security.¹²¹ One way of building such capacity is through empowering women and girls through education. Education is seen as a key enabler of economic growth and indeed a part of sustainable development discourse. As such, increasing women's and girls' educational attainment contributes to women's economic empowerment and more inclusive economic growth.¹²² This is because education is critical for women's and girl's health and wellbeing, as well as their income-generation opportunities and participation in the formal labour market.¹²³

Education will not only enable them diversify their sources of income and ease pressure on the environment but will also give them the voice to

¹¹⁹ 'Peace by All Means: Women Crusaders in Northern Kenya Make the Search for Peace Personal | International Organization for Migration - Nairobi' </article/peace-all-means-women-crusaders-northern-kenya-make-search-peace-personal> accessed 5 July 2020.

¹²⁰ Ibid.

¹²¹ 'Mediating Peace in Africa' (ACCORD) <https://www.accord.org.za/publication/mediating-peace-in-africa/> accessed 5 July 2020.

¹²² 'Facts and Figures: Economic Empowerment' (UN Women) <https://www.unwomen.org/what-we-do/economic-empowerment/facts-and-figures> accessed 5 July 2020.

¹²³ 'Facts and Figures: Economic Empowerment' (UN Women) <https://www.unwomen.org/what-we-do/economic-empowerment/facts-and-figures> accessed 5 July 2020.

meaningfully participate in negotiations geared towards management of conflicts. Empowering women and girls through education is important in ensuring that they actively and meaningfully participate in community peace efforts. It is noteworthy that adopting a community-based approach to empowerment of women does not automatically translate into greater participation and inclusion. This is because some of the traditional practices have negative impacts such as discrimination of women and disabled persons.¹²⁴ In fact, it is against this fact that the Constitution retains the test of non-repugnancy while applying traditional justice systems.¹²⁵ This is where the Courts come in as the legal guardians of the Bill of human rights as envisaged in the Constitution.¹²⁶

c) Encouraging Active Participation of Women in Peace Negotiation and Mediation Processes

Under Article 31 of the *RIO+20 Report*, state parties emphasized that sustainable development must be inclusive and people-centred, benefiting and involving all people, including youth and children. They also recognized that gender equality and women's empowerment are important for sustainable development and our common future. They therefore reaffirmed their commitments to ensure women's equal rights, access and opportunities for participation and leadership in the economy, society and political decision-making.

¹²⁴ See generally, Muigua, K., –Securing the Realization of Environmental and Social Rights for Persons with Disabilities in Kenya. Available at <http://www.kmco.co.ke/attachments/article/117/Securing%20the%20Realization%20of%20Environmental%20and%20Social%20Rights%20for%20Persons%20with%20Disabilities%20in%20Kenya.pdf>; See also generally Human Rights Watch, *World Report 2013*, available at http://www.hrw.org/sites/default/files/wr2013_web.pdf < accessed 5 July 2020.

¹²⁵ Constitution of Kenya 2010, Art. 159(3).

¹²⁶ Constitution of Kenya 2010, Art.23. Article 23 of Constitution of Kenya deals with Authority of courts to uphold and enforce the Bill of Rights.

(1) The High Court has jurisdiction, in accordance with Article 165, to hear and determine applications for redress of a denial, violation or infringement of, or threat to, a right or fundamental freedom in the Bill of Rights.

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Although the need to engage women in peace processes is widely acknowledged, it has been observed that in many parts of the world especially where conflicts persist, most mediation teams do not include or encourage the voices and representation of women.¹²⁷ This is despite evidence that women have demonstrated that they can be adept at mobilizing diverse groups for a common purpose, working across ethnic, religious, political and cultural divides to promote peace.¹²⁸

The role of women in negotiation and mediation of conflicts should be institutionalized. The place of women in our society puts them in the most proximate contact with the wellbeing of communities. Conflicts affect them and they should therefore be involved in any efforts geared towards reaching lasting peace solutions. Women traditionally played a primary role in resolving conflicts as negotiators, albeit informally. Conflict negotiation and mediation systems should require specifically that gender issues are given adequate weight and should include some requirement for inclusion of female negotiators and mediators when appropriate, like when land rights are involved.¹²⁹ The constitution now requires gender parity in almost all commissions or organs of government.¹³⁰

¹²⁷ 'Mediating Peace in Africa' (ACCORD)

<<https://www.accord.org.za/publication/mediating-peace-in-africa/>> accessed 5 July 2020.

¹²⁸ Ibid; see also Helen Kezie-Nwoha and Juliet Were, 'Women's Informal Peace Efforts: Grassroots Activism in South Sudan' (2018) 2018 CMI Brief; Esther Soma, 'Our Search for Peace: Women in South Sudan's National Peace Processes, 2005-2018'.

¹²⁹ Fitzpatrick, D., "Dispute Resolution; Mediating Land Conflict in East Timor", in AusAID's *Making Land Work Vol 2; Case Studies on Customary Land and Development in the Pacific*, (2008), Case Study No. 9, p. 196.

<<http://www.ausaid.gov.au/publications/pdf>> accessed 5 July 2020.

¹³⁰ See Articles 97 (1)(b); 98 (1)(b); 98(1)(c) of the Constitution.

The Constitution of Kenya readily recognizes women by way of creation of special seats for women that resulted in the election of forty-seven (47) women into the National Assembly, nomination of sixteen women by political parties and one woman representing the youth and persons with disabilities into the Senate and County Governments and appointment of women into other decision-making bodies. ('Actualization and Implementation of the "Two-Thirds Gender Principle" in Kenya | Wwww.Sidint.Net' <<https://www.sidint.net/content/actualization-and-implementation-two-thirds-gender-principle-kenya>> accessed 5 July 2020.).

Elimination of social injustices entails promoting gender equity as a way of ensuring that both men and women get fair opportunities for the realisation of their right to self-determination and contribution towards national development. The *UN Conference on Environment and Development, Agenda 21*¹³¹ under chapter 23 calls for full public participation by all social groups, including women, youth, indigenous people and local communities in policy-making and decision-making.

6.2.6 Conclusion

Some commentators have asserted that achieving SDG 16 – and the SDGs in general – requires partnerships, integrated solutions, and for countries and member states to take charge and lead in reshaping the institutional and social landscape, preparing grounds for important reforms that help build sustainable peace.¹³² This is because it is crucial to have an inclusive and participatory approach to development to counteract the potentially destabilizing impact of marginalization and exclusion.¹³³

Peaceful societies have enjoyed better business environments, higher per capita income, higher educational attainment and stronger social cohesion.¹³⁴ Better community relationships tend to encourage greater levels of peace, by discouraging the formation of tensions and reducing chances of tensions devolving into conflict.¹³⁵ Peacebuilding is done collaboratively, at

¹³¹ United Nations Conference on Environment & Development Rio de Janeiro, Brazil, 3 to 14 June 1992.

¹³² 'SDG 16 as an Accelerator for the 2030 Agenda' (UNDP) <<https://www.undp.org/content/undp/en/home/blog/2019/sdg-16-as-an-accelerator-for-the-2030-agenda.html>> accessed 26 November 2020.

¹³³ 'SDG 16 as an Accelerator for the 2030 Agenda' (UNDP) <<https://www.undp.org/content/undp/en/home/blog/2019/sdg-16-as-an-accelerator-for-the-2030-agenda.html>> accessed 26 November 2020.

¹³⁴ The Institute for Economics and Peace (IEP), 'Pillars of Peace - Understanding the Key Attitudes and Institutions That Underpin Peaceful Societies - International Security Sector Advisory Team (ISSAT)', p. 2

<<https://issat.dcaf.ch/ser/Learn/Resource-Library/Policy-and-Research-Papers/Pillars-of-Peace-Understanding-the-key-attitudes-and-institutions-that-underpin-peaceful-societies>> accessed 26 November 2020.

¹³⁵ The Institute for Economics and Peace (IEP), 'Pillars of Peace - Understanding the Key Attitudes and Institutions That Underpin Peaceful Societies - International Security Sector Advisory Team (ISSAT)', p. 6.

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local, national, regional and international levels. Individuals, communities, civil society organizations, governments, regional bodies and the private sector all play a role in building peace. Peacebuilding is also a long-term process, as it involves changes in attitudes and behaviour and institutional norms.¹³⁶

The United Nations 2030 Agenda for Sustainable Development Goals (SDGs)¹³⁷ recognises the place of gender equality and equity in development. SDG Target 20 states that: “Realizing gender equality and the empowerment of women and girls will make a crucial contribution to progress across all the Goals and targets. The achievement of full human potential and of sustainable development is not possible if one half of humanity continues to be denied its full human rights and opportunities. Women and girls must enjoy equal access to quality education, economic resources and political participation as well as equal opportunities with men and boys for employment, leadership and decision-making at all levels”. Goal 5 of the SDGs seeks to achieve gender equality and empower all women and girls. UN Women acts to empower women and girls across all its programmes and advocacy.¹³⁸

Kenya cannot achieve peaceful and inclusive societies through investing in security alone; it must address the various underlying factors such as poverty, marginalization, environmental degradation and corruption, among others. In the absence of measures to deal with these, peace will only be short-lived or even impossible to achieve. Peace is the outcome of concerted efforts geared towards building self-sustaining societies where all people can meet their socio-economic needs. Promoting peaceful and inclusive societies for sustainable development in Kenya is a goal that is clearly attainable, in the fullness of time.

¹³⁶ International Alert, “What is Peace Building?” <<https://www.international-alert.org/what-we-do/what-is-peacebuilding>> Accessed 26 November 2020.

¹³⁷ UN General Assembly, *Transforming our world: the 2030 Agenda for Sustainable Development*, 21 October 2015, A/RES/70/1.

¹³⁸ Sustainable Development Goal 5: Gender Equality’ (*UN Women*) <<https://www.unwomen.org/news/in-focus/women-and-the-sdgs/sdg-5-gender-equality>> accessed 15 October 2020.

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If Kenya is to achieve the sustainable development goals as well as its national development plans such as the Vision 2030, then gender equality and equity must be addressed as a matter of priority since development requires concerted efforts of both men and women. It has been contended that a gendered approach can improve not only the lives of men and women in conflict and post-conflict situations, but it can also reap significant environmental dividends.¹³⁹ Specifically, women's participation in peace negotiations is believed to increase the durability and the quality of peace.¹⁴⁰ There is a need to ensure that peacemaking efforts take into consideration the gender aspect and an acknowledgement that both men and women are affected differently by natural resource based conflicts and there is therefore a need to ensure that both are included if Kenya is to not only ensure peace across the country but also achieve effective environmental management.

The significant daily interaction of women with environmental resources makes them critical players in peacemaking efforts especially where natural resource based conflicts arise. Mainstreaming the role of women in peacemaking and environmental management in Kenya is a necessary move in order to achieve sustainable development.

¹³⁹ 'Understanding Gender, Conflict and the Environment' (CE OBS, 5 June 2017) <<https://ceobs.org/understanding-gender-conflict-and-the-environment/>> accessed 4 July 2020.

¹⁴⁰ Jana Krause, Werner Krause and Piia Bränfors, 'Women's Participation in Peace Negotiations and the Durability of Peace' (2018) 44 *International Interactions* 985.

CHAPTER SEVEN

Redefining Development in Kenya-Reflections and Lessons from the Coronavirus Disease (COVID-19) Pandemic

7.1 Introduction

The first case of Coronavirus disease (Covid-19) in the world was diagnosed in China some time in December 2019, and since then it has become a global pandemic, declared a pandemic by the World Health Organization (WHO) on 11 March 2020, which has continued to spread across the world.¹ The disease has not only caused unprecedented health crisis but has also threatened to bring the global economy to its knees.² In addition to this, the pandemic has exposed the underbelly of African economies as far as development is concerned. It is evident from the reports that most if not all African countries are heavily relying on donor funds to not only fight the pandemic but also to ensure that their economies do not collapse. This has necessitated revisiting the old debate between the Global North and the Global South on what development means for them.

This chapter starts on the premise that the Global South has for long relied on the Global North for not only defining what development should mean for them but also dictating how development projects in the Global South are implemented. The main reason for this is that it is the Global North

¹'Coronavirus (COVID-19) Events as They Happen' <<https://www.who.int/emergencies/diseases/novel-coronavirus-2019/events-as-they-happen>> accessed 22 May 2020.

² Fernandes, N., "Economic effects of coronavirus outbreak (COVID-19) on the world economy." *Available at SSRN 3557504* (2020); 'Complacency to Chaos: How Covid-19 Sent the World's Markets into Freefall | Business | The Guardian' <<https://www.theguardian.com/business/2020/mar/28/how-coronavirus-sent-global-markets-into-freefall>> accessed 22 May 2020; <https://www.the-star.co.ke/authors/alex-awiti>, 'Covid-19 Triggers Unprecedented Global Economic Turmoil' (*The Star*) <<https://www.the-star.co.ke/opinion/columnists/2020-03-24-covid-19-triggers-unprecedented-global-economic-turmoil/>> accessed 22 May 2020.

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donors and countries that fund these projects and thus retain the powers to dictate what and how these projects should be actualized.

This discourse is important because African countries, which are technically beggars as they stand today, need to learn some important lessons from the pandemic and chart a new development path post-Covid-19. Apart from their weak health systems, it is also arguable that the reason most of the affected African countries have not been able to call for total lockdown as has been the case in countries such as China, United Kingdom, Italy among others, is because their economies may not survive a lockdown at this stage, especially without the donor funds. In addition, their people are too poor to remain indoors for months as most of them survive on wages and live hand to mouth.³ The existing socio-economic infrastructure and investments in the country cannot support the needs of the Kenyan population and this comes with greater risks of exposure Covid-19 for the general public. This chapter proffers the hypothesis that there is hardly enough investment by the Government for socio economic development in the country.

The discourse revisits the widely discussed theme of development with a view to analyzing the challenges that face the existing approaches to development, making them inappropriate for the Global South, especially Africa. The discussion highlights the existing definitions and approaches and how the same differ from the needs and circumstances existing within the third world, as far as development needs are concerned.

The phrase “Global South” is used to refer broadly to the regions of Latin America, Asia, Africa, and Oceania. It is one of a family of terms, including “Third World” and “Periphery,” that denote regions outside Europe and North America, mostly (though not all) low-income and often politically or

³ Central Bank of Kenya, Kenya National Bureau of Statistics and FSD Kenya, *The 2019 Finaccess Household Survey– Financial Sector Deepening Kenya*, April 3, 2019 <<https://fsdkenya.org/publication/finaccess2019/>> accessed 22 May 2020; <https://www.the-star.co.ke/authors/amadala>, ‘51% of Kenyans Live Hand to Mouth - CBK Report’ (*The Star*) <<https://www.the-star.co.ke/business/2019-04-03-51-of-kenyans-live-hand-to-mouth-cbk-report/>> accessed 22 May 2020.

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culturally marginalized.⁴ Notably, the phrase 'Global South' is meant to mark a shift from a central focus on development or cultural difference toward an emphasis on geopolitical relations of power.⁵

This chapter adopts the term 'global south' based on the hypothesis that development is greatly shaped by the power relations between the nations in the north and those in the south. Development is as much an economic as it is a political issue. No country can demand for political freedom when they cannot afford economic freedom.

7.2 Defining Development: Aspects and Theories of Development

The United Nations *Declaration on the Right to Development*⁶ recognises that development is a comprehensive economic, social, cultural and political process, which aims at the constant improvement of the well-being of the entire population and of all individuals on the basis of their active, free and meaningful participation in development and in the fair distribution of benefits resulting therefrom.⁷ The *Declaration* posits that the right to development is an inalienable human right by virtue of which every human person and all peoples are entitled to participate in, contribute to, and enjoy economic, social, cultural and political development, in which all human rights and fundamental freedoms can be fully realized.⁸ Notably, the term 'development' is not defined in the *Declaration* and instead it takes a descriptive approach which entails outlining the various aspects of development.

Development takes many forms and thus defining the term must take into account the various elements of development. Some scholars have defined 'development' to mean a multi-dimensional process that involves major changes in social structures, popular attitudes, and national institutions, as

⁴ Dados, N. and Connell, R., "The global south." *Contexts* 11, no. 1 (2012): 12-13.

⁵ *Ibid*, p.12.

⁶ UN General Assembly, *Declaration on the Right to Development: resolution / adopted by the General Assembly*, 4 December 1986, A/RES/41/128.

⁷ *Ibid*, Preamble.

⁸ Article 1.1, *Declaration on the Right to Development: resolution / adopted by the General Assembly*, 4 December 1986, A/RES/41/128.

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well as economic growth, reduction of inequality, and eradication of absolute poverty.⁹ Some opine that 'development, then, is about: change for the better; continuing processes; collectivities of people; growth and prosperity; interrelationships.¹⁰ The components of development are considered to be as follows: Growth, in the economy; Equity in the distribution of society's resources to meet human needs; Participation in decisions about how these resources will be applied.¹¹

The international agenda which began to focus on development beginning in the second half of the twentieth century was reinforced by the belief the understanding that economic growth did not necessarily lead to a rise in the level and quality of life for populations all over the world; there was a need to place an emphasis on specific policies that would channel resources and enable social and economic mobility for various layers of the population.¹² Indeed, this view has solidified over the years considering that it forms the foundation upon which the sustainable development agenda is built.

The three essential dimensions of sustainable development agenda are: *Economic*: an economically sustainable system must be able to produce goods and services on a continuing basis, to maintain manageable levels of government and external debt, and avoid extreme sectoral imbalances that damage agricultural and/or industrial production; *Environmental*: an environmentally sustainable system must maintain a stable resource base and avoid over-exploitation of non-renewable resource systems, including

⁹ Gabriel Antwi, 'The Theories of Development Studies', 2019, p.1. Available at https://www.researchgate.net/publication/331262291_THE_THEORIES_OF_DEVELOPMENT_STUDIES [Accessed on 15/5/2020].

¹⁰ Bown, L., *What do we mean by Development?*. Development Education Centre and 80: 20 Educating and Acting for a Better World, 1999, p.4. Available at <https://developmenteducation.ie/media/documents/What.pdf> [Accessed on 15/5/2020].

¹¹ Bown, L., *What do we mean by Development?*. Development Education Centre and 80: 20 Educating and Acting for a Better World, 1999, p.7. Available at <https://developmenteducation.ie/media/documents/What.pdf> [Accessed on 15/5/2020].

¹² 'What Is Development?' <<https://www.sid-israel.org/en/Development-Issues/What-is-Development>> accessed 19 May 2020.

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maintenance of biodiversity, atmospheric stability and ecosystems services not always looked upon as economic resources; and *Social*: a socially sustainable system must achieve fairness in distribution and opportunity among all persons with adequate provision of such social services as health, education and gender equity. The social dimension focuses on reconciliation of environment and development, and governance related to provision of social services.¹³

There are four main theories of development namely: modern; dependency; world-systems; and globalization.¹⁴ The proponents of modernization theory argued that development involved the process of replicating the changes in social, economic and political systems that developed in western Europe and North America from the 17th century to the 19th century and have then spread to other countries and in the 19th and 20th centuries to the South American, Asian and African continents.¹⁵ This would largely be facilitated through colonization.¹⁶ It was thus a case of the Global North not only imposing their influence upon the Global South but was also exercising their power and setting the development agenda which they would later fund through donor funding. Indeed, some have argued that the reason for the emergence of Modernization Theory was the freedom of Third World countries from colonization and the strategies employed during the Cold War by Western countries in order to prevent these countries from being controlled by communists.¹⁷

¹³ Sanginga, P.C., Ochola, W.O. and Bekalo, I., "Natural resource management and development Nexus in Africa." *Managing Natural Resources for Development in Africa: A Resource Book* (2010): 11-43.

¹⁴ Shareia, B.F., "Theories of development." *International Journal of Language and Linguistics* 2, no. 1 (2015): 78-90.

¹⁵ 'The Basic Characteristics of Modernization. 1966' (2006), in: Themenportal Europäische Geschichte, 2006, <<http://www.europa.clio-online.de/quelle/id/q63-28279>> accessed 22 May 2020;

¹⁶ Ibid.

¹⁷ Shareia, B.F., "Theories of development." *International Journal of Language and Linguistics* 2, no. 1 (2015): 78-90, at p.79.

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While the support from the Global North especially in terms of the funds may be welcome to the Global South as it strives to achieve socio-economic development for its people, the downside to this is that over the years, the leaders in these developing countries have had little if any incentive to invest in their institutions and their people as they always have a fall back plan through asking for foreign and donor funds to cushion their economies against shocks such as the current Covid-19 pandemic.

The focus of the modernization approach on replicating the development model of the now developed nations makes the policymakers in the developing nations lose focus of the real challenges afflicting their people as they compete to become like the developed world in terms of infrastructural development. It must be appreciated that this theory envisages development as a phased process and different regions of the world must thus realise that they are at different phases of development. The leaders fail to acknowledge that as they seek to modernize the infrastructural systems in the country, the African countries are still struggling with poverty, hunger, disease, illiteracy, inequalities, corruption and other social ills.¹⁸

The Dependency Theory seeks to improve the Modernization Theory by combining elements from a neo-Marxist theory and adopting a “revolution of under developed nations’ model”.¹⁹ The theory focuses on the totality of society and social system periphery, which highlights the differences between imperialistic countries in the first world and underdeveloped countries.²⁰ Dependency Theory explains these differences by focusing on regions and structural conditions in different nation states.²¹

Three main characteristics of dependency theory are summarized as follows: First, the international system is seen as the sum of two sets of

¹⁸ Handley, G., Higgins, K. and Sharma, B., *Poverty and poverty reduction in sub-Saharan Africa: An overview of the issues*. Overseas Development Institute, 2009;

¹⁹ Shareia, B.F., "Theories of development." *International Journal of Language and Linguistics* 2, no. 1 (2015): 78-90, p. 81.

²⁰ Ibid, p.81.

²¹ Ibid, p. 81.

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states: *dominant* and *dependent*; Second, dependency theory holds that *external forces* are critical in terms of economic activity of dependent states; Third, relationships, based on strongly historical patterns and dynamics (i.e., *internationalization of capitalism*), between dominant and dependent states are a vibrant process, with exchanges taking place between the states playing a considerable role in the reinforcement of patterns of inequality.²² Dependency theory is a mixture of various theories, including world systems theory, historical structure theory, and neo-Marxist theory.²³ Some commentators have pointed out the following limitations of the dependency theory: the theory significantly failed to explain the rise of the newly industrialized countries of East Asia (Hong Kong, South Korea, Taiwan, and Singapore), as well as those of Southeast Asia (Indonesia, Malaysia, and Thailand); the theory also presumes that all developing countries share the same traits; and finally, dependency theory is limited in its analytical ability when applied to sectors beyond manufacturing.²⁴

The World Systems Theory uses other levels of quantitative analysis, though it admits that there is no set of processes in World Systems Theory that is applicable to all economies.²⁵ World Systems Theory argues that international trade specialization and transfer of resources from less developed countries to developed countries (known as “core” countries) prevents development in less developed countries by making them rely on core countries and by encouraging peripheralization.²⁶ In other words, wealth is taken from semi-periphery or periphery zones to economies in the core countries.²⁷

²² Scott Romaniuk, ‘Dependency Theory’ in, Joseph, P., ed., *The SAGE encyclopedia of war: social science perspectives*. Sage Publications, 2016.

²³ Ibid.

²⁴ Scott Romaniuk, ‘Dependency Theory’ in, Joseph, P., ed., *The SAGE encyclopedia of war: social science perspectives*. Sage Publications, 2016., p. 4.

²⁵ Shareia, B.F., "Theories of development." *International Journal of Language and Linguistics* 2, no. 1 (2015): 78-90, p. 82.

²⁶ Ibid, p.82.

²⁷ Ibid, p. 82.

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Globalization is a theory of development that uses a global mechanism of greater integration with particular emphasis on the sphere of economic transactions. It is a US- and Europe-centric positive model of development whose feature is the spread of capitalism around the globe.²⁸ Notably, these main theories revolve around the impact of the Global North's policies and systems on the Global South. The bottom line is that the development agenda of the developing countries in the South seem to be inherently tied to that of the developing nations.

7.3 Need for Contextualized Development for the Global South: Prospects and Challenges

Some commentators have rightly pointed out that encouragement of growth and increase in wealth without safeguards over distribution of wealth leads to poverty for those who are excluded. In this respect, poverty, seen as human distress, becomes more dramatically noticeable in societies where there has been a rise in wealth for some but a widening gap between those who have benefited and those who have not.²⁹

Notably, while the Western concept of development largely relies on Gross National Product (GNP) or Gross Domestic Product (GDP) per capita on which, for example, the World Bank bases its typology of development with occasional citation of other measures of development such as caloric intake, access to portable water, infant and maternal mortality, life expectancy, literacy, and so as representative measures of human development, as distinguished from measures of economic development, some scholars have right challenged this approach.³⁰ While it is acknowledged that none of these measures of the development of humanity can be improved without a certain level of economic well-being relative to the society in which one lives, exclusive reliance on economic quantities such as GNP per capita,

²⁸ Shareia, B.F., "Theories of development." *International Journal of Language and Linguistics* 2, no. 1 (2015): 78-90, p. 83.

²⁹ Bown, L., *What do we mean by Development?*. Development Education Centre and 80: 20 Educating and Acting for a Better World, 1999, p.11.

³⁰ Debra Straussfogel, 'Redefining Development as Humane and Sustainable' (1997) 87, *Annals of the Association of American Geographers*, 280, at p.281.

however, as standards for the economic development of countries exclude, or at least supersede, these more broadly humanitarian issues.³¹ Furthermore, economic measures of wealth generally overlook the environmental costs of growth and the social costs incurred by families and communities as well as discrediting the benefits that accrue from non-monetary sources and social networks.³²

7.3.1 Response to Covid 19: The Challenges

Notably, in most developing countries especially within the urban poor living in slums and other informal settlements, the call for social distancing, self-isolation and other restrictive measures by the Government that are meant to curb the spread of Covid-19 remain difficult if not impossible to implement. This is due to the fact that for them it is a tough call to balance between the risk of contracting and spreading disease or putting up with hunger and possible death. Thus, for them it is a catch-22 situation. Poverty and lack of basic necessities have therefore made it harder to implement the Government's directives on combating Covid-19 among these poor and vulnerable groups of people in the country. It is not enough that the Government is receiving donor funding from donors to fight the pandemic; the systemic challenges of poverty, hunger, disease, illiteracy and corruption, among others still pose a greater challenge to combating Covid-19 in the country and the African continent at large. The pandemic has affirmed that it is difficult if not impossible to contain a poverty-stricken populace even in the greatest external danger. Their first instinct is to fight hunger, which is the most basic survival need.

Kenya's development blueprint, Vision 2030 was launched by the Grand Coalition Government in July 2008. It was the first national long-term development vision and its aim was to transform Kenya into a newly industrialising, middle-income country providing a high quality of life to all its citizens by 2030 in a clean and secure environment. The three key pillars of this vision are: a sustained average economic growth rate of 10% p.a.; just, cohesive and equitable social development in a clean and secure

³¹ Ibid, p. 281.

³² Ibid, p. 281.

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environment; and an issue-based, people-centred, results-oriented and accountable democracy.³³ This is what is supposed to guide the country's development agenda and any investments are supposed should be geared towards achieving this.

The World Bank observes that Kenya has made significant political, structural and economic reforms that have largely driven sustained economic growth, social development and political gains over the past decade. However, its key development challenges still include poverty, inequality, climate change, continued weak private sector investment and the vulnerability of the economy to internal and external shocks.³⁴ Indeed, Covid-19 has demonstrated the extent to which Kenya's economy is vulnerable to external shocks. While data from the World Bank and the United Nations may paint a positive picture of development in a country, the reality on the ground may be different. Some commentators have even suggested that *"the questions to ask about a country's development are three: What has been happening to poverty? What has been happening to unemployment? What has been happening to inequality? If all three of these have declined from high levels, then beyond doubt this has been a period of development for the country concerned."*³⁵

Kenya still struggles with giving positive feedback on the three questions and the situation becomes dire when we look at the rural areas as well as the urban informal settlements where there are high levels of poverty. Despite some positive reports on notable improvements, there still exist inequalities in Kenya, as far as access to social, economic and political

³³ 'National Development Plan in Kenya' <<http://www.commonwealthgovernance.org/countries/africa/kenya/national-development-plan/>> accessed 15 May 2020.

³⁴ 'Overview' (World Bank) <<https://www.worldbank.org/en/country/kenya/overview>> accessed 15 May 2020.

³⁵ Seers, Dudley, 'The meaning of development' in International Development Review, Dec 1969, Reproduced Lehmann, 1979.

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opportunities are concerned.³⁶ In September 2018, the United Nations' human development index, which is the index used by the United Nations to measure the progress of a country, ranked Kenya as one of the countries still lagging behind as far as human development is concerned as it was ranked position 142 out of 189.³⁷ Again, according to the UNDP's *Human Development Report 2019*³⁸ titled "Beyond income, beyond averages, beyond today: Inequalities in human development in the 21st century", as at 2018, 38.7 per cent of Kenya's population or 19.2 million people were poor while an additional 34.9 per cent or 17.3 million people were classified as vulnerable. Even more worrisome is the 2019 survey report released by the Central Bank of Kenya to the effect that about 51 per cent of Kenyans are living hand to mouth, a rise from 34.3 per cent in 2016.³⁹ The implication of these statistics is that this huge percentage risks hunger in case they are completely contained within their houses. Arguably, fighting poverty is the

³⁶ 'Kenya: Extreme Inequality in Numbers' (*Oxfam International*, 20 October 2019) <<https://www.oxfam.org/en/kenya-extreme-inequality-numbers>> accessed 22 May 2020; Stefania Ilinca and others, 'Socio-Economic Inequality and Inequity in Use of Health Care Services in Kenya: Evidence from the Fourth Kenya Household Health Expenditure and Utilization Survey' (2019) 18 *International Journal for Equity in Health* 196; 'Overview' (*World Bank*) <<https://www.worldbank.org/en/country/kenya/overview>> accessed 22 May 2020; 'Kenya Lags behind in Human Development, UN Report Reveals - Daily Nation' <<https://www.nation.co.ke/news/diaspora/Kenya-lags-behind-in-human-development--UN-report-reveals----/2107720-4760978-98afngz/index.html>> accessed 22 May 2020.

³⁷ 'Kenya Lags behind in Human Development' (*Daily Nation*) <<https://www.nation.co.ke/news/diaspora/Kenya-lags-behind-in-human-development--UN-report-reveals----/2107720-4760978-98afngz/index.html>> accessed 21 May 2020.

³⁸ Conceição, P. "Human development report 2019." *Beyond income, beyond averages, beyond today: Inequalities in human development in the 21st century*. New York, UNDP (2019). Available at <http://hdr.undp.org/sites/default/files/hdr2019.pdf> [Accessed on 16/5/2020].

³⁹ Central Bank of Kenya, Kenya National Bureau of Statistics and FSD Kenya, *The 2019 Finaccess Household Survey- Financial Sector Deepening Kenya*, April 3, 2019 <<https://fsdkenya.org/publication/finaccess2019/>> accessed 22 May 2020; <https://www.the-star.co.ke/authors/amadala>, '51% of Kenyans Live Hand to Mouth - CBK Report' (*The Star*) <<https://www.the-star.co.ke/business/2019-04-03-51-of-kenyans-live-hand-to-mouth-cbk-report/>> accessed 22 May 2020.

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first step towards a healthy nation and attaining economic freedom. As things stand, Kenya's economy and indeed most of other African countries are highly dependent on the generosity of the Bretton woods institutions and other foreign donors. After the Covid-19 pandemic is over, it would therefore be impossible if not outright hilarious for these African countries to warn the developed countries to keep off their domestic issues as far as decision-making processes on development are concerned. It is a classic case of he who pays the piper calls the tune.

The Covid-19 pandemic has proved that no matter how industrialized a country becomes, as long as they have not invested in their people through socio-economic and human development, they are truly not independent. The Covid-19 pandemic has exposed the challenges that are still affecting the country and the African continent at large.⁴⁰ The economies have been hit hard and it is expected that the effect will be felt for much longer.⁴¹

Most African countries have resorted to giving out food handouts in form of care packages and monthly stipends to the section of their population that

⁴⁰ Damian Zane, "Without Food, We'll Die inside Our Homes" *BBC News* (28 April 2020) <<https://www.bbc.com/news/world-africa-52426040>> accessed 22 May 2020; 'Aid Has Failed. COVID-19 Both Exposes This and Offers the Chance for a Reset.' (*African Arguments*, 16 April 2020) <<https://africanarguments.org/2020/04/16/aid-has-failed-coronavirus-covid-19-both-exposes-this-and-offers-the-chance-for-a-reset/>> accessed 22 May 2020; 'COVID-19 (Coronavirus) Drives Sub-Saharan Africa Toward First Recession in 25 Years' (*World Bank*) <<https://www.worldbank.org/en/news/press-release/2020/04/09/covid-19-coronavirus-drives-sub-saharan-africa-toward-first-recession-in-25-years>> accessed 22 May 2020.

⁴¹ Union, African. "Impact of the Coronavirus Covid-19 on the African Economy." *Addis Ababa: African Union* (2020); Ozili, P.K. "COVID-19 in Africa: socioeconomic impact, policy response and opportunities." *Policy Response and Opportunities (April 13, 2020)* (2020); Bong, C.L., Brasher, C., Chikumba, E., McDougall, R., Mellin-Olsen, J. and Enright, A., "The COVID-19 Pandemic: Effects on Low-and Middle-Income Countries." *Anesthesia and Analgesia* (2020); Gilbert, M., Pullano, G., Pinotti, F., Valdano, E., Poletto, C., Boëlle, P.Y., d'Ortenzio, E., Yazdanpanah, Y., Eholie, S.P., Altmann, M. and Gutierrez, B., "Preparedness and vulnerability of African countries against importations of COVID-19: a modelling study." *The Lancet* 395, no. 10227 (2020): 871-877;

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is considered poor and vulnerable and the funds to do this have originated from donors.⁴² This was reflected by the World Bank Vice President for Africa's comments that they are "rallying all possible resources to help countries meet people's immediate health and survival needs while also safeguarding livelihoods and jobs in the longer term - including calling for a standstill on official bilateral debt service payments which would free up funds for strengthening health systems to deal with Covid-19 and save lives, social safety nets to save livelihoods and help workers who lose jobs, support to small and medium enterprises, and food security."⁴³ The April edition of *Africa's Pulse*, the World Bank's twice-yearly economic update for the region, recommended that African policymakers pay attention to saving lives and protecting livelihoods by focusing on strengthening health systems and taking quick actions to minimize disruptions in food supply chains. They also recommend implementing social protection programs, including cash transfers, food distribution and fee waivers, to support citizens, especially those working in the informal sector.⁴⁴

In line with this, Kenya's new scheme, known as the *Covid-19 Support Stipend* which was launched by President Uhuru Kenyatta targets only the most poor and vulnerable. While the initiative is well meaning, it is not clear if the same will be sustained for long should the pandemic continue for longer. It is also worth pointing out that those considered to be poor and vulnerable are largely being picked based on their income. However, it is also true that a good number of the major town dwellers especially in Nairobi and Mombasa are on salaries and wages and with the continued layoffs at

⁴²Ibid; See also 'Grants Not Loans Needed in Africa to Fight' <<https://www.theafricareport.com/25870/fighting-covid19-in-africas-most-vulnerable-states-needs-grants-not-loans/>> accessed 22 May 2020; Andrew Mizner, 'ALB - African Law and Business' (*ALB Legal and Business Issues from Africa*) <<https://iclg.com/alb/11307-african-countries-receive-imf-support-for-covid-19>> accessed 22 May 2020.

⁴³ 'COVID-19 (Coronavirus) Drives Sub-Saharan Africa Toward First Recession in 25 Years' (*World Bank*) <<https://www.worldbank.org/en/news/press-release/2020/04/09/covid-19-coronavirus-drives-sub-saharan-africa-toward-first-recession-in-25-years>> accessed 22 May 2020.

⁴⁴ Ibid.

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workplaces, it is expected that more people will join this category of the vulnerable. Indeed, this is not unique to Kenya as it is estimated that 85% of the continent's urban dwellers do not receive a regular wage.⁴⁵

This leaves the Government with the hard question as to whether the targeted bracket of people will be expanded. What qualifies or disqualifies one from being eligible to receive the government grants? It is not to be forgotten that the Horn of Africa is still suffering an unprecedented locust invasion and subsequent crop failures.⁴⁶ The implication of this invasion is that even after the coronavirus pandemic is over, the affected communities and to some extent the whole country will have to fight hunger and famine that will continue ravaging the country.

With the slowed down economic activities, many people have been left at the mercy of relying on aid and handouts. Indeed, even the Government has been relying on aid from donor countries and organizations in order to take care of its people. While this may not only be limited to Kenya, it is evident that the situation is mostly common with the African countries.⁴⁷

Questions have arisen as to whether, with the rising cases of coronavirus pandemic, donors will continue giving donations to the developing

⁴⁵ 'Aid Has Failed. COVID-19 Both Exposes This and Offers the Chance for a Reset.' (*African Arguments*, 16 April 2020)

<<https://africanarguments.org/2020/04/16/aid-has-failed-coronavirus-covid-19-both-exposes-this-and-offers-the-chance-for-a-reset/>> accessed 22 May 2020.

⁴⁶ Locust Plague Devastates Crops in Horn of Africa - Reuters' <<https://www.reuters.com/article/us-africa-locusts/locust-plague-devastates-crops-in-horn-of-africa-idUSKBN1ZG1GC>> accessed 22 May 2020; Nathaniel Gronewold News E&E, 'Unprecedented & rdquo; Locust Invasion Approaches Full-Blown Crisis' (*Scientific American*)

<<https://www.scientificamerican.com/article/unprecedented-locust-invasion-approaches-full-blown-crisis/>> accessed 22 May 2020; 'East Africa's Plague of Locusts and the Bizarre Climate Science behind It'

<<https://www.nationalgeographic.com/science/2020/02/locust-plague-climate-science-east-africa/>> accessed 22 May 2020.

⁴⁷ 'Grants Not Loans Needed in Africa to Fight' (*The Africa Report.com*, 9 April 2020)

<<https://www.theafricareport.com/25870/fighting-covid19-in-africas-most-vulnerable-states-needs-grants-not-loans/>> accessed 22 May 2020.

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countries, mostly in the global south or they will focus on their own people who are also affected.⁴⁸ It has been observed that with countries focusing on their own outbreaks and economic turmoil, they could hesitate to contribute more abroad, potentially allowing the virus to take hold in vulnerable communities.⁴⁹ This is an eye opener for the Global South countries as far as over-reliance on donor funding and aid is concerned. Indeed, some African commentators have rightly pointed out that Covid-19 has changed the world especially in relation to donor aid. It is feared that it could lead to significant setbacks in the fight against poverty as developed countries turn inwards, thus changing the nature of aid as we know it.⁵⁰ African countries are therefore encouraged to consider this as an opportunity to reset their priorities, where the African countries learn to own their problems and invest in their homegrown lasting solutions.⁵¹

The mismanagement and/or non-priority utilization of funds is evident across Africa in terms of Africa's infrastructural deficit, now badly exposed by coronavirus.⁵² Reports show that Africa has the lowest number of doctors per capita in the world, with the likes of Uganda limited to just 1 doctor per 10,000 people.⁵³ It is even surprising that these countries still export doctors

⁴⁸ 'Will the Coronavirus Endanger Foreign Aid?' (*Council on Foreign Relations*) <<https://www.cfr.org/in-brief/coronavirus-endanger-foreign-aid-WHO>> accessed 22 May 2020.

⁴⁹ Ibid.

⁵⁰ 'Aid Has Failed. COVID-19 Both Exposes This and Offers the Chance for a Reset.' (*African Arguments*, 16 April 2020) <<https://africanarguments.org/2020/04/16/aid-has-failed-coronavirus-covid-19-both-exposes-this-and-offers-the-chance-for-a-reset/>> accessed 22 May 2020.

⁵¹ 'Aid Has Failed. COVID-19 Both Exposes This and Offers the Chance for a Reset.' (*African Arguments*, 16 April 2020) <<https://africanarguments.org/2020/04/16/aid-has-failed-coronavirus-covid-19-both-exposes-this-and-offers-the-chance-for-a-reset/>> accessed 22 May 2020.

⁵² 'Aid Has Failed. COVID-19 Both Exposes This and Offers the Chance for a Reset.' (*African Arguments*, 16 April 2020) <<https://africanarguments.org/2020/04/16/aid-has-failed-coronavirus-covid-19-both-exposes-this-and-offers-the-chance-for-a-reset/>> accessed 22 May 2020.

⁵³ 'Aid Has Failed. COVID-19 Both Exposes This and Offers the Chance for a Reset.' (*African Arguments*, 16 April 2020)

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or allow brain drain due to poor pay and poor working conditions, losing them to the developed world countries despite the shortage and the dire need for their services at home, due to a high disease burden and already fragile health systems.⁵⁴ At the same time, they still import doctors from countries such as Cuba⁵⁵, Kenya, Uganda and South Africa being some of the examples.⁵⁶

<<https://africanarguments.org/2020/04/16/aid-has-failed-coronavirus-covid-19-both-exposes-this-and-offers-the-chance-for-a-reset/>> accessed 22 May 2020; 'Medical Doctors (per 10 000 Population)' <<https://www.who.int/data/maternal-newborn-child-adolescent/monitor>> accessed 22 May 2020; 'Aid Has Failed. COVID-19 Both Exposes This and Offers the Chance for a Reset.' (*African Arguments*, 16 April 2020) <<https://africanarguments.org/2020/04/16/aid-has-failed-coronavirus-covid-19-both-exposes-this-and-offers-the-chance-for-a-reset/>> accessed 22 May 2020; 'Lowest Physicians Density Worldwide by Country 2016' (*Statista*)

<<https://www.statista.com/statistics/280151/countries-with-the-lowest-physicians-density-worldwide/>> accessed 22 May 2020; abairdqz, 'Africa Has about One Doctor for Every 5000 People' (*Quartz*) <<https://qz.com/520230/africa-has-about-one-doctor-for-every-5000-people/>> accessed 22 May 2020.

⁵⁴'Diagnosing Africa's Medical Brain Drain | Africa Renewal'

<<https://www.un.org/africarenewal/magazine/december-2016-march-2017/diagnosing-africa%E2%80%99s-medical-brain-drain>> accessed 22 May 2020; Olayinka Stephen Ilesanmi Ibadan University of, 'As Nigeria's Health Infrastructure Crumbles, Doctors Have Become a Key Export' (*Quartz Africa*) <<https://qz.com/africa/1657343/why-nigerias-doctors-are-leaving-in-droves/>> accessed 22 May 2020; Robbert J Duvivier, Vanessa C Burch and John R Boulet, 'A Comparison of Physician Emigration from Africa to the United States of America between 2005 and 2015' (2017) 15 *Human Resources for Health* 41; Alon Mwesigwa, 'Uganda Crippled by Medical Brain Drain' *The Guardian* (10 February 2015) <<https://www.theguardian.com/global-development/2015/feb/10/uganda-crippled-medical-brain-drain-doctors>> accessed 22 May 2020; Akhenaten Benjamin Siankam Tankwanchi, Çağlar Özden and Sten H Vermund, 'Physician Emigration from Sub-Saharan Africa to the United States: Analysis of the 2011 AMA Physician Masterfile' (2013) 10 *PLOS Medicine* e1001513.

⁵⁵'How Doctors Became Cuba's Biggest Export' (*Time*)

<<https://time.com/5467742/cuba-doctors-export-brazil/>> accessed 22 May 2020.

⁵⁶ 20/1/2020, 'When Cuban Doctors Leave...' (*Daily Nation*)

<<https://www.nation.co.ke/health/when-cubans-leave/3476990-5424908-cv5o0n/index.html>> accessed 22 May 2020; Reuters, 'Cuba Sends Doctors to South Africa to Combat Coronavirus' (*The Standard*)

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The sad reality is that while these foreign doctors were expected to facilitate knowledge, skills and technology transfer, and have indeed impacted positively on the recipient countries' health sector, the host countries have not done much to facilitate this by way of investing in the relevant infrastructure.⁵⁷

The statistics paint a grim picture of African countries' priorities as far as development is concerned especially in consideration of the fact the greatest threat to Africa is not posed by the pandemic itself; it is posed by careless African leaders, abdicating the responsibility for development and care for their citizens.⁵⁸ Political leaders and policymakers must take up the challenge and review their priorities when it comes to investments for national development. They must start paying serious attention to socio-economic and human development through such initiatives as inadequate investment in education and health for inclusive growth and meaningful participation of groups vulnerable to poverty.

7.4 Redefining Development in Kenya- Adopting a Customized Global South Perspective on Development

Historically, the less developed countries have not defined what development means for their societies and are indeed considered as less developed based on the criteria delineated by the so called developed countries; instead, the values of the more developed countries are imposed on those societies which, from the Eurocentric perspective, do not possess all the requisite development criteria. These criteria, therefore, become the

<<https://www.standardmedia.co.ke/article/2001369161/cuba-sends-doctors-to-south-africa-to-combat-coronavirus>> accessed 22 May 2020; 'How Doctors Became Cuba's Biggest Export' (*Time*) <<https://time.com/5467742/cuba-doctors-export-brazil/>> accessed 22 May 2020.

⁵⁷ 20/1/2020, 'When Cuban Doctors Leave...' (*Daily Nation*)

<<https://www.nation.co.ke/health/when-cubans-leave/3476990-5424908-cv5o0n/index.html>> accessed 22 May 2020.

⁵⁸ 'Aid Has Failed. COVID-19 Both Exposes This and Offers the Chance for a Reset.' (*African Arguments*, 16 April 2020)

<<https://africanarguments.org/2020/04/16/aid-has-failed-coronavirus-covid-19-both-exposes-this-and-offers-the-chance-for-a-reset/>> accessed 22 May 2020.

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measures of development denoting progress toward desired goals.⁵⁹ This has often led to underdevelopment or white elephant projects at the expense of people-centred development that would actually impact on the livelihoods of their people. Development in Kenya and other African countries should focus on poverty eradication, economic empowerment of people, eliminating illiteracy, strengthening democratic and governance processes and institutions and fighting corruption.

Poverty eradication, sustainable economic growth and environmental sustainability are considered to be the key pillars of development plans in most African countries.⁶⁰ In addition, there is consensus that natural resources, especially those of land, soil, water, forest, plant and animal diversity, vegetation, renewable energy sources, climate change and ecosystems services are fundamental for improving livelihoods and achieving sustainable development in Africa.⁶¹ As already pointed out, one of the components of development is participation in decisions about how these resources will be applied. It is therefore arguable that it is not enough in an African country that its natural resources are utilized for what is considered to be national development but the targeted populace must also be included in making such decisions. Appropriation of available resources must be done in a way that takes into account the views of those expected to benefit. As already agreed that the development needs of each country differ from the rest, it is also when it comes to the regional parts of the country. What may be pressing for the residents of Nairobi may not be a priority or even a need at all for people living in the Western part of the country.

⁵⁹ Debra Straussfogel, 'Redefining Development as Humane and Sustainable' (1997) 87, *Annals of the Association of American Geographers*, 280, at p.280.

⁶⁰ Sanginga, P.C., Ochola, W.O. and Bekalo, I., "Natural resource management and development Nexus in Africa." *Managing Natural Resources for Development in Africa: A Resource Book* (2010): 11-43, at p.11. Available at <https://www.idrc.ca/sites/default/files/openebooks/506-9/index.html> [Accessed on 17/5/2020].

⁶¹ *Ibid*, p.11.

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As an attempt to enhance Kenya's economic development, President Uhuru Kenyatta during his inauguration speech for the second term, unveiled the Big Four Agenda on food security, affordable housing, manufacturing and affordable healthcare. Kenya's current development plans are aligned towards these priorities in which the government plans to create 1.3 million jobs in the manufacturing sector by 2022 in order to pave the way for Kenya's future: moving from a lower middle-income to an upper middle-income economy by the year 2030.⁶²

Some commentators have however argued that while all the four agenda items are undoubtedly important pillars in enabling the achievement of SDGs, whether they do end up supporting the attainment of SDGs or not will so much depend on the economic strategy chosen; policy choices embedded in such a strategy; as well as the ways and means of implementation.⁶³ They also observe that an economic growth path that is widening inequalities leaves experts worried whether all these notable efforts would help the country meet its stated Vision 2030 and global ambitions.⁶⁴

It is evident that Kenya is still ravaged by poverty and there is need to relook into what the decision making organs and agencies consider to be poverty. As one commentator has argued, policy makers and governments should look at other dimensions of poverty beyond income because income does not speak to what people can do, or how they can improve their own situation.⁶⁵ Interventions must be targeted to the type of poverty they are meant to fix – and to unexpected groups that may not seem to be poor at

⁶² 'Linking Local Aspirations to Global Frameworks for Sustainable Development | KCIC'

<<http://www.kenyacic.org/blog/linking-local-aspirations-global-frameworks-sustainable-development>> accessed 21 May 2020.

⁶³ Ibid.

⁶⁴ Ibid.

⁶⁵ 'Redefining Poverty in Kenya's Fishing Villages'

<<https://rethink.earth/redefining-poverty-in-kenyas-fishing-villages/>> accessed 22 May 2020.

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first glance.⁶⁶ Arguably, generalized approaches to poverty eradication may not achieve lasting outcomes since some poor groups may be left out of empowerment programmes only for them to fall further into the poverty at a later time, thus counteracting the government's efforts to comprehensively address poverty.

The pandemic lays bare Africa's challenges and inadequacies of its development agenda. The 'investments' meant to boost development over the years were clearly not well thought out. The socio-economic development agenda of the African countries has been neglected. This is closely connected to the human development, which again, has been neglected for many years. Human development heavily relies on the socio-economic development agenda and if any lasting results are to be realised, then the two must go hand in hand. The basic objective of human development should be enlarging people's choices by creating an enabling environment for people to enjoy long, healthy and creative lives, to be educated, and to enjoy a decent standard of living, political freedom, guaranteed human rights and self-respect.⁶⁷

Arguably, the African Continent should be looking at COVID-19 as an opportunity to reset their politics, policies and economies and in response to this, if donors want to be partners to African countries in the long-term, they should reset theirs too.⁶⁸ Africa should learn to be self-reliant and move away from the begging mentality that has not only made it become excessively dependent on the generosity of others, but has also made it vulnerable to changes of circumstance such as the current global economic meltdown due to corona virus pandemic.⁶⁹

⁶⁶ Ibid.

⁶⁷ Kiriti, T. and Tisdell, C.A., *Gender inequality, poverty and human development in Kenya: Main indicators, trends and limitations*. No. 1745-2016-141001. 2003, p. 1.

⁶⁸ Ibid.

⁶⁹ 'Aid Has Failed. COVID-19 Both Exposes This and Offers the Chance for a Reset.' (*African Arguments*, 16 April 2020)

<<https://africanarguments.org/2020/04/16/aid-has-failed-coronavirus-covid-19-both-exposes-this-and-offers-the-chance-for-a-reset/>> accessed 22 May 2020.

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There is a need for these countries especially those in the South to revisit and redefine what they consider development. This may not be as easy as it sounds. It has been pointed out by some scholars that the Global North donors' influence on the agenda setting of Global South recipients cannot be ignored.⁷⁰ Indeed, it has been concluded through past evaluations of project aid that it led to: (i) a high administrative burden on recipients due to multiple reporting and accounting requirements; (ii) inefficient spending dictated by donor priorities and procurement arrangements; (iii) highly unpredictable funding levels; (iv) undermining of state systems through parallel structures and staffing; (v) corrosion of democratic accountability through mechanisms to satisfy donor rather than domestic accountability; (vi) difficulties in ensuring sustainability; and (vii) openness to corruption.⁷¹

It is thus known that when funds are available to a country, there are certain terms and conditions on how the same should be utilized, sometimes to promote the interests of the donor organizations and/or countries. For instance, it has rightly been pointed out that while Africa receives more than \$60 billion every year in aid, much of this is not spent on Africans themselves, of course, but on services from donors, such as Western management consultants. Around one-fifth of total bilateral aid in 2012, for example, went back to donor countries or took the form of debt relief.⁷² In addition, much aid, too, is wasted by going to regimes that lack the governance or policies to further development. Rather than using it for the

⁷⁰ Bradley, M., "Whose agenda? Power, policies, and priorities in North-South research partnerships," *Putting Knowledge to Work: Collaborating, influencing and learning for international development* (2017): 37À70.

⁷¹ Handley, G., Higgins, K. and Sharma, B., *Poverty and poverty reduction in sub-Saharan Africa: An overview of the issues*. Overseas Development Institute, 2009, p. 23.

⁷² 'Aid Has Failed. COVID-19 Both Exposes This and Offers the Chance for a Reset.' (*African Arguments*, 16 April 2020)

<<https://africanarguments.org/2020/04/16/aid-has-failed-coronavirus-covid-19-both-exposes-this-and-offers-the-chance-for-a-reset/>> accessed 22 May 2020.

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benefit of their populations, this much-needed funding is used instead to shore up political power.⁷³

With such outcomes, it is arguable that the solutions for the Global South will not be found within donor funding. The political leaders and policymakers from the African countries must therefore reconsider their approaches to the development agenda in their countries and focus more on approaches that directly benefit their people.

While the Global South encompasses developing countries across different continents including Africa and Asia, African countries seem to be lagging behind other Global South regions as far as taking charge of their development agenda is concerned. While the donors set the agenda in Africa, this is not the case in most Asian countries. For example, it has been observed that in much of Asia, countries took ownership of their own development, setting priorities and leading donors, unlike in Africa, where the countries are led by our donors. As a result, many externally-funded roads, railways and ports – especially in the case of China – are motivated by vanity or opportunities for individual profit rather than their benefits for citizens.⁷⁴ The positive steps in Asia are further reflected in improvement in human development, where the 2018 UN report on human development noted that South Asia was the fastest growing region over 1990–2017, at 45.3 percent, followed by East Asia and the Pacific at 41.8 percent and Sub-Saharan Africa at 34.9 percent.⁷⁵

⁷³ 'Aid Has Failed. COVID-19 Both Exposes This and Offers the Chance for a Reset.' (*African Arguments*, 16 April 2020)

<<https://africanarguments.org/2020/04/16/aid-has-failed-coronavirus-covid-19-both-exposes-this-and-offers-the-chance-for-a-reset/>> accessed 22 May 2020.

⁷⁴ 'Aid Has Failed. COVID-19 Both Exposes This and Offers the Chance for a Reset.' (*African Arguments*, 16 April 2020)

<<https://africanarguments.org/2020/04/16/aid-has-failed-coronavirus-covid-19-both-exposes-this-and-offers-the-chance-for-a-reset/>> accessed 22 May 2020.

⁷⁵ UNDP, UNDP. "Human development indices and indicators: 2018 statistical update." (2018): 22-25, at p.22.

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Kenya and the African continent need to take charge of their development agenda and truly focus on what will benefit their people. They must ask themselves whether every development project they are carrying out is for selfish interests or for the common good of their people.

Lawmakers and policymakers need to ensure that they put in place governance structures that will uplift the lives of citizens through promoting good governance and holding accountable those charged with utilizing public funds. As expected of law in its role to promote development, the Constitution of Kenya 2010 outlines the national values and principles of governance which must bind all State organs, State officers, public officers and all persons whenever any of them--applies or interprets the Constitution; enacts, applies or interprets any law; or makes or implements public policy decisions.⁷⁶ These values include: (a) patriotism, national unity, sharing and devolution of power, the rule of law, democracy and participation of the people; (b) human dignity, equity, social justice, inclusiveness, equality, human rights, non-discrimination and protection of the marginalised; (c) good governance, integrity, transparency and accountability; and (d) sustainable development.⁷⁷

These values and principles of governance are geared towards creating a socially just society where all persons equally and equitably enjoy high socio-economic and human development benefits. The inclusion of sustainable development as one of the national values and principles of governance also speaks volumes as to the path that national development agenda is expected to take. It is a path that is supposed to empower the citizens socially, economically and politically (giving them a voice) while at the same time meeting their basic needs in a sustainable way for the good of the current and future generations.⁷⁸ This is also reflected under Article 43

⁷⁶ Art. 10(2) (d), Constitution of Kenya.

⁷⁷ See Art. 10(1), Constitution of Kenya 2010.

⁷⁸ See also Art. 42-Right to Clean and Healthy environment which includes the right—to have the environment protected for the benefit of present and future generations through legislative and other measures, particularly those contemplated in Art. 69; and to have obligations relating to the environment fulfilled under Art. 70.

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of the Constitution which guarantees the rights of every person to an adequate standard of living for all and this encompasses right to adequate food, clothing, shelter, clean and safe water, education, health and social security.

Faced with the threat of Covid-19, locusts' invasion and raging floods across the country, these should serve as a wakeup call for the National and County Governments on what really matters for their people. The county governance system was introduced to take development nearer to the people. This also meant that such development should be implemented with closer and frequent consultation and participation of all the affected groups of people. As already pointed out, there have been instances where a large chunk of donor funds is directed towards administrative activities, for both local and the foreign human resource activities, leaving a barely enough

Article 69 outlines the State and individual obligations in respect of the environment. Clause (1) provides that the State shall—(a) ensure sustainable exploitation, utilisation, management and conservation of the environment and natural resources, and ensure the equitable sharing of the accruing benefits; (b) work to achieve and maintain a tree cover of at least ten per cent of the land area of Kenya; (c) protect and enhance intellectual property in, and indigenous knowledge of, biodiversity and the genetic resources of the communities; (d) encourage public participation in the management, protection and conservation of the environment; (e) protect genetic resources and biological diversity; (f) establish systems of environmental impact assessment, environmental audit and monitoring of the environment; (g) eliminate processes and activities that are likely to endanger the environment; and (h) utilise the environment and natural resources for the benefit of the people of Kenya.

Article 70(1) provides that if a person alleges that a right to a clean and healthy environment recognised and protected under Art. 42 has been, is being or is likely to be, denied, violated, infringed or threatened, the person may apply to a court for redress in addition to any other legal remedies that are available in respect to the same matter. Clause (2) thereof provides that on application under clause (1), the court may make any order, or give any directions, it considers appropriate--(a) to prevent, stop or discontinue any act or omission that is harmful to the environment; (b) to compel any public officer to take measures to prevent or discontinue any act or omission that is harmful to the environment; or (c) to provide compensation for any victim of a violation of the right to a clean and healthy environment.

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percentage to go towards the actual projects. This is a trap that even the national and county governments have often found themselves in. Their primary focus should be to ensure the implementation of Article 43 of the Constitution of Kenya 2010 on socio-economic rights. While infrastructural development across the country is important, the socio-economic rights of communities deserve equal if not more attention. One cannot negotiate or consult with a hungry person on the best types of roads to put up within the counties. That is not to say that the infrastructural development activities are not important, but they do not fall within the definition of basic needs of human beings.

The various socio-economic rights as outlined under Article 43 may currently be at different stages of realisation by the national and county governments for the different regions and counties. The aspirations and social realities of the different regions may also mean differing priorities. For these reasons, it may be beyond the scope of this chapter to offer recommendations on the best way forward on realizing the same. However, as held in various domestic court cases, these social and economic rights should be progressively realised. Lady Justice Mumbi Ngugi, J. held in *Mitubell Welfare Society vs. The Attorney General & 2 Others*, Petition No. 164 of 2011 that;⁷⁹

"The argument that socio-economic rights cannot be claimed at this point two years after the promulgation of the Constitution ignores the fact that no provisions of the Constitution is intended to wait until the state feels it is ready to meet its constitutional obligations. Article 21 and 43 require that there should be "progressive realization" of socio- economic rights, implying that the state must be seen to be taking steps, and I must add be seen to take steps towards realization of these rights.....Granted also that these rights are progressive in nature, but there is a constitutional obligation on the state, when confronted with a matter such as this, to go beyond the standard objection.....Its obligation requires that it assists the court by showing if, and how, it is addressing or intends to address the rights of citizens to the

⁷⁹ See also *In the Matter of the Principle of Gender Representation in the National Assembly and the Senate* [2012]eKLR, Advisory Opinions Application 2 of 2012.

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attainment of the socio-economic rights, and what policies, if any it has put in place to ensure that the rights are realized progressively and how the Petitioners in this case fit into its policies and plans."

It was also acknowledged in *Isaac Kipyego Cherop v State Ministry of Water & 142 others [2017] eKLR, Petition 348 of 2015*, that "Rights under Article 43 of the Constitution can only be realized progressively. The State cannot realize this right for every Kenyan in one investment".

The import of this is that the real development should mainly be geared towards making tangible and lasting investments for the realisation of the socio-economic rights as guaranteed under Article 43 of the Constitution. It is the high time that the political leaders and policy makers realised that the solutions to most of the challenges facing their people during this period of the Covid-19 pandemic will not be solved by the foreign aid and donations but by conscious homegrown solutions developed through people-centred investments. The national development agenda such as the Vision 2030 and other development initiatives should guide their expenditure. Corruption should also be firmly dealt with as it is also a huge threat to achieving these aspirations.

The concept of development in the country as we know it must be revisited so as to ensure that it captures the aspirations of the local people since what they feel about it also matters. Development should offer them the freedom from the shackles of poverty, hunger, illiteracy and other social ills.⁸⁰ The concept of development is both objective and subjective and the policymakers must thus always bear this in mind when coming up with development projects and programmes. The Development programmes, plans and projects must start working towards empowering people so that they can stand on their own. The country must start investing in its own

⁸⁰ Sen, A., *Development as freedom*. Oxford Paperbacks, 2001; Sen, A., "The concept of development." *Handbook of development economics* 1 (1988): 9-26; Giri, A.K., "Rethinking human well-being: a dialogue with Amartya Sen." *Journal of International Development: The Journal of the Development Studies Association* 12, no. 7 (2000): 1003-1018.

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people and also work towards building wealth that would not only cushion the national economy against internal and external shocks such as the current pandemic but also cushion the public against abject poverty and the extreme levels of vulnerability. While it may certainly not be feasible for the country to immediately stop their reliance on foreign aid, such funds must be redirected towards building a solid economy that will take the country towards self-reliance in future. The country must aggressively start the aspirational journey towards economic and social freedom of its people in the near future.

7.5 Conclusion

The Covid-19 pandemic has devastated economies and lives across the world. However, it is arguable that there is no other region that has been hit harder by these adverse effects than the Global South and especially the African continent. This chapter urges that the political leaders and policy makers in the African continent and especially Kenya need to learn from the pandemic and focus on redefining their priorities when it comes to development agenda. They must not compete with the developed world in getting to the so called mass consumption stage of development as envisaged by the modernization theory before they ensure that their people have access to the most basic human rights to food, shelter, education and health. They must acknowledge that development is context-based and differs from country to country. The development agenda of a country must be informed by their local aspirations and the international agenda should only be used to facilitate realisation of the domestic agenda.

We must change our choices as a country and ensure that the period post-covid-19 will mark a new beginning-point towards building a better economy and spurring growth and development that focuses on the local problems of the people. There is certainly a need to reflect on and redefine the concept of development in Kenya. The Covid-19 pandemic has taught us lessons that we cannot ignore.

CHAPTER EIGHT

Charting a New Path for Environmental Management and Sustainable Development

8.1 Introduction

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

Environmental management encompasses all activities geared towards the protection, conservation and sustainable components of the environment.¹ While the law provides for various approaches to environmental management and governance such as the command and control, market-based approaches, incentives (taxation and subsidies), Community Based Natural Resource Management (CBNRM) and traditional resource management institutions, among others, the actualization of these approaches requires some innovative approaches to ensure that the same are fully adopted and implemented. Such innovation is important in overcoming the shortcomings that may be associated with each of the approaches.

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

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

8.2 Meaningful and Active Participation of Citizens in Environmental Management

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

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

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

² Article 69, Constitution of Kenya, 2010.

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

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

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

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

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

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

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

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

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

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

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

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

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any of the community's concerns on possible health effects of the proposed projects. It is important to entrench environmental democracy which is meant to empower the general public and enable them to meaningfully participate in environmental management.¹¹

8.3 Enhancing the Effectiveness of the Regulatory Framework on Corporations' Environmental Liability

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

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

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

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As a way of using their corporate social responsibility (CSR) towards achieving sustainability, the corporations are also expected to contribute positively towards improving the livelihoods of the people. However, while the CSR is entirely pegged on the corporations' initiatives, the local content provisions that are now found within the mining and petroleum laws¹³ in the country should be fully implemented in a way that ensures that any affected groups of persons have the legal backing as far as the accruing benefits are concerned.

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

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

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

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

8.4 Expediting the Approval of the Legislation on Benefit Sharing

While the theme of benefit sharing in natural resources and environmental goods features across most of the statutes and regulations governing the sector, it is pointing out that the single piece of legislation that is meant to provide substantive guidelines on benefit sharing has been pending for quite some time. The proposed *Benefit Sharing Bill 2018*¹⁵ has been pending for several years due to some contentious issues as put forth by various stakeholders. There is a need to wrap up the discussion and have the Bill passed as law.

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

8.5 Creating Practical Platforms for use of Science and Indigenous Knowledge

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

¹⁵ Natural Resources (Benefit Sharing Bill), 2018 (Government Printer, Nairobi, 2018).

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knowledge on the same.¹⁶ Traditional knowledge is capable of yielding better results, technologically speaking, when placed within its environmental and social context. This is because sometimes, it has the most refined technologies, other times, it is very simple but still more appropriate, ecologically compatible and locally manageable.¹⁷ Furthermore, local people are the custodians of traditional systems and are therefore well informed about their own situations, their resources, what works and what does not work. They are also aware of the possible impact of a change in one factor on the other parts of the production system.¹⁸

The incorporation of traditional knowledge in crop production will not only enhance food security but will also be useful in afforestation and reafforestation since the knowledge will greatly contribute in identifying the most ecologically suitable trees in some regions where the most common and exotic varieties of trees would not grow. Environmental management is essential towards attainment of the right to a clean and healthy environment in Kenya. Environmental management combines science, policy, and socioeconomic application in finding solutions to practical problems that people face in cohabitation with the environment, resource exploitation and waste production.¹⁹ The Environmental Management and Co-Ordination Act (EMCA) defines environmental management to include the protection, conservation and sustainable use of the various elements or components of the environment.²⁰

¹⁶ Ibid, Article 11.

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

¹⁸ Ibid.

¹⁹ National Environment Commission, 'Environmental Management Tools and Techniques' available at

https://www.undp.org/content/dam/bhutan/docs/Energy_environment/Env-publications/2019-NEC-Env%20Mgt%20Tools.pdf accessed 17 March 2020.

²⁰ Environmental Management and Co-Ordination Act (EMCA), No. 8 of 1999, S 2, Government Printer, Nairobi.

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However, in Kenya, environmental management has often taken a human approach with little emphasis on the role of science and technology towards achieving this goal.

It has been argued that science and technology can provide effective solutions to most, if not all, environmental problems facing the world.²¹ In the context of environmental management, environmental science studies the mechanisms and processes underlying our interactions with the natural environment whereas environmental technology allows application of such knowledge through actions geared towards environmental protection and conservation.²² Technology not only refers to machines and equipment, but also includes the knowledge, abilities, skills, processes and systems necessary to facilitate environmental conservation and protection.²³ To this extent, technology has been classified as *soft technology* which entails information, training, research and capacity building and *hard technology* comprising of equipment.²⁴

Science and technology have resulted in many environmental problems but can also be key to addressing environmental concerns such climate change, waste management and environmental degradation.²⁵ It has been described as a double edged sword capable of both doing and undoing environmental damage.²⁶ Most environmental challenges such as global warming and

²¹Huesemann. M.H., 'Can Pollution Problems Be Effectively Solved by Environmental Science and Technology? An Analysis of Critical Limitations, *Ecological Economics*, Volume 37, Issue 2, May 2001, pg 271-287.

²²Voulvoulis.N., & Burgman.M.A., The Contrasting Roles of Science and Technology in Environmental Challenges, *Critical Reviews in Environmental Science and Technology*, Volume 49, 2019, issue 12.

²³Srinivas. H., 'Introduction: Technology and Environment'

< <http://www.gdrc.org/techtran/introduction.html> > accessed 18 march 2020.

²⁴ Ibid.

²⁵Nichols. M.R., 'How Technology Can Save the Environment'

< <https://born2invest.com/articles/technology-save-environment/> > accessed 3 April 2020.

²⁶ Kung, Wen-Hsiang. "The Role of Science in Environmental Protection: Is the Development of Environmental Law Toward More Protective and Productive Way,

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climate change can be attributed to technological innovations since they are majorly caused by industrial pollution and fuel emissions from motor vehicles.²⁷ Addressing these environmental concerns requires the input of science and technology through measures such as reducing greenhouse gases, conserving biological diversity, providing clean energy and expanding the adoption of green technologies for climate change mitigation, among others.²⁸

Environmental management and decision making in Kenya is governed by laws, regulations, and policies. Due to the shortcomings of such laws, regulations and policies, there is need for these processes to be informed by scientific evidence.²⁹ Indeed, science has the ability to remedy the shortcomings of laws and regulations through effective solutions tailor made to specific problems. In the context of environmental management, there is need to link law and science in order to ensure effective environmental management.³⁰

In Kenya, the Constitution obligates the state to recognize the role of science and indigenous technologies in the development of the nation.³¹ To this effect, strides have been made towards the use of science and technology in environmental management. The ban on the manufacture, importation, supply, distribution and use of plastic bags and the subsequent adoption of woven bags has helped to curb environmental pollution.³² However, more

or Distorted to Inequality, Through the Involvement of Science?." In *APSA 2009 Toronto Meeting Paper*. 2009.

²⁷ Ibid.

²⁸ Juma. C., 'Exponential Innovation and Human Rights: Implications for Science and Technology Diplomacy', *Science, Technology and Globalization*, February, 2018.

²⁹ Moore. J.W et al, Towards Linking Environmental Law and Science,

< <https://www.facetsjournal.com/doi/pdf/10.1139/facets-2017-0106> > accessed 1 April 2020.

³⁰Human Rights Dimension of Covid-19 Response, available at <https://www.hrw.org/news/2020/03/19/human-rights-dimensions-covid-19-response> (accessed on 03/04/2020).

³¹ Constitution of Kenya, 2010, Article 11 (2) (b).

³² National Environment Management Authority, 2 years on: Say no to plastic bags, available at

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needs to be done to integrate the use of science and technology in environmental management in Kenya. Adoption of cleaner technologies in such areas as transport, energy production and food production can be an effective preventive measure.³³ Scientific knowledge is also useful in helping the citizenry adopt healthy lifestyles for a better, cleaner and healthier environment.³⁴

8.6 Entrenching Integrated Pest Management in Agricultural Production in Kenya

While pests may have major impacts on crop production, the mode of control of these pests may potentially have even a bigger impact on biodiversity. Some of the chemicals used may lead to crop poisoning, water and soil pollution and consequently, have an adverse effect on the biodiversity thriving within the soil and water. In Kenya, use of pesticides has been promoted to expand agricultural production and increase productivity.³⁵

The concept of Integrated Pest Management (IPM) was born in response to the discovery of pesticide resistance as well as the environmental and health impact of pesticide overuse, and IPM has greatly evolved and expanded.³⁶ IPM is associated with many advantages because it optimizes the cost of production (a benefit to the farmer) and the cost of food (a benefit to the consumer) without indirect environmental costs while also providing a long-term benefit for overall food production (a benefit to the environment).³⁷ Integrated pest management (IPM) is an ecological

(Accessed on 20/03/2020).

³³Muigua, Kariuki. "Reconceptualising the Right to Clean and Healthy Environment in Kenya." (2015).

³⁴ Ibid.

³⁵ Macharia, I.N., Mithã, M. and Waibel, H., "Potential environmental impacts of pesticides use in the vegetable sub-sector in Kenya." *African Journal of Horticultural Science* 2 (2009).

³⁶ 'Integrated Pest Management: The Future of Agriculture?' (*FreshFruitPortal.com*, 5 May 2020)

<<https://www.freshfruitportal.com/news/2020/05/05/is-integrated-pest-management-the-future-of-agriculture/>> accessed 5 May 2020.

³⁷ Ibid.

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approach to pest management as it discourages the use of pest control methods that have negative effects to the non-target organisms.³⁸ It is estimated that “90-95% of strawberry growers in California use predatory mites to manage pest mites, an example of inundative biological control in outdoor farming.”³⁹

There are some positive steps that Kenya has made towards promotion and achievement of IPM. In 2018, the Ministry of Agriculture, Livestock, Fisheries and Irrigation (MoALF&I) came up with the “Integrated Pest Management Plan (IPMP) For National Agricultural and Rural Inclusive Growth Project (NARIGP)” whose main objective are objectives of IPMP are to: establish clear procedures and methodologies for IPM planning, design and implementation of micro-projects to be financed under the Project; develop monitoring and evaluation systems for the various pest management practices for subprojects under the Project; to assess the potential economic, environmental and social impacts of the pest management activities within the micro-projects; to mitigate against negative impacts of crop protection measures; to identify capacity needs and technical assistance for successful implementation of the IPMP; to identify IPM research areas in the Project; and to propose a budget required to implement the IPMP.⁴⁰ This document on Integrated Pest Management (IPM) is meant to provide a strategic framework for the integration of climate change mitigation measures, smart agriculture, SLM practices and technologies, environmental and pest management considerations in the

³⁸ Para. 17, *Integrated Pest Management Plan (IPMP) For National Agricultural and Rural Inclusive Growth Project (NARIGP)*, October, 2018.

³⁹ ‘Integrated Pest Management: The Future of Agriculture?’ (*FreshFruitPortal.com*, 5 May 2020)

<<https://www.freshfruitportal.com/news/2020/05/05/is-integrated-pest-management-the-future-of-agriculture/>> accessed 5 May 2020.

⁴⁰ Para. 23, Republic of Kenya, Ministry of Agriculture, Livestock, Fisheries and Irrigation National Agricultural and Rural Inclusive Growth Project (NARIGP), *Integrated Pest Management Plan (IPMP) For National Agricultural and Rural Inclusive Growth Project (NARIGP)*, October, 2018. Available at

<http://www.kilimo.go.ke/wp-content/uploads/2019/02/NARIGP-INTERGRATED-PEST-MANAGEMENT-PLAN-IPM%20JANUARY-2019.pdf> accessed 5 May 2020.

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planning and implementation of the activities to be implemented within the National Agricultural and Rural Growth Project (NARIGP).⁴¹

The Ministry of Agriculture, Livestock, Fisheries and Irrigation (MOALF&I) is designated as the principal agency responsible for overall mitigation and monitoring of the adverse impacts of the pesticides including ensuring that the IPMP is followed under the NARIGP.⁴²

Notably, the targeted micro-projects will use farmer groups and associations who are the project beneficiaries to undertake monitoring for instance in observing the pests in the farms, identifying weeds, and reporting as part of the surveillance to inform what sort of control measure to adopt. The farmer groups and associations will be trained on surveillance and best management practices in pesticide application and use.⁴³ In addition, the Agrochemical Association of Kenya (AAK) and distributors or wholesalers of pesticides will also be used to mitigate and monitor the adverse impacts. The agro-vet distributors will be trained to provide education and awareness to farmers on judicious pesticide use and application for the benefit of the environment and human health since they have constant contact with the farmers.⁴⁴

The Pest Control and Product Board (PCPB) and the National Environment Management Authority (NEMA) are also to be included in the implementation.⁴⁵ The above document rightly points out that in Kenya, Integrated Pest Management is not prioritized, particularly through government policies. In addition, though many solutions to pest problems

⁴¹ Para. 18, *Integrated Pest Management Plan (IPMP) For National Agricultural and Rural Inclusive Growth Project (NARIGP)*, October, 2018.

⁴² Para. 8, *Integrated Pest Management Plan (IPMP) For National Agricultural and Rural Inclusive Growth Project (NARIGP)*, October, 2018.

⁴³ Para 10, *Integrated Pest Management Plan (IPMP) For National Agricultural and Rural Inclusive Growth Project (NARIGP)*, October, 2018.

⁴⁴ Para. 11, *Integrated Pest Management Plan (IPMP) For National Agricultural and Rural Inclusive Growth Project (NARIGP)*, October, 2018.

⁴⁵ Paras. 12 & 13, *Integrated Pest Management Plan (IPMP) For National Agricultural and Rural Inclusive Growth Project (NARIGP)*, October, 2018.

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exist, farmers tend to rely on pesticides as the first choice of pest control measure, particularly in high input agriculture experienced in horticultural sector.⁴⁶

While the above Project was a step in the right direction, the same was targeted and hence it can only be hoped that the outcome of this project will be passed on to the target farmers who will in turn be used to reach out to other farmers in order to ensure that the lessons are replicated in other farms across the country. As it is now, most large and small scale farmers continue to engage in indiscriminate use of pesticides in crop and animal production.⁴⁷ For instance, the Kenya Plant Health Inspectorate Service (Kephis) reported in its 2018 annual report that there were pesticide residues in vegetable samples collected from various outlets and markets across the country. Some of the most affected vegetables included kales (94percent of

⁴⁶ Para. 18, *Integrated Pest Management Plan (IPMP) For National Agricultural and Rural Inclusive Growth Project (NARIGP)*, October, 2018.

⁴⁷ 'Kenyan Farmers Grapple with High Pesticide Use - Xinhua | English.News.Cn' <http://www.xinhuanet.com/english/2019-11/10/c_138544622.htm> accessed 6 May 2020; 'ATAMBA: Pesticides Used in Kenya Do More Harm than Good' (*Business Daily*)

<<https://www.businessdailyafrica.com/analysis/ideas/Pesticides-used-in-Kenya-do-more-harm/4259414-5260702-bcexptz/index.html>> accessed 6 May 2020; 'Kenyan Farmers Cost for Using Europe's Poisoned Agrochemicals - News'

<<https://www.farmers.co.ke/article/2001339810/kenyan-farmers-cost-for-using-europe-s-poisoned-agrochemicals>> accessed 6 May 2020; Macharia, I.N., Mithi, M. and Waibel, H., "Potential environmental impacts of pesticides use in the vegetable sub-sector in Kenya." *African Journal of Horticultural Science* 2 (2009); Route to Food, "Pesticides in Kenya: Why our health, environment and food security are at stake," August, 2019. Available at

<https://routetofood.org/wp-content/uploads/2019/08/RTFI-White-Paper-Pesticides-in-Kenya.pdf> accessed 6 May 2020; 'Regulation of Harmful Pesticides in Kenya - Kenya News Agency' <<https://www.kenyanews.go.ke/regulation-of-harmful-pesticides-in-kenya/>> accessed 6 May 2020; Duncan M Taiti, 'Effects of the Use of Pesticides on the Health of Farmers in Molo District Kenya' (Thesis, University of Nairobi, Kenya 2010)

<<http://erepository.uonbi.ac.ke/handle/11295/4956>> accessed 6 May 2020;

<https://www.the-star.co.ke/authors/johnmuchangi>, 'Farmers Use Killer Chemicals to Grow Food, Study Finds' (*The Star*) <<https://www.the-star.co.ke/news/2019-08-21-farmers-use-killer-chemicals-to-grow-food-study-finds/>> accessed 6 May 2020.

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1,139 samples), peas (76percent) and capsicum (59percent).⁴⁸ There is a need for stakeholders, including the legislators, to step in and curb the situation or at least ensure that the chemical pesticides on sale are highly regulated also and at par with the accepted international standards.⁴⁹

It has been reported that two species of insect parasitoids, one form of biological control of pests, have been discovered in Kenya. They have found to be efficient biological control agents against two major maize pests: the *Cotesia typhae* to control the maize stemborer, *Sesamia nonagrioides*, which has invaded France, and *Cotesia icipe* to control the fall armyworm, *Spodoptera frugiperda*, in Africa.⁵⁰ These are good news for the farmers and the country in general as these will contribute in avoiding and eliminating chemical control of pests due to the chemicals' adverse environmental and economic effects. With the International Centre of Insect Physiology and Ecology (ICIPE) headquartered in Nairobi, there is a need for continued research towards discovering more non-destructive but ecologically beneficial species of insects that can contribute towards biological control of pests. Farmers also need to be sensitized fully on the possibility of adopting IPM in their farming activities. Traditional ecological knowledge of the various communities in Kenya should also be further exploited in order to streamline the positive aspects of such knowledge that may have a bearing on biological control of pests.

However, even as we move towards adoption of IPM, the Government agencies should also continue working on crop species that are fairly

⁴⁸ 'ATAMBA: Pesticides Used in Kenya Do More Harm than Good' (*Business Daily*) <<https://www.businessdailyafrica.com/analysis/ideas/Pesticides-used-in-Kenya-do-more-harm/4259414-5260702-bcexptz/index.html>> accessed 6 May 2020.

⁴⁹ Gladys Shollei, 'Kenya Should Do Away with Harmful Pesticides' (*The Standard*) <<https://www.standardmedia.co.ke/article/2001349775/kenya-should-do-away-with-harmful-pesticides>> accessed 6 May 2020.

⁵⁰ Paul-andré Calatayud and Sevgan Subramanian, 'New Bugs, Found in Kenya, Can Help to Control Major Maize Pests' (*The Conversation*) <<http://theconversation.com/new-bugs-found-in-kenya-can-help-to-control-major-maize-pests-134906>> accessed 6 May 2020.

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resistant to pests yet safe for the human use and consumption, such as the BT cotton, a genetically modified organism (GMO) or genetically modified pest resistant plant cotton variety, which produces an insecticide to combat bollworm.⁵¹ This will also contribute positively towards the gradual eradication of use of harmful pesticides in the agricultural sector and encourage the adoption of biological means of pest control.

8.7 Adoption of Greener Technologies in Infrastructural Development in Cities and Towns

The ever growing human population and the need for housing and other supporting amenities have often resulted in clearing of forests and other buffer zones, leading to pollution and affecting the efforts towards tackling climate change. However, some architects and engineers have been coming up with innovative ways to mitigate the loss.⁵² They have been advocating for adoption of green technology as a tool to solve these problems with an orientation towards sustainable development at all levels.⁵³

⁵¹'Briefly on Farming and Agribusiness' (*Daily Nation*) <<https://www.nation.co.ke/business/seedsofgold/Briefly-on-farming-and-agribusiness/2301238-5539566-141yuq/index.html>> accessed 6 May 2020; 'Kenya's Bt Cotton Approval Opens Door to Other GMO Crops' (*Alliance for Science*) <<https://allianceforscience.cornell.edu/blog/2019/12/kenyas-bt-cotton-approval-opens-door-to-other-gmo-crops/>> accessed 6 May 2020; See also 'Prospects Looking up for Cotton Farmers - Kenya News Agency' <<https://www.kenyanews.go.ke/prospects-looking-up-for-cotton-farmers/>> accessed 6 May 2020; MT KENYA STAR, 'Mwea BT Cotton to Unlock Billions - News' <<https://www.farmers.co.ke/article/2001343003/mwea-bt-cotton-to-unlock-billions>> accessed 6 May 2020; Muhammad Arshad, Rashad Rasool Khan and Asad Aslam and Waseem Akbar, 'Transgenic Bt Cotton: Effects on Target and Non-Target Insect Diversity' [2018] Past, Present and Future Trends in Cotton Breeding <<https://www.intechopen.com/books/past-present-and-future-trends-in-cotton-breeding/transgenic-bt-cotton-effects-on-target-and-non-target-insect-diversity>> accessed 6 May 2020.

⁵² Chai-Lee Goi, 'The Impact of Technological Innovation on Building a Sustainable City' (2017) 3 International Journal of Quality Innovation 6.

⁵³ Laffta, S. and Al-rawi, A., "Green technologies in sustainable urban planning." In *MATEC Web of Conferences*, vol. 162, p. 05029. EDP Sciences, 2018.

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Green technology is considered to be very effective tool in modern urban planning which incorporates of all aspects of planning such as infrastructure and industry, energy, telecommunications, transportation and other vital areas in cities. These technologies are environment friendly inventions that often involve - energy efficiency, recycling, safety and health concerns, renewable resources, and more.⁵⁴ Green technologies include several forms of technology that help to minimize negative effects on the environment and create new ways to achieve sustainable development.⁵⁵ Green technology is an umbrella term that refers to the use of science and technology to create products and processes that are environmentally friendly for sustainable development.⁵⁶ Clean technology refers to products or services that improve operational performance while reducing costs, energy consumption, waste or negative effects on the environment.⁵⁷ These technologies can be used to protect the environment and in some instances repair damage done in the past. They provide the best eco- friendly option to ensure future sustainability.⁵⁸ Such technologies include recycling of waste and use of renewable sources of energy solar, wind and geothermal energy.⁵⁹

The technology is used to make production processes more efficient, finding solutions to various "threats" that may affect the ability of cities to compete, such as the use of soil and urban transport, waste management in the city, quality of air, cultural heritage of cities, urban information systems, sustainable energy, agriculture, and new building materials applied to urban development and sustainable water management.⁶⁰

⁵⁴ Ibid.

⁵⁵ Ibid.

⁵⁶ Ali.M., Model of Green Technology Adaptation in Small and Medium -Sized Tannery Industry, *Journal of Engineering and Applied Sciences*, 12 (4), 2017.

⁵⁷Kenton. W., Green Tech, available at

https://www.investopedia.com/terms/g/green_tech.asp

(accessed on 29/03/2020).

⁵⁸ National Environment Management Authority (NEMA), Green Initiatives in Kenya, available at (accessed on 29/03/2020).

⁵⁹ Ibid.

⁶⁰ Laffta, S. and Al-rawi, A., "Green technologies in sustainable urban planning." In MATEC Web of Conferences, vol. 162, p. 05029.

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The various aspects of green technology can be incorporated into the spatial planning process to help find new ways to achieve sustainable development by reducing the negative impacts of various economic and human activities on the environment and ecosystems and guiding development towards adoption of green and eco-friendly ways of life in cities and urban areas through such means as promoting green transport to enhance access to services and help reduce pollution levels and health inequities of the city's population; the use of treated wastewater in public water and green gardens help to reduce overall water consumption. Cities should look at circular development models that recycle water and waste and produce energy in them, so that sewage can be used.⁶¹

While originally, "green" infrastructure was identified with parkland, forests, wetlands, greenbelts, or floodways in and around cities that provided improved quality of life or "ecosystem services" such as water filtration and flood control, now, green infrastructure is more often related to environmental or sustainability goals that cities are trying to achieve through a mix of natural approaches: "green" infrastructure and technological practices include green, blue, and white roofs; hard and soft permeable surfaces; green alleys and streets; urban forestry; green open spaces such as parks and wetlands; and adapting buildings to better cope with floods and coastal storm surges.⁶² Applications of these green infrastructure approaches range in scale from individual buildings, lots, and neighborhoods to entire cities and metro regions.⁶³

⁶¹ Ibid; See also Bai, M., Zhou, S., Zhao, M. and Yu, J., "Water use efficiency improvement against a backdrop of expanding city agglomeration in developing countries – A case study on industrial and agricultural water use in the Bohai Bay Region of China." *Water* 9, no. 2 (2017): 89.

⁶² Foster, J., Lowe, A. and Winkelmann, S., "The value of green infrastructure for urban climate adaptation." *Center for Clean Air Policy* 750, no. 1 (2011): 1-52, at p.3; Goi, C.L., "The impact of technological innovation on building a sustainable city." *International Journal of Quality Innovation* 3, no. 1 (2017): 6.

⁶³ Ibid.

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It is noteworthy that many cities and towns across the world have embraced the idea of green technologies in infrastructural developments.⁶⁴ The benefits of developing Eco-cities and Eco-Townships; which among other things, are largely green and eco-friendly include: efficient land-use, habitat preservation and restoration, effective transport management and energy efficiency, efficient use of resources, emissions and pollution control and enhanced quality of life for the occupants.⁶⁵

It is important that towns and cities in Kenya start not only embracing this idea but also implementing the same in larger scales, considering that the real estate in Kenya has been on upward trajectory in the last few years and the effect has been adverse on the environment. Kenya has made some significant strides towards the adoption of green and clean technologies especially in the area of renewable energy. The country has been ranked as the largest producer of renewable energy in Africa with 70% of its electricity

⁶⁴ Bertie Russell, 'This Small German Town Took Back the Power - and Went Fully Renewable' (*The Conversation*) <<http://theconversation.com/this-small-german-town-took-back-the-power-and-went-fully-renewable-126294>> accessed 10 May 2020; 'Small Towns May Hold the Key to India's Future of Sustainability' (*Times of India Blog*, 10 June 2019)

<<https://timesofindia.indiatimes.com/blogs/voices/small-towns-may-hold-the-key-to-indias-future-of-sustainability/>> accessed 10 May 2020; 'Three Ways Cities Can Take the Lead on Climate Change - Quartz' <<https://qz.com/1750042/three-ways-cities-can-take-the-lead-on-climate-change/>> accessed 10 May 2020; 'The Case for ... Making Low-Tech "dumb" Cities Instead of "Smart" Ones | Cities | The Guardian'

<<https://www.theguardian.com/cities/2020/jan/15/the-case-for-making-low-tech-dumb-cities-instead-of-smart-ones>> accessed 10 May 2020; 'To Fix Our Infrastructure, Washington Needs to Start from Scratch'

<<https://www.brookings.edu/research/to-fix-our-infrastructure-washington-needs-to-start-from-scratch/>> accessed 10 May 2020; 'Truly Sustainable Cities Are All about Balance' <<https://www.sustainability-times.com/in-depth/truly-sustainable-cities-are-all-about-balance/>> accessed 10 May 2020; 'A 100 Percent Clean Future - Center for American Progress'

<<https://www.americanprogress.org/issues/green/reports/2019/10/10/475605/100-percent-clean-future/>> accessed 10 May 2020.

⁶⁵ 'Eco-Innovations in Designing Eco-Cities and Eco-Towns'

<<https://www.thsmartcityjournal.com/en/articles/1042-eco-innovations-eco-cities-eco-towns>> accessed 10 May 2020.

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generation coming from renewable sources such as geothermal, hydropower, wind and solar sources.⁶⁶ The Government of Kenya through the National Environment Management Authority imposed a ban on plastic carrier bags which has led to the use of eco-friendly non-woven bags.⁶⁷ Such measures are to be lauded since they offer significant promise in the country's endeavour towards green and clean technologies. There is however need for more measures towards this endeavour such as the adoption of agricultural methods and technologies that are eco-friendly as opposed to the polluting and dangerous chemicals.⁶⁸ The county and national governments should work closely with private investors and professionals such as engineers, architects and urban planners to incorporate green technologies into urban planning and management.⁶⁹

8.8. Conclusion

An integrated approach to environmental and natural resources management in Kenya with practical application of diverse knowledge from

⁶⁶ 'New Push on Green Technologies - Kenya News Agency' <<https://www.kenyanews.go.ke/new-push-on-green-technologies/>> accessed 16 February 2021.

⁶⁷ 'National Environment Management Authority (NEMA) - Ban on Manufacture Importation, Supply, distribution And Use Of Non-Woven Polypropylene Bags In Kenya' <https://www.nema.go.ke/index.php?option=com_content&view=article&id=281&catid=2&Itemid=432> accessed 16 February 2021.

⁶⁸ Muigua, K., *Nurturing Our Environment for Sustainable Development*, Glenwood Publishers Limited, 2016.

⁶⁹ 'Invest in Technologies That Convert Waste into Energy and Fuel, CS Macharia Challenges Counties - Kenya News Agency' <<https://www.kenyanews.go.ke/invest-in-technologies-that-convert-waste-into-energy-and-fuel-cs-macharia-challenges-counties/>> accessed 10 May 2020; See also Hermelin, B. and Andersson, I., "How green growth is adopted by local policy—a comparative study of ten second-rank cities in Sweden." *Scottish Geographical Journal* 134, no. 3-4 (2018): 184-202; Hammer, S. et al. (2011), "Cities and Green Growth: A Conceptual Framework", OECD Regional Development Working Papers 2011/08, OECD Publishing. <http://dx.doi.org/10.1787/5kg0tflmzx34-en>; cf. Zuniga-Teran, A.A., Staddon, C., de Vito, L., Gerlak, A.K., Ward, S., Schoeman, Y., Hart, A. and Booth, G., "Challenges of mainstreaming green infrastructure in built environment professions." *Journal of Environmental Planning and Management* 63, no. 4 (2020): 710-732.

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science and traditional ecological knowledge would go a long way in ensuring that the various approaches to resource management are not only applied efficiently but also that the various aspects of the environment such as the flora and fauna are well taken care of.

The law, if applied alone will not be effective in addressing such challenges as pollution, environmental degradation, food insecurity, natural resource based conflicts and other social ills all of which pose some threats to environmental sustainability. For hundreds of years, local communities have acknowledged and indeed observed the ecological approaches to conservation. However, rising levels of poverty and the ever shrinking parcels of land due to the commercialization of land in the country have often made them lean more towards anthropocentricity at the expense of sustainability. However, all hope is not lost as the government agencies can work closely with them to address the challenges through integrated approaches to poverty alleviation, agriculture, animal husbandry, and generally the realisation of the sustainable development agenda. This is the only way that will ensure that anthropocentric approaches coupled with ecocentric approaches are adopted in order to strike a balance in safeguarding environmental, social and economic interests of the country.

This is the only way that the global *2030 Agenda for Sustainable Development*⁷⁰ which is a plan of action for people, planet and prosperity, will be achieved. Charting a new path for Environmental Management and Conservation in Kenya is absolutely necessary. We have to explore new paradigms in order to achieve the goal of effectively managing the environment for the present and future generations.

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

CHAPTER NINE

Enforcing State's Responsibilities in Sustainable Development Goals: Challenges and Prospects

9.1 Introduction

The 2030 Agenda for Sustainable Development Goals acknowledges that these goals cannot be achieved without global cooperation and thus requires each state to fulfil its individual obligations as outlined therein. This chapter discusses how Kenya and the world in general can achieve sustainable consumption and production patterns as envisaged under the United Nations 2030 Agenda for Sustainable Development Goal 12. The chapter identifies the challenges that still make it difficult to achieve this goal and offers some viable solutions ranging from social, economic, political and environmental in nature and also ones that require the participation of all stakeholders. The international legal framework outlines the state obligations relating to environmental management and conservation as well as protection of human rights. States are thus expected to not only respect these international obligations but also to adopt their general principles while coming up with their domestic laws. For instance, Article 2(5) and (6) of the Constitution of Kenya 2010 provides that 'the general rules of international law shall form part of the law of Kenya' and that 'any treaty or convention ratified by Kenya shall form part of the law of Kenya under this Constitution' respectively.¹ In *Re The Matter of Zipporah Wambui Mathara [2010] eKLR* the High Court held that by virtue of the provisions of Section 2 (6) of the Constitution of Kenya 2010, International Treaties, and Conventions that Kenya has ratified, were imported as part of the sources of the Kenyan Law and thus the provisions of the International Covenant on Civil and Political Rights (ICCPR) which Kenya ratified on 1st May 1972 were part of the Kenyan law. The court went on to hold that the provisions of the ICCPR superseded those contained in the Banking Act.²

¹ See also Treaty-Making and Ratification Act, No. 45 of 2012, Laws of Kenya.

² See also *David Njoroge Macharia v Republic [2011] eKLR*, Criminal Appeal 497 of 2007; see also *Samuel Kamau Macharia & Another vs Kenya Commercial Bank Limited & 2 Others Sup. Ct. Application No. 2 of 2011; [2012] eKLR*.

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It is in line with the country's international obligations on human rights and gender issues that Article 59 (2) (g) of the Constitution of Kenya provides that one of the functions of the Kenya National Human Rights and Equality Commission is to act as the principal organ of the State in ensuring compliance with obligations under treaties and conventions relating to human rights.

9.2 Promoting Sustainable Consumption and Production Patterns in Kenya for Development

The world is faced with dwindling environmental and natural resources attributable to a myriad of reasons which include but are not limited to climate change, environmental degradation due to pollution and other unsustainable consumption and production practices by the human race.³ The potential for human kind to destroy the environment was indeed acknowledged in 1972 when the UN Conference on the Human Environment stated: "In our time, man's capability to transform his surroundings, if used wisely, can bring to all peoples the benefit of development and the opportunity to enhance the quality of life. Wrongly or heedlessly applied, the same power can do incalculable harm to human beings and human environment".⁴ Undoubtedly, this human power has been used wrongly through unsustainable consumption and production patterns, and the results have been devastating, the world over, including in Kenya where there have been rampant cases of environmental

³ '1.4 The Environmental Crisis' <https://www.soas.ac.uk/cedep-demos/000_P500_ESM_K3736-Demo/unit1/page_11.htm> accessed 6 November 2020; 'Sustainable Consumption and Production Global Edition. A Handbook for Policymakers: Sustainable Development Knowledge Platform' <<https://sustainabledevelopment.un.org/index.php?page=view&type=400&nr=1951&menu=35>> accessed 6 November 2020; see also Magnus Bengtsson and others, 'Transforming Systems of Consumption and Production for Achieving the Sustainable Development Goals: Moving beyond Efficiency' (2018) 13 Sustainability Science 1533.

⁴ 'What Is Sustainable Consumption and Production?' (*One Planet Network*, 13 September 2016) <<https://www.oneplanetnetwork.org/about/what-Sustainable-Consumption-Production>> accessed 6 November 2020.

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degradation.⁵ The United Nations argues that the human population is currently consuming more resources than ever, exceeding the planet's capacity for generation.⁶

As a way of addressing this challenge, the United Nations 2030 Agenda on Sustainable Development Goals⁷ (SDGs) dedicates SDG Goal 12 to ensuring sustainable consumption and production patterns by all countries.⁸ It has

⁵ Adam Lampert, 'Over-Exploitation of Natural Resources Is Followed by Inevitable Declines in Economic Growth and Discount Rate' (2019) 10 *Nature Communications* 1419; *Global Environment Outlook: GEO4: Environment for Development* (United Nations Environment Programme [host 2007] 93; Washington Odongo Ochola and others (eds), *Managing Natural Resources for Development in Africa: A Resource Book* (co-published by University of Nairobi Press in association with International Development Research Centre, International Institute of Rural Reconstruction, Regional Universities Forum for Capacity Building in Agriculture 2010).

⁶ UN Environment, 'Sustainable Consumption and Production Policies' (*UNEP - UN Environment Programme*, 2 October 2017)

<<http://www.unenvironment.org/explore-topics/resource-efficiency/what-we-do/sustainable-consumption-and-production-policies>> accessed 7 November 2020.

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

⁸ Goal 12. Ensure sustainable consumption and production patterns

12.1 Implement the 10-Year Framework of Programmes on Sustainable Consumption and Production Patterns, all countries taking action, with developed countries taking the lead, taking into account the development and capabilities of developing countries

12.2 By 2030, achieve the sustainable management and efficient use of natural resources

12.3 By 2030, halve per capita global food waste at the retail and consumer levels and reduce food losses along production and supply chains, including post-harvest losses

12.4 By 2020, achieve the environmentally sound management of chemicals and all wastes throughout their life cycle, in accordance with agreed international frameworks, and significantly reduce their release to air, water and soil in order to minimize their adverse impacts on human health and the environment

12.5 By 2030, substantially reduce waste generation through prevention, reduction, recycling and reuse

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been observed that although consumption and production are at the core of the global economy, the current unsustainable production and consumption patterns lead to deforestation, water scarcity, food waste, and high carbon emissions, and cause the degradation of key ecosystems.⁹

Sustainable Consumption and Production (SCP) can be defined as: “*the use of services and related products which respond to basic needs and bring a better quality of life while minimising the use of natural resources and toxic materials as well as the emission of waste and pollutants over the life cycle of the service or product so as not to jeopardize the needs of future generations*”.¹⁰ It has also been

12.6 Encourage companies, especially large and transnational companies, to adopt sustainable practices and to integrate sustainability information into their reporting cycle

12.7 Promote public procurement practices that are sustainable, in accordance with national policies and priorities

12.8 By 2030, ensure that people everywhere have the relevant information and awareness for sustainable development and lifestyles in harmony with nature

12.a Support developing countries to strengthen their scientific and technological capacity to move towards more sustainable patterns of consumption and production

12.b Develop and implement tools to monitor sustainable development impacts for sustainable tourism that creates jobs and promotes local culture and products

12.c Rationalize inefficient fossil-fuel subsidies that encourage wasteful consumption by removing market distortions, in accordance with national circumstances, including by restructuring taxation and phasing out those harmful subsidies, where they exist, to reflect their environmental impacts, taking fully into account the specific needs and conditions of developing countries and minimizing the possible adverse impacts on their development in a manner that protects the poor and the affected communities.

⁹ United Nations, ‘Goal 12—Ensuring Sustainable Consumption and Production Patterns: An Essential Requirement for Sustainable Development’ (*United Nations*) <<https://www.un.org/en/chronicle/article/goal-12-ensuring-sustainable-consumption-and-production-patterns-essential-requirement-sustainable>> accessed 6 November 2020.

¹⁰ ‘What Is Sustainable Consumption and Production?’ (*One Planet Network*, 13 September 2016) <<https://www.oneplanetnetwork.org/about/what-Sustainable-Consumption-Production>> accessed 6 November 2020.

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defined as: *a holistic approach to minimising the negative environmental impacts from consumption and production systems while promoting quality of life for all*".¹¹ Thus, while Sustainable Consumption and Production (SCP) may mean different things to different people, it can generally be agreed that SCP is about systemic change, decoupling economic growth from environmental degradation and applying a lifecycle thinking approach, taking into account all phases of resource use in order to do more and better with less.¹²

9.2.1. Sustainable Consumption and Production Patterns in Kenya: Challenges

It has rightly been pointed out that a major challenge in environmental policymaking is determining whether and how fast our society should adopt sustainable management methods as these decisions may have long lasting effects on the environment.¹³

a) Excessive Use of agrochemicals and Overreliance on Agriculture

It has rightly been pointed out that commercialization of horticulture farming, expansion of farms, and the practice of monoculture favour the proliferation of pests, which in turn increases the need for pesticides.¹⁴ Currently, due to agricultural industrialization, more and more farmers in Kenya and indeed globally, are using agro-chemicals (fertilizers and pesticides) in their farms to deal with pests and all other destructive insects

¹¹ Lewis Akenji, Emily Briggs, and United Nations Environment Programme, *Sustainable Consumption and Production: A Handbook for Policymakers* (2015), 10.

¹² Ibid.

¹³ Adam Lampert, 'Over-Exploitation of Natural Resources Is Followed by Inevitable Declines in Economic Growth and Discount Rate' (2019) 10 *Nature Communications* 1419, 1.

¹⁴ Aliyu Ahmad Warra and Majeti Narasimha Vara Prasad, 'Chapter 16 - African Perspective of Chemical Usage in Agriculture and Horticulture – Their Impact on Human Health and Environment' in Majeti Narasimha Vara Prasad (ed), *Agrochemicals Detection, Treatment and Remediation* (Butterworth-Heinemann 2020) <<http://www.sciencedirect.com/science/article/pii/B9780081030172000167>> accessed 7 November 2020; Binoy Sarkar and others, 'Chapter 8 - Sorption and Desorption of Agro-Pesticides in Soils' in Majeti Narasimha Vara Prasad (ed), *Agrochemicals Detection, Treatment and Remediation* (Butterworth-Heinemann 2020) <<http://www.sciencedirect.com/science/article/pii/B9780081030172000088>> accessed 7 November 2020.

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as well as increasing productivity.¹⁵ The need for increased food production is occasioned by the growing population thus making it imperative to ensure food security by increasing crop production.¹⁶ Some commentators have argued that application of excessive fertilizers and pesticides to improve crop production has negative environmental implications, including soil degradation, enhanced greenhouse gas emissions, accumulation of pesticides, and decline in the availability and quality of water.¹⁷ Indeed, indiscriminate use of chemical pesticides not only affects the texture and productivity of soil but also affects the environment, health-related issues, and the non-target microorganism.¹⁸

b) High Levels of Abject Poverty

Arguably, environmental unsustainability is due to both structural features and historically specific characteristics of industrial capitalism resulting in specific patterns of production and consumption, as well as population growth.¹⁹ Poverty has often contributed to unsustainable production and consumption patterns and ultimately to environmental degradation in the country.²⁰ It has been observed that the objective of SCP is to: conserve natural resources through more efficient use so that human needs can be satisfied without exhausting the world's finite supply of such resources,

¹⁵ Ibid.

¹⁶ Sachchidanand Tripathi and others, 'Chapter 2 - Influence of Synthetic Fertilizers and Pesticides on Soil Health and Soil Microbiology' in Majeti Narasimha Vara Prasad (ed), *Agrochemicals Detection, Treatment and Remediation* (Butterworth-Heinemann 2020)

<<http://www.sciencedirect.com/science/article/pii/B9780081030172000027>> accessed 7 November 2020.

¹⁷ Ibid.

¹⁸ Vipin Kumar Singh and others, 'Chapter 10 - Impact of Pesticides Applications on the Growth and Function of Cyanobacteria' in Prashant Kumar Singh and others (eds), *Advances in Cyanobacterial Biology* (Academic Press 2020)

<<http://www.sciencedirect.com/science/article/pii/B9780128193112000103>> accessed 7 November 2020.

¹⁹ Helen Kopnina, 'The Victims of Unsustainability: A Challenge to Sustainable Development Goals' (2016) 23 *International Journal of Sustainable Development & World Ecology* 113.

²⁰ Lewis Akenji, Emily Briggs, and United Nations Environment Programme, *Sustainable Consumption and Production: A Handbook for Policymakers* (2015).

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leaving behind enough for future generations; and ensure that the goods and services we produce and consume and the manner in which they are produced, used and discarded does not pollute the planet.²¹

The poor depend much more on nature for their livelihoods than the rich. Thus “natural” changes – for instance those brought about by climate change due to man-made activities – are likely to hit the poor much harder than the rich, although ultimately they will affect all.²² Thus, poverty may make communities more susceptible to environmental degradation or contribute to the same.

c) Food Wastage and losses at Consumer and Production Levels

It has been noted that although Sub-Saharan Africa faces severe food shortages, on one hand, it experiences high rates of postharvest loss on the other, with an estimation that about 50% of fruits and vegetables, 20% of cereals, pulses and legumes and 40% of roots and tubers are lost before they reach the consumer.²³ Thus, such wastage and loss not only leaves the people hungry with inadequate food to consume but also exerts undue pressure on the lands for higher production of food to feed the ever growing population.

9.2.2. Promoting Sustainable Consumption and Production Patterns in Kenya for Sustainable Development: Prospects

It has been observed that although environment does not feature in Vision 2030 as a pillar, there has been a wide range of policy, institutional and

²¹ Ibid.

²² Ibid; Jeremy Millard and others, ‘Social Innovation for Poverty Reduction and Sustainable Development: Some Governance and Policy Perspectives’, *Proceedings of the 9th International Conference on Theory and Practice of Electronic Governance - ICEGOV '15-16* (ACM Press 2016)

<<http://dl.acm.org/citation.cfm?doid=2910019.2910079>> accessed 8 November 2020; United Nations Environment Programme (ed), *Towards a Green Economy: Pathways to Sustainable Development and Poverty Eradication* (UNEP 2011).

²³ Huho, Julius M. "Reducing food loss and waste through innovative food preservation technologies applied by women in rural areas in Kenya." *International Journal of Latest Research in Humanities and Social Science (IJLRHSS)* Vol 3, no. 1 (2020): 76-82.

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legislative frameworks by the Government aimed at addressing the major causes of environmental degradation and negative impacts on ecosystems emanating from industrial and economic development programmes.²⁴

As already pointed out, SDG 12 requires countries around the globe to work towards the following: implement the 10-Year Framework of Programmes on Sustainable Consumption and Production Patterns, all countries taking action, with developed countries taking the lead, taking into account the development and capabilities of developing countries; by 2030, achieve the sustainable management and efficient use of natural resources; by 2030, halve per capita global food waste at the retail and consumer levels and reduce food losses along production and supply chains, including post-harvest losses; by 2020, achieve the environmentally sound management of chemicals and all wastes throughout their life cycle, in accordance with agreed international frameworks, and significantly reduce their release to air, water and soil in order to minimize their adverse impacts on human health and the environment; by 2030, substantially reduce waste generation through prevention, reduction, recycling and reuse; encourage companies, especially large and transnational companies, to adopt sustainable practices and to integrate sustainability information into their reporting cycle; promote public procurement practices that are sustainable, in accordance with national policies and priorities; by 2030, ensure that people everywhere have the relevant information and awareness for sustainable development and lifestyles in harmony with nature; support developing countries to strengthen their scientific and technological capacity to move towards more sustainable patterns of consumption and production; develop and implement tools to monitor sustainable development impacts for sustainable tourism that creates jobs and promotes local culture and products; and rationalize inefficient fossil-fuel subsidies that encourage wasteful consumption by removing market distortions, in accordance with national circumstances, including by restructuring taxation and phasing out those harmful subsidies, where they exist, to reflect their environmental impacts, taking fully into account the specific needs and conditions of

²⁴ United Nations, 'Sustainable Development in Kenya: Stocktaking in the run up to Rio+20' (2012) Nairobi: United Nations, 3.

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developing countries and minimizing the possible adverse impacts on their development in a manner that protects the poor and the affected communities.²⁵ Banking on these SDG obligations, Kenya can take up and implement a number of measures that can inch it closer to achieving sustainable consumption and production patterns.

i. Tackling Food Wastage at Consumer and Production Levels

There is a need to address the challenge of food wastage and loss during harvesting, transportation, storage as well as at the consumption stage in order to ensure that there is enough for local consumption as well as possible sale of the excess as a way of improving the livelihoods of farmers.²⁶ Locally produced food and other potential income earners natural resources could undergo local value addition and be exported either within African region markets or out of Africa. This would have a positive effect on the economic wellbeing of all persons starting from the grassroots levels.²⁷

ii. Promoting Environmental Ethics

Environmental ethics is a term used to refer to the moral relationship between the status of the land (from the perspective of the human being) and the use of the land by humans and other living species.²⁸ Environmental ethics has also been defined as a set of expectations, rules of behaviour, of how we treat the planet's inhabitants, human and nonhuman.²⁹

²⁵ SDG Goal 12, *Transforming our world: the 2030 Agenda for Sustainable Development*.

²⁶ Timmermans, A. J. M., J. Ambuko, W. Belik, and Jikun Huang. *Food losses and waste in the context of sustainable food systems*. No. 8. CFS Committee on World Food Security HLPE, 2014; Kimiywe, J. "Food and nutrition security: challenges of post-harvest handling in Kenya." *Proceedings of the Nutrition Society* 74, no. 4 (2015): 487-495; Huho, Julius M. "Reducing Food Loss and Waste through Innovative Food Preservation Technologies Applied by Women in Rural Areas in Kenya." *International Journal of Latest Research in Humanities and Social Science (IJLRHSS)* Vol 3, no. 1 (2020): 76-82.

²⁷Muigua, K., Utilizing Africa's Natural Resources to Fight Poverty, available at <http://www.kmco.co.ke/attachments/article/121/Utilizing%20Africa's%20Natural%20Resources%20to%20Fight%20Poverty-26th%20March,2014.pdf>

²⁸ Donald L Grebner, Pete Bettinger and Jacek P Siry, *Introduction to Forestry and Natural Resources* (First edition, Academic Press 2013).

²⁹ Daniel A Vallero, *Paradigms Lost: Learning from Environmental Mistakes, Mishaps, and Misdeeds* (Butterworth-Heinemann 2006) ch 1.

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Environmental ethics dictate that one should base their behaviour on a set of ethical values that guide our approach toward the other living beings in nature.³⁰ In addition, it has been argued that since sustainability makes us consider what we do in light of future consequences, good and bad, our contemporary environmental ethic stretches environmental awareness in space and time.³¹ Environmental ethicists advocate the need for change in consciousness, attitudes, thoughts, models, beliefs and world view.³²

As a way of ensuring that the general populace in Kenya is aware of the impact of all their actions on their surroundings, there is a need for promoting an approach to production and consumption that incorporates both anthropocentrism and ecocentrism.³³ Ecocentrism finds inherent (intrinsic) value in all of nature. It takes a much wider view of the world than does anthropocentrism, which sees individual humans and the human species as more valuable than all other organisms.³⁴ There is therefore a need for environmental education in order to supply the general public with the

³⁰ IV Muralikrishna and Valli Manickam, *Environmental Management: Science and Engineering for Industry* (Butterworth-Heinemann, an imprint of Elsevier 2017) ch 4.

³¹ Daniel A Vallero, *Paradigms Lost: Learning from Environmental Mistakes, Mishaps, and Misdeeds* (Butterworth-Heinemann 2006) ch 1.

³² S Morand and Claire Lajaunie, *Biodiversity and Health: Linking Life, Ecosystems and Societies* (ISTE Press ; Elsevier 2018) ch 12.

³³ Sabine Lenore Müller and Tina-Karen Pusse (eds), *From Ego to Eco: Mapping Shifts from Anthropocentrism to Ecocentrism* (Brill 2018); Muigua, Kariuki. "Achieving Environmental Security in Kenya." *E. Afr. LJ* (2018): 1; 'Why Ecocentrism Is the Key Pathway to Sustainability' (MAHB, 4 July 2017)

<<https://mahb.stanford.edu/blog/statement-ecocentrism/>> accessed 8 November 2020; Noel E Boulting and The Society for Philosophy in the Contemporary World, 'Between Anthropocentrism and Ecocentrism': (1995) 2 *Philosophy in the Contemporary World* 1; Muigua, Kariuki. *Nurturing Our Environment for Sustainable Development*. Glenwood Publishers Limited, 2016; Karataş, Assist Prof Dr Abdullah. "The Role of Environmental Education in Transition from Anthropocentrism to Ecocentrism." *International Journal of Business and Social Science* 7, no. 1 (2016); Jana Rülke and others, 'How Ecocentrism and Anthropocentrism Influence Human-Environment Relationships in a Kenyan Biodiversity Hotspot' (2020) 12 *Sustainability* 8213.

³⁴ 'Why Ecocentrism Is the Key Pathway to Sustainability' (MAHB, 4 July 2017) <<https://mahb.stanford.edu/blog/statement-ecocentrism/>> accessed 8 November 2020.

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relevant information and awareness for sustainable development and lifestyles in harmony with nature.

iii. Investing in Scientific and Technological Capacity

The Constitution obligates the State to recognise the role of science and indigenous technologies in the development of the nation.³⁵ There is a need for the country to invest in and adopt scientific knowledge especially locally for eliminating unsustainable and harmful practices that adversely affect realization right to clean and healthy environment for all as well as the sustainable development agenda. This may be aimed at achieving, inter alia, use of science and technology in industrial waste management, adoption of green and clean technologies, climate change mitigation measures, food production and preservation measures, among others.³⁶

iv. Addressing Poverty Levels in Kenya

A poverty stricken population is more likely to disregard sustainable production and consumption of environmental resources for lack of resources to explore possible alternatives to get their livelihoods and thus they end up overexploiting environmental resources and lands. It is therefore important for the stakeholders and policymakers to ensure that they support efforts towards addressing poverty levels as a prerequisite in achieving sustainability.

v. Pollution Prevention and Control

There is a need for stakeholders to identify opportunities and explore the same in order to reduce the production of wastes and the use of toxic materials, to prevent soil, water, and air pollution and to conserve and reuse resources.³⁷ The Constitution of Kenya guarantees the right of every person to a clean and healthy environment including the right to have the

³⁵ Constitution of Kenya, Art. 11(2) (b).

³⁶ Muigua, K., Utilising Science and Technology for Environmental Management in Kenya, available at <http://kmco.co.ke/wp-content/uploads/2020/04/Utilising-Science-and-Technology-for-Environmental-Management-in-Kenya.pdf>

³⁷ Boubaker Elleuch and others, 'Environmental Sustainability and Pollution Prevention' (2018) 25 Environmental Science and Pollution Research 18223.

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environment protected for the benefit of present and future generations through legislative and other measures, particularly those contemplated in Article 69.³⁸

Pollution may be as a result of, inter alia, waste by-products emanating from industrialization of our society, the introduction of motorized vehicles, and the explosion of the human population, leading to an exponential growth in the production of goods and services.³⁹ Combating pollution in all its forms is thus critical if the sustainable development agenda is to be achieved and this calls for concerted efforts from all stakeholders including state organs, private sector and individuals.⁴⁰

vi. Agricultural Diversification and Diversification of Livelihood Sources in Kenya

Agricultural diversification is considered to be an important mechanism for economic growth. Agricultural diversification can be facilitated by technological breaks-through, by changes in consumer demand or in government policy or in trade arrangements, and by development of irrigation, roads, and other infrastructures.⁴¹ It has been argued that the policy frameworks of government for rural infrastructure transport, irrigation, storage facilities, processing, and providing incentives to the farmers encourages agricultural diversification.⁴²

³⁸ Art. 42; Art. 70(1) of the Constitution states that if a person alleges that a right to a clean and healthy environment recognised and protected under Art. 42 has been, is being or is likely to be, denied, violated, infringed or threatened, the person may apply to a court for redress in addition to any other legal remedies that are available in respect to the same matter. See the case of Peter K. Waweru vs R, Misc civ application no. 118 of 2004

³⁹ See Muigua, K., 'Safeguarding the Environment through Effective Pollution Control in Kenya', September 2019, available at <http://kmco.co.ke/wp-content/uploads/2019/09/Safeguarding-the-Environment-through-Effective-Pollution-Control-in-Kenya-Kariuki-Muigua-28th-SEPT-2019.pdf>

⁴⁰ Muigua, K., 'Safeguarding the Environment through Effective Pollution Control in Kenya', 26-27.

⁴¹ 'IV. Agricultural Diversification on Small Farms'

<<http://www.fao.org/3/ac484e/ac484e06.htm>> accessed 8 November 2020.

⁴² Donald L Sparks, *Advances in Agronomy. Volume 110* (Elsevier 2011) ch 4 <<http://site.ebrary.com/id/10444577>> accessed 8 November 2020.

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A research targeting Southern Nakuru County on 'Sustainable food systems through diversification and indigenous vegetables' found that one way to improve sustainability of the local food system is diversification, starting with better integrating indigenous vegetables, into the food system.⁴³ Overreliance on certain foods in the country such as maize and so the staple grains often leads to communities overexploiting their lands through farming. There is a need for continued campaigns for communities to change their attitudes towards other sources of food and embracing the same.⁴⁴ The overreliance on certain foods is also what leads to excessive use of agrochemicals leading to environmental degradation. Thus, diversification of food sources and agricultural diversification may not only ensure that there is food security but also help in environmental conservation and restoration.⁴⁵

It is not only important to promote agricultural diversification but also livelihood diversification, where the latter means farming households engaging in multiple agricultural and nonagricultural activities. Both agricultural and livelihood diversification are ways of managing climate risk.⁴⁶ In addition, agricultural diversification can address poverty levels by increasing and stabilizing farmers' incomes and rural employment.⁴⁷

⁴³ Molina, P.B., D'Alessandro, C., Dekeyser, K. and Marson, M., "Sustainable food systems through diversification and indigenous vegetables." (2020), 104.

⁴⁴ Muigua, K., 'Achieving the Right to Food for Sustainable Development in Kenya,' *Paper Presented at the Public Engagement Forum on the Right to Food Inception Meeting held on 24th July 2018 at the African Population and Health Research Center (APHRC) Campus* < <http://kmco.co.ke/wp-content/uploads/2018/08/Achieving-the-Right-to-Food-for-Sustainable-Development-in-Kenya-Presentation-African-Population-and-Health-Research-Center-APHRC-Campus-24th-July-2018.pdf> > Accessed 8 November 2020.

⁴⁵ Katharina Waha and others, 'Agricultural Diversification as an Important Strategy for Achieving Food Security in Africa' (2018) 24 *Global Change Biology* 3390.

⁴⁶ Clayton Campanhola and Shivaji Pandey, *Sustainable Food and Agriculture: An Integrated Approach* (2019) <<https://public.ebookcentral.proquest.com/choice/publicfullrecord.aspx?p=5611463>> accessed 8 November 2020.

⁴⁷ Chiara Mazzocchi and others, 'The Dimensions of Agricultural Diversification: A Spatial Analysis of Italian Municipalities' (2020) 85 *Rural Sociology* 316; Cristina

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While some authors have conflicting opinion on the full effect of agrochemicals on the environment, there is a need for farmers to turn towards compost manure and treat their soils in attempts to reduce agrochemicals inputs for the sake of healthy environment and sustainability purposes.

vii. Sustainable Public Procurement Practices and Green Economy Investments

It has been suggested that shifting public spending towards more sustainable goods and services can help drive markets in the direction of innovation and sustainability, thereby enabling the transition to a green economy.⁴⁸

Kenya's *Public Procurement and Asset Disposal Act, 2015*⁴⁹ was enacted to give effect to Article 227 of the Constitution; to provide procedures for efficient public procurement and for assets disposal by public entities; and for connected purposes.⁵⁰ The Act provides that public procurement and asset disposal by State organs and public entities shall be guided by, *inter alia*, the following values and principles of the Constitution and relevant legislation—the national values and principles provided for under Article 10; maximization of value for money; and promotion of local industry, sustainable development and protection of the environment.⁵¹ An accounting officer of a procuring entity is required to prepare specific requirements relating to the goods, works or services being procured that are clear, that give a correct and complete description of what is to be procured and that allow for fair and open competition among those who

Salvioni, Roberto Henke and Francesco Vanni, 'The Impact of Non-Agricultural Diversification on Financial Performance: Evidence from Family Farms in Italy' (2020) 12 *Sustainability* 486.

⁴⁸ UN Environment, 'Sustainable Consumption and Production Policies' (*UNEP - UN Environment Programme*, 2 October 2017)

<<http://www.unenvironment.org/explore-topics/resource-efficiency/what-we-do/sustainable-consumption-and-production-policies>> accessed 7 November 2020.

⁴⁹ Public Procurement and Disposal Act, No. 33 of 2015, Laws of Kenya (Revised Edition 2016 [2015]).

⁵⁰ *Ibid*, Preamble.

⁵¹ *Ibid*, s. 3.

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may wish to participate in the procurement proceedings. The specific requirements shall include all the procuring entity's technical requirements with respect to the goods, works or services being procured, and the technical requirements shall, where appropriate, *inter alia*: factor in the socio-economic impact of the item; be environment-friendly; and factor in the cost disposing the item.⁵²

Regarding disposal of assets, the Act provides that radioactive or electronic waste shall be disposed of only to persons licensed to handle the respective waste under section 88 of the Environmental Management and Coordination Act, 1999.⁵³ The *Public Procurement and Asset Disposal Regulations, 2020*⁵⁴ provides that while the user department shall be submitting the requisition to the head of the procurement function for processing, it shall be accompanied by, *inter alia*, as applicable: environmental and social impact assessment reports.⁵⁵ Regulation 193(2) provides that the documents, procedures and approvals required for waste disposal management shall be obtained from the relevant public agencies allowing a procuring entity to dispose those items that are harmful and unfriendly to the environment.⁵⁶

There is a need for the public entities to uphold the foregoing provisions and work towards ensuring that both the processes of procurement of goods and disposal of waste are not only environmentally friendly but are also cost effective and contribute towards achieve the sustainable development agenda.

The public funds expenditure should be geared towards targeted green investments in a bid to develop green economy. A green economy is defined as 'low carbon, resource efficient and socially inclusive, where growth in

⁵² Public Procurement and Disposal Act, s. 60.

⁵³ *Ibid*, s. 165(2).

⁵⁴ Public Procurement and Asset Disposal Regulations, 2020, *Kenya Gazette Supplement No. 53 (Legislative Supplement No. 37)*, Legal Notice No. 69, Laws of Kenya.

⁵⁵ *Public Procurement and Asset Disposal Regulations, 2020*, Regulation 71(2)(c).

⁵⁶ *Ibid*, 2020, Regulation 193(2).

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employment and income are driven by public and private investment into such economic activities, infrastructure and assets that allow reduced carbon emissions and pollution, enhanced energy and resource efficiency, and prevention of the loss of biodiversity and ecosystem services.⁵⁷

viii. Promoting Gender Equity and Equality

Sustainable Development Goal 5 seeks to achieve gender equality and empower all women and girls. This is because gender equality is not only seen as a fundamental human right, but a necessary foundation for a peaceful, prosperous and sustainable world.⁵⁸ While there has been impressive progress in tackling gender discrimination over the years, there are still many challenges facing women such as: discriminatory laws and social norms which remain pervasive, women continue to be underrepresented at all levels of political leadership, and 1 in 5 women and girls between the ages of 15 and 49 report experiencing physical or sexual violence by an intimate partner within a 12-month period.⁵⁹ While these statistics are not specifically for Kenya, it does not mean that Kenya's situation is any better.⁶⁰ It has been argued that due to the different roles women and men play in households, the economy, and environmental sustainability in most societies, enhancing gender equality is integral to ensuring a balanced approach to the economic, social and environmental dimensions of sustainable development and to achieving all other SDGs.⁶¹

⁵⁷ UN Environment, 'Green Economy' (*UNEP - UN Environment Programme*, 23 January 2018)

<<http://www.unenvironment.org/regions/asia-and-pacific/regional-initiatives/supporting-resource-efficiency/green-economy>> accessed 8 November 2020.

⁵⁸ 'Gender Equality and Women's Empowerment' (*United Nations Sustainable Development*) <<https://www.un.org/sustainabledevelopment/gender-equality/>> accessed 7 November 2020.

⁵⁹ Ibid.

⁶⁰ Muigua, K., "Actualising the National Policy on Gender and Development in Kenya." *Journal of cmsd Volume 5(2)* (2020).

⁶¹ OECD, *Policy Coherence for Sustainable Development: Fostering an Integrated Policy Agenda* (OECD 2018).

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Thus, efforts towards promoting sustainable consumption and production patterns in Kenya may not bear the desired results if they do not incorporate gender equality and equity measures.

9.3 Conclusion

Arguably, Sustainable Consumption and Production can contribute substantially to poverty alleviation and the transition towards low-carbon and green economies.⁶² It is considered to be a holistic approach and is about systemic change.⁶³ It is indeed possible to improve production processes and consumption practices to reduce resource consumption, waste generation and emissions across the full life cycle of processes and products in the different sectors of the economy as a way to promote sustainable development agenda. Unless all stakeholders are brought on board and ensuring that there is a societal attitude and behavioural change as far as interactions with the environment are concerned, then realization of truly sustainable development practices remains a mirage. There is a need for a shift to a lifestyle that is geared towards achieving sustainability in all areas of economy. Promoting Sustainable Consumption and Production for Development may take a while to achieve, but it is worth pursuing.

⁶² UN Environment, 'Sustainable Consumption and Production Policies' (*UNEP - UN Environment Programme*, 2 October 2017)

<<http://www.unenvironment.org/explore-topics/resource-efficiency/what-we-do/sustainable-consumption-and-production-policies>> accessed 7 November 2020.

⁶³ *Ibid.*

CHAPTER TEN

Evaluating Africa's Regional Development Plans against the Sustainable Development Goals Agenda

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

10.1.1 Introduction

There is documented evidence from majority of resource-rich countries, especially those endowed with depletable natural resources (i.e. fuels, ores, minerals and metals), which suggests that resource riches can be a “curse” rather than a “blessing”.¹ It has been observed that while one might expect to see better development outcomes after countries discover natural resources, resource-rich countries tend to have higher rates of conflict and authoritarianism, and lower rates of economic stability and economic growth, compared to their non-resource-rich neighbors.² This chapter explores the topic of resource curse in Africa which has led to the exploitation and dehumanization of African people who struggle with high levels of poverty despite most countries in the Continent being rich in diverse natural resources that would have otherwise uplifted the livelihoods of these people.

10.1.2 The Resource Curse Phenomenon and Natural Resource-Based Conflicts

Natural resource conflicts may be divided into two broad types: Type one conflict encompasses situations where armed conflict is financed or sustained through the sale or extra-legal taxation of natural resources, and Type two conflict results from competition over resources among various

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

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

Available at

https://resourcegovernance.org/sites/default/files/nrgi_Resource-Curse.pdf

[Accessed on 26/5/2020].

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groups.³ Normally, it is countries with environmental and natural resources scarcity that are faced with a high risk of conflicts and even violence. Environmental scarcities greatly affect populations, including violent conflicts in many parts of the developing world.⁴ Considering that in many parts of the poor and developing world, natural resources form the main source of livelihood for the majority of the poor communities. As a result, any conflicts relating to access and control of these resources are usually more devastating in these poor societies since they are less able to buffer themselves from environmental scarcities and the social crises they cause.⁵

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

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

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

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

⁵ *Ibid.*, p.6.

⁶ Natural Resource Governance Institute, "The Resource Curse: The Political and Economic Challenges of Natural Resource Wealth," *NRGI Reader*, March, 2015, p. 1. Available at https://resourcegovernance.org/sites/default/files/nrgi_Resource-Curse.pdf [Accessed on 26/5/2020].

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

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wealth, and for governments in these countries to respond effectively to public welfare needs.⁸

Under the scarcity theory, a number of challenges which include rapid population growth, environmental degradation, resource depletion, and unequal resource access combine to aggravate poverty levels and income inequality in many of the world's least developed countries, and such deprivations are easily translated into grievances, increasing the risks of rebellion and societal conflict."⁹ An example of areas experiencing scarcity problems in Kenya is Turkana County which has been documented as one of the Counties with the highest level of poverty in Kenya¹⁰, and with the distrust between local communities around the region against each other¹¹ leading to constant conflicts as well as cross border conflicts.¹² The conflict is largely attributed to livestock rustling, harsh climate and boundary dispute. A scramble for the scarce resources has often led to poverty and even violent and armed conflict.¹³

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

⁹ *Ibid.*, p.8.

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

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

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

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

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

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

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

¹⁵ 'Why Natural Resources Are a Curse on Developing Countries and How to Fix It – The Atlantic'

<<https://www.theatlantic.com/international/archive/2012/04/why-natural-resources-are-a-curse-on-developing-countries-and-how-to-fix-it/256508/>>

accessed 28 May 2020; 'Few Developing Countries Can Climb the Economic Ladder | St. Louis Fed'

<<https://www.stlouisfed.org/publications/regional-economist/october-2015/trapped-few-developing-countries-can-climb-the-economic-ladder-or-stay-there>> accessed 28 May 2020; Van der Ploeg, F., "Africa and natural resources: managing natural resources for sustainable growth." (2008), available at https://www.economics.ox.ac.uk/images/Documents/OxCarre_Policy_Papers/oxcarrepp200801.pdf [Accessed on 27/5/2020].

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

¹⁷See 'Diamonds in Sierra Leone, A Resource Curse?' available at <http://erd.eui.eu/media/wilson.pdf> [Accessed on 27/5/2020]; Kinniburgh, C., 'Beyond "Conflict Minerals": The Congo's Resource Curse Lives On,' *Dissent Magazine*, Spring 2014, available at

<https://www.dissentmagazine.org/article/beyond-conflict-minerals-the-congos-resource-curse-lives-on> [Accessed on 27/5/2020]; Free the Slaves, 'Congo's Mining Slaves: Enslavement at South Kivu Mining Sites,' *Investigative Field Report*, June 2013. Available at

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Communities expect that availability of environmental goods and services in their region will improve their livelihoods by 'real' development, which may not always be the case.¹⁸ Poor and low economic development¹⁹ and consequently, failed economies result in conflicts,²⁰ as a result of environmental and natural resources' bad governance or mismanagement.²¹ Skewed distribution of benefits from natural resources and other environmental goods may fuel social exclusion and conflict, threatening sustainability.²²

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

<https://www.freetheslaves.net/wp-content/uploads/2015/03/Congos-Mining-Slaves-web-130622.pdf> [Accessed on 27/5/2020].

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

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

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

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

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

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

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

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environmental resources exploitation is capable of degenerating into a war. Effective governance of these resources is thus necessary for security and peace. Thus, competition for scarce resources, as well as inequality in access to accruing environmental benefits where there are abundant resources, both have the effect of heightened animosity and potential cause for violence.²⁵

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

10.1.3 The Resource Curse in Africa: So Much yet so Little

Some scholars have rightly argued that mineral endowment in Africa is a "resource curse" rather than a blessing mainly because of the corrupt

²⁵ See Muigua, K., Kariuki, F., Wamukoya, D., *Natural Resources and Environmental Justice in Kenya*, Glenwood Publishers, Nairobi, 2015.

²⁶ United Nations Environment Programme, 'From Conflict to Peacebuilding: The Role of Natural Resources and the Environment,' p. 5. Available at http://www.unep.org/Themes/Freshwater/PDF/FromConflict_to_Peachbuilding.pdf [Accessed on 27/5/2020].

²⁷ Engel, A. & Korf, B., 'Negotiation and mediation techniques for natural resource management' (FAO, Rome, 2005), p. 22.

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collusion of African political elites and some of the so-called “investors” in the mining sector.²⁸ This has resulted in the continued African continent’s struggle with development issues.²⁹ For instance, extractive industries, particularly in sub-Saharan Africa, have been associated with increasing levels of political, social, technical and environmental risk.³⁰ This has been the case in countries like Sudan, Democratic Republic of Congo³¹ and Nigeria where there have been eruption of internal armed conflict as a result of their rich natural resources as well as significant environmental degradation.³² A degraded environment leads to a scramble for scarce resources and may culminate in poverty and even conflict.³³ Notably, environmental degradation may be as a result of either overexploitation of resources or total disregard for the environmental laws by corporations especially in the extractives industry. In Nigeria, despite the oil revenue, poverty rates are generally higher and infrastructure is poorer in the oil-rich

²⁸ Mupambwa, G. and Xaba, M.B., "Chapter Ten “Investors” or Looters? A Critical Examination of Mining and Development in Africa." *Grid-locked African Economic Sovereignty: Decolonising the Neo-Imperial Socio-Economic and Legal Force-fields in the 21st Cen* (2019): 292.

²⁹ Ibid.

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

³¹ Samndong, R.A. & Nhantumbo, I., *Natural resources governance in the Democratic Republic of Congo:*

Breaking sector walls for sustainable land use investments, (International Institute for Environment and Development Country Report, February 2015), p. 11. Available at <http://pubs.iied.org/pdfs/13578IIED.pdf> [Accessed on 27/5/2020].

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

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

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states and there is disproportionate allocation of such funds.³⁴ It has been documented in the past that while oil exports had fuelled real GDP growth of over 5 per cent a year in Nigeria, the official unemployment rate climbed from 15 per cent in 2005 to 25 per cent in 2011, and youth unemployment rates were estimated to be as high as 60 per cent.³⁵

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

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

The soda ash mining in Lake Magadi where the poverty and lack of investments in Magadi, after 100 years of exploitation of trona worth

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

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

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

³⁷ Ibid.

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

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trillions of shillings, has been attributed to the lack of transparency in the governance of natural resources, corruption, and illegal outflows.³⁹ Thus, the locals, despite suffering adverse environmental effects from the mining activities, have not benefitted from the resources.

Natural resource conflicts mainly have to do with the interaction between the use of and access to natural resources and factors of human development factors such as population growth and socio-economic advancement.⁴⁰ One of the goals of the *Agenda 2030 on Sustainable Development*⁴¹ is promoting human development. Natural resources are expected to contribute to national development, where development carries several dimensions which include: Economic development, that is, improvement of the way endowments and goods and services are used within (or by) the system to generate new goods and services in order to provide additional consumption and/or investment possibilities to the members of the system; Human development, that is, people-centred development, where the focus is put on the improvement of the various dimensions affecting the well-being of individuals and their relationships with the society (health, education, entitlements, capabilities, empowerment etc.); Sustainable development, that is, development which considers the long term perspectives of the socio-economic system, to ensure that improvements

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

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

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

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occurring in the short term will not be detrimental to the future status or development potential of the system.⁴²

Sustainable development is linked to the right to development, human rights and good governance, when it is described as sustainable human development. Sustainable human development focuses on material factors such as meeting basic needs and non-material factors such as rights and participation. It also seeks to achieve a number of goals which include, poverty reduction, promotion of human rights, promotion of equitable opportunities, environmental conservation and the assessment of impacts of development activities.⁴³

The *Agenda 21*⁴⁴, under Chapter 15 acknowledges that the current decline in biodiversity is largely the result of human activity and represents a serious threat to human development.⁴⁵ Resource-based conflicts usually are a major threat to the sustainable development of natural resources in Africa and usually have the result of undermining economic development, sustainability and definitely human development.⁴⁶ Conflicts usually complicate the exploitation of the natural resources and as such there are usually no resulting benefits to the various parties. It is important to note that overdependence on natural resources is also a potential source of

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

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

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

⁴⁵ *Agenda 21*, Para. 15.2.

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

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conflicts among communities in different countries especially when these resources get exhausted. It is thus imperative that countries diversify their economies in order to ensure that various sectors of the economy contribute to the well-being of the people and that other sectors of the economy are also given the importance deserved.

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

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

The mismanagement of resources and the resultant failure to invest in crucial socio-economic sectors such as education, job creation and health has led to low human development with Africa still recording high levels of poverty, diseases and illiteracy.⁵¹ *The 2018 UN report on Human Development*

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

⁴⁸ Kenya Vision 2030, Government of Kenya, 2007.

⁴⁹ Natural Resource Governance Institute, "The Resource Curse: The Political and Economic Challenges of Natural Resource Wealth," *NRGI Reader*, March, 2015, p. 4.

⁵⁰ *Ibid*, p.4.

⁵¹ Conceição, P. "Human development report 2019." *Beyond income, beyond averages, beyond today: Inequalities in human development in the 21st century*. New York, UNDP

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noted that South Asia was the fastest growing region during the period 1990–2017, at 45.3 percent, followed by East Asia and the Pacific at 41.8 percent and Sub-Saharan Africa at 34.9 percent.⁵² This is despite Africa being one of the richest in terms of natural resources wealth.

10.1.4 Overcoming the Resource Curse in Africa for economic and Human Development

Natural resource wealth is often expected to offer three large benefits for poor economies. First, the income stream from resource extraction can boost real living standards by financing higher levels of public and private consumption. Second, resource extraction can finance higher levels of investment, both directly out of natural resource income, and indirectly from borrowing made possible by that income. Third, since resource income typically accrues largely to the public sector, and indeed to the public budget, it can remove a huge barrier to development: the lack of fiscal resources needed to finance core public goods, including infrastructure.⁵³ Despite this, the natural resource curse has led to a situation where many countries in Africa and the Middle East rich in oil and other natural resources, have their people continuing to experience low per capita income and a low quality of life.⁵⁴

Since minerals and hydrocarbons and indeed most natural resources are finite resources, developing countries rich in these resources should come up with strategies to harness the opportunities created with the extractive industries to support sustainable economic development.⁵⁵ It has been

(2019). Available at <http://hdr.undp.org/sites/default/files/hdr2019.pdf> [Accessed on 26/5/2020].

⁵² UNDP, UNDP. "Human development indices and indicators: 2018 statistical update." (2018): 22-25, at p.22.

⁵³ Badeeb, R.A., Lean, H.H. and Clark, J., "The evolution of the natural resource curse thesis: A critical literature survey." *Resources Policy* 51 (2017): 123-134, at p. 124.

⁵⁴ *Ibid*, p. 124.

⁵⁵ Claudine Sigam and Leonardo Garcia, *Extractive Industries: Optimizing Value Retention In Host Countries*, UNCTAD/SUC/2012/1 (New York and Geneva, 2012), p. 1. Available at https://unctad.org/en/PublicationsLibrary/suc2012d1_en.pdf [Accessed on 26/5/2020].

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acknowledged that some resources such as oil, mineral and gas wealth is distinct from other types of wealth because of its large upfront costs, long production timeline, site-specific nature, scale (sometimes referred to as large *rents*), price and production volatility, non-renewable nature, and the secrecy of the industry.⁵⁶ However, there are a few success stories from the African continent and beyond that would offer valuable lessons to the other countries on how best they can utilize their resources to build their economies and uplift their people from abject poverty. Botswana is one such country.

i. The Case of Botswana: A Success Story

The extractives industry has promoted socio-economic development in some African countries without falling into the trap of resource curse. For instance, Botswana has extractive mineral industries that have played a crucial role in the development of the country. Through proper management of its resources and thus achieving a mineral-led economic growth, the country has been transformed from one of the poorest countries in the world at the time of independence in 1966 to an upper-middle income country.⁵⁷ Botswana mainly exports diamonds, as the world's largest producer in value terms, as well as copper and nickel.⁵⁸

Botswana's record of mineral-led development is remarkable and the country is also considered to be relatively free of the corruption and environmental damage that is often associated with mining industries. Public finances are strong, debt is minimal, and the country enjoys investment-grade credit ratings.⁵⁹ It has been observed that Botswana's

⁵⁶ Natural Resource Governance Institute, "The Resource Curse: The Political and Economic Challenges of Natural Resource Wealth," *NRGI Reader*, March, 2015, p. 1.

⁵⁷ Jefferis, K., "The role of TNCs in the extractive industry of Botswana," *Transnational corporations* 18, no. 1 (2010): 61-92 at p.61.

⁵⁸ *Ibid*, p.61.

⁵⁹ *Ibid*, p.61; See also International Monetary Fund, Botswana: 2017 Article iv Consultation—Press Release; Staff Report, August 2017, IMF Country Report No. 17/249. Available at

<https://www.imf.org/~media/Files/Publications/CR/2017/cr17249.ashx> [Accessed on 26/5/2020].

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approach has not been based on offering low-tax incentives, but on a stable, open and transparent policy regime, free of corruption and political interference, that allows investors freedom to operate once agreements have been reached.⁶⁰

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

Despite scholarly evidence that mineral-dependent economies perform worse than other, otherwise similar economies across the gamut of development indicators and the argument that mineral dependent states have particularly low living standards, high poverty rates, and high income inequality, Botswana seems to have figured it out to go against the grain and achieved high economic development through its mineral resources.⁶³ Other countries like Indonesia, Chile and Tanzania have also mitigated the resource curse effects of their substantial mineral sectors and used those sectors to achieve strong development outcomes in many areas.⁶⁴

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

⁶¹ *Ibid*, p. 62.

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

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

⁶⁴ *Ibid*.

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ii. Utilising Natural resources to Address Poverty in Africa

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

Sustainable exploitation, utilization, management and conservation of the environment and natural resources and equitable sharing of the accruing benefits are key in fighting poverty and consequently, empowering communities for overall national development. The *2030 Agenda for Sustainable Development*⁶⁹ acknowledges that eradicating poverty in all its forms and dimensions, including extreme poverty, is the greatest global challenge and an indispensable requirement for sustainable development.⁷⁰ The mining sector and all other commercially viable resources in any country are expected to uplift the lives of its people by not only creating employment opportunities but also jobs through creating markets for local goods. One way of alleviating poverty in such regions would be empowering the local people through job opportunities such as direct employment opportunities or creating markets for the locally produced

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

⁶⁶ Ibid, Preamble.

⁶⁷ Ibid, Clause 3.2.

⁶⁸ Ibid, Clause 3.2.

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

⁷⁰ Ibid.

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goods and services.⁷¹ Income growth is touted as the main contributor to directly increasing the capabilities of individuals and consequently the human development of a nation since it encapsulates the economy's command over resources.⁷² Improving levels of education and health should have priority or at least move together with efforts to directly enhance growth.⁷³ This would greatly contribute to alleviation of abject poverty in the continent.

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

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

One of the major reasons why the general public in many African countries do not benefit from the wealth of their countries is that they are not even aware of what is available in those countries. They entrust leaders with all the decision-making powers or even denied such rights in decision making

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

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

⁷³ *Ibid*, p. 10.

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

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and the leaders gladly engage in corrupt dealings with local and foreign investors thus benefitting only a few.

Some authors have convincingly argued that where there are adequate funds accruing from natural wealth, governments are likely to become immune to the citizenry's concerns and complaints and even become authoritarian. This is not new in Africa as some of the countries such as Democratic Republic of Congo with immense natural wealth have also had some of the worst internal conflicts. This has been explained in terms of taxation in that, in general, governments are more responsive to their citizens and are more likely to transition to democracy when government spending is reliant on citizen taxation.⁷⁵ However, when countries collect large revenues from natural resources, they are less dependent on levying taxes on citizens, and thus citizens feel less invested in the national budget.⁷⁶

In addition, politicians and government officials are also less directly tied to citizen requests or demands. Further, when resource revenues are secret, citizens do not have a clear sense of whether the resource revenues are being spent well or not.⁷⁷ The proponents of this theory thus suggest that the tendency toward authoritarianism can be mitigated by increasing transparency of revenues and strengthening the links between government and citizens through citizen participation in budgeting or direct distribution of wealth (e.g., cash transfers).⁷⁸

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

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

⁷⁶ *Ibid*, p. 2.

⁷⁷ *Ibid*, p. 2.

⁷⁸ *Ibid*, p. 2.

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

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

iv. Diversifying the Economy: Putting the Natural Resources income to proper Use

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

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

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

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

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behaviour that was attributed to debt crises when revenues declined in Mexico, Nigeria and Venezuela in the 1980s.⁸²

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

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

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

⁸² Natural Resource Governance Institute, "The Resource Curse: The Political and Economic Challenges of Natural Resource Wealth," *NRGI Reader*, March, 2015, p. 3.

⁸³ *Report on the Global Sustainable Blue Economy Conference 26th – 28th November 2018, Nairobi, Kenya*, p.3:

These were held in the context of the Leaders Commitment Segment, nine Signature Thematic Sessions, Business and Private Sector Forum, Governors and Mayors Convention, Science and Research Symposium, Civil Society Forum, Side Events and the Leaders Circle and Closing segments. Partnerships for financing, access to new technologies and innovations; capacity building, integrating women, youth and people in vulnerable situations and opportunities, priorities and challenges in the blue economy sectors were discussed as cross cutting issues (p.3).

⁸⁴ Natural Resource Governance Institute, "The Resource Curse: The Political and Economic Challenges of Natural Resource Wealth," *NRGI Reader*, March, 2015, p. 3.

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price deterioration and economic meltdown like the one currently occasioned by the Coronavirus (Covid-19) disease⁸⁵.

v. Managing Public Spending and Debt

It is not uncommon for African countries to become slaves of foreign countries through aid and takeover of the exploitation of their resources in order to repay huge debts that often accumulate through inefficient spending and borrowing to finance development projects and their governments' recurrent expenditure.

Recently, China has been on the limelight for lending African countries such huge infrastructural loans that they become unable to repay prompting takeover of the extraction of some their natural resources as collateral. Indeed, this idea is not farfetched as China is already reported as having taken land in Tajikistan and a port in Sri Lanka in exchange for the waiving of outstanding debt.⁸⁶

It is estimated that in the five years from 2012 to 2017, Chinese lending to sub Saharan African countries jumped to more than \$10 billion a year, up

⁸⁵ Fernandes, N., "Economic effects of coronavirus outbreak (COVID-19) on the world economy." Available at SSRN 3557504 (2020); 'Complacency to Chaos: How Covid-19 Sent the World's Markets into Freefall | Business | The Guardian' <<https://www.theguardian.com/business/2020/mar/28/how-coronavirus-sent-global-markets-into-freefall>> [Accessed on 27/5/2020].; <https://www.the-star.co.ke/authors/alex-awiti>, 'Covid-19 Triggers Unprecedented Global Economic Turmoil' (*The Star*) <<https://www.the-star.co.ke/opinion/columnists/2020-03-24-covid-19-triggers-unprecedented-global-economic-turmoil/>> [Accessed on 27/5/2020].

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

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from less than \$1 billion in 2001.⁸⁷ During that period, China pledged billions of dollars to countries in loans, grants, and development financing as a way of extending their “win-win” economic policy by investing in railway, highway and port projects besides industrialization.⁸⁸ The result has been a borrowing spree by African countries meant to allegedly boost their infrastructure, economic growth, and global competitiveness, a practice which has come under scrutiny in recent years, with critics noting they could encourage dependency, entrap nations in debt, and push debt limits to unsustainable levels.⁸⁹ Countries such as Kenya, Zambia, Djibouti and Angola have reached critical levels of debt where it has been reported that Angola, for instance, services its debt to China by shipping specific quantities of oil.⁹⁰

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

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

⁸⁸ Ibid.

⁸⁹ Ibid.

⁹⁰ Ibid.

⁹¹ 'SGR Makes Sh10 Billion Loss in First Year: The Standard' <<https://www.standardmedia.co.ke/article/2001288487/sgr-makes-sh10-billion-loss-in-first-year>> [Accessed on 27/5/2020]; 'The Hits, Misses and Hopes of SGR Dream' (*Daily Nation*) <<https://www.nation.co.ke/business/The-big-SGR-dream-begins-to-fizzle-out/996-5138766-97cb5gz/index.html>> [Accessed on 27/5/2020]; 'CS Macharia Defends Loss Making SGR on Sentimental Value' (*Citizen.co.ke*) <<https://citizentv.co.ke/business/cs-macharia-defends-loss-making-sgr-sentimental-value-250788/>> [Accessed on 28/5/2020]; 'SGR Raked in Sh10bn Revenue in First Year' (*Business Daily*) <<https://www.businessdailyafrica.com/economy/SGR-raked-in-Sh10bn-revenue-in-first-year/3946234-5020294-13c0x1lz/index.html>>

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There is a need for African countries to review their priorities in public expenditure and borrowing to minimize the risk of exposure. This will not only ensure economic stability but will also ensure that the available resources are utilized to improve the lives of its people instead of repaying foreign debts. It will also reduce the risk of foreign capture of national resources as collateral.

v. Investing in Science, Technology and Innovation

The ability to generate scientific and technological knowledge and translate it into new products or processes is a key instrument of economic growth and development.⁹² For the longest period, Africa has been a consumer of scientific knowledge, which underpins much of the technological capacities that fuel the knowledge economy: production and services based on knowledge-intensive activities that contribute to an accelerated pace of technological and scientific advance⁹³, rather than a contributor at the global level. This has often reduced it to a consumer of resultant goods and services from the rest of the world as opposed to a producer. Indeed, it is estimated that Africa produces a paltry 1% of the global scientific knowledge.⁹⁴ If Africa is to realise its development agenda and transact business with other continents as able partners, this trend must be addressed.

[Accessed on 28/5/2020]; Julie Owino, 'SGR Profits Rise to Sh8.8 Billion from Sh3.7 Billion in 2019' (*Capital Business*, 17 January 2020)

<<https://www.capitalfm.co.ke/business/2020/01/sgr-profits-rise-to-sh8-8-billion-from-sh3-7-billion-in-2019/>> [Accessed on 28/5/2020].

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

⁹³ Ibid, at p. 674.

⁹⁴ Tom Kariuki, 'Africa Produces Just 1.1% of Global Scientific Knowledge - but Change Is Coming' *The Guardian* (26 October 2015)

<<https://www.theguardian.com/global-development-professionals-network/2015/oct/26/africa-produces-just-11-of-global-scientific-knowledge>>

[Accessed on 28/5/2020]; Elsevier, 'Africa Generates Less than 1% of the World's Research; Data Analytics Can Change That' (*Elsevier Connect*)

<<https://www.elsevier.com/connect/africa-generates-less-than-1-of-the-worlds-research-data-analytics-can-change-that>> [Accessed on 28/5/2020].

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There is a need for Africa to invest heavily in science, technology and innovation for not only insulating their economies but also for development of strong value addition industries and information technology, among others. Science forms a strong basis for improvements in human welfare, through technologies which it develops for health, food production, engineering and communication.⁹⁵ In addition, science is also important in solving problems created by human activity, such as environmental degradation and climate change.⁹⁶ Science, technology and innovation is considered key for future development strategies relating to innovation in products, services, business and social processes as well as models.⁹⁷

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

vi. Reviewing Resource Extraction Agreements

The extractive or mining industries generally have long been touted as key to anchor 'development' or 'economic growth' to alleviate poverty in developing countries.⁹⁹ Despite this, many African countries have largely

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

⁹⁶ Ibid.

⁹⁷ Schaaper, M., "The Importance of Science, Technology and Innovation Indicators for Policy," *UNESCO Institute for Statistics UNESCO Workshop on Surveys on Science, Technology and Innovation (STI) Policy Instruments, Governing Bodies, Policies and Indicators*, Harare, Zimbabwe 7-8 November 2012. Available at http://www.unesco.org/new/fileadmin/MULTIMEDIA/HQ/SC/pdf/UIS-Schaaper_Harare.pdf [Accessed on 28/5/2020].

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

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

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exhibited low levels of development and poor standards of living.¹⁰⁰ This has been attributed to various factors including exploitative multinational corporations, lack of expertise and corruption, and African countries negotiating unfavourable mining development agreements, with the result that the Continent has received inadequate returns for its mineral wealth.¹⁰¹ Some governments often enter into exploitative agreements that result in minimal, if any, benefits accruing to their people or even the national coffers.

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

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

¹⁰¹ Ibid, p.2; Ezekwe sili, O.K., "Harnessing Africa's natural resources to fight poverty," *Daily Nation*, Wednesday April 15 2009. Available at <https://www.nation.co.ke/oped/opinion/440808-560566-gn18o6z/index.html> [Accessed on 28/5/2020].

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

¹⁰³ Ibid.

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

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

There is a need for the African countries to consider renegotiating these agreements in order to safeguard the national interests as far as benefit sharing and economic growth is concerned. Some countries such as Tanzania have sought to renegotiate their extractives exploitation contracts where it was deemed necessary. The Tanzanian government enacted laws that introduced changes in the exploitation of natural resources in the country's mining sector to ensure that Tanzania's natural resources are exploited to benefit the citizens.¹⁰⁶ Some of the laws such as the Natural Wealth and Resources Contracts (*Review and Re-negotiation of Unconscionable Terms*) Act, 2017¹⁰⁷ are meant to empower Parliament to review all the arrangements and agreements made by the government regarding natural resources.¹⁰⁸ The Natural Wealth and Resources Contracts (Review and Re-negotiation of Unconscionable Terms) Act 2017 is meant to give powers to parliament to direct the Government to re-negotiate and rectify any term that seem to bear questionable circumstances in the contracts.

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

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

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

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

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Renegotiation of existing mining agreements may be justified:- when rigid contractual terms provide for an excessive duration, secured against any legislative change; when the agreement reflects the one-sided distribution of bargaining power and ability in favour of the transnational corporations; when circumstances have changed considerably so that the agreement needs adjustment to existing usages; and, when the agreement hampers severely the host country's freedom to employ its natural resources as a lever for effective economic development.¹⁰⁹ Other African countries should consider following Tanzania's path in order to reclaim their rights to exploit and use their natural resources to develop their economies and fight poverty among its citizens.

10.1.5 Conclusion

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

¹⁰⁹ Walde, T.W., "Revision of Transnational Investment Agreements in the Natural Resource Industries," *University of Miami Inter-American Law Review*, Vol.10, no. 2 (1978): 265, at p. 267; Kuruk, Paul. "Renegotiating Transnational Investment Agreements: Lessons for Developing Countries from the Ghana-Valco Experience," *Michigan Journal of International Law* 13, no. 1 (1991): 43-82.

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

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

10.2 African Court of Justice and Human Rights: Emerging Jurisprudence

10.2.1 Introduction

The African Court of Justice and Human Rights, formerly known as the African Court on Human and Peoples' Rights (the African Court) was established under Article 1 of the *Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights*¹¹¹, adopted by Member States of the then Organisation of African Unity (OAU) in Ouagadougou, Burkina Faso, in June 1998 and which Protocol came into force on 25 January 2004.¹¹² With its seat in Arusha, Tanzania, the African Court is one of the two bodies set up by the African Union to monitor human rights violations in the continent and it complements the work of the African Commission on Human and Peoples' Rights (African Commission).¹¹³ The Court's jurisdiction is on all cases and disputes submitted to it concerning the interpretation and application of the African Charter on Human and Peoples' Rights, (the Charter), the Protocol

¹¹¹ Organization of African Unity (OAU), *Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights*, 10 June 1998.

¹¹² 'African Court on Human and Peoples' Rights' <<https://en.african-court.org/>> accessed 18 June 2020.

¹¹³ 'African Court on Human and Peoples' Rights' <african-court-human-and-peoples-rights.html> accessed 19 June 2020.

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and any other relevant human rights instrument ratified by the States concerned, which are specifically classified into two types of jurisdiction: contentious and advisory.¹¹⁴ Article 28 of the Protocol provides that:

The Court shall have jurisdiction over all cases and all legal disputes submitted to it in accordance with the present Statute which relate to:

- a) the interpretation and application of the Constitutive Act;*
- b) the interpretation, application or validity of other Union Treaties and all subsidiary legal instruments adopted within the framework of the Union or the Organization of African Unity;*
- c) the interpretation and the application of the African Charter, the Charter on the Rights and Welfare of the Child, the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, or any other legal instrument relating to human rights, ratified by the States Parties concerned;*
- d) any question of international law;*
- e) all acts, decisions, regulations and directives of the organs of the Union;*
- f) all matters specifically provided for in any other agreements that States Parties may conclude among themselves, or with the Union and which confer jurisdiction on the Court;*
- g) the existence of any fact which, if established, would constitute a breach of an obligation owed to a State Party or to the Union;*
- h) the nature or extent of the reparation to be made for the breach of an international obligation.*

This chapter critically discusses and explores the emerging jurisprudence on the court's role, and its effectiveness in discharging its mandate, in comparison with what has been happening in other regional courts on human rights across the world. However, this chapter is mainly concerned with the Court's jurisdiction in relation to the protection of human rights. This chapter is informed by the fact that despite the existence of the African

¹¹⁴ 'Welcome to the African Court' <<https://en.african-court.org/index.php/12-homepage1/1208-welcome-to-the-african-court1>> accessed 18 June 2020.

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court for the last several years, cases of human rights violations especially by governments in many African states continue to be reported.¹¹⁵

10.2.2 African Court of Justice and Human Rights: The Mandate, Vision and Mission

It is worth noting that while the African Court was established by the *Protocol to the African Charter on Human and People's Rights on the Establishment of an African Court on Human and People's Rights*, 1998, the Protocol, together with the Protocol of the Court of Justice of the African Union, adopted on 11 July 2003 in Maputo, Mozambique, have since been replaced by the *Protocol on the Statute of the African Court of Justice and Human Rights*, 2008¹¹⁶. The new Protocol merged the African Court on Human and Peoples' Rights established by the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights and the Court of Justice of the African Union established by the Constitutive Act of the African Union, into a single Court and established as "The African Court of Justice and Human Rights"¹¹⁷. The *Protocol on the Statute of the African Court of Justice and Human Rights* received its last signature on February 04, 2019 out of the required 15 signatures for it to enter into force.¹¹⁸ The Protocol and the Statute annexed to it was to enter into force thirty (30) days after the deposit of the instruments of ratification by fifteen (15) Member States.¹¹⁹

¹¹⁵ 'Responding to Human Rights Violations in Africa in: International Human Rights Law Review Volume 7 Issue 1 (2018)' <https://brill.com/view/journals/hrlr/7/1/article-p1_1.xml?language=en> accessed 24 June 2020; Wachira, George Mukundi. *African Court on Human and Peoples' Rights: Ten years on and still no justice*. London: Minority Rights Group International, 2008.

¹¹⁶ African Union, *Protocol on the Statute of the African Court of Justice and Human Rights*, 1 July 2008.

¹¹⁷ Article 2, *Protocol on the Statute of the African Court of Justice and Human Rights*, 2008.

¹¹⁸ 'Protocol on the Statute of the African Court of Justice and Human Rights | African Union' <<https://au.int/en/treaties/protocol-statute-african-court-justice-and-human-rights>> accessed 19 June 2020.

¹¹⁹ 'List of Countries Which Have Signed, Ratified/Acceded to the Protocol on the Statute of the African Court Of Justice And Human Rights' <<https://au.int/sites/default/files/treaties/36396-sl->

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As far as the mandate of the African Court is concerned, the Court was established to complement and reinforce the functions of the African Commission on Human and Peoples' Rights (the African Commission – often referred to as the Banjul Commission), which is a quasi-judicial body charged with monitoring the implementation of the Charter.¹²⁰ In the case of *Femi Falana v African Commission on Human and Peoples' Rights (jurisdiction)* (2015), the relationship between the two institutions was put to test and the African Court held that it could not compel the African Commission on Human and Peoples' Rights to refer a case submitted by the complainant before the African Commission to the Court. The Court as stated, *inter alia*: *The relationship between the Court and the Respondent is based on complementarity. Therefore, the Court and the Respondent work as independent yet mutually reinforcing partner institutions with the aim of protecting human rights on the whole continent. Neither institution has the mandate to compel the other to adopt any measures whatsoever.*¹²¹

Regarding who can bring a case before the Court, in the case of *Femi Falana v African Union (jurisdiction)* (2012) 1 AfCLR 118, a Nigerian national, brought this case against the African Union alleging violation of his rights as a result of Nigeria's failure to make a declaration under Article 34(6)¹²² of the Protocol. The Court, by a majority of seven to three votes, held that since the AU is not a party to the Protocol, it could not be subject to its obligations and the Court therefore lacked jurisdiction. This question had previously been dealt with in *Michelot Yogogombaye v The Republic of Senegal*, 2008, where the Court held that "[t]he effect of the foregoing two provisions, read together, is that direct access to the Court by an individual is subject to the

protocol_on_the_statute_of_the_african_court_of_justice_and_human_rights.pdf> accessed 19 June 2020.

¹²⁰ 'Mandate, Vision, Mission & Values' <<https://en.african-court.org/index.php/about-us/mandate-vision-mission-values>> accessed 19 June 2020.

¹²¹ Para. 16, *Femi Falana v African Commission on Human and Peoples' Rights (jurisdiction)* (2015) 1 AfCLR 499.

¹²² The requirement for the Federal Republic of Nigeria to deposit the declaration required under Article 34(6) of

the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights.

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deposit by the Respondent State of a declaration authorizing such a case to be brought before the Court."¹²³

The Court was established with the mission of enhancing the protective mandate of the African Commission on Human and Peoples' Rights by strengthening the human rights protection system in Africa and ensuring respect for and compliance with the African Charter on Human and Peoples' Rights, as well as other international human rights instruments, through judicial decisions.¹²⁴

The vision of the Court is to ensure an African continent with a viable human rights culture.¹²⁵ This is in line with the objectives and aspirations of the *African Charter on Human and Peoples' Rights* (Banjul Charter)¹²⁶. Article 3 of the Protocol provides that the Court shall consist of sixteen (16) Judges who are nationals of States Parties. However, upon recommendation of the Court, the Assembly, may, review the number of Judges.¹²⁷ In addition, the Court should not, at any one time, have more than one judge from a single Member State.¹²⁸ Each geographical region of the Continent, as determined by the Decisions of the Assembly shall, where possible, be represented by three (3) Judges except the Western Region which shall have four (4) Judges.¹²⁹

¹²³ Para 34, *Michelot Yogogombaye v The Republic of Senegal*, Application No 001/2008.

¹²⁴ Mandate, Vision, Mission & Values' <<https://en.african-court.org/index.php/about-us/mandate-vision-mission-values>> accessed 19 June 2020.

¹²⁵ Mandate, Vision, Mission & Values' <<https://en.african-court.org/index.php/about-us/mandate-vision-mission-values>> accessed 19 June 2020.

¹²⁶ African Union, *African Charter on Human and Peoples' Rights* (Banjul Charter), adopted June 27, 1981, OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982), entered into force Oct. 21, 1986.

¹²⁷ Article 3 (1), *Protocol on the Statute of the African Court of Justice and Human Rights*, 2008.

¹²⁸ Article 3 (2), *Protocol on the Statute of the African Court of Justice and Human Rights*, 2008.

¹²⁹ Article 3 (3), *Protocol on the Statute of the African Court of Justice and Human Rights*, 2008.

10.2.3 Effectiveness of African Court of Justice and Human Rights: Prospects and Challenges

From the colonial times, the African continent has been awash with cases of human rights violations, by both governments and private persons. The human rights violations manifested in several forms including slavery, (neo) - colonialism, apartheid, and multidimensional (extreme) poverty.¹³⁰ The violations were perpetrated during colonialism where Africa's human and material resources were 'largely exploited for the benefit of outside powers'.¹³¹ However, even after independence, the African independent Governments continued with the same violations as the leaders sought to unjustly enrich themselves to the detriment of the masses.¹³² Indeed, this state of affairs was one of the concerns that led to the setting up of the Court. The African court was meant to promote the rule of law and end impunity for rights violators.¹³³ For long, the fight for democracy and respect for human rights was mostly left to a handful of civil society activists in most countries across the Continent.¹³⁴ The question of independence of judicial systems and the rampant impunity witnessed in many African states also informed the decision to set up the African Court as an enforcement arm of

¹³⁰ Manisuli Ssenyonjo, 'Responding to Human Rights Violations in Africa: Assessing the Role of the African Commission and Court on Human and Peoples' Rights (1987-2018)', *International Human Rights Law Review*, Volume 7: Issue 1 (2018)

<https://brill.com/view/journals/hrlr/7/1/article-p1_1.xml?language=en> accessed 19 June 2020.

¹³¹ Ibid, p.2.

¹³² 'Africa's Imperial Presidents: Immunity, Impunity and Accountability in: African Journal of Legal Studies Volume 5 Issue 2 (2012)' <https://brill.com/view/journals/ajls/5/2/article-p91_1.xml?language=en> accessed 21 June 2020; Richard Joseph, 'The Democratic Challenge in Africa' (Working Papers from Seminar on Democratization Atlanta, GA: Carter Center ... 1994) < <https://www.cartercenter.org/documents/1220.pdf>> accessed 21 June 2020; Ogbeyi, Michael M. "Political leadership and corruption in Nigeria since 1960: A socio-economic analysis." *Journal of Nigeria studies* 1, no. 2 (2012) < http://www.unh.edu/nigerianstudies/articles/Issue2/Political_leadership.pdf> accessed 21 June 2020.

¹³³ 'Human Rights Move up on Africa's Agenda | Africa Renewal' <<https://www.un.org/africarenewal/magazine/july-2004/human-rights-move-africas-agenda>> accessed 19 June 2020.

¹³⁴ Ibid.

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the African Union.¹³⁵ It has also been argued that 'many African judges are unwilling or unable to rule against their governments, because they are dependent on the ruling parties for their positions, lack the authority to enforce their rulings or, in some cases, may face arrest or assault for challenging government actions.¹³⁶ Indeed, it has been argued that one of the reasons the negotiations for the setting up of the African Court took longer than anticipated was the fact that 'there was not yet sufficient political will among the African states to submit to the jurisdiction of a court'.¹³⁷ Since independence, several human rights treaties have been adopted in Africa to strengthen the protection of rights of vulnerable groups including refugees, children, women, youth, internally displaced persons, and older persons.¹³⁸ One of the mandates of the African Court is *the interpretation and the application of the African Charter, the Charter on the Rights and Welfare of the Child, the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, or any other legal instrument relating to human rights, ratified by the States Parties concerned*.¹³⁹

¹³⁵ Ibid.

¹³⁶ Ibid; See also 'Judiciary: Fighting Graft Needs Muscles | Africa Renewal' <<https://www.un.org/africarenewal/magazine/august-2016/judiciary-fighting-graft-needs-muscles>> accessed 23 June 2020; ISSAfrica.org, 'Chapter 5: The Judiciary' (*ISS Africa*) <<https://issafrika.org/chapter-5-the-judiciary>> accessed 23 June 2020; R Nugent, 'Judicial Independence under Threat?' <<https://www.gcbsa.co.za/law-journals/2000/firstterm/2000-firstterm-vol013-no1-pp37-38.pdf>> accessed 19 June 2020.

¹³⁷ Zimmermann, Andreas, *Current Challenges Facing the African Court on Human and Peoples' Rights*, Konrad Adenauer Stiftung., 2010

< https://www.kas.de/c/document_library/get_file?uuid=1933766c-dbe1-d244-ef61-47dcb64ce9bb&groupId=252038> accessed 19 June 2020.

¹³⁸ Manisuli Ssenyonjo, 'Responding to Human Rights Violations in Africa: Assessing the Role of the African Commission and Court on Human and Peoples' Rights (1987–2018)', *International Human Rights Law Review*, Volume 7: Issue 1 (2018), p.3
<https://brill.com/view/journals/hrlr/7/1/article-p1_1.xml?language=en> accessed 19 June 2020.

¹³⁹ Article 28 (c), *Protocol on the Statute of the African Court of Justice and Human Rights*, 2008.

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Africa has suffered under racial discrimination, slavery as perpetrated by the colonial masters before and after independence. While some states' courts such as South African courts have made considerable steps in strengthening the rule of law and respect for human rights, other countries have done little or nothing towards achieving the same¹⁴⁰, hence the need to strengthen the African court's jurisdiction in protecting the human rights of African people. However, the African Court faces a number of challenges as discussed in this chapter that must first be addressed in order to enhance its efficiency in discharging its mandate in protection of human rights.

10.2.4 The Complementary Role of the Court and the African Commission on Human Rights: The Relevance and the Jurisdiction

The African Commission is supposed to receive and consider cases ('communications') alleging human rights violations by any State party to the African Charter and make quasi-judicial 'recommendations'. The jurisdiction of the Commission is compulsory and automatic as it extends to all States parties to the African Charter.¹⁴¹

Notably, while the African Commission on Human and Peoples' Rights (African Commission) task is to protect and uphold human rights, it is not a judicial, but rather a supervisory body, with no prosecutorial powers over states for breaching human rights.¹⁴² The choice of a non-judicial a

¹⁴⁰'Factors of the Rule of Law' (*World Justice Project*)

<<https://worldjusticeproject.org/our-work/research-and-data/wjp-rule-law-index-2019/factors-rule-law>> accessed 24 June 2020; Abebe, Daniel. "Does international human rights law in African Courts make a difference." *Va. J. Int'l L.* 56 (2016): 527.

¹⁴¹ Manisuli Ssenyonjo, 'Responding to Human Rights Violations in Africa: Assessing the Role of the African Commission and Court on Human and Peoples' Rights (1987-2018)', *International Human Rights Law Review*, Volume 7: Issue 1 (2018), p.4

<https://brill.com/view/journals/hrlr/7/1/article-p1_1.xml?language=en> accessed 19 June 2020.

¹⁴² Zimmermann, Andreas, *Current Challenges Facing the African Court on Human and Peoples' Rights*, Konrad Adenauer Stiftung., 2010

<https://www.kas.de/c/document_library/get_file?uuid=1933766c-dbe1-d244-ef61-47dcb64ce9bb&groupId=252038> accessed 19 June 2020.

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Commission instead of a court was informed by, *inter alia*, that the selection of a non-judicial procedure was more in keeping with African tradition.¹⁴³ However, the African Court has since been established and it operates on the understanding that its role and that of the Commission are complementary. The African Court of Justice and Human Rights is now designated as the main judicial organ of the African Union with its prosecutorial powers.¹⁴⁴

Some of the main achievements of the African Commission since its inception have been listed as including the development of standards on the various provisions of the African Charter through: decisions on admissibility of communications mainly concerning exhaustion of domestic remedies; decisions on merits of communications; adoption of resolutions, principles/guidelines, general comments, model laws and advisory opinions; special rapporteurs and working groups to deal with thematic human rights issues; consideration of State reports and conducting on-site visits; and referral of communications (unimplemented interim measures, serious or massive human rights violations, or Commission's admissibility and merits finding) to the African Court.¹⁴⁵

Notably, the *Protocol on the Statute of the African Court of Justice and Human Rights*, 2008 introduced two chambers in the newly constituted Court after the merger, to have two (2) Sections; a General Affairs Section composed of eight (8) Judges and a Human Rights Section composed of eight (8) Judges.¹⁴⁶

¹⁴³ Ibid, p. 2.

¹⁴⁴ Article 2 (1), *Protocol on the Statute of the African Court of Justice and Human Rights*, 1 July 2008.

¹⁴⁵ Manisuli Ssenyonjo, 'Responding to Human Rights Violations in Africa: Assessing the Role of the African Commission and Court on Human and Peoples' Rights (1987-2018)', *International Human Rights Law Review*, Volume 7: Issue 1 (2018), p.7.

¹⁴⁶ Article 16, *Protocol on the Statute of the African Court of Justice and Human Rights*, 2008.

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Article 29 of the Protocol outlines the entities which are eligible to file cases at the Court as follows: State Parties to the present Protocol; the Assembly, the Parliament and other organs of the Union authorized by the Assembly; a staff member of the African Union on appeal, in a dispute and within the limits and under the terms and conditions laid down in the Staff Rules and Regulations of the Union.¹⁴⁷ However, the Court shall not be open to States, which are not members of the Union. The Court shall also have no jurisdiction to deal with a dispute involving a Member State that has not ratified the Protocol.¹⁴⁸ In addition to the foregoing, the following entities are also entitled to submit cases to the Court on any violation of a right guaranteed by the African Charter, by the Charter on the Rights and Welfare of the Child, the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, or any other legal instrument relevant to human rights ratified by the States Parties concerned: State Parties to the present Protocol; the African Commission on Human and Peoples' Rights; the African Committee of Experts on the Rights and Welfare of the Child; African Intergovernmental Organizations accredited to the Union or its organs; African National Human Rights Institutions; Individuals or relevant Non-Governmental Organizations accredited to the African Union or to its organs, subject to the provisions of Article 8 of the Protocol.¹⁴⁹

Without prejudice to its competence to rule on issues of compensation at the request of a party by virtue of paragraph 1(h), of Article 28 of the present Statute, the Court may, if it considers that there was a violation of a human or peoples' right, order any appropriate measures in order to remedy the situation, including granting fair compensation.¹⁵⁰ The decision of the Court is binding on the parties. Subject to the provisions of paragraph 3, Article 41

¹⁴⁷ Article 29 (1), *Protocol on the Statute of the African Court of Justice and Human Rights*, 2008.

¹⁴⁸ Article 29 (2), *Protocol on the Statute of the African Court of Justice and Human Rights*, 2008.

¹⁴⁹ Article 30, *Protocol on the Statute of the African Court of Justice and Human Rights*, 2008.

¹⁵⁰ Article 45, *Protocol on the Statute of the African Court of Justice and Human Rights*, 2008.

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of the Statute, the judgment of the Court is final.¹⁵¹ However, the Court may either interpret or revise its own judgment at the request of a Party.¹⁵²

It has been noted that unlike its regional counterparts – the Inter-American Court of Human Rights or the European Court of Human Rights (the Inter-American Court and the European Court, respectively) – the African Court does not restrict itself to considering human rights violations exclusively under the regional human rights system under which it was established.¹⁵³ In *Chacha v Tanzania (admissibility)* (2014), the African Court reiterated that ‘as long as the rights allegedly violated are protected by the Charter or any other human rights instrument ratified by the State concerned, the Court will have jurisdiction over the matter’.¹⁵⁴ Some commentators have argued that the effect of the above is that the Court’s authority to issue binding decisions on “any other relevant human rights instrument ratified by the States concerned” means that its jurisdiction extends beyond applying and interpreting just the African Charter.¹⁵⁵ The implication of this is that the African Court not only has potentially greater powers than any adjudicatory body established under any of the international bill of rights but with non-prosecutorial powers but also the Court’s broad adjudication powers would mean that where a particular right is not covered in the African Charter, a citizen of a

¹⁵¹ Article 46, *Protocol on the Statute of the African Court of Justice and Human Rights*, 2008.

¹⁵² Articles 47 & 48, *Protocol on the Statute of the African Court of Justice and Human Rights*, 2008.

¹⁵³ Yakaré-Oulé (Nani) Jansen Reventlow & Rosa Curling, ‘The Unique Jurisdiction of the African Court on Human and People’s Rights: Protection of Human Rights Beyond the African Charter | Emory University School of Law | Atlanta, GA’ (*Emory University School of Law*) <<http://law.emory.edu/eilr/content/volume-33/issue-2/articles/jurisdiction-african-court-human-rights-beyond-african-charter.html>> accessed 24 June 2020.

¹⁵⁴ Para. 113, *Chacha v Tanzania (admissibility)* (2014) 1 AfCLR 398; See also Application Number 001/2012 *Frank David Omary and Others v United Republic of Tanzania* and Application Number 003/2012 *Peter Joseph Chacha v United Republic of Tanzania*; *Thomas v Tanzania (merits)* (2015) 1 AfCLR 465.

¹⁵⁵ Yakaré-Oulé (Nani) Jansen Reventlow & Rosa Curling, ‘The Unique Jurisdiction of the African Court on Human and People’s Rights: Protection of Human Rights Beyond the African Charter | Emory University School of Law | Atlanta, GA’ (*Emory University School of Law*), p. 207.

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Member State falling within the Court's jurisdiction still could be protected if that right is contained in another international human rights treaty ratified by a member state.¹⁵⁶ The challenge would arise in enforcement of such rights in the member state if it does not recognise the rights in question in its domestic laws, for instance, in the case of lesbian, gay, bisexual, transgender, queer and intersex (LGBTQI) rights.¹⁵⁷

Notably, while the Court has power to issue binding decisions, within the African human rights system, the Court's powers cannot be considered unique: the Commission has the same jurisdiction on human rights issues, but its decisions are not binding.¹⁵⁸ This raises the question of how to separate the jurisdiction of the two institutions especially regarding serious cases which can be handled by either of the two bodies. This is because, while the Commission may decide to hear and determine a case itself instead of referring it to the Court, the question of enforcement comes into play. It really matters because it would mean that where the Commission decides to hear the case, the parties thereto may be denied the chance to enjoy real justice as the state parties are not obligated to enforce the same since the Commission's decisions are not binding. The challenge is complicated even further by the fact that while the Commission has automatic jurisdiction on all African States by virtue of their membership to the African Charter, the membership to the Court is by ratification and an optional declaration for member states to allow their citizens and NGOs to have direct access to the Court, as discussed below.¹⁵⁹

¹⁵⁶ Ibid, p. 208.

¹⁵⁷ Ibid, p. 208.

¹⁵⁸ Yakaré-Oulé (Nani) Jansen Reventlow & Rosa Curling, 'The Unique Jurisdiction of the African Court on Human and People's Rights: Protection of Human Rights Beyond the African Charter | Emory University School of Law | Atlanta, GA' (*Emory University School of Law*), p.204.

¹⁵⁹ "The Subject Matter Jurisdiction of the African Court of Human and Peoples' Rights"

<<https://www.icj.org/wp-content/uploads/2015/04/MENA-Arab-Court-Memo-Monageng-Advocacy-2015-ENG.pdf>> 24 June 2020; Juma, Dan. "Access to the African Court on Human and Peoples' Rights: A Case of the Poacher Turned Gamekeeper?." *Available at SSRN 1391482* (2007); Series, SALC Handbook. "Justice

10.2.5 The Challenge of Access to the African Court

Notably, the Protocol allows direct access to the Court by individuals or indirectly through a referral of a case to the Court by the African Commission. The concept of 'access' may be understood as the competence to approach a human rights system in order to: obtain a remedy (in a contentious case); be represented as victim (personally or through a legal representative) before the Court (in contentious proceedings); solicit an advisory opinion, and contribute to Court proceedings as *amicus curiae*.¹⁶⁰ With some African governments feeling that individuals should not have direct access to the Court, some state parties have invoked their right to withdraw the declaration allowing individuals to have direct access to the Court.¹⁶¹ This is because such declarations are optional and state parties may opt out any time, provided that the effect of such withdrawal takes comes into force a year after.¹⁶² This is what happened in the case of Rwanda in 2016 when it withdrew its declaration to give access to African Court for Rwandan individuals and Non-Governmental Organizations (NGOs), which it had made in 2013.¹⁶³ It is reported that the case of *Ingabire Victoire*

for all: Realising the Promise of the Protocol establishing the African Court on Human and Peoples' Rights."

<https://www.southernafricalitigationcentre.org/wp-content/uploads/2017/08/Justice-for-all-Realising-the-Promise-of-the-Protocol-establishing-the-African-Court-on-Human-and-Peoples-Rights-1.pdf> <24 June 2020; Abebe, Daniel. "Does international human rights law in African Courts make a difference." *Va. J. Int'l L.* 56 (2016): 527.

¹⁶⁰ Viljoen, Frans. "Understanding and overcoming challenges in accessing the African Court on Human and Peoples' Rights." (2018), p. 2 <https://repository.up.ac.za/bitstream/handle/2263/65342/Viljoen_Understanding_2018.pdf?sequence=1&isAllowed=y> accessed 23 June 2020.

¹⁶¹ "'Victim of Its Commitment ... You, Passerby, a Tear to the Proclaimed Virtue": Should the Epitaph of the African Court on Human and Peoples' Rights Be Prepared? - EJIL: Talk!" <<https://www.ejiltalk.org/victim-of-its-commitment-you-passerby-a-tear-to-the-proclaimed-virtue-should-the-epitaph-of-the-african-court-on-human-and-peoples-rights-be-prepared/>> accessed 24 June 2020.

¹⁶² 'Declarations Recognizing the Jurisdiction of the Court as Compulsory | International Court of Justice' <<https://www.icj-cij.org/en/declarations>> accessed 24 June 2020.

¹⁶³ 'Rwanda's Withdrawal of Its Special Declaration to the African Court : Setback for the Protection of Human Rights'

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*Umuhoza v. Republic of Rwanda*¹⁶⁴ triggered the decision.¹⁶⁵ In this case, a claim had been made against Rwanda by a leading opposition politician, Victoire Ingabire, who had alleged her imprisonment for genocide denial was unfair and politically motivated.¹⁶⁶

Rwanda's decision was later followed by Tanzania which withdrew its resolution for direct access in 2019. Tanzania's Minister for Foreign Affairs and East African Cooperation signed the notice of withdrawal on 14 November 2019, and the African Union Commission received it on 21 November 2019.¹⁶⁷ Some commentators have attributed this decision to the Court's many judgments against Tanzania over the years.¹⁶⁸ Notably, Tanzania remains a member of the African Court.

The decision by member states to lock out individuals and the civil society from direct access to the court threatens the court's mandate to protect human rights. This is because of the African Court's 30 member states, it is reported that only 10 (Benin, Burkina Faso, Côte d'Ivoire, Gambia, Ghana, Malawi, Mali, Rwanda, Tanzania, and Tunisia) have ever made the declaration under Article 34(6) of the African Court's Protocol accepting the

<<https://www.fidh.org/en/region/Africa/rwanda/joint-civil-society-statement-on-rwanda-s-withdrawal-of-its-article>> accessed 24 June 2020.

¹⁶⁴ *Umuhoza v Rwanda* (003/2014) [2018] AfCHPR 21; (24 November 2017).

¹⁶⁵ 'Rwanda Withdraws Access to African Court for Individuals and NGOs | International Justice Resource Center' <<https://ijrcenter.org/2016/03/14/rwanda-withdraws-access-to-african-court-for-individuals-and-ngos/>> accessed 24 June 2020; *Umuhoza v Rwanda* (003/2014) [2018] AfCHPR 21; (24 November 2017).

¹⁶⁶ 'Rwanda Withdraws Access to African Court for Individuals and NGOs | International Justice Resource Center' <<https://ijrcenter.org/2016/03/14/rwanda-withdraws-access-to-african-court-for-individuals-and-ngos/>> accessed 24 June 2020.

¹⁶⁷ Nicole De Silva, 'Individual and NGO Access to the African Court on Human and Peoples' Rights: The Latest Blow from Tanzania' (*EJIL: Talk!*, 16 December 2019) <<https://www.ejiltalk.org/individual-and-ngo-access-to-the-african-court-on-human-and-peoples-rights-the-latest-blow-from-tanzania/>> accessed 23 June 2020.

¹⁶⁸ *Ibid*; See *Ally Rajabu and Others v. United Republic of Tanzania* concerning Tanzania's mandatory death sentence for murder convictions.

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competence of the Court to receive cases from individuals and NGOs.¹⁶⁹ With the withdrawal of Rwanda and Tanzania, only eight countries have so far afforded their individual citizens and NGOs this possibility. The adverse effect of the states' decision not to make such declarations on the effectiveness of the Court is evidenced by the fact that since the Court's creation in 2006, this direct access has proven to be the Court's main pipeline of cases, giving the Court the opportunity to help victims of human rights violations who exhausted local remedies and went to the regional level to seek justice. Statistics as of September 2019 show that of the 238 applications it has received, individuals made 223 applications, and NGOs made 12 applications.¹⁷⁰

As already observed, the African Court on Human and Peoples' Rights is meant to complement the role of the African Commission on Human and Peoples' Rights in protecting fundamental rights across the continent. However, with states denying their citizens and NGOs direct access to the Court and the Commission only having referred about three cases to the Court, the effectiveness of the Court is greatly reduced. The fact that the Commission does not have prosecutorial powers as the Court makes the role of protecting fundamental rights in the continent even weaker. It also demonstrates the African governments' lack of political will to support the work of the Court and the Commission and thus raises fundamental questions regarding their willingness and commitment to promote the rule of law and protection of human rights. Their membership to the Court's jurisdiction (such as that of Rwanda and Tanzania) is thus seen as a mere formality with no intention of allowing it to exercise its authority in their territories.

¹⁶⁹ Nicole De Silva, 'Individual and NGO Access to the African Court on Human and Peoples' Rights: The Latest Blow from Tanzania' (*EJIL: Talk!*, 16 December 2019).

¹⁷⁰ *Ibid.*

10.2.6 Emerging Jurisprudence on Regional Human Rights Courts: Lessons for the African Court of Justice and Human Rights

As already pointed out, while the African Court has the mandate to decide cases on the Charter and its Protocol, and also any other relevant human rights instrument ratified by the Member State concerned, this unique mandate is not directly matched by either of the Court's regional counterparts: the European Court of Human Rights or the Inter-American Court of Human Rights.¹⁷¹

i. Inter-American Court of Human Rights

The Inter-American Court of Human Rights and the Inter-American Commission on Human Rights are the two bodies established by the Organization of American States to monitor human rights in the Americas.¹⁷² Article 106 of the *Charter of the Organization of American States* (A-41) establishes the Inter-American Commission on Human Rights, whose principal function is to promote the observance and protection of human rights and to serve as a consultative organ of the Organization in these matters. Specifically, in the exercise of its mandate, the Commission has the following functions and powers: to develop an awareness of human rights among the peoples of America; to make recommendations to the governments of the member states, when it considers such action advisable, for the adoption of progressive measures in favor of human rights within the framework of their domestic law and constitutional provisions as well as appropriate measures to further the observance of those rights; to prepare such studies or reports as it considers advisable in the performance of its duties; to request the governments of the member states to supply it with information on the measures adopted by them in matters of human rights; to respond, through the General Secretariat of the Organization of American States, to inquiries made by the member states on matters related to human

¹⁷¹ Yakaré-Oulé (Nani) Jansen Reventlow & Rosa Curling, 'The Unique Jurisdiction of the African Court on Human and People's Rights: Protection of Human Rights beyond the African Charter | Emory University School of Law | Atlanta, GA' (*Emory University School of Law*), p.206.

¹⁷² 'Inter-American Court of Human Rights' <[inter-american-court-human-rights.html](#)> accessed 24 June 2020.

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rights and, within the limits of its possibilities, to provide those states with the advisory services they request; to take action on petitions and other communications pursuant to its authority under the provisions of Articles 44 through 51 of this Convention; and to submit an annual report to the General Assembly of the Organization of American States.¹⁷³

Notably, the Inter-American Court of Human Rights is the judicial organ of the Inter-American human rights system, with a mandate that is more limited than that of the Commission because the Court may only decide cases brought against the Organization of American States (OAS) Member States that have specifically accepted the Court's contentious jurisdiction and those cases must first be processed by the Commission.¹⁷⁴ However, only States parties and the Commission may refer contentious cases to the Court.¹⁷⁵

ii. The European Court of Human Rights

The *European Convention for the Protection of Human Rights and Fundamental Freedoms*¹⁷⁶ establishes the European Court of Human Rights to ensure the observance of the engagements undertaken by the High Contracting Parties in the Convention and the Protocols thereto.¹⁷⁷ The jurisdiction of the Court extends to all matters concerning the interpretation and application of the Convention and the protocols thereto which are referred to it as provided in Articles 33, 34, 46 and 47.¹⁷⁸ In addition, the Court may, at the request of the Committee of Ministers, give advisory opinions on legal questions

¹⁷³ Article 41, *American Convention on Human Rights*, Adopted at the Inter-American Specialized Conference on Human Rights, San José, Costa Rica, 22 November 1969.

¹⁷⁴ 'Inter-American Human Rights System | International Justice Resource Center' <<https://ijrcenter.org/regional/inter-american-system/>> accessed 24 June 2020.

¹⁷⁵ Article 61, Organization of American States (OAS), *American Convention on Human Rights*, Adopted at the Inter-American Specialized Conference on Human Rights, San José, Costa Rica, 22 November 1969.

¹⁷⁶ Convention for the Protection of Human Rights and Fundamental Freedoms as amended by Protocols No. 11 and No. 14, European Treaty Series-No. 5, Rome, 4.XI.1950.

¹⁷⁷ Ibid, Article 19.

¹⁷⁸ Ibid, Article 32.

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concerning the interpretation of the Convention and the protocols thereto.¹⁷⁹ However, such opinions must not deal with any question relating to the content or scope of the rights or freedoms defined in Section I of the Convention and the protocols thereto, or with any other question which the Court or the Committee of Ministers might have to consider in consequence of any such proceedings as could be instituted in accordance with the Convention.¹⁸⁰

Notably, the Convention provides that 'any High Contracting Party may refer to the Court any alleged breach of the provisions of the Convention and the protocols thereto by another High Contracting Party'.¹⁸¹ Of significant relevance is the provision that '*the Court may receive applications from any person, non-governmental organisation or group of individuals claiming to be the victim of a violation by one of the High Contracting Parties of the rights set forth in the Convention or the protocols thereto. The High Contracting Parties undertake not to hinder in any way the effective exercise of this right*'.¹⁸²

While the Convention provides that the Court may only deal with the matter after all domestic remedies have been exhausted, according to the generally recognised rules of international law, and within a period of six months from the date on which the final decision was taken¹⁸³, the European Court practice departs from the African Court's approach that requires that the concerned party state must have made a declaration to allow its individual citizens or NGOs to directly access the Court. The European Court goes further to make a provision to the effect that the High Contracting Parties must undertake not to hinder in any way the effective exercise of this right of individuals' and NGOs' direct access to the Court¹⁸⁴.

¹⁷⁹ Ibid, Article 47(1).

¹⁸⁰ Ibid, Article 47(2).

¹⁸¹ Ibid, Article 33.

¹⁸² Ibid, Article 34.

¹⁸³ Ibid, Article 35 (1).

¹⁸⁴ Ibid.

10.2.7 Conclusion and the Future of the African Court and Commission

As the African Court establishes its jurisprudence, it may require revisiting the emerging issues of the extent of its jurisdiction by consideration and a balancing of the scope of rights as intended by the drafters of the Charter with those protected by other human rights treaties.¹⁸⁵ In addition, there is a need for the African Union Member States to revisit the Protocol and the Charter especially in the case of the requirement for countries to make declarations allowing individuals and NGOs to have direct access to the African Court as a way of showing their commitment to fight human rights violations in the Continent. They need to borrow a leaf from the European Union's approach to the same. The current approach that allows states to opt in and out of making such declarations is arguably self-defeating in achieving the mandate of the African Charter and Protocol on protecting the human rights of Africans. The Court must be allowed to build its jurisprudence and legacy on comprehensive protection of human rights in the continent without fear of sabotage or reprisal from the member states. The jurisdiction of the African Commission may also need to be reconsidered by either giving it prosecutorial powers over certain cases or by making it part of the African Court's human rights division in order to ensure that all their decisions can be enforced against member states. While the Commission has played a significant role in exposing instances of human rights violations in many African States, reparation for such victims will remain a dream as long as direct access to the Court is hampered and the Commission's role is reduced to that of making recommendations. If the African continent is to shed the longstanding tag of impunity and violation of human rights, then the above concerns must urgently be addressed. This is in light of the fact that human rights form the basis of sustainable development goals.

¹⁸⁵ Yakaré-Oulé (Nani) Jansen Reventlow & Rosa Curling, 'The Unique Jurisdiction of the African Court on Human and People's Rights: Protection of Human Rights beyond the African Charter | Emory University School of Law | Atlanta, GA' (*Emory University School of Law*), p.208.

10.3 Investment-Related Dispute Settlement under the African Continental Free Trade Agreement: Promises and Challenges

10.3.1 Introduction

Calls for the unity of African states have been the centre of development discourses as advanced by many African scholars and political leaders.¹⁸⁶ The African continent has for the longest time sought unity of purpose among the African countries especially in matters relating to trade and investments, by coming up with agreements that will facilitate the same through the principle of free movement of people and goods within the continent.¹⁸⁷ The first real steps towards creation of an African economic community were first crystalized through the *Abuja Declaration of 1991*¹⁸⁸.

The agreements are meant to promote regional integration aimed at eliminating tariff and non-tariff barriers across different African regions for ease of regional trading. In addition, the agreements are meant to also give it bargaining power when it comes to intercontinental trading.¹⁸⁹ For instance, since its inception, the European Union has acted with a single external voice in international trade negotiations.¹⁹⁰

¹⁸⁶ Nkrumah, Kwame, Roberta Arrigoni, and Giorgio Napolitano. *Africa must unite*. London: Heinemann, 1963

<<http://feintandmargin.com/wp-content/uploads/2015/04/Africa-Must-Unite.pdf>> accessed 9 June 2020.

¹⁸⁷ 'How to Boost Trade within Africa | Africa Renewal'

<<https://www.un.org/africarenewal/magazine/september-2002/how-boost-trade-within-africa>> accessed 9 June 2020; 'Africa Set for a Massive Free Trade Area | Africa Renewal' <<https://www.un.org/africarenewal/magazine/august-november-2018/africa-set-massive-free-trade-area>> accessed 9 June 2020.

¹⁸⁸ Declaration A/DCL.1/7/91 of the Authority of Heads of State and Government.

¹⁸⁹ 'Time to Reset African Union-European Union Relations' (*Crisis Group*, 17 October 2017) <<https://www.crisisgroup.org/africa/255-time-reset-african-union-european-union-relations>> accessed 9 June 2020.

¹⁹⁰ 'Free Trade Agreements: Corporate Law Powers of the EU and Member States, and a Way Forward' (*Oxford Law Faculty*, 10 October 2019) <<https://www.law.ox.ac.uk/business-law-blog/blog/2019/10/free-trade-agreements-corporate-law-powers-eu-and-member-states-and>> accessed 11 June 2020.

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One such Agreement that is meant to promote intra-African trade and investment is the *African Continental Free Trade Agreement*¹⁹¹ (AfCFTA) whose main objectives are to create a single continental market for goods and services, with free movement of business persons and investments, and thus pave the way for accelerating the establishment of the Customs Union; expand intra-African trade through better harmonization and coordination of trade liberalization and facilitation and instruments across the Regional Economic Communities (RECs) and across Africa in general; and also expected to enhance competitiveness at the industry and enterprise level through exploitation of opportunities for scale production, continental market access and better reallocation of resources.¹⁹² Currently, the African countries trade in terms of blocks, with States forming RECs such as the East African Community (EAC), Economic Community of West African States (ECOWAS) and Southern African Development Community (SADC).

All these are geared towards promoting regional markets integration but the AfCFTA is meant to work towards achieving economic integration of major African markets with the smaller markets and enhance competitiveness at the industry and enterprise level by exploiting opportunities for scale production, continental market access and better reallocation of resources.¹⁹³

¹⁹¹ African Union, Agreement Establishing the African Continental Free Trade Area. March 21, 2018. (entered into force May 30, 2019)

<https://au.int/sites/default/files/treaties/36437-treaty-consolidated_text_on_cfta_-_en.pdf> accessed 9 June 2020.

¹⁹² TRALAC Trade Law Centre, 'African Continental Free Trade Area (AfCFTA) Legal Texts and Policy Documents' (*tralac*)

<<https://www.tralac.org/resources/our-resources/6730-continental-free-trade-area-cfta.html>> accessed 9 June 2020.

¹⁹³ 'Preparing for Trade under the AfCFTA Agreement' (ECDPM) <<https://ecdpm.org/great-insights/african-continental-free-trade-area-agreement-impact/preparing-trade-afcfta-agreement/>> accessed 15 June 2020;

Gayathri Iyer and Gayathri Iyer, 'AfCFTA: Need for Integrating the African Continental Infrastructure Framework' (*ORF*)

<<https://www.orfonline.org/expert-speak/afcfta-need-for-integrating-the-african-continental-infrastructure-framework-51507/>> accessed 15 June 2020;

Marcia Tavares, 'The African Continental Free Trade Area Agreement - What Is Expected of LDCs in Terms of Trade Liberalisation? By Trudi Hartzenberg,

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All these trading and investment activities are expected to come with disputes which, if not well handled, would derail the above listed objectives of AfCFTA. While the Agreement provides for a dispute settlement body and the procedures to be followed, it presents a potential challenge where dealing with an investment dispute that is intercontinental. Normally, when investors and regional unions from out of Africa such as the European Union have disputes, they may prefer to use investment-related dispute settlement mechanisms such as investor-state dispute arbitration, which they may perceive as neutral. Notably, the African Union does not currently have a specialized forum to hear trade related disputes.¹⁹⁴

The Agreement provides that each State Party shall promptly publish or make publicly available through accessible mediums its laws, regulations, procedures and administrative rulings of general application as well as any other commitments under an international agreement relating to any trade matter covered by this Agreement.¹⁹⁵

It is also worth pointing out that AfCFTA provides that laws, regulations, procedures and administrative rulings of general application as well as any other commitments under an international agreement relating to any trade matter covered by this Agreement adopted after the entry into force of this Agreement shall be notified by State Parties in one (1) of the African Union working languages to other State Parties through the Secretariat.¹⁹⁶ AfCFTA however provides that the Agreement shall not nullify, modify or revoke rights and obligations under pre-existing trade agreements that State Parties have with Third Parties.¹⁹⁷ This provision raises the question of the place of

Executive Director, Trade Law Centre (Tralac) and Member of the Committee for Development Policy (CDP) | LDC Portal' <<https://www.un.org/ldcportal/afcfta-what-is-expected-of-ldcs-in-terms-of-trade-liberalisation-by-trudi-hartzenberg/>> accessed 15 June 2020.

¹⁹⁴ TRALAC Trade Law Centre, 'African Continental Free Trade Area (AfCFTA) Legal Texts and Policy Documents' (*tralac*), p. 1.

¹⁹⁵ Article 16 (1), *African Continental Free Trade Area Agreement*.

¹⁹⁶ *Ibid*, Article 17 (1).

¹⁹⁷ *Ibid*, Article 18 (3).

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dealings of two member states that are also bound by international legal instruments especially in dispute settlement. This raises the question whether such countries can freely pick such a foreign mechanism if they both agree to the same.

In the event of any conflict and inconsistency between the AfCFTA and any regional agreement, the Agreement provides that its provisions shall prevail to the extent of the specific inconsistency, except as otherwise provided in the Agreement.¹⁹⁸ In addition, notwithstanding the provisions of Paragraph 1 of Article 19, State Parties that are members of other regional economic communities, regional trading arrangements and custom unions, which have attained among themselves higher levels of regional integration than under the Agreement, shall maintain such higher levels among themselves.¹⁹⁹

This chapter offers a critical discussion on the African Continental Free Trade Agreement and evaluates the effectiveness of investment dispute settlement provisions under the Agreement.

10.3.2 Overview of the African Continental Free Trade Agreement: Scope, Objectives and Principles

The *African Continental Free Trade Area Agreement* (“the AfCFTA”), unveiled in March, 2018 in Kigali, Rwanda, was put in place to establish the African Continental Free Trade Area Agreement,²⁰⁰ and so far is considered the world’s largest free trade area: 55 countries merging into a single market of 1.2 billion people with a combined GDP of \$2.5 trillion.²⁰¹

Generally, the Agreement is expected to: create a single market for goods, services, facilitated by movement of persons in order to deepen the

¹⁹⁸ Ibid, Article 19 (1).

¹⁹⁹ Ibid, Article 19 (2).

²⁰⁰ Article 2, *African Continental Free Trade Area Agreement*.

²⁰¹ ‘Africa Set for a Massive Free Trade Area | Africa Renewal’ <<https://www.un.org/africarenewal/magazine/august-november-2018/africa-set-massive-free-trade-area>> accessed 9 June 2020.

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economic integration of the African continent and in accordance with the Pan African Vision of “An integrated, prosperous and peaceful Africa” enshrined in Agenda 2063; create a liberalised market for goods and services through successive rounds of negotiations; contribute to the movement of capital and natural persons and facilitate investments building on the initiatives and developments in the State Parties and RECs; lay the foundation for the establishment of a Continental Customs Union at a later stage; promote and attain sustainable and inclusive socio-economic development, gender equality and structural transformation of the State Parties; enhance the competitiveness of the economies of State Parties within the continent and the global market; promote industrial development through diversification and regional value chain development, agricultural development and food security; and resolve the challenges of multiple and overlapping memberships and expedite the regional and continental integration processes.²⁰²

In order to achieve the foregoing general objectives, AfCFTA is expected to specifically achieve the following objectives: progressively eliminate tariffs and non-tariff barriers to trade in goods; progressively liberalise trade in services; cooperate on investment, intellectual property rights and competition policy; cooperate on all trade-related areas; cooperate on customs matters and the implementation of trade facilitation measures; establish a mechanism for the settlement of disputes concerning their rights and obligations; and establish and maintain an institutional framework for the implementation and administration of the AfCFTA.²⁰³

The implementation of AfCFTA is to be governed by the following principles: driven by Member States of the African Union; RECs' Free Trade Areas (FTAs) as building blocs for the AfCFTA; variable geometry; flexibility and special and differential treatment; transparency and disclosure of information; preservation of the acquis; Most-Favoured-Nation (MFN) Treatment; National Treatment; reciprocity; substantial liberalisation; consensus in decision-making; and best practices in the RECs,

²⁰² Article 3, *African Continental Free Trade Area Agreement*.

²⁰³ Article 4, *African Continental Free Trade Area Agreement*.

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in the State Parties and International Conventions binding the African Union.²⁰⁴

Notably, the scope of AfCFTA shall cover trade in goods, trade in services, investment, intellectual property rights and competition policy.²⁰⁵ Member States were to enter into Phase II negotiations in the following areas: intellectual property rights; investment; and competition policy, which negotiations were to commence after the adoption of the Agreement by the Assembly and were to be undertaken in successive rounds.²⁰⁶

The Agreement is designed to work hand in hand with the Protocols on Trade in Goods, Trade in Services, Investment, Intellectual Property Rights, Competition Policy, Rules and Procedures on the Settlement of Disputes and their associated Annexes and Appendices, upon adoption, and shall form an integral part of the Agreement.²⁰⁷

The institutional framework for the implementation, administration, facilitation, monitoring and evaluation of the AfCFTA consists of the following: the Assembly; the Council of Ministers; the Committee of Senior Trade Officials; and the Secretariat,²⁰⁸ with the Assembly, as the highest decision-making organ of the AU, providing oversight and strategic guidance on the AfCFTA, including the Action Plan for Boosting Intra-African Trade (BIAT).²⁰⁹

Decisions of the AfCFTA institutions (namely the Assembly, the Council of Ministers and the Committee of Senior Trade Officials) on substantive issues are to be taken by consensus.²¹⁰

²⁰⁴ Article 5, *African Continental Free Trade Area Agreement*.

²⁰⁵ Article 6, *African Continental Free Trade Area Agreement*.

²⁰⁶ Article 7, *African Continental Free Trade Area Agreement*.

²⁰⁷ Article 8, *African Continental Free Trade Area Agreement*.

²⁰⁸ Article 9, *African Continental Free Trade Area Agreement*.

²⁰⁹ Article 10 (1), *African Continental Free Trade Area Agreement*.

²¹⁰ Article 14 (1), *African Continental Free Trade Area Agreement*.

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The Agreement and the Protocols on Trade in Goods, Trade in Services, and Protocol on Rules and Procedures on the Settlement of Disputes were to enter into force thirty (30) days after the deposit of the twenty second (22nd) instrument of ratification.²¹¹ It is worth mentioning that AfCFTA entered into force on 30th May, 2019 after achieving the required minimum number of ratifications, that is, 22 countries ratifying the same.²¹² The Agreement is also categorical that no reservations shall be made to the Agreement.²¹³

i. Disputes Settlement Provisions under AfCFTA

As highlighted above, the scope of AfCFTA includes goods, trade in services, investment, intellectual property rights and competition policy. This also comes with the need for provision for settlement of disputes relating to these areas. Notably, the Agreement provides for establishment of a Dispute Settlement Mechanism which shall apply to the settlement of disputes arising between State Parties.²¹⁴ The Dispute Settlement Mechanism shall be administered in accordance with the Protocol on Rules and Procedures on the Settlement of Disputes.²¹⁵ In addition, the Protocol on Rules and Procedures on the Settlement of Disputes is to establish, inter alia, a Dispute Settlement Body.²¹⁶

The *Protocol on Rules and Procedures on the Settlement of Disputes* (the Protocol) applies to disputes arising between State Parties concerning their rights and

²¹¹ Article 23 (1), *African Continental Free Trade Area Agreement*; Hogan Lovells, 'Report on the African Continental Free Trade Agreement 2019: Implications for the continent,' November 2019

<<https://www.hoganlovells.com/en/knowledge/topic-centers/~media/2e3f5059b0c44b3c84d8e5bc375abf8.ashx>> 15 June 2020.

²¹² 'AfCFTA Agreement Secures Minimum Threshold of 22 Ratification as Sierra Leone and the Saharawi Republic Deposit Instruments. | African Union' <<https://au.int/en/pressreleases/20190429/afcfta-agreement-secures-minimum-threshold-22-ratification-sierra-leone-and>> accessed 15 June 2020.

²¹³ Article 25, *African Continental Free Trade Area Agreement*.

²¹⁴ Article 20 (1), *African Continental Free Trade Area Agreement*.

²¹⁵ Article 20 (2), *African Continental Free Trade Area Agreement*.

²¹⁶ Article 20 (3), *African Continental Free Trade Area Agreement*; TRALAC TRADE LAW CENTRE, 'The Dispute Settlement Mechanism under the African Continental Free Trade Area' (*tralac*) <<https://www.tralac.org/blog/article/13529-the-dispute-settlement-mechanism-under-the-african-continental-free-trade-area.html>> accessed 15 June 2020.

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obligations under the provisions of the Agreement.²¹⁷ The Protocol provides that a State Party which has invoked the rules and procedures of this Protocol with regards to a specific matter shall not invoke another forum for dispute settlement on the same matter.²¹⁸

The Protocol provides for the use of consultations, mediation, Dispute Settlement Board (DSB) and arbitration to settle disputes arising from the Agreement.²¹⁹ Notably, the Protocol provides that the DSB will only hear disputes from State Parties to the AfCFTA Agreement.²²⁰ Despite the foregoing provisions, the Protocol provides for arbitration as an elective process that State Parties may opt for. It specifically provides that 'where the parties to a dispute consider it expedient to have recourse to arbitration as the first dispute Settlement Avenue, the parties to a dispute may proceed with arbitration as provided for in Article 27 of this Protocol.²²¹ Article 27 of the Protocol provides that Parties to a dispute may resort to arbitration subject to their mutual agreement and shall agree on the procedures to be used in the arbitration proceedings.²²² Such referral of a dispute for arbitration pursuant to this Article shall bar Parties from simultaneously referring the same matter to the Dispute Settlement Mechanism.²²³ The Parties to an arbitration proceeding shall abide by the arbitration award and the award shall be notified to the DSM for enforcement.²²⁴ However, such arbitration seems to be only on trial basis since the Protocol provides that in the event of a Party to a dispute refusing to cooperate, the Complaining Party shall refer the matter to the DSB for determination.²²⁵ Where

²¹⁷ Article 3 (1), *Protocol on Rules and Procedures on the Settlement of Disputes*.

²¹⁸ Article 3 (4), *Protocol on Rules and Procedures on the Settlement of Disputes*.

²¹⁹ Articles 4-27, *Protocol On Rules and Procedures On the Settlement of Disputes*.

²²⁰ Article 3 (1), *Protocol on Rules and Procedures on the Settlement of Disputes*; TRALAC Trade Law Centre, 'The Dispute Settlement Mechanism under the African Continental Free Trade Area' (tralac)

<<https://www.tralac.org/blog/article/13529-the-dispute-settlement-mechanism-under-the-african-continental-free-trade-area.html>> accessed 15 June 2020.

²²¹ Article 6(6), *Protocol on Rules and Procedures on the Settlement of Disputes*.

²²² Article 27(1), *Protocol on Rules and Procedures on the Settlement of Disputes*.

²²³ Article 27(2), *Protocol on Rules and Procedures on the Settlement of Disputes*

²²⁴ Article 27(5), *Protocol on Rules and Procedures on the Settlement of Disputes*

²²⁵ Article 27(6), *Protocol on Rules and Procedures on the Settlement of Disputes*

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arbitration awards are not contested, the same shall be enforced in accordance with the provisions of Articles 24 and 25 of this Protocol *mutatis mutandis*.²²⁶

10.3.3 Investment-Related Dispute Settlement under the African Continental Free Trade Agreement: Promises and Challenges

Notably, neither the Agreement nor the Protocol defines what is meant by the use of the term 'arbitration' therein. It has rightly been pointed out that while investment disputes can sometimes be resolved in local courts, or through state-state dispute settlement, the most common way in which breaches of an investment treaty are enforced is via investor-state arbitration.²²⁷

It is therefore unclear if the same would entail state-state arbitration under international arbitration panels as well. The question is whether a party may choose an international arbitral body or expert to carry out arbitration. In addition, there is a question as to whether, where two states agree on an international body, Dispute Settlement Board under the Agreement can overrule this parties' agreement in favour of regional expertise. This is important because where Parties elect to use arbitration and opt to use state-state arbitration before international arbitration bodies in cases involving investments, with binding procedural rules from bodies being used, and one Party opts out, the question that would arise is whether by seeking audience before international arbitration bodies, the jurisdiction of the DSB is ousted so that Parties would not go back for the determination of their dispute by the DSM. This would especially be important where two African States had included a state-state arbitration clause in their investment agreement.

The other scenario where a challenge would arise would be where an investor from African Country A, in the spirit of the AfCFTA, invests in

²²⁶ Article 27(7), *Protocol on Rules and Procedures on the Settlement of Disputes*

²²⁷ 'How International Investment Dispute Settlement Works' (WHO FCTC Secretariat's Knowledge Hub on legal challenges, 20 March 2017) <<https://untobaccocontrol.org/kh/legal-challenges/investment/dispute-settlement/>> accessed 11 June 2020.

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African Country B and they agree to refer any investment disputes to investor-state arbitration, on the strength of the fact that Countries A and B are State parties to an international investor-state arbitration agreement or against the background of a Bilateral Investment Treaty between the two countries. It is not yet clear what would happen if Government of Country B responds by invoking the State-State arbitration procedure of the same treaty or the implied broad interpretation of AfCFTA.²²⁸ The difficulty in determining the above potential disputes is further aggravated by the fact that whereas state-state dispute settlement predates investor-state arbitration, and was the norm in the early Friendship, Commerce and Navigation (FCN) treaties and some early investment treaties, today, most investment treaties include both state-state and investor-state dispute settlement mechanisms.²²⁹ AfCFTA notably defines "Member States" to mean the Member States of the African Union. The implication of this is that the Agreement and the related Protocols only envisage that it is for the states to bring disputes before the dispute settlement body either on behalf of their governments or the individual investors. It may therefore be assumed that it only provides for state-state dispute settlement and not investor-state dispute settlement.

Investor-State arbitration and state-state arbitration have traditionally been carried out by international arbitral tribunals such as the International Centre for the settlement of Investment Disputes (ICSID), the United

²²⁸ For instance, see, J Seifi, 'Investor-State Arbitration v State-State Arbitration in Bilateral Investment Treaties' (2004) 1 Transnational Dispute Management (TDM) <<https://www.transnational-dispute-management.com/article.asp?key=112>> accessed 11 June 2020.

"...following the decision by a Chilean firm, Lucchetti, to institute Investor-State arbitral proceedings against the Peruvian Government under the terms of the Chile-Peru Bilateral Investment Treaty, the Peruvian Government responded by invoking the State-State arbitration procedure of the same treaty. Both the Investor-State dispute and the State-State dispute were officially registered with the Secretariat of the ICSID."

²²⁹ Bernasconi-Osterwalder, N., "State-state dispute settlement in investment treaties." *Rethinking Bilateral Investment Treaties* (2014): 253, p.1 <<https://www.iisd.org/sites/default/files/publications/best-practices-state-state-dispute-settlement-investment-treaties.pdf>> accessed 11 June 2020.

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Nations Commission on International Trade Law (UNCITRAL), the International Chamber of Commerce (ICC), the International Court of Arbitration (ICA), the Permanent Court of Arbitration (PCA), the International Court of Justice (ICC), the Arbitration Institute of the Stockholm Chamber of Commerce (SCC), or the London Court of International Arbitration (LCIA).²³⁰ However, most African countries and indeed many countries in the developing world the world over have complained about lack of legitimacy and transparency, exorbitant costs of arbitration proceedings and arbitral awards as well as inconsistent and flawed decisions, with developing countries that are mostly dragged before these bodies also getting concerned about the violation of their sovereignty.²³¹ With African countries alive to these concerns, there is a need to streamline the dispute settlement mechanisms under AfCFTA in order to enhance their effectiveness.

10.3.4 Streamlining Investment Disputes Settlement under AfCFTA

Some commentators have observed that the AfCFTA Agreement will hopefully include an investment protocol, which is likely to include substantive investment protections and a separate set of rules for the resolution of investment disputes, during African Union's Phase II negotiations.²³² It is recommended that such an investment protocol will consider the issues discussed under this section.

²³⁰ 'Arbitration Centres | United Nations Commission on International Trade Law' <<https://uncitral.un.org/en/texts/arbitration/contractualtexts/arbitration/centres>> accessed 15 June 2020.

²³¹ TRALAC Trade Law Centre, 'Investor-State Dispute Settlement in Africa and the AfCFTA Investment Protocol' (*tralac*) <<https://www.tralac.org/blog/article/13787-investor-state-dispute-settlement-in-africa-and-the-afcfta-investment-protocol.html>> accessed 13 June 2020.

²³² Hogan Lovells, 'Report on the African Continental Free Trade Agreement 2019: Implications for the continent,' November 2019, p.9.

a) Clarification of Definition of Arbitration and the Arbitration Body under AfCFTA

It is necessary for the AfCFTA to be reviewed and clarify whether arbitration as provided for under the Agreement and the relevant protocol covers state-state arbitration, investor-state arbitration or both. It is also necessary to make it clear as to which body would be charged with conducting the arbitration process whose decision is then adopted as the decision of the Dispute Settlement Board. This is especially important considering that the Agreement and the Protocol on dispute settlement omitted any reference to the international arbitration bodies such as the International Centre for Settlement of Investment Disputes (ICSID) and the Permanent Court of Arbitration.

Defining the body charged with arbitration may save parties considerable time and resources as opposed to the current position where parties have the right to appoint such arbitrator (s), failing which the Board would appoint them on the parties' behalf.

b) Inclusion of Judicial Mechanisms to Settle State-State Disputes?

Notably, a number of African states subscribe to the ICSID system as a way of attracting foreign investments. This is because most of the foreign investors do not have confidence in the local frameworks on investment disputes settlement.²³³ For instance, the Investment Agreement for the COMESA Common Investment Area requires that its Member States should, where they have not done so, endeavour to accede to: the New York Convention on the Recognition and Enforcement of Foreign

²³³The Evolution of Investment Arbitration in Africa' <https://globalarbitrationreview.com/print_article/gar/editorial/1169359/the-evolution-of-investment-arbitration-in-africa?print=true> accessed 15 June 2020; Engela C Schlemmer, 'An Overview of South Africa's Bilateral Investment Treaties and Investment Policy' (2016) 31 ICSID Review - Foreign Investment Law Journal 167; Charles N. Brower and Michael P. Daly, 'A Study of Foreign Investment Law in Africa: Opportunity Awaits,' https://www.arbitration-icca.org/media/7/82088225980224/brower__daly_a_study_of_foreign_investment_law_in_africa.pdf 15 June 2020.

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Arbitral Awards; the International Convention on Settlement of Investment Disputes between States and Nationals of Other States; the Convention Establishing the Multilateral Investment Guarantee Agency; the Agreement Establishing the African Trade Insurance Agency; and any other multilateral agreement designed to promote or protect investment.²³⁴

The creation of a new dispute settlement system under AfCFTA creates new challenges as to how disputes with foreigners on matters falling under this Agreement will be dealt with. This is because the AfCFTA is an agreement among African Union member states and cannot therefore create any rights or obligations for foreign (non-African) investors.²³⁵ However, most African national courts have been associated with lack of impartiality and independence from their governments and may also not have expertise investment-related arbitrations.²³⁶ This may therefore not be viable as at now and will take time to equip them properly and also have them shed the notions of lack of impartiality and independence. There is however a need for national courts to work towards enhancing their independence and impartiality.

c) Use of Regional Courts for State-State Arbitration?

Currently, the place of regional courts in settlement of disputes especially through arbitration as far as disputes arising under the AfCFTA Investment Protocol are concerned is not clear. The courts, such as the East African Court of Justice (EACJ) have not been expressly mentioned in the Agreement. This is unlike the provisions in the *Investment Agreement for the COMESA Common Investment Area* which expressly provides that 'any dispute between Member States as to the interpretation or

²³⁴ Article 6, Investment Agreement for the COMESA Common Investment Area <<https://www.iisd.org/toolkits/sustainability-toolkit-for-trade-negotiators/wp-content/uploads/2016/06/rei120.06tt1.pdf>> accessed 13 June 2020.

²³⁵ TRALAC Trade Law Centre, 'Investor-State Dispute Settlement in Africa and the AfCFTA Investment Protocol' (*tralac*) <<https://www.tralac.org/blog/article/13787-investor-state-dispute-settlement-in-africa-and-the-afcfta-investment-protocol.html>> accessed 13 June 2020.

²³⁶ *Ibid.*

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application of this Agreement not satisfactorily settled through negotiation within 6 months, may be referred for decision to either: (i) an arbitral tribunal constituted under the COMESA Court of Justice in accordance with Article 28(b) of the COMESA Treaty; or (ii) an independent arbitral tribunal; or (iii) the COMESA Court of Justice sitting as a court'.²³⁷

As for Investor-State disputes, the *Investment Agreement for the COMESA Common Investment Area* provides that 'in the event that a dispute between a COMESA investor and a Member State has not been resolved pursuant to good faith efforts in accordance with Article 26, a COMESA investor may submit to arbitration under this Agreement a claim that the Member State in whose territory it has made an investment has breached an obligation under Part Two of this Agreement and that the investment has incurred loss or damage by reason of, or arising out of that breach by submitting that claim to any one of the following fora at a time: to the competent court of the Member State in whose territory the investment has been made; to the COMESA Court of Justice in accordance with Article 28(b) of the COMESA Treaty; or to international arbitration: (i) under the International Centre for the Settlement of Investment Disputes (ICSID) Convention, provided that both the home state of an investor and Member State in whose territory the investment has been made are parties to the ICSID Convention; (ii) under the ICSID Additional Facility Rules, provided that either the non-disputing Party or the respondent is a party to the ICSID Convention; (iii) under the UNCITRAL Arbitration Rules; or (iv) under any other arbitration institution or under any other arbitration rules, if the both parties to the dispute agree.²³⁸

Such clarity is needed under AfCFTA. While the Agreement may leave out the inclusion of international arbitral bodies, there is a need for clarity on the place of local national courts and regional courts/dispute settlement

²³⁷ Article 27 (1), Investment Agreement for the COMESA Common Investment Area.

²³⁸ Article 28(1), Investment Agreement for the COMESA Common Investment Area.

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bodies in the implementation of AfCFTA. There is also a need to clearly differentiate between state-state disputes and investor-state disputes and how they are to be settled.

There may be a need to consider having such courts working closely with the inter-state disputes settlement body provided for under the AfCFTA Investment Protocol especially in handling the state-state arbitrations. This would not only build the capacity of these regional courts but would also enhance the efficiency of arbitration as provided for under AfCFTA Protocol.

10.3.5 Conclusion

While the African Continental Free Trade Agreement is well meaning in its objectives, the provisions on dispute settlement are unclear. It is not clear as to what type of disputes would be submitted to particular dispute settlement settlements and whether the arbitral process provided for under the Agreement would allow parties to go for international arbitrators or arbitral bodies. This is especially important when it comes to investment disputes which may prove challenging to some of the regional dispute settlement bodies in Africa. There is a need to clarify the issues raised in this chapter as they may determine the success of the implementation of AfCFTA. Africa must acknowledge that while economic integration is an idea whose time has come, the potential disputes must be settled in a clear and unambiguous manner that creates confidence for the member states and other investors dealing with matters provided for under the Agreement. For African countries to achieve their economic independence as envisaged under AfCFTA, they must be willing to invest in local expertise in dispute settlement by not only encouraging and supporting individual local dispute settlement experts but also strengthening the national and regional dispute settlement bodies in order for them to win the confidence of local investors, state parties and international investors as well.

Investment-related dispute settlement is an area that requires attention. It has its challenges but holds a future promise of free trade within Africa and beyond. Trade is an important component of the sustainable development

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agenda and it is thus important to ensure that African countries benefit from free trade both with trading partners within its borders and beyond.

10.4 Africa's Agenda 2063: What is in it for Kenya?

10.4.1 Introduction

This section is inspired by Africa's Agenda 2063 – *a shared strategic framework for inclusive growth and sustainable development*²³⁹ (Agenda 2063) and it seeks to offer some reflections on how Kenya can contribute and benefit from the realisation of this Agenda. Arguably, Africa's success in realisation of the Agenda 2063 mainly depends on individual states' efforts towards implementation of the Agenda.

Africa's Agenda 2063 was unveiled in 2015 as the continent's new long-term vision for the next 50 years.²⁴⁰ The New Partnership for Africa's Development (NEPAD) Agency, the implementing agency of the African Union, has been tasked with fast-tracking the implementation and monitoring of major continental development programmes and frameworks, including Agenda 2063 and the Sustainable Development Goals (SDGs).²⁴¹

The African Union Commission and NEPAD Agency are supposed to domesticate the first 10 year Implementation plan into national and regional plans to ensure effective and aligned implementation at national, regional and continental levels.²⁴² Various authors have discussed what this development Agenda portends for Africa as a continent.²⁴³ However, there

²³⁹ African Union Commission, *Agenda 2063: The Africa we Want*, 2015, ISBN: 978-92-95104-23-5, adopted at the 24th Ordinary Assembly of the African Union (AU) in Addis Ababa in January 2015.

²⁴⁰ NEPAD, *Agenda 2063*, available at <http://nepad.org/cop/agenda-2063> [Accessed on 17/6/2019].

²⁴¹ Ibid.

²⁴² Ibid.

²⁴³ See generally, Tella, O., "Agenda 2063 and Its Implications for Africa's Soft Power," *Journal of Black Studies* 49, no. 7 (2018): 714-730; Slavova, M., & Okwechime, E., "African smart cities strategies for Agenda 2063," *Africa Journal of Management* 2,

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have been few, if any, commentaries on how this continental Development Blueprint is likely to influence Kenya's development agenda, if at all. It is against this background that this section offers some insight on how Kenya can strategically position itself to not only contribute to the realisation of this Agenda but also to benefit from the same.

10.4.2 Overview of the Africa's Agenda 2063

The Agenda 2063 contains seven aspirations that are to guide its implementation. These include:²⁴⁴ *Aspiration 1*: A prosperous Africa based on inclusive growth and sustainable development²⁴⁵; *Aspiration 2*: An

no. 2 (2016): 210-229; Vickers, B., *A handbook on regional integration in Africa: Towards Agenda 2063*, Commonwealth Secretariat, 2017; Kararach, G., Besada, H., & Shaw, T., "African development, political economy and the road to Agenda 2063," *Development in Africa: Refocusing the Lens After the Millennium Development Goals* (2015): 365; Ogbonnaya, U.M., "Terrorism, Agenda 2063 and the challenges of development in Africa," *South African Journal of International Affairs* 23, no. 2 (2016): 185-199; Ndzendze, B. and Monyae, D., "China's belt and road initiative: linkages with the African Union's Agenda 2063 in historical perspective," *Transnational Corporations Review* (2019): 1-12; Zhang, H., & Tesfaye, N., "Alignment of Belt and Road Initiative with Africa Agenda 2063," In *3rd International Symposium on Asian B&R Conference on International Business Cooperation (ISBCD 2018)*, Atlantis Press, 2018; DeGhetto, K., Gray, J. R., & Kiggundu, M. N., "The African Union's Agenda 2063: aspirations, challenges, and opportunities for management research," *Africa Journal of Management* 2, no. 1 (2016): 93-116; le Pere, G., "Harnessing Africa's External Trade Partnerships for 'Agenda 2063'," (2017); Achieng', R.M., "Can We Speak of African Agency?: APRM and Africa's Agenda 2063," *African Sociological Review / Revue Africaine De Sociologie* 18, no. 1 (2014): 49-64.

²⁴⁴ African Union Commission, *Agenda 2063: The Africa we Want*, 2015.

²⁴⁵ *Aspiration 1*: A Prosperous Africa based on inclusive Growth and Sustainable Development: ending poverty, inequalities of income and opportunity; job creation, especially addressing youth unemployment; facing up to the challenges of rapid population growth and urbanization, improvement of habitats and access to basic necessities of life – water, sanitation, electricity; providing social security and protection; developing Africa's human and social capital (through an education and skills revolution emphasizing science and technology) and expanding access to quality health care services, particularly for women and girls; transforming Africa's economies through beneficiation from Africa's natural resources, manufacturing, industrialization and value addition, as well as raising productivity and competitiveness; radically transforming African agriculture to enable the continent to feed itself and be a major player as a net food exporter; exploiting the vast potential of Africa's blue/ocean economy; and finally putting in place measures to

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integrated continent; politically united and based on the ideals of Pan-Africanism and the vision of Africa's Renaissance²⁴⁶; *Aspiration 3*: An Africa of good governance, democracy, respect for human rights, justice and the rule of law²⁴⁷; *Aspiration 4*: A peaceful and secure Africa²⁴⁸; *Aspiration 5*: An Africa with a strong cultural identity, common heritage, shared values and ethics²⁴⁹; *Aspiration 6*: An Africa, whose development is people-driven, relying on the potential of African people, especially its women and youth,

sustainably manage the continent's rich biodiversity, forests, land and waters and using mainly adaptive measures to address Climate change risks.

²⁴⁶ *Aspiration 2*: An integrated continent, politically united, based on the ideals of Pan Africanism and the vision of Africa's Renaissance: accelerating progress towards continental unity and integration for sustained growth, trade, exchanges of goods, services, free movement of people and capital through: (i) establishing a United Africa; (ii) fast tracking of the CFTA; (iii) improving connectivity through newer and bolder initiatives to link the continent by rail, road, sea and air; and (iv) developing regional and continental power pools, as well as ICT.

²⁴⁷ *Aspiration 3*: An Africa of good governance, respect for human rights, justice and the rule of law: consolidating democratic gains and improving the quality of governance, respect for human rights and the rule of law; building strong institutions for a development state; and facilitating the emergence of development-oriented and visionary leadership in all spheres and at all levels.

²⁴⁸ *Aspiration 4*: A peaceful and secure Africa: strengthening governance, accountability and transparency as a foundation for a peaceful Africa; strengthening mechanisms for securing peace and reconciliation at all levels, as well as addressing emerging threats to Africa's peace and security; and putting in place strategies for the continent to finance her security needs.

²⁴⁹ *Aspiration 5*: An Africa with a strong cultural identity, common heritage, values and ethics: inculcating the spirit of Pan Africanism; tapping Africa's rich heritage and culture to ensure that the creative arts are major contributors to Africa's growth and transformation; and restoring and preserving Africa's cultural heritage, including its languages.

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and caring for children²⁵⁰; and *Aspiration 7*: Africa as a strong, united, resilient and influential global player and partner²⁵¹.

Notably, the Agenda mainly covers the areas of: social and economic development; integration, democratic governance and peace and security amongst others.²⁵²

The implementation of the Agenda 2063 is to be carried out in phases. The first phase covers the first ten years from the years 2013 to 2023. The First Ten Year Implementation Plan, the first in a series of five ten year plans over the fifty year horizon was adopted by the Summit in June 2015 as a basis for the preparation of medium term development plans of member states of the Union, the Regional Economic Communities and the AU Organs.²⁵³

In summary, the Agenda 2063 First Ten Year Implementation Plan document seeks to: identify priority areas, their associated targets/expected outcomes and indicative strategies to stakeholders; highlight the fast track programmes/ projects that will bring quick wins and generate and sustain the interest of the African Citizenry in the African Agenda; assign

²⁵⁰ *Aspiration 6*: An Africa whose development is people-driven, relying on the potential of African people, especially its women and youth, and caring for children: strengthening the role of Africa's women through ensuring gender equality and parity in all spheres of life (political, economic and social); eliminating all forms of discrimination and violence against women and girls; creating opportunities for Africa's youth for self-realization, access to health, education and jobs; and ensuring safety and security for Africa's children, and providing for early childhood development.

²⁵¹ *Aspiration 7*: Africa as a strong, united, resilient and influential global player and partner: improving Africa's place in the global governance system (UNSC, financial institutions, global commons such as outer space); improving Africa's partnerships and refocusing them more strategically to respond to African priorities for growth and transformation; and ensuring that the continent has the right strategies to finance its own development and reducing aid dependency.

²⁵² African Union, An Overview of Agenda 2063, available at https://au.int/sites/default/files/documents/33126-doc-11_an_overview_of_agenda.pdf [Accessed on 17/6/2019].

²⁵³ African Union, *Agenda 2063: First Ten-Year Implementation Plan 2014 – 2023*, September 2015. Available at <https://www.un.org/en/africa/osaa/pdf/au/agenda2063-first10yearimplementation.pdf> [Accessed on 17/6/2019].

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responsibilities and accountabilities to all stakeholders in the implementation, monitoring and evaluation of the plan and outline the strategies required to ensure resource and capacity availability and sustained citizen's engagement for plan execution.²⁵⁴

The focus areas for the implementation of the Agenda include but are not limited to: Sustainable and inclusive economic growth; Human Capital Development; Agriculture/value addition and agro-businesses development; Employment generation, especially the youth and females; Social Protection; Gender / Women development and youth empowerment; Good governance including capable institutions; Infrastructural development; Science, Technology, Innovation; Manufacturing-based industrialization; Peace and Security; and Culture, Arts and Sports.²⁵⁵

Of utmost importance are the implementation, monitoring and evaluation responsibilities of Key Stakeholders, including Member States, towards the Agenda. The Member States are required to: Adopt/ integrate Agenda 2063 and the associated Ten Year Implementation Plans as the basis for developing their national visions and plans; Use the national planning systems- structures for implementation monitoring and evaluation, methodologies, systems and processes, rules and regulations, forms and formats in the execution of Agenda 2063; Develop policy guidelines on the design and implementation, monitoring and evaluation by various stakeholders; Ensure that the Legislature adopts Agenda 2063 as the blue print for Africa's social, economic and political development in the next 50 years; and encourage all political parties / private candidates use Agenda 2063 as a basis for preparing their political manifestos.²⁵⁶

²⁵⁴Ibid. African Union, An Overview of Agenda 2063, available at https://au.int/sites/default/files/documents/33126-doc-11_an_overview_of_agenda.pdf [Accessed on 17/6/2019].

²⁵⁵ Ibid.

²⁵⁶ African Union, *Agenda 2063: First Ten-Year Implementation Plan 2014 – 2023*, op. cit., p. 25.

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This Agenda is also geared towards achieving sustainable development agenda in the greater African continent. It is worth pointing out that the United Nations 2030 *Agenda for Sustainable Development*²⁵⁷ has since been launched. There have even been efforts to integrate the implementation of Agenda 2063 and Agenda 2030 for Sustainable Development in Africa.²⁵⁸ For instance, at the annual Africa Week in October 2015 held at the United Nations headquarters, representatives of the African Union's development institutions held discussions with their UN counterparts on the AU's Agenda 2063 and the newly-adopted Sustainable Development Goals (SDGs). Although they bear some differences, the two agendas were considered to be mutually supportive and coherent.²⁵⁹

Also notable is the fact that in achieving the main goals of these development plans, State Parties have specific roles to play towards social and economic development; integration, democratic governance and peace and security amongst others, which themes feature in both Agendas. It is for this reason that individual African States, including Kenya, have a role to play not only to achieve their national development plans but also to contribute towards achieving the continental Agenda. The next section focuses specifically on Kenya and how the country can contribute towards

²⁵⁷ UN General Assembly, *Transforming our world: the 2030 Agenda for Sustainable Development*, 21 October 2015, A/RES/70/1.

²⁵⁸ United Nations Office of the Special Adviser on Africa, "Implementing Agenda 2063 and Agenda 2030 for Sustainable Development in an Integrated and Coherent Manner in Africa: Moving Forward (21 September 2016)", *High-level Event*, available at

<https://www.un.org/en/africa/osaa/events/2016/mdgtosdgagenda2063.shtml> [Accessed on 17/6/2019].

"The objective of the side event on "implementing Agenda 2063 and Agenda 2030 in an integrated and coherent manner" was to ensure that the highest offices, including the African group in New York and other relevant stake holders are fully aware of what the continent is doing with regard to the implementation of the regional and global agenda in an integrated manner. It also discussed how to put efforts together to effectively implement the development frameworks in Africa."

²⁵⁹ Kuwonu, F., "Agenda 2063 is in harmony with SDGs," *Africa Renewal*, Online Magazine, December 2015, available at

<https://www.un.org/africarenewal/magazine/december-2015/agenda-2063-harmony-sdgs> [Accessed on 17/6/2019].

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realisation of Agenda 2063 while also achieving her own domestic development plan, including Vision 2030, the Big Four Agenda, amongst others.

10.4.3 Realising Africa's Agenda 2063: Integrating the Agenda 2063 into Kenya's Domestic Development Agenda

Kenya's *Vision 2030* is the long-term development blueprint for the country and is motivated by a collective aspiration for a better society by the year 2030.²⁶⁰ The aim of Kenya Vision 2030 is to create "a globally competitive and prosperous country with a high quality of life by 2030". It aims to transform Kenya into "a newly-industrialising, middle income country providing a high quality of life to all its citizens in a clean and secure environment".²⁶¹

The economic, social and political pillars of Kenya Vision 2030 are anchored on the foundations of macroeconomic stability; infrastructural development; Science, Technology and Innovation (STI); Land Reforms; Human Resources Development; Security and Public Sector Reforms.²⁶² The Vision 2030 is to be implemented through successive five-year medium term plans. The current stage of implementation is the Third Medium Term Plan (MTP III) 2018-2022 whose theme is dubbed *Transforming Lives: Advancing socio-economic development through the "Big Four"*.²⁶³ The Second Medium Term Plan (MTP II) 2013-2017 was meant to achieve progress in development and modernisation of infrastructure, improved security, human resource development, job creation, expanding access to affordable health care, and in modernizing the country's public services.²⁶⁴ As to

²⁶⁰Republic of Kenya, 'About Vision 2030', available at <http://vision2030.go.ke/about-vision-2030/> [Accessed on 17/6/2019].

²⁶¹ 'About Vision 2030', available at <http://vision2030.go.ke/about-vision-2030/> [Accessed on 17/6/2019].

²⁶² Ibid.

²⁶³Republic of Kenya, "Third Medium Term Plan 2018-2022," available at <http://vision2030.go.ke/publication/third-medium-term-plan-2018-2022/> [Accessed on 20/6/2019].

²⁶⁴ Ibid.

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whether the progress in these areas was felt across the country remains both a development and political question.

Currently, Kenya is thus pursuing the 'BIG FOUR' Agenda that seeks to ensure universal health coverage, affordable and decent housing, to increase the manufacturing contribution to the economy from 9.8 per cent to 15 per cent and guarantee food and nutrition security by 2022. The Kenyan Government's projects under the Big Four Agenda were allocated \$4.3 billion from the \$28 billion 2019/2020 budget.²⁶⁵ Universal health coverage got \$906 million; manufacturing \$40.8 million; affordable housing \$183 million; and food and nutrition security \$177 million.²⁶⁶

As already pointed out, the Agenda 2063 focuses on several areas of development including but not limited to: Sustainable and inclusive economic growth; Human Capital Development; Agriculture/value addition and agro-businesses development; Employment generation, especially the youth and females; Social Protection; Gender/Women development and youth empowerment; Good governance including capable institutions; Infrastructural development; Science, Technology, Innovation; Manufacturing-based industrialization; Peace and Security; and Culture, Arts and Sports.²⁶⁷ These development themes notably overlap at the national and continental levels and it can thus be argued that the achievement of the national plans can greatly succeed by building synergies with the continental implementation plans especially as captured in the Agenda 2063 First Ten-Year Implementation Plan 2014-2023.

The dream of a successful continent can only be achieved through ensuring that the member States are not only supporting the realisation of Agenda 2063 but also ensuring that their national development plans are in harmony

²⁶⁵ Njiraiini Muchira, "Uhuru legacy projects get \$4.3b despite slow progress," *The East African*, Sunday, June 16, 2019. Available at <https://www.theeastafrican.co.ke/business/Uhuru-legacy-projects-get-allocation/2560-5158394-chdf89z/index.html> [Accessed on 20/6/2019].

²⁶⁶ Ibid.

²⁶⁷ Ibid.

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with the Agenda and that they are actually achieved not just a matter of wishful thinking. Kenya's key development issues are especially among those given prominence in the Africa's Agenda 2063. These include infrastructure, health, manufacturing, affordable housing and food and nutrition security, amongst others.

Africa's Agenda 2063 has set forth certain milestones related to integration, prosperity, and African ownership of its development programmes.²⁶⁸ Further milestones are related to structural transformation, human development, good governance, and innovation and technology transfer.²⁶⁹ Some of the most significant milestones on innovation and technology transfer are building a better infrastructure, engineering and manufacturing base that shows significant increase in local content and input, increased science, technology and innovation (STI) output at national and regional levels and increased human capacity for science and technology and stimulating entrepreneurship through an increased number of added value products and services.²⁷⁰

Infrastructure is considered as bedrock for development, whereby, as an essential part of a supportive environment for investment and livelihood, adequate infrastructure promotes economic growth, reduces poverty, and improves delivery of health and other services.²⁷¹

A survey by Afrobarometer, a pan-African, non-partisan research network that conducts public attitude surveys on democracy, governance, economic conditions, and related issues across more than 30 countries in Africa,

²⁶⁸ Achieng', R.M., "Can We Speak of African Agency? APRM and Africa's Agenda 2063," *African Sociological Review / Revue Africaine De Sociologie* 18, no. 1 (2014): 49-64, p. 61.

²⁶⁹ Ibid, p.61.

²⁷⁰ Ibid, p.61.

²⁷¹ Mitullah, W. V., Samson, R., Wambua, P. M., & Balongo, S., "Building on progress: Infrastructure development still a major challenge in Africa," *Afrobarometer Dispatch No. 69*, 14 January 2016. Available at <https://www.africaportal.org/publications/building-on-progress-infrastructure-development-still-a-major-challenge-in-africa/> [Accessed on 25/6/2019].

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reported that provision of basic service infrastructure remains a challenge. On average across 35 African countries, only about two-thirds of citizens live in communities with an electric grid (65%) and/or piped water infrastructure (63%), and less than one in three have access to sewerage (30%). More than three times as many have access to cell phone service (93%), while about half (54%) live in zones with tarred or paved roads.²⁷² Rural residents continue to be severely disadvantaged in most countries, with urban-rural gaps of more than 40 percentage points in the average availability of an electric grid, sewerage, and piped water infrastructure.²⁷³ This is despite the high priority assigned to infrastructure by both citizens and their governments in many African countries. Nevertheless, access to basic services remains highly variable across countries and regions.²⁷⁴

Africa is also considered as the continent with the world's highest mortality rates, and it is the only continent where deaths from infectious disease still outnumber deaths from chronic disease.²⁷⁵ Indeed, Sub-Saharan Africans' overall evaluation of their well-being has been reported to be lower than that of any other population in the world.²⁷⁶ The Low well-being is also largely attributed to low incomes in sub-Saharan Africa.²⁷⁷ Arguably, this is

²⁷² Mitullah, W. V., Samson, R., Wambua, P. M., & Balongo, S., "Building on progress: Infrastructure development still a major challenge in Africa," *Afrobarometer Dispatch No. 69*, 14 January 2016, p. 3.

²⁷³ Ibid.

²⁷⁴ Ibid; See also United Nations, "Regional overview: sub-Saharan Africa," *Education for All Global Monitoring Report*, 2011. Available at <https://en.unesco.org/gem-report/sites/gem-report/files/191393e.pdf> [Accessed on 25/6/2019]; Ayodele Odusola, Giovanni Andrea Cornia, Haroon Borhat and Pedro Conceição (eds), "Income Inequality Trends in sub-Saharan Africa: Divergence, Determinants and Consequences," *Overview*, United Nations Development programme, 2017; Deaton, A. S., & Tortora, R., "People in sub-Saharan Africa rate their health and health care among the lowest in the world." *Health Affairs* 34, no. 3 (2015): 519-527.

²⁷⁵ Deaton, A. S., & Tortora, R., "People in sub-Saharan Africa rate their health and health care among the lowest in the world." *Health Affairs* 34, no. 3 (2015): 519-527, at p. 519.

²⁷⁶ Ibid, p. 520.

²⁷⁷ Ibid, p. 521.

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an indication of the interconnectedness of the various socio-economic rights and thus the need for an integrated approach to development.

The Government of Kenya's *Sector Plan for Science, Technology and Innovation 2013-2017* recognises that Science, Technology and Innovation (ST&I) play a pivotal role in the industrialization, sustainable development and growth of nations. Investments and integration of ST&I into social, economic and governance policies is expected to increase Kenya's global competitiveness, create employment and increase productivity.²⁷⁸ This was developed in line with the recognition that the Kenya Vision 2030 and the Constitution explicitly place a premium on the generation and management of a knowledge-based economy and the need to raise productivity and efficiency.²⁷⁹ While Kenya has made significant progress in the area of science, technology and innovation, it is worth pointing out that this is a sector that requires cooperation among countries especially if the same is to be used to promote and sustain cross-border trade. Also closely related to this is manufacturing and value addition. This will go a long way in enhancing national incomes as well as boosting agricultural production. Investing in people and technology transfer from developed states will boost Africa's manufacturing industries. Value addition for agricultural produce will also boost Africa's standing at the global platform as far as trade and commerce are concerned.

This is why Agenda 2063's focus on promoting the growth and development of science, technology and innovation is a welcome move that requires goodwill and concerted efforts of all stakeholders.

²⁷⁸ Republic of Kenya, *Sector Plan for Science, Technology and Innovation 2013-2017*, available at research.tukenya.ac.ke/images/Sector-Plan-for-Science-and-Technology.pdf [Accessed on 25/6/2019].

²⁷⁹ Ibid, p.1. Science, Technology and Innovation Act, No. 28 of 2013, Laws of Kenya, was enacted to facilitate the promotion, co-ordination and regulation of the progress of science, technology and innovation of the country; to assign priority to the development of science, technology and innovation; to entrench science, technology and innovation into the national production system and for connected purposes.

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Both Agenda 2063 and Kenya's Vision 2030 seek to promote environmental rule of law which is central to sustainable development, a concept that seeks to integrate environmental needs with the essential elements of the rule of law, and provides the basis for improving environmental governance.²⁸⁰ However, while the Constitution of Kenya 2010 and other post constitution statutes and policy documents recognise the centrality of sustainable development, Kenya still has a long way to go in achieving sustainable production and development practices. Agenda 2063 seeks to promote environmentally sustainable climate and resilient economies and communities. Arguably, this will not be achieved unless individual states put in place national measures geared towards this. Individual efforts coupled with concerted efforts from all African governments will ensure that Africa achieves its targets under Agenda 2063 as well as United Nations Agenda 2030 on Sustainable Development.

Sustainable agricultural production features in both AU Agenda 2063 and Kenya's Agenda 2030. If the African continent is to guarantee food and nutritional security for its people, then there must be cooperation amongst states in research and tackling infrastructure challenges that make it difficult to access and/or distribute food across countries and regions. Boosting agricultural production also requires land reforms across various states. There is need for supporting the agricultural sector through modern methods of production, guaranteeing farmers' protection from foreign invasion of markets especially those outside Africa, good infrastructure, investing in value addition and enhancing national food storage and preservation facilities, amongst others.

Gender parity is a subject that is still relevant not only in Kenya but across many African societies. Investing in both men and women will go a long way in realisation of Africa's development agenda. Putting in place empowerment measures such as fair labour practices and protection from all forms of violence is important. While having domestic laws on gender equality and equity is important, there is need for strong reporting

²⁸⁰ See generally, UN General Assembly, *Transforming our world: the 2030 Agenda for Sustainable Development*, 21 October 2015, A/RES/70/1.

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mechanisms within the Agenda 2063 implementation framework, in order to ensure that no state is left behind as far as this issue is concerned.

Some parts of Kenya and Africa in general still suffer violence and general insecurity. Some concerted efforts towards promoting peace and stability in the continent are still required as a basis for meaningful development.

10.4.4 Conclusion

Africa is a Continent that is rich in natural resources and cultural diversity amongst its many communities. However, it has lagged behind in development and protection of its riches both in terms of diverse communities and source of wealth for the rest of the world. Agenda 2063 promises to coordinate the various countries' development agenda through outlining a development blueprint that should be used as a yardstick to ensure that the Continent moves forward as one. Kenya can work closely with other states to not only realise this Agenda but to also benefit from the same. Africa as a continent can certainly achieve the vision of prosperity.

There is a lot for Kenya in this dream. Kenya can contribute and benefit from the realisation of Africa's Agenda 2063. Africa's efforts towards achievement of this Agenda 2063 should be tied with United Nations 2030 Agenda for Sustainable Development Goals as they are mutually inclusive and not exclusive.

CHAPTER ELEVEN

Integrating Community Practices and Cultural Voices into the Sustainable Development Discourse

11.1 Integrating Community Practices and Cultural Voices into the Sustainable Development Discourse

11.1.1 Introduction

The United Nations 2030 Agenda for Sustainable Development Goals seeks to not only achieve sustainability under the various aspects of development but also aims at an inclusive society where all voices are heard and considered in the development agenda. As rightly pointed out, everyone is needed to reach these ambitious targets.¹ This is to be achieved through such aspects as public participation in decision making, and the integration of all forms of knowledge, including scientific and traditional forms of knowledge. The process of sustainable development binds in a relationship of interdependence, the protection and enhancement of natural resources to the economic, social, in order to meet the needs of the present generation, without compromising the ability of future generations to meet their own needs.² It also follows that it would be incompatible with any practice either by private persons or the government that contributes to the degradation of heritage and natural resources, as well as the violation of human dignity and human freedom, poverty and economic decline, and the lack of recognition of the rights and equal opportunities.³

The social aspect of sustainable development agenda requires that 'a socially sustainable system must achieve distributional equity, adequate provision

¹Sustainable Development Goals | UNDP in Kenya' (*UNDP*) <<https://www.ke.undp.org/content/kenya/en/home/sustainable-development-goals.html>> accessed 6 January 2021.

²Nocca F, 'The Role of Cultural Heritage in Sustainable Development: Multidimensional Indicators as Decision-Making Tool' (2017) 9 Sustainability 1882, 2<<https://www.agbs.mu/media/sustainability-09-01882-v3.pdf>> accessed 6 January 2021.

³ Ibid, 2.

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of social services including health and education, gender equity, and political accountability and participation'.⁴

Notably, in many African societies, culture and traditions have been at the centre of affairs of rural communities, especially in the conservation of natural sites earmarked as sacred.⁵ However, in reality, cultural and traditional forms of knowledge have not received as much attention in the sustainable development debates as the scientific or western forms of knowledge, especially in relation to environmental and natural resources governance and management. As things stand currently in Kenya and many parts of the world, communities seem sidelined in the efforts sustainable development agenda in the country, with the state organs leading the same and communities together with their cultural and traditional expertise especially on environmental matters getting directions on what to do without any meaningful participation or contribution. The frequent evictions from forest areas is one such example.⁶

It is against this background that this chapter argues for the need for more efforts towards ensuring that the community knowledge and practices as well as cultural voices are incorporated into the sustainable development discourse in Kenya, as a platform for boosting communities' participation in pursuit of the sustainable development agenda.⁷ Communities are more likely to embrace the same if they feel like part of it.

⁴Harris J, 'Basic Principles of Sustainable Development' (2001).

⁵ 'The Place and Voice of Local People, Culture, and Traditions: A Catalyst for Ecotourism Development in Rural Communities in Ghana' (2019) 6 *Scientific African* e00184.

⁶'Kenya: Abusive Evictions in Mau Forest' (*Human Rights Watch*, 20 September 2019) <<https://www.hrw.org/news/2019/09/20/kenya-abusive-evictions-mau-forest>> accessed 6 January 2021.

⁷'Kenya: Sustainable Development Knowledge Platform' <<https://sustainabledevelopment.un.org/memberstates/kenya>> accessed 6 January 2021.

11.1.2 The Place of Community Practices and Cultural Voices in International and Domestic Laws

i. Community Practices and Cultural Voices under International Law

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

It has been argued that many, if not all of the planet's environmental problems and certainly all of its social and economic problems, have cultural activity and decisions – people and human actions – at their roots.⁸ As such, solutions are likely to be also culturally-based, and the existing models of sustainable development forged from economic or environmental concern are unlikely to be successful without cultural considerations.⁹ Culture in this context, has been defined as: culture as the general process of intellectual, spiritual or aesthetic development; culture as a particular way of life, whether of people, period or group; and culture as works and intellectual artistic activity.¹⁰

The United Nations Educational, Scientific and Cultural Organization (UNESCO) asserts that 'culture is who we are and what shapes our identity. No development can be sustainable without including culture.'¹¹ The

⁸Dessein, J. et al (ed), 'Culture in, for and as Sustainable Development: Conclusions from the COST Action IS1007 Investigating Cultural Sustainability,' (University of Jyväskylä, Finland, 2015), p. 14. Available at <http://www.culturalsustainability.eu/conclusions.pdf> accessed 6 January 2021.

⁹ Ibid, p.14.

¹⁰ Ibid, p. 21.

¹¹ United Nations Educational, Scientific and Cultural Organization (UNESCO), 'Culture for Sustainable Development,' available at <http://en.unesco.org/themes/culture-sustainable-development>

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Agenda 2030 for Sustainable Development captures the states' pledge to foster intercultural understanding, tolerance, mutual respect and an ethic of global citizenship and shared responsibility, and their acknowledgement of the natural and cultural diversity of the world and recognition that all cultures and civilizations can contribute to, and are crucial enablers of, sustainable development.¹²

African States and other stakeholders, in the *Ngorongoro Declaration*¹³ have acknowledged that Sustainable development can ensure that appropriate efforts are deployed to protect and conserve the cultural and natural resources of a region faced with the challenges of climate change, natural and human-made disasters, population growth, rapid urbanization, destruction of heritage, and environmental degradation for present and future generations.¹⁴ As such, they declared that on the one hand, African heritage is central to preserving and promoting African cultures thereby uplifting identity and dignity for present and future generations in an increasingly globalised world, and on the other hand, heritage, including World Heritage properties, is a driver of sustainable development and critical for achieving regional socio-economic benefits, environmental protection, sustainable urbanization, social cohesion and peace.¹⁵

ii. Community Practices and Cultural Voices under Kenyan Law: Prospects and Challenges

The Constitution of Kenya 2010 recognises culture as the foundation of the nation and as the cumulative civilization of the Kenyan people and nation.¹⁶ In light of this, it obligates the State to, inter alia, promote all forms of national and cultural expression through literature, the arts, traditional

Accessed 6 January 2021.

¹² United Nations, *Transforming our world: the 2030 Agenda for Sustainable Development*, A/RES/70/1, Resolution adopted by the General Assembly on 25 September 2015, para. 36.

¹³ The Ngorongoro Declaration on Safeguarding African World Heritage as a Driver of Sustainable Development, adopted in Ngorongoro, Tanzania on 4 June 2016.

¹⁴ *Ibid*, p.2.

¹⁵ *Ibid*, p. 3.

¹⁶ Article 11 (1), Constitution of Kenya, 2010.

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celebrations, science, communication, information, mass media, publications, libraries and other cultural heritage; recognise the role of science and indigenous technologies in the development of the nation; and promote the intellectual property rights of the people of Kenya.¹⁷

Parliament is also obligated to enact legislation to: ensure that communities receive compensation or royalties for the use of their cultures and cultural heritage; 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.¹⁸

The Ministry of Sports, Culture and Heritage was established through the Executive Order No. 2 “Organization of the Government of the Republic of Kenya dated May 2013” and comprises of departments of Sports, Office of the Sports Registrar, Culture, Permanent Presidential Music Commission, Kenya National Archives and Documentation Services, Library Services, Records Management, The Arts Services.¹⁹ Part of their mandate includes ‘developing, promoting and coordinating research, copyrights and conservation of Culture’ and to ‘develop, promote & coordinate the national culture policy, heritage policy and its management’.²⁰ Notably, the core functions of the Department of Culture under the Ministry are: the promotion, revitalization and development of all aspects of culture-including performing, visual arts, languages indigenous health, nutrition, environment, and oral traditions; and, education, information and research on all aspects of the tangible and intangible cultural heritage.²¹

The Department’s core mandate includes, to: advise the government on cultural matters; set policy standards to guide the development of cultural

¹⁷ Ibid, Article 11 (2).

¹⁸ Ibid, Article 11 (3).

¹⁹ ‘The Ministry’ (*The Ministry of Sports, Culture and Heritage*)

<<http://sportsheritage.go.ke/the-ministry/>> accessed 6 January 2021.

²⁰ Ibid.

²¹ ‘Department of Culture’ (*The Ministry of Sports, Culture and Heritage*)

<<http://sportsheritage.go.ke/culture-heritage/department-of-culture/>> accessed 6 January 2021.

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programmes; develop national cultural infrastructure and actively engage in the promotion, preservation and development of culture, in collaboration with other likeminded government agencies, County governments, and local communities based on the principles of Free Prior and Informed Consent; coordinate the documentation of national cultural inventories, and support cultural programmes and events; promote the use of Kiswahili, sign and indigenous languages in Kenya; coordinate safeguarding of Kenya's intangible cultural heritage and promotion of the diversity of cultural expressions; conduct capacity building for county governments, and disseminating cultural information; coordinate and facilitate cultural exchange programmes for groups and individuals; liaise with cultural offices and Offer technical support for cultural development programmes; and register cultural groups, associations and agencies.²²

Notably, the Department of Culture acknowledges that 'while it has been playing some of the key roles in promotion of cultural integration, formulation of policies and standards that will guide the development of culture, Kenyan identity and social cohesion, both at the national and international levels, little information has been available to the Kenyan public'.²³ However, while the Department, in line with its constitutional mandate, seeks to use its website to disseminate information, and open up an online forum, where all Kenyans can contribute towards realisation of our shared dreams and aspirations; our pride in ethnic, cultural, and religious diversity, and the determination to live in peace and unity, as one indivisible and sovereign nation, there are challenges that come with this.

Arguably, most of the custodians of the cultural practices and knowledge of Kenyan communities are either not able to access the internet due to infrastructure challenges or do not simply have the formal education required to enable them do so. This therefore means that the Department's initiative, however well meaning, will either not reach a large section of the target group or will not benefit from added knowledge that would be gained from the input of elders from the villages. There may therefore, be a

²² Ibid.

²³ Ibid.

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need for the Department to organize physical forums where they can meet the communities' elders and leaders and share their dream with them in a bid to enrich their cultural knowledge database. The only way that the Department of culture and heritage can effectively achieve their mandate of advising the government on cultural matters, dissemination of cultural information, conducting capacity building for county governments, coordination and facilitate cultural exchange programmes for groups and individuals, offering technical support for cultural development programmes and registering cultural groups, associations and agencies would be through organizing forums where communities, without the limitation of technology or distance would come forward and share what they have with the Department. This cannot certainly be the online platform. Physical meetings should thus be organized at the grassroots level. Through such forums, the Department can collaborate with the other stakeholders especially in matters that are relevant to the sustainable development agenda in order to tap into the communities' knowledge and practices where such can help in promoting sustainability.

Some of the main challenges that have been identified especially in relation to the implementation of the *Convention on the Protection and Promotion of the Diversity of Cultural Expressions*²⁴ in Kenya, in the past include; Lack of a coordinated national framework on implementation of the Convention; Lack of official cultural statistics that has negatively affected fiscal and political decisions; Inadequate legislative and institutional framework to promote the cultural and creative cultural sector; Inadequate cultural infrastructure and spaces for cultural expression; and Lack of awareness and non-appreciation on the role of culture in development by key policy makers.²⁵

²⁴Convention on the Protection and Promotion of the Diversity of Cultural Expressions 2005, Paris, 20 October 2005.

²⁵ 'The Convention on the Protection and Promotion of the Diversity of Cultural Expressions' (*Diversity of Cultural Expressions*, 15 February 2018) <<https://en.unesco.org/creativity/convention>> accessed 6 January 2021.

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Cultural expressions, services, goods and heritage sites can contribute to inclusive and sustainable economic development, thus making a vital contribution to eradication of poverty as envisaged under sustainable development goal 1 of the 2030 Agenda on Sustainable Development Goals.²⁶ This is because the natural and environmental resources form the basis of the 2030 SDGs Agenda for provision of the resources required for eradication of poverty. These resources however require conservation for the sake of the current and future generations. It is also true that conservation principles and practices evolve and adapt to the cultural, political, social and economic environments in which they take place.²⁷ It is for this reason that cultural practices of communities become critical in giving communities a chance to participate in sustainable development discourse. It has been observed that conservation practices are intimately linked to codes of ethics dictated by local and/or international systems of values. In turn, these values are inscribed in legal frameworks or they comply with legal texts.²⁸ Arguably, it is not enough for the laws in Kenya to acknowledge the place of communities' cultural practices; there is a need to actually implement and incorporate these practices in environmental management and conservation measures through engaging communities in national plans and strategies geared towards the realisation of the sustainable development goals. Notably, while Kenya has been making progress towards realisation of the SDGs, if a 2017 Report by the Ministry of Devolution dubbed *'Implementation of the Agenda 2030 for Sustainable Development in Kenya* is anything to go by, there is little evidence of incorporation of communities' practices and indigenous knowledge in tackling the challenges that are likely to derail the realisation of the Agenda 2030. The process seems to be state-led, with communities playing a peripheral role. They only seem to be included in making peace, which in

²⁶Cities U and Governments L, *Culture in the Sustainable Development Goals: a Guide for Local Action* (Academic Press 2015)

<https://www.uclg.org/sites/default/files/culture_in_the_sdgs.pdf> accessed 3 January 2021.

²⁷ Anne-Marie Deisser and Mugwima Njuguna, *Conservation of Cultural and Natural Heritage in Kenya* (2016) 1 <<http://www.jstor.org/stable/10.2307/j.ctt1gxpc6>> accessed 6 January 2021.

²⁸*Ibid*, 3.

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itself is critical for development, but that is just about all. The farthest the Report has gone in demonstrating communities' inclusion is 'the Government putting in place mechanisms to foster peace among warring communities through initiatives like joint Cultural Festivals, and signing treaties on cultural exchange programmes with 51 countries hosting Kenya Missions' in pursuit of SDG Goal 16 on 'promoting peaceful and inclusive societies for sustainable development, provide access to justice for all and build effective, accountable and inclusive institutions at all level'.²⁹ Thus, while there are admittedly policy, legal and institutional frameworks meant to promote the utilization of cultural and traditional community knowledge in national development, there is little evidence that the same is actively being pursued.

11.1.3 Community Practices and Cultural Voices under the Sustainable Development Goals

Sustainable development is one of the national values and principles of governance that binds all State organs, State officers, public officers and all persons whenever any of them—applies or interprets this Constitution; enacts, applies or interprets any law; or makes or implements public policy decisions.³⁰ This is in addition to democracy and participation of the people; human dignity, equity, social justice, inclusiveness, equality, human rights, non-discrimination and protection of the marginalised; and good governance, integrity, transparency and accountability.³¹ Arguably, this should include participation of communities and their cultural knowledge especially in matters related to the sustainable development agenda.³²

Target 11.4 of the 2030 Agenda on Sustainable Development Goals seeks to, inter alia, "strengthen efforts to protect and safeguard the world's cultural

²⁹ Republic of Kenya, *Implementation of the Agenda 2030 For Sustainable Development In Kenya*, June, 2017, 45

https://www.un.int/kenya/sites/www.un.int/files/Kenya/vnr_report_for_kenya.pdf accessed 6 January 2021.

³⁰ Article 10, Constitution of Kenya 2010.

³¹ Article 10(2), Constitution of Kenya 2010.

³² Nocca F, 'The Role of Cultural Heritage in Sustainable Development: Multidimensional Indicators as Decision-Making Tool' (2017) 9 Sustainability 1882.

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and natural heritage". It has however been argued that this is a weak reference because it is not specific on cultural heritage, but it is mentioned together with natural one; furthermore, this specific target deals only with the protection and safeguard of cultural heritage.³³

Arguably, culture has received insufficient attention as an intrinsic component of sustainable development and must be translated and embedded in national and local development.³⁴ Indeed, some commentators have argued that culture, sustainability and sustainable development are complicated concepts that are not always easy for scientists, policy makers or practitioners to grasp or apply.³⁵

Culture can play a significant role in the attainment of the Sustainable Development Goals (SDGs), especially those related to quality education, sustainable cities, the environment, economic growth, sustainable consumption and production patterns, peaceful and inclusive societies, gender equality and food security.³⁶ According to UNESCO, from cultural heritage to cultural and creative industries, culture is both an enabler and a driver of the economic, social and environmental dimensions of sustainable development.³⁷ This is due to its potential to have community-wide social, economic and environmental impacts.³⁸

³³Ibid, 3.

³⁴Energy and Resources Institute, *Global Sustainable Development Report 2019: The Future Is Now : Science for Achieving Sustainable Development*. (2019) 117.

³⁵Dessein, J., Soini, K., Fairclough, G. and Horlings, L. (eds) 2015. Culture in, for and as Sustainable Development. Conclusions from the COST Action IS1007 Investigating Cultural Sustainability. University of Jyväskylä, Finland, 8 <<https://jyx.jyu.fi/bitstream/handle/123456789/50452/1/978-951-39-6177-0.pdf>> accessed 5 January 2021.

³⁶ UNESCO, 'Culture for Sustainable Development' (UNESCO, 15 May 2013) <<https://en.unesco.org/themes/culture-sustainable-development>> accessed 5 January 2021.

³⁷ Ibid.

³⁸UNESCO. "Culture: A driver and an enabler of sustainable development." *Thematic Think Piece. UN System Task Team on the Post-2015 UN Development Agenda* (2012), 3.

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Notably, traditional knowledge can and should be used to contribute to the realization of sustainable development agenda, where most indigenous and local communities' contribution can go beyond conservation and sustainable use of biological diversity to include their skills and techniques which provide valuable information to the global community and a useful model for biodiversity policies.³⁹ Furthermore, as on-site communities with extensive knowledge of local environments, indigenous and local communities are most directly involved with conservation and sustainable use.⁴⁰ The relevance of this traditional knowledge in the sustainable development debate is premised on the fact that it is based on the experience, often tested over centuries of use, adapted to local culture and environment, dynamic and changing especially in relation to knowledge and skills on how to grow food and to survive in difficult environments, what varieties of crops to plant, when to sow and weed, which plants are poisonous, which can be used for control of diseases in plants, livestock and human beings.⁴¹

SDG Goal 2 seeks to end hunger, achieve food security and improved nutrition and promote sustainable agriculture. As also acknowledged under the Constitution of Kenya, traditional knowledge related to the preservation of existing genetic resources, including the genetic diversity of seeds, should be recognized and maintained, and the fair sharing of the relevant benefits should be promoted.⁴² However, for effectiveness, it has been recommended that there should be integration of cultural factors, including the knowledge, traditions and practices of all people and communities, into local strategies

³⁹Unit B, 'Introduction' (6 October 2011)

<<https://www.cbd.int/traditional/intro.shtml>> accessed 3 January 2021.

⁴⁰ Ibid.

⁴¹ CN Atoma, 'The Relevance of Indigenous Knowledge to Sustainable Development in Sub-Saharan Africa' (2011) 5 *International Journal of Tropical Agriculture and Food Systems* 72.

⁴²Cities U and Governments L, *Culture in the Sustainable Development Goals: A Guide For Local Action* (Academic Press 2015)

<https://www.uclg.org/sites/default/files/culture_in_the_sdgs.pdf>accessed 3 January 2021.

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on environmental sustainability.⁴³ The indigenous knowledge based on cultural practices should be utilized in achieving such goals as SDG Goal 2 on food security.

Thus, while there is little by way of mention in the 2030 Agenda on SDGs on the role of culture and communities' traditional knowledge in achieving sustainable development goals, practically, these communities have a lot to contribute in tackling the challenges that face the world today, ranging from food insecurity, poverty, and environmental degradation, among others. The global community cannot therefore afford to ignore their role in the same.

11.1.4 Development from the Global South Perspective

The 'Global South' is a term used to refer to less economically developed countries and these comprise a variety of states with diverse levels of economic, cultural, and political influence in the international order.⁴⁴ It has rightly been pointed out that 'when major global events are told from a Western perspective, the voices of the colonised and oppressed often go missing, which leads to a different basis for theorising'.⁴⁵ It is thus it is important to incorporate non-Western actors and non-Western thinking in order to explore the ways in which different actors challenge, support, and shape global and regional orders.⁴⁶

While the term 'development' carries different connotations to different people, more so those in the developing world, it is worth pointing out that development is not purely an economic phenomenon but rather a multi-dimensional process involving reorganization and reorientation of entire economic and social system.⁴⁷ In addition, development is process of

⁴³ Ibid.

⁴⁴ 'Global South Perspectives on International Relations Theory' (*E-International Relations*, 19 November 2017) <<https://www.e-ir.info/2017/11/19/global-south-perspectives-on-international-relations-theory/>> accessed 6 January 2021.

⁴⁵ Ibid.

⁴⁶ Ibid.

⁴⁷ Abyu G, *Concept of Development* (2020)

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improving the quality of all human lives with three equally important aspects, namely: raising peoples' living levels, that is, incomes and consumption, levels of food, medical services, and education through relevant growth processes; creating conditions conducive to the growth of peoples' self-esteem through the establishment of social, political and economic systems and institutions which promote human dignity and respect and increasing peoples' freedom to choose by enlarging the range of their choice variables, such as varieties of goods and services.⁴⁸

It has been argued that indigenous knowledge builds on long-term understanding and practices of socio-ecological systems of various societies across the world. It is a social learning process by which practices and behaviours are adjusted towards embracing better uses of the surrounding environment and contributing to the well-being at individual, communal and societal levels.⁴⁹ If these communities are to overcome the challenges that face them in their day to day lives, western and scientific notions of development will not help; they must be meaningfully involved in the development plans to not only enable them appreciate the same but to also ensure that these challenges are addressed using local solutions, where possible. Sometimes, all they need is the support of the government and other stakeholders to enable them come up with suitable solutions.

<https://www.researchgate.net/publication/340127781_Concept_of_Development/link/5e7a0844299bf1b2b9ac2b0b/download> accessed 3 January 2021.

⁴⁸'GEO 260 - Third World Development'

<http://www.uky.edu/AS/Courses/GEO260/glossary_development.html> accessed 6 January 2021.

⁴⁹Energy and Resources Institute, *Global Sustainable Development Report 2019: The Future Is Now : Science for Achieving Sustainable Development*. (2019) 120.

11.1.5 Integrating Community Practices and Cultural Voices into the Sustainable Development Discourse: Way Forward

a) Call for Diversity in Development Voices

People-centred development is inclusive and participatory and rooted in local culture and heritage.⁵⁰ While the national government should continually strengthen efforts to implement policies/legislation aimed at addressing cultural practices such as female genital mutilation and child marriage, which slow access to education and affect attainment of gender equality and equity, the positive aspects of culture should be tapped into especially in relation to natural resources management.⁵¹

SDG Goal 17 calls for countries to ‘strengthen the means of implementation and revitalize the global partnership for sustainable development’. One of the targets under this goal is tackling systemic issues which include countries respecting each country’s policy space and leadership to establish and implement policies for poverty eradication and sustainable development, and encouraging and promoting effective public, public-private and civil society partnerships, building on the experience and resourcing strategies of partnerships.⁵² The Global South should tap into all available knowledge including traditional knowledge to tackle the unique problems that may exist in their territories. Communities are more likely to identify and offer plausible solutions to the problems found within their localities better than the scientific or western knowledge would do.

⁵⁰Energy and Resources Institute, *Global Sustainable Development Report 2019: The Future Is Now : Science for Achieving Sustainable Development*. (2019) 92.

⁵¹ SDGs Kenya Forum, ‘The Third Progress Report on Implementation of SDGs in Kenya,’ 2020

<<https://sdgkenyaforum.org/content/uploads/documents/8b832986477dddbd.pdf>>accessed 6 January 2021.

⁵² #Envision2030 Goal 17: Partnerships for the Goals | United Nations Enable’ <<https://www.un.org/development/desa/disabilities/envision2030-goal17.html>> accessed 6 January 2021.

b) Equitable Access of Resources by Communities and Fair Benefit Sharing

Communities should tap into the available resources, enjoy equitable access, to enable them utilize these resources to achieve tangible development within their regions. The government should thus continually look for ways through which this can be achieved. This would give these communities incentives to not only participate in the sustainable development of resources but also to proffer solutions to degradation challenges where they feel that their traditional knowledge can be utilized.⁵³

The law should therefore not be used to limit communities' access and enjoyment of the accruing benefits from natural resources but should instead be used to guarantee the same.⁵⁴ The cultural and creative industries have been rated among the fastest growing sectors in the world, with an estimated global worth of 4.3 trillion USD per year, accounting for 6.1% of the global economy and nearly 30 million jobs worldwide, employing more people aged 15 to 29 than any other sector.⁵⁵ Thus, cultural and creative industries are considered to be essential for inclusive economic growth, reducing inequalities and achieving the goals set out in the 2030 Sustainable

⁵³ 'Indigenous Peoples and the Nature They Protect' (*UN Environment*, 8 June 2020) <<http://www.unenvironment.org/fr/node/27724>> accessed 8 January 2021.

⁵⁴ Elisa Morgera, 'The Need for an International Legal Concept of Fair and Equitable Benefit Sharing' (2016) 27 *European Journal of International Law* 353; Norfolk, Simon. "Examining access to natural resources and linkages to sustainable livelihoods." *A case study of Mozambique. FAO Livelihood support programme Working Paper* 17 (2004): 69; 'Managing Natural Resources for Development in Africa: A Resource Book' <<https://www.idrc.ca/sites/default/files/openebooks/506-9/index.html>> accessed 8 January 2021; Yolanda T Chekera and Vincent O Nmehielle, 'The International Law Principle of Permanent Sovereignty over Natural Resources as an Instrument for Development: The Case of Zimbabwean Diamonds' (2013) 6 *African Journal of Legal Studies* 69; 'Tenure, Governance, and Natural Resource Management' (*LandLinks*) <<https://land-links.org/issue-brief/tenure-governance-and-natural-resource-management/>> accessed 8 January 2021;

⁵⁵ 'The Convention on the Protection and Promotion of the Diversity of Cultural Expressions' (*Diversity of Cultural Expressions*, 15 February 2018) <<https://en.unesco.org/creativity/convention>> accessed 6 January 2021.

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Development Agenda.⁵⁶ There is a need for the government to rise to the occasion and promote a conducive environment for communities to benefit from the intellectual property of their indigenous knowledge for economic advancement and achievement of sustainable development agenda.⁵⁷

c) Guaranteed Cultural Security

While the phrase "cultural security" is used to mean different things in different regions of the world, in Australia, the phrase is used when speaking about how modernization threatens to change the way of life of Aborigines, while in Africa, leaders have applied the phrase in voicing concerns over the impact of development on local traditions.⁵⁸ While modernization is desirable, the constitutional safeguards against erosion of culture should be upheld and used to ensure that communities are afforded a chance to celebrate their culture and meaningfully participate in the development agenda through the use of the beneficial aspects of their culture.⁵⁹ It should not only be a source of pride for them but also a source of livelihood where possible, through the support of the government.⁶⁰ They

⁵⁶ Ibid.

⁵⁷ See Protection of Traditional Knowledge and Cultural Expressions Act, 2016 (No. 33 of 2016), Laws of Kenya.

⁵⁸ Nemeth E, 'What Is Cultural Security? Different Perspectives on the Role of Culture in International Affairs' (23 April 2016).

⁵⁹ Rivière, François, ed. *Investing in cultural diversity and intercultural dialogue*. Vol. 2. Unesco, 2009; 'Kenya's New Constitution Benefits Indigenous Peoples' <<http://www.culturalsurvival.org/news/kenyas-new-constitution-benefits-indigenous-peoples>> accessed 8 January 2021; EO Wahab, SO Odunsi and OE Ajiboye, 'Causes and Consequences of Rapid Erosion of Cultural Values in a Traditional African Society' (*Journal of Anthropology*, 5 July 2012) <<https://www.hindawi.com/journals/janthro/2012/327061/>> accessed 8 January 2021; Campese, Jessica. *Rights-based approaches: Exploring issues and opportunities for conservation*. CIFOR, 2009; Bockstael, Erika, and Krushil Watene. "Indigenous peoples and the capability approach: taking stock." *Oxford Development Studies* 44, no. 3 (2016): 265-270; Kanyinga, Karuti. "Kenya: Democracy and political participation." (2014).

⁶⁰ 2. Cultural Characteristics of Small-Scale Fishing Communities' <<http://www.fao.org/3/y1290e05.htm>> accessed 8 January 2021; Daskon, Chandima Dilhani. "Cultural resilience—the roles of cultural traditions in sustaining rural livelihoods: a case study from rural Kandyan villages in Central Sri Lanka." *Sustainability* 2, no. 4 (2010): 1080-1100; Soh, Mazlan Bin Che, and Siti

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should be involved in what is referred to as Primary Environmental Care (PEC), 'a process by which local groups or communities organise themselves with varying degrees of outside support so as to apply their skills and knowledge to the care of natural resources and environment while satisfying livelihood needs'.⁶¹

11.1.5 Conclusion

The section has highlighted some of the initiatives or areas of collaboration that reflect the existing relationship between culture and sustainable development, thus affirming the fact that cultural issues cannot be wished away in the discussion and efforts towards achieving sustainable development in Kenya and the world over.⁶² This is, however, not to say that there are no cultural practices that are counterproductive in their effect as far as development and sustainability are concerned. Such retrogressive practices ought to be shunned while embracing the ones that are compatible with progress and sustainable development goals.⁶³

If the sustainable development goals are to be accomplished in a way that leaves no one behind, there is a need for the stakeholders to adopt a bottom-up approach that includes traditional and cultural institutions and the associated knowledge in tackling the problems that afflict the society. Integrating Community Practices and Cultural Voices into the Sustainable Development Discourse is indeed a step in the right direction.

Korota'aini Omar. "Small is big: The charms of indigenous knowledge for sustainable livelihood." *Procedia-Social and Behavioral Sciences* 36 (2012): 602-610.

⁶¹Melissa Leach, Robin Mearns and Ian Scoones, 'Challenges to Community-Based Sustainable Development: Dynamics, Entitlements, Institutions' (1997) 28 IDS Bulletin 4, 5,

<https://www.researchgate.net/publication/227736698_Challenges_to_CommunityBased_Sustainable_Development_Dynamics_Entitlements_Institutions> accessed 6 January 2021.

⁶² See also Muigua, K., *Nurturing Our Environment for Sustainable Development*, Glenwood Publishers, Nairobi - 2016), chapter Eleven, for the full discussion.

⁶³ See 'Cultural Practices That Hinder Children's Rights among the Digo Community - Msambweni District, Kwale County - Kenya' (*Resource Centre*) <https://resourcecentre.savethechildren.net/node/7573/pdf/report_on_cultural_practices_-_mswambweni1.pdf> accessed 6 January 2021.

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

11.2.1 Introduction

The term "indigenous knowledge" may generally refer to how members of a community perceive and understand their environment and resources, particularly the way they convert those resources through labour.⁶⁴ Indigenous groups offer alternative knowledge and perspectives based on their own locally developed practices of resource use.⁶⁵ In general, all traditional knowledge and resources are considered to be collective heritage of a community or ethnic group, even if the accumulation of knowledge is individual, because they are ancestral heritage, and are believed to come from God.⁶⁶ Thus, Indigenous knowledge is the local knowledge that is unique to a culture or society.⁶⁷ Indigenous knowledge is seen as the social capital of the poor since it is their main asset to invest in the struggle for survival, to produce food, to provide for shelter and to achieve control of their own lives.⁶⁸

⁶⁴ Castro, A.P. & Ettenger, K., 'Indigenous Knowledge And Conflict Management: Exploring Local Perspectives And Mechanisms For Dealing With Community Forestry Disputes,' *Paper Prepared for the United Nations Food and Agriculture Organization, Community Forestry Unit, for the Global Electronic Conference on "Addressing Natural Resource Conflicts Through Community Forestry,"* (FAO, January-April 1996).

Available at <http://www.fao.org/docrep/005/ac696e/ac696e09.htm> [Accessed on 14/7/2020].

⁶⁵ Berkes, F., et. al., 'Rediscovery of Traditional Ecological Knowledge as Adaptive Management,' *Ecological Applications*, Vol. 10, No. 5., October 2000, pp. 1251-1262 at p. 1251.

⁶⁶ Swiderska, K., et. al., 'Protecting Community Rights over Traditional Knowledge: Implications of Customary Laws and Practices,' *Interim Report (2005-2006)*, November 2006, p. 13. Available at <http://pubs.iied.org/pdfs/G01253.pdf> [Accessed on 14/7/2020].

⁶⁷ SGJN Senanayake, 'Indigenous Knowledge as a Key to Sustainable Development' (2006) 2 *Journal of Agricultural Sciences-Sri Lanka* <https://www.researchgate.net/publication/265197993_Indigenous_knowledge_as_a_key_to_sustainable_development> accessed 16 July 2020.

⁶⁸ *Ibid.*

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The Sustainable Development Goals (SDGs)⁶⁹ has several goals that seek to incorporate the knowledge vested in indigenous people in order to achieve its main agenda. This section offers some insights on debate relating to the place of indigenous knowledge in the sustainable development agenda as a means of promoting growth and development in Kenya.

11.2.2 Indigenous Knowledge as a Tool for Promoting Inclusive Growth and Development

Kenya has had a history of environmental injustice, where the colonialists used the law to appropriate all land and land-based resources from Africans and to vest them in the colonial masters.⁷⁰ In addition, the law gave the colonial authorities powers to appropriate land held by indigenous people and allocate it to the settlers.⁷¹ The colonial authorities were, therefore, able to grant land rights to settlers in the highlands, while Africans were being driven and restricted to the native reserves. In the natives' reserves, there was overcrowding, soil erosion, and poor sanitation, amongst many other problems.⁷²

The loss of control rights over natural resources also affected other resources including forests and water.⁷³ The focus of forests management in reserved forests was production and protection and included collection of revenues, supervisory permits and licences, protection against illegal entry and use, reforestation and afforestation, research and extension.⁷⁴ Further, outside

⁶⁹ United Nations General Assembly, *Transforming our world: the 2030 Agenda for Sustainable Development*, Resolution adopted by the General Assembly on 25 September 2015 [without reference to a Main Committee (A/70/L.1)].

⁷⁰ Ogendo, HWO, *Tenants of the Crown: Evolution of Agrarian Law & Institutions in Kenya*, (ACTS Press, Nairobi, 1991), p.54.

⁷¹ See generally the case of *Isaka Wainaina and Anor v Murito wa Indagara and others*, [1922-23] 9 E.A.L.R. 102.

⁷² See Ogendo, HWO, *Tenants of the Crown: Evolution of Agrarian Law & Institutions in Kenya*, (ACTS Press, Nairobi, 1991).

⁷³ Mogaka, H., 'Economic Aspects of Community Involvement in Sustainable Forest Management in Eastern and Southern Africa,' *Issue 8 of Forest and social perspectives in conservation*, IUCN, 2001.p.74.

⁷⁴ Kigenyi, *et al*, 'Practice Before Policy: An Analysis of Policy and Institutional Changes Enabling Community Involvement in Forest Management in Eastern and

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reserved forests, the focus by the government authorities was regulation and control of forest resources utilisation through legislation without considering the interests of the local communities or the existing traditional management systems.⁷⁵

Thus, the colonial government effectively transferred the management of forests from the local communities to the government through exclusionist and protectionist legal frameworks, a move that was inherited by the independent governments of Kenya.⁷⁶ It was only in the 1990s that there emerged a paradigm shift towards community-based forests management, although this was done with minimal commitment from the stakeholders.⁷⁷

Arguably, this has been with little success due to the bureaucracy involved in requiring communities to apply for complicated licences and permits in order to participate in the same. Similarly, in relation to water resources, legal frameworks were enacted chief among which, was the Water Ordinance of 1929, vesting water resources on the Crown. This denied local communities the universal water rights that they had enjoyed in the pre-colonial period. It is noteworthy, that the problem of environmental injustice in Kenya has in fact continued into independent Kenya and often with ugly results, as has been documented in various Government reports.⁷⁸

Southern Africa,' *Issue 10 of Forest and social perspectives in conservation*, (IUCN, 2002), p. 9.

⁷⁵ *Ibid.*

⁷⁶ For instance, in 1985 the Government of the day effected a total ban on the shamba system, which was participatory in nature in that it allowed communities to settle in forests and engage in farming as they took care of the forests. Following the ban, the communities were resettled outside the gazette forest areas. This form of eviction has also been witnessed in such recent cases as the Endorois and the Ogiek cases.

⁷⁷Emerton, L., 'Mount Kenya: The Economics of Community Conservation,' *Evaluating Eden Series*, Discussion Paper No.4, p. 6.

⁷⁸ See the *Report of the Judicial Commission Appointed to Inquire into Tribal Clashes in Kenya*, July 31, 1999 (Akiwumi Report, p. 59). The report found that some of the main causes of post-independence tribal clashes have been ambitions by some communities of recovering what they think they lost when the Europeans forcibly acquired their ancestral land; See also the *Kriegler and Waki Reports on 2007 Elections*, 2009, (Government Printer, Nairobi). The *Kriegler and Waki Reports* stated that the

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Environmental injustice continues to manifest itself in modern times. The recent conflicts such as those in Lamu County and in the pastoral counties are largely attributable to environmental injustices inflicted over the years.⁷⁹ In some, there are feelings that land and other land-based resources were taken away from local communities, creating a feeling of disinheritance. In other areas, there are conflicts over access to resources such as forests among forest communities for livelihood, while in others conflicts emerge due to competition over scarce natural resources and competing land uses.⁸⁰

Economically, forests provide timber which is an important source of revenue and a major foreign exchange earner. Forests also serve as habitats and a source of livelihoods for indigenous peoples and forest dwellers.⁸¹ The Africa Forest Law Enforcement and Governance (AFLEG) Ministerial Declaration of 2003⁸² recognized the role of forests in its preamble noting that Africa's forest eco-systems are essential for the livelihoods of the African people; especially the poor and that forests play important social, economic and environmental functions.⁸³

causes of the post-election clashes in the Rift Valley region covered by included conflict over land, cattle rustling, political differences and ecological reasons among others.

⁷⁹ "They Just Want to Silence Us" (*Human Rights Watch*, 17 December 2018) <<https://www.hrw.org/report/2018/12/17/they-just-want-silence-us/abuses-against-environmental-activists-kenyas-coast>> accessed 17 July 2020; Rachel Berger, 'Conflict over Natural Resources among Pastoralists in Northern Kenya: A Look at Recent Initiatives in Conflict Resolution' (2003) 15 *Journal of International Development* 245.

⁸⁰ 'FAO Working Paper 1' <<http://www.fao.org/3/X2102E/X2102E01.htm>> accessed 17 July 2020; Urmilla Bob and Salomé Bronkhorst, 'Environmental Conflicts: Key Issues and Management Implications' (2010) 10 *African Journal on Conflict Resolution*.

⁸¹ UNFF Memorandum, available at www.iucnael.org/en/.../doc../849-unit-3-forest-game-background.html. > accessed 16 July 2020; See also UNEP, *Global Environment Outlook 5: Environment for the future we want*, (UNEP, 2012), pp.145-154.

⁸² Africa Forest Law Enforcement and Governance (AFLEG), Ministerial Conference 13-16 October, 2003; Ministerial Declaration, Yaoundé, Cameroon, October 16, 2003.

⁸³ Sec. 2, *Forest Conservation and Management Act*, No. 34 of 2016, Laws of Kenya.

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Notably, while the laws acknowledge the existence of indigenous forests, the command and control approach to natural resource management and the associated sustainability and conservation measures do not differentiate indigenous forests from other types of forests in reality. All indigenous forests and woodlands are to be managed on a sustainable basis for purposes of water, soil and biodiversity conservation; riverine and shoreline protection; cultural use and heritage; recreation and tourism; sustainable production of wood and non-wood products; carbon sequestration and other environmental services; education and research purposes; and as habitats for wildlife in terrestrial forests and fisheries in mangrove forests.⁸⁴ As a result, the law requires the Kenya Forest Service to consult with the forest conservation committee for the area where the indigenous forest is situated in preparing a forest management plan.⁸⁵ Further, the Forests Board may enter into a joint management agreement for the management of any state indigenous forest or part thereof with any person, institution, government agency or forest association.⁸⁶ While such arrangements are important in promoting environmental justice since communities get to participate in management of indigenous forests, there is little evidence of active involvement of these communities. If anything, they have been suffering eviction from the indigenous forests.⁸⁷

⁸⁴ Sec. 42 (1), *Forest Conservation and Management Act*, No. 34 of 2016.

⁸⁵ *Ibid*, S. 42(2).

⁸⁶ *Ibid*, S. 44(3).

⁸⁷ 'Kenya: Indigenous Peoples Targeted as Forced Evictions Continue despite Government Promises

<<https://www.amnesty.org/en/latest/news/2018/08/kenya-indigenous-peoples-targeted-as-forced-evictions-continue-despite-government-promises/>> accessed 16 July 2020; 'Kenya: Indigenous Ogiek Face Eviction from Their Ancestral Forest... Again' (*Mongabay Environmental News*, 8 October 2018) <<https://news.mongabay.com/2018/10/kenya-indigenous-ogiek-face-eviction-from-their-ancestral-forest-again/>> accessed 16 July 2020; 'Families Torn Apart: Forced Eviction of Indigenous People in Embobut Forest, Kenya - Kenya' (*ReliefWeb*)

<<https://reliefweb.int/report/kenya/families-torn-apart-forced-eviction-indigenous-people-embobut-forest-kenya-0>> accessed 16 July 2020; 'Imminent Forced Eviction by Kenya Threatens Indigenous Communities'

Human Rights and Ancestral Forests - Kenya' (*ReliefWeb*)

<<https://reliefweb.int/report/kenya/imminent-forced-eviction-kenya-threatens->

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It has been argued that many, if not all of the planet's environmental problems and certainly its entire social and economic problems, have cultural activity and decisions – people and human actions – at their roots.⁸⁸ As such, solutions are likely to be also culturally-based, and the existing models of sustainable development forged from economic or environmental concern are unlikely to be successful without cultural considerations.⁸⁹ Culture in this context, has been defined as: the general process of intellectual, spiritual or aesthetic development; culture as a particular way of life, whether of people, period or group; and culture as works and intellectual artistic activity.⁹⁰ Notably, the generation, adaptation and use of indigenous knowledge are greatly influenced by the culture.⁹¹ It has rightly been observed that despite the indigenous populations having suffered from invasion and oppression, and oftentimes they have seen their knowledge eclipsed by western knowledge, imposed on them through western institutions, indigenous populations have managed to survive for centuries adapting in many different ways to adverse climate

indigenous-communities-human-rights-and> accessed 16 July 2020; 'Kenya Defies Its Own Courts: Torching Homes and Forcefully Evicting the Sengwer from Their Ancestral Lands, Threatening Their Cultural Survival | Forest Peoples Programme' <<http://www.forestpeoples.org/topics/legal-human-rights/news/2014/01/kenya-defies-its-own-courts-torching-homes-and-forcefully-evi>> accessed 16 July 2020; 'Kenya's Sengwer People Demand Recognition of "Ancestral Land" | Voice of America - English' <<https://www.voanews.com/africa/kenyas-sengwer-people-demand-recognition-ancestral-land>> accessed 16 July 2020; Jacqueline M Klopp and Job Kipkosgei Sang, 'Maps, Power, and the Destruction of the Mau Forest in Kenya' (2011) 12 Georgetown Journal of International Affairs 125; 'Kenya Forest Service - Kenya Forest Service' <http://www.kenyaforestservice.org/index.php?option=com_content&view=article&catid=223&id=149&Itemid=98> accessed 16 July 2020.

⁸⁸ Dessein, J. et al (ed), 'Culture in, for and as Sustainable Development: Conclusions from the COST Action IS1007 Investigating Cultural Sustainability,' (University of Jyväskylä, Finland, 2015), p. 14. Available at <http://www.culturalsustainability.eu/conclusions.pdf> [Accessed on 17/7/2020].

⁸⁹ Ibid, p.14.

⁹⁰ Ibid, p. 21.

⁹¹ SGJN Senanayake, 'Indigenous Knowledge as a Key to Sustainable Development' (2006) 2 Journal of Agricultural Sciences–Sri Lanka.

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conditions and managing to create sustainable livelihood systems.⁹² Indeed, their diverse forms of knowledge, deeply rooted in their relationships with the environment as well as in cultural cohesion, have allowed many of these communities to maintain a sustainable use and management of natural resources, to protect their environment and to enhance their resilience; their ability to observe, adapt and mitigate has helped many indigenous communities face new and complex circumstances that have often severely impacted their way of living and their territories.⁹³ It is therefore worth including indigenous knowledge and culture in any plans, programmes and policies aimed at realisation of sustainable development agenda.

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

i. The International Law Framework

The *United Nations Declaration on the Rights of Indigenous Peoples*⁹⁴ was adopted against a background of indigenous peoples having suffered from historic injustices as a result of, *inter alia*, their colonization and dispossession of their lands, territories and resources, thus preventing them from exercising, in particular, their right to development in accordance with their own needs and interests.⁹⁵ It therefore came in to, *inter alia*, correct such situations through guaranteeing their right to self-determination.⁹⁶ In addition, it reaffirms the indigenous peoples' right to the lands, territories and resources which they have traditionally owned, occupied or otherwise used or acquired; the right to own, use, develop and control the lands,

⁹² Giorgia Magni, 'Indigenous Knowledge and Implications for the Sustainable Development Agenda.' (2017) 52 *European Journal of Education* 437, p.3 <<https://unesdoc.unesco.org/ark:/48223/pf0000245623>> Accessed 17 July 2020.

⁹³ *Ibid*; See also Anders Breidlid, 'Culture, Indigenous Knowledge Systems and Sustainable Development: A Critical View of Education in an African Context' (2009) 29 *International Journal of Educational Development* 140.

⁹⁴ 61/295, *United Nations Declaration on the Rights of Indigenous Peoples*, adopted by the General Assembly on Thursday, 13 September 2007.

⁹⁵ *Ibid*, Preamble.

⁹⁶ *Ibid*, Art. 3.

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territories and resources that they possess by reason of traditional ownership or other traditional occupation or use, as well as those which they have otherwise acquired; and States should give legal recognition and protection to these lands, territories and resources.⁹⁷ Such right includes their right to use their customs, traditions and land tenure systems of the indigenous peoples concerned especially in relation to their right to the conservation and protection of the environment and the productive capacity of their lands or territories and resources.⁹⁸ States are therefore obligated to establish and implement assistance programmes for indigenous peoples for such conservation and protection, without discrimination.⁹⁹

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

The United Nations Educational, Scientific and Cultural Organization (UNESCO) asserts that ‘culture is who we are and what shapes our identity. No development can be sustainable without including culture.’¹⁰⁰ African States and other stakeholders, in the *Ngorongoro Declaration*¹⁰¹ have acknowledged that Sustainable development can ensure that appropriate efforts are deployed to protect and conserve the cultural and natural resources of a region faced with the challenges of climate change, natural and human-made disasters, population growth, rapid urbanization,

⁹⁷ Ibid, Art. 26.

⁹⁸ Ibid, Art. 29 (1).

⁹⁹ Ibid.

¹⁰⁰ United Nations Educational, Scientific and Cultural Organization (UNESCO), ‘Culture for Sustainable Development,’ available at <http://en.unesco.org/themes/culture-sustainable-development> [Accessed on 17/7/2020]

¹⁰¹ The Ngorongoro Declaration on Safeguarding African World Heritage as a Driver of Sustainable Development, adopted in Ngorongoro, Tanzania on 4 June 2016.

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destruction of heritage, and environmental degradation for present and future generations.¹⁰² As such, they declared that on the one hand, African heritage is central to preserving and promoting African cultures thereby uplifting identity and dignity for present and future generations in an increasingly globalized world, and on the other hand, heritage, including World Heritage properties, is a driver of sustainable development and critical for achieving regional socio-economic benefits, environmental protection, sustainable urbanization, social cohesion and peace.¹⁰³

ii. The National Policy and Legal Framework on Indigenous Knowledge

The Constitution of Kenya 2010 recognises culture as the foundation of the nation and as the cumulative civilization of the Kenyan people and nation.¹⁰⁴ In light of this, it obligates the State to, inter alia, promote all forms of national and cultural expression through literature, the arts, traditional celebrations, science, communication, information, mass media, publications, libraries and other cultural heritage; and recognise the role of science and indigenous technologies in the development of the nation.

The Constitution provides that the State shall protect and enhance indigenous knowledge of biodiversity of the communities.¹⁰⁵ The State is also obliged to encourage public participation in the management, protection and conservation of the environment.¹⁰⁶ In doing so, the State is also obligated to supply the relevant environmental information. Article 35(1) of the Constitution states that every citizen has the right of access to – (a) information held by the State; and (b) information held by another person and required for the exercise or protection of any right or fundamental freedom. *Access to Information Act, 2015*¹⁰⁷, which is intended to give effect to Article 35 of the Constitution; to confer on the Commission

¹⁰² Ibid, p.2.

¹⁰³ Ibid, p. 3.

¹⁰⁴ Art. 11 (1), Constitution of Kenya, 2010.

¹⁰⁵ Ibid, Art. 69(1) (c).

¹⁰⁶ Ibid, Art. 69 (1) (d).

¹⁰⁷ Access to Information Act, No. 31 of 2016, Laws of Kenya.

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on Administrative Justice the oversight and enforcement functions and powers and for connected purposes. It classifies environmental information as part of the information that falls under information affecting public interest. Such environmental information is necessary to enable communities make informed decisions.¹⁰⁸ Thus decision-making processes should focus on the supply of the right information, incentives, resources and skills to citizens so that they can increase their resilience and adapt to climate change and other environmental changes.¹⁰⁹

Notably, sustainable development involves adoption of sustainable methods of managing conflicts and disputes.¹¹⁰ In settling land disputes, communities are encouraged to apply recognized local community initiatives consistent with the Constitution.¹¹¹ This will enhance community involvement in natural resource management thus enhancing their participation in achieving peace for sustainable livelihoods.¹¹² All these provisions encourage in one way or the other the participation of local communities in the management, use or ownership of natural resources and most importantly, using their indigenous knowledge as a knowledge reference point.

¹⁰⁸ Carolina Zambrano-Barragán, 'Decision Making and Climate Change Uncertainty: Setting the Foundations for Informed and Consistent Strategic Decisions' (*World Resources Institute*, 27 June 2013) <<https://www.wri.org/our-work/project/world-resources-report/decision-making-and-climate-change-uncertainty-setting>> accessed 17 July 2020.

¹⁰⁹ Ibid.

¹¹⁰ See Kariuki Muigua, *Harnessing Traditional Knowledge for Environmental Conflict Management in Kenya* (2016) <<http://kmco.co.ke/wp-content/uploads/2018/08/TRADITIONAL-KNOWLEDGE-AND-CONFLICT-MANAGEMENT-29-SEPTEMBER-2016.pdf>> accessed 17 July 2020.

¹¹¹ *Constitution of Kenya, 2010*, Art.60 (1) (g) and Art.67 (2) (f).

¹¹² See Kariuki Muigua, 'Mainstreaming Traditional Ecological Knowledge in Kenya for Sustainable Development', 2020 *Journal of cmsd* Volume 4(1) <<http://journalofcmsd.net/wp-content/uploads/2020/03/Mainstreaming-Traditional-Ecological-Knowledge-in-Kenya-for-Sustainable-Development-Kariuki-Muigua-23rd-August-2019.pdf>> Accessed on 17 July 2020.

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The *Protection of Traditional Knowledge and Traditional Cultural Expressions Act, 2016*,¹¹³ which seeks to provide a unified and comprehensive framework for the protection and promotion of traditional knowledge and traditional cultural expressions; and to give effect to Articles 11, 40(5) and 69 of the Constitution, recognises the intrinsic value of traditional cultures and traditional cultural expressions, including their social, cultural, economic, intellectual, commercial and educational value.¹¹⁴ While the Act does not expressly mention the words ‘sustainable development’, it provides that equitable benefit sharing rights of the owners and holders of traditional knowledge or cultural expressions shall include the right to fair and equitable sharing of benefits arising from the commercial or industrial use of their knowledge, which right might extend to non-monetary benefits, such as *contributions to community development, depending on the material needs and cultural preferences expressed by the communities themselves* (emphasis added).¹¹⁵ Notably, *2030 Agenda on Sustainable Development Goals (SDGs)* under Goal 16 which seeks to promote peaceful and inclusive societies for sustainable development, provide access to justice for all and build effective, accountable and inclusive institutions at all levels, calls for states to ensure responsive, inclusive, participatory and representative decision-making at all levels.¹¹⁶ The SDGs also pledge to foster intercultural understanding, tolerance, mutual respect and an ethic of global citizenship and shared responsibility. They also acknowledge the natural and cultural diversity of the world and recognise that all cultures and civilizations can contribute to and are enablers of, sustainable development.¹¹⁷ The provisions in the *Protection of Traditional Knowledge and Traditional Cultural Expressions Act, 2016* thus offer a rare opportunity for the state to realize the vision of the 2030 SDGs by incorporating Kenyan communities’ indigenous knowledge in the roadmap to the achievement of the sustainable development agenda.

¹¹³ *Protection of Traditional Knowledge and Traditional Cultural Expressions Act, No. 33 of 2016, Laws of Kenya.*

¹¹⁴ *Ibid*, s. 2(d).

¹¹⁵ *Ibid*, s. 24 (1)(2).

¹¹⁶ *2030 Agenda on Sustainable Development Goals, Goal 16.7.*

¹¹⁷ *Ibid*, Vision, Para. 36.

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By including these communities and their knowledge, any development policies aimed to benefit these communities will be more likely to not only respond to their cultural needs and preferences but will also enable them meaningfully participate. The *Environmental Management and Conservation Act* (EMCA)¹¹⁸ is the overarching law on environmental matters in Kenya. It is a framework environmental law establishing legal and institutional mechanisms for the management of the environment. It provides for improved legal and administrative co-ordination of the diverse sectoral initiatives in order to improve the national capacity for the management of the environment.

Section 44 of the Act, mandates the National Environment Management Authority (NEMA), in consultation with the relevant lead agencies, to develop, issue and implement regulations, procedures, guidelines and measures for the sustainable use of hill sides, hill tops, mountain areas and forests. It also requires the formulation of regulations, guidelines, procedures and measures aimed at controlling the harvesting of forests and any natural resources located in or on a hill side, hill top or mountain areas so as to protect water catchment areas, prevent soil erosion and regulate human settlement. Section 46(1) requires every County Environment Committee to specify the areas identified in accordance with section 45(1) as targets for afforestation or reforestation. A County Environment Committee is to take measures, through encouraging voluntary self-help activities in their respective local community, to plant trees or other vegetation in any areas specified under subsection (1) which are within the limits of its jurisdiction.¹¹⁹

It is noteworthy that such afforestation may be ordered to be carried out even in private land. Paragraph (3) thereof is to the effect that where the areas specified under subsection (1) are subject to leasehold or any other interest in land, including customary tenure, the holder of that interest shall implement measures required to be implemented by the District

¹¹⁸ No. 8 of 1999, Laws of Kenya.

¹¹⁹ S. 46(2), No. 8 of 1999.

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Environment Committee, including measures to plant trees and other vegetation in those areas.

Under section 48, the Director-General with the approval of the Director of Forestry, may enter into any contractual arrangement with a private owner of any land on such terms and conditions as may be mutually agreed for the purposes of registering such land as forest land. The powers of the Authority include the issuance of guidelines and prescribing measures for the sustainable use of hill tops, hill slides and mountainous areas.¹²⁰ To promote environmental justice and community participation in environmental matters, section 48 (2) prohibits the Director-General from taking any action, in respect of any forest or mountain area, which is prejudicial to the traditional interests of the indigenous communities customarily resident within or around such forest or mountain area.

The general objectives of the *Environmental Management and Co-ordination (Wetlands, River Banks, Lake Shores and Sea Shore Management) Regulation, 2009*¹²¹ (dealing with wetlands management) include, *inter alia*: to provide for the conservation and sustainable use of wetlands and their resources in Kenya; to promote the integration of sustainable use of resources in wetlands into the local and national management of natural resources for socio-economic development; to ensure the conservation of water catchments and the control of floods; to ensure the sustainable use of wetlands for ecological and aesthetic purposes for the common good of all citizens; to ensure the protection of wetlands as habitats for species of fauna and flora; provide a framework for public participation in the management of wetlands; to enhance education research and related activities; and to prevent and control pollution and siltation.

Regulation 5(1) thereof provides for the general principles that shall be observed in the management of all wetlands in Kenya including: Wetland resources to be utilized in a sustainable manner compatible with the continued presence of wetlands and their hydrological, ecological, social

¹²⁰ S. 47(1), No. 8 of 1999.

¹²¹ Legal Notice No. 19, Act No. 8 of 1999.

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and economic functions and services; Environmental impact assessment and environmental audits as required under the Act to be mandatory for all activities likely to have an adverse impact on the wetland; Special measures to promote respect for, preserve and maintain knowledge innovations and practices of indigenous and local communities embodying traditional lifestyles relevant for the conservation and sustainable use of biological diversity and promote their wider application with the approval and involvement of the holders of such knowledge, innovations and practices and encourage the equitable sharing of the benefits arising from the utilization of such knowledge, innovations and practices; Sustainable use of wetlands to be integrated into the national and local land use plans to ensure sustainable use and management of the resources; principle of public participation in the management of wetlands; principle of international co-operation in the management of environmental resources shared by two or more states; the polluter-pays principle; the pre-cautionary principle; and public and private good.

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

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

The 2030 Agenda for Sustainable Development Goals captures the states' pledge to foster intercultural understanding, tolerance, mutual respect and an ethic of global citizenship and shared responsibility, and their acknowledgement of the natural and cultural diversity of the world and recognition that all cultures and civilizations can contribute to, and are crucial enablers of, sustainable development.¹²²

¹²² United Nations, *Transforming our world: the 2030 Agenda for Sustainable Development*, A/RES/70/1, Resolution adopted by the General Assembly on 25 September 2015, para. 36.

a) Environmental Justice and Access to Information

As already pointed out, in order to contribute to the protection of the right of every person to live in an environment adequate to his or her health and well-being, there is need to guarantee the rights of access to information, public participation in decision-making, and access to justice in environmental matters.¹²³ The Constitution guarantees the right of access to information held by the State, any other person and required for the exercise or protection of any right or fundamental freedom.¹²⁴ It also obligates the State to publish and publicise any important information affecting the nation.¹²⁵ Guaranteeing access to relevant information, is imperative in facilitating access to environmental justice and enabling the communities to give prior, informed consent in relation to exploitation of natural resources.

With regard to informed consent, 'informed' has been defined to mean that all information relating to the activity is provided to indigenous peoples and that the information is objective, accurate and presented in a manner or form that is understandable to indigenous peoples.¹²⁶ Relevant information includes: the nature, size, pace, duration, reversibility and scope of any proposed project; the reason(s) or purpose of the project; the location of areas that will be affected; a preliminary assessment of the possible economic, social, cultural and environmental impacts, including potential risks and benefits; personnel likely to be involved in the implementation of the project; and procedures that the project may entail.¹²⁷ This informed consent cannot therefore be given without first ensuring that the concerned communities have access to relevant information. In *Friends of Lake Turkana*

¹²³ Art.1 of the 1998 Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters, UN Doc. ECE/CEP/43. Adopted at the 4th UNECE Ministerial Conference, Aarhus, 25 June, 1998, UN Doc. ECE/CEP/43.

¹²⁴ Art. 35(1).

¹²⁵ Art. 35(2).

¹²⁶ FAO, 'Respecting free, prior and informed consent: Practical guidance for governments, companies, NGOs, indigenous peoples and local communities in relation to land acquisition,' *Governance of Tenure Technical Guide* No. 3, Rome, 2014, p.5.

¹²⁷ *Ibid.*

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Trust v Attorney General & 2 others,¹²⁸ the court was of the view that access to environmental information was a prerequisite to effective public participation in decision making and monitoring governmental and public sector activities on the environment.

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

b) Environmental Justice and Public Participation

Meaningful involvement of people in environmental matters requires effective access to decision making processes for all, and the ability in all communities to make informed decisions and take positive actions to produce environmental justice for themselves.¹²⁹ The *Vienna Declaration and Programme of Action*¹³⁰ states that all peoples have the right of self-determination.¹³¹ By virtue of that right, they freely determine their political status, and freely pursue their economic, social and cultural development. This calls for free prior and informed consent from the affected communities in relation to exploitation of natural resources in their areas.

¹²⁸ ELC Suit No 825 of 2012.

¹²⁹ US Office of Legacy Management, 'Environmental Justice' *What Is Environmental Justice?* Available at <http://energy.gov/lm/services/environmental-justice/what-environmental-justice>[Accessed on 12/7/2020].

¹³⁰ UN General Assembly, *Vienna Declaration and Programme of Action*, 12 July 1993, A/CONF.157/23.

¹³¹ Proclamation 1.2.

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Free, prior and informed consent is a collective right of indigenous peoples to make decisions through their own freely chosen representatives and customary or other institutions and to give or withhold their consent prior to the approval by government, industry or other outside party of any project that may affect the lands, territories and resources that they customarily own, occupy or otherwise use.¹³² It is, thus, not a stand-alone right but an expression of a wider set of human rights protections that secure indigenous peoples' rights to control their lives, livelihoods, lands and other rights and freedoms and which needs to be respected alongside other rights, including rights relating to self-governance, participation, representation, culture, identity, property and, crucially, lands and territories.¹³³ The Guidelines call for consultation and participation which entails engaging with and seeking the support of those who, having legitimate tenure rights, could be affected by decisions, prior to decisions being taken, and responding to their contributions; taking into consideration existing power imbalances between different parties and ensuring active, free, effective, meaningful and informed participation of individuals and groups in associated decision-making processes.¹³⁴

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

¹³² FAO, 'Respecting free, prior and informed consent: Practical guidance for governments, companies, NGOs, indigenous peoples and local communities in relation to land acquisition, *op cit*, p.4.

¹³³ *Ibid.*

¹³⁴ *Ibid*, p. 4.

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resources throughout Kenya; and to facilitate the decentralisation of State organs, their functions and services, from the capital of Kenya.¹³⁵

The Constitution provides for participation of persons with disabilities,¹³⁶ youth,¹³⁷ minorities and marginalized groups,¹³⁸ and older members of society,¹³⁹ in governance and all other spheres of life. The foregoing provisions are important especially in relation to the provisions of the *County Governments Act*,¹⁴⁰ which are to the effect that citizen participation in county governments shall be based upon the principles of, *inter alia*, timely access to information, data, documents, and other information relevant or related to policy formulation and implementation; reasonable access to the process of formulating and implementing policies, laws, and regulations; protection and promotion of the interest and rights of minorities, marginalized groups and communities; legal standing to interested or affected persons, organizations, and where pertinent, communities, to appeal from or, review decisions, or redress grievances, with particular emphasis on persons and traditionally marginalized communities, including women, the youth, and disadvantaged communities; reasonable balance in the roles and obligations of county governments and non-state actors in decision-making processes; promotion of public-private partnerships; and recognition and promotion of the reciprocal roles of non-state actors' participation and governmental facilitation and oversight.¹⁴¹

These provisions have an implication on natural resources management. It means that the devolved governments must not purport to make unilateral decisions especially with regard to the management of natural resources. They must recognise the centrality of people in natural resources management, since these resources have an impact on the economic, social,

¹³⁵ Art. 174, Constitution of Kenya 2010.

¹³⁶ Art. 54.

¹³⁷ Art. 55.

¹³⁸ Art. 56.

¹³⁹ Art. 57.

¹⁴⁰ No. 17 of 2012, Laws of Kenya.

¹⁴¹ *Ibid*, S. 87.

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cultural and even spiritual lives of the diverse communities in Kenya. As such, they must ensure their active participation in coming up with legislative and policy measures to govern their management and utilisation for the benefit of all. They must also be alive to the fact that any negative impact on the environment directly affects these communities and ultimately has an adverse effect on the sustainable development agenda.

The Constitution of Kenya requires Parliament to conduct its business in an open manner, and its sittings and those of its committees to be open to the public; and to facilitate public participation and involvement in the legislative and other business of Parliament and its committees.¹⁴² The proposed law, *The Natural Resources (Benefit Sharing) Bill, 2018*, also seeks to have established by each affected local community a Local Benefit Sharing Forum comprising of five persons elected by the residents of the local community.¹⁴³ Every affected local community is also to enter into a local community benefit sharing agreement with the respective county benefit sharing committee.¹⁴⁴ Such local community benefit sharing agreement is to include non-monetary benefits that may accrue to the local community and the contribution of the affected organization in realizing the same.¹⁴⁵

It is, therefore, imperative that such communities be involved in the whole process to enable them air their views on the same and where such negative effects are inevitable due to the nature of exploitation of the natural resources, their appreciation of such impact is the ultimate key to winning social acceptance of these projects.¹⁴⁶ Indeed, participation will bring the

¹⁴² Art. 118(1) (a).

¹⁴³ Clause 31 (1).

¹⁴⁴ Clause 32 (1).

¹⁴⁵ Clause 32(2).

¹⁴⁶ S. 115 of the *County Governments Act, 2012*, provides that Public participation in the county planning processes shall be mandatory and be facilitated through – mechanisms provided for in Part VIII of this Act; and provision to the public of clear and unambiguous information on any matter under consideration in the planning process, including – clear strategic environmental assessments; clear environmental impact assessment reports; expected development outcomes; and development options and their cost implications.

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most benefit when the process is seen as fair, and processes are seen as more fair, if those who are affected have an opportunity to participate in a meaningful way and their opinions are taken seriously.¹⁴⁷ Indicators of procedural justice have been identified as: presence of local environmental groups, public participation or consultation on local developments and initiatives, access to information, and responsiveness by public bodies.¹⁴⁸

Indeed, those affected by environmental problems must be included in the process of remedying those problems; that all citizens have a duty to engage in activism; and that in a democracy it is the people, not the government, that are ultimately responsible for fair use of the environment.¹⁴⁹ Active and meaningful public participation, therefore, through such means as suggested in the indicators of procedural justice are important in enhancing community participation in realisation of the sustainable development agenda.

c) Benefit Sharing Arrangements

Benefit-sharing is a way of integrating the economic, social and environmental considerations in the management of natural resources.¹⁵⁰ In order to protect community and individual interests over land-based resources, and facilitate benefit sharing, the *National Land Policy*, 2009, recommends that the Government should: establish legal frameworks to recognise community and private rights over renewable and non-renewable land-based natural resources and incorporate procedures for access to and sustainable use of these resources by communities and private entities;

¹⁴⁷ Amerasinghe, M., *et al*, 'Enabling Environmental Justice: Assessment of Participatory Tools. Cambridge, MA: Massachusetts Institute of Technology, 2008, p.3. Available at <http://web.mit.edu/jcarmin/www/carmin/EnablingEJ.pdf> [Accessed on > accessed 17 July 2020].

¹⁴⁸ Todd, H., & Zografos, C., Justice for the Environment: Developing a Set of Indicators of Environmental Justice for Scotland, *Environmental Values*, 14(4), 483-501.

¹⁴⁹ Frechette, K.S., 'Environmental Justice: Creating Equality, Reclaiming Democracy,' OUP USA, 2005. Available at <http://philpapers.org/rec/SHREJC> Accessed on > accessed 17 July 2020.

¹⁵⁰ Government of Kenya, *Sessional Paper No. 3 of 2009 on National Land Policy*, p. 23, (Government Printer, Nairobi).

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devise and implement participatory mechanisms for compensation for- loss of land and damage occasioned by wild animals; put in place legislative and administrative mechanisms for determining and sharing of benefits emanating from land based natural resources by communities and individuals where applicable; make benefit-sharing mandatory where land based resources of communities and individuals are managed by national authorities for posterity; and ensure the management and utilization of land-based natural resources involves all stakeholders.¹⁵¹

The proposed law, *Natural Resources (Benefit Sharing) Bill, 2018*¹⁵² seeks to establish a system of benefit sharing in resource exploitation between resource exploiters, the national government, county governments and local communities; to establish the Natural Resources Benefits Sharing Authority; and for connected purposes. The Bill, if passed into law, is to apply with respect to the exploitation of petroleum, natural gas, minerals, forest resources, water resources, wildlife resources and fishery resources.¹⁵³ Notably, the Bill provides for the guiding principles in benefit sharing which include: transparency and inclusivity; revenue maximization and adequacy; efficiency and equity; accountability and participation of the people; and rule of law and respect for human rights of the people.¹⁵⁴

The proposed law also proposes the establishment of a Benefit Sharing Authority,¹⁵⁵ with the mandate to, *inter alia*, coordinate the preparation of benefit sharing agreements between local communities and affected organizations; review, and, determine the royalties payable; identify counties that require to enter into benefit sharing agreement for the commercial exploitation of natural resources within the counties; oversee the administration of funds set aside for community projects identified or determined under any benefit sharing agreement; monitor the implementation of any benefit sharing agreement entered into between a

¹⁵¹ *Ibid*, p. 23.

¹⁵² KenyaGazette Supplement No.130 (Senate Bills No.31).

¹⁵³ Clause3.

¹⁵⁴ Clause4.

¹⁵⁵ Clause5.

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county and an affected organization; conduct research regarding the exploitation and development of natural resources and benefit sharing in Kenya; make recommendations to the national government and county governments on the better exploitation of natural resources in Kenya; determine appeals arising out of conflicts regarding the preparation and implementation of county benefit sharing agreements; and advise the national government on policy and the enactment of legislation relating to benefit sharing in resource exploitation.¹⁵⁶

The Bill also seeks to establish in each county with natural resources, a County Benefit Sharing Committee.¹⁵⁷ Benefit sharing could effectively be used to promote environmental justice among communities and enhance the relationship between the government and communities, as well as among communities which in turn enhances peace in the country. A satisfied people are likely to support and even contribute in efforts towards the sustainable development agenda and are also more likely to adopt sustainable methods of production.

To facilitate more equitable distribution of accruing benefits among local, often subsistence, and indigenous peoples, there are those who advocate for approaches incorporating community based natural resource management (CBNRM) and other approaches that protect the interests of the local people. The CBNRM approach is built upon three assumptions: management responsibility over the local natural resources that is devolved to

¹⁵⁶ Clause6 (1).

¹⁵⁷ Clause28. The functions of the said Committees will include to: negotiate with an affected organization on behalf of the County Government prior to entering into a county benefit sharing agreement; monitor the implementation of projects required to be undertaken in the county pursuant to a benefit sharing agreement; determine the amount of money to be allocated to each local community from sums devolved under this Act; convene public forums to facilitate public participation with regard to proposed county benefit sharing agreements prior to execution by the county government; convene public forums for the purpose of facilitating public participation with regard to community projects proposed to be undertaken using monies that accrue to a county government pursuant to this Act; and make recommendations to the county government on projects to be funded using monies which accrue to the county government pursuant to this Act.(Clause 29).

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community level will encourage communities to use these resources up to sustainable levels; the “community” represents the interests of all its members; and communities are keen to accept management responsibility because they see the (long-term) economic benefits of sustainable utilisation, and they are willing to invest time and resources in natural resource management.¹⁵⁸

d) Payment for ecosystem services

One aspect of biodiversity conservation that has not been tapped by Kenyans is payment for ecosystem services. Ecosystem services refer to the value people get from ecosystems. Examples are the value of ecosystems in freshwater purification, pollination, clean air, flood control, soil stability, water conservation and climate regulation.¹⁵⁹ The value of ecosystem services is estimated at more than one third of the total value of the world’s economy.¹⁶⁰ The primary reason that ecosystem services are taken for granted is that they are deemed to be free.¹⁶¹ An example of payment for ecosystem services includes the residents of Nairobi paying a certain amount of money to the communities surrounding Aberdare National Park because most of the water used in Nairobi comes from the Aberdares. This will encourage the Aberdares community to continue conserving the resources as such conservation benefits them. However, in Kenya, the value of ecosystem services rarely enters policy debates or public discussions.¹⁶²

¹⁵⁸ Shackelton, S. & Campbell, B. (eds), ‘Empowering Communities to Manage Natural Resources: Case Studies from Southern Africa,’ Center for International Forestry Research, March 2000, p. 10. Available at http://www.cifor.org/publications/pdf_files/Books/Empowering.pdf > accessed 17 July 2020.

¹⁵⁹ Hunter, David, James Salzman, and Durwood Zaelke. *International environmental law and policy*. Vol. 516. New York: Foundation Press, 2007, p. 916.

¹⁶⁰ *Ibid*; Losey, J.E. & Vaughan, M., ‘The Economic Value of Ecological Services Provided by Insects,’ *BioScience*, Vol. 56, No. 4, April 2006, pp. 311-323; Costanza, R., ‘The value of the world’s ecosystem services and natural capital,’ *Nature*, Vol. 387, 15 May 1997, pp. 253-260.

¹⁶¹ Hunter, David, James Salzman, and Durwood Zaelke. *International environmental law and policy*. Vol. 516. New York: Foundation Press, 2007, p. 916; Salzman, J., ‘Valuing Ecosystem Services,’ *Ecology Law Quarterly*, Vol. 24, Iss. 4, September 1997, pp.887-904.

¹⁶² *Ibid*.

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

This is the involvement of community members and local institutions in the management of natural resources for their economic growth and development. It involves devolution of power and authority from the State to local levels. This legitimises indigenous resource uses and rights and includes traditional values and ecological knowledge in modern resource management.¹⁶³ The Constitution provides that the state shall protect and enhance indigenous knowledge of biodiversity of the communities.¹⁶⁴ The use of indigenous knowledge in biodiversity conservation encourages community participation and benefits from conservation and ultimately leads to reduction in human-wildlife conflict.¹⁶⁵ The Wildlife Conservation and Management Act, 2013¹⁶⁶ (WCMA) provides for CBNRM through the recognition of community conservancies and sanctuaries.¹⁶⁷

Another opportunity under CBNRM approach is the use of incentives to encourage participation in wildlife management. Command and control approaches to wildlife management have failed to curb loss of wildlife. If private land owners and communities are given incentives to keep wildlife on their land, then they will perceive wildlife as an economic good and protect it in the same manner they protect their private property. The WCMA now provides for incentives for wildlife management.¹⁶⁸ Economic incentives such as tax exemptions and waiver of stamp duties on land relating to wildlife would go a long way in encouraging Kenyans to conserve wildlife as an alternative land use method. These incentives may also be used in management of other resources such as forests, using

¹⁶³ Kellert, S.R., *et al*, 'Community Natural Resource Management: Promise, Rhetoric and Reality,' *Society and Natural Resources: An International Journal*, Vol.13, No.8, 2000, p.706.

¹⁶⁴ Art. 69(1) (c).

¹⁶⁵ Warren, M., 'Indigenous Knowledge, Biodiversity Conservation and Development' in Bennunet, L.A., *al.*, (eds), *Conservation of Biodiversity in Africa: Local Initiatives and Institutional Roles* (Centre for Biodiversity, National Museums of Kenya, 1995) 93, p.96.

¹⁶⁶ Wildlife Conservation and Management Act, No. 47 of 2013, Laws of Kenya.

¹⁶⁷ *Ibid*, sec. 39 & 40.

¹⁶⁸ S. 70.

indigenous community knowledge especially for those communities who have traditionally relied on such forests for their livelihoods.

f) Dissemination of Information and Environmental Education to Communities

Agenda 21 provides that Governments at the appropriate level, with the support of the relevant international and regional organizations, should, *inter alia*: promote a multidisciplinary and cross-sectoral approach in training and the dissemination of knowledge to local people on a wide range of issues which include various resources management.¹⁶⁹ Further, Agenda 21 states that Coastal States should promote and facilitate the organization of education and training in integrated coastal and marine management and sustainable development for scientists, technologists, managers (including community-based managers) and users, leaders, indigenous peoples, fisherfolk, women and youth, among others. Management and development, as well as environmental protection concerns and local planning issues, should be incorporated in educational curricula and public awareness campaigns, with due regard to traditional ecological knowledge and socio-cultural values.¹⁷⁰ This is useful in promoting sustainable and inclusive sustainable resources management through empowering the local people to participate meaningfully in the same.

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

g) Community Participation in Climate Change Mitigation

The Bali Principles affirm the fact that the impacts of climate change are disproportionately felt by small island states, women, youth, coastal peoples, local communities, indigenous peoples, fisherfolk, poor people and

¹⁶⁹ Clause 13.22.

¹⁷⁰ Clause 17.15.

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the elderly. Also noteworthy is the assertion that the local communities, affected people and indigenous peoples have been kept out of the global processes to address climate change. The Principles also acknowledge that unsustainable production and consumption practices are at the root of this and other global environmental problems. The impacts of climate change also threaten food sovereignty and the security of livelihoods of natural resource-based local economies. They can also threaten the health of communities around the world-especially those who are vulnerable and marginalized, in particular children and elderly people. More importantly, the *Bali Principles* acknowledge in the preamble that combating climate change must entail profound shifts from unsustainable production, consumption and lifestyles, with industrialized countries taking the lead.¹⁷¹

¹⁷¹ Though non-binding, the *Bali Principles* give some recommendations that can boost efforts to achieve sustainable development. These include, inter alia: the need to reduce with an aim to eliminate the production of greenhouse gases and associated local pollutants; the rights of indigenous peoples and affected communities to represent and speak for themselves; Governments' responsibility for addressing climate change in a manner that is both democratically accountable to their people and in accordance with the principle of common but differentiated responsibilities; fossil fuel and extractive industries be held strictly liable for all past and current life-cycle impacts relating to the production of greenhouse gases and associated local pollutants; clean, renewable, locally controlled and low-impact energy resources in the interest of a sustainable planet for all living things; the right of all people, including the poor, women, rural and indigenous peoples, to have access to affordable and sustainable energy; the need for solutions to climate change that do not externalize costs to the environment and communities, and are in line with the principles of a just transition; the need for socio-economic models that safeguard the fundamental rights to clean air, land, water, food and healthy ecosystems; the rights of communities dependent on natural resources for their livelihood and cultures to own and manage the same in a sustainable manner, and avoiding the commodification of nature and its resources; recognition of the right to self-determination of Indigenous Peoples, and their right to control their lands, including sub-surface land, territories and resources and the right to the protection against any action or conduct that may result in the destruction or degradation of their territories and cultural way of life; the right of indigenous peoples and local communities to participate effectively at every level of decision-making, including needs assessment, planning, implementation, enforcement and evaluation, the strict enforcement of principles of prior informed consent, and the right to say "No"; the need for solutions that address women's rights; the right of youth as equal partners in the movement to address climate change and its associated impacts; education of

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It has rightly been argued that forest and landscape restoration is about more than just trees. It goes beyond afforestation, reforestation, and ecological restoration to improve both human livelihoods and ecological integrity. Key characteristics include the following: Local stakeholders are actively engaged in decision making, collaboration, and implementation; whole landscapes are restored, not just individual sites, so that trade-offs among conflicting interests can be made and minimized within a wider context; landscapes are restored and managed to provide for an agreed, balanced combination of ecosystem services and goods, not only for increased forest cover; a wide range of restoration strategies are considered, from managed natural regeneration to tree planting; and continuous monitoring, learning, and adaptation are central.¹⁷²

Further, a restored landscape can accommodate a mosaic of land uses such as agriculture, protected reserves, ecological corridors, regenerating forests, well-managed plantations, agroforestry systems, and riparian plantings to protect waterways. Restoration must complement and enhance food production and not cause natural forests to be converted into plantations.¹⁷³ Communities can and should therefore be encouraged to utilise their indigenous knowledge and technologies in combating climate change. It has been suggested that inclusive innovations enhance the social and economic well-being of disenfranchised society members and the participatory

present and future generations, emphasising on climate, energy, social and environmental issues, while basing itself on real life experiences and an appreciation of diverse cultural perspectives; the need for we, as individuals and communities, to make personal and consumer choices to consume as little of Mother Earth's resources, conserve our need for energy; and make the conscious decision to challenge and reprioritize our lifestyles, re-thinking our ethics with relation to the environment and the Mother Earth; while utilizing clean, renewable, low impact energy; and ensuring the health of the natural world for present and future generations; and the rights of unborn generations to natural resources, a stable climate and a healthy planet.

¹⁷² World Resources Institute, 'Atlas of Forest and Landscape Restoration Opportunities,' available at <http://www.wri.org/resources/maps/atlas-forest-and-landscape-restoration-opportunities> > accessed 17 July 2020.

¹⁷³ Ibid.

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element in innovative systems development.¹⁷⁴ This is because the redistribution of resources is combined by the active participation of the marginalized poor applying participatory processes in relation to problem, conflict solution and related strategies.¹⁷⁵ Communities should therefore not be left out in climate change mitigation measures as they may have some contribution to make.

h) Incorporation of Indigenous Knowledge in Food Production Methods

SDG Goal 2 seeks to end hunger, achieve food security and improved nutrition and promote sustainable agriculture.¹⁷⁶ In order to achieve this, the SDGs Agenda aims at ensuring that by 2030, state parties will double the agricultural productivity and incomes of small-scale food producers, in particular women, indigenous peoples, family farmers, pastoralists and fishers, including through secure and equal access to land, other productive resources and inputs, knowledge, financial services, markets and opportunities for value addition and non-farm employment.¹⁷⁷

Food security depends, *inter alia*, on sustainable management of fish, forests, and wildlife since in many indigenous communities; these resources are the principal sources of protein in the diet.¹⁷⁸ It also highlights the fact that the traditional knowledge within indigenous communities also plays an important role in the achievement of food security for these communities and others.¹⁷⁹

¹⁷⁴ Jussi S Jauhiainen and Lauri Hooli, 'Indigenous Knowledge and Developing Countries' Innovation Systems: The Case of Namibia' (2017) 1 International Journal of Innovation Studies 89.

¹⁷⁵ Ibid.

¹⁷⁶ UNGA, *Transforming our world: the 2030 Agenda for Sustainable Development*, Resolution adopted by the General Assembly on 25 September 2015 [without reference to a Main Committee (A/70/L.1)], Goal 2.

¹⁷⁷ Ibid, SDG Goal 2.3.

¹⁷⁸ The Rome World Food Summit Commitment No. 3.

¹⁷⁹ Ibid.

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It has been argued that the interaction and cooperation between different actors facilitate learning and knowledge creation in specific socioeconomic contexts in which innovation and development processes are embedded.¹⁸⁰ In addition, the impact of the context is reciprocal: it influences the capacity of individuals, institutions, sectors, regions, and countries to develop, apply, and diffuse innovations while these innovations change the context.¹⁸¹

As already pointed, the Constitution also obligates the State to recognise the role of science and indigenous technologies in the development of the nation.¹⁸² These rights are important, not only for the individual citizens, but also for the country in adopting scientific knowledge especially local for eliminating unsustainable and harmful practices that adversely affect realisation right to clean and healthy environment for all.

It has been observed that indigenous knowledge may get lost due to the intrusion of foreign technologies and development concepts aimed at short-term gains or solutions to problems without being capable of sustaining them.¹⁸³ Thus, even as the stakeholders in the ministry of agriculture gear towards adoption of improved methods of crop and animal production such as Genetically Modified technologies, there is a need to involve communities in coming up with adoptive methods, which may include indigenous knowledge and technologies available and utilised by certain communities in certain regions.

¹⁸⁰ Jussi S Jauhiainen and Lauri Hooli, 'Indigenous Knowledge and Developing Countries' Innovation Systems: The Case of Namibia' (2017) 1 *International Journal of Innovation Studies* 89.

¹⁸¹ *Ibid.*

¹⁸² Art. 11(2) (b).

¹⁸³ SGJN Senanayake, 'Indigenous Knowledge as a Key to Sustainable Development' (2006) 2 *Journal of Agricultural Sciences–Sri Lanka*.

i) Incorporating Customary and Indigenous Knowledge into the Formal and Non-Formal Education Curricula

The 2030 Agenda for Sustainable Development (SDGs)¹⁸⁴, which was adopted by all United Nations Member States in 2015 acknowledges the place of education in the sustainable development debate.¹⁸⁵ SDG Goal 4 requires that all State Parties should ensure inclusive and equitable quality education and promote lifelong learning opportunities for all. The corresponding Targets are that: by 2030, ensure that all girls and boys complete free, equitable and quality primary and secondary education leading to relevant and Goal-4 effective learning outcomes; by 2030, ensure that all girls and boys have access to quality early childhood development, care and preprimary education so that they are ready for primary education; by 2030, ensure equal access for all women and men to affordable and quality technical, vocational and tertiary education, including university; by 2030, substantially increase the number of youth and adults who have relevant skills, including technical and vocational skills, for employment, decent jobs and entrepreneurship; by 2030, eliminate gender disparities in education and ensure equal access to all levels of education and vocational training for the vulnerable, including persons with disabilities, indigenous peoples and children in vulnerable situations; by 2030, ensure that all youth and a substantial proportion of adults, both men and women, achieve literacy and numeracy; by 2030, ensure that all learners acquire the knowledge and skills needed to promote sustainable development, including, among others, through education for sustainable development and sustainable lifestyles, human rights, gender equality, promotion of a culture of peace and non-violence, global citizenship and appreciation of cultural diversity and of culture's contribution to sustainable development; build and upgrade education facilities that are child, disability and gender sensitive and provide safe, nonviolent, inclusive and effective learning environments for all; by 2020, substantially expand globally the number of scholarships available to developing countries, in particular least developed

¹⁸⁴ UN General Assembly, *Transforming our world: the 2030 Agenda for Sustainable Development*, 21 October 2015, A/RES/70/1.

¹⁸⁵ 'Education | Department of Economic and Social Affairs' <<https://sdgs.un.org/topics/education>> accessed 6 December 2020.

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countries, small island developing States and African countries, for enrolment in higher education, including vocational training and information and communications technology, technical, engineering and scientific programmes, in developed countries and other developing countries; and by 2030, substantially increase the supply of qualified teachers, including through international cooperation for teacher training in developing countries, especially least developed countries and small island developing states.¹⁸⁶

The Constitution of Kenya recognizes culture as the foundation of the nation and as the cumulative civilization of the Kenyan people and nation.¹⁸⁷ Where possible, it is important that schools, including institutions of higher learning, ensure that their students appreciate and understand the place of indigenous knowledge in the development discourse to give them wider choices in life.

Kenyan universities and especially the University of Nairobi boasts of robust curriculums that incorporate and encourage innovation. The University of Nairobi, for instance, does not just teach formal education but it also allows the students to be taught on a first-hand basis informally. They have incorporated clinical internships and externships in their curriculum. With this, the students can go for fieldwork where they interact with local members of the society such as the village elders where they get to learn about and appreciate the customs of the society and/or different community settings. Through this, the students have an opportunity of knowing and learning the customary laws which form part of the laws of Kenya. Article 2 of the constitution embraces customary law as a form of law in Kenya. This is affirmed by Article 159 of the constitution which provides for the application of customary laws unless the same is repugnant to justice.

It is through such units as clinical externships being offered to the students that the learners can acquire the knowledge and skills needed to promote

¹⁸⁶ SDG 4 Targets 4.1-4.7(a)(b)(c).

¹⁸⁷ Article 11, Constitution of Kenya, 2010.

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sustainable development through education for sustainable development and sustainable lifestyles, human rights, gender equality, promotion of a culture of peace and non-violence and appreciation of cultural diversity.

At the Wangari Maathai Institute of Environmental Studies (WMI), University of Nairobi, lecturers have an opportunity to impact skills necessary for sustainable development. It is an opportunity and platform that lecturers should and indeed use to impact and transform future generations by teaching them the nexus between education, peace, democracy, and environmental freedom, among other sustainable development concepts.

11.2.4 Walking the Talk: Making Community Based Approaches in Environmental and Natural Resources Management Work in Kenya

Some commentators have argued that due to the 'interdependence of community well-being and ecosystem health, there is a need to strengthen the capacity of communities to have a voice in decisions about planning and design of conservation initiatives affecting them'.¹⁸⁸ This is because 'the natural environment plays a huge role in the health and welfare of people who rely on it as their sole source of income and food'.¹⁸⁹ CBNRM approach not only gives communities a voice in management of natural resources within their locality but also allows them to benefit from them and also avert any adverse effects of environmental degradation, in recognition of the right to clean and healthy environment¹⁹⁰. It allows them to enjoy environmental democracy. Environmental democracy entails the principle of equal rights for all including the public, community groups, advocates, industrial leaders, workers, governments, academics and other professionals to be involved in environmental governance.¹⁹¹ It connotes the right of all whose

¹⁸⁸ 'Community Based Natural Resources Management' (*World Neighbors*) <<https://www.wn.org/what-we-do/community-based-natural-resources-management/>> accessed 10 July 2020.

¹⁸⁹ Ibid.

¹⁹⁰ See Article 42, Constitution of Kenya, 2010.

¹⁹¹ Hazen, S., *Environmental Democracy*, (1998). Available at

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daily lives are affected by the quality of the environment to participate in environmental decision-making as freely as they do in other public interest matters such as education, health care, finance and government.¹⁹² Access to environmental information and justice for all those who choose to participate in such decision-making is integral to the concept of environmental democracy.¹⁹³ In addition, Principle 10 of the *Rio Declaration*¹⁹⁴ provides that environmental issues are best handled with the participation of all concerned citizens, at the relevant level. It further provides for access to information by the public. At the national level, each individual must have appropriate access to information concerning the environment that is held by public authorities, including information on hazardous materials and activities in their communities, and the opportunity to participate in decision-making processes. States must facilitate and encourage public awareness and participation by making information widely available.¹⁹⁵

It has rightly been pointed out that ‘many indigenous peoples are still heavily dependent on natural resources for their survival, and have, over time, developed social and cultural mechanisms that reflect the very real dynamics of natural systems’.¹⁹⁶ CBNRM approach is informed by the view that sustainable management of natural resources is most likely to be achieved where local communities are able to manage and derive benefits from natural resources.¹⁹⁷ The approach calls for a commitment to involve

<<http://www.ourplanet.com>> [Accessed on 12/7/2020]; Muigua, K., *Nurturing Our Environment for Sustainable Development*, Glenwood Publishers, Nairobi – 2016), Chapter Five.

¹⁹² Ibid.

¹⁹³ Ibid.

¹⁹⁴ United Nations, Rio Declaration of 1992, UN Doc. A/CONF.151/26 (Vol. I).

¹⁹⁵ Report of the United Nations Conference on Environment and Development (Rio De Janeiro, 3-14 June 1992).

¹⁹⁶ Jay Mistry, ‘Indigenous Knowledges’ In Kitchin R, Thrift N (eds) *International Encyclopedia of Human Geography*, Volume 5, pp. 371–376. Oxford: Elsevier. <https://www.academia.edu/940129/Indigenous_knowledges> accessed 10 July 2020.

¹⁹⁷ Muigua, K., Kariuki, F., Wamukoya, D., *Natural Resources and Environmental Justice in Kenya*, Glenwood Publishers, Nairobi – 2015, Chapter Three.

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community members and local institutions in management of natural resources, devolution of power and authority to the grass roots, a desire to reconcile the objectives of socio-economic development and environmental conservation, the tendency to defend and legitimize local and indigenous property rights and a desire to include traditional values in modern management of natural resources.¹⁹⁸

It is for these reasons that the Government of Kenya and other stakeholders in the management of environment and natural resources should reconsider and address the laxity experienced in the implementation of CBNRM approach in Kenya.

Kenya can learn from other countries within and beyond Africa. For instance, in Malawi, Lake Chilwa, a tropical lake without an outlet, and the second largest lake in Malawi, is a home to large populations of breeding waterfowls and an estimated 100 bird catchers are rely economically on the birds.¹⁹⁹ It is worth noting that the Lake is listed as a Ramsar site. The fertile Lake Chilwa Wetland also has a lot of agricultural activities with two main crops grown, maize and rice, and sustains thousands of people through rice farming and cultivation of a variety of vegetables.²⁰⁰ A number of Community-Based Natural Resources Management (CBNRM) groups have been formed to manage different resources like fish, waterfowls, soil and trees.²⁰¹ While these groups are yet to receive user rights and legal tenure, Kenya can borrow a leaf especially around swampy areas and Lake Victoria

¹⁹⁸ Nelson F. & Agrawal, A., "Patronage or Participation? Community-based Natural Resource Management Reform in Sub-Saharan Africa," *Journal of Development and Change*, vol. 39, No.4, 2008, pp.557-585; See also Kellert, S.R., *et al*, "Community Natural Resource Management: Promise, Rhetoric and Reality," *Society and Natural Resources: An International Journal*, Vol.13 (8), p.706; Muigua, K., Kariuki, F., Wamukoya, D., *Natural Resources and Environmental Justice in Kenya*, Glenwood Publishers, Nairobi – 2015, Chapter Three.

¹⁹⁹ 'Community-Based Natural Resources Management - the Case of Lake Chilwa Wetland, Malawi | Ramsar' <<https://www.ramsar.org/news/community-based-natural-resources-management-the-case-of-lake-chilwa-wetland-malawi>> accessed 12 July 2020.

²⁰⁰ Ibid.

²⁰¹ Ibid.

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which is currently choked by the invasive water hyacinth. The community living around the lake should be allowed to work closely with the Government to not only manage fish resources but also to keep the water resource clean. Kenya can also borrow a leaf from the management of the Okavango Delta System (a Ramsar site) in Botswana. The Okavango Delta is divided into Wildlife Management Areas (WMAs). These have been further divided into: Controlled Hunting Areas (CHAs); Commercial Wildlife Utilization; Community Managed Wildlife Utilization; Community Based Natural Resources Management Programme; and Non-Consumptive/Photographic.²⁰²

Zimbabwe's Communal Areas Management Programme for Indigenous Resources (CAMPFIRE) also offers valuable example to Kenya. CAMPFIRE, started in the late 1980s in Zimbabwe, and subsequently widely emulated elsewhere in southern Africa, involves the sale by rural authorities of the rights to access wildlife to entrepreneurs who in turn market safaris to hunters and eco-tourists.²⁰³ CAMPFIRE was developed largely around the concept of managing wildlife and wildlife habitat in the communal lands of Zimbabwe for the benefit of the people living in these areas.²⁰⁴

The Bigodi Wetland Sanctuary in Uganda is also another example where the local community has been running a successful community-based natural resource management programme (CBNRM) for the wetland for over a decade, with external visitors to the wetland providing ecotourism revenues

²⁰² JobeManga and Gertrude Matswiri, 'Expert Meeting: Transboundary Cooperation For Protecting The Cubango-Okavango River Basin & Improving The Integrity Of The Okavango Delta World Heritage Property,' 3-4 June, Cresta Hotel, Maun, Botswana Okavango Delta World Heritage Property -History, Governance & Current Conservation Issues< [whc.unesco.org > document](http://whc.unesco.org/document)> 12 July 2020.

²⁰³ Peter GH Frost and Ivan Bond, 'The CAMPFIRE Programme in Zimbabwe: Payments for Wildlife Services' (2008) 65 *Ecological economics* 776.

²⁰⁴ *Ibid.*

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and majority of households collecting a wide variety of plant and fish resources and water from the wetland for household use and livestock.²⁰⁵ Australia's Indigenous land and sea management projects, a funding program by the Australian Federal Government in recognition of the ecological value of Indigenous land management can also offer valuable lessons. Notably, the Australian programs provide funds to Indigenous people to support Indigenous land management activities) and are also known to generate social and economic benefits in addition to the ecological ones.²⁰⁶ They are thus considered as important economic vehicles for elimination of poverty in Northern Australia.²⁰⁷ Notably, Australia was emerging from a tradition of oppression of the indigenous peoples' rights to exploitation of natural resources.²⁰⁸

While Kenya's legal framework on natural resource management may have provisions that envisage similar establishments, the implementation of the same has largely remained a challenge. Even where established, the same receive little, if any, support from the state agencies. Their establishment may therefore be argued to be a mere formality, with little involvement in the actual management of resources.

There is a need for the various state organs to work closely with stakeholders in the various natural resource sectors to establish the legal and institutional frameworks provided for under the statutes to ensure effective CBNRM. As things stand now, the statutes make provisions for the use of

²⁰⁵ A Gosling, Charlie M Shackleton and J Gambiza, 'Community-Based Natural Resource Use and Management of Bigodi Wetland Sanctuary, Uganda, for Livelihood Benefits' (2017) 25 *Wetlands Ecology and Management* 717.

²⁰⁶ Diane Jarvis and others, 'Indigenous Land and Sea Management Programs: Can They Promote Regional Development and Help "Close the (Income) Gap"?' [2018] 53 *Australian Journal of Social Issues* 283.

²⁰⁷ *Ibid*, p. 299; See also Diane Jarvis and others, 'Are Indigenous Land and Sea Management Programs a Pathway to Indigenous Economic Independence?' [2018] *The Rangeland Journal*.

²⁰⁸ See *Mabo v. Queensland (No. 1)* (1988) 166 CLR 186 F.C. 88/062; *Mabo and others v. Queensland (No. 2)* [1992] HCA 23; (1992) 175 CLR 1 F.C. 92/014 (3 June 1992).

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CBNRM but the actual implementation of these provisions is yet to be witnessed.

If water scarcity issues, logging problems, environmental degradation, poverty, human-wildlife conflicts and other social ills facing the natural resources sector in the country are to be eliminated, there is a need to revisit the above provisions and come up with ways on how best the same can be implemented. It is worth pointing out that the implementation of specific approaches under CBNRM may differ based on other factors, but the end result should be achieving conservation, poverty eradication and achievement of the sustainable development agenda. CBNRM is an important approach in the achievement of Sustainable Development Goals (SDGs). This is because it seeks to achieve several of the SDGs at a go. It seeks to achieve environmental conservation, economic and social empowerment through encouraging participation of communities in management of environmental and natural resources. This gives such a community a source of livelihood thus eliminating poverty while at the same time achieving conservation goals: all key goals of the sustainable development agenda as envisaged under the United Nations *2030 Agenda for Sustainable Development*²⁰⁹.

11.2.5 Conclusion

The Constitution creates obligations on the State to ensure sustainable exploitation, utilisation, management and conservation of the environment and natural resources, and ensure the equitable sharing of the accruing benefits; protect and enhance intellectual property in, and indigenous knowledge of, biodiversity and the genetic resources of the communities; encourage public participation in the management, protection and conservation of the environment; protect genetic resources and biological diversity; eliminate processes and activities that are likely to endanger the environment; and utilize the environment and natural resources for the benefit of the people of Kenya.²¹⁰

²⁰⁹ UN General Assembly, *Transforming our world: the 2030 Agenda for Sustainable Development*, 21 October 2015, A/RES/70/1.

²¹⁰ Constitution of Kenya 2010, Art. 69(1).

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Indigenous knowledge offers a viable platform for exchange of ideas between the state organs and communities in their efforts towards realisation of the sustainable development agenda. CBNRM approach is not only considered as a response to the challenges of a decentralized management system which occasions natural resources degradation but also as a modern attempt to revive traditional mechanisms for the conservation of natural resources.²¹¹ Giving local communities the rights to manage, use or own resources, creates incentives for them to collectively invest in natural resources management.²¹² It is against this background that this chapter advocates for renewed efforts in the full implementation of CBNRM in Kenya as a step towards eradication of poverty and enhancing community participation in environmental and natural resources management as a means to an end, that is, for the achievement of sustainable development agenda.

²¹¹ Nelson F. & Agrawal, A., "Patronage or Participation? Community-based Natural Resource Management Reform in Sub-Saharan Africa," *Journal of Development and Change*, vol. 39, No.4, 2008, p.558.

²¹² *Ibid*, p.558.

CHAPTER TWELVE

Sustainable Development and Access to Justice

12.1 Introduction

Justice is a universally accepted principle that has been enshrined in various international legal instruments including the Charter of the United Nations which seeks among other things ‘to establish conditions under which justice and respect for obligations arising under international law can be maintained.’¹

Further, the *Universal Declaration of Human Rights* recognises the inherent dignity and the equal and inalienable rights of all members of the human family as the foundation of freedom, *justice* and peace in the world.² The *International Covenant on Economic, Social and Cultural Rights*³ recognises in its preamble that, in accordance with the Universal Declaration of Human Rights, the ideal of free human beings enjoying freedom from fear and want can only be achieved if conditions are created whereby everyone may enjoy his economic, social and cultural rights, as well as his civil and political rights.

The *International Covenant on Civil and Political Rights*⁴ recognizes in its preamble that, in accordance with the Universal Declaration of Human Rights, the ideal of free human beings enjoying civil and political freedom and freedom from fear and want can only be achieved if conditions are created whereby everyone may enjoy his civil and political rights, as well as his economic, social and cultural rights.

¹ United Nations, *Charter of the United Nations*, 24 October 1945, 1 UNTS XVI.

² UN General Assembly, *Universal Declaration of Human Rights*, 10 December 1948, 217 A (III).

³ United Nations, *International Covenant on Economic, Social and Cultural Rights*, Adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16 December 1966 entry into force 3 January 1976, in accordance with article 27.

⁴ UN General Assembly, *International Covenant on Civil and Political Rights*, 16 December 1966, United Nations, Treaty Series, vol. 999, p. 171.

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The *African Charter on Human and Peoples' Rights*⁵ (Banjul Charter) reaffirms in its preamble the pledge African States members of the African Union solemnly made in Article 2 of the said Charter to eradicate all forms of colonialism from Africa, to coordinate and intensify their cooperation and efforts to achieve a better life for the peoples of Africa and to promote international cooperation having due regard to the Charter of the United Nations and the Universal Declaration of Human Rights.

The Preamble to the Constitution of Kenya 2010 recognises the aspirations of all Kenyans for a government based on the essential values of human rights, equality, democracy, *social justice* and the rule of law (Emphasis added).

Article 4(2) of the Constitution provides that the Republic of Kenya is a multi-party democratic State founded on the national values and principles of governance referred to in Article 10. These values and principles of governance include; (a) patriotism, national unity, sharing and devolution of power, the rule of law, democracy and participation of the people; (b) human dignity, equity, social justice, inclusiveness, equality, human rights, non-discrimination and protection of the marginalized (Emphasis added).

The Constitution of Kenya 2010 also provides that the national values and principles of governance which include the rule of law, human dignity, equity, *social justice*, inclusiveness, equality, human rights, non-discrimination and protection of the marginalised are binding on all State organs, State officers, public officers and all persons whenever any of them applies, or interprets, the Constitution; enacts, applies or interprets any law; or makes or implements public policy decisions⁶ (Emphasis added).

Also notable is Article 19 (2) of the Constitution which provides that the purpose of recognising and protecting human rights and fundamental freedoms is to preserve the dignity of the individuals and communities and

⁵ Organization of African Unity (OAU), *African Charter on Human and Peoples' Rights* ("*Banjul Charter*"), 27 June 1981, CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982).

⁶ Article 10, Constitution of Kenya 2010.

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to promote social justice and the realization of the potential of all human beings.

Further, article 48 of the Constitution enshrines the right of access to justice and mandates the state to ensure access to justice for all persons in Kenya.⁷ As already pointed elsewhere in this book, the 2030 Agenda for Sustainable Development Goals (SDGs) acknowledges the link between peace and development and thus provide that sustainable development cannot be realized without peace and security; and peace and security will be at risk without sustainable development.⁸ The SDGs Agenda also recognizes the need to build peaceful, just and inclusive societies that provide equal access to justice and that are based on respect for human rights (including the right of women to participate in community affairs), on effective rule of law and good governance at all levels and on transparent, effective and accountable institutions. Factors which give rise to violence, insecurity and injustice, such as inequality, corruption, poor governance and illicit financial and arms flows, are addressed in the Agenda. The aim is to redouble the efforts to resolve or prevent conflict and to support post-conflict countries, including through ensuring that women have a role in peace building and state building.⁹

⁷ In the case of *Thomas Alugha Ndegwa v Republic* [2016] eKLR, Criminal Appeal (Application) 2 of 2014, the Court of Appeal at Nairobi elaborated on the content of social justice as provided under Article 10 as follows:

3. While these two provisions, and more so Article 50(2)(h), are specific on legal aid, there are many other provisions of the Constitution that are relevant to the concept of legal aid. These include the value of social justice under Article 10; provisions on equality before the law under Article 27; provisions on protection of marginalised and vulnerable persons and the requirement under Article 159 that justice shall be done to all irrespective of status. The overarching notion to be derived from these provisions is that it is difficult to achieve justice where one party has to compete with the elaborate machinery and resources available to the opposite party.

⁸ United Nations, *Transforming our world: the 2030 Agenda for Sustainable Development*, A/RES/70/1, para. 35.

⁹ *Ibid.*

12.2 Legal Practice and New Frontiers: Embracing Legal Technology for Enhanced Efficiency and Access to Justice

12.2.1 Introduction

The Coronavirus disease (Covid-19) pandemic has unsettled not only the global economy but also many professions and they are all seeking to stay afloat during the pandemic. Due to the preventive measures recommended by the World Health Organisation which include social distancing among others, it has become almost impossible for professionals to operate from their traditional physical offices. The legal profession has not been spared either. The legal practice in many parts of the world including the African continent has been by way of physical attendance in courtrooms where the judges and magistrates, advocates and witnesses physically present their cases. The physical presence of employees in law firms has also become difficult.¹⁰ Court hearings are being conducted virtually via online platforms. Arguably, this has disrupted the profession in a way not experienced before.

Apart from the effects of pandemic, the changes in the legal sector have also been largely attributed to the ascendancy of information technology, the globalization of economic activity, the blurring of differences between professions and sectors, and the increasing integration of knowledge.¹¹ Technology has greatly impacted the way law and law firms are operating in this era as far as enhancing efficiency is concerned.¹²

¹⁰ Meganne Tillay | February 28 and 2020 at 03:39 AM, 'Baker McKenzie Shuts Down London Office Following Coronavirus Scare' (*Law.com International*) <<https://www.law.com/international-edition/2020/02/28/baker-mckenzie-shuts-down-london-office-following-coronavirus-scare/>> accessed 3 June 2020.

¹¹ Kellogg Sarah, 'Cover Story: The Transformation of Legal Education' *From Washington Lawyer*, May 2011 <<https://www.dcb.org/bar-resources/publications/washington-lawyer/articles/may-2011-legal-education.cfm>> accessed 4 June 2020.

¹² Abigail Hess, 'Experts Say 23% of Lawyers' Work Can Be Automated—Law Schools Are Trying to Stay Ahead of the Curve' (*CNBC*, 7 February 2020) <<https://www.cnb.com/2020/02/06/technology-is-changing-the-legal-profession-and-law-schools.html>> accessed 5 June 2020; Alej, ro Miyar | February 06 and 2020 at 09:46 AM, 'Technology Trends That Will Affect the Legal Profession in 2020' (*Daily Business Review*)

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In this section, 'legal technology' (Legal Tech) is used to mean the use of technology and software to provide and aid legal services.¹³ Legal Technology applies technology and software to assist Law Firms in practice management, billing, big data, e-discoveries, predictive analytics, knowledge management and document storage.¹⁴

While Legal Tech is meant to enable the bigger firms improve overall efficiency in order to adapt to a progressively popular agile working environment, it also allows smaller firms and sole practitioners to compete with the leading names in the field, giving them access to powerful research tools.¹⁵

This chapter discusses these new developments and proceeds on the hypothesis that even though the profession may resume its normal traditional mode of operation, it is now time for the legal practitioners to consider adopting this way of doing things. The section specifically looks at legal practice in Kenya and explores recommendations on how best the

<<https://www.law.com/dailybusinessreview/2020/02/06/technology-trends-that-will-affect-the-legal-profession-in-2020/>> accessed 5 June 2020; Singapore Academy of Law, 'Deep Thinking: The Future Of The Legal Profession In An Age Of Technology' (*Medium*, 19 July 2019)

<<https://medium.com/@singaporeacademyoflaw/deep-thinking-the-future-of-the-legal-profession-in-an-age-of-technology-6b77e9ddb1e9>> accessed 5 June 2020; 'Disruptive Technology in the Legal Profession' (*Deloitte United Kingdom*) <<https://www2.deloitte.com/uk/en/pages/financial-advisory/articles/the-case-for-disruptive-technology-in-the-legal-profession.html>> accessed 5 June 2020; 'New Technologies and the Legal Profession' (*nyujlb*)

<<https://www.nyujlb.org/single-post/2019/04/08/New-Technologies-and-the-Legal-Profession>> accessed 5 June 2020; Tanya Du Plessis, 'Competitive Legal Professionals' Use of Technology in Legal Practice and Legal Research' (2008) 11 *Potchefstroom Electronic Law Journal*.

¹³ 'What Is Legal Technology and How Is It Changing Our Industry?' (*The Lawyer Portal*, 29 January 2019) <<https://www.thelawyerportal.com/blog/what-is-legal-tech-and-how-is-it-changing-industry/>> accessed 3 June 2020.

¹⁴ 'Business Models for Law Firms - p.Xel Marketing Agency' <<https://www.p-xel.co/business-models-for-digital-disruption-in-the-legal-industry/>> accessed 5 June 2020.

¹⁵ 'What Is Legal Technology and How Is It Changing Our Industry?' <<https://www.thelawyerportal.com/blog/what-is-legal-tech-and-how-is-it-changing-industry/>> accessed 5 June 2020.

legal practitioners in the country as well as the Judiciary can tap into technology to sustain virtual attendance of courts albeit alongside the traditional court attendance. The section, however, approaches the subject of legal practice generally and does not make any attempt to look at the various disciplines of practice. It adopts a generalized approach to the term 'legal practice'.

12.2.2 Use of Legal Technology within the Legal Profession in Kenya: Progressive or Conservative Profession?

A broad approach to the term "Legal profession" may be used to refer to all those who are in some capacity engaged in the working of the legal system, including judges, advocates, government lawyers, prosecutors, academics, paralegals and law reformers.¹⁶ All these persons play a crucial role in administration of justice and offering legal training for capacity building in the sector. They are therefore all relevant in the context of this chapter as it deals with how all the stakeholders in the legal sector can embrace technology as a tool for enhancing accessing to justice for all.

With the Colonial incursion in Africa came the introduction of the formal justice systems that before then were non-existent and even unknown.¹⁷ In Kenya especially, this was necessitated by the emergence of private ownership of property by the colonialists particularly the settlers, and there arose the need for protection of their rights to the property and also enforcing the same against others, especially the Africans who had been rendered landless.¹⁸ However, even after the colonialists left, there was no turning back as far as formal justice system was concerned.

The Government of Kenya continued to invest, albeit at an unsatisfactory pace, in ensuring that courts were put up across the country as the main system of access to justice. The legal profession has since played a major role

¹⁶ Ghai, Y.P. and Cottrell, J. eds., *The legal profession and the new constitutional order in Kenya*. Strathmore University Press, 2014

<https://www.kas.de/c/document_library/get_file?uuid=56ba9291-7c05-98d5-96b1-8161785ff854&groupId=252038> 30 May 2020, p. 16.

¹⁷ See Muigua, K., *Alternative Dispute Resolution and Access to Justice in Kenya*, Glenwood Publishers, Nairobi, 2015, p.61.

¹⁸ *Ibid*, p.61.

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in facilitating access to justice. However, it is not always easy for Kenyans to access justice due to a myriad of challenges. Some of the documented challenges facing access to justice over the years include but are not limited to: legal, institutional and structural challenges; Institutional and procedural obstacles; Social barriers; and Practical and economic challenges.¹⁹ Closely related to these are high court fees, geographical location, complexity of rules and procedure and the use of legalese.²⁰ These are challenges that directly impact on the general public's ability to seek and access justice.

These domestic challenges are compounded by economic turbulence due to societal and economic changes; adaption to new technology; compliance and ethical issues; and continuing professional development which directly impact on the legal profession especially the lawyers.²¹ The changing times and the above listed challenges have made clients to continue to demand efficiency and responsiveness from their lawyers for less cost. Clients expect their lawyers to focus more on the outcome and less on time spent on a legal matter.²² The legal profession is also facing competitive pressures from accountants, realtors, financial advisors, and others - enabled by the Internet which is making it easier for them to compete.²³ The lawyers also face competition from global legal service providers, as the doors to

¹⁹ Access to Justice-Concept Note for Half Day General Discussion Endorsed by the Committee on the Elimination of Discrimination against Women at its 53rd Session, p. 9. Available at <http://www.ohchr.org/Documents/HRBodies/CEDAW/AccessToJustice/ConceptNoteAccessToJustice.pdf> > 30 May 2020.

²⁰ *Strengthening Judicial Reform in Kenya: Public Perceptions and Proposals on the Judiciary in the new Constitution*, ICJ Kenya, Vol. III, May, 2002; See also Kariuki Muigua, *Avoiding Litigation through the Employment of Alternative Dispute Resolution*, pp 6-7, a Paper presented by the author at the In-House Legal Counsel, Marcus Evans Conference at the Tribe Village Market Hotel, Kenya on 8th& 9th March, 2012. Available at <http://www.chuitech.com/kmco/attachments/article/101/Avoiding.pdf> > 30 May 2020.

²¹ Mboya, Apollo, 'The Bar: Challenges and Opportunities', in Ghai, Y.P. and Cottrell, J. eds., *The legal profession and the new constitutional order in Kenya*. Strathmore University Press, 2014, p. 242.

²² *Ibid*, p. 242.

²³ *Ibid*, p. 242.

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transnational practice by lawyers widen by the World Trade Organization's General Agreement on Trade in Services (GATS) and regional integration.²⁴ While lawyers have long been characterized as technology antagonists who are slow to change and wary of innovation²⁵, law practice has slowly but surely moved from an era of using desktop phones, filing cabinets, and yellow legal pads to a period when all these have been replaced by laptops, tablets, cell phones, and other mobile devices and often virtual or cloud-based platforms.²⁶ In addition, majority of clients' documents are stored on hard drives or in the cloud, while layers of difficult-to-access "metadata" contain hidden information that could influence lawyers' decisions.²⁷ This development in technology has come with tremendous improvement in not only efficiency but has also enhanced the security of clients' data. While this has been the trend worldwide, it is not difficult to find Kenyan law firms still struggling with the 'outdated' way of doing things around the office. Indeed, it is only recently that digital signatures and service of pleadings started taking root in the country.

It is still a concern on whether the Kenyan lawyers are ready to embrace technology to enhance efficiency and cut down on costs of doing business for the general public. In 2018²⁸, the Law Society of Kenya (LSK) went to court to oppose a decision by the Ministry of Lands and Physical Planning to digitize the land transactions processes at the land registry through the National Land Information Management System (NLIMS) arguing that the

²⁴ Ibid, p. 242.

²⁵ Ready or not: artificial intelligence and corporate legal departments' <<https://legal.thomsonreuters.com/en/insights/articles/artificial-intelligence-ai-report>> accessed 5 June 2020.

²⁶ Gaffney Nick, 'Law Practice Management: Transforming a Law Practice with Technology' <https://www.americanbar.org/groups/gpsolo/publications/gp_solo/2017/sep-tember-october/law-practice-management-transforming-law-practice-technology/> accessed 3 June 2020.

²⁷ Ibid.

²⁸ Sunday, March 18 and 2018 15:36, 'Land Ministry in Fresh Bid to Digitise Records' (*Business Daily*) <<https://www.businessdailyafrica.com/economy/Land-ministry-in-fresh-bid-to-digitise-records/3946234-4347056-goa3sg/index.html>> accessed 3 June 2020.

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ministry had failed to consult the relevant stakeholders as required.²⁹ The LSK also argued that the regulations establishing the legal framework for electronic conveyancing are pending before Parliament.³⁰ In addition, The LSK further argued that rural Kenya still faces huge electricity and power challenges and that many Kenyans with no access to internet and online portal and risk being dispossessed of their lands.³¹ While these arguments are certainly valid, and ones that may not be strictly interpreted to mean that LSK is opposed to the process, LSK must realise that the future of practice lies in embracing technology. The general public has been advocating for the digitization of land records to cut costs and for efficiency purposes.³² The need for digitization has been demonstrated by the Covid-19 pandemic which has necessitated the closure of all registries following an advisory by the National Emergency Response Committee on the management of Covid-19.³³ The continued closure of registries negatively affected businesses with pending and anticipated land transactions.³⁴ With the use of technology, such challenges may be overcome. Rwanda is considered to

²⁹ 'Lands Ministry Wants Orders Stopping Digitisation Lifted' (*Daily Nation*) <<https://www.nation.co.ke/https://www.nation.co.ke/dailynation/news/lands-ministry-wants-orders-stopping-digitisation-lifted--38664>> accessed 3 June 2020; Kamau Muthoni, 'LSK Sues Ministry over Online Land Transactions' (*The Standard*) <<https://www.standardmedia.co.ke/article/2001277226/lsk-sues-ministry-over-online-land-transactions>> accessed 3 June 2020.

³⁰ Ibid.

³¹ Wednesday, April 18 and 2018 10:25, 'Lawyers Reject Automation of Land Deals in Court Suit' (*Business Daily*) <<https://www.businessdailyafrica.com/economy/Lawyers-reject-automation-of-land-deals-in-court-suit/3946234-4421556-p3kd3g/index.html>> accessed 3 June 2020.

³² Monday, March 19 and 2018 18:19, 'EDITORIAL: Fulfil Digitisation Promise' (*Business Daily*) <<https://www.businessdailyafrica.com/analysis/editorials/Fulfil-digitisation-promise/4259378-4348512-ayf632z/index.html>> accessed 3 June 2020.

³³ 'Lands CS Karoney Extends Land Registries Lockdown' (*People Daily*, 15 April 2020) <<https://www.pd.co.ke/business/economy-and-policy/lands-cs-karoney-extends-land-registries-lockdown-32930/>> accessed 3 June 2020.

³⁴ Ibid.

be one of the few African nations that have managed to move all their land records online and is considering introducing blockchain.³⁵

In the sections below, this chapter explores the various technological developments that the legal profession in Kenya can embrace and use to not only enhance access to justice but also enhance efficiency and productivity for increased business opportunities.

12.2.3 Legal Practice in the 21st Century: Challenges and Prospects

The Covid-19 pandemic has notably created an unprecedented state of affairs where lawyers and other law firm staff have left their offices and forced to work from their homes, where they now juggle their legal work with child care, household management and plenty of other obligations.³⁶ This has not only changed the way lawyers view their approach to legal work but has also created an opportunity for them to weigh and reconsider how law firms will operate in the near future.

Some commentators in the legal field have reported that as law firms embrace the idea of working remotely due to the Covid-19 pandemic, there has been a growing likelihood that physical offices will look very different in the future compared to what they are now.³⁷ These are some of the expected and unexpected effects of the Covid-19 pandemic on law firms

³⁵ 'Kenyan Lawyers Wrangle with Government over Land Registry Digitization' *Reuters* (7 May 2018) <<https://www.reuters.com/article/us-kenya-landrights-idUSKBN1I81K1>> accessed 3 June 2020.

³⁶ Samantha Stokes | April 27 and 2020 at 06:59 PM | The original version of this story was published on *The American Lawyer*, 'The Coronavirus Will Change the Legal Industry's Approach to Remote Work—But How?' (*Law.com International*) <<https://www.law.com/international-edition/2020/04/27/the-coronavirus-will-change-the-legal-industrys-approach-to-remote-work-but-how-378-140355/>> accessed 3 June 2020.

³⁷ Paul Hodkinson | May 05 and 2020 at 01:00 AM | The original version of this story was published on *The American Lawyer*, 'Welcome to the Law Firm Office of the Future: Smaller, Higher-Tech and One-Way' (*Law.com International*) <<https://www.law.com/international-edition/2020/05/05/smaller-higher-tech-and-one-way-welcome-to-the-law-firm-office-of-the-future/>> accessed 3 June 2020.

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where remote working is expected to take off as never before and firms will operate with more prudent and flexible financial models.³⁸

It has been observed that young lawyers are the set of lawyers that came into practice within the 21st century, so they face a unique set of challenges which older lawyers of the earlier generations never had to face.³⁹ Some of the highlighted challenges facing them include: lack of job opportunities; lack of mentorship from older lawyers; lack of funding; lack of a firm structure; location; personal branding; exposure; career projectory; resources; difficulty in getting new work; and limited networking.⁴⁰ Despite this, the 21st century lawyer is considered as one with 'staggering prospects which has the potential to pay off mightily'.⁴¹ It has been argued that the strength of the 21st century young lawyer lies in the understanding and use of Technology as a practice tool and area of core competence.⁴² This is because, it has been acknowledged, the current world has become tech-driven and information-powered, such that the entire spectrum of communications is available at the click of a button.⁴³ The world is becoming more interconnected and smaller with the click of a button, and as such, the 21st century lawyer who is analytical savvy and business-smart enough to navigate through the technology maze is considered lucky as they have the capacity to cast their law practice net across a huge spread of the

³⁸ Ibid.

³⁹ Kingsley Ugochukwu Ani, 'The 21st Century Lawyer: Challenges and Prospects' (Social Science Research Network 2018) SSRN Scholarly Paper ID 3270279 <<https://papers.ssrn.com/abstract=3270279>> accessed 5 June 2020.

⁴⁰ Kingsley Ugochukwu Ani, 'The 21st Century Lawyer: Challenges and Prospects' (Social Science Research Network 2018) SSRN Scholarly Paper ID 3270279 <<https://papers.ssrn.com/abstract=3270279>> accessed 5 June 2020.

⁴¹ Ibid, p. 9.

⁴² Ibid, p.9; See also 'Tech Competence a Must | Canadian Lawyer' <<https://www.canadianlawyermag.com/news/opinion/tech-competence-a-must/274463>> accessed 5 June 2020; 'Shaping the 21st-Century Lawyer - IE Law Hub' <<https://lawahead.ie.edu/shaping-the-21st-century-lawyer/>> accessed 5 June 2020; Alyson Carrel, 'Legal Intelligence Through Artificial Intelligence Requires Emotional Intelligence: A New Competency Model for the 21st Century Legal Professional' (2019) 35.

⁴³ Ibid, p.10; See also 'Eight Ways Technology Is Changing Business' <<https://www.gomodus.com/blog/eight-ways-technology-changing-business>> accessed 5 June 2020.

population.⁴⁴ With increased knowledge and specialization as a result of the many areas that come with the growth and development of technology, the 21st century lawyer can use all this to shape the course of their practice. Client demands have become primary drivers of change within the legal profession.⁴⁵

The next section looks at some of these opportunities and how modern lawyers can exploit them to their advantage in order to remain relevant in a fast changing world and also ensure that they discharge their duty as dispute resolvers for sustainable development.

12.2.4 Enhancing Access to Justice through Embracing Technology in the Legal Practice

i. Artificial Intelligence for Enhanced Productivity

Artificial intelligence (AI) defined as “the science and engineering of making intelligent machines” that employ “cognitive computing” (enabling computers to learn, reason, perceive, infer, communicate, and make decisions like humans do), and it encompasses many branches such as machine learning (ML) including deep learning and predictive analytics, and natural language processing (NLP).⁴⁶

It has been observed that while AI has made a transformative impact on every industry and profession, its potential for use in the legal profession has not been tapped adequately. This is because the legal services market

⁴⁴ Ibid, p. 10; See also Moore, Thomas R. "The Upgraded Lawyer: Modern Technology and Its Impact on the Legal Profession." *UDC/DCSL L. Rev.* 21 (2019): 27; Anyim, Wisdom Okereke. "E-Lawyering and Virtual Law Practice: A Paradigm Shift for Law Library System." *Library Philosophy and Practice* (2019): 0_1-16.

⁴⁵ 'Future Law Office 2020: Redefining the Practice of Law | Robert Half' <<https://www.roberthalf.com/research-and-insights/workplace-research/future-law-office-2020-redefining-the-practice-of-law>> accessed 5 June 2020.

⁴⁶ Duggal Vishal, 'Role of AI in Legal Practice' (*Engineers Garage*, 23 January 2020) <<https://www.engineersgarage.com/featured/role-of-ai-in-legal-practice/>> accessed 5 June 2020.

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remains 'profoundly under digitized, tradition-bound, and slow to embrace novel technologies and tools'.⁴⁷

However, Artificial Intelligence (AI) companies have continually developed and used technology that helps manage laborious tasks in different industries for better speed and accuracy, and the legal profession is no different as AI has already found its way into supporting lawyers and clients alike.⁴⁸ Basically, AI can and has indeed been used to: perform due diligence – litigators carry out due diligence with the help of AI tools to uncover background information; prediction technology – An AI software generates results that forecast litigation outcome; legal analytics – lawyers can use data points from past case law, win/loss rates and a judge's history to be used for trends and patterns; document automation – law firms use software templates to create filled out documents based on data input; intellectual property – AI tools guide lawyers in analyzing large Intellectual Property (IP) portfolios and drawing insights from the content; and electronic billing – lawyers' billable hours are computed automatically.⁴⁹ In addition to the foregoing, AI can and has been applied to save lawyers enormous amount of time while achieving efficiency in legal contracts review.⁵⁰ These are just examples of where AI technology may be used in enhancing legal practice in modern times going forward.

⁴⁷ Duggal Vishal, 'Role of AI in Legal Practice' (*Engineers Garage*, 23 January 2020) <<https://www.engineersgarage.com/featured/role-of-ai-in-legal-practice/>> accessed 5 June 2020.

⁴⁸ Daniel Faggella, 'AI in Law and Legal Practice – A Comprehensive View of 35 Current Applications' (*Emerj*) <<https://emerj.com/ai-sector-overviews/ai-in-law-legal-practice-current-applications/>> accessed 5 June 2020.

⁴⁹ Daniel Faggella, 'AI in Law and Legal Practice – A Comprehensive View of 35 Current Applications' (*Emerj*) <<https://emerj.com/ai-sector-overviews/ai-in-law-legal-practice-current-applications/>> accessed 5 June 2020; Law Technology Today, 'Three Ways Law Firms Can Use Artificial Intelligence' (*Law Technology Today*, 19 February 2019) <<https://www.lawtechnologytoday.org/2019/02/three-ways-law-firms-can-use-artificial-intelligence/>> accessed 5 June 2020; Duggal Vishal, 'Role of AI in Legal Practice' (*Engineers Garage*, 23 January 2020) <<https://www.engineersgarage.com/featured/role-of-ai-in-legal-practice/>> accessed 5 June 2020.

⁵⁰ Raghav Bharadwaj, 'Applying AI to Legal Contracts – What's Possible Now' (*Emerj*) <<https://emerj.com/ai-podcast-interviews/applying-ai-legal-contracts-whats-possible-now/>> accessed 5 June 2020.

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The legal profession needs to embrace AI, as it has a lot of potential to benefit from this technology in order to work more productively and spend less time on monotonous tasks, thus achieving convenience, freedom from mundane work, and saving more time for other aspects of the job such as analyses, counseling, negotiations, and court visits.⁵¹

There is a need for law schools to work with experts and professionals in the areas of Artificial Intelligence in order to equip their students with AI certifications at the law school as a first step towards preparing them for the future. Deloitte predicts at least 100,000 legal roles will be automated by 2036 and law firms will start using new talent strategies by 2020, a prediction that is already taking shape.⁵²

The initial cost of investment in infrastructure may be very high but it may be worth it to make the learning institutions relevant and competitive. While experts and stakeholders in this area continue to explore the benefits and shortcomings of use of AI in the legal profession and ways of overcoming the same, lawyers will need to get ready to embrace the idea since it has already started being used and this will only increase with time.

ii. Investing in Virtual Hearings Infrastructure

With the emergence of the Covid-19 pandemic, courts in many countries around the world were forced to rethink their approach to administration of justice both quickly and efficiently in order to ensure that, where possible,

⁵¹ Law Technology Today, 'Three Ways Law Firms Can Use Artificial Intelligence' (*Law Technology Today*, 19 February 2019)

<<https://www.lawtechnologytoday.org/2019/02/three-ways-law-firms-can-use-artificial-intelligence/>> accessed 5 June 2020.

⁵² Law Technology Today, 'Three Ways Law Firms Can Use Artificial Intelligence' (*Law Technology Today*, 19 February 2019)

<<https://www.lawtechnologytoday.org/2019/02/three-ways-law-firms-can-use-artificial-intelligence/>> accessed 5 June 2020; Duggal Vishal, 'Role of AI in Legal Practice' (*Engineers Garage*, 23 January 2020)

<<https://www.engineersgarage.com/featured/role-of-ai-in-legal-practice/>>

accessed 5 June 2020; Lexology-Victoria Arnold, 'How Your Legal Department Can Benefit from AI Contract Management | Lexology'

<<https://www.lexology.com/library/detail.aspx?g=7fcc7e37-301d-4828-bffd-e525960e0cbb>> accessed 5 June 2020.

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hearings can proceed.⁵³ This has led them to adopt virtual hearings – conducting hearings remotely in order to minimise the risk of transmission of Covid-19 and ensure the health of all parties in attendance is maintained.⁵⁴ While the pandemic will certainly pass, there is a need for both courts and law practitioners to think about investing in virtual hearings post Covid-19. It is commendable that the Judiciary recently embarked on enhancing the use of technology in judicial proceedings in all courts, especially during the Covid-19 pandemic period, including the use of: (a) e-filing; (b) e-service of documents; (c) digital display devices; (d) real time transcript devices; (e) video and audio conferencing; (f) digital import devices; and (g) computers in the court.⁵⁵ All that is required now is for continued use of the same post Covid-19 pandemic period as well as infrastructural investment to ensure that the processes run smoothly and efficiently. This may also call for equipping the courts and all registries with the relevant infrastructure through setting up some permanent virtual courts and tribunals.

This technology will come in handy in not only saving time but also resources, which in many countries especially in Africa, are still limited. As for law firms, investing in virtual hearings infrastructure in their practice may lead to better administration of justice and also help reach out to a wider class of clients both within the country and across borders. It will also work for the benefit of their employees since it offers them the much needed work-life balance.

It has been suggested that while spending more time outside the office may become commonplace as law firms and legal departments adopt collaborative technologies and reduce real estate costs, easier-to-use video technologies similar to FaceTime may actually promote efficiency and job

⁵³ ‘Virtual Hearings: The Way Forward in the UK in Uncertain Times’ <<https://www.dentons.com/en/insights/alerts/2020/march/29/virtual-hearings-the-way-forward-in-the-uk-in-uncertain-times>> accessed 5 June 2020.

⁵⁴ *Ibid*,

⁵⁵ ‘Kenya Law: Electronic Case Management Practice Directions, 2020’ <<http://kenyalaw.org/kl/index.php?id=10211>> accessed 5 June 2020, Rule 6.

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satisfaction by putting the human element back in business communications.⁵⁶

With increased globalisation, lawyers can tap into this infrastructure to serve clients from the comfort of their homes or offices regardless of the geographical location or distance. Lawyers can use the technology to tap into the ever growing international Alternative modes of Dispute Resolution such as international arbitration, mediation and Online Disputes Resolution (ODR) especially in the face of rapidly growing networking and borderless legal practice, with the introduction of diverse social media platforms that allow interconnectivity beyond the national boundaries and enabling cross-border relationships between clients and their lawyers and law firms amongst themselves.⁵⁷ They should tap into the tremendous growth of international trade, interstate deals, bilateral and multilateral treaties, where legal practice is increasingly becoming global and smart practitioners must therefore up their game with international best practices as with the advent of internet, telecommunication systems, clients are no longer limited to lawyers in their regions nor are they limited to the need for legal services within their jurisdiction.⁵⁸

As it has rightly been pointed out, 'the Covid-19 pandemic may prove a catalyst for Courts to embrace technology and reduce their reliance on in-person hearings and hard copy documents, particularly for case

⁵⁶ Zach Warren | January 15 and 2020 at 03:30 PM | The original version of this story was published on Legaltech News, 'The Future of Legal Tech Is About Transformation, Not Automation' (*The American Lawyer*) <<https://www.law.com/americanlawyer/2020/01/15/the-future-of-legal-tech-is-about-transformation-not-automation/>> accessed 3 June 2020.

⁵⁷ Emmanuel Oluwafemi Olowononi and Ogechukwu Jennifer Ikwuanusi, 'Recent Developments in 21st Century Global Legal Practice: Emerging Markets, Prospects, Challenges and Solutions for African Lawyers' (2019) 5 *KIU Journal of Social Sciences* 31; Samuel Omotoso, 'Law, Lawyers And The Social Media In The 21st Century: Challenges And Prospects' *Law, Lawyers And The Social Media In The 21st Century: Challenges And Prospects* <https://www.academia.edu/40663364/LAW_LAWYERS_AND_THE_SOCIAL_MEDIA_IN_THE_21ST_CENTURY_CHALLENGES_AND_PROSPECTS> accessed 5 June 2020.

⁵⁸ *Ibid*, p. 34.

management purposes, even after the pandemic. As such, developing good virtual hearing practices now is likely to pay significant dividends in the future'.⁵⁹

iii. Safeguarding the Privacy of Data: Transfer, Processing and Storage of Data

Most modern businesses including law firms have increasingly found themselves bound by data privacy laws at the national and international levels, requiring companies to know where they are storing Personally Identifiable Information (PII) and Personal Health Information (PHI) and wrap tight controls around the processing, use, and transfer of such PII and PHI.⁶⁰ The effect of this will become even more clearer as firms embrace technology due to the high risks and challenges posed by technology as far as such data is concerned.⁶¹ The challenge is especially great when it comes to legal processes that require extraordinary care in the identification and handling of PII and PHI on very tight turnaround times: data breach notification workflows, Data Subject Access Requests (DSARs), and cross-border e-discovery projects.⁶² Notably, law firms have started cross broader practice where firms in different jurisdictions collaborate either directly or through legal organisations to enable them serve clients in different countries.⁶³ Data protection laws in one country may not be necessarily as advanced as those in another country hence the need for firms to invest

⁵⁹ 'The Remote Courtroom: Tips and Tricks for Online Hearings' <<https://www.ashurst.com/en/news-and-insights/legal-updates/the-remote-courtroom-tips-and-tricks-for-online-hearings/>> accessed 5 June 2020.

⁶⁰ Katharine Perekslis, 'Four Strategies to Navigate Data Privacy Obligations for Compliance, Litigation, and E-Discovery Professionals' (*Law.com*) <<https://www.law.com/native/?mvi=7bd540437dde4b60991f35c257adc521>> accessed 3 June 2020.

⁶¹ *Ibid.*

⁶² *Ibid.*

⁶³ International Bar Association, 'What model for cross-border joint practice?' *A handbook for bar associations*, <www.ibanet.org> Document › Default› 5 June 2020; 'Global Law Firms: Globalization and Organizational Spaces of Cross-Border Legal Work by Jonathan Beaverstock, Daniel Muzio, Peter J. Taylor, James Faulconbridge :: SSRN' <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1155048> accessed 5 June 2020.

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heavily in this area to not only win the trust of clients and partners in another country but also to avoid the legal hurdles that may come with breach of such data privacy.⁶⁴

There is a need for local firms to make a conscious decision to invest in data protection infrastructure that will enable them to work efficiently and protect their clients' data regardless of the status of the local data protection laws. As law firms and corporate legal departments look for cost-effective ways to enhance the delivery of legal services, they should seek paralegals and legal assistants with expertise in technology-driven systems who can help the firm operate more efficiently in order to not only facilitate efficiency but also guarantee privacy of data.⁶⁵

There may be a need for the policymakers to work closely with other stakeholders to relook into the existing laws on data protection in order to enhance their effectiveness. Relevant law firm and Judiciary staff should also be equipped with the necessary skills and knowledge regarding data protection. Such skills and knowledge mainly include Information security management, which is a set of policies and procedural controls that Information Technology (IT) and business organizations implement to secure their informational assets against threats and vulnerabilities-information security.⁶⁶ Such staff would be responsible for managing the institution/firm's Information Security Management System (ISMS). ISMS is necessary for ensuring that any data is guaranteed confidentiality,

⁶⁴ United Nations Conference On Trade And Development, 'Data protection regulations and international data flows: Implications for trade and development,' UNCTAD/WEB/DTL/STICT/2016/1/iPub, United Nations, 2016 <https://unctad.org/en/PublicationsLibrary/dtlstict2016d1_en.pdf> 5 June 2020; 'How Organizations Can Stay Ahead of Changing Privacy Laws' (*Digital Guardian*, 22 August 2019) <<https://digitalguardian.com/blog/how-organizations-can-stay-ahead-changing-privacy-laws>> accessed 5 June 2020.

⁶⁵ 'Future Law Office 2020: Redefining the Practice of Law | Robert Half' <<https://www.roberthalf.com/research-and-insights/workplace-research/future-law-office-2020-redefining-the-practice-of-law>> accessed 5 June 2020.

⁶⁶ 'What Is Information Security Management?' (*Sumo Logic*) <<https://www.sumologic.com/glossary/information-security-management/>> accessed 5 June 2020.

integrity and it is easily available when required. Notably, whether the data collected is maintained in digital or physical format, the discipline of Information Security Management is still critical to protecting the data from unauthorized access or theft.⁶⁷ This is because every technology-driven business process is exposed to security and privacy threats and the legal profession is no different.⁶⁸ The security controls can follow common security standards or be more focused on the industry.⁶⁹

iv. Rolling out E-literacy Trainings/Education

With the expected increase in the uptake and use of technology within the legal profession, there is a need for sustained and enhanced e-literacy training on not only efficient use of technology but also the potential challenges that may come along and how to overcome them. The training should target lawyers, facilitated by LSK as well as judges and magistrates and all their support staff, facilitated by the Judiciary, in collaboration with the experts and professionals in ICT and other related areas.

As for lawyer students, law schools should come up with relevant courses to be included in their curricula in order to arm them with relevant skills.

In order to equip the general public, there is a need for the Government, through the Ministry of Information Communication Technology in collaboration with the other relevant stakeholders to make it easy for the public to acquire the relevant skills in technology through tailored courses at all levels of the school curriculum as well as through other simplified courses available to those already out of school and not likely to benefit from job related trainings in the area. This will also make it easier for the public to interact meaningfully with the justice sector. This is especially important considering that the Judiciary is on course to incorporate the use of

⁶⁷ Ibid.

⁶⁸ 'Introduction to Information Security Management Systems (ISMS) - BMC Blogs' <<https://www.bmc.com/blogs/introduction-to-information-security-management-systems-isms/>> accessed 5 June 2020.

⁶⁹ Luke Irwin, 'ISO 27001: The 14 Control Sets of Annex A Explained' (*IT Governance UK Blog*, 18 March 2019) <<https://www.itgovernance.co.uk/blog/iso-27001-the-14-control-sets-of-annex-a-explained>> accessed 5 June 2020.

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technology in dispensation of justice. Empowering the disseminators/facilitators of justice while leaving out the consumers of justice will defeat the need for embracing justice-to facilitate efficient access to justice for all. Leaving them out will instead promote digital apartheid-systematic exclusion of certain communities from digital access and experience through political and business policies and practices.⁷⁰ With the increased digitization of government services through such initiatives as the *Huduma Center service delivery model*- a Government of Kenya initiative aimed at advancing citizen-centred public service delivery through a variety of channels, including deploying digital technology and establishing citizen service centres across the country⁷¹, there is an urgent need to tackle digital illiteracy in order to enhance access by all. Virtual access to justice will benefit in the process. The Government can work with the Judiciary arm to set up Digital Villages Projects kind of structure across the country to ease access to services related to justice.⁷² However, such centres would focus on offering digital trainings and education specifically related to access to justice.

In addition, the Government should liaise with tech firms both national and international to roll out internet access services across the country for ease of access to all. They should also work with the local mobile service providers to ensure that mobile data is affordable for the majority of Kenyans. Furthermore, electricity should also be made more affordable for

⁷⁰ Paula Barnard-Ashton and others, 'Digital Apartheid and the Effect of Mobile Technology during Rural Fieldwork' (2018) 48 *South African Journal of Occupational Therapy* 20.

⁷¹ Sarah aru and Moses Wafula, 'Factors Influencing the Choice of Huduma Centers' Services (A Case Study of Mombasa Huduma Centre)' (2015) 5 *International Journal of Scientific and Research Publications*; Amir Ghalib Abdalla and others, 'Effect of Huduma Centers (One Stop Shops) in Service Delivery – A Case Study of Mombasa Huduma Centre' (2015) 5 *International Journal of Academic Research in Business and Social Sciences* 102; 'Study Heaps Praise on Revolutionary Huduma Centres' (*Daily Nation* <<https://www.nation.co.ke/https://www.nation.co.ke/dailynation/news/study-heaps-praise-on-revolutionary-huduma-centres-89030>> accessed 5 June 2020.

⁷² 'Broadband in Kenya | Broadband Strategies Toolkit' <<http://ddtoolkits.worldbankgroup.org/broadband-strategies/case-studies/broadband-kenya>> accessed 5 June 2020.

all. It is commendable that the Government of Kenya is already striving to ensure that all Kenyans have access to electricity through the *Last Mile Electricity Connectivity Project*.⁷³

v. Training, Regulation and Capacity Building: Role of Law and Legal Institutions

The recent amendments/enactments to enhance the use of technology in judicial proceedings in Kenyan courts are a step in the right direction.⁷⁴ There is a need to ensure that even as we seek to invest in the physical infrastructure to enhance the use of technology in the administration of justice, legal and institutional frameworks are also put in place to not only facilitate the uptake of technological developments but also to ensure that there is an effective regulatory framework to deal with the myriad of issues that will arise therefrom.

There have been calls for the Kenyan law schools to ensure that in their curriculum they also take into account the changing dynamics in the legal world and design programmes that equip the future lawyers to deal with

⁷³Last Mile Connectivity Program Kenya - Inclusive Infrastructure' <<https://inclusiveinfra.github.org/case-studies/last-mile-connectivity-program-kenya/>> accessed 5 June 2020; 'Kenya - Last Mile Connectivity Project II' <<https://projectsportal.afdb.org/dataportal/VProject/show/P-KE-FA0-013>> accessed 5 June 2020; African Development Bank, 'Kenya - Last Mile Connectivity Project - Project Appraisal Report' (*African Development Bank - Building today, a better Africa tomorrow*, 24 January 2020) <<https://www.afdb.org/en/documents/kenya-last-mile-connectivity-project-project-appraisal-report>> accessed 5 June 2020; 'Last Mile Project - Ministry of Energy' <<https://energy.go.ke/?p=914>> accessed 5 June 2020.

⁷⁴Civil Procedure (Amendment) Rules, 2020 (26 February 2020); Electronic Case Management Practice Directions, 2020. The Law of Contract Act, Cap 23 of the Laws of Kenya was recently amended vide the Business Laws (Amendment) Act, No. 1 of 2020, (18 March 2020) to recognize use of advanced electronic signatures. Notably, Electronic signatures are not a new concept to Kenyan law, as they are already provided for under the Kenya Information and Communication Act No. 2 of 1998, as amended. The new amendments however sought to align the same with particular laws.

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the changes.⁷⁵ The modern lawyer ought to be well endowed with basic technological knowledge to enable them build on the same to fit in a fast growing globalized world where geographical boundaries and physical offices may no longer matter.

After qualification, lawyers should continually be subjected to technological knowledge and skills through the Continuing Professional Development (CPD) trainings which must be re-looked at to make them more receptive and richer. The CPD committee of the Law Society of Kenya should consider working closely with Information communication technology and other relevant experts and professionals who may not necessarily be lawyers and invite them to CPD events in order to deliver more practical skills and knowledge on the area. It is not enough for lawyers to get theoretical talks on the area from fellow lawyers who are techno-legal savvy; the real professionals in the field must be involved as a way of impacting practical knowledge and skills. There is a need to actively involve the tech firms in and out of the country alongside other stakeholders.

Law schools in the future, like the legal profession itself, have been called to be more collaborative, diverse, international, technologically friendly, and entrepreneurial than they are today.⁷⁶ In addition, tomorrow's law school curriculum has been challenged to be more entrepreneurial to respond to the financial pressures on the legal profession and the opportunities wrought by innovation and globalization.⁷⁷ Embracing technology will also enable law schools to widen their scope of students since students from abroad can either enroll for legal education in Kenya without the need to travel all the way or even have exchange programs and this would be beneficial to both students and the institutions.

⁷⁵ Mboya, Apollo, 'The Bar: Challenges and Opportunities', in Ghai, Y.P. and Cottrell, J. eds., *The legal profession and the new constitutional order in Kenya*. Strathmore University Press, 2014, p. 245.

⁷⁶ Kellogg Sarah, 'Cover Story: The Transformation of Legal Education' *From Washington Lawyer*, May 2011

<<https://www.dcb.org/bar-resources/publications/washington-lawyer/articles/may-2011-legal-education.cfm>> accessed 4 June 2020.

⁷⁷ Ibid.

vi. Enhanced e-filing and service of Court Pleadings and Documents

The law amendments that allowed for e-filing and service of documents in Kenya could not have come at a better time.⁷⁸ As has become the norm during the Covid-19 pandemic period, Kenyan courts should consider fully adopting and shifting to electronic systems for filing documents. This would save both law firms and courts enormous resources in terms of finances and storage facilities for the hardcopy documents. It would also enhance efficiency in terms of accessibility and review of the documents as both sides can access the documents from anywhere. All that is required is enhancing the security of such data to safeguard privacy. This can be achieved through investing in modern infrastructure as well as offering information management training to the staff charged with such.

vii. Amendment of Remuneration Order to guide on Legal fees payment by clients

It has been argued that one of the biggest differences is how lawyers will practice in the future-how lawyers value and price what they sell.⁷⁹ It is suggested that there is a need to implore members of the Bar to transition away from the traditional billable time and services system to alternative billing strategies by understanding that apart from “legal services” and “time”, lawyers are also selling knowledge, which may include fixed, results based, hourly, graduated, or any such combination.⁸⁰ This would all be facilitated by technology which allows one to serve clients without physically meeting clients or even attending court physically. This,

⁷⁸ ‘Kenya Law: Electronic Case Management Practice Directions, 2020’ *Gazette Notice No. 2357* <<http://kenyalaw.org/kl/index.php?id=10211>> accessed 5 June 2020.

The objectives of the Electronic Case Management Practice Directions are to guide the integration of Information Communication Technology (ICT) in judicial proceedings and in particular to provide for – (a) electronic filing and electronic service of court documents; (b) electronic case search; (c) electronic diary; (d) electronic case tracking system; (e) electronic payment and receipting; (f) electronic signature and electronic stamping; (g) exchange of electronic documents, including pleadings and statements; and (h) use of technology in case registration and digital recording of proceedings for expeditious resolution of cases.

⁷⁹ Mboya, Apollo, ‘The Bar: Challenges and Opportunities’, in Ghai, Y.P. and Cottrell, J. eds., *The legal profession and the new constitutional order in Kenya*. Strathmore University Press, 2014, p. 247.

⁸⁰ *Ibid*, p. 247.

therefore, creates a need to reconsider amending/revising the current Remuneration Order so as to accommodate these new possibilities.

viii. Licensing and Regulation of virtual law firms

Some scholars have rightly argued that competition to the Kenyan firms by global law firms requires a reconsideration of traditional organizational structures of law firms, ethical rules and regulation mechanisms for the legal profession and restructuring of how legal services are delivered.⁸¹ The argument is that in order for the profession to stay relevant and thrive, lawyers must examine who can invest in firms, models for publicly traded firms, and lawyer partnerships with other professionals.⁸²

There is need for the law firms licensing stakeholders in Kenya to consider the idea of licensing virtual law firms, which will largely be conducting technology driven business. As a result of the COVID-19 which has forced many law firms across the world to allow employees to work from home, some firms abroad have already started reporting final decisions to close their physical offices and turning to virtual firms where their employees will permanently work from home.⁸³ Slater and Gordon, a London-based law firm is set to have its staff working from home permanently from September 2020 onwards, after almost three months of working remotely under the COVID-19 lockdown.⁸⁴ All its 200 London employees will work from home most of the time – though the firm is hoping to find a smaller office space which will be used to host meetings. The Staff are to be provided with multiple screens if they are needed and homes fitted with comfortable office

⁸¹ Mboya, Apollo, 'The Bar: Challenges and Opportunities', in Ghai, Y.P. and Cottrell, J. eds., *The legal profession and the new constitutional order in Kenya*. Strathmore University Press, 2014, p. 243.

⁸² Ibid, p. 243.

⁸³ Meganne Tillay | May 27 and 2020 at 10:13 AM, 'Slater & Gordon to Close London Office, Staff to Work From Home Permanently' (*Law.com International*) <https://www.law.com/international-edition/2020/05/27/slater-and-gordon-to-close-london-office-staff-to-work-from-home-permanently/?cmp_share> accessed 3 June 2020; Meganne Tillay, Simon Lock | May 29 and 2020 at 08:38 AM, 'Slater & Gordon Working From Home: How Will It Work?' (*Law.com International*) <<https://www.law.com/international-edition/2020/05/29/slater-gordon-working-from-home-how-will-it-work/>> accessed 3 June 2020.

⁸⁴ Ibid.

equipment.⁸⁵The firm's management rightly argued that this approach would improve the well-being and work life balance of their staff and provide flexibility to their customers.⁸⁶ Other United Kingdom based firms such as Baker McKenzie and DLA Piper have also been toying with the idea.⁸⁷

The growth of virtual law firms will inevitably come with the challenge of regulation. The regulators of provision of legal services should adequately prepare to respond to the impact of technology on law practice and lawyer regulation, including the growth in cloud computing, virtual law offices, and outsourcing of legal services.⁸⁸

ix. A Possibility of Online Courts?

The Covid-19 pandemic has unintentionally fast-tracked courts' adoption of technology since courts around the world have been forced to replace face-to-face hearings with video hearings, using phonelinks and platforms such as Zoom, Teams and Skype.⁸⁹ Kenyan Judiciary has not been left behind in these latest developments.⁹⁰ Kenya still suffers from the challenge of physical accessibility to law courts due to geographical distance since some of the farthest regions still do not have physical court buildings. As a result,

⁸⁵ Ibid.

⁸⁶ Ibid.

⁸⁷ Hannah Roberts | May 07 and 2020 at 05:16 AM, 'Baker McKenzie Surveys Staff over London Office Return as DLA Also Mulls Reopening Base' (*Law.com International*) <<https://www.law.com/international-edition/2020/05/07/baker-mckenzie-surveys-staff-over-london-office-return-as-dla-also-mulls-reopening-base/>> accessed 3 June 2020.

⁸⁸ Laurel S Terry, Steve Mark and Tahlia Gordon, 'Trends and Challenges in Lawyer Regulation: The Impact of Globalization and Technology' (2011) 80 *Fordham L. Rev.* 2661, p. 2662.

⁸⁹ Jane Croft, 'Courts Test Their Online Future, from Dress-down Lawyers to Witness Appearance' (23 April 2020) <<https://www.ft.com/content/936e04b6-7a8c-11ea-bd25-7fd923850377>> accessed 5 June 2020; 'Remote Courts' <<https://remotecourts.org/>> accessed 5 June 2020.

⁹⁰ A experiência dos tribunais mundo afora durante a p and Emia Says, 'Kenyan Courts Are Using Video Calls To Keep Wheels of Justice Spinning' (*Gadgets Africa*, 31 March 2020) <<https://gadgets-africa.com/2020/03/31/kenya-courts-video-call-covid-19/>> accessed 5 June 2020.

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advocates and witnesses travel long distances in search of justice.⁹¹ While the Judiciary continues to invest in physical infrastructure, the stakeholders in the justice sector may also consider the idea of embracing online courts to deal with the problem. Considering that even where the Judiciary puts up courts, lawyers may still be unavailable to the litigants either due to costs or general shortage, some scholars have argued that putting online courts may come in handy in overcoming some of the challenges faced by litigants who represent themselves, *Pro Se Litigation*.⁹² They argue that in most jurisdictions, including the United States of America, to date, the use of online technology to support legal self-representation has been confined primarily to the provision of educational and informational materials, such as “how-to” websites and downloadable legal forms, available mostly in the pre-filing stage.⁹³ Arguably, the Judiciary can go further in embracing technology through instituting “online courts; judicial online dispute resolution systems, can improve the ability of self-represented litigants to effectively participate in proceedings, as well as the ability of courts to administer them fairly and efficiently.⁹⁴ Where parties are in far-flung areas and they do not have access to legal representation, it has been suggested that they can benefit from self-representation in online courts where they can handle all procedural and substantive aspects of their legal matters, including court appearances, without representation by counsel.⁹⁵ This is because lay people who self-represent in judicial processes typically lack knowledge of legal procedure and substance, an inherent limitation which is consistently found to impede their access to justice and the legal system’s ability to deliver justice.⁹⁶ This is a viable idea since representation through

⁹¹ Republic of Kenya, *State of the Judiciary and the Administration of Justice Annual Report, 2017 - 2018*, The Judiciary, <<https://www.judiciary.go.ke/wp-content/uploads/sojar20172018.pdf> .> 4 June, 2020.

⁹² Ayelet Sela, ‘Streamlining Justice: How Online Courts Can Resolve the Challenges of Pro Se Litigation’ (2016) 26 *Cornell JL & Pub. Pol’y* 331.

⁹³ *Ibid*, p. 333.

⁹⁴ *Ibid*, p. 333.

⁹⁵ *Ibid*, p. 133; See also Schäfer, Saskia. "New practices of self-representation: The use of online media by Ahmadiyya and Shia communities in Indonesia and Malaysia." In *New media configurations and socio-cultural dynamics in Asia and the Arab world*, pp. 174-197. Nomos Verlagsgesellschaft mbH & Co. KG, 2015.

⁹⁶ *Ibid*, p. 333.

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legal aid or pro bono programs may not always suffice. While video-conference hearings may require documents to be filed physically and sometimes require physical presence of witnesses or parties, online courts would have every part of the process facilitated through some web-based platform from filing, payments and hearings without requiring any physical presence.⁹⁷ The system may be akin to the United Kingdom's Money Claim Online system, which is the online portal for starting simple court claims, allowing individuals and organizations to file online specified money claims for sums of up to GBP £100,000.⁹⁸ It is a web-based service for issuing money claims and resolving fixed money disputes introduced in the judiciary of England and Wales in February 2002.⁹⁹

The Canadian District of British Columbia also set up the Civil Resolution Tribunal which started working in 2016 and it allows the public to resolve their condominium property and small claims disputes up to \$5,000 fairly, quickly, and affordably where participants use all of negotiation, facilitation and, if necessary, adjudication services from a computer or mobile device at a time that is convenient for them, and for those who are unable or unwilling to use technology to resolve their dispute, the tribunal provides paper-based or telephone-based services.¹⁰⁰ It has been observed that over 90 percent of

⁹⁷ Legg, Michael. "The future of dispute resolution: online ADR and online courts." *Forthcoming-Australasian Dispute Resolution Journal* (2016); Dame Hazel Genn, 'Birkenhead Lecture 2017: Online Courts and the Future of Justice Gray's Inn,' 16 October 2017

<https://www.ucl.ac.uk/laws/sites/laws/files/birkenhead_lecture_2017_professor_dame_hazel_genn_final_version.pdf> 5 June 2020.

⁹⁸ Admin, 'Money Claim Online - Learn What It Is, Where It Is and How To Use It' (*Small Claims Court Genie. Free hints, tips and news*) <<https://www.smallclaimscourtgenie.co.uk/money-claim-online/>> accessed 5 June 2020.

⁹⁹ Jannis Kallinikos, 'Institutional Complexity and Functional Simplification: The Case of Money Claim Online Service in England and Wales' in Francesco Contini and Giovan Francesco Lanzara (eds), *ICT and Innovation in the Public Sector: European Studies in the Making of E-Government* (Palgrave Macmillan UK 2009) <https://doi.org/10.1057/9780230227293_8> accessed 5 June 2020.

¹⁰⁰ Shannon Salter, 'Online Dispute Resolution and Justice System Integration: British Columbia's Civil Resolution Tribunal' (2017) 34 *Windsor Yearbook of Access to Justice/Recueil annuel de Windsor d'accès à la justice* 112, p. 114; Office of

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parties in British Columbia's Small Claims Court are self-represented, and even if they could finance legal fees, many British Columbians in remote communities must travel great distances to a courthouse, burdening them with further costs. In addition, no matter where you live or who you are, navigating the civil justice system, even Small Claims Court, can be stressful and overwhelming, and there is little support available to help with the process.¹⁰¹ Thus, the online tribunal system comes in handy. Effective July 15, 2019, British Columbia's Civil Resolution Tribunal (CRT) expanded its jurisdiction to include claims against societies incorporated under the *Societies Act* (British Columbia), changing the forum for dispute resolution for many types of claims made against a society or its directors.¹⁰²

Therefore, even though Kenya is in the process of putting up small claims courts¹⁰³, they may suffer the same setbacks. As a result, in future, Kenya may need to benchmark with the above countries, noting the strengths and weaknesses of this system and consider adopting the same. All the Government needs to do to facilitate is to Fast-track internet access across the country and promote setting up advanced computer centres where less fortunate members of the society can access internet. It is also encouraging that the use of smartphones is fast spreading in the country, a development that may enhance the use of online courts. Initially, the Judiciary may begin with smaller claims whose value may not be economically viable to travel long distances, spend too much or even wait in courts due to the huge backlog currently experienced in our courts.

Housing and Construction Standards, 'The Civil Resolution Tribunal and Strata Disputes - Province of British Columbia'

<<https://www2.gov.bc.ca/gov/content/housing-tenancy/strata-housing/resolving-disputes/the-civil-resolution-tribunal>> accessed 5 June 2020.

¹⁰¹ Ibid, p. 119.

¹⁰² Millman, Bryan, 'Society Disputes May Now Be Settled by BC Civil Resolution Tribunal' (<https://www.nortonrosefulbright.com:443/en-za/knowledge/publications/2019>) <<https://www.nortonrosefulbright.com/en-za/knowledge/publications/303e1394/society-disputes-may-now-be-settled-by-bc-civil-resolution-tribunal>> accessed 5 June 2020.

¹⁰³ Small Claims Court Act, No. 2 of 2016, Laws of Kenya.

As for the fear of coaching of witnesses, the system can incorporate measures similar to proctoring programs for ensuring witnesses do not get coached, among other quality assurance software and measures. However, where possible, courts may also consider taking written submissions and evidence in proceedings, particularly in courts where affidavit evidence is not the ordinary procedure.¹⁰⁴

x. Enhanced collaboration Between International Law Firms and Local Firms/ Globalization of Legal Services

Notably, some Kenyan firms are already ahead in this area by collaborating with East African law firms and some with even international firms beyond the region.¹⁰⁵ Bowmans, a firm with nine offices (Cape Town, Dar es Salaam, Durban, Lilongwe, Lusaka, Johannesburg, Kampala, Moka and Nairobi) in seven African countries and over 400 specialist lawyers, for instance, has been extending its reach across the African continent.¹⁰⁶ In all these countries (Kenya, Malawi, Mauritius, South Africa, Tanzania, Uganda and Zambia), they have alliance firms with which they work closely. They are representatives of Lex Mundi, a global association with more than 160 independent law firms in all the major centres across the globe, which gives them access to firms in each jurisdiction represented.¹⁰⁷ There is a need for more local firms to consider the idea and possibly join the bandwagon as it may give them access to a wider clientele.

12.2.5 Conclusion

The Covid-19 has laid bare the direction that legal practice is headed. There is a need for lawyers to reconsider the issues of *law firm structure and billing*,

¹⁰⁴ 'The Remote Courtroom: Tips and Tricks for Online Hearings' <<https://www.ashurst.com/en/news-and-insights/legal-updates/the-remote-courtroom-tips-and-tricks-for-online-hearings/>> accessed 5 June 2020.

¹⁰⁵ Karangizi, S., 'Future Proofing the Legal Profession in East Africa | ALSF' <<https://www.aflsf.org/director-article/future-proofing-legal-profession-east-africa>> accessed 30 May 2020.

¹⁰⁶ 'Company Profile' (*Bowmans*) <<https://www.bowmanslaw.com/our-firm/company-profile/>> accessed 3 June 2020.

¹⁰⁷ 'Our African Footprint' (*Bowmans*) <<https://www.bowmanslaw.com/our-firm/our-african-footprint/>> accessed 3 June 2020.

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law firm marketing, work-life balance and technology vis-à-vis the practice of law, cross border legal practice, educating and training new adaptable lawyers (Emphasis added).¹⁰⁸ Law schools and the LSK should take this opportunity to equip lawyers with the requisite skills in order to prepare them for the fast changing legal practice the world over. Law firms should also invest in technological developments if they hope to remain relevant in the face of technological innovations and developments and globalisation. The Judiciary also needs to take up the challenge of adopting technology to facilitate remote access to justice for all.

We are moving into an era where many lawyers may find themselves working from home due to the desire to cut costs using technological investments and following clients' needs which will lead firms to embrace technology.¹⁰⁹ This is the time for them to invest wisely in these new technological areas and acquire the relevant skills and knowledge to enable them remain relevant. Arguably, automation technologies can make legal services more affordable and easily accessible to their clients. Additionally, law firms can leverage these technologies to develop and add alternative services, while reducing overheads and workload.¹¹⁰ While clients are putting law firms under intense pressure to deliver a higher level of service by making use of the latest technological advancements, all at a reduced cost, it has been argued that this generational shift in consumer expectation is an opportunity for legal service providers to implement *innovative digital products* that meet next-generation clients' demands while increasing productivity within their own staff.¹¹¹

¹⁰⁸ Mboya, Apollo, 'The Bar: Challenges and Opportunities', in Ghai, Y.P. and Cottrell, J. eds., *The legal profession and the new constitutional order in Kenya*. Strathmore University Press, 2014, p. 252.

¹⁰⁹ Zach Warren | January 15 and 2020 at 03:30 PM | The original version of this story was published on Legaltech News, 'The Future of Legal Tech Is About Transformation, Not Automation' (*The American Lawyer*) <<https://www.law.com/americanlawyer/2020/01/15/the-future-of-legal-tech-is-about-transformation-not-automation/>> accessed 3 June 2020.

¹¹⁰ 'Business Models for Law Firms - p.Xel Marketing Agency' <<https://www.p-xel.co/business-models-for-digital-disruption-in-the-legal-industry/>> accessed 5 June 2020.

¹¹¹ Ibid.

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The future of legal practice is in embracing technology and the Kenyan legal practitioners and players in the justice sector must take up the challenge or be rendered irrelevant since legal practice is likely to become increasingly virtual. The journey into the future has already begun and there is no turning back.

Legal practice must venture into new frontiers: embracing technology for enhanced efficiency and Access to Justice is an idea whose time has come.

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

12.3.1 Introduction

Tribunals are an integral component of the justice system in Kenya and play an important role in reducing pressure on courts and facilitating expeditious access to justice.¹¹² They have the potential to facilitate faster management of disputes and deal with specialised matters under different statutes.¹¹³ The Constitution recognises tribunals as part of subordinate courts in the judicial hierarchy.¹¹⁴

The Constitutional recognition of tribunals as part of the judiciary demonstrates their importance in the administration of justice in Kenya. Under the previous constitutional dispensation, tribunals were under the respective ministries.¹¹⁵ This posed several challenges such as undermining the independence of tribunals.

¹¹² Muigua. K., *Tribunals within the Justice System in Kenya: Integrating Alternative Dispute Resolution in Conflict Management*, available at <http://kmco.co.ke/wp-content/uploads/2019/05/Presentation-Tribunals-within-the-Justice-System-in-Kenya-Integrating-Alternative-Dispute-Resolution-in-Conflict-Management-Kariuki-Muigua-23rd-May-2019.pdf> (Accessed on 27/02/2020).

¹¹³ Ibid.

¹¹⁴ Constitution of Kenya, 2010, Article 169 (1) (d), Government Printer, Nairobi.

¹¹⁵ The Judiciary of Kenya, *State of the Judiciary and the Administration of Justice Annual Report, 2017 – 2018*, March 2019, Available at

<https://www.judiciary.go.ke/wp-content/uploads/sojar20172018.pdf> p. 66,

Accessed on 09/03/2020.

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Consequently, under the new constitutional dispensation, the judiciary is undertaking measures towards integrating tribunals as part of the judiciary. The purpose of transitioning tribunals is to delink them from the executive and integrate them into the judiciary in order to enhance their independence.¹¹⁶ With independence, tribunals are able to discharge their mandate in facilitating the administration of justice and enhancing access to justice by reducing pressure on courts.

The National Environment Tribunal (NET) is established under the Environmental Management and Co-Ordination Act (EMCA).¹¹⁷ The jurisdiction of the Tribunal is set out under section 125 of the Act. The Tribunal hears and determines appeals concerning: *grant of a licence or permit or refusal to grant a licence or permit; imposition of any condition, limitation or restriction on a licence; revocation, suspension or variation of a licence; the amount of money required to be paid as fee under the Act or imposition against the person of an environmental restoration order or environmental improvement order by the Authority under the Act or its regulations* (emphasis added).¹¹⁸

The Act requires appeals to be lodged with the Tribunal within sixty days of the occurrence of the event which a person is dissatisfied with.¹¹⁹ In addition, the jurisdiction of the Tribunal extends to appeals against decisions of the Director General of the National Environment Management Authority (NEMA), the Authority, committees of the Authority or its agents.¹²⁰ In interpreting NET's jurisdiction, the Environment and Land Court in *Simba Corporation Limited v Director General, National Environment Management Authority (NEMA) & Another*¹²¹, held that:

¹¹⁶ Ibid.

¹¹⁷ Environmental Management and Co-Ordination Act, No. 8 of 1999, S 125, Government Printer, Nairobi.

¹¹⁸ Ibid, S 129 (1).

¹¹⁹ Ibid.

¹²⁰ Ibid, s. 129(2).

¹²¹ *Simba Corporation Limited v Director General, National Environment Management Authority (NEMA) & Another* ELC Civil Appeal No. 100 of 2015, (2017) eKLR.

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

Upon hearing an appeal, the Tribunal may: *confirm, set aside or vary the order or decision in question, exercise any of the powers that could have been exercised by the Authority; make orders as to costs and those necessary to enhance the principles of sustainable development; make orders maintaining the status quo of any matter or activity which is the subject of an appeal until the appeal is determined or review its orders upon application by a party (emphasis added).*¹²² This provision demonstrates that the jurisdiction of the tribunal is wide and it enjoying important powers of enhancing the principles of sustainable development in Kenya. The tribunal can upon hearing an appeal, exercise powers that would ordinarily be done by the National Environment Management Authority (NEMA) such as grant of an Environmental Impact Assessment (EIA) Licence and environmental restoration orders.¹²³

12.3.2 NET and Sustainable Development

Courts and tribunals in exercising judicial authority are mandated to be guided by several principles which include the protection and promotion of the purpose and principles of the Constitution.¹²⁴ Among these principles is sustainable development.¹²⁵ Sustainable development has been defined as that which meets the needs of the present generation without compromising the ability of future generations to meet their own needs.¹²⁶ EMCA defines sustainable development as development that meets the needs of the

¹²² EMCA, S. 129(3).

¹²³ Ibid.

¹²⁴ Constitution of Kenya, 2010, Article 159 (2).

¹²⁵ Ibid, Article 10 (2) (d).

¹²⁶ Report of the World Commission on Environment and Development: Our Common Future, available at (Accessed on 09/03/2020).

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present generation without compromising the ability of future generations to meet their needs by maintaining the carrying capacity of the supporting ecosystems.¹²⁷ It has further been pointed out that sustainable development seeks to address *intra generational equity*; which is equity among present generations and *inter-generational equity*; which is equity between generations.¹²⁸ In the case concerning the *Gabcikovo- Nagymoros Project*, it was opined that sustainable development reaffirms the need for both development and environmental protection, and that neither can be neglected at the expense of the other.¹²⁹ It reconciles the human rights to development and protection of the environment by ensuring that the right to development resonates with the reasonable demands of environmental protection.¹³⁰

In Kenya, courts are key actors in the sustainable development discourse in terms of developing environmental jurisprudence geared towards environmental protection and conservation.¹³¹ The Constitution of Kenya, 2010 enshrines both the human rights to development and environmental protection.¹³² Consequently, it obligates the state to ensure sustainable exploitation, utilisation, management and conservation of the environment and natural resources, and ensure the equitable sharing of the accruing benefits.¹³³ This position was succinctly captured in the case of *Patrick Musimba vs National Land Commission & 4 Others (2016) eKLR*, where the Court stated as follows:-

“....the State under Article 69 of the Constitution is enjoined to ensure sustainable development. (See also the preamble to the Constitution). The

¹²⁷ EMCA, S. 2.

¹²⁸ Weiss, E.B., “In Fairness to Future Generations and Sustainable Development” *American University International Law Review*, Vol. 8, 1992.

¹²⁹ *Hungary v Slovakia*, 1997 WL 1168556 (I.C.J-1997).

¹³⁰ *Ibid*.

¹³¹ Muigua.K., Wamukoya. D & Kariuki.F., ‘Natural Resources and Environmental Justice in Kenya’ Glenwood Publishers Ltd, 2015; See also the case of *Peter K. Waweru v Republic (2006) eKLR*.

¹³² Constitution of Kenya, 2010, Chapter Four on Bill of Rights, Articles 42 and 43, Government Printer, Nairobi.

¹³³ *Ibid*, Article 69 (1) (a).

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State is also to ensure that every person has a right to a clean and health environment. However, physical development must also be allowed to foster to ensure that the other guaranteed rights and freedoms are also achieved. Such physical development must however be undertaken within a Constitutional and Statutory framework to ensure that the environment thrives and survives. It is for such reason that the Constitution provides for public participation in the management, protection and conservation of the environment. It is for the same reason too that the Environmental Management and Coordination Act (“the EMCA”) has laid out certain statutory safeguards to be observed when a person or the State initiates any physical development.”¹³⁴

The Constitution further provides a framework for enforcement of environmental rights through an application to court which may make any order, or give any directions, it considers appropriate to prevent, stop or discontinue any act or omission that is harmful to the environment; to compel any public officer to take measures to prevent or discontinue any act or omission that is harmful to the environment; or to provide compensation for any victim of a violation of the right to a clean and healthy environment.¹³⁵

NET plays a central role in the sustainable development discourse in Kenya. Under EMCA, upon any appeal, the Tribunal may grant several remedies including *orders to enhance the principles of sustainable development* (emphasis added).¹³⁶ In discharging this mandate, NET has on several occasions issued orders such as revocation of Environmental Impact Assessment (EIA) Licenses and subsequent cancellation of projects which do not adhere to sustainable development principles including public participation. In *Save Lamu & 5 others v National Environmental Management Authority (NEMA) & Another*, the Tribunal while setting aside the decision by the National Environment Management Authority (NEMA) to issue an EIA Licence held as follows:

¹³⁴ *Patrick Musimba vs National Land Commission & 4 Others*, Petition No. 613 of 2014, (2016) eKLR.

¹³⁵ *Ibid*, Article 70.

¹³⁶ EMCA, S 129 (3) (c).

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'The purpose of the Environment Impact Assessment (EIA) process is to assist a country in attaining sustainable development when commissioning projects. The United Nations has set Sustainable Development Goals (SDGs), which are an urgent call for action by all countries recognizing that ending poverty and other deprivations must go hand-in-hand with strategies that improve health and education, reduce inequality, and spur economic growth – all while tackling climate change and working to preserve our oceans and forests. (Emphasis added)'¹³⁷

Further, in *Narok County Council & another vs National Environment Management Authority & another*,¹³⁸ the Tribunal quashed the decision of NEMA to approve development activities on several parcels of land in Narok County. It further, directed the proponent to prepare a full Environmental Impact Assessment study report in accordance with EMCA and its Regulations, and stop any development activities on the project site until the report was approved by NEMA.

These examples illustrate the central role played by NET in fostering sustainable development in Kenya. When environmental management institutions fail to discharge their obligations in accordance to the law, the tribunal has acted by issuing orders aimed at enhancing sustainable development and promoting environmental conservation in Kenya.

12.3.3 NET and Access to Environmental Justice

Access to justice has been described as a situation where people in need of legal redress find effective solutions from justice systems that are accessible, affordable, comprehensible to ordinary people, and which dispense justice fairly, speedily and without discrimination, fear or favour and offer a greater role for alternative dispute resolution.¹³⁹ It has also been used to refer to judicial and administrative remedies and procedures available to a person

¹³⁷ *Save Lamu & 5 others v National Environmental Management Authority (NEMA) & Another, Tribunal Appeal No. NET 196 of 2016, (2019) eKLR.*

¹³⁸ *Narok County Council & another vs National Environment Management Authority & another, Tribunal Referral NET 07/2006, (2006) eKLR.*

¹³⁹ Ladan, M., 'Access to Justice as a Human Right under the ECOWAS Community Law' available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2336105 (Accessed on 11/03/2020).

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who is aggrieved or likely to be aggrieved by an issue.¹⁴⁰ The Constitution enshrines the right of access to justice.¹⁴¹ Access to justice is also one of the pillars of the Agenda 2030 on Sustainable Development Goals (SDGs). SDG Goal 16 seeks to ‘*promote peaceful and inclusive societies for sustainable development, provide access to justice for all and build effective, accountable and inclusive institutions at all levels (emphasis added).*’¹⁴²

Access to justice has an environmental dimension. Environmental justice is associated with two elements of justice which are: *procedural justice* and *distributive justice*. Procedural environmental justice is concerned with environmental decision making and encompasses the concept of participation.¹⁴³ Distributive environmental justice acknowledges the right of every person to a clean and healthy environment.¹⁴⁴

NET facilitates both distributive and procedural justice by providing a framework through which the right to a clean and healthy environment can be enforced. Through some of its decisions, the Tribunal has ensured that the state’s obligations in respect of the environment enshrined under the

¹⁴⁰ Muigua.K., Wamukoya.D & Kariuki.F., ‘Natural Resources and Environmental Justice in Kenya’, Op Cit, p. 59.

¹⁴¹ Article 48 of the Constitution of Kenya, 2010 provides that the State shall ensure access to justice for all persons and, if any fee is required, it shall be reasonable and shall not impede access to justice.

¹⁴²UNDP, Sustainable Development Goals, 2015, available at <https://www.undp.org/content/undp/en/home/sustainable-development-goals.html> (accessed on 13/03/2020).

¹⁴³ Muigua.K., Wamukoya.D & Kariuki.F., ‘Natural Resources and Environmental Justice in Kenya’, Op Cit, p. 30.

¹⁴⁴ Constitution of Kenya, 2010, Article 42, provides that ‘Every person has the right to a clean and healthy environment, which includes the right to have the environment protected for the benefit of present and future generations through legislative and other measures, particularly those contemplated in Article 69; and to have obligations relating to the environment fulfilled under Article 70. The right to a clean and healthy environment is a justiciable right which is enforceable under article 70 of the Constitution. Under article 70 (3) of the Constitution and section 3 (4) of EMCA, there is no requirement of *locus standi* in enforcement of the right to a clean and healthy environment.

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Constitution have been undertaken.¹⁴⁵ These include *public participation, environmental impact assessment and environmental audits* (emphasis added).¹⁴⁶ The tribunal further promotes access to justice by providing an avenue through which persons who are aggrieved by some of the decisions of NEMA can seek recourse.¹⁴⁷ NET is thus an integral tribunal in Kenya. It is supposed to enhance the principle of sustainable development enshrined under the Constitution. It should further promote the right of access to justice stipulated under article 48 of the Constitution.

12.3.4 Challenges

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

a. Jurisdiction

Despite the wide mandate granted to the National Environment Tribunal under the Constitution and EMCA, courts have often adopted a narrow interpretation of its jurisdiction. In *Republic v National Environmental Tribunal & 2 others ex-parte Athi Water Services Board*,¹⁴⁸ the High Court held that:

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

¹⁴⁵ See for example the cases of *Save Lamu & 5 others v National Environmental Management Authority (NEMA) & Another*, Tribunal Appeal No. NET 196 of 2016, (2019) eKLR.

¹⁴⁶ Constitution of Kenya, 2010, Article 69 (1) (d) (f), See also EMCA, s 57A on strategic environmental assessment on environmental audits.

¹⁴⁷ EMCA, S 129 (1).

¹⁴⁸ *Republic v National Environmental Tribunal & 2 others ex-parte Athi Water Services Board*, (2015) eKLR.

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Further, in *Republic vs National Environmental Tribunal & 3 Others Ex-Parte Overlook Management Ltd and Silvers and Camping Site Limited*,¹⁴⁹ the court held that:

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

This restricted interpretation of NET’s jurisdiction has seen some of its decisions being overturned by the High Court through judicial review or the Environment and Land Court on Appeal. However, with the 2015 amendments, EMCA was aligned with the new Constitution with consequently saw the jurisdiction of NET being enhanced. Under EMCA, the Tribunal can *inter alia* exercise any of the powers which could have been exercised by NEMA and *make any orders to enhance the principles of sustainable development* (emphasis added).¹⁵⁰ These are wide powers which make the Tribunal a vital component of the sustainable development and environmental justice discourse in Kenya. The jurisdiction of the tribunal needs to be broadly interpreted and upheld in order to enable it discharge its functions effectively.

b. Capacity

The Tribunal is composed of persons appointed under section 125 (1) of EMCA. Its staff is derived from either the Judiciary or the Ministry of Environment and Forestry. This poses a challenge when it comes to

¹⁴⁹ *Republic vs National Environmental Tribunal & 3 Others Ex-Parte Overlook Management Ltd and Silvers and Camping Site Limited, Miscellaneous Application Number 391 of 2006.*

¹⁵⁰ EMCA, S 129 (3).

supervision as well as the appraisal of staff.¹⁵¹ This coupled with other problems facing tribunals in Kenya including budgetary constraints and inadequate space may hinder the operational capacity of the National Environment Tribunal. Data from the judiciary shows that there were a number pending cases before the Tribunal at the end of the Financial Year 2018/2019.¹⁵² It is important to address these capacity constraints in order to enhance the capacity of the National Environment Tribunal to promote access to environmental justice in Kenya.

12.3.5 Way Forward

a. Capacity Building

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

b. Upholding NET's Jurisdiction

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

¹⁵¹ Judiciary, 'State of the Judiciary and the Administration of Justice Annual Report: 2018/2019' available at <https://www.judiciary.go.ke/resources/reports/> (accessed on 12/03/2020).

¹⁵² Ibid.

c. Public Awareness

Despite the important role being played by NET in Kenya, there is limited public awareness on its existence and operations. There is a limited number of cases being lodged in the Tribunal with many being filed in courts.¹⁵³ NET can assist in enhancing sustainable development and environmental conservation in Kenya.¹⁵⁴ There is need for public awareness on the role of NET due its importance. Through this, many of the cases currently being filed at the Environment and Land Court will end up in the Tribunal which will enable it to further develop environmental jurisprudence in Kenya and enhance the principles of sustainable development.

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

The Constitution mandates courts and tribunals to promote alternative forms of dispute resolution in exercising judicial authority.¹⁵⁵ Alternative Dispute Resolution (ADR) mechanisms refer to the set of mechanisms that are utilised to manage disputes without resort to the often costly adversarial litigation.¹⁵⁶ These mechanisms include negotiation, mediation, arbitration and Traditional Dispute Resolution (TDR) mechanisms. Some of these mechanisms have been hailed for their advantages which include expeditious dispute resolution, flexibility, cost effectiveness and addressing the root causes of conflicts.¹⁵⁷

It has been asserted that increased application of ADR can lead to faster dispensation of cases, particularly in tribunals.¹⁵⁸ However, these mechanisms have also been criticised for their shortcomings such as the

¹⁵³ Judiciary, 'State of the Judiciary and the Administration of Justice Annual Report: 2017/2018' available at <https://www.judiciary.go.ke/resources/reports/> (accessed on 12/03/2020).

¹⁵⁴ Under section 129 (3) (c) of EMCA, upon any appeal, the Tribunal may make such other orders to enhance sustainable development.

¹⁵⁵ Constitution of Kenya, 2010, Article 159 (2) (c).

¹⁵⁶ Muigua.K., *Alternative Dispute Resolution and Access to Justice in Kenya*, Glenwood Publishers Limited, 2015.

¹⁵⁷ *Ibid.*

¹⁵⁸ Muigua.K., *Tribunals within the Justice System in Kenya: Integrating Alternative Dispute Resolution in Conflict Management*, Op Cit.

inability to grant urgent remedies such as injunctions, power imbalances and enforceability of decisions.¹⁵⁹ Due to the important role played by NET in promoting environmental conservation and enhancing sustainable development, application of ADR would lean towards a mechanism that can guarantee enforceability of decisions, grant interim remedies necessary for environmental conservation while promoting other principles such as expediency. However, not all matters filed before the Tribunal may be suitable for ADR. This calls for a case to case analysis of matters before the tribunal to determine the most appropriate mechanism for their disposal depending on the facts and issues in dispute.¹⁶⁰ There may be need for an enabling legal and institutional framework to entrench the use of ADR mechanisms within the justice system which includes tribunals. Adoption of the ideals of the Alternative Dispute Resolution policy can go a long way towards achieving this aim.¹⁶¹

e. Promotion of Human Rights

The right to clean and healthy environment is a fundamental right and a prerequisite for full enjoyment of all the other rights.¹⁶² This right is interwoven with the realisation and enjoyment of other fundamental rights such as the right clean water, housing, food and health.¹⁶³ In the absence of a clean and healthy environment, it is difficult to enjoy the other human rights. To this extent, the right to a clean and healthy environment has been

¹⁵⁹ See generally Owen Fiss, "Against Settlement", 93Yale Law Journal 1073(1984).

¹⁶⁰ Muigua.K., Tribunals within the Justice System in Kenya: Integrating Alternative Dispute Resolution in Conflict Management, Op Cit.

¹⁶¹ See the Alternative Dispute Resolution Policy (Zero Draft), available at https://www.ncia.or.ke/wp-content/uploads/2019/08/ZERO-DRAFT-NATIONAL-ADR-POLICY_P.pdf

(accessed on 12/03/2020). The formulation of an ADR policy is ongoing. This is against the backdrop of important international developments such as the coming into force of the Singapore Convention on International Settlement Agreements Resulting from Mediation and the UNCITRAL Model Law on Mediation and Conciliation.

¹⁶² Muigua, Kariuki. "Reconceptualising the Right to Clean and Healthy Environment in Kenya." (2015).

¹⁶³ Ibid.

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equated to the right to life.¹⁶⁴ Thus, while promoting the right to a clean and healthy environment, NET is also fostering other human rights including the right to health, clean water, food and housing. NET should never forget its role a promoter of human rights and should actively uphold the same.

12.3.6 Conclusion

Tribunals in Kenya have been critical in facilitating access to justice. The National Environment Tribunal however plays a more important role of enhancing the principles of sustainable development and promoting human rights. Its jurisdiction therefore flows from the Constitution which enshrines sustainable development as a principle of governance.¹⁶⁵ However, NET's jurisdiction has on several instances been narrowly interpreted thus posing a threat to its role. This coupled with other problems such as its capacity and limited funding are hindrances to the effectiveness of the tribunal. There is an urgent need to deal with these challenges. Creating an ideal environment that will enable NET to enhance sustainable development, promote human rights and enable access to justice is an imperative whose time has come.

¹⁶⁴ See the Indian case of *K. Ramakrishnan and Others Versus State of Kerala and Others*(smoking case), AIR 1999 Ker 385.

¹⁶⁵ Constitution of Kenya, 2010, Article 10 (2) (d) 'National values and principles of governance include sustainable development'.

CHAPTER THIRTEEN

Conclusion

13.1 Conclusion

A degraded environment will mean that people will be deprived of resources to support themselves. In such a situation, the State cannot guarantee peace except by way of ensuring that its people's basic needs are fulfilled. Thus, for the people to enjoy environmental security, there is a need for the state to involve all stakeholders in combating climate change and other environmental degrading human activities and conditions.

As discussed in chapter two, it should be possible for states around the world to also embrace the idea of granting nature the right to exist on their own, so as to protect the nature from destruction or overexploitation, independent of human needs. That is, nature should be treated as one that possesses intrinsic values and these values are proper to the environment itself and do not depend on its usefulness or appropriation by human beings.

A move to recognise the legal personality of nature should be based on the recognition of the intrinsic values of the resources and the whole ecological system and not merely as part of securing human needs that rely on these resources for satisfaction.

Climate change is a global challenge that ought to be urgently tackled as it is now identified as the biggest threat to the 2030 Agenda, where the Sustainable Development Goals, from poverty eradication and ending hunger to conserving biodiversity and peace, will be unattainable if climate change is not urgently addressed.¹ States should be innovative in coming up with climate change mitigation measures, ranging from adopting green technologies to encouraging sustainable consumption patterns.

¹ 'Aligning SDG and Climate Action' (*Sustainable Goals*, 18 June 2019) <<https://www.sustainablegoals.org.uk/aligning-sdg-and-climate-action/>> accessed 21 January 2021.

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Kenya's efforts towards becoming a newly industrialising middle income country will require adoption of empowerment measures that will ensure that this development is inclusive of all groups in the society.

As revealed by the Covid-19 pandemic, this book has affirmed that the right to health forms the basis for the realisation and enjoyment of other rights and thus also requires the implementation and protection of other human rights for its full enjoyment.

The discourse in this book has also shown that peacebuilding is a long-term process that involves changes in attitudes and behaviour and institutional norms.² It is a multidimensional process that not only requires elimination of active war activities but also securing the wellbeing of citizens to ensure positive peace where people enjoy justice, democracy and abundant resources to satisfy their needs. Thus peace efforts must also address underlying factors such as poverty, marginalization, environmental degradation and corruption, among others. This is the only way that the *2030 Agenda for Sustainable Development*³ which is the global plan of action for people, planet and prosperity, will be achieved.

The United Nations 2030 Agenda for Sustainable Development Goals (SDGs) was launched in 2015 and since then, the global community has been working towards achieving the same. Countries have been putting in place measures to ensure that their development agenda is aligned with these goals. However, this has not been without challenges. For instance, Coronavirus Disease (Covid-19) that was first reported in China some time in December 2019, and has since then become a global pandemic, has had devastating economic and social effects on countries across the world. This has naturally affected the countries' efforts towards achieving 2030 Agenda for SDGs and this has arguably affected the Global South region as

² International Alert, "What is Peace Building?" <<https://www.international-alert.org/what-we-do/what-is-peacebuilding>> Accessed 26 November 2020.

³ *Transforming our world: the 2030 Agenda for Sustainable Development*, Resolution adopted by the General Assembly on 25 September 2015, [without reference to a Main Committee (A/70/L.1)], Seventieth session, Agenda items 15 and 116, 21 October 2015.

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compared to the Global North. Most countries in the African continent have continually borne the brunt of this pandemic as most depend on foreign aid even to meet their basic socio-economic obligations under the SDGs. The pandemic has also shed light on the countries' ability to not only fight the disease but also meet their SDGs' obligations in the absence of foreign aid. The social disparities especially between men and women was greatly exposed by the Covid-19 pandemic where it was reported that in 13 out of 17 countries surveyed since the outbreak, women reported more emotional stress and mental health challenges compared to men, including higher gender-based violence, fewer sexual and reproductive services, greater economic impact and increased household burdens. Notably, the 17 countries surveyed were France, Germany, the UK, US, Canada, Japan, Australia, New Zealand, India, Mexico, China, Colombia, Switzerland, South Africa, Argentina, *Kenya* and Tunisia.⁴

This then calls for re-evaluation of these countries' priorities in their development agenda. This book offers some reflections and helps the African countries and Kenya in particular draw some lessons on the need to shift their development goals towards building a better future for their people as far as socio-economic development is concerned.

While the sustainable development goals are concerned with striking a balance between economic development, environmental protection and conservation, on the other hand, it is also concerned with achievement of human rights and improving the social well-being of all groups of people. This is where the social justice concept comes in; it is only through promoting social, economic and environmental sustainability that the 2030 Agenda on Sustainable Development Goals (SDGs) will truly be achieved. The book also acknowledges that peace and environmental security are vital

⁴'Aiming for a Gender-Equal World' (*Cosmos Magazine*, 29 January 2021) <<https://cosmosmagazine.com/people/society/aiming-for-a-gender-equal-world/>> accessed 6 February 2021; see also 'The Changes and Challenges to Justice in the Time of COVID-19' (UNDP) <<https://www.undp.org/content/undp/en/home/blog/2020/the-changes-and-challenges-to-justice-in-the-time-of-covid-19.html>> accessed 6 February 2021.

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aspects of sustainable development agenda without which the SDGs cannot be achieved. The three-pillar conception of (social, economic and environmental) sustainability, commonly represented by three intersecting circles with overall sustainability at the centre, is arguably one of the best demonstrations of the place of social justice in the realisation of an all-inclusive sustainable development agenda.⁵ It is thus worth pointing out that all the three dimensions of sustainability must be addressed together to attain the most sustainable outcome possible.⁶ Kenya, like many other countries around the world has committed itself to work towards achieving sustainable development goals and in the process transform the lives of its people.⁷

The desire of a socially just society in Kenya was well captured in the Supreme Court case of *In the Matter of the Speaker of the Senate & another [2013] eKLR*,⁸ where the Court stated as follows:

[51] Kenya's Constitution of 2010 is a transformative charter. Unlike the conventional "liberal" Constitutions of the earlier decades which essentially sought the control and legitimization of public power, the avowed goal of today's Constitution is to institute social change and reform, through values such as social justice, equality, devolution, human rights, rule of law, freedom and democracy. This is clear right from the preambular clause which premises the new Constitution on –
"RECOGNISING the aspirations of all Kenyans for a government based on the essential values of human rights, equality, freedom, democracy, social justice and the rule of law."

⁵ Ben Purvis, Yong Mao and Darren Robinson, 'Three Pillars of Sustainability: In Search of Conceptual Origins' (2019) 14 Sustainability Science 681.

⁶ 'What Is Social Sustainability? | Definition of Social Sustainability | ADEC ESG Solutions' <<https://www.esg.adec-innovations.com/about-us/faqs/what-is-social-sustainability/>> accessed 5 February 2021.

⁷ 'Sustainable Development Goals | UNDP in Kenya' (UNDP) <<https://www.ke.undp.org/content/kenya/en/home/sustainable-development-goals.html>> accessed 6 February 2021.

⁸ *In the Matter of the Speaker of the Senate & another [2013] eKLR*, Advisory Opinion Reference 2 of 2013.

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And the principle is fleshed out in Article 10 of the Constitution, which specifies the “national values and principles of governance”, and more particularly in Chapter Four (Articles 19-59) on the Bill of Rights, and Chapter Eleven (Articles 174-200) on devolved government.

Similarly, in *Centre for Rights Education & Awareness (CREAW) v Attorney General & another* [2015] eKLR⁹, the High Court of Kenya at Nairobi observed that:

1. *The Constitution of Kenya has been described as one of the most progressive in the world. **It envisions a society based on the rule of law, non-discrimination and social justice.** (Emphasis added) At its core is the belief that there can only be real progress in society if all citizens participate fully in their governance, and that all, male and female, persons with disabilities and all hitherto marginalized and excluded groups get a chance at the table.*

Despite the ambitious plan set forward by the SDGs, the situation in Kenya and indeed in many African countries is still wanting. Social injustices are still widespread. Economic disparities between the poor and the rich mean that one class of people can afford all the luxuries life has to offer while the other struggles to meet even the basic human needs.¹⁰ Consequently, as a result of extreme poverty, a good population of Kenya cannot access quality and adequate food; health services; quality education; clean water and sanitation and affordable and clean energy.¹¹ There has been an increasing inequality gap in Kenya despite the reports on any economic development in the country, implying that the ‘fruits’ of such development do not impact everyone in the same way, with the poor becoming poorer, devoid of access

⁹ *Centre for Rights Education & Awareness (CREAW) v Attorney General & another* [2015] eKLR, Petition 182 of 2015.

¹⁰ Kenya: Extreme Inequality in Numbers | Oxfam International’
<<https://www.oxfam.org/en/kenya-extreme-inequality-numbers>> accessed 6 February 2021.

¹¹ ‘Water, Sanitation and Hygiene | UNICEF Kenya’
<<https://www.unicef.org/kenya/water-sanitation-and-hygiene>> accessed 6 February 2021.

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to basic resources and inability to meaningfully participate in national development agenda.¹²

Further, gender disparities are still evident especially in the political and economic arena and despite the attempt by framers of the Constitution to cure this ill, the country's attempts towards gender equality has been futile.¹³ Environmental pollution is still widespread as evidenced by pollution of water sources, poor solid waste management and industrial pollution which creates climate change concerns.¹⁴

In summary, the World Bank notes that while Kenya has made significant political, structural and economic reforms that have largely driven sustained economic growth, social development and political gains over the past decade, its key development challenges still include poverty, inequality, climate change, continued weak private sector investment and the vulnerability of the economy to internal and external shocks.¹⁵

¹² 'Kenya: Extreme Inequality in Numbers | Oxfam International' <<https://www.oxfam.org/en/kenya-extreme-inequality-numbers>> accessed 6 February 2021.

¹³ Cf. Hydrant (<http://www.hydrant.co.uk>) S designed and built by, 'Blog: Kenya's Milestones in Accelerating Gender Equality and Women's Empowerment' (*The Commonwealth*, 20 September 2019)

<<https://thecommonwealth.org/media/news/opinion-kenya-milestones-accelerating-gender-equality-and-womens-empowerment>> accessed 6 February 2021; 'Progress towards Gender Equality under Threat, World Leaders Warn as General Assembly Marks Twenty-Fifth Anniversary of Landmark Women's Rights Conference - World' (*ReliefWeb*) <<https://reliefweb.int/report/world/progress-towards-gender-equality-under-threat-world-leaders-warn-general-assembly-marks>> accessed 6 February 2021; 'Has COVID-19 Pushed Women in Politics off Kenya's Agenda? | Inter Press Service' <<http://www.ipsnews.net/2020/07/has-covid-19-pushed-women-in-politics-off-kenyas-agenda/>> accessed 6 February 2021; 'Virus Exacerbating Global Inequality, Hunger - FN Arena' <<https://www.fnarena.com/index.php/2020/10/26/virus-exacerbating-global-inequality-hunger/>> accessed 6 February 2021.

¹⁴ Ferronato N and Torretta V, 'Waste Mismanagement in Developing Countries: A Review of Global Issues' (2019) 16 *International Journal of Environmental Research and Public Health* <<https://www.ncbi.nlm.nih.gov/pmc/articles/PMC6466021/>> accessed 6 February 2021.

¹⁵ 'Overview' (*World Bank*) <<https://www.worldbank.org/en/country/kenya/overview>>

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This state of affairs has resulted in social injustices in Kenya and does not fit within the ideal of the Sustainable Development Goals to end poverty, protect the planet and ensure that all people enjoy peace and prosperity by 2030. Notably, this is not unique to Kenya as it is evident in many other African countries. Despite its huge wealth of natural resources, the African continent remains largely underdeveloped with majority of its population poor and living in dehumanizing conditions. While these resources would naturally be expected to spur growth and development, the opposite has been the reality for Africans. The Continent has been afflicted by natural resource-based conflicts resulting from either scramble for scarce resources or the fight for control and management of abundant resources, often referred to as 'natural resource curse'. This book has a chapter dedicated to highlighting the challenge of natural resource curse in Africa and offers some recommendations on how best the African countries can overcome the challenge and utilise their resources to promote growth and development for their people as a step towards ensuring that the African States achieve sustainable development and guarantee peace and environmental security for their people. Covid-19 pandemic demonstrated that despite its massive natural resources wealth, the African continent is still very vulnerable to socio-economic shocks and still heavily relies on the west to take care of its people. There is a need for the African governments to work towards securing environmental security for all as well as building resilient and just institutions that safeguard access to justice for all. The Continent must, therefore, invest in her institutions to build a culture of respect for human rights as part of development agenda.

This book has offered some recommendations on political, economic, legal, social and technological interventions in order to hasten achievement of SDGs in Kenya and Africa in general. The Agenda 2030 on Sustainable Development Goals covers many aspects of development and as such, Kenya should continually review and align its development plans with the SDGs agenda in order to ensure that it is not left behind by the rest of the

accessed 6 February 2021; 'World Report 2018: Rights Trends in Kenya' (Human Rights Watch, 21 December 2017)

<<https://www.hrw.org/world-report/2018/country-chapters/kenya>> accessed 6 February 2021.

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world. The discourse covers various topics meant to ensure that the available resources are strategically distributed in order to win the fight against poverty, inequality, bad governance, lack of public participation, the skills gap between market requirements and the education curriculum, climate change, and low investment and low firm productivity, among others.¹⁶

Addressing all the foregoing is important if peace and environmental security in the context of sustainable development are to be achieved. Environmental security can be defined as the process of peacefully reducing human vulnerability to human-induced environmental degradation by addressing the root causes of environmental degradation and human insecurity.¹⁷ Arguably, human vulnerability cannot be tackled or reduced in an environment of poverty and all other factors that contribute to environmental degradation. In conclusion, this book is thus dedicated to discussing these factors, whether causing human vulnerability directly or indirectly.

Furthermore, it is worth pointing out that while most of the chapters focus on Kenya, the lessons therein can be applied to other countries across Africa, especially those with similar socio-economic situation as Kenya.

¹⁶ Arias, Omar, David K. Evans, and Indhira Santos. *The skills balancing act in Sub-Saharan Africa: Investing in skills for productivity, inclusivity, and adaptability*. World Bank Publications, 2019

<<http://documents1.worldbank.org/curated/en/558991560840574354/pdf/The-Skills-Balancing-Act-in-Sub-Saharan-Africa-Investing-in-Skills-for-Productivity-Inclusivity-and-Adaptability.pdf>> accessed 6 February 2021; 'How to Fix Economic Inequality?' (*PIIE*, 17 November 2020) <<https://www.piie.com/microsites/how-fix-economic-inequality>> accessed 6 February 2021; 'Nine strategies to reduce inequality' (*A-id*, 8 November 2016) <<https://www.a-id.org/2016/11/08/nine-strategies-to-reduce-inequality/>> accessed 6 February 2021; Nam, Chang Woon. "World Economic Outlook for 2020 and 2021." In *CESifo Forum*, vol. 21, no. 02, pp. 58-59. München: ifo Institut-Leibniz-Institut für Wirtschaftsforschung an der Universität München, 2020.

¹⁷ Muigua, Kariuki. "Achieving Environmental Security in Kenya." *E. Afr. LJ* (2018): 1.

13.2 Achieving Sustainable Development, Peace and Environmental Security for all

The realization of the 2030 Agenda for Sustainable Development calls for concerted efforts from all stakeholders.¹⁸ It has also been highlighted in this book that the SDGs are concerned with poverty eradication, public participation, social justice, gender equality and equity, human health and well-being, sustainable consumption, and inequality within and among countries, among others. These themes are all meant to, *inter alia*, secure human well-being and eliminate human suffering. Eliminating human suffering and all threats to human wellbeing such as environmental degradation, unsustainable production and consumption patterns, climate change, gender inequality and inequity, social injustice, among others, will mean that there will be minimal to no conflict and this in turn mean that environmental security for all will be guaranteed and in turn result in peace. Achieving these ideals, however, requires political good will and participation of all people, in addition to the legislative measures.

Sustainable development is not just about the environment protection and economic development but also social justice. These aspects of sustainable development must all be mutually realised for the sake of building just and sustainable societies based on human rights, peace and development. Poverty is one of the greatest challenges to the achievement of sustainable development and as such, countries must actively cooperate and work towards eradication of poverty as envisaged under SDG Goal 1, if the other SDGs are to be realizable or even make sense to every person, without the restriction of social class.

There is a need for states to invest in and exploit both scientific and indigenous knowledge in order to address the local challenges facing their people. In addition, the indigenous knowledge is likely to provide a viable platform for communities to participate in national development discourse.

¹⁸ 'About Global Goals - National Consultations on Sustainable Development Goals' <<http://sdg.org.ua/en/about-sdgs>> accessed 19 February 2021.

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Covid-19 pandemic should be an eye opener to many countries especially in the developing world that they need to focus their development agenda on not just economic development but also uplifting the lives of their people to ensure that they have social security and are self-sufficient. Without this, the risk of violence will always be at the door. When people feel that the source of their livelihoods (environment and various forms of employment opportunities) is secure, it is easy to engage such people in pursuing peace and all other ideals envisaged under the sustainable development agenda.

In addition to the foregoing, as discussed in chapter two of this book, there is a need for the sustainable development debates to reconsider the anthropocentric approach to sustainability and instead adopt an approach that seeks to protect the environment for its own sake, an ecocentric and/or biocentric approaches, as envisaged under the *Earth Charter*¹⁹. It is not enough to legislate on environmental matters; there is a need to also consider giving nature a legal personality. This is not an entirely new perspective as it has been achieved in such countries as Bolivia, Ecuador and New Zealand.

Achieving Sustainable Development, Peace and Environmental Security is an imperative whose time is now.

¹⁹ UN General Assembly, *World Charter for Nature*, 28 October 1982, A/RES/37/7.

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